CONFERENCE PACKET

Customary Justice and Legal Pluralism in Post-Conflict and Fragile Societies

Hosted by:

United States Institute of Peace
George Washington University
World Bank

The George Washington University,
Elliott School of International Affairs
1957 E Street, NW
Washington, DC 20052

November 17-18, 2009
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Peacebuilding: A Global Imperative
It is essential that the United States, working with the international community, play an active part in preventing, managing, and resolving conflicts. Fragile states, ethnic and religious strife, extremism, competition for scarce resources and the proliferation of weapons of mass destruction all pose significant challenges to peace. The resulting suffering and destabilization of societies make effective forms of managing conflict imperative. The United States Institute of Peace (USIP) is dedicated to meeting this imperative in new and innovative ways.

USIP’s Mission and Goals
The United States Institute of Peace is an independent, nonpartisan, national institution established and funded by Congress. Its goals are to help:

- Prevent and resolve violent international conflicts
- Promote post-conflict stability and development
- Increase conflict management capacity, tools, and intellectual capital worldwide

The Institute does this by empowering others with knowledge, skills, and resources, as well as by directly engaging in peacebuilding efforts around the globe.

USIP’s Rule of Law Center of Innovation
The Rule of Law Center of Innovation conducts research, identifies best practices, conducts training and develops new tools for policymakers and practitioners working to promote the rule of law. The program is based on the premise that adherence to the rule of law entails far more than the mechanical application of laws and establishment of formal institutions. The center takes on an active role in shaping the field and in advancing the rule of law in fragile and post-conflict societies.

For more information about the Rule of Law Program, contact us at rol-info@usip.org or (202) 457-1700. For further information on the United States Institute of Peace, please contact the Office of Public Affairs and Communications by e-mail at info@usip.org, by phone at (202) 457-1700 or visit the Institute’s Web site at www.usip.org.
African Center for Health and Human Security
The George Washington University Africa Center for Health and Human Security was formed under the direction of Provost and Vice President for Health Affairs John "Skip" Williams in November 2004 to explore forward-looking and innovative ways to enhance capacity, improve dialogue, provide information and resources, and assist in attaining solutions that better the life of Africans. The Center provides a forum for experts from a range of disciplines to discuss such issues as health and environment (disease, geographic information systems, remote sensing, urbanization, nutrition, water, sanitation); security (conflict resolution, governance, poverty, terrorism, violence); and education and infrastructure (information technology, capacity building, water, sanitation). These issues are evaluated within the multi-dimensional context that includes environmental realities and the rapidly changing situations of Africans. The Center distinguishes itself from other academic and advocacy groups by integrating diverse academic, research and policy agendas that drive programmatic action in Africa.

Culture in Global Affairs Program
Culture in Global Affairs (CIGA), a research and policy program in George Washington University's Elliott School of International Affairs, seeks to promote knowledge about global and local cultures and their policy relevance. CIGA sponsors an annual seminar series and supports a blog, anthropologyworks.com.

The World Bank, Justice for the Poor Program
What is Justice for the Poor?
Effective justice systems are crucial for good governance and sustainable development. Justice systems play a key role in shaping the distribution of rights, responsibilities and power; they underpin the provision of public services, mediate conflict, and facilitate institutional change. However, there is limited understanding of how equitable justice systems emerge, and thus how they can be promoted. Justice for the Poor (J4P) is an attempt by the World Bank and its counterparts to establish a context-specific evidence base on which to grapple with the theory and practice of building more equitable justice systems, especially at the local level and in settings where non-state justice systems often prevail.

How Does Justice for the Poor Operate?
J4P recognises that law, justice and pluralist legal orders are issues that cut across all aspects of development; thus the program focuses on integrating such considerations into broader reform processes. Three key methods are used: (a) Research, Analysis and Dialogue, in which intensive field-based research identifies the nature of existing justice mechanisms, and possible entry points for reform; (b) Experimentation through context specific operational pilots; and (c) Scaling Up and Mainstreaming, by expanding successful pilots and incorporating lessons from both research and pilots into broader sectoral (e.g. land, service delivery) and governance programs. In addition, all J4P country teams seek to build local research and analytical capacity.

**Why Does Justice for the Poor Operate this Way?**
Attempts by development organizations to ‘build the rule of law’ have a long but often difficult history. This stems in large part from theoretical assumptions and organizational imperatives encouraging the replication of ‘successful’ institutions from one (usually western) country in others. Legal reform is thus frequently treated as a largely technical problem. J4P draws on the skills of lawyers, but is also deeply informed by insights from legal anthropology, social theory and political history, which offer a different intellectual basis for characterizing the problem and thus the responses to it. From this perspective, legitimate, effective local justice institutions emerge iteratively, as much through locally embedded processes of contestation, as through the adoption of institutional or legal ‘blueprints’.

**What are Some Concrete Examples of Justice for the Poor in Action?**
In Indonesia, J4P is working to ensure that disputes arising out of national community driven development programs have adequate avenues of redress, while also working with NGOs to provide basic legal services to marginalised groups. In Cambodia, J4P teams are supporting efforts to build land and labour rights. In Kenya, J4P works in arid settings to sustain the rights and livelihoods of minority groups. In Sierra Leone, the program focuses on community rights and entitlements in mining areas as well as more generally at the question of supporting local governance efforts in the context of legal pluralism. J4P has recently expanded into Timor-Leste, Vanuatu, Papua New Guinea and Solomon Islands.

For more information please visit [www.worldbank.org/justiceforthepoor](http://www.worldbank.org/justiceforthepoor) or contact j4p@worldbank.org
## CONFERENCE AGENDA
### DAY ONE: NOVEMBER 17, 2009

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<th>Time</th>
<th>Event</th>
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<tr>
<td>8:00 – 8:40</td>
<td>Conference Registration and Breakfast</td>
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<td>8:40 – 9:00</td>
<td>Welcome and Conference Objectives</td>
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<td>Welcome remarks:</td>
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<td></td>
<td>• Tara Sonenshine, Executive Vice President, USIP</td>
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<td>• Christina Biebesheimer, Chief Counsel, The World Bank</td>
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<td>• Barbara Miller, Associate Dean, The Elliott School</td>
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<td>• Deborah Isser, United States Institute of Peace</td>
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<td>• Stephen Lubkemann, George Washington University</td>
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<td>• Caroline Sage, The World Bank</td>
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<tr>
<td>9:00 – 10:50</td>
<td>SESSION I: Re-thinking Legal Pluralism and the Rule of Law in Post-Conflict and Fragile Countries</td>
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<td>Session Objectives:</td>
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<td>(1) To examine mainstream and alternative frameworks for understanding legal pluralism in the post-conflict state and for establishing strategic objectives for engagement.</td>
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<td>(2) To identify a common set of issues that will provide a common base of reference for discussions throughout the workshop.</td>
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<td>While there has been a growing interest in customary justice systems among rule of law practitioners, it has remained very much at the margins of justice reform strategies. This session will challenge us to view customary justice and other forms of legal pluralism not as a side issue, but as a fundamental part of the justice landscapes in which we work. It will take a critical stance in reviewing the current range of overall policy approaches to legal pluralism and the preconceptions and assumptions that underlie those approaches. It will seek to identify and critically review how different approaches (rights-based, developmental, expanding access to justice, peace-building, state-building etc.) tend to “frame the problem” when it comes to engagement with legal pluralism and will reflect specifically on how these approaches affect a range of key post conflict objectives. Finally it will consider the building blocks needed to define strategic objectives for engagement with legal pluralism.</td>
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<td>Moderator: Sarah Cliffe, The World Bank</td>
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<td>• Deborah Isser, United States Institute of Peace</td>
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<td>• Eric Scheye, Independent Consultant</td>
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<td>• Vijay Nagaraj, International Council on Human Rights</td>
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<td>Caroline Sage, The World Bank</td>
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<td>10:50 – 11:10</td>
<td>Coffee Break</td>
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11:10 – 1:00  SESSION II: Case Studies: Grappling with Legal Pluralism – Select Countries and Programs & Projects

Session Objectives:
(1) To provide a robust picture of what legal pluralism looks like and the issues it is raising in an important sample of post-conflict, war-torn, or fragile country cases
(2) To provide an overview of innovative and/or influential programs and projects that are actively engaging with legal pluralism in these countries through a variety of different approaches.

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<thead>
<tr>
<th>Afghanistan</th>
<th>Southern Sudan</th>
<th>Liberia</th>
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<tr>
<td><strong>Moderator:</strong> Alex Thier, United States Institute of Peace</td>
<td><strong>Moderator:</strong> Gordon Woodman, University of Birmingham</td>
<td><strong>Moderator:</strong> Leopold von Carlowitz, German Center for International Peace Operations (ZIF)</td>
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<td><strong>Speakers:</strong></td>
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<tr>
<td>- Adailt Kowa, Deputy Minister of Justice, Afghanistan (overview)</td>
<td>- Deng Biong Mijak, Undersecretary MOLACD (overview)</td>
<td>- Cllr Phillip A.Z. Banks, Liberia Law Reform Commission (overview)</td>
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<td>- Massoud Karukhil, The Liaison Office (TLO)</td>
<td>- Manfred Hinz, University of Namibia</td>
<td>- Stephen Lubkemann, George Washington University</td>
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<td>- Kate Fearon, Provincial Reconstruction Team – Helmand Province</td>
<td>- Harriet Kuyang, United Nations Development Program-Sudan</td>
<td>- Anthony Valcke, American Bar Association</td>
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<td><strong>Discussant:</strong> Matt Zurstrassen, The World Bank</td>
<td>- David Pimentel, Florida Coastal School of Law</td>
<td><strong>Discussant:</strong> Tom Crick, The Carter Center</td>
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1:00 – 2:00  Lunch

2:00 – 3:50  SESSION II, Continued

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<th>Sierra Leone</th>
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<td><strong>Moderator:</strong> Doug Porter, World Bank</td>
<td><strong>Moderator:</strong> Naomi Cahn, George Washington University</td>
<td><strong>Moderator:</strong> Lene Østergaard, The World Bank</td>
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<tr>
<td>- Tarcisius Tara Kabutaulaka, Centre for Pacific Island Studies, University of Hawai‘i</td>
<td>- Sarah Callaghan, Irish Aid (overview)</td>
<td>- Monfred Sesay, Lead Customary Law Officer and Senior Public Prosecutor, Sierra Leone</td>
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<td>- Lawrence Kalinoe, Constitutional and Law Reform Commission, Papua New Guinea</td>
<td>- Frank Othembi, Uganda Law Reform Commission</td>
<td>- Giselle Corradi, Ghent University</td>
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<td>- Meg Taylor, Vice President, Compliance Advisor/Ombudsman, IFC</td>
<td>- Judy Adoko, The Land and Equity Movement in Uganda (LEMU)</td>
<td>- Peter Albrecht, Department for International Development</td>
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<td><strong>Discussant:</strong> Sinclair Dinnen, Australian National University</td>
<td>- Isaac Robinson, Norwegian Refugee Council</td>
<td>- Vivek Maru, The World Bank</td>
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3:50 – 4:10  Coffee Break

4:10 – 5:45  SESSION III: Interactive Conversation

**Facilitators:** Deborah Isser, United States Institute of Peace
**Caroline Sage, The World Bank**

**Reflection:** Michael Woolcock, The World Bank

6:00 – 8:00  EVENING RECEPTION
WHERE: World Bank, Preston Lounge, 1818 H Street, NW.
DAY TWO: NOVEMBER 18, 2009

8:30 – 9:00 Breakfast & Overview of Day Two

9:00 – 3:40 SESSION IV: Putting Theory into Practice: Programming with Respect to Legal Pluralism

Session Objectives:
1. To explore lessons, “best practice” and approaches for developing programming in select areas.
2. To share the concepts and implementation experience of actual programs related to legal pluralism (eventually toward the development of a catalogue of such activities)

This session will relate back to the overall strategic objectives and framework discussed in Session I to explore how programs to date have measured up in achieving specific objectives, and what process and types of considerations should go into the development of programming. Reference can be made to country studies from Session II, as well as examples from other countries. Our primary assumptions are that key objectives include improving the quality of justice experienced by the population in the near term; and fostering some coherence (or at least the mitigation of negative effects) within the overall justice system.

9:00 – 10:45 Panel 1: Developing the Knowledge Base for Policy

Many Rule of Law policies and programs have been critiqued for failing to be based on an empirical understanding of the justice sector and in particular of the role in actual practice of legal pluralism, instead relying on ideal-based mandates and templates. Well-intentioned policies that lack an empirical basis have also led to unintended negative consequences. This panel will explore how research and assessments can be used to inform policy regarding legal pluralism so that it can take into account social realities and anticipate the actual impact on the ground. This panel will:

1. Provide examples of how specific research approaches have contributed to policy development;
2. Discuss some of the framing assumptions about legal pluralism and current rule of law approaches that empirical research casts into doubt;
3. Identify major gaps in the evidentiary base that remain with respect to legal pluralism;
4. Consider the various factors--technical, practical, and political--that can enhance or inhibit the use of evidence in rule of law policy-making.

Moderator: Stephen Lubkemann, George Washington University

Speakers:
- Tanja Chopra, United Nations Development Fund for Women
- Bilal Siddiqi, Centre for the Study of African Economies, Oxford University
- Varun Gauri, The World Bank

Discussant: Gordon Woodman, University of Birmingham

10:45 – 11:00 Coffee Break
11:00 – 12:50 Panel 2: ‘Improving’ Customary Justice or Perpetuating ‘Onerous Practices’

A growing number of efforts seem to be focused on supporting customary justice mechanisms sometimes as a recognition of their continuing importance for the populations they serve and often times in response to growing frustration with efforts to reform state justice institutions. However, some argue (especially multilateral and bilateral actors concerned with human rights) that the foundational principles of customary practices are inherently inimical to certain forms of “improvement” as measured by international standards.

The panel will reflect upon some of the programs that have been used to ‘improve’ customary justice (e.g. different types of training of traditional authorities; introducing written decisions and record keeping into informal systems; ascertaining or codifying informal laws; building “community conflict resolution houses;”; providing advocacy services to litigants etc.) and ask to what extent do these efforts succeed in “improving” customary justice, and for whom? The panel will consider efforts to ascertain or codify customary law; “top-down” efforts to regulate or ban certain practices; using modern versions of repugnancy clauses; training and awareness; efforts to foster change within the community; efforts to provide assistance and/or alternatives to vulnerable people.

Moderator: Jose Munoz, George Washington University

Speakers:
- Manfred Hinz, University of Namibia
- Tiernan Mennen, Open Society Institute, Justice Initiative
- Fergus Kerrigan, Danish Institute of Human Rights

Discussant:
- Nina Berg, United Nations Development Program, Bureau for Crisis Prevention and Recovery

12:50 – 1:40 Lunch


Plural justice systems may result in overlapping jurisdictions, lack of clarity of roles and tension between the systems and their different paradigms. Sometimes this may create opportunities for forum shopping that can have positive effects on access to justice; sometimes it may create the possibility of further injustice. What are possible ways of improving linkages so as to improve the justice experience and/or strengthen the legitimacy of the various justice mechanisms? What are the potential consequences of regulating linkages when the formal system is very weak and/or lacks the confidence of the population?

The panel will also explore to what extent and in what ways have the development of hybrid conflict-resolution mechanisms aimed at combining customary and formal elements succeeded and/or failed in achieving key rule of law as well as other vital post-conflict objectives? More specifically: In what way does the expansion of legal pluralism through the introduction of new hybrid institutions --alongside already existing customary and formal ones--affect access to justice, and popular satisfaction with the quality of results? Do hybrid institutions have any comparative advantages to offer in the immediate and intermediate term? What inadvertent consequences can result from the resulting
expansion of the institutional marketplace? How should these programs relate to longer-term reform strategies? Examples of policies this panel will explore include: efforts in Afghanistan to link the formal and informal systems by recording jirga decisions in court; Southern Sudanese efforts to incorporate restorative justice in the penal code; the community courts established in Mozambique etc.

**Moderator:** Doug Porter, The World Bank

**Speakers:**
- Matt Stephens, The World Bank
- Bruce Baker, Coventry University
- Helene Marie Kyed, Danish Institute for International Studies

**Discussant:**
- Noah Coburn, United States Institute of Peace, Afghanistan

**3:40 – 4:00**  **Coffee Break**

**4:00 – 5:30**  **SESSION V: Legal Pluralism in Post-Conflict and Fragile States: Reflections and Next Steps**

**Session Objectives:**
1. To sum up the key themes, areas of commonality and remaining challenges
2. To look beyond this workshop to what might be next steps in improving our response and rule of law activities in post-conflict countries with elements of legal pluralism

**Roundtable discussions**

**Facilitators:** Caroline Sage, World Bank, Stephen Lubkemann, George Washington University and Deborah Isser, United States Institute of Peace

**Reflection:** Brian Tamanaha, St John’s University
SESSION I: Re-thinking Legal Pluralism and the Rule of Law in Post-Conflict and Fragile Countries

Re-thinking Legal Pluralism and the Rule of Law in Post-Conflict and Fragile Countries

By Deborah Isser

This discussion paper is based on five years of studying the role of customary justice systems in post-conflict societies, which has included an edited volume of case studies (Afghanistan, East Timor, Guatemala, Iraq, Liberia, Mozambique and Southern Sudan) to be published later this year, as well as research and operational work in Liberia, Afghanistan and Southern Sudan.

I. Shifting the basic assumptions

Over the last few years the community of rule-of-law policy makers and practitioners has begun to accept that customary justice systems are important. References to traditional justice can be found in much of the recent rule-of-law literature and guidance and a wide range of international and local actors are beginning to experiment with programming in this area. Yet, as rule-of-law professionals, our understanding of these systems and their place in the overall justice sector is rudimentary and efforts to engage with them remain very much on the margins of the justice reform agenda. In theory we understand that in many of the post-conflict countries in which we work these traditional systems are the primary – if not the sole – means of dispute resolution for 80-90% of the population. Nevertheless, we have found it extremely difficult to shift our focus to engaging with these existing traditional mechanisms rather than exclusively (re)constructing formal justice institutions in the image of western ideals.

Why? Making the leap beyond rhetorical recognition of the importance of traditional justice systems toward a practical approach that more fully incorporates the realities of their role in justice strategies requires shifting some of the fundamental assumptions that underlie most post-conflict rule of law work. Here I will emphasize three main points that account for the failure of donors, and sometimes national policy-makers to take into account legal pluralism in ROL strategies:

(1) The political/state-building imperative: Post-conflict rule-of-law work is ultimately part of the enterprise of state-building, generally interpreted as strengthening the organs of the state to fulfill its primary functions. Moreover, most multilateral and bilateral international actors are mandated to work through state bodies. Customary justice systems which function outside of, or as an alternative to, the state, are often seen as incompatible with this mission. [See Eric Scheye’s contribution for a detailed critique of this approach].

(2) Normative/institutional constraints: I am combining here the normative constraints of the ideal of rule of law with the tendency to focus on top-down institutional efforts.
Our goal in rule of law reform is generally stated as nothing less than full compliance with international standards, which we generally try to achieve by emphasizing forms based on western templates – changing laws, developing institutions and training institutional actors. Our assumption is that with the right reforms these institutions can be off and running in a few years and the internationals can go home. Customary justice systems pose a huge challenge here – they are not based on a western template of justice, they often include practices that deviate from international norms, and they involve actors that fall outside of recognized institutions.

(3) **Practical/strategic constraints:** Because we largely see rule of law as a technical exercise of drafting laws and building institutions, it is generally seen as a job for legal professionals. But lawyers schooled in western formal law rarely have the background, skills or access needed to account for complex situations of legal pluralism including customary justice systems in their work. Understanding traditional justice systems and their role requires empirical research and in-depth ethnographic, political and historical analysis – an undertaking that is unfortunately often considered too time-consuming, difficult or inaccessible to internationals in the crisis environment of post-conflict reconstruction.

As evidenced by the problematic and unimpressive track record of post-conflict rule of law interventions, this reasoning is flawed and, in numerous examples, has resulted in the development of institutional shells that have little relevance to the vast majority of the population. In some cases the failure to develop effective strategies for dealing with the customary justice system has served to increase the population’s grievances against the state, undermining the effort to build its legitimacy.

Examples:

-- In East Timor, UNTAET’s failure to have any policy on customary justice was in part normative (concerns about how to deal with deviations from human rights); in part political (aim was to establish state institutions “from scratch”). The result: 10 years after the start of UNTAET, the formal justice system is still one of the weakest links; out of necessity there is growing interest, but as yet no coherent strategy regarding the role the customary system can play.

-- Afghanistan, to quote one of the lead internationals on rule of law speaking about traditional justice: “I won’t put one euro into that barbaric system”. That was a prevailing attitude, although as we will hear later today necessity again has caused a major shift in such thinking.

-- In Liberia there is growing interest in the customary system – again a matter of necessity as the formal system cannot handle current levels of criminal cases, but suggestions that the role of the customary system be officially recognized or expanded meets immediately with concerns that this will undermine the project of building “One Liberia”.

**II. Toward an alternative starting point**
To make the leap from rhetoric to effective strategies, we need new starting points and assumptions, which in turn imply a shift in strategy.

(1) **Customary justice is not a side issue, a sort of sub specialty on the margins of the “real justice system”, nor is it necessarily a problem to be overcome. Rather, it is an undeniable and critical part of the justice landscape.** Justice strategies need to start with what actually exists, and this often includes a messy variety of justice mechanisms – legal pluralism in fact. This requires a new way of assessing the justice system we are setting out to reform based much more on a social science analysis than on an institutional one. We need to avoid seeing the system through the western lens of laws and formal justice institutions and look at the justice landscape as it really is, as it is seen and used by people and in terms of the functions the various components can – and cannot – perform. To take this further – we need to look at things in relative terms. There is a tendency to compare traditional justice systems to an idealized formal system, but this often bears little relation to reality. A more meaningful assessment is one that compares the justice delivered by traditional systems in actual practice -- with that delivered by its alternative(s) – the formal system or other mechanisms, in actual practice. Or better yet, we should avoid compartmentalizing “traditional” and “formal”, and instead examine the actual options in all of their blurry and hybrid forms.

(2) **Justice reform is not a technical exercise but one that is bound up in the complexities of culture, socio-economic realities and politics.** The ill-fated law and development movement of the 1960s came to the hard realization that a legal system is as much – if not more – about a complex composite of local and social dynamics than it is about positive laws, but this is a lesson we have yet to apply in practice. Our assessment of the greater justice landscape needs to include an understanding of the socio-economic, historical and political context that determines the nature, role and population’s perceptions of both the customary and formal systems. We need to recognize the limits of law, institutions and top-down policies in transforming society. Legal solutions such as progressive legislation have an important role to play, but alone cannot change socio-economic circumstances and deep-seated beliefs, and may in fact have counter-productive consequences with respect to underlying societal tensions.

**Examples:** The elimination of “offensive practices” such as trial by ordeal in Liberia or the exchange of girls as a means of settling a dispute in Afghanistan requires much greater socio-economic and cultural transformation than can be achieved by law alone. We need to understand the social and cultural needs served by those practices and work within communities to find acceptable alternatives in practice. Moreover, the justice role of traditional authorities may have deep political and power implications. For example, in Mozambique, Frelimo rejected traditional justice as part of its socialist modernism platform, while in Iraq the judicial power granted to sheiks served to shore up Baath party control.

(3) **Justice reform is not a task that can be accomplished within the timeframes established for post-conflict reconstruction, but is a transitional and transformational**
process that should be measured in decades, not years. What passes for an ROL strategy is often framed as an ideal end goal that sounds something like the UN definition of rule of law. This, as well as the constraints described above, often precludes us from taking a more pragmatic approach to improving justice in a way that reflects current social and political realities. Justice strategies need to take into account today’s realities – including socially differentiated conceptions of justice, and capacity limitations (including physical capacity, quality, legitimacy, access) -- not an idealized vision of what they should be. This means working with what we have to achieve a better – if not best – result. It may mean “compromising” on the immediate application of international standards on paper in favor of pragmatic solution that still moves the ball forward. There are numerous examples of well-intentioned policies aimed at achieving international standards without regard to such social realities, that have unintended negative consequences in practice.

Examples: What guidance there is on customary systems generally states that they should not be allowed to deal with matters of serious crime because of the danger of violations of basic rights, and because that is a key prerogative of the state. Hard to argue with that in theory. But it is a different story when you see how this policy can play out in practice. In Afghanistan, Sudan and Iraq the effect of prohibiting traditional systems from dealing with murder can easily be the continuation of violent blood feuds. In Liberia, Guatemala and Mozambique the impact of the same policy is the creation of a serious justice vacuum given that the formal system is not capable for a variety of reasons of effectively handling the criminal caseload. The population often blames this vacuum on the state, undermining any legitimacy it may be trying to build up, and worse, it has greatly increased incidents of mob justice. This isn’t to question the ultimate goal of leaving serious crime to the formal system – just to point out that policies cannot get too far ahead of social realities.

III. Implications for shifting strategies

(1) The importance of empirical research. This will be discussed in depth in a later session of this conference (Session IV, Panel 1). For now, suffice it to say that rule of law efforts should prioritize the development of a much more robust evidence-base than is generally pursued. Research should identify the relative strengths, weaknesses and interrelationships of the various existing justice mechanisms in practice, as well as the socio-economic and political determinants of these effects. Research needs to be empirical, and current. The post-conflict period is one of rapid and compressed change – social, political, economic and physical – and research needs to capture how these changes impact the justice landscape. This will require an investment in skilled researchers and carefully crafted methodologies. The risk of not doing so is to develop strategies that fail to address real needs, or worse, that have unintended, but real, negative consequences.

(2) A new way of defining “the problem”. The assumptions underlying conventional rule of law efforts usually see the problem of justice reform as the need to make formal
laws and institutions compatible with international standards of rule of law -- to the extent legal pluralism is considered, it is often seen as a problem to contend with in that it challenges the project of state building and progress toward international norms. The tendency is to hit these issues head on with legalistic approaches to integration. The more contextual assessments proposed here allow us to take a more practical and nuanced problem-solving approach in which the aim is to use legal pluralism to the best advantage.

In Liberia, for example, the dual justice system in which the customary and formal systems exist in parallel is approached as a problem – a product of an anachronistic law – the Hinterland Regulations – that creates two classes of justice and needs to be reformed. Up to now the debate is framed as a question of law reform, which inevitably goes off into legal abstractions with little connection to reality, and worse, it triggers institutional defensiveness and interests (from the lawyers: justice should be the sole domain of the judiciary; from the chiefs: our authority should be recognized officially and we should be paid). Framing it as a question of how to improve justice for the population, given a deep understanding of the current social realities and capacity limitations, allows for a much more nuanced and creative set of options involving the customary, the formal, linkages between them, new hybrids, community justice programs etc.

(3) **Understand the possible trade-offs.** Related to the point above, there can be numerous ways of defining the “problem” when one takes into account broader peacebuilding objectives including promoting social stability, mitigating violent conflict, building the legitimacy of the state, and promoting human rights. While all of these objectives may be desirable, there may be trade-offs that need to be considered. For example, a policy aimed solely at promoting compliance with human rights may have the impact of reducing social stability, or indeed of building the legitimacy of the state. This is again broadly a function of social realities and actual capacities, but justice reformers must have in mind the potential of these broader effects and be prepared to prioritize.

(4) **Re-envisioning the potential of legal pluralism.** The argument in this paper is largely premised on the notion that legal pluralism is a fact that we need to recognize and work with, in all of its complexity. Here I would go further: we need to be open to the idea that legal pluralism may be a desirable state. Justice reform strategies need to question preconceptions about the inevitable and blanket superiority of western templates and the notion that all things “customary” should eventually be phased out and replaced. In fact customary law does not need to be seen as an obstacle to achieving justice; rather it may present opportunities to envision a home grown alternative to the standard western template that includes restorative elements and matches local conceptions of justice. Justice reform strategies should aim to foster constructive and inclusive discussions among key stakeholders and segments of the population with the aim of reducing misconceptions and a sense of exclusivity between the systems and promoting the idea of a system the reflects the values and needs of society as a whole. This is
inherently a political process and one that may be bound up with faultlines of the conflict. The process itself may be seen as a strategy to promote peace.

IV. USIP’s work on Customary Justice Systems
USIP’s work on customary justice systems in post-conflict societies includes a volume edited by Deborah Isser of case studies examining Afghanistan, East Timor, Guatemala, Iraq, Liberia, Mozambique and Southern Sudan, which will be published in the coming months. In addition, we have conducted research and facilitated policy development in a number of post-conflict countries. In Afghanistan, we have held dialogues between traditional elders and state officials at the local level, and have contributed to the development of the overall justice strategy which, for the first time recognizes the importance of the traditional justice system. We are currently working with partner organizations in Eastern Afghanistan and Herat to conduct pilot projects aimed at improving linkages between the traditional and state justice systems. In Liberia we recently published a report “Looking for Justice: Liberian’s Experience and Perceptions of Local Justice Options” analyzing extensive data collected over ten months regarding how rural Liberians resolve their disputes. We are also co-sponsoring, with UNMIL and the Carter Center, a working group of legal professionals representing key institutions to examine the legal framework governing the dual justice system, and continue to facilitate policy discussions on these issues. In Southern Sudan we have facilitated traditional councils in three states (Eastern Equatoria, Lakes and Central Equatoria) in the process of ascertaining the customary rules of the various ethnic groups in those states. We are also supporting field research on local justice systems in practice, and a comparative analysis of key policy issues facing Southern Sudan.
We will continue our efforts to develop knowledge and guidance on legal pluralism in post-conflict societies following this conference by hosting a community of practice dedicated to this topic on the International Network to Promote the Rule of Law (www.inprol.org) and by working with partners on a series of guidance notes.
Human Rights, Legal Pluralism and Conflict: Challenges and Possibilities—Some Reflections
By Vijay Kumar Nagaraj

These notes are based on *When Legal Orders Overlap: Human Rights, State and Non-state Law*, a report on the human rights impacts of legal pluralism published by the ICHRPI in November 2009. For the full report, please see [http://www.ichrp.org/files/reports/50/135_report_en.pdf](http://www.ichrp.org/files/reports/50/135_report_en.pdf) or contact nagaraj@ichrp.org. They also draw on an earlier ICHRPI publication *Negotiating Justice? Human Rights and Peace Agreements*; also available online.

The Importance of Stating the Obvious

Legal pluralism or plural legal orders exist in every part of the world and in all types of political systems and contexts and vary enormously in jurisdiction, procedure, structure, and degree of autonomy.

Numerous interrelated factors influence their evolution including colonialism; the state’s need for legitimacy; the quality, reach and relevance of official legal systems; conflict and post-conflict reconstruction; as well as other social, political and economic factors.

Plural legal orders also engage significant political and economic interests. In a resource-hungry world, claims to jurisdiction over land, water and other natural resources are often entangled with issues of customary usage and indigenous peoples’ rights, and trigger many conflicts between these groups and national and international economic interests.

Ethno-cultural and religious communities, minorities and majorities, also represent vital political constituencies. Internationally, too, culture has become a flashpoint with the result that plural legal orders lie at the heart of many current human rights debates.

Much of the debate regarding plural legal orders is characterised by polarised presumptions that disregard the complexity and variety of local situations. Cultural differences are significant, real to people; but the relationship between law and culture is very complex, and culture itself is a dynamic process, socially and politically contested.

Human rights lie within rather than outside the universe of normative systems and culture. People are bearers of both culture and rights, and recognition of rights does not imply rejection of culture.

Not all justice claims can be resolved through law. Many languages of justice are also available to people. Everyone, including human rights advocates, must accept the social fact that many disputes, including serious ones, are often resolved through non-formal mechanisms—true, again, of all parts of the world.
This does not however necessarily mean unqualified support to the non-formal—not only does the non-formal and but also the preference for it needs to be thoroughly deconstructed—a lack of choice or coercion (due to many factors) or even a strategic choice?

Non-state or customary legal orders are not always quicker, cheaper, more accessible, more inclusive, focused on restorative justice, or more effective in resolving local disputes. Third, support for non-state legal orders is not universal. In many instances, people want more rather than less from the state.

The line between state and non-state legal orders is often blurred rather than rigid, and that they influence one another. Rushing to replace state systems that enjoy little legitimacy with non-state mechanisms (or vice versa) may make little difference if analyses of ‘choices’ between state and non-state legal orders leave issues of power unexamined.

Legal Pluralism: The Challenge to Human Rights

From a human rights perspective, the simple presence of plural legal orders makes plain that state law is not the only relevant and effective legal order in people’s lives. At the same time, the state remains central to a human rights analysis of plural legal orders because it is the primary duty bearer in relation to human rights.

Human rights standards and instruments contain much that is relevant to plural legal orders, but there are important gaps. Fragmentation of international human rights law is a particular problem.

Fragmentation, combined with a “gender blindspot” and the influence of religious fundamentalisms on standard-setting, have encouraged the emergence of approaches that seek to ‘balance’ gender equality against the rights to culture or religious freedom. This false dichotomy is an analytical trap, notably for women’s human rights.

In many instances, human rights standards call for limiting the jurisdiction of non-state legal orders (customary law or religious courts) to ‘minor’ matters, typically areas of family law. Yet these have major human rights consequences.

Family law is most susceptible to pluralism, because controlling family and intimate relationships is central to the politics of preservation of collective cultural identity. It also the most easily bargained away in political negotiations, including post-conflict situations.

Human rights standards do not provide tools that identify and address violations that arise from jurisdictional confusion and their limitations are especially evident where the
state order legitimises plural family laws based on ethno-religious frameworks that tend to have particularly adverse consequences for women.

**The Human Rights Challenge to Legal Pluralism**

A range of negative human rights consequences that can result from plural legal orders. It does not mean that plural legal orders are necessarily harmful, but there is evidence that plural legal orders are structurally likely to precipitate certain negative human rights outcomes.

In particular, the subordination of rights to a regime based on (religious or other) identity can cause discrimination and inequality before the law, especially in areas related to personal status and family etc. The confusion over personal and subject matter jurisdiction or the application of law, common to plural legal orders, may result in abuse of power, reduced human rights protection, and impunity.

Those who are poor or otherwise marginalised can be seriously disadvantaged, because they lack resources to navigate the complicated jurisdictional and procedural arrangements that are characteristic of plural legal orders.

The weaknesses of the formal system are indeed real, but when states recognise non-state legal orders or alternate dispute resolution mechanisms, there are also concerns that they may offer diluted justice.

In addition, separate civil law regimes for minorities can obscure substantive and institutional problems within those regimes, or they may become so ‘politically sensitive’ that reform is very difficult.

Further, official recognition of non-state legal orders can undermine democratic processes and human rights freedoms in other ways. It may confer power on unelected leaders, or reinforce hegemonic or majoritarian interpretations of custom; it may actually segregate society in ways that reinforce ethnic and religious fundamentalisms.

**Recognition of Customary Law/Justice**

Recognition involves questions of normative content; jurisdiction; authority; adjudicatory process; and enforcement of decisions. If a plural legal order is to operate smoothly, all these elements need to be defined clearly – but this is rarely achieved.

From a rights perspective, decisions to recognise or incorporate a non-state legal order, or devolve powers to it, must take account of its *outputs* but also the authority and autonomy of its *processes*.

Recognition presents numerous conceptual challenges and policy dilemmas. Recognition is not just a technical matter but deeply political in character.
The incorporation or recognition of customary law presents particular challenges. It could involve ‘translation’ of the customary to recognising it without elaborating their content.

Calls to recognise the ‘customary’ do not always imply a retreat into the past: they may legitimate present and future political claims. Such calls are often associated with claims to “authenticity”.

The demand to recognise the culturally specific is often invoked in the name of universal equality but, by definition, it implies acknowledging and giving status to something that is not universally shared.

Further difficulties arise when state law is based on ethno-religious identities or when the state recognises identity-based non-state legal orders. In such cases, an individual’s multiple identities become legally fixed or formalised.

**The Additional Challenges that Conflict Poses**

- Rupture of social fabric and customary institutions
- A dramatic capture or change in the nature of social, political, cultural and economic institutions
- A sharpening and even militarisation of identities
- Possible crippling or collapse of formal legal institutions
- The peace agreement does not hold and violence reignites.
- The implementation of human rights measures involves a transfer of power which is resisted.
- Some cores issues are not dealt with, and human rights become an ongoing bargaining tool. Socio-economic rights concerns and violations.
- External processes of monitoring and verification are weak, or external actors operate to undermine the peace agreement.
- Civil society is weak, being restrained, or made dysfunctional by the peace process itself.
- Human rights are narrowly understood to include only matters and groups relevant to the conflict.

**The Way Ahead**

Notwithstanding their limitations, existing human rights standards do offer scope for effective engagement with plural legal orders. Human rights instruments also provide approaches, for example, to understand the complexities of identity and the internal diversity of culture, which rise above a ‘balancing’ approach. A great deal can be learnt from the way human rights principles have been used by regional and national courts to address cases where rights apparently conflict as well as violations associated with plural legal orders.
Recognition of cultural difference in the form of plural legal orders must assess: actual human rights impacts on inter- and intra-group equality; the proportionality of any restriction on rights caused by such recognition; and whether the cumulative effect of the proposed measure would be to create a qualitatively new level of discrimination.

A functional rather than a categorical approach to recognition of customary law is more likely to produce positive human rights outcomes. A four point approach, broadly following the ALRC, is relevant: avoid a single all-purpose definition of 'customary laws and practices'; aim to secure all basic human rights for every member of the community; deal with internal stresses and difficulties within the community that are due to external forces; and, avoid establishing distinct and possibly conflicting systems of law that will generate inequities and inefficiencies.

The further development of human rights standards is desirable in several areas. These include: the meaning and practical application of due diligence; family law; the allocation to different jurisdictions of ‘minor’ and ‘major’ disputes; and due process standards in the context of civil disputes governed by non-state legal orders that have a measure of state recognition.

More national research and transnational sharing of experience is required on whether and how such recognition of non-state legal orders contributes to or obstructs progress in human rights. Cooperation between those working on different aspects of rights - on women's rights, minority ethnic and religious rights, indigenous peoples' rights, sexual orientation, etc, as well as between those working nationally and internationally an urgent imperative for the development of more congruent human rights standards across different areas.

Donor-funded justice reform programmes need a sound research base to ensure that policies are not inconsistent, incoherent or unrealistic. Donors need to apply human rights principles consistently, especially when they fund or design decentralisation projects and alternate dispute resolution mechanisms. More meaningful consultation, local participation and effective monitoring and evaluation, are needed. Donor initiatives also need better coordination to ensure effectiveness and learning from successful initiatives.

Some guiding principles for a human rights engagement with plural legal orders

- Start from the perspective of those who experience inter- and intra-group discrimination, and the need to redress this and analyse the role of state and non-state actors at the level of family and community, as well as at national, regional and international levels.
- Plural legal orders are neither intrinsically good nor bad for human rights – use a power lens to examine the processes behind their demand, development, content and structure, and human rights implications.
• Adopt a comprehensive contextual approach to analysis taking into account historical as well as current social, economic and political factors.
• The benefits and disadvantages of state and non-state legal orders need to be questioned and supported by quantitative and qualitative empirical evidence.
• Discussion of, and decisions about, how best to promote and protect rights in relation to plural legal orders involves moral and political preferences. All those involved – including human rights advocates – must be reflexive and transparent about these preferences.
• Despite limitations, international human rights standards offer useful tools for policy and advocacy, especially when advocates can apply universal standards meaningfully to their local contexts.
• People are bearers of both rights and culture – transcend the apparent problem of ‘balancing’ rights by: a) adopting an intersectional approach to identity; b) seeing culture, custom, tradition and religion as changing, internally diverse and contested; and, c) using a situated analysis that regards rights-holders as simultaneously individuals and members of multiple collectives.

Additional Conflict Related Principles Relevant to Rule of Law and Plural Legal Orders

• Inclusion of human rights provisions in a peace agreement is a job that begins during the conflict.
• Human rights need not be viewed as ‘concessions’ but as matters which focus around basic human needs, relating to identity, freedom, security, participation and welfare, which it is in the interests of all parties to address.
• Bargaining will occur around human rights issues during a peace process, but engaging with the negotiation process is the price of inclusion.
• Notwithstanding the standards set within human rights law, given the need to apply these standards domestically, and the possibility of sequencing their implementation there is some room to negotiate as regards processes of implementation.
• Human rights standards do not for the most part provide absolute rights but also allow for rights to be constrained with regard to democratic objectives, provided that this is done by law.
• Reform of criminal justice, police, and judiciary must be seen as concepts which go beyond the basics of courts and institutional structures.
• Attention must be paid to rule of law initiatives at the start of a peace operation.
• The UN, bilateral donors and host governments should agree on an overall rule of law strategy, specifying priorities, sequencing, benchmarks, indicators, evaluation mechanisms, responsibilities and deadlines, as well as follow-up.
• Non-governmental organisations and civil society in general should participate in the strategising process, and local ownership should be fostered through facilitating local participation, and using local experts.
International actors who have supported human rights NGOs, should continue to support them at the implementation stage, by recognising that human rights advocacy is particularly challenging and often dangerous at this stage of a process.
Grappling with Legal Pluralism in Afghanistan
By Kate Fearon

Introduction

Resolving disputes by informal means is a way of life in Helmand. The provincial government’s analysis is that formal and informal methodologies are two distinct sectors of the one system. The PRT supports this analysis, on that informs our joint approach, which is that the formal sector (almost universally conflated with ‘the government’) should handle the most serious cases and that minor matters are more appropriately dealt with through (non-Taliban) informal sector. It is our goal to strengthen both sectors and seek opportunities to link them in order to increase access to justice and improve accountability throughout the whole system.

There are two contexts that we take account of in operationalising our approach:

(i) Political
(ii) Practical.

Politically, the government sees the provision of justice as a key counter-insurgency battleground. Military means alone will never defeat the Taliban – confident bottom up communities which have faith in and can meet a robust top down government that delivers key services (security, justice, education, health and economic development) is the parallel key.

Therefore, for Afghans, and for us, justice is a key service that needs to be delivered in a counter-insurgency environment. Everywhere we go in Helmand we find a strong individual and collective desire for justice. But the environment has a multitude of justice providers. From the courts and prosecutors, to the police, to the district governors, to the mullahs, to the elders, to the Taliban, there is a continuum of justice options, a continuum which is much more accessible to men than women.

Practically, Helmand is a big place. It is approximately the size of Ireland, but with only a quarter of its population. So there is a lot of room for 1.4 million citizens, mostly desert. The major urban centre is the provincial capital of Lashkar Gah, a city of around 400,000 citizens. Administratively, there are 13 districts. Eight of these enjoy the presence of the Government of the Islamic Republic of Afghanistan (GIROA). Until this summer, the Helmand PRT worked in 5 districts (Musa Qala, Sangin, Nad e Ali, Gereshk and Garmsir) and since the summer has extended to work in a further three districts (Nawa, Khan e Shen and Nawzad).

For all this space and for all this population there are only 9 judges. It is our
understanding that only three of these have had formal legal education. There is only one functioning court in the province. There is (just recently) prosecutorial presence in two districts only, and in one of those the prosecutor is having a tough time with the District Governor. There are no defence attorneys outside the provincial capital – and only two in Lashkar Gah.

To boot, the formal system is seen as slow, ineffective and devastatingly corrupt. Helmandis tell us for example that

“There are two types of judge. One is cheap. But if someone has money, they give it to the judge. Their case is sorted out quickly, but the poor persons’ case can go on for years and years.”

In the absence of any formal sector Helmandis use traditional dispute resolution methodologies. These methods have been used for hundreds of years, and, in a counter insurgency environment, plays a critical role. It is the formal sector which is the relative newcomer. The informal sector is diverse: the Elders, the Mullahs and the Taliban are all part of it. We estimate that the Taliban’s mobile courts operate in 12 out of the 13 Helmand Administrative Districts and that around 90% of all disputes in Helmand are handled through the informal sector. In the urban areas, however the influence of the Elders on disputes, though real, is attenuated, seen as being able to deal with minor, but not major disputes:

“The Elders are able to provide for some, but not all cases. For example, if two families are in dispute over a smaller problems the Elders would solve it.”

“The Elders are for dealing with smaller problems, they can’t deal with big issues.”

However, in the rural areas, out in the districts, the Elders have greater capability, and can be involved in serious dispute resolution, even up to murder:

“If we can’t solve [the murder], it goes to Lashkar Gah. For a murder we go to both families and ask them for permission to make a deal. We might have to got o them 3-4 times. Then, if they give us permission to make a deal, /…/ we charge the killer with money to give to the family of the man who got killed. /…/ [The typical amount] is about $30,000 – 40,000.”

The Taliban however, are also recognised as justice providers in the rural areas especially. There exists an ambiguity in Helmand between rejecting the cruelty of hudud punishment meted out by the Taliban and accepting the results of ‘effective’ justice:

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1 Fearon, K The Cow that Ate the Turban, March 2009, Helmand PRT, p10
2 Ibid. pg 8
3 Fearon, K and Griffiths, D A Bridge Between Community and Government, Helmand PRT, November 2009 p16
“Yes, the Taliban [deliver justice] here sometimes. It is a good system, it has some good things, but they are bad people operating it. [The positive is] that there are not thieves and no robbery under their system./.../ Because the TB cut [off] hands and feet.”

So, the competition for justice service delivery in the districts is between the Elders and the Taliban.

What the government seeks to do is to direct its support towards the Elders through, inter alia, the structures that support government influence and address community desire for justice. The PRT Governance Team has assisted the Provincial Governor establish 4 Community Councils. Each of the Community Councils has three sub-committees, reflecting Afghan National Development Strategy priorities:

1. Security (SSC)
2. Justice (JSC)
3. Economic and Social Development (ESC)

There are, and there will likely always be, a myriad of village level shuras. We cannot, and are not likely to, ever contact yet alone reach all of these, due to both security and human resource elements. They are organic structures and will continue to do the work that they have done in the way that they have done for hundreds of years, if not millennia. However, in the short time that the CC JSCs have been operational, it is our understanding that JSC members are at once members of their village dispute resolution shura and the District level one, thus linking the two, each referring to the other.

In terms of punishment, the Elders approach is – perhaps counterintuitively – what we might recognise as restorative. Their aim is to restore community harmony, to reduce enmity between parties whose social bond has been ruptured by the actions of one or both parties. This phrase, ‘to reduce enmity’ comes up time and again in conversation. In the 18 months that the PRT has been developing its work, we have not seen any instances of the Elders handing down hudud punishments, though we have heard of some instances of baadh – the use of women or girls as part of a compensation deal. In stark contrast, the Taliban routinely use hudud punishments, chiefly the amputation of hands or feet, but also beheadings and hangings.

There are strengths and weaknesses to each mechanism. The Elders system is acceptable, accessible, legitimate, sustainable and efficient. It is fairly predictable. On the other hand it raises human rights concerns, it is not always enforceable and few records are kept. The Taliban’s system is also seen as accessible, and efficient. But it is recognised that its punishments are ‘too harsh’, that it is vulnerable to corruption and that there is very little due process. Afghans don’t like it when decisions are handed down from Taliban high command in Quetta. The formal system has as strengths, its statutory authority, its (theoretical) predictability and the fact that decisions in a lower

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4 Ibid., p 15
court can be appealed. Yet it is viewed as slow, corrupt, inaccessible and operated by unqualified personnel.

For all this, we have to work with the cards that are dealt us. We are there to support the government, and we are not going to impose Western legal norms on a system that is as decentralised and fragmented as the informal sector in Helmand. What we aim to do is to support the establishment of the district JSC as a focal point, a bridge between government and community, at district level, but reaching right down to village level. It becomes a platform to which efforts such as human rights and basic legal education training can be directed. Indeed, its members are very keen to learn about these matters.

This is the first strand of our work. The second is the creation of Prisoner Review Shuras and the third is about getting the formal sector out to the districts and enable them to operate securely in the district centres at least.

To give an idea of the nature of the work that the JSCs deal with, below I outline a number of case studies. The first two are from Gereshk, which is the only community council that women sit on, and of those, two women sit on the JSC, which makes a real difference in the type of cases coming forward.

There was one very horrible case. A young girl of 18 yrs came to me. She said ‘my parents want me to marry an addict, who is also a smuggler.’ But how can I stay with him? He doesn’t care about anyone. I need your help or I will kill myself!’ I went to her house, to speak with her father. At first he didn’t allow us in, and told me to go away. But, we are Afghan: you must host someone even if they are your enemy. So we got a cup of tea. The first time we talked, the father took an extreme view. But we continued to talk, and he came around. He was worried, though, about the marriage contract that he had already entered into. He said ‘I can’t do anything about that. His [the addict’s] family will take the girl.’ So I took her husband and brother and father to the shura. I said to them, ‘if you want to give a girl to an addict, he is a half-man, she will kill herself and this will be your responsibility. The girl repeated in front of them that she would kill herself if they made her marry the addict. That decision was really hard. The session lasted 2-3 hours. But eventually they allowed her to go by herself./…/ Now, she goes to school.\(^5\)

On this case, when asked if the decision might have been different if there were not the two women on the JSC, the answer was yes, that it might well not have had such a positive outcome. The rationale given was that a lot of the CC are uneducated, that ‘they don’t look to the big picture, to the future.’ That said, the two women (one of whom is a respected lawyer and widow) stated that they were very comfortable with attending and speaking at the JSC.

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\(^5\) Fearon, K. *Now She Goes to School: The work of the Gereshk Community Council JSC May-Sept 2009* p3
Another case concerned a commercial property dispute. The Chair of the JSC told me that

*Two men had an equal claim to a shop. This was a 10 year-old case that was getting nowhere in the courts. We made a decision that was supported by all concerned. We took a record and fingerprints. /*...*/ The decision was made because of Islamic rules. We selected two lawyers, and they estimated a price for the shop. We then asked who was happy to purchase. One was, one wasn’t. So one got the money, and the other got the shop.*

The Chair of the JSC in Garmsir reported that, in terms of a tribal dispute

*One tribe had a problem. They wanted to split into two and they were fighting all the time. /*...*/ It started with the kids fighting in the street. Then one of the kids really got hurt. Then the older kids – around 20-25 years – got involved. There was a stabbing. The ANP arrested someone. Then the tribe gave us the authority to deal with the problem and we discussed it with both sides. In the end they signed a statement saying that they would not fight anymore.*

These two JSCs have also started to take an interest in detainees, both in terms of visiting the detention facilities – which are very basic – and in terms of demanding that those detained mistakenly be released.

*There was a case of a prisoner, a guy who was arrested by ISAF/ANSF. He should not have been arrested. The DG sent the case to the JSC. The JSC got together a petition from amongst the community for his release. The whole community knew he was innocent, that he was not a Talib. /*...*/ So ISAF released him.*

The issue of arbitrary detention, and detention beyond the legal deadline of 72 hours is also addressed in part by the JSC, one of whose members sits on a Prisoner Review Shura (where there is a community council andPRS in the same district). The PRSs act as a proxy for prosecutorial presence in the districts when GIROA cannot be present, or can only be partially present. Again, for GIROA and us, it is about both some due process and governance service delivery.

Briefly, the PRS members (the local heads of the ANA, ANP, NDS, DG & JSC Chair) determines if there is any evidence of a crime committed by a detainee. If there is not, then the detainee is released. If there is, then the second question they consider is if the crime is serious or minor. If it is a serious crime, it is referred to the formal sector. If it is a minor offence, it can be referred to the JSC, or the village elders.

We have just begun to see how these structures work. We know that we need to continue to support them, facilitate training by the Ministry of Justice and other Afghan institutions like the Afghan Independent Human Rights Commission. We also need to work on strengthening the formal sector: there is no point in having cases referred there if those arrested can simply buy their way out, or if a case will languish for years without

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6 Fearon, K Now She Goes to School: The work of the Gereshk Community Council JSC May-Sept 2009 p4
resolution. In line with the draft national policy, we encourage our Afghan colleagues to keep records of the cases they deal with, and we have been pleasantly surprised by the degree of records that are currently kept.

So, in conclusion, we agree with the provincial government that the formal sector is the most appropriate for handling serious criminal cases. Minor cases can – and are – being dealt with in the non-Taliban informal sector. We will continue to seek opportunities to strengthen both sectors and to link them.

We have identified and support two such linkages already – the Justice Sub-Committees and the Prisoner Review Shuras. By close monitoring and support we hope to assist our Afghan colleagues in refining these structures in order to enlarge the justice footprint, and access to it.

We are fully conscious that this approach is not without risk. In fact, it comes with a hierarchy of risk. The first risk is security: it is a very difficult environment in which to operate per se. Specifically, there is also the risk that the Taliban will directly attack the Elders in villages, or on the JSCs, or that they will simply undermine any structure that seeks to bridge communities and government by a campaign of intimidation. There is also the risk that, even though the vast majority of Taliban punishments violate human rights there may also be human rights violations in decisions taken by the Elders.

This is a weakness in the Elders’ approach. PRT policy aims address this weakness by arranging to inform and educate those on the JSCs – and through them, cascade to village level – about human rights and basic legal norms. We do know that JSC members – in stark contrast to the Taliban – are very keen to learn about human rights. But we cannot do this alone. Such change will only happen in the long term, and it will only come about if it is both underpinned and led from the front by GIROA.

But the biggest risk of all is not providing any justice, and leaving the field open to the Taliban. The reality is that in the absence of any other provider, people will go to the Taliban. By providing justice in a form that people recognise and accept as fair and efficient, the government is not only meeting that strong individual and collective desire for justice, but also helping to build strong and self-sufficient communities which in and of themselves will contribute to the counterinsurgency effort and the creation of a strong and self-sufficient state. The PRT is pleased to be able to assist in this effort.
The Current Informal Justice System in Afghanistan
By Abdul Qader Adalat Khwa

In the Name of Allah the merciful and compassionate,

First of all let me to extend my thanks and gratitude to the organizers of this conference, especially to the USIP staff and officials, the World Bank and Georgetown University and all other colleagues who helped in organizing this conference. I sincerely hope this will be a productive time for all of us.

Dear Colleagues,

I want to talk briefly on the current situation of the informal justice system in Afghanistan describing the following points:

- A short introduction to Informal Justice in Afghanistan
- Types of Shuras or councils and Jirgas (Informal Dispute Resolution Forums)
- Characteristics of Shuras and Jirgas
- The importance of Jirgas
- How the Shuras and Jirgas are held
- Positive and negative aspects of Jirgas and Shuras
- The current drafting of a National Policy linking the formal justice system with Dispute Resolution Councils
- Initiatives and next steps after this policy is approved

1. A Brief Introduction of Informal Justice System in Afghanistan
The informal justice system has a very long history in Afghanistan. For years, people have kept bringing their disputes to this system for resolution. Different names are given to this system throughout the country such as Jirga, Shuras Mark or Maraka. The term Jirga is commonly used in the Pashtoon populated areas and terms Shura and Marka are common among Tajiks, Hazaras and Uzbeks.

Jirga is used to refer to a meeting where certain participants gather in order to resolve disputes between individuals who are living in the same family, tribe or even from different tribes. Participants or members of the Jirgas in most cases are the men, elders and influential persons in their tribe or community. Jirgas in Afghanistan continue today to resolve civil and criminal cases, even including cases such as murder.

2. Types of Jirga
There are different types of Jirga existing in Afghanistan which are mainly divided into three categories, small, medium or local and large Jirgas. Small Jirgas are commonly held to resolve cases of individuals who are living in the same community or in a tribe.
Medium or local Jirgas are held to resolve disputes between two tribes or two communities that are neighbors.

Large Jirgas are called Loya Jirgas or “Grand Assemblies” and they are held to deal with very important issues that affect people at the national level. For example, Afghan leaders used to be selected by Loya Jirgs. Loya Jirgas are held only under exceptional circumstances, such as the approving of the constitution or declaring war against another state.

In addition to this there are other situations used which have a direct relation with the concept of Jirga, such as the senate or the upper house of the parliament is called “MESHRA NO JIRGA” and the lower house is called Wolesi Jirga. Moreover there are numerous other formal and informal Shuras and Jirgas operating throughout the country such as Provincial Councils, District Councils, Council of Religious Scholars, and Community Development Councils.

It has to be noted that our aim here is not to discuss all types of Jirgas but our focus is on Jirgas or Shuras which have important roles in resolving the disputes informally therefore, I would like to turn now to some of the characteristics of these forums.

3. The main Characteristics of Shuras and Jirgas

Shuras and Jirgas have certain important characteristics as I will now describe:

a) No Specified Models for Jirgas: One of the main characteristics of the Jirga system is that there is no specified model for it throughout the country. They do not have any unified structure and practices differ from one region to another. In general, members are selected based on the importance of the issue under consideration.

b) No Gender Equality: This also means almost all Jirgas are primarily male and the women do not have the right to participate or take part in decision-making processes. Decision-makers are almost all men since influential members of the community are also primarily male.

c) Ad Hoc Base: Jirgas are held on ad hoc bases without having any permanent or active structure. Whenever a dispute arises between individuals, a jirga is held to resolve it. Discussions and debates continue among the members until they reach a solution.

d) Unwritten Decision: Decision by Jirgas or Shuras are traditionally made verbally and the parties in dispute are obliged to respect and follow the decision.

e) No Detention by Jirgas: Decisions made by Jirgas do not result in imprisonment and any party who rejects the decision of the jirga is generally fined.

f) Compensation: Most Jirgas decisions result in compensation from one party to another. It means the compensation is taken from the person caused the damage and given to the victim, even if the compensatory amount is not proportional to the damage caused.

4. The Importance of Jirgas
Currently *Jirgas* are very important in Afghanistan because the formal justice system, for many reasons cannot deal with all disputes throughout the country. Three decades of war, insecurity, lack of professionals and qualified personal in the formal institutions, longs distance between rural and urban areas and corruption are all factors which causes people to have extremely limited access to the formal justice system. This is why many cases are resolved by the informal justice system and the people continue taking cases to these forums regularly.

5. The way *Jirgas* are Held or Conducted

Whenever a dispute arises between two party, one or both parties refer the case to the elders or influential person in the community and request the formation of a *Jirga* to resolve the case. The members to be in a *Jirga* are well-known in their community and they are skilled in resolving disputes. Members voluntarily participate in the *Jirga* meetings. *Jirgas* do not have offices or designated locations. They can be held in mosques, private homes, under a tree or any other place that members agree to. Members try their best to resolve the dispute in a peaceful manner, ensuring that both parties. There is no specified number of people to participate in the *Jirga* process. This depends on the nature and circumstance of each dispute. Normally each party invites half of the participants and the food is provided by the party who has initiated the meeting.

In order to create a transparent system, members agree on certain rules and principles before they start discussing the case. Ideally all members enjoy equal rights in the *Jirga* but in practice certain influential figures almost always have a central role in the proceedings and the recommendations made by him tend to be accepted by other members.

6. Positive and Negative Aspects of *Jirgas*

There are many positive aspects to resolving disputes with *jirgas*. On one hand this system is very inexpensive and less time consuming that taking cases to the formal system. In general the system is accessible to most Afghans. Any access this system because *Jirgas* can be held anywhere, simply and without any protocol or formalities. Adding to this, decisions in *Jirgas* are based on reconciliation and preserving the cohesion in the community. For this reason disputants can be easily reintegrated in the community after decisions are made.

Despite of all positive aspects mentioned above, the *Jirgas* have specific shortcomings as well. The main crucial defect is that certain influential men in the community tend to dominate these forums. The whole process is controlled by men and women generally have no role.

Moreover human rights violations specially the rights of women and children are sometimes violated in decisions made by *Jirgas*. *Bad* and *Badal* marriages, forced marriages and child marriage are the crucial examples of women and child rights violations committed traditionally by *Jirgas*. The other deficiency of this system is that of
having no competent formal institution to oversee and control the actions taken by the informal system.

7. **Draft National Policy on Relation between Formal Justice and Dispute Resolution Councils**

The informal justice system is a valuable and useful mechanism for resolving disputes in Afghanistan however it also has certain clear problems and deficiencies. This is why the government of Afghanistan has taken some steps in order to improve the defects and bring this system in line with Afghan laws. The government initially recognized this system officially under the Justice Sector Strategy as one of the resources for justice for citizens of Afghanistan. The Justice Sector Strategy mandated the Ministry of Justice to make an assessment of this system and specify how best this system can be used by making a policy on the government’s approach.

The Justice Sector Strategy emphasized protecting the rights of parties to participate voluntarily in Jirgas dealing with disputes. The process should proceed without any type of discrimination in civil cases and the decisions of these bodies should not contradict the principles of Shariah, Human Rights and the Constitution. To accomplish this task the Ministry of Justice initiated a process under which two teams composed of national and international institutions (a small team to draft the policy and larger team to review the draft) were formed. The drafting team drafted the National Policy on Relation between Formal Justice and Dispute Resolution Councils in a series of weekly meetings. The drafting process took months to get the first draft finalized and it was completed on 10 November 2009. The Ministry of Justice plans to give this draft to the larger team for its review and when it is approved, the ministry will submit it to the council of the ministers. When the policy is approved by the council of ministers than it will be the time for its application. In the implementation of this policy, there will be a great need for assistance from national and international institutions. Proceeding from here, our key goals are the public awareness on the policy, drafting a law on informal justice and eventual application of this policy.

8. **Next Steps after Approval of the Policy**

When the policy is approved by the council of Ministers the next steps will be drafting a law that regulates the activities and processes of Jirgas. There will be a need to create regulations and guidelines for application of the law and the policy. The policy provides for the oversight and registration of informal decisions in a related formal institution. The government should allocate an existing institution to review and register the informal justice decisions or establish a new institution for this purpose. There is the need for funding and training to establish such a government body or enable a current governmental institution to begin this process.

Thank you all for your attention!
Legal Pluralism in Southern Sudan
By Kuyang Harriet Logo

The picture of legal pluralism:
Southern Sudan is transforming from war to peace, after a very long protracted war that ravaged the region for two and a half decades and before that for seventeen years. Despite the hurdles at implementation, the comprehensive peace agreement of 2005 takes credence over; almost all other agreements entered into by the two parties previously; as it confronts all the contentious issues that have torn the country apart for years and clearly spells out the modalities of implementation.

Reconstruction of the south is taking shape, amidst huge challenges, but the most challenging aspect of it; is reinstating the rule of law and ensuring that it is functional and facilitates and upholds the respect for Human rights and Democratic Governance; as a cornerstone, for a lasting peace.

Like other former colonies, the Sudan and particularly the South is no exception in regard to grappling with legal pluralism, for the prevalence of the colonial law to govern commercial transactions for instance; and tribal law or customary law to govern family matters is and has been the known practise. But over time the distinctions have gotten weak and persons often seek legal claims from systems that would better work in their advantage or a system that is more comprehensible to them.

During the war, the South reverted to the usage of customary law and reliance on customary chiefs for the dispensation of justice for the people within the SPLM controlled areas; in the absence of formal judicial structures, giving prominence to customary law and the informal justice system. In 1994, when the SPLM promulgated the SPLM acts, later repealed in 2003, there was an informal fusion of statutory law and customary law as a mechanism to deal with disputes.

As the GOSS formulated its government, and other parallel structures, especially the rule of law institutions, it became clear that the informal fusion of customary and statutory law in the past would be a hard nut to crack.

Ethnicity and its history in Southern Sudan and continuous disregard of the traditional identities and cultural practised of the southerners by the central government had in the past been a basis for disgruntlement for decades and indeed an integral aspect of the struggle. And with the peace accord, it is impossible to discuss a legal system for the South without incorporating discussions on customary law; this is evidenced in the interim constitution of Southern Sudan, which clearly spells out the importance of customary law (Part two of the ICSSS – Bill of rights art.37)
The South has as well, been impacted on by different laws that governed the whole of Sudan before the signing of the peace agreement; for instance there was a strong British influence and the sharia laws.

The changes disregarded existing laws and customs and was alien to the Sudan setting; hence its revision to the pre – 1970 common law basis. However following the suppression of a coup attempt in 1976, and subsequent imposition of the sharia law; led to modification of customary law in varying levels to deal with personal matters between tribes and clans.

At the onset of the implementation of the comprehensive peace agreement, Southern Sudan promulgated the interim constitution of Southern Sudan and subsequent state constitutions, bills of right of which recognise the practise and adherence of customary law and indeed, was a source of law. The law making efficacy of customary law is still very strong. And, Indeed in Southern Sudan custom is a very important source of law that is embedded in the legislation, (ICSS), with very vague guide to the role of customary law; and its role is even vaguer under the local government provisions. All the same, its importance has not yet diminished because the legal system hasn’t fully grown and no stringent limitations have been imposed by law upon the law creating efficacy of customary law.

Explaining this is the fact that custom is frequently the embodiment of principles which have commended themselves to the national conscience as principles of justice and public utility. Its rational expectation of continuance in the future fulfils men’s rational expectation rather than be frustrated. Even if it can be shown that the national conscience has gone astray in establishing them, even when better rules have been formulated and enforced, it is still wise to accept as they are other than frustrate expectations which are based on practice.

**Issues associated with legal pluralism:**

- The legal profession and the statutory system is growing and customary law and the traditional authorities that have been given prominence during the war feel throttled and the policy for aid agencies and government is to establish a modern Judiciary; and the legal system strives to usurp most of the traditional jurisdictions of the customary law. The customary court mapping exercise that commenced last year and was concluded in August of 2009; raises hope that this
particular policy would develop and expand to strengthen the capacity and legitimacy of these courts and not to weaken them; while establishing systems of appellate reviews that reinforce the principles of human rights and technically sound judgments.

- The challenge of moving Southern Sudan to a lasting peace lies in the establishment of a legal system that disentangles jurisdictional issues between the fledging statutory system and customary law; while maintaining the authority and support to customary law that maintains its important position in the frontline of judicial access. The distinction between tribal law and statutory law must be made clear. The interim constitution of southern Sudan for instance, recognizes the applicability of customary law and that has been interpreted in rural areas, in an unadulterated form, to suggest acceptance of customary law irrespective of its harmful traditional aspects and absolutism in the powers of the traditional authorities and chiefs.

- Documentation of customary law in the south has been on going right before the peace was signed, but this exercise has been more anthropological than pragmatic; conducted by so many actors with different intentions and programmes. Most of these findings have never been utilized or availed to government for effective use to create a jurisdictional guideline that incorporates tribal laws.

- The vast nature of the tribal groupings and customary laws that are existent, pause great concerns, the studies that have often been conducted tend to focus on large ethnic groupings all the time [the Dinka, Nuer, Azande, Shilluk, the Bari group], leaving out the smaller groups. The importance of diverse social fields in creating a pluralistic system that reflect norms has been lacking in Southern Sudan.

- Customary law and practices is largely viewed as an impediment to the full realization of minority rights – women and children. However what constitutes negativity in this regard is subject to variances within the various ethnic groupings. Cultural practices have in the past largely contributed to the current marginalization of women. The ICSS attempts to address the issue by incorporating an affirmative action clause to increase the participation of women in politics and public life; while at the same time addressing the need to enact laws that would combat negative harmful practices that have undermined the dignity of women.

Approaches to legal pluralism:

Existing projects:

USIP’s project in Southern Sudan
• Facilitating traditional leaders’ councils and their communities to ascertain their own customary and community laws

• Creation of a digitized records management for statutes, law reports, customary and community laws and court judgments

• Organizing workshops for criminal sector actors and traditional authorities and their communities

World vision protection and peace building:

The customary law project in Western Equatoria:

The project takes its point of departure in traditional conflict resolution mechanisms inherent in the traditional authority structure and the existence of customary law, which complements the statutory law framework. During the war, these local traditional conflict resolution mechanisms were significantly weakened, and combined with a general lack of implementation capacity of the statutory law system in Southern Sudan this creates a rule of law vacuum.

World Vision Sudan cooperates with local and traditional authorities to identify, register and strengthen customary law practices which can have a conflict mitigating impact on a local level. A peace and customary law conference held between two tribes who have been trapped in a cycle of violence for many years is an one significant achievement of the project, and constitutes a significant shift from the use of guns to use of constructive dialogues.

Berghof Foundation for peace support

• Looking at traditional mechanisms of conflict resolution of family matters
• Codification of customary law
• Linking traditional systems with modern systems of local government

The approaches of UNDP – Access to Justice; MOLACD; and JOSS projects:

Supporting the development of traditional authorities and customary court systems through

Conducting a legal training capacity assessment for the traditional authorities

Development of a methodology and manual to raise human rights awareness and to promote the eradication of harmful traditional practices
JOSS & MOLACD – Customary law study tours

Development of a customary law strategy through a broad based consultative process to inform the linkages between customary law and statutory law

NPA – Norwegian Peoples aid; is conducting research on harmful traditional practices that inhibit the full realization of the rights of women.

Recommendations on approaching legal pluralism in southern Sudan:

Conclusively, Southern Sudan is exerting its efforts at stabilizing relations between the various tribal groups especially those that are having conflicts; and this needs to be reinforced with a legal framework that recognizes the importance of customary law, by focusing on in-depth in country researches and reviewing other approaches from African states, that have dealt with legal pluralism squarely and within the realms of human rights, constitutionalism and democratic governance.

Southern Sudan needs to focus on creating a continuous dialogue, between customary law and oral jurisprudence on one side, to document rulings and build a consistent and “professional” customary law system, which is consistent and predictable in terms of rulings.

The legal system that eventually evolves needs to incorporate specific constitutional clauses, to effectively direct the interpretation of customary law by the various tribal groupings; detailing boundaries and to find a middle ground for the coexistence of customary law and statutory law.
RULE OF LAW Reform WITHOUT Cultural Imperialism? Reinforcing Customary Justice Through Collateral Review In SOUTHERN SUDAN
By David Pimentel

[This is a summary of the full article, which will appear THE HAGUE JOURNAL ON RULE OF LAW in 2010.]

I. INTRODUCTION

The challenge of establishing the rule of law, especially in developing and post-conflict societies, is complex and multi-faceted. The desirability of such projects is usually assumed, as reflected in reports of Justice Anthony Kennedy’s remarks at Stanford University’s 2009 commencement, which included the observation that “more than half the world’s population lives ‘outside the law,’” and that the new graduates should work to “spread American principles of justice, especially in places that resist them.” The imperialistic tone of the latter injunction is deeply problematic for the rule of law enterprise, however, as attempts to import foreign (usually Western) legal concepts and structures can be a bitter reminder of the colonial history of many of these societies.

At the same time, some of these developing and post-conflict societies have highly functional customary law institutions (in parts of Africa, e.g., a tribal chief applying a customary law handed down by oral tradition). These systems enjoy public confidence and function on very limited budgets—often providing prompt and accessible dispute resolution in the community. Unfortunately, these indigenous systems do not always adhere to minimum standards of justice and human rights.

In response, Rule of Law reformers in such communities are now working to codify customary law, and/or create rights of appeal from the customary courts. These efforts, however, threaten to deprive the tribal communities of ownership of and control over their law. Rule of law reformers must learn the lessons of colonialism, lest they perpetrate a new imperialism.

Instead, customary adjudication should be subject only to collateral review. Statutory courts should defer fully to customary law adjudicators on the principles and application of customary law, and review their decisions only for compliance with minimum standards of justice and human rights (ideally those recognized in the local constitution and international human rights instruments the country has ratified).

And in that compromise, we see a model for other rule of law efforts: an archetype for the delicate yet critical balancing of competing interests—cultural respect and rule of law reform—as well as the way ahead, in post-conflict transitional justice efforts the world over.

II. RULE OF LAW CHALLENGES

A. Cultural Imperialism v. Cultural sensitivity

Among the core problems, however, is the dissonance inherent in the imposition of rule of law institutions and rule of law principles born of foreign cultures on an unwilling or unready society. Indeed, any attempt to export concepts of institutional justice from Western powers—particularly those countries that dominate the UN power
structure—has been characterized as a type of cultural imperialism, a particularly sensitive issue in post-colonial societies.

Nonetheless, protection of principles of justice and human rights requires some intervention; otherwise, human rights violations will remain unchecked wherever such abuses have become customary. Thus the issue is not as simple as respecting and preserving local culture—even the valued and cherished aspects of it—in that society’s approach to justice and the rule of law. Not all systems of justice and not all systems of cultural values share equal legitimacy. Tolerance of cultural differences need not, and must not, require the acceptance of practices that violate the most fundamental principles of human rights and dignity. A more sophisticated sorting of practices and institutions may be in order, keeping in mind the lesson and legacy of the former colonists and occupiers.

B. Public confidence in the Rule of Law Institutions

Cultural sensitivity is not just a principle of ethics; it is also a pragmatic concern for the success of the rule of law reform initiative. In any society—post-colonial, post-conflict, or otherwise—the rule of law requires a judicial system that engenders and enjoys public confidence and trust. Further, a foreign-looking legal system imposed on a post-conflict society is unlikely to inspire great public confidence and may even be viewed as further oppression. The public is likely to expect their judiciary and other rule of law institutions to reflect the traditional concepts of justice that are time-honored in that society. And even if the rule of law institutions have not been revered or trusted in the past, such as when the conflict involved the overthrow of a corrupt regime whose institutions were also corrupt, or where the society is seeking relief from militarized “justice” that may have prevailed during armed conflict, such trust will not necessarily come any more quickly to a new and unfamiliar legal regime.

C. Limited resources

Another compelling and immediate barrier to such rule of law reform, is the lack of resources. The resource deficit is not limited to the obvious issue of budget, buildings, facilities, equipment. Even if donors come forward with money—which often happens in the most war-torn areas—where can we find the personnel qualified and untainted by the prior regime to run these new rule of law institutions, adhering to higher standards than have ever been known in this society? They are unlikely to be readily available, if they exist at all. The pragmatic truth, unfortunately, is that you have to work with what you have.

III. SOUTHERN SUDAN AS A CASE IN POINT

Because it is difficult to generalize on such issues—every situation will include special circumstances that can or should be taken into account—it is most useful to consider the question in the context of one example, a post-conflict case-in-point. The challenges faced by the rule of law community in Southern Sudan are instructive.

Southern Sudan has recently emerged from civil war with the powers in the north, led by the Khartoum government. Upon the signing of the Comprehensive Peace Agreement in 2005, United Nations peacekeepers were brought into Sudan to oversee the implementation of the Agreement itself: a compromise that stopped short of giving
Southern Sudan full independence but conferred regional autonomy for a period of six years.

Government of Southern Sudan (GoSS) officials, including members of their newly appointed Supreme Court, face the challenge of establishing rule of law norms and institutions in Southern Sudan. They have rejected Shari’a, which had been imposed upon them by Khartoum, and which was a major issue underlying the civil war, and are attempting to implement a common law system like that of Kenya and Uganda, its neighbors to the south. Yet, the reality of life in Southern Sudan is such that a formal court system can serve only a small percentage of the population. Overwhelmingly, dispute resolution is handled within the tribal communities under principles of customary law.

While customary law certainly varies among the different tribes, the customary courts function in similar ways. For the most part, the parties bring their dispute to a tribal elder or tribal chief. This respected member of the tribal community can hear the petitions of the parties—unrepresented by counsel—and render a decision reflecting the customary law principles that have been handed down over the generations, usually by oral tradition, within the tribe. Public confidence in these courts runs significantly higher than any confidence in the statutory courts.

The operation of customary law in Southern Sudan is therefore an essential aspect of establishing and maintaining the rule of law there. Even if one wanted to carry out an imperialistic approach—bringing a more “enlightened” legal regime to the area—it is a practical impossibility to completely replace the customary court system. The necessary resources and infrastructure simply do not exist.

**IV. DRAWING THE LINE / STRIKING THE BALANCE**

Those involved in rule of law reform must find a way to retain cultural concepts, constructs, and practices without undermining the pursuit of the rule of law in general. As cultural sensitivity concerns may come into conflict with rule of law objectives, a line must be drawn and a balance must be struck between these competing interests.

Colonial powers, of course, engaged in the same kind of line drawing. The British, for example, accepted customary law except where it was “repugnant to natural justice, equity, and good conscience.” Such a test is inherently offensive today, as it suggests among other things that practitioners of customary law lack “good conscience” and as it implicitly substitutes the cultural conscience of British society for indigenous values. A better starting point for such line-drawing lies in the international treaties and conventions on human rights. They represent the closest thing presently available to an international and cross-cultural consensus on minimum standards for justice in a society, and Southern Sudan has already embraced them in its constitution.

As already noted, it is impossible at present to create sufficient statutory courts in Southern Sudan to ensure that such principles will be enforced. The customary courts of Southern Sudan must remain a part of the rule of law solution there (1) as a matter of cultural sensitivity, (2) as a matter of public confidence, and (3) as a necessary leveraging of severely limited resources. For these reasons, even aside from the constitutional mandate formally recognizing customary law, the line has to be drawn in such a way that includes customary dispute resolution in the larger rule of law strategy.
However, most critically, the dilemma is exacerbated by the fact that some cultural practices and time-honored remedies provided in tribal adjudication in Southern Sudan run afoul of these very standards.

For example, due to the long-standing cultural practice of “bride wealth”—a custom by which a young man wishing to marry must present the bride’s family with a bride price—an unmarried girl has significant economic value in these communities. For many families in this incredibly impoverished region, their daughters are their only significant assets, as each carries the promise of future bride wealth and a means of social security for the family. When a tort claim such as wrongful death arises between two families, the tortfeasor may have nothing to compensate the plaintiff with other than his own daughter. Recognizing this, customary courts in Southern Sudan have historically resorted to this as a remedy: ordering one family to compensate the other by giving them one of their daughters. It is, of course, impossible to reconcile this legal and cultural practice with contemporary standards of human rights. Nonetheless, it is a practice deeply rooted in Southern Sudanese society.

Despite these fundamental human rights problems that arise out of customary adjudication, we cannot live without the customary courts. Given their cultural significance, practical impact on societal stability, and indispensability given the unavailability of viable alternatives, we have to find a way to live with them.

Some have advocated codification of customary law, which will ostensibly make it more transparent and controllable. Once codified, any aspects of it that offend larger principles—such as the awarding of daughters as tort damages—could be easily amended out of the law. Yet, if customary law is codified, it becomes, for all meaningful purposes, the property of the state. In other words, while codification recognizes and formalizes a tribal community’s customary law, it does so only by depriving that same community of ownership and control of such law.

Chary of codification for this reason, modern reformers have tended to focus on ascertainments of customary law. These written documents attempt to describe—but not prescribe—the principles applied, in an effort to keep ownership of the law in the hands of the original sources. However, even this exercise is likely to function as some kind of external restraint on customary law development and application. Once it is written, customary adjudicators can be subjected to second-guessing on the substantive law they apply; statutory courts may feel emboldened to rely on the ascertainment and substitute their own judgment for the customary law adjudicator’s. Moreover, even if the ascertainment does not serve to hinder the continued development, flexibility, and vitality of customary law, that is, if the customary law continues its evolution regardless of the content of a written ascertainment, the ascertainment itself will quickly become obsolete and irrelevant.

Far from reifying, through codification, the customary law, or otherwise insulating it from outside influences, embracing and legitimizing customary law means finding ways to help it adapt in a changing and increasingly globalized world. A more promising approach is to start with training those who hand down customary court decisions. If customary court judges have an appreciation for the constitutionally enshrined principles of law that their decisions must conform to, the community will, ultimately, benefit from better decisions—i.e. decisions consistent with international
human rights standards, as well as due process standards implicit in establishing the rule of law—at the ground level.

And what if the customary law forum gets it wrong and violates a fundamental right? It is tempting to suggest that the problem of noncompliant and unaccountable customary courts should be resolved through the right of appeal. The problem is that the appellate court, inevitably some type of statutory court set up by the GoSS, is not privy to the principles of customary law being applied, and the appellate judges cannot second-guess the correctness of a lower court ruling if they are not applying the same law. Because the appellate body inevitably applies different law or is left to guess at the customary law applied below, the net effect is to disrupt the rule of law and the societal stability that should follow from it. Legal decisions begin to look arbitrary to the public in such circumstances, and public confidence in judicial decision-making is further undermined.

A far more effective approach would be to establish a mechanism of collateral review of customary court decisions. Statutory courts can be vested with power to review and overturn customary court decisions not on their merits, but rather on the ground that the procedure, outcome, or remedy somehow violated minimum standards of human rights or judicial process guaranteed in the GoSS Constitution. This approach leaves the customary court to determine what its law is and how it should be applied, with the statutory court reviewing those decisions only against these external standards. This collateral review procedure in Southern Sudan will empower a statutory court to intervene when, for example, a girl is ordered from one family to another, but not to second-guess the customary court’s ruling of tort liability. The remedy can be struck down as a violation of constitutional principles, but the merits of the case can otherwise left to the customary court and its interpretation/application of customary law.

This is a far more limited review than a general right of appeal, and it should be a far lighter burden on the few and under-staffed statutory courts. It also maximizes the autonomy of customary courts, which may be vital to maintaining the relevance and effectiveness of those institutions. In the example above, the statutory court need not even interpose its own substitute remedy, but may simply remand the case for the customary court to enter a new remedy to vindicate the rights already adjudicated.

The specific procedure need not be complex; indeed, the simpler the better, given the lack of sophistication of the largely uneducated public and the severe shortage of lawyers. It is vital that the parties to the customary law decision be empowered to seek collateral review. The aggrieved party has undeniable standing to seek redress for the violation of rights. At the same time, however, the aggrieved party may be unaware of this avenue of relief or, perhaps, may not perceive the need for such relief. Accordingly, the procedure should also grant standing to some separate entity to raise these issues. The most appropriate institution is the Southern Sudan Human Rights Commission (SSHRC), which is already charged in the Constitution with closely related tasks.

While some may view collateral review as an infringement of the power of customary courts, the net impact may well be to further strengthen customary law institutions. First, every reversal of a customary court decision will serve to educate the
customary court judges (tribal chiefs and elders) as to the constitutional standards that must be complied with. The quality and sensitivity of customary law decisions—at least as they are measured against the international conventions—will necessarily improve as a result of this process. Even more significant, the collateral review process formally recognizes and legitimizes the customary court decisions. Because the statutory courts will defer to customary adjudication in all cases and on all issues other than those specified for collateral review, the customary courts become a formal and official part of the larger rule of law regime. Thus, the imposition of a collateral review procedure for customary courts can actually strengthen traditional and indigenous rule of law mechanisms.

V. CONCLUSION

In order to keep and strengthen customary courts as part of a larger and viable rule of law strategy, it is necessary to take certain steps to shore up the protections and rights guarantees they can provide. There is a balance that must be struck, a line that must be drawn, anywhere rule of law reform efforts are underway. For Southern Sudan, that may mean avoiding attempts by outsiders to codify or ascertain the customary law, or to create rights of appeal; a simpler and far-less-intrusive system of collateral review may do far more to (1) respect local culture and institutions, (2) strengthen the customary courts, and (3) promote the rule of law generally in the region.

The challenges in Southern Sudan are acute but not unique, and the balances struck there, respecting local culture while elevating rule of law standards, will be instructive for contemporaneous and future efforts to establish the rule of law elsewhere in the world and in fashioning justice systems that respond to the contexts in which they operate.
“to acknowledge and incorporate the role of traditional authorities and customary law in the local government system.” Observations about local government in Southern Sudan
By Manfred O Hinz

Background
1 The quotation in the title of this presentation is taken from the Local Government Act of 2009 (LGA – cf Section 12(9) but also Section 19) enacted by the Government of Southern Sudan (GoSS). The LGA of Southern Sudan is a remarkable piece of legislation as it attempts to provide a comprehensive set of rules for local government in its usual understanding and traditional government.

2 The integration of local government as a state-created or state-promoted system of governance at the local level and traditional authority into one system of local government has been on the political agenda of Southern Sudan since the consultations on the future civil administration in the SPLM-liberated areas started in 1994. The integration of both into one system was the political vision entertained in the various local government frameworks developed over the years until the last framework paper of 2006, which preceded the LGA of 2009.

3 The above-stated quotation is of interest to the presentation, as it expresses two views in particular about traditional authority, the main focus of the following observations. It acknowledges the importance of traditional authority as required by the Interim Constitution of Southern Sudan (ICSS - cf Articles 5, 174, 175 of the ICSS). By referring to incorporating of traditional authority into the local government system, the LGA goes beyond the required acknowledgment. By doing so, the act translates the acknowledgment into a system of local government according to which traditional authority be incorporated into local government.

4 The question which arises from this undertaking is whether or not the politically expected integration of both types of local governance was appropriately achieved by the LGA, i.e. by incorporating traditional authority and customary law into local government. Views expressed by officials of the GoSS (officials of the judiciary and the Local Government Board) in a recently held workshop on how to strategise customary law in Southern Sudan9 revealed problems the solution of which may lead to reconsider the Act. The following theoretical, i.e. legal anthropological and jurisprudential excursion into the foundation of governance at the local level was designed to assist in reconstructing the legally formalised relationship between the two spheres of local governance.

Governance at the local level: what is this?
4 What do we have in mind when talking of local government as state-created or state-promoted local government? What do we have in mind when talking of

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9 The workshop was held on 7 October 2009 in Juba. The purpose of the workshop was to comment on the customary law strategy submitted by the author of this paper in fulfillment of an assignment of UNDP and the Southern Sudanese Ministry of Legal Affairs and Constitutional Development.
traditional authority? Comparative reflections will give answers to questions of this nature.

5 The comparative perspective informs us about two very principal elements in the conceptualization of local government. The first relates local governance to the overall principle of democratic governance. As much as governance at the central level of a political entity is to be in accordance with principles of democracy, so is governance at the local level. What modern constitutionalism expects to be applied to central governance: separation of powers, respect for human rights, the election of local parliaments and the main representatives of the respective local entity, etc is expected to apply to governance at the local level.

6 The second element in the conceptualization of local governance relates to the derivation of the authority of local governance. Where does the authority of local government come from? In accordance with what has been said in the previous paragraph, the fact that local government is elected by the members of the respective political local entity reflects the usual understanding that its authority is the result of the volonté générale expressed in the vote of the members of the political entity. It is in line with this that the authority in local government is seen by some to be original, even stipulated in pre-statal natural law. When states implement local governance, they merely confirm requirements of such natural law. Others, however and this in accordance with the Kelsenian positivist hierarchical model of the state, require the delegation of authority from the state (by way of decentralization and devolution) to the respective entities of local government. In accordance with this view, states which implement local government recognize it by creating the legal framework in which local government is to operate.

7 The conceptualisation of authority in traditional authority is different from the authority in local government. Representatives of traditional government are usually not elected. They may be appointed by higher structures in a given traditional government. They may be recruited in accordance with rules that preserve the right to authority to the members of royal families, but, nevertheless, respect the aspirations of the people albeit without formalised elections. Anthropological evidence refers to family councils and councils of elders whose task is to secure that the most appropriate candidate be chosen for the throne.

8 Many legal scholars – again in line with Kelsenian centralism – ignore anthropological evidence of the quoted nature and maintain that the authority of traditional authority is derived authority in the sense that it is the state that delegates authority as part of its overall authority to all entities below the central level of the state, including traditional authority. This is certainly debatable in view of the fact that the authority of traditional authorities is much older than the authority of African states created later by the colonial administration and popular vote for independence. The Kelsenian interpretation of the status of traditional authority is even more debatable when taking note of the traditional understanding of traditional legitimacy. The first reference of this
is the customary law that governs the respective traditional authority. The second is to the foundation of customary law. Customary law is seen to be there and legitimate since time immemorial. This applies even to rules of customary law which are not to be recent enactments. Recent enactments are valid since time immemorial because they are supported by the underlying principles of customary law inherited from the times immemorial. In other words, traditional legitimacy is legitimacy created by the ancestors, by the ones before us who left us to continue their dead lives as the living lives.

Legal anthropological findings explain the difference between traditional and local government in the following manner: Officials in local government represent the local electorate; local government achieves its legitimacy through the democratic procedure that leads to its establishment. Traditional leadership represents the community as an entity, which consists of those alive and those dead. Traditional legitimacy is founded in the ancestors. The relationship with the ancestors guarantees fertility and prosperity of the community.

The reported concept of traditional authority is certainly ideal typological in the sense that the realities may not always support the ideal typological simplification. Legislation enacted by the colonial administration impacted on traditional governance. Anti and post-colonial wars impacted as did the various forms of post-colonial administrations. This is in particular of relevance to Southern Sudan and the various inroads made into traditional authority before 1956 and since then up to today. It can be assumed that the colonial and post-colonial making of chiefs also influenced the traditional perception of traditional governance.

However and as long as we do not have a more comprehensive picture about the traditional landscape of Southern Sudan, the few data we have support the overriding assumption that despite changes in the perception the foundation of the perception has basically remained intact. We may hear about invented chiefs’ position in the so-called accephalous societies of Southern Sudan, but we also hear about inherited traditional positions, such as spear masters, leopard skin priests etc who still have a say before chiefs can reach a decision. When conducting an interview with a Murle chief some weeks ago, the chief did not only claim that the traditional constitution of the Murle was very close to the constitution of the Shiluk, but also that the Murle Alan (King), the spiritual leader of the Murle, was the one who appoints the paramount chief of the Murle.

What does this mean for the conceptualization of local governance, traditional governance and a system of local governance which would integrate both types of governance? The answers to these questions will depend on the jurisprudential position with respect to given realities prevailing in a society. Two opposing positions are possible. The first – again in pursuance of legal centrality – would follow value decisions flowing from widely accepted principles of democracy as established since the time of enlightenment and known as western democracy and provide for reforms that would change existing practices accordingly. The second would accept what research about legal pluralism has
taught us since legal pluralism became part of jurisprudence / legal philosophy some one hundred years ago.

Traditional authority in the described manner will be an anathema to the first jurisprudential position. Traditional authority is seen as something of the past, something that has to give space to democratic governance. The legal pluralist view will approach traditional governance as an existing phenomenon. The legal pluralist will enquire what the position of traditional authority will be in a given society, will research to what extent it is accepted by the people, will explore whether or not traditional authority is functional in view of governmental necessities. The legal pluralist will also establish where the potential of change is should there be a need to change.

It is in this sense that the Namibian Traditional Authorities Act, 25 of 2000, accepted traditional governance in the inherited manner despite the constitutional foundation of Namibia in western democracy and rule of law principles. Only where no customary law exists on who would be the successor to a supreme traditional leader or the rules of customary law are being disputed in the community, elections are to decide about who will be the chief of the community.

The Local Government Act of 2009 of Southern Sudan

The LGA of Southern Sudan has gone a different way. The Act distinguishes kingdoms and chiefdoms. The kingdoms are recognized as *self existing traditional systems* and accepted by the Act as they exist in the country. The chiefdoms *shall be established in accordance with the provisions of the Act.* (Section 113(2) LGA) Chiefdoms *shall* be established in each county and town councils. (Section 114(1)) Chiefdoms *shall* perform traditional and local government functions covering the territorial area of counties. (Section113(1)(b)) The Paramount Chief is the head of the chiefdom. Chiefdoms *shall* be decentralized into chieftainships, led by Head Chiefs, Executive Chiefs, Sub-Chiefs and Headmen. (Sections 115 and 116 of the LGA)

The Executive Chiefs *shall be elected* by the Sub-Chiefs and all the people who are eligible to vote in his or her jurisdiction. The Head Chief *shall be elected* by the Executive Chiefs and the Sub-Chiefs in his / her jurisdiction. The Head Chief *shall be elected* by all the Chiefs including the Head Chiefs and Executive Chiefs in the County. The Paramount Chief *shall be elected* according to conventional electoral system or *selected according to traditional practices* as the case may be. (Section 117 LGA– see also Section 105: Procedures for Election or Selection of Chiefs, which differ from the procedures set out in Section 117)

Apart from the recognition of the inherited kingdoms and the last provision which accepts traditional practices as an alternative to what the act calls the conventional electoral system, what the LGA envisages is a system of local government in which the traditional level will basically only remain in existence by nomenclature. The lowest levels of local governance will be termed as chiefs etc but will in no way carry traditional authority as described above. The clearly worded shall-provisions will eventually lead to the dissolution of the inherited
traditional structure in the country. The result will be a hierarchically streamlined structure in the form of a power pyramid with the one paramount chief on top. In other words, the implementation of the LGA given, the traditional system will have been integrated into and streamlined in accordance with the modern type of local government.

18 This leaves us with two questions: a legal question and a factual question. The legal question will ask whether the conceptualisation of local plus traditional government in the LOG is covered by the ICSS. The ICSS recognises the status of traditional authorities. (See Article 174(1) of the ICSS) What will be left from the status of traditional authority after the intended incorporation?

19 Leaving aside the kingdoms and noting (as planned by the Local Government Board) that the territory under GoSS will have 77 counties, the streamlined traditional authority of Southern Sudan will consist of 77 paramount chiefs. Paramount chiefs of what communities – considering that there is only an estimate on the number of traditional communities ranging between 50 and 150? Or just chiefs of this rank and not related to the existing ethnic reality?

Conclusion: Diverse types of governance, or: what to integrate into what?

20 What would be an alternative? An alternative would be to assess the existing traditional structure and to evaluate its legitimacy in line with customary law before implementing the far-reaching provisions of the LGA. The mapping of the traditional landscape would be the indispensable pre-condition of any type of consolidation of traditional authority. The consolidation would decide who of the existing leadership would legitimately be accepted to continue operating as traditional leader. Special measures could be employed to provoke desirable changes, so with respect to the need to increase the number of female leaders or leaders representing otherwise unrepresented parts of the population.

21 Lessons from legal pluralism have taught us lessons of modesty. Great ideas change the world only in exceptional circumstances. Statutory changes will bear success when they take note of the perceptions in place and use the appropriate ends for change. Instead of focusing on those elements in traditional governance which indispensably require statutory modifications, and by doing so leaving the bigger rest to procedures that guarantee both types of local governance their respective own right.

22 Taking statutory note of traditional governance cannot be conceptualized as decentralization or devolution of authority and / or power. Such a conceptualization will take away the substance of traditional governance and turn traditional governance into a form of state-created or state-supported form of local governance. Traditional leaders will cease to be traditional leaders and eventually become state-salaried state officials.

23 The comprehensive mapping of the traditional landscape of Southern Sudan would allow reconsidering the foundation of the LGA as it stands now. This would, indeed, be in line with the local government framework of 2006 which suggested, inter alia two very principal matters: One, to go for a new local authority system ... to integrate the statutory and the traditional authorities, but,
two, to do this only after an additional framework for traditional authority in Southern Sudan has been formulated.
Customary Justice and Legal Pluralism in Post-Conflict Southern Sudan

By Hon. Deng Biong Mijak

A-Introduction:

Customary justice or traditional justice as we sometimes refer to it in Southern Sudan significantly forms part of the legal pluralism not only in Southern Sudan, but in the old Sudan despite differences over its effectiveness and suitability as a legal tool in this rapidly changing world. While most communities, especially in South Sudan, not only feel comfortable with applying customary law to most of their issues, being they land disputes, conflict over pastures or marriages, there are some educated Arab or Muslim oriented, mainly northern Sudanese, who look at customary law as an inferior law as opposed to modern statutory law and view it as incapable of addressing the needs of a modern society. Yet the reality in the South is that almost 90% of cases in most parts are settled through employing customary law as applied by both local customary courts as well as statutory courts. This is evidently shown in this confession from my former lecturer and one of renowned Southern Sudanese legal scholars Dr. Peter Nyot Kok: “I became interested in the customary law of the Dinka effective from 1999, after I became actively involved in the Sudan Peoples Liberation Movement (SPLM). It was an interest reinforced by the choice which I made to come and practice law in the Southern Sudan. I found very quickly that you can’t practice law in a meaningful way without awareness of what the customary law is. So, I sort of got into it from the angle of legal practice. I deferred defining what law was until the time I felt I had sufficiently immersed myself into customary law practice. In short, I will say that I can identify three main sources of customary law.”

Today if you ask a former Southern Sudanese freedom fighter why he or she took part in Sudan’s North-South civil wars, the answer would probably include the need to protect the Southern identity, customs and cultures of Southern Sudanese communities from the policies of Islamization and Arabization systematically perpetuated by the successive Northern Arab and Muslim dominated regimes in Khartoum since independence in 1956. This explains why issues of culture and the integration of customary law into formal legal system became prominent in the Comprehensive Peace Agreement concluded in January, 2005 to bring an end the longest civil war in Africa.

It remains to be seen how the actors in the legal or rule of law sector are going to deal with the eminent challenges of integrating customary law into the formal legal system in Southern Sudan.

Recognition of Customary Law as Part of Legal Pluralism in the Sudan:

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10 During the last civil war in the Sudan (19983-2005) the Sudan Liberation Movement aimed at establishing a free, just and prosperous new Sudan where all Sudanese would be equal irrespective of their sex, race or religion. It therefore referred to the rest of the Sudan outside its control as the Old Sudan of social injustice and oppression.

11 Francis M. Deng’s “Customary Law in the Modern World” Routledge, p.149.
Custom is not only recognized as law by the “Original Communities” of Sudan, but has ever been recognized by the general territorial law (i.e. state law) as one of the sources of law in the country. It started during the Anglo-Egyptian administration with the Milner Report, 1920 which recognized the role of the traditional leaders and the customary laws they applied and made the following recommendation:

“Having regard to the vast extent and the varied Character of its (Sudan) inhabitants, the Administration of Different parts should be left, as far as possible, In the hands of the Native Authorities wherever They exist, under the British supervision.”12

Later on, the said policy culminated into the adoption of two landmark legal instruments; namely: The Chiefs’ Courts Ordinance,1931, applicable to the then Southern Sudan’s three provinces of Bahr el Ghazal, Equatoria and Upper Nile; and the Native Courts Ordinance,1932, applicable to the remaining six provinces of Northern Sudan.

The courts established under the said ordinances were to apply native laws and customs prevailing in the area over which they exercised jurisdiction to both civil and non-civil cases in so far as such laws and customs are not contrary to justice, morality and order.13 They were allowed to administer the provisions of any other law, the administration of which was authorized by their warrant of establishment or the regulations accompanying such warrants.

In particular, a Chiefs’ Court was given jurisdiction in all non-criminal cases where the parties were natives of Africa, other than Egypt, and were domiciled in or ordinarily resident within the then three Southern Provinces. Again and still under the Anglo-Egyptian rule, Section.5 of the Civil Justice Ordinance, 1929, under the heading “law to be administered” provided that:

‘Where in any suit and other proceedings in a civil court any question arises regarding succession, inheritance, wills, legacies, gifts, marriage, divorce, family relations, or the constitution of Wakfs, the rule of decision shall be …any custom applicable to the parties concerned, which is not contrary to justice, equity and good conscience, and has not by this or any other enactment been altered or abolished and has not been declared void by the decision of a competent court.’

The other Act which recognized the application of customary law, though it repealed both the Chiefs’ Courts Ordinance, 1931 and the Native Courts Ordinance, 1932, was The People’s Local Courts Act, 1977. Its Section 13 repeated the provision of 5.7 of the Chiefs Courts Ordinance, 1931, cited above.

Despite the repeal of the statutes mentioned above, the status of custom as one of the sources of law in the Sudan, though relegated to lower position in the North, but never

12 Sudan Notes and Records, 1932.
13 Section 7 of the Chiefs Courts Ordinance,1931
vanished as emphasized by Section 5 of the Civil Justice Act, 1983. Further, local courts, warrants issued from time to time by the Chief Justice of the Sudan, authorized those courts to apply the local custom applicable to the contesting parties.

Judicial Precedents Recognizing Customary Law:

Apart from the statutes, there are judicial decisions which have from time to time, given recognition to custom as one of the sources of law in the Sudan e.g. Gibril Barbare V Reen Abdel Massin Khalil14 A plea for the application of the non-Mohamedan marriage ordinance was raised by the defendants’ (appellants) advocate to be applied to the family dispute between the parties. The plea was rejected by the court of appeal. But the court referred back the case to the province court which was the court of first instance, to ascertain a common custom between the parties and to apply it. The essence of the decision of the court of appeal was that the indigenous Sudanese must be governed by their own custom and not the custom or personal law which only governs personal matters of non-Sudanese who are domiciled in the Sudan.

Recognition of Customary Law under the New Sudan Laws.

As came in my introduction, above, protection of customary laws and cultures of the Southern Sudanese and those of other marginalized black African Sudanese, was one of the causes for the last civil war (1983-2005) and I believe the earlier civil war (1955-1972) in the Sudan, the SPLM/A which led the last war made sure that customary justice is recognised in its legal system. Thus in the first legal code that was passed by the Movement in the next year to its inception; namely the SPLA Penal and Disciplinary Law, 1984. the work of local courts applying the customary laws existing in their respective liberated areas was recognised. Ten years later, at the SPLM National Convention held at Chukudum in Eastern Equatoria about 15 laws were passed which were later in 2003 were replaced by about 26 of what is referred to as the Laws of the New Sudan, 2003. Chief among those new laws were the Civil Procedure Act, the Code of Criminal Procedure, and the Penal Code all of which contained provisions of relevance to customary law and its application.

By way of illustrating how the SPLM’s New Sudan legal system gave an unequivocal recognition to the customary law, section 3(2) of the New Sudan Penal Code, 2003 provided: In the application of this Code, courts may consider the existing customary laws and practices prevailing in each area.

Also, section 251 of the same penal code provided: Whoever commits murder shall, on conviction, be punished with death or imprisonment for life and may also be liable to fine. Provided that if the nearest relatives of the deceased opt for customary blood compensation[Dia], the court may

14 (1966) Sudan Law Journal Reports, 53
award it in lieu of death sentence, with imprisonment for a term not exceeding 10 years or with fine or with both.

I think this is the first time in the history of the Sudanese legal system that a penal code clearly recognizes the application of customary law in the criminal sector. In the past, civil codes and ordinances used to be the only legal instruments conventionally known for containing provisions for the application of customary and Sharia laws, mainly, to matters of personal status. It is worth mentioning that under the current Government of Southern Sudan (GoSS) laws, quoted laws of 2003 were repealed by the Code of Civil Procedure Act of 2007; the Code of Criminal Procedure Act of 2008, the Penal Code Act of 2008 and the Judiciary Act of 2008.

**Recognition of Customary Law under CPA, INC, ICSS all of 2005.**
Sudan is a country governed by an agreement called the Comprehensive Peace Agreement abbreviated as CPA. The CPA has set a legal framework for the country based on the principles of: “one country, two systems,” by which Islamic law shall apply in the North, while the South shall have a secular democratic system in which the source of legislation shall be: “the values and customs of the people.” The provisions of three articles cited below, illustrate more how the CPA has emphasized the role of the customary system in the legal pluralism in the Sudan in general and in Southern Sudan in particular:

Article 3.7.2: The Southern Sudan Supreme Court shall:-

3.7.2.1 Be the court of final judicial instance in respect of any litigation or prosecution under Southern State or Southern Sudan law, including statutory and customary law.

Article 2.2: The Parties agree that a process be instituted to progressively develop and amend the relevant laws to incorporate customary laws and practices, local heritage...

Article 2.6.6.2: Recognition of customary land rights and/or law.

The Interim National Constitution (INC), 2005 repeated all the CPA provisions on customary law and traditional justice. As for the Interim Constitution of Southern Sudan (ICSS), 2005, ‘customs and traditions of the people of Southern Sudan’ are recognized as the third source of legislation in Southern Sudan. The ICSS in its article 175 provides that: ‘Legislations of the states shall provide for the role of traditional authority as an institution at local government level on matters affecting local communities’; and that ‘legislations at the Southern Sudan and states levels shall provide for the establishment, composition, functions and duties of the Councils of Traditional Authority Leaders’.

**Effect of the conflict in the Legal Pluralism in Southern Sudan**

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15 Article 5 of ICSS, 2005.
The last civil war which was mainly fought on Southern Sudan soil devastated whatever socio-economic and physical infrastructures were in place. Courts whether state or local were not functioning normally. The gravity of the situation in relation to traditional justice is clearly illustrated by these findings in the last Local Government Framework:

- The traditional leaders lost their authority and power to the military and civil administrators in total marginalization through two ways:
  1. The Boma Councils established by the CANS were used by the Local Government Administration and SPLM Liberation Councillors to take over and perform administrative functions of the traditional leaders.
  2. The military Administrators established parallel customary courts to judge customary cases for personal gains and threatened the chiefs so that they would not perform their judicial functions.
- The County Commissioners or their Executive Directors single-handedly stage-managed the local government council in order to support the war efforts and in most cases served their personal interests.
- The SPLA military administration grossly interfered in the SPLM Civil Administration in their civil defence intervention, which led to the total loss of the local government authorities’ independence in managing civil affairs;
- The people resented the loss of power and the mistreatment of their traditional leaders and demanded the reinstatement of the traditional authorities for their self-rule.
- Political pressures led to unnecessary proliferation of the number of counties into many tribal constituency units, which in most cases fell short of requirements to qualify as local government authorities.

**Challenges and policy approaches**

For traditional justice system to become an effective partner in the legal pluralism in Southern Sudan it must be developed and strengthened as it is weak and incapable these days. This can be in a number of approaches:

- Developing customary law through ascertainment, recording, harmonization among various customary regimes as well harmonisation of the customary justice system with the formal state legal system.
- Raising of capacities of the traditional leaders by increasing their knowledge about how the formal legal system operates as well educating and training the sitting state judges and practising lawyers about customary law and how the traditional justice works.
- Rehabilitation of the working conditions of both the customary and formal state systems.

The above can be achieved through proper employment of internal resources as well as soliciting external technical assistance and funding.

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LOOKING FOR JUSTICE: Liberian experiences with and perceptions of local justice options

By Stephen Lubkemann and Deborah Isser

This report presents the research findings and analysis of ten months of field study as part of the United States Institute of Peace and George Washington University project titled “From Current Practices of Justice to Rule of Law: Policy Options for Liberia’s First Post-Conflict Decade.” The analysis we present, based on three types of research methods (focus groups, individual interviews with parties to specific disputes, and interviews with chiefs, zoes [traditional leaders], and other justice practitioners) employed primarily in three counties (Grand Gedeh, Lofa, Nimba, and less extensively in parts of Monrovia), is intended to provide the Liberian government and other stakeholders in the country with more robust evidence than has hitherto been available on how both formal and customary justice systems are perceived and utilized by Liberians. It also addresses what implications this evidence has for policy options regarding justice sector reform. Our methodology was designed to trace actual practice of dispute resolution, regardless of which institution—formal, customary, or other—was involved. This allows us to understand the choices made by litigants and their levels of satisfaction in relational value to the available alternatives. These realities facing Liberians in the pursuit of justice, as well as the social beliefs that inform Liberians’ conceptions of justice, are critical to take into account in any effort to design a successful justice strategy for the immediate and medium terms.

Key Findings
Liberians are overwhelmingly dissatisfied with the formal justice system, particularly at the local level. Affordability, accessibility, and timeliness are three of the most consistent demands that Liberians have when it comes to the provision of justice. Our research reveals that the formal justice system is seen almost universally by Liberians as falling abysmally short of their expectations in all three of these important service categories. Liberians report a bewildering array of fees associated with the formal system, including registration fees, gas money for police investigators, requirements that victims pay the cost of food for the detained accused, lawyers’ fees, bribes, and indirect costs such as money for transportation and time spent away from livelihoods. The formal system is also faulted for its lack of transparency and impartiality, and is widely believed to be a forum in which wealthy, powerful, and socially connected people can assert their will. Finally, the formal system is widely seen as ineffective and failing to enforce—or even get to the point of making—judgments against offenders. Victims of crime report feeling further victimized by their experience with the formal courts, expressing astonishment that they would have to pay excessively while the perpetrators nearly always walked free. One woman put into words a constant theme: “There is no justice for the poor.”
In fact, what emerges clearly from the research is that many Liberians not only view the formal system as failing to deliver justice, but they regard the formal justice system as one of the most effective mechanisms through which powerful and wealthy social actors are able to perpetrate injustice in service to their own interests. The cases we traced reveal a deliberate use of opportunistic forum shopping, in which litigants choose the formal system primarily if they believe it will give them an unfair advantage over their opponent. Liberians we interviewed reported using the formal system, or the threat of the formal system, as a means of advancing a contentious social agenda for retaliatory purposes, or for gaining leverage in other matters that have nothing to do with the actual case in question.

*Even if the formal justice system were able to deliver affordable, timely, and impartial results, it would still not be the forum of choice for many rural Liberians.*

One of the most striking findings of our research is that most Liberians would still be unsatisfied with the justice meted out by the formal system, even if it were able to deliver on the basics discussed earlier. This is because the core principles of justice that underlie Liberia’s formal system, which is based on individual rights, adversarialism, and punitive sanctions, differ considerably from those valued by most Liberians. One of the consistent complaints levied by Liberians against the formal court system is that it is overly narrow in how it defines the problems it resolves and thus fails to get at the root issues that underlie the dispute. This concern rests on a culturally grounded and deeply held assumption that incorrect or injurious behavior is usually rooted in damaged and acrimonious social relations. In order to be seen as adequate, justice must work to repair those relations, which are the ultimate and more fundamental causal determinant, rather than merely treat the behavioral expressions that are viewed as its symptoms. Redressive action is thus considered deficient if it does not also produce reconciliation among the parties. A Western-style formal system, by contrast, is a zero-sum game in which one party is determined the winner and the other the loser of a narrow issue through sterile application of law, blind of social context. Many Liberians noted that far from resolving the underlying dispute, formal adjudication serves to exacerbate adversarial relations.

It is important to note that the preference for restorative justice and social reconciliation is not based on an abstract notion of tradition. Quite the contrary, it represents a very rational calculation based on the socioeconomic and cultural context in which most Liberians live. Given the subsistence livelihoods and economic interdependence of rural communities, adversarial relations between neighbors have serious consequences. As one interviewee put it: “Actually, the customary law is the one that I prefer. . . Our traditional laws help us to handle our dispute very easily and after the settlement of these disputes, the disputants go with smiles in their faces. . . . [In] fact, the statutory law brings separation among our people.”

*For the most part, the customary justice system is able to provide the kind of justice most*
rural Liberians are looking for.

Customary institutions and practices of justice have clearly survived the civil war and remain active in virtually all of Liberia’s rural communities. Moreover, the overarching principles that guide the exercise of customary justice have not been fundamentally altered by the Liberian conflict and are based on the overall goals of restorative justice and social reconciliation preferred by most Liberians.

The process of customary dispute resolution resembles nonbinding arbitration—in that a decision rendered is appealable, with additional elements of mediation, and there is a strong effort to bring both parties to a consensus resolution. There is an emphasis on revealing the truth of the matter in an expansive way that includes the root causes and additional social factors that inform the dispute. In adjudicating, chiefs rely on the counsel and participation of community elders and sometimes representatives of constituent groups such as youth leaders. A broad social consultation process is employed to verify the truth and to increase the legitimacy—and therefore the acceptance—of the decision. Admission of guilt by the perpetrator is considered the best means of knowing the truth. Trial by ordeal is sometimes employed as a means of ascertaining the truth as well.

Customary forms of redress are aimed at addressing the root causes of the dispute and not just the narrow matter at hand. Compensation or repair of the harm to the victim is important but generally subordinate to social reconciliation. For certain offenses, a public fine may be levied, often in the form of cooking a meal for the community. Public apologies are important and are often followed by a ritual such as sharing a kola nut, knocking glasses together, or performing some other gesture that signifies forgiveness and reconciliation. Egregious cases, considered beyond social repair, may involve a punitive sanction.

Many Liberians also express a preference for the customary system as it is able to address the full range of problems they confront, including public insults and the very real belief that some individuals use supernatural means (witchcraft) to harm others. In their view, the failure of the formal system to recognize these as offenses leaves serious problems and insecurity unaddressed.

Indeed, according to the survey conducted by the Centre for the Study of African Economies at Oxford University, of a total of 3,181 civil cases, only 3 percent were taken to a formal court; 38 percent to an informal forum; and 59 percent to no forum at all. Of 1,877 criminal cases, only 2 percent were taken to a formal court; 45 percent to an informal forum; and 53 percent to no forum at all.

Our research also demonstrates the limits of the customary system (perhaps accounting in part for the above statistics regarding the majority of cases that go to no forum at all). Because of its emphasis on social reconciliation, the customary system is generally not effective or considered fair when litigants are not members of the same community, or
in some cases when they are ethnically or religiously diverse. Egregious cases, considered beyond social repair, are likewise poor candidates for customary resolution. Finally, the effectiveness of customary institutions is seen by many to have been undermined by external factors, including, to some extent, social dislocation caused by the civil war and state policies limiting their jurisdiction.

State policies aimed at regulating and limiting the customary justice system in order to comply with human rights and international standards are having unintended adverse consequences.

Without questioning the ultimate goals of state policies regulating the customary justice system, we believe that a robust empirical understanding of Liberians’ reactions to these policies and their on-the-ground impact is vital to inform justice strategies that include realistic provisions for garnering local endorsement and compliance, and that are sufficiently sensitive to the dangers of social unrest. A clear finding of our research is that certain policies aimed at addressing human rights and international standards have in fact had unintended adverse consequences that may be undermining that very goal. Jurisdictional limitations.

Chiefs seem to be aware of the state policy forbidding customary courts from handling matters of serious crimes, and for the most part they seem to adhere to this policy. However, chiefs and rural Liberians alike generally believe that many kinds of serious crime would be better handled by chiefs than the formal courts, and in practice chiefs often hear such cases when requested by both parties. Chiefs expressed embarrassment at the limitation of their role and consequent erosion of their authority. Many interviewees believed that this policy was leading to less, rather than more, justice, as the formal courts have yet to provide a credible and viable alternative. This policy is seen by many as favoring the wealthy and powerful, who they see as able to use the formal system to their advantage, and as creating a justice vacuum and culture of impunity.

“Human rights.”

A striking finding of our research is that to many Liberians the very term “human rights” has negative connotations. For the most part, Liberians associate the term with children’s rights and defendants’ rights, and complain that these are undermining the social order. Children’s rights are understood as encouraging children to sue their parents and preventing them from working, which to rural Liberians is an affront to social values and has serious economic implications. To Liberians whose conception of justice is about truth and reconciliation, rather than an adversarial process, defendants’ rights are seen as giving an unfair advantage to perpetrators at the expense of the victims.

Trial by ordeal.
The vast majority of Liberians we interviewed believe strongly that at least some forms of trial by ordeal (TBO) should be allowed, and raised very serious concerns that the ban on its use is causing significant societal problems—most particularly the inability to control crime and a rise in witchcraft. The prohibition on its use may be inhibiting its practice by chiefs (or at least the extent to which they acknowledge using it), but it is not in any way discrediting the practice itself, much less its epistemological hold on the local Liberian mindset. Moreover, there is evidence that these policies may simply be driving the practice into more secretive performance that further legitimizes other customary practitioners who are entirely unregulated by the state (e.g., Poro masters). Of even greater concern is the frequency with which Liberians blame the state for the increase in lawlessness and insecurity they perceive to have resulted from the ban. Our data also suggests that the blanket ban may be missing important nuance and variation, and is seen as an attack on culture rather than on harmful practice. A significant subset of our interviewees drew clear distinctions between “sassywood,” which involves a prima facie harmful process, such as ingesting poison or application of a hot cutlass (it is believed that only the guilty will actually experience pain or suffer harm), and “cowfur,” which involves a prima facie nonharmful process, such as ingesting dirt or taking an oath (it is believed that this will cause the guilty or one who lies to suffer some harm within a certain period of time). Many accepted the ban on the former but wanted to reinstate the latter. A minority of interviewees—mostly, but not exclusively, Muslims and Pentecostal Christians—thought the ban was a good thing, either because they did not believe in the supernatural qualities of TBO, or they believed it was not reliable and often abused.

Rape.

While there is widespread understanding that rape cases must go to the formal courts, there is also widespread dissatisfaction with how formal courts handle the cases—primarily for the same reasons that formal courts are seen as ineffective generally—and concern that the ineffectiveness of the courts leads to impunity. In addition, several interviewees raised concerns that officials of the state court system have been the perpetrators of sexual abuse and rape. Both men and women stated that a consequence of the new rape law is an increase in false accusations of rape in order to achieve leverage against the other party for some other reason. While most Liberians agree that the most serious forms of rape (for example, violent rape) should be dealt with in a punitive fashion by the formal court system, they criticize the new rape law for not allowing for restorative remedies that take into account broader social interests for “less egregious” types of rape.

While many rule of law reformers advocate that a uniform system of law will best serve the aim of ending historical discrimination, many rural Liberians believe this would perpetuate discrimination and argue that they should be allowed to keep the dual system.

Very similar intentions to banish the past injustices embodied in the historical duality of
Liberia’s justice system appears to be motivating many rule of law reformers as well as the local population. However, somewhat paradoxically these same intentions may also be driving these two groups in opposite directions. To many national policymakers and their international counterparts, the assumption is that the key to rule of law in Liberia is to enshrine the principle of uniformity—that is, to provide a singular legal system and framework that works the same way everywhere for everybody. However, our research clearly shows that most rural Liberians are unenthusiastic about such efforts because they are seen as (yet another) effort to extend the power and domination of a Monrovian elite and foreign culture. Without rejecting the ultimate authority of the state or even a local role for the formal justice system, rural Liberians consistently reject the proposition that the “laws (and institutions) of Monrovia”—or of the international community—should be allowed to supplant and override their customary ones.

Policy implications

In the final section of our report we develop an analytical framework against which justice reform options can be tested for their likely impact. We suggest that the impact be analyzed from the perspective of four objectives that are vital to Liberia’s postwar future:

- justice objectives,
- governance and peace building objectives,
- international standards and human rights objectives,
- and political objectives.

We next identify three aspects of local Liberian reality—

- capacity of the formal system at the local level;
- capacity of the customary system;
- and Liberians’ socially informed conceptions of justice—which we believe have a critical impact on whether justice policies in fact reach or undermine those objectives.

These realities will undoubtedly change over time, requiring a reassessment of policies to determine if the strategic objectives are still being maximized. However, we would warn against any overly optimistic assumptions about how quickly these realities change. While our study clearly underscores the need for a great deal more attention to the wide-ranging needs of the local level of Liberia’s formal justice system, it seems to us highly unlikely that current levels of donor and government of Liberia resource allocation hold much promise of enabling such change within the time parameters initially contemplated by this study (Liberia’s first post-conflict decade). Indeed, if other post-conflict cases—even the more optimistic ones—have anything instructive to say about the rate of change that might be effected in Liberia’s formal system, it is quite likely that the meaningful metric for significance in change will actually be generational.

We thus offer two suggestions on how policymakers might go about developing successful reform strategies in the near time.
First, rather than set standards at an unattainable level, it would be wise to consider transitional policies aimed at providing the best possible justice under the circumstances, and at creating an environment of openness and trust between the customary and formal systems that seeks to bridge the gaps and move toward full realization of Liberia’s goals for its justice system. Again, without being prescriptive, we suggest a preliminary—and by no means complete—list of policy directions that might be considered:

- Place greater emphasis on building the capacity of and easing access to the formal justice system at the local level—the point of contact with the local population—for example, by reducing fees, reducing case resolution time, eliminating the need for legal representation in certain cases, etc.
- Incorporate restorative principles into formal adjudication of criminal cases—for example, by allowing victims to opt for compensation in lieu of (or in addition to) penal sanctions on the guilty (rather than requiring them to pursue costly civil cases) and by incorporating a role for traditional authorities to help reconcile the parties.
- Adopt a more nuanced approach to defining jurisdictional limitations—for example, by introducing criteria to determine when crimes may—and may not—be adjudicated by customary authorities. Such criteria might include whether or not the parties prefer customary adjudication, whether or not a third party is affected, whether or not there is a political or ethnic dimension to the crime, etc. Among the benefits of such an approach would be a reduced caseload in the formal courts.
- Restrict opportunistic forum shopping by encouraging the exhausting of traditional resolution in most cases (except for where this would lead to clear injustice) prior to entry into the formal system.
- Vastly increase accessible legal assistance and representation to the many litigants who fall victim to the vagaries of justice.
- Ensure that policies aimed at promoting human rights take into account the larger socioeconomic context of rural Liberians.

Second, we suggest that rural Liberians and customary authorities be regarded not just as a subject of policy but as a source of change and innovation. Local ideas can be tapped through a type of consultative process, consciously and explicitly engineered “to identify and listen” to local ideas and solutions rather than telling rural Liberians what those are. This process should be carefully designed to get communities to do more than identify problems. It should also get them involved in imagining solutions, what change should look like, and how to effectively bring change about. It is our belief that such a mechanism can allow policymakers to develop reform strategies that are practical because they continuously take into account and update their understanding of the types of local realities and social beliefs we have analyzed here, and also foster more meaningful local participation that can prove invaluable in Liberia’s rule of law reform process.
GRAPPLING WITH LEGAL PLURALISM: THE LIBERIAN EXPERIENCE
By Philip A. Z. Banks, III

Councilor Philip Banks currently heads the Liberian Law Reform Commission, and previously served as the Minister of Justice for the Liberian Government.

Liberian legal pluralism is very complex, having to comprise of a three-fold dimensional component. Firstly, there is the formal legal system, which because of a series of historical, divisive and misdirection, from the inception of the Liberian nation-state to the present, has been engulfed in mistrust, corruption and a general lack of confidence by the citizenry. Secondly, the informal or customary system, which because of its multi-cultural make-up, comprising many tribes from differing background, origins, and beliefs, has complicated the development of a truly single uniform agenda and approach to conflict resolution and justice. Thirdly, a mix of some statutory and customary elements, developed by the Liberian Government as a means of attempting to pacify the indigenous people, reduce their hostilities towards the new comers (settlers), and prevent encroachments on the Liberian territory by external forces (nations and foreigners). This third dimension comprised infusing some statutory personnel into the cultural settings, making certain of those settings amenable to the statutory authority while allowing them to continue certain of their practices and values, and infusing into the Government a select core of the indigenous inhabitants along with their culture and values. I submit that all of these contributed to the war, and even to today could be a basis for continued problems in post-war Liberia.

The Status of the Formal Legal System:

Liberia’s formal justice system, already in a state of disarray and distrust prior to the Liberian civil crisis, continues, five years after the formal end of the civil war, to face enormous challenges, difficulties, and a confidence dilemma. The armed conflict had resulted into the almost total destruction and disintegration of the Liberian formal legal framework, especially the Judiciary, the institution created by the Liberian Constitution and statutes for the administration of justice to the Liberian people. The formal legal framework had operated in a nation that was highly suspicious of the basis of the administration of justice by the institutions set up for that purpose, given the difficulties in accessing justice, the manner in which justice was meted out, and the negative tendencies of those who were charged with the responsibility to administer justice. The perception was that the system, as manned by the justice administrators, encouraged the sale of justice and deprived the less fortunate of speedy access to justice, in violation of rights guaranteed by the organic law.

The Historical Perspective:

The weakness of the formal justice system, it is believed, was a major contributing factor to the Liberian civil conflict. The system, most Liberians believe, was out of control and not in tune with the rudiments of the rule of law, including the law of the
land. Thus, many Liberians, both those with traditional backgrounds and other who were part of the formal system, feared bringing their matters to a forum where they were not assured of justice. The execution of the Chief Justice of the Supreme Court in 1980, following the military overthrow of the constitutional government in a bloody coup, said much of the formal justice system and remained fresh in the minds of the judges.

It was in an attempt to remedy the public distrust of the system and to restore confidence in it that the Comprehensive Peace Agreement, the instrument that brought the Liberian armed conflict to an end, required, under the stipulation of several of its provisions that a transitional arrangement be undertaken to reinstate the democratic process, and that as part of that process the Supreme Court be reconstituted. Those provisions also facilitated the restoration of much of the nation’s lower courts, engulfed theretofore in accusations of corruption and allegations of maladministration of justice. Many of the judges of those courts, being fully aware of the negative stigma that had befallen the formal justice system, had fled the country to avoid retribution or revenge. The commission held by others had expired and hence a void was left in the system, especially at the lowest level courts (justices of the peace and magistrates in whose courts the public first encounters the justice system). Note also that is was at this level that the greatest abuses occurred.

Given those historical underpinnings of the distrust of the formal legal system and the recognition of the need for corrective action, a new core of judges were appointed by the Transitional Government, with the assistance of some foreign partners and the Liberian National Bar Association. Unfortunately, the process, as in the past, was seriously flawed, due both to a misidentification of priority needs of the formal system, the costs associated with those needs, the capacity requirements of the formal system, the retention of much of the distrustful personalities, the engagement of new personalities with records of serious distrust, and the misdirection of national rule of law and administration of justice priorities. Foreign and local partners, governments, international financial and other institutions and NGOs committed resources and experts both to the Transitional Government and the new constitutional Government that assumed the helm of authority in Liberia in 2006, to rebuild the formal justice system, but the process too experienced serious flaws. Thus, what was believed to be an already dysfunctional formal justice system continued to experience and to tolerate the mishaps of the past. As a consequence, public continued to withhold their confidence and the perception continued to be prevalent, including within the Government, that the formal justice system was still not in the position to render true justice to the people.

*Perspective on the Liberian Customary System:*

As opposed to the formal legal system, the institutional framework of the customary law system, to a large extent, remained in tact during the course of the conflict, although because of the nature of the conflict, many of the administrators of justice in that
system had to flee their areas. What is important to note, however, is that the departure of the customary administrators of justice was due mostly to reasons unconnected with the manner in which they administered justice or with the consequences of their administration of justice; rather, they centered on ethnic and other social differences amongst the various ethnic peoples. Thus, given how the informal system operated and the level of trust and confidence of the people in the functional administration of justice within that system, it has been much easier for the informal legal system to be restored and become almost fully functional again, with the trust and confidence of the people who are affected by that governance process, unlike the situation that prevails with the formal system.

Indeed, most Liberians who derive their heritage and background from the traditional or customary cultural values, although becoming increasingly contaminated by the formal system because they now find themselves in urban areas that are exposed to and governed by the formal legal system, prefer to have their disputes adjudicated under the customary law system rather than in the extensive time-consuming and rather expensive formal legal system which they continue to view with suspicion. Additionally, under the informal system, disputes continued to be settled without much recrimination amongst the parties or towards the customary judges, although in some instances there were minor displays of dissatisfaction, especially where those involved had encountered the distrustful formal legal system. Important to the informal process was and continues to be the retention of the trust of the public and the perception that the process is not motivated by corruption, that justice under the system is not for sale, and that the success of a party is not dependent upon the wealth of the party. The family, the elders, the chiefs, all of whom play permanent roles in the process, ensured equality in the administration of justice.

Descriptive nature of the Liberian Customary Setting:

The customary law system was and remains largely, if not exclusively, dependent upon the respect and revere for elders in the community, such that whatever decision is reached or judgment rendered is accepted as fair and impartial. During the civil war when elders of communities lost the respect of young people who, because of bearing arms, believed that they, and not the elders, were the real masters in town, the structure of the informal justice system also suffered a setback; yet, while it has not completely recovered, it has made tremendous gains in restoring a sense of law and order to many communities. It is true that many of the traditional communities were exposed to a series of negative vices, including unimaginable violence, lack of respect for the elderly, dishonesty, etc., but the trust of the inhabitants of those communities motivated and enable many of them to gradually return to the informal legal system as their primary mode of dispute resolution.

The Formal Justice System and the Customary System: The Challenge of Harmony
Many a times the formal legal system and the customary system competed rather than complemented each other. Understanding this dilemma requires looking at the systems in a historical context. The dichotomy and conflict between the two systems can be traced as far back as the first landing of settlers on the shores of the geographical locale now known as the Republic of Liberia in the early 1800s. The new comers, having originally been taken from Africa to America and other places as slaves, with the consequence of being exposed to the rudiments of the formal legal system, had, on arriving in Liberia, sought in a rather discriminatory manner that looked down on the inhabitants they met on the Liberian shores, to introduce the new formal legal system onto the Liberian scene. No attempts were made, at the onset, to study the existing customary system that the settlers met or to seek to infuse that system into the one they attempted to introduce in the country. Primarily because the settlers considered the indigenous people as “primitive natives,” in the negative sense of those words, they almost completely discounted the positive values of the indigenous culture and legal the system which formed a part of that culture.

While in hindsight this superiority complex on the part of the settlers may be considered irrational since they and the indigenous population were of the same race, when viewed in its historical context, yet one can appreciate why they acted in the manner in which they did. These were a group of people who were forcibly removed from their families in Africa and transported to distant parts of the world where they were treated inhumanely, constantly being told that they were inferior to white people and that the white culture was superior to the black culture. Over time, they internalized these beliefs or value systems, and upon returning to what is now Liberia, saw the indigenous inhabitants as inferior to them, given that they had had the benefit of experiencing the white culture, including its legal system and form of government.

With the passage of time, the Liberian Government made attempts to integrate some of the indigenous populace into the formal societal fold from which they were previously barred, the attempts were not the result of a genuine desire to integrate or infuse the customary practices into the formal system; rather, it was done out of necessity and was designed to preserve the then Americo-Liberian Government, both from the prospect of external aggression via the indigenous people and/or curtailing the possibility of attacks from elements of the indigenous people.

A second problem that confronted the Liberian pluralism was that the indigenous inhabitants had migrated from several locales across Africa, with different cultural values and practices. Hence, while there were many similarities, there was no true substantial unity to the cultures and practices. Indeed, in some instances there even existed outright conflict, making it difficult for the Government to accept a unified culture. For example, the practice of trial by ordeal or sassywood (as sometimes called) existed and still exists, although outlawed by the Government, amongst certain ethnical groups but is disallowed amongst other groups. Trial by ordeal is a process by which the guilt of persons believed to have been involved in certain acts against the community or its inhabitants were determined, not necessarily out of their free will. Justice so
administered was speedy, but its fairness is seriously challenged as such justice necessarily requires the accused to testify against himself or herself, many times under duress. Similarly, the practice of female genital mutilation or female circumcision existed and still exists amongst certain ethnic groups but disallowed amongst other groups. Finally, in some of the cultures, females were regarded as chattels or of a lesser sex, and therefore were obligated to do the husband’s biddings but not entitled to inherit from him.

A third factor in the conflict between the formal and the informal system was the military coup of 1980. Although the military coup was initially viewed as necessary response to the Americo-Liberian domination and suppression of the ethnic majority and to put the latter in power, the military reign had wider effects that created a much more explosive state of division both between the Americo-Liberians and the ethnic peoples and more seriously amongst the various ethnic peoples. The ethnic rivalries that emerged increasingly made operation of the informal system amongst the ethnic groups difficult, although it continued to survive within the various ethnic groups.

The last factor is the continued intrusion by the Government into the ethnic or customary legal system, without the appropriate work as would aid rather than destroy the system. The critical question than is how should the customary legal practice be incorporated into or supplement the formal legal system to reflect the values of the entire population, and if so, how? While the Liberian Constitution of 1986 provides the avenue by which such incorporation can be made, it also creates the basis for rejection of many of the customary practices. Article 5, for example provides that “[t]he Republic shall... (b) preserve, protect and promote positive Liberian culture, ensuring that traditional values which are compatible with public policy and national progress are adopted and developed as an integral part of the growing needs of the Liberian society”, but Article 2 thereof also provides that: “This Constitution is the Supreme and fundamental law of Liberia and its provisions shall have binding force and effect on all authorities and persons throughout Liberia. Any laws, treaties, statutes, decrees, customs and regulations found to be inconsistent with it shall, to the extent of the inconsistency, be void and of no legal effect...” Thus while Article 2 sets forth the foundation for incorporating the informal legal system into the Liberian constitutional and statutory scheme, it also makes the incorporation conditioned upon the informal legal system being consistent with the 1986 Constitution. Where any aspect or component of the informal legal system conflicts with the Constitution the conflicting aspect is void. This would render many of the legal mechanisms for the resolution of disputes void and hence the rulings from those mechanisms unenforceable.

Moreover, while the 1986 Constitution provides the basis for incorporation of some components of the informal system into the formal system, the task of doing so is not an easy task, given that certain of the negative aspects of the practices and customs are made illegal and therefore punishable under the new regime, even though they have been in place for a protracted period of time and ingrained in the psyche and way of life of those to be brought under the new regime. Therefore the process of incorporation
must be carefully planned and executed in consultations with the representatives of the affected people, taking into account their views, comments and concerns, but with firm commitment to reforming the informal system so that it is in line with constitutional requirements. The aims of such reformation should be to critically enhance the justice process.

Addressing the issue of Harmony for the Future

A necessary starting point in the incorporation process is for the three branches of Government to establish a national commission to study the various customs and practices, including legal practices of various ethnicities, to determine which customary practices, including customary modes of dispute resolution are not repugnant to our constitutional and statutory scheme and can be fully recognized by the formal system by legislative enactment so that their legality is recognized throughout the country.

The Government has taken significant steps towards giving people the right to engage in certain traditional practices, but with the qualifications that such practices should be carried out within the bounds of the law. An example of this effort on the part of the Government is the Inheritance Law. This law, while permitting the traditional custom of marrying more than one wife, gives customary wives certain rights, including property rights, which were until the passage of the law, denied to customary wives. The law also makes it illegal for customary husbands to demand the return of dowry, the payment of damages and the extraction of forced confessions of the names of suspected lovers of their customary wives. Additionally, the law gives customary widows the choice of remaining in the homes or villages of their late husbands or leaving the residences for places of their choice, and specifically prohibits the family members of such widows from forcing them to remain in the home or marry the relatives of their late husbands. The law further makes it illegal for parents and other family members of a customary female to force her to marry a man. What is needed is a refinement in the law such that it does not destroy the mechanism for settling of disputes under the customary legal system.

Another example of the Government’s efforts in this regard is the New Rape Law, which makes it illegal for adults to have sexual intercourse with minors under the age of 18 and also makes it a second degree felony for any individual to have sexual intercourse with another person without the person’s consent. This prohibition against non-consensual sex is applicable to husbands and wives. Hence, unlike times past, husbands of customary marriages who force their customary wives into having sex against their will can be criminally prosecuted and if found guilty, punished by ten years imprisonment.

Conclusion:

The difficulty of the past in ensuring harmony amongst the two systems is that there has been an almost dismal failure in studying the entire Liberian ethnic components before
conclusions are drawn as to their principles, workings and values. Most studies have centered only on a certain segment rather than the entire ethnic populace as would enable a determination of those values that are in conflict and those that conform to the statutory mechanisms. It is only after such extensive study that conclusions can and should be drawn as to how the two systems can and should work in harmony; for there is no doubt that the formal system cannot deal with the number of disputes currently emerging in the Liberian nation-state and that it will need the full involvement of the informal system in order to minimize disputes getting out of control. The lack of a coordinated approach by the many partners, in researching the problems and advancing solutions, has also been a contributing factor to a lack of resolution to the dichotomy between the systems. This is where the Government’s new institution, the Law Reform Commission, holes to play a key role, in additional to its other activities.
Overview of Customary Justice and Legal Pluralism in Uganda
By Sarah Callaghan

This paper provides a summary of political events in Uganda since independence, with a focus on the conflicts in the north and north-east. Issues of land and transitional justice, the sites for customary justice discussions in Uganda, will be highlighted before outlining the customary and state justice systems and the local council courts. Lastly some of the challenges and questions that customary justice and legal pluralism present for policy makers in Uganda will be presented.

History and Context
Uganda gained its independence from the British in 1962 and after a relatively short period of prosperity suffered successive dictatorships and massive human rights violations under Milton Obote and Idi Amin for the majority of the next 20 years. The Acholi and Langi ethnic groups of the north were particular objects of Amin's political persecution because they had supported Obote and constituted a large part of the army.

In 1986 the National Resistance Army, who had fought a five-year guerrilla war against Obote, organized a government with Yoweri Museveni as President and dominated by the political grouping called the National Resistance Movement (NRM or the "movement"). This movement system, or "no-party" system, in which everyone was free to participate and people were elected on individual merit from village level to the national Parliament, continued until February 2006 when the first multi-party general elections were held since President Museveni came to power. Ruling NRM candidate President Museveni was declared the winner, giving him a third term in office following the passage of a controversial amendment in June 2005 to eliminate presidential term limits.

Conflict in the North
Despite bringing relative stability to the country, President Museveni's NRM failed to defeat the rebel Lord's Resistance Army (LRA) in northern Uganda resulting in a devastating and protracted conflict for over 20 years and revealing serious deficiencies in the Government's capacity to protect the population. The vicious and cult-like LRA insurgency, led by Joseph Kony, lacks any clear political objective and its claim to represent the grievances of the Acholi people appears to be at odds with its methods. The LRA have produced great suffering of largely Acholi civilians in the north and east. It is estimated that about 80% of its fighters (primarily children and youth) were abducted, 76% of the northern population have had a family member killed, while some 1.8 million people were forced into internally displaced persons (IDP) camps by the Uganda Peoples
Defence Force (UPDF) for their own protection. UN Under-Secretary-General for Humanitarian Affairs Jan Egeland termed the situation the “world’s most forgotten humanitarian disaster”. The conflict is a struggle between the Government and the LRA, fuelled by animosity between Uganda and Sudan, who supported rebellions on each other’s territory and it continued the North-South conflict that has marked Ugandan politics and society since independence.

In December 2003 the Government of Uganda referred the matter to the International Criminal Court (ICC), which issued arrest warrants for Kony and 4 of his senior commanders. In 2005, the LRA were pushed out of northern Uganda and escaped to the Democratic Republic of Congo. These two events combined are believed to have brought the LRA to the negotiating table. The Government of Southern Sudan Vice President Riek Machar mediated the two and a half year Juba peace process which resulted in a Final Peace Agreement (FPA) in April 2008. Although the FPA has not been signed by the LRA leader, the talks were successfully concluded and no serious security incidents have taken place in northern Uganda for more than 2 years and people are returning home. During the conflict state justice services and civilian law and order were largely absent. The customary justice systems of the north continued to operate, although the forced displacement into camps impacted on both the systems and the law. For example, camp leaders competed with elders for authority, and more recently during the return home, the interpretation of women’s rights to land under customary law has been contested. The last two years has seen an increased presence of state justice institutions in the north but legal aid services and legal awareness remain limited.

Sixty-one percent of the north’s population are living in poverty which is double the national average. Other social indicators for the north are considerably worse than for the rest of Uganda. There is poor local governance performance and lack of service delivery in the north and east. Specific political, economic and social initiatives aimed at building the north’s stake in the central government is required for a successful transition to peace and in this regard a Peace, Recovery and Development Plan for the north and east of the country has been launched.

Conflict in Karamoja

Poverty indicators in the north-eastern region of Karamoja are even worse than the Acholi north. Karamoja is remote, climatically harsh and culturally isolated from the rest of Uganda. The estimated 1.1 million Karamojong are largely agro-pastoralists/semi-nomadic people and depend on livestock for survival. Their customary governance system includes the resolution of disputes according to customary law through a Council of Elders. The region, given its position bordering Kenya and South Sudan and on the ivory trade route, has had easy access to arms since the nineteenth century. The colonial administrators struggled to exert any form of control over the region and armed cattle raiding increased during the 1950s and early 1960s. The region has faced intra-Karamoja conflicts, conflicts with state organs, cross district conflicts and cross border conflicts. Successive attempts by post-independence governments to close the district
and forcibly disarm the Karamojong contributed to the isolation, insecurity, disadvantage and severe poverty of the region. The pervasive insecurity is underpinned by the absence of effective state protection and minimal capacity to enforce local law and order.

The NRM Government attempts to establish law and order in the region through sedentarising the largely nomadic population and forceful disarmament by the UPDF have been met with resistance from the Karamojong. These efforts have been accused of heavy handedness and of violating human rights, and have further deepened distrust of the state among the people. However, in recent years there have been attempts by UPDF and police to improve their relations with the community. The extreme poverty combined with the increase in small arms and light weapons in the region has affected the elders whose loss of wealth has impacted on their status and their success in resolving conflicts or disputes. There are tensions between traditional centres of power and decision making and those of the state, particularly over attempts to move populations to the more fertile parts of the region.

Conflict over land
A source of more recent, and possible future, conflict is land. Long-standing political and ethnic tensions over land are escalating, especially between the central state and the traditional kingdoms. Tensions arise from acquisition for investment, multiple ownership rights, ‘land grabbing’ and evictions, the land administration system, rising landlessness and falling productivity as plots are sub-divided. The difficulties in land administration and formulating a land policy to address these issues are a legacy of colonial agreements. As in many post-conflict situations, land is both a source of dispute and critical to Uganda’s future growth and poverty reduction. Over 88% of the population live in rural areas and are largely dependent on agriculture. Although land is an important asset, land ownership is vastly disproportionate to the number of land users. The poorest 40% of the population own 24% of the land but use 34% of it. Furthermore women are at a disadvantage, land ownership is dominated by men, accounting for about 80% to 90%. A quarter of Uganda’s population lives in chronic poverty, a category that is primarily constituted of those affected by conflict, widows, orphans and female headed households and the disabled. Therefore, poor, displaced women, who often lack authority in customary systems and lack a male relative are the most vulnerable to ‘land-grabbing’ and eviction.

Some of the challenges facing land justice reform include: the multiplicity of fora for both administration and dispute resolution, the large backlog of cases in the state justice system, a lack of awareness of systems and rights under customary and state law and the growing, unresolved post-conflict tensions that are manifesting themselves in land disputes.

Legal pluralism
Legal pluralism in Uganda and the challenges surrounding it reflect this history of multiple and overlapping conflicts. The Juba peace agreements most tangibly represent
this pluralism by providing for a range of justice mechanisms to be adopted. There are four justice systems operating to varying degrees in different parts of Uganda, corresponding to the history of conflict in each region: state justice, the system of local council courts, customary justice, and military justice. Military justice will not be discussed in this paper, but is particularly relevant in Karamoja where civilians are being tried under section s119 (1)(h) of the Uganda Peoples Defence Force Act 2005 which provides that every person in unlawful possession of arms is subject to military justice.

State Justice System
Uganda has a common law justice system. The courts of record are the Supreme Court, the Court of Appeal (which also doubles as the Constitutional Court) and the High Court. The subordinate courts include the Magistrates Courts, Local Council Courts and Qadi Courts. State courts have the power to apply customary law so long as the custom is not inconsistent with any written law or repugnant to nature, justice, equity and good conscience.

The courts are brought together with the other core justice institutions (including the DPP, police, prisons and the Human Rights Commission) by the Justice Law and Order Sector (JLOS). It is renowned as one of the most innovative and first examples of the Sector Wide Approach being applied to justice institutions in Africa and has been successful in implementing a justice reform agenda through improved coordination, communication and co-operation. The sector has an overarching goal of “Justice for All” and sets out a comprehensive approach to justice reform, targeting criminal, commercial, land and family justice. It is focused on five key result areas: Promoting the Rule of Law; Fostering a Human Rights Culture; Enhancing Access to Justice for All (particularly the poor and marginalised groups); Reducing Crime and Promoting Safety and Security; and Contributing to Economic Development.

The sector has made progress on some of these issues, notably improved human rights, increased physical presence of justice institutions across the country and an improvement in prison conditions. However, challenges remain including providing access to justice particularly for the poor and vulnerable, large numbers of pre-trial detainees awaiting trial for extended periods and a large case backlog, a large number of priorities and the need to strengthen institutional capacity.

The role of legal aid and awareness in enhancing access to justice for the poor and vulnerable, and in creating linkages between the systems is recognised and development of a legal aid policy and framework is one of the sectors priorities. Pilot programmes on the use of paralegals to divert petty cases out of the state system and a community service programme which incorporates restorative justice principles are being undertaken.

In the current draft of Uganda’s National Development Plan for Uganda 2010 – 2014 the Justice Sector has committed to “strengthen the capacity and role of Local Council
Courts, and develop a national framework for the practice of informal, customary system of justice to ensure conformity with human rights standards including gender equality, upholds the rule of law, and complements the formal justice sector.” It also recognises the role of alternative dispute resolution mechanisms, particularly in post-conflict areas.

The key legal pluralism challenge facing the sector is in developing a transitional justice framework. The sector has the lead role in proposing practical ways to operationalise the annexure to the Agreement on Accountability and Reconciliation signed by the Government of Uganda and the Lords Resistance Army/Movement in February 2008. The Government committed to expeditiously prepare and develop the necessary legislation and modalities for implementing the Agreement and the Annexure. Areas to address include the legal and institutional framework for investigations, prosecutions and trial within the formal justice system, reparations and traditional justice approaches.

Significant work has been undertaken on developing a model for the formal criminal jurisdiction, partly because of the desire to pose a complementarity challenge to the International Criminal Court, as agreed during the peace talks. A draft bill domesticating the Rome Statue is to be submitted to Cabinet shortly. The sector will then consider in more detail how traditional justice may be appropriately integrated with truth telling and reconciliation and the formal criminal aspects to provide for a comprehensive approach to transition. Significant challenges arise about how to best utilise traditional justice mechanisms and principles in such a context, particularly in relation to the role of women and youth, its links with the formal system and its application to contemporary and widespread conflict. My colleague will elaborate further on these issues.

Customary Justice
Discussions on customary justice in Uganda centre on the practices and laws of the north and east. This focus is perhaps due to the insecurity in these regions which has contributed to the continued knowledge of customary justice and a lack of presence of state justice institutions. There has been considerable research into the customary justice systems of Acholi and Karamoja in particular and their role in transitional justice and peace building, as well as in resolving land disputes. Today the customary fora are used more frequently in rural areas and primarily for land and family related disputes. It is generally recognised that criminal law is the jurisdiction of the state justice system, although this may be less true in Karamoja where the customary system is also used to address criminal offences.

The multiplicity and diversity of customary justice law and systems in Uganda poses real challenges to policy makers. Policy makers also contend that the lack of clear agreement and record of legal principles undermines the legitimacy of the law and system. However, recent research has identified that although customary procedures and laws differ across the northern groups there are principles common to all. The five key elements are i) material compensation, ii) reconciliation and forgiveness, iii) truth-telling and responsibility, iv) cleansing and welcoming, and v) punishment.
The *Land Act 1998* provides that traditional authorities have a function of determining disputes over customary tenure and may act as a mediator in such disputes. As my colleagues will outline, how to interpret this section and enforce the decisions has in practice posed challenges. In particular, there is no supervision of these fora and no clear links to the state system. Linkages between the customary justice system and the Local Council Courts are much closer.

**Local Council Courts**

The National Resistance Movement during their armed struggle created a system of local level councils to provide government services where none existed. When the NRM effectively became the government, this system was formalised through the *Resistance Councils and Committees (Judicial Powers) Statute 1987*, and expanded to cover the nation through grass roots level dispute resolution fora. The Statue was revised and became the *Local Council Courts Act 2006*. The Local Council (LC) Courts are quasi-state institutions, regulated by the Ministry of Local Government, but customary law is applicable, procedures are informal and in exercising its powers the court should act quickly and be guided by the principles of natural justice.

The LC Courts are generally the court of first instance and it is estimated that 80% of the population use them to resolve disputes. The LC Court system has three levels: village (LC1), parish (LC2) and sub-county (LC3). The courts have jurisdiction over petty criminal offences and civil matters within their geographical area, including those governed by customary law. However, there are frequent claims that the LCs exceed their mandate in both civil and criminal matters. In customary land disputes, the LC Court and Magistrates Court exercise concurrent jurisdiction, although the LC2 Court is the court of first instance. The Chief Magistrate has supervisory powers over the LC Courts in his or her jurisdiction, although in practice this is limited by scope and enforcement powers.

Regulations provide for minimal user fees to cover the costs of stationery and witnesses, but much more is usually demanded, particularly as the officials are not provided with any recompense for their services by the state. Challenges include lack of knowledge or practice of procedures, lack of respect for women’s rights, corruption and nepotism.

The LC Courts are the link-pin between the customary and state justice systems. They can and do refer land and family disputes back to the customary justice system for resolution. In some places they sit with elders during customary fora and vice versa. Similarly they act as a filter for the state system, referring criminal cases to the police and work closely with probations officers in ensuring community acceptance after a jail term. Despite these practices on the ground, there are no formal linkages between the systems and tensions over authority exist between elders and LCs and LCs and police.

The JLOS has worked with the Ministry of Local Government to train LCs and to translate the *Local Council Court Act 2006* into local languages. However, in 2006 the Constitutional Court held that sections of the *Local Government Act 1997* which allow for election of LCs, had not been amended to reflect a multi-party dispensation.
LC1 and LC2 officials were last elected in 2001 and therefore amendment of the legislation and fresh elections were required. The Electoral Commission has stated that due to the expense, the elections will be held at the same time as the 2011 Presidential and Parliamentary elections. The Ministry of Local Government issued an instrument attempting to legalise the current officials until that time, there is therefore lack of clarity on the legality of LC1 and LC2s thereby hampering concerted training and capacity building efforts for these officers in the meantime.

Challenges facing policy makers and questions for panel

Some of the key challenges facing policy makers when developing approaches to legal pluralism and customary justice are around governance and the role of the state. These include: 1) How to balance the desire for state consolidation with recognition of customary justice systems, particularly where tensions exist between traditional and state centres of power? 2) How to manage the delineation between justice and governance in customary justice systems? 3) How to manage, and learn from, the different levels of accountability of the various justice systems? 4) What are the ways in which the existing practices linking the systems can best be captured in a legal and policy framework? 5) Can incorporating the principles of customary justice into existing systems be a sufficient basis for recognising customary law?

References:

Meanwhile the LRA continues to commit atrocities against local populations in DRC, Southern Sudan and CAR.


Poverty levels in Karamoja are 82%, more than twice the national average.


Museveni in 1993 reinstated the traditional kingdoms which had been abolished by the Constitution of 1967. These are largely ceremonial roles, however, some Kingdoms have Parliaments.

Due to the nature of the conflict and forced disarmament civilians are regularly being arrested and tried under military court martial. Section 129 of the Constitution provides for Qadi courts which have jurisdiction for marriage, divorce, inheritance of property and guardianship under Sharia law and are subordinate courts of the state justice system. However the bill to operationalise these courts is being re-drafted as there is considerable discussion around how best to do so.

Article 2 of the Constitution provides that other laws and customs are valid to the extent of any inconsistency with the Constitution while article 33(6) provides that “Laws, cultures, customs or traditions which are against the dignity, welfare or interest of women or which undermine their status, are prohibited by this Constitution.”

JLOS was conceived with the overall objective of improving the administration and quality of justice through coordinated planning, budgeting, implementation, monitoring and evaluation. Funding for the institutions within JLOS supports a single policy and expenditure programme the Strategic Investment
Plan (SIP II).
A call for consultants to develop a legal aid policy was advertised in October, 2009.
A Transitional Justice Working Group was established to critically think through the practical issues that have to be addressed before the transitional justice mechanisms on accountability and reconciliation can be operationalised. The working group has five sub-committees: i) formal criminal justice system ii) truth telling and national reconciliation iii) traditional justice iv) integrated system v) budget. These sub-committees are due to submit to Cabinet recommendations for implementing an integrated transitional justice system, including any draft bills.
The terms traditional justice and formal system are used in reference to transitional justice as these are the terms in the Annexure and Agreement.
Despite also weakening the authority and role of elders.
Liu Institute, Gulu District NGO Forum, Ker Kwara Acholi (Sept 2005) Roco Wat I Acholi.
Restoring relationships in Acholi. Traditional approaches to justice and integration. JLOS/UNDP (2007)
Transitional Justice in Northern, Eastern Uganda and some parts of West Nile. Muhereza, F. Ossiya, D.
Section 88(1)
Today there are almost 4,000 courts.
Local Council Court Act 2006, section 22. The councils are termed quasi-state because while formalised through state structures in theory, in practice they receive no state funding or supervision.
The Constitutional Court ruling was in response to a petition by a member of the Forum for Democratic Change, opposition party. There are approximately 20,000 LC1 and 2 positions.
How can we turn legal anarchy into harmonious pluralism?
Why integration is the key to legal pluralism in Northern Uganda.
By Judy Adoko and Simon Levine

We had case recently of a man who used to beat his wife when he got drunk. One night, things were worse than usual and the woman couldn’t take it any more. Where should she run? Remember that in Uganda, as in most of Africa, when a woman marries she leaves her village and her family and goes to live with her husband, joining her husband’s family and clan. She ran to the person who was supposed to protect her, her father-in-law. So far, this is not an untypical story, unfortunately. But her husband, drunk, decided to follow her to force her home, and went to the house of his fathering the middle of the night. This is culturally unacceptable behaviour, because he is supposed to be called by his father the next day for the matter to be talked over. His father, who happened to be also a clan leader, took his responsibility to protect his daughter-in-law seriously and also wanted to teach his son a lesson for coming to disturb them all in the middle of the night. He had his drunk son physically thrown off the homestead. He assumed that the son would go back to his home, chastened, and would appear the next day sober and contrite for a family meeting on his marriage. Instead, the son, annoyed at having been physically man-handled, went to the police to make a complaint against his father and those who had ejected him from his father’s home. The police did what Ugandan police always do. They don’t investigate or interview people; they simply arrest the subject of the complaint and lock him in the cells overnight, usually without any kind of formal charge (or warrant). It is quite possible that the complainant made a small payment to ensure this happened “to cover the transport costs of the police”. It was the father who returned home after his time in police custody a chastened man. Any thoughts of protecting his daughter-in-law had been put well in check.

It’s a simple story, repeated many times with some variations across the country, and it’s an important one, because it is a very typical depiction of what legal pluralism really means for Ugandans, stripped of the theory. We had at play two normative codes. According to the old man’s code (i.e. the local culture) it was his responsibility as family and clan head to protect his daughter-in-law from his own son, and to punish his son for his behaviour in pursing the young wife to his home drunk and in the middle of the night. The son knew perfectly well that his behaviour was unacceptable in his own culture and that in any meeting with the family he would be shamed and in the wrong. So, he chose to ‘move code’ and bring the dispute into the realm of State law, focusing not on his own behaviour, but on the rights of his father to use physical force in ejecting him from the compound. As a young man, he knew better how to manage this code, and he knew the workings in practice of the ‘law’ – or rather of the “State justice system” that may have little connection with actual written law. The old man is now confused: he has acted perfectly correctly by his code, but finds himself in gaol.

Neither code is supposed to reward wife beating. Both codes are in fact supposed to protect the poor woman. What happened in practice? The State system is so
dysfunctional it can’t actually do its job. But worse, its existence and very dysfunctionality undermines the other code. Instead of adding a further layer of protection, the State justice system is used to combat the local normative code so as to reward the wife-beater. Legal pluralism is legal anarchy – and lawlessness never favours the vulnerable.

It shouldn’t have to be this way. So what’s going wrong? The case of land justice is the most accessible way into the problem for two reasons. First, because in Uganda, cultural normative codes or ‘customary law’ are given full legal recognition. The opposition – or disconnect – between two legal codes is therefore most clearly seen for what is in this area. Secondly, land disputes are the most common ‘legal’ problem that is found, perhaps after marriage problems, which are usually regarded as a private matter rather than one for scrutiny by legal theorists. Land justice is therefore the most important one for Ugandans and also the area where there is the most evidence for coming to a verdict on the failings of legal pluralism.

Legal pluralism sounds as though it is about people seeing two (or more) legal codes, and having to work out which one applies to them in which circumstances. In practice this is a completely erroneous picture. People don’t see two legal codes at all. The ‘customary’ legal framework is not seen as law at all, but as a way of life, how people live – State Law on the other hand is something imposed and foreign. It is remote, in a foreign language and has little to do with most people’s lives. It must be appreciated to what extent the situation is different from that in Europe, where statutory law is the outcome of a very long process of codifying people’s own cultural rules. This is simply more explicit, of course, in countries where common law – another name for ‘customary law’ – is a part of the same legal code. In Europe or America, law is not only derived from the culture, but it is also a part of the culture: people are socialised from birth into accepting the law as an important reference point for behaviour. This is simply not the case in a country such as Uganda where even those supposed to make and uphold the law treat it as something largely irrelevant to their own lives.

Three culture clashes are thus created. The first is between the citizens and the State – the remote, foreign entity imposing its arbitrary and opaque rulings on communities. The second is between the majority of the population, and especially the rural population, and the educated elite, who are to some extent familiar with State law, at least in concept. Since these are the people who speak for ‘the people’ – they are the politicians, the NGOs, the academics – the people’s own perceptions have been doubly silenced, for even their silence is unnoticed. The third is within the minds of the elite who adhere to the supremacy of State law. Even for them, statutory law is a foreign language that they have learned, and like non-native speakers of all languages, they speak more by learned rote than from an internalisation of the natural rhythms of language. Even when land law gives full recognition to customary law, this is not internalised, but instead they search for examples where customary law is ‘repugnant to

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The term ‘customary law’ is often criticised, but it is the one used by Uganda’s Land Act (1998) in extending its legal recognition, and so the one we use here.
natural justice’. (It is interesting to note that the “repugnance” of customary law to natural justice was enshrined in a ruling where the judge ruled that a spouse could give evidence against the other spouse since the payment of bride price meant there was no marriage but wife purchase. The importance of understanding this cultural mess will be discussed in more detail below, but it should be obvious that the widespread belief that that ‘sensitisation’ will bring everyone to take on board State law as the governing principles of their lives is, at best, hopelessly naïve.

Let us return to land law. The Land Act says clearly that all disputes on land held under customary tenure should be resolved according to customary law, and that the customary authorities have the power to determine and mediate in those disputes. In Northern and Eastern Uganda, customary land law and land administration are with the clan. What can be seen in the State system as different functions are all combined in clan authority. The clan has the duty to protect the land and its integrity for the future; it protects the rights of the clan members, including future generations; it sets the rules for the transfers of rights and responsibilities; and they adjudicated or mediated on land disputes. Each family head is responsible for protecting the rights of all the family members, but it is the clan’s responsibility to hold them to account and to ensure that the rights of the vulnerable are protected.

In giving recognition to customary law, the State gave recognition to an existing system of rules, institutions and authorities that were already working to administer land, to respect rights and to solve disputes – an opportunity too good to be missed for a State that had no effective administration or judicial presence at the grass roots and which had either the resources nor the personnel to establish such systems capable of handling the work involved in administering land across the country. (It has, in fact, failed to establish either an administrative system or a judicial system capable of governing the 20% of land in the country which is registered, or titled, where customary law does not apply.) Too good to miss, perhaps, but rather than take it on board, the State simply ignored it. The administration of customary land has been simply ignored by the State (despite provisions in the law) and State law created a completely parallel justice system, so that the same Act gave power to determine disputes to customary authorities using customary law, and also made the (State) Local Council Courts the first courts.

Legal pluralism isn’t about different laws: it’s about different world views

Customary land law and state land law are not substantively different in northern Uganda, because Parliament decided that customary land law should be binding. Why then is it so difficult to find points of contact between the two? And why have State administrative and judicial structures not replaced the struggling customary ones? Part of the explanation is that the State tries to deal with legal pluralism as though it were about different laws, when in fact it touches much deeper and more profound differences in people’s basic world view.
justice  Justice in Statutory courts is about determining who is in the right (winners and losers) according to laws that have to be ‘certain’. Customary courts believe that justice is about finding a way forward that allows everyone to live together in harmony in the future whilst respecting fairness – which may involve compromises.

laws and procedures  State courts follow rules designed to ensure that the process is fair. These rules have to be fixed to be certain and to prevent abuse. Customary courts follow more flexible rules, which are not based on an attempt to follow the letter of any (unwritten) laws. it is impossible to win a case in a customary court on a technicality. This possibility in State courts makes them completely foreign to local conceptions of justice.

rights  “Formal” (or western based) law grants specific rights to individuals, which are defined and absolute. Customary rights go with responsibilities (the word for ‘rights’ and ‘responsibilities’ is the same in N Uganda), they are situational dependant, subject to compromise and are derived from one’s position in the family or society.

land rights  State legal systems grant rights of ownership – those who own land, have rights. Customary law grants rights to ownership – the basic rule is that no-one can be denied land rights, and substantive customary law defines where and from whom you claim these rights.

Neither world view is inherently superior to the other. It has proved counter-productive, though, to bring awareness of people’s legal rights under State law without an appreciation of the differences.

It is easy to imagine legal pluralism as a supermarket shelf of added choice – more choice always being better. Such an analysis would ignore two key features of legal pluralism as it currently exists. First, ‘products’ do not exist in isolation. The mere existence of one legal forum has a profound impact on others. The fact that people have parallel judicial pathways erodes the power of customary courts, whose only power comes from their authority which comes from the respect they command. it is a vicious circle. As powerless old men, they command less respect, less authority and so less power. Although his reality is not specific to a post-conflict context, the conflict and the mass forced displacement that went with it, changed the equation. The customary authorities were lining up in the same queues for food aid as everyone else for a decade: how can they re-don their figurative wigs and gowns and expect their verdicts to be respected with no power of enforcement?. Second, the phenomenon of ‘forum shopping’ is well known and does not need further discussion. It is merely important to remember that in any dispute, it is the ‘stronger’ party that has the upper hand in
choosing the forum that will determine the outcome. We have analysed the outcome of this interplay of forces elsewhere, and described how the “weak” (and in particular women) lose from having two parallel systems both of which are supposed to protect their rights, in what we have called ‘falling between two stools’. The existence of State forums undermines the customary forum, but they cannot replace it: they cannot command allegiance (see box) and yet the State simply does not have the capacity to make them work. Again, this is not a phenomenon specific to post-war situations, but a long war and the displacement of almost the entire rural population have made sure that the numbers of the ‘weak’ are very high indeed. (You are far weaker when you are trying to reclaim your land from an IDP camp than when you are on your land to defend it.) The results are plain for all to see in N Uganda: customary protection is dysfunctional and State justice non-existent; the Magistrate’s Courts have backlogs of land cases going back several years and growing every year; in a judicial vacuum, people take the law into their own hands. Port-war societies have been socialised to violence, and it is therefore little surprise that violence is a frequently used tool for advancing or defending claims to land.

The Land and Equity Movement in Uganda has spent several years studying the workings of land rights and the process by which land disputes are ‘managed’ in practice in Northern and eastern Uganda. Our theoretical conclusions, as we have presented them above, have led us to a clear course of action that – with guarded optimism – we hope is increasingly being taken up by State and non-State actors.

The first action is that land disputes are not a problem requiring ad hoc or individual case-by-case solutions (e.g. legal advice to victims), just as the problem of women’s land rights cannot be solved by “raising awareness about the need for gender equality” in individual men and/or women. What we are faced with is a system problem and that means we need a system solution. The solution does not lie in the justice system (i.e. winning cases in courts for victims) because a major part of the problem is the very architecture (or lack of it) of justice system, or, rather, systems. So, we have started with widespread advocacy at local and national level to change the way we see the problem.

Second, we have to bring some harmony between the two systems. Currently, the weak lose out to forum shopping, whilst each “system” blames the other for consequences. The truth is that neither is particularly responsible for the legal jungle (of “survival of the strongest”): the “blame” lies in the fact that they operate independently rather than harnessing the combination of their powers and authorities. We need a situation where everyone knows the roles of the State judicial system and of the customary system, and where there are clear rules about how protection issues move from one to another.

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18 From a great deal of field research we have documented in detail how ‘strength’ works in land disputes and the fault lines on each system that allow land grabbers to move from one forum to another at will. See www.land-in-uganda.org for “Let’s face up to Land Grabbing”

19 “falling between two stools” in a book on women’s land rights published by James Currey publishers
But if, as we argue, the two systems are based on inherently different world views, is it possible to bring the two into a single ‘legal meta-system’? We believe that it is and we have been working to achieve precisely this end, though certain compromises have to be made.

a) the customary system has to be made to look a bit more like a legal system that the State can recognise. This means, for example, we need clarity in its rules and have to curtail some of the room for flexibility that it used to enjoy. (Since this flexibility is nowadays exploited shamelessly by the ‘strong’, this is a step worth taking on its own merits.) Clarity and certainty can only be achieved by writing down customary land codes (or “customary land law”, as we take great care not to call it). This has proved a complex process. Because cultural normative codes are so much a part of people’s way of life, they are hard for people to see in isolation. On the other side, academics and activists have both refused to accept the idea that customary law exists at all. They continue to equate customary law with “whatever people do”, meaning that there is no normative function at all (e.g. rules that people often break). It has taken us several years to expose the underlying principles that people tacitly know they ought to follow – even when they don’t. These ‘principles, practices, rights and responsibilities’ (PPRR) as they have been called have now been written down for most of northern and eastern Uganda, and have been accepted by the customary authorities and, we believe, by the majority of the population in question. This has been a step of enormous importance for several reasons. It means that, for the first time, State courts and customary courts alike know what the rules are supposed to be; it means that they can now uphold the same rules; and it means that customary courts can be held to account, including by the State courts, for applying their own rules properly. (Of course, this is the beginning and not the end, and for example, we still need to work out how we will get authoritative case law through recognised precedents – simple in theory, but very complicated in practice – or the mechanisms that people will accept for amending customary law in the future.)

As well has having an authorised code, the customary system also has to have recognised authorities or courts. It has taken us a long time to work with the customary institutions to build up, village by village, a register of the people who are ‘genuine’ authorities. Without this rather tedious type of work, we can talk about accountability, but no-one will know whom to scrutinise or whom to hold to account.

b) We are now working to establish a single judicial pathway through the legal jungle. This will mean if State courts receive fresh cases that have not been to customary authorities they have agreed principles for a decision either to hear them, to send them back or to demand the records of the customary hearing that probably did take place but was not in favour of the one bringing the new case. The State courts are now very much in favour of the idea that all cases should begin in customary courts because they are simply overwhelmed otherwise, and they recognise that customary courts do for free what the State will never be able to afford. Customary courts are very much in favour of the idea that State courts can hold them to account and can be used as appeal courts, because otherwise they have no powers at all to enforce their decisions.
Becoming subject to judicial review by Magistrate’s Courts increases their importance, because the case would now start with their decisions and not with a fresh hearing of the evidence; and because it opens up the possibility that they themselves can apply to a Magistrate’s Court for enforcement of their verdicts. (Customary authorities have shown that they do not mind their verdicts being over-turned by Magistrates. What they resent is their verdicts being ignored.) The exact pathways from court to court have yet to be fixed, but there is now an emerging consensus that this needs to happen – though it has taken us several years to persuade the State system to take the customary system seriously.

On another level, the boundaries of each set of laws needs to be clear to all. Everyone knows that customary law is subject to State law and the Constitution. If everyone – customary authorities and disputants – knows which customary laws are binding and where they can be challenged, we can reduce the ability of the ‘strong’ to manipulate systems in their favour against weaker victims.

c) Whatever local agreements are made, we need official support from the top. National Land Policy is currently being formulated in Uganda, and we have worked hard to ensure that respect for the principles for customary law has been entrenched. This has meant overcoming hostility to customary tenure as backward”, “primitive”, “an impediment to economic growth and investment”, “repugnant to natural justice”, “discriminatory against women” which are the phrases that we have heard time and again. It has been time away from the grassroots, but we remain convinced that local level solutions only work when they are strategically sound. Getting the legal strategy right has been crucial.

d) We now need harmony in land administration and not just in land justice. Land administration just means systems for ensuring that everyone knows who has what rights to which pieces of land, and for facilitating changes in those rights (e.g. through allocation/inheritance, land transactions, etc.). The State cannot run such a system – it has failed to run a land registry for the small portion of Ugandan land that is titled, and at the current pace of surveying and titling ‘new’ land, it will take the State many years to register the rest of the country in the formal system. The customary system used to rely on the fact that everyone knew whose land was whose, but the increasing commercial value of land means that this is no longer a viable way forward. The customary system can, though, provide new solutions, getting villages or a group of neighbours to draw maps of their land, planting specific tree species as boundary markers, making sure the maps get mutually signed by neighbours and customary authorities, etc. The State courts need to become familiar with such papers so that they will give them the status as evidence of rights that they deserve. (We also need to make sure that they know how to interpret them – e.g. that land is not owned as the personal property of a household head but is the property of the family as whole, even of children born after the drawing of maps. Formal ‘titling’ cannot accommodate this last principle of open-ended ownership, which is largely foreign to the world view of the State system.) LEMU has been advocating for such measures for a long time, and the difficulties that it has encountered – in what would appear to be an uncontentious area
– are a sign of just how complicated land work can be in Uganda, and how much patience is needed.

Can an end point where different legal codes work in harmony be called “legal pluralism”? We leave such thorny problems to others. We are convinced that only such an outcome can bring justice of any kind at all to the citizens of N Uganda.
1.0 Introduction and historical background

1.1 Uganda’s legal and regulatory regime is rooted in its colonial history. Uganda came under British influence following the 1884 Berlin conference that led to the partitioning of Africa and was a British protectorate until independence on 9th October 1962. Much of the British law and legal system was imported wholesale into Uganda. Uganda has since passed several laws customized to its unique political and socio-economic circumstances.

1.2 Uganda has had a turbulent post-independence history characterized by various conflicts and violent regime changes. Uganda’s first democratically elected Government led by Prime Minister Apollo Milton Obote that assumed office after independence in 1962 was soon embroiled in conflict with the ceremonial President, Kabaka (king) Edward Mutesa of Buganda. This led to a Constitutional crisis in 1966, abrogation of the independence Constitution and forceful adoption of the 1967 Constitution. Prime Minister Obote became President Obote with immense powers. The next 20 years or so were characterized by political turbulence and war.

1.3 In January 1986 the National Resistance Movement/Army (NRM/A) of current President Yoweri Kaguta Museveni captured State power. There has since been a gradual return to the rule of law, relative peace and greater democratization.

1.4 Uganda has had a protracted war in the northern part of the country that has led to destruction of life and property. Over the last two years there has been relative peace as the Government and rebel forces have negotiated a peace settlement.

1.5 Uganda is evolving into a functioning multi-party democracy but still faces several challenges – human rights violations, institutional development, judicial independence and respect for opposing views.

2.0 The Northern Uganda Conflict

2.1 The Lord’s Resistance Army (LRA), led by rebel leader Joseph Kony, has waged a 23 year rebellion in northern Uganda from 1986. The LRA has employed terror tactics by attacking villages, murdering, raping, abducting and pillaging.

2.2 The LRA does not have a discernible political agenda and no realistic prospect of ever forcefully or otherwise assuming State power. The LRA was initially backed by Sudan (in retaliation for Uganda’s perceived backing of the SPLA rebels in southern Sudan). The fledgling peace process in Sudan and improved relations between Sudan and Uganda has deprived the LRA of much of its support from the Sudanese Government.
2.3 Between 1990 and 2004 there were several half-hearted attempts at a negotiated settlement. Often the LRA used these periods of ‘negotiation’ as an opportunity to re-arm and reorganize for war. Sustained military successes by the Ugandan army and defections from the ranks have weakened the LRA and pushed it into a more serious and committed negotiation – the Juba peace process mediated by the Lt. General Reik Machar Vice President of the Government of Southern Sudan. The Juba peace talks presented a real opportunity for a negotiated settlement.

2.4 As a result of the Juba peace process, the Government and the LRA signed peace agreement on 29th June 2007\(^{20}\). The agreement provides *inter alia* for the application of customary law in dealing with offenders.

3.0 **Application of Customary Justice in Uganda**

3.1 The Law applicable in Uganda is spelt out in the Judicature Act of 1996\(^{21}\). Ugandan Law allows enforcement of customary law that is “not repugnant to natural justice, equity and good conscience and not incompatible with any written Law”\(^{22}\).

3.2 Under the provision of the Juba peace agreement on accountability and reconciliation there is provision for application of “traditional justice mechanisms”\(^{23}\). The Annexure to the agreement signed on 19th February 2008 further provides:

   “Traditional justice shall form a central part of the alternative justice and reconciliation framework identified in the Principal Agreement”\(^{24}\).

3.3 Uganda is a signatory to the Rome Statute\(^{25}\) setting up the International Criminal Court. Uganda is in the process of enacting its International Criminal Court Bill to give domestic effect to the Rome Statute. The proposed ICC Bill allows for application of customary law.

3.4 Uganda has established an International Crimes Division of the High Court. It has appointed a head, deputy head and registrar of the division.

4.0 **Challenges**

4.1 Uganda faces a number of challenges in giving effect to the proposed application of customary law in its post conflict setting:

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\(^{22}\) Section 15, Judicature Act (Cap. 13).
\(^{23}\) Clause 3.
\(^{24}\) Clause 19. Annexure to the Agreement on Accountability and Reconciliation, 2008.
• There is a pending ICC indictment against Joseph Kony and 4 top commanders of the LRA. Uganda, having accessed to the Rome Statute, has to fulfill her treaty obligations and hand over Kony and his commanders to the ICC if they are arrested.
• There is still a degree of mistrust between LRA & Government
• There is public anger – especially in the areas that have suffered the brunt of the rebellion – and a very real possibility of mob justice if former rebels are taken to the community for customary justice.
• Reluctance of LRA to physically leave the bush – we have an International Crimes Court but no defendants.
• Uganda has diverse ethnic groups with different customary practices. It is challenging to decide which customary justice to apply.

5.0 Challenges – Uganda ICC Bill
5.1 It is difficult to identify and determine the offences that qualify for customary justice. The most serious war crimes will need to be subjected to the ordinary court process.

5.2 There is need to ensure that there is no impunity for war crimes committed both by the LRA and the Government forces. There is a need to ensure equity in treatment of LRA and Government soldiers. However, the expediency of having peace may require that some seemingly serious offenders get relatively minor punishments.

5.3 There is also a challenge of determining offenders who should face the law. Most LRA combatants – including some so called ‘top commanders’ – were abducted as young children. There were indoctrinated into the ways of the LRA and carried out horrendous atrocities to assure their own survival in the LRA.

5.4 The President of Uganda, while still in office, currently enjoys Constitutional immunity from prosecution for criminal offences. There is a fear of removal of this immunity which will make it extremely difficult for the ICC Bill to be enacted into law.

5.5 The implementation of the customary justice is likely to have grave financial implications. The structures required to give carry out such justice are elaborate and costly. Compensation to victims is also costly.

5.6 Appropriate legal structures for implementation have not been agreed upon. Apart from the War Crimes Division of the High Court there is no other structure agreed upon. Uganda is considering establishing a truth and reconciliation commission along the lines of South Africa. It is not clear which organs will be responsible for administering customary justice.

6.0 Way forward
6.1 Uganda is hosting a major review of the Rome Statute in 2010 – unlikely to do anything to jeopardize that. This represents an excellent opportunity for civil society and the international community to pressure the Government into adopting alternative justice mechanisms.

6.2 Unless the indictment against Joseph Kony and his top commanders is withdrawn there is a very slim likelihood of him voluntarily coming out of the bush. Uganda needs to put in place an acceptable justice mechanism and engage the ICC with a view to requesting to be allowed to try Joseph Kony and his top commanders in the Ugandan courts.

6.3 Uganda’s Parliament needs to urgently pass ICC Bill into Law – the agreed deadline of October 2009 expired. The Justice Law and Order Sector’s Transitional Justice Working Group, which is responsible for fine tuning the Bill needs to fast track its adoption.

7.0 Conclusion

7.1 The legal regime in Uganda has provisions that can be invoked to facilitate application of customary justice in Uganda.

7.2 The northern Uganda peace process provided the opportunity and framework to apply customary justice in Uganda.

7.3 The passing of the ICC Bill into law will be critical to the success of alternative justice in Uganda.
A. **Introduction to NRC**

*Programmes: NRC Uganda implements:*
- Livelihood promotion, including food security
- Food distribution (phasing out fully by end 2009)
- Shelter
- Education
- Camp management – aiding vulnerable people to return home, improving infrastructure in return areas
- Legal Aid

*Objective of the NRC Legal Aid Project:*
Assist IDPs in overcoming obstacles to durable solutions and contribute to an improved access to justice system.

*Activities: NRC Legal Aid Project:*
- Information dissemination/sensitization/awareness raising
- Legal counseling
- Legal Aid and Alternative Dispute Resolution (ADR)
- Documentation services
- Training and capacity building for formal and informal institutions
- Research and Advocacy targeting local authorities and to some extent policy makers.

B. **Description of IDP Land Disputes in Acholi land**

*Most common land disputes*
- Boundary dispute (23%, WB report May 2009)
- Land use dispute (18%, WB report)
- Illegal occupation (grabbing by neighbors/family) (17% WB report)
- Trespass (16% WB report)
- Inheritance (13% WB report)

*NRC classification of land disputes from IDP rights’ perspective*
- Land rights of ex-combatants, children born in captivity, single mothers
- Land rights of women not formally married
- Illegal occupation of vulnerable IDPs’ land by neighbors/family members
- Retroactive land gift
- Adverse possession and 12 year bona fide occupancy rule
- Compulsory acquisition
- Inheritance
- Unlawful eviction
- Landlord’s claim for compensation
- Individual boundary dispute
- Inter-clan boundary dispute

**IDPs mostly affected**
- Widows and elderly women
- Single mothers
- Ex combatants
- Orphans, and children born outside wedlock in camp/bush
- Other EVI: e.g. socially outcasts, particularly women; disabled.

**Implication of Land Disputes in attaining durable solutions for IDP (from UNHCR findings)**
- Obstacles to return for those still in camps
- Obstacles to sustainability of return
- Contributing factors to food insecurity as people do not tend to cultivate land under dispute

**C. Limited Knowledge/Understanding of Land Dispute**

**Misinterpretation of law and legal conundrum:**
- Confusing substantive law with procedural law
- Legal conundrum on clan’s jurisdiction/competence on dispute resolution
- Legacy of the Land Tribunal
- Conflicting sources of succession law
- Conflicting legal opinion on adverse possession law
- Limited literature/commentary on customary law
- Outdated National Policy for Internally Displaced Person (NIDP) 2004

**Biases against customary tenure within government officials/NGOs:**
- It is primitive
- Not conducive to development
- Discriminatory against woman

**Gap in Public Knowledge:**
- 90% of population has no knowledge of the Land Act (WB report)
- Misinformation, confusion and distortion of law is highly prevalent
- Capacity gaps in interpretation exists among CBOs, NGOs (WB report)
- Law Schools don’t teach customary law, nor does the Bar Council have any catch up program in place
- Statutes and Policies, some of which are relatively new, are not well explained to the grass root leaders who are responsible for their implementation.

**Some consequences of the knowledge gaps**
- 85% of population experienced tenure security (WB report)
- Lack of legal education on customary law: lawyers, including legal aid lawyers, are challenged while handling cases governed by customary law
- 48% Acholi population perceive gov/military/politicians as land grabber (WB report)
- Government officials and elected representatives follow directions which are inconsistent with the intent and spirit of applicable law and policy. Intents of legislation are sometimes misunderstood or even challenged in execution
- NGOs and CBOs provide conflicting opinions.

**Limited factual research and analysis:**
- Fact captured through survey and questionnaire may not reveal true nature of land disputes (NRC and LEMU research)
- What is commonly know as boundary dispute could be simply land grabbing
- Women, children and vulnerable groups’ exposure to land dispute/grabbing is unknown
- Extent of formal and information dispute resolution mechanisms’ mishandling of cases and their impact is not known

**NRC contribution towards improving situation**
- Compilation of principles and practices on customary tenure in cooperation with the cultural institutions
- Compilation of five training modules on land disputes and dispute resolution mechanism used for capacity development of institutions
- One-on-one legal counseling for IDPs
- Radio talk shows for awareness raising on durable solutions
- Research and publication of advocacy paper on thematic issues for better understanding of laws and issues
- On going joint research (NRC-IOM) on land dispute trends based on around 2300 cases serviced by NRC in 6 years. Report due on 2nd February 2010
- Research and publication of short briefs/leaflets on legal issues in collaboration with Land and Equity Movement Uganda
D. Challenges: Dispute Resolution Mechanism and Land Administration

1) Dispute Resolution Mechanism

i) Formal Mechanism: (LC11 and Sub-County Court)
   - Exorbitant and arbitrary fees collection
   - Very little governmental support
   - Poor quality staffing
   - Lacks supervision
   - Political bias
   - Usually sides with party with better resources
   - Judgments do not sustain in appeal mainly on technical grounds
   - Overall: only the corrupt and powerful are seen to be benefiting from the formal justice system when it comes to land disputes.

ii) Informal Mechanism
   - Conundrum on jurisdiction
   - Significantly weakened by the conflict
   - Attracts little to no government interest
   - Besieged with its own structural issues
   - Diminished command over people
   - Unregulated
   - Awards influenced by clan’s bias against particular groups, e.g. ex-combatants, single mother, socially outcasts, child born in captivity etc.
   - Adds to the forum shopping opportunity for land grabbers

B) Customary Land Administration

General overview:
   - District Land Board (DLB) and District Land Office (DLO) suffer from under-funding, operational inefficiencies (WB report)
   - Area Land Committees (ALC): either non-existent or non functional (WB report)
   - No institutional framework to handle restitution, resettlement and compensation (WB report)
   - No public/private mapping/demarcation scheme

Certificate of Customary Ownership (CCO) and Titling:
   - Titling viewed as death of customary tenure. Current titling system cannot cater for the bundle of rights inherent in customary tenure, i.e user right, management right, income right, capital right and transfer right
   - Divided opinion exits on appropriateness of CCO at this stage
- Institutions responsible for CCO (ALC and DLB) are besieged with capacity problem. Institutions lack bylaws, regulations and directions
- Unregulated CCO fees structure, ranging from $35 to $400
- Apathy of some government officials towards CCO
- The process is expensive, time consuming and sometimes unnecessarily complicated
- Despite hundreds of application are pending before the ALC and DLB, no CCO has been issued so far.

**Communal Land Association (CLA)**
- An interesting and significant body laid down in the Land Act
- Public knowledge about CLA is near zero
- No CBO or NGO is working on CLA
- Community once ready for CLA is likely to face enormous capacity challenges on mobilization, paper works and incorporation
- CLA a potential solution to District’s need for land for development and other purposes not covered by compulsory acquisition law.

**Mapping and Demarcation**
- Scope for demarcation is available under titling and CCO. Given the limited use of these, systematic mapping and demarcation is often seen as a solution to land dispute
- Some discussions among CBOs and NGOs are underway; no significant step taken yet
- Division of opinion exists on different methods of mapping and demarcation processes
- Resentment against GPS exists because of the belief of possible margin of error. Even a few feet margin of error could be a crucial factor in the dispute.

**E. Conclusion/Recommendations**

- Dialogue among judicial bodies, elected offices, and cultural institutions for reaching common understanding of substantive law on land (statutory and customary), land policies, and the linkage between traditional and formal justice systems.
- Undertaking information campaigns. NGOs and CBOs could be of big help
- Regulating customary dispute resolution mechanisms (WB recommendation) and finding appropriate links with the formal system
• Capacity development activities for both formal and informal dispute resolution mechanisms

• Functional statutory bodies responsible for administration of customary land

• Introducing an acceptable method for land marking/mapping scheme, and ensuring an effective registry system

• Ensuring affordability of land administration and dispute resolution services

• Creating adequate safeguards against corruption and political bias in dispute resolution processes. Ombudsperson institution, among others, can be considered

• Creating institutional framework for restitution, resettlement and compensation.
SESSION II: Sierra Leone Case Study: Grappling with Legal Pluralism – Select Countries and Programs & Projects

Secret societies and security sector reform in Sierra Leone
By Peter Albrecht

This paper is an initial exploration of how the so-called ‘secret societies’ in rural Sierra Leone condition access to justice at the local level in Kono District, one of the country’s diamond rich areas. An institution such as the secret society was never engaged or even considered in the process of transforming security and justice provision. Ultimately, they do not fall within a framework that is well-understood by external actors that continue to support security sector reform in the Sierra Leone.

Data for the paper is derived from 6 months of ethnographic fieldwork carried out between October 2008 and June 2009, primarily in a small diamond mining town in Kamara Chiefdom. The town is, as many others across Sierra Leone, relatively isolated from state-sanctioned security and justice provision. Fundamentally, this means that it is the town chief, an actor that holds considerable power in rural Sierra Leone, who oversees cases and sanctions town security, e.g. through the organization of groups of youth that constitute the physical force of security (a short-term prison is located in a back room of the so-called Court Barrie, an open, roofed compound that is also the site for cultural events). The police post closest to the town is in the Chiefdom headquarter town of Kamara Chiefdom, six miles away, through the forest or across the river, and only summoned in the event of ‘blood crimes,’ i.e. crimes that involve serious wounding and unusual deaths. During the rainy season, it is practically impossible to get to and from the town. In sum, various actors, which, it should be noted, defy any unambiguous distinction between what falls under the categories of ‘state’ and ‘non-state,’ organize security and justice provision.

This paper does not focus on the intricacies of security and justice provision per se. Rather, it explores how these services are structured and conditioned by the secret society that is explicitly referred to as out of reach of state institutions. The paper falls in two broad sections. First, it describes exclusionary mechanisms of the secret society, as discursively produced by the town’s inhabitants. In this discussion, the paper exemplifies how this conditioning of security and justice take place, particularly around access to land, which is held in trust by chiefs by law passed in parliament in Freetown. Being closely linked to ancestral spirits and devils controlling resources in specific localities, the secret society separates natives from a particular locality and Kono more broadly from the non-natives, including other tribes, such as the Mendes and Temnes (the two major tribes in Sierra Leone, both of which are more numerous than Konos in the town where I carried out my fieldwork). By implication secret societies therefore directly condition access to rights based on autochthony. The second part of the paper calibrates the institution of the secret society against broader programmes of security sector reform (SSR), which have been extensive in the case of Sierra Leone. It is one
thing to acknowledge that institutions such as secret societies impact on SSR programmes – and among the many police advisers, in particular, who ushered into Sierra Leone to support security and justice reform this certainly cannot be taken for granted. It is something entirely different to understand how they are used as a mechanism of social exclusion, which in the end will be paramount to developing effective programming and implementation around security and justice delivery.

**Secret society**

‘In the history of anything Pagan,’ Butt-Thompson explains in his 1929 book West African Secret Societies, ‘there must always be hesitation in using dates. Suffice it then to say that when the Muhammedan invasion of the West Coast took place the Pagan societies were well-established.’ Butt-Thompson continues: ‘They were instituted to enforce and maintain tribal tradition, customs and beliefs that were in danger of changing or becoming obsolete. The organisers were the champions of the old against the new, as some of their descendants still are.... They were clever enough to know that prohibition alone was not sufficient foundation for any organisation desiring longevity, and, therefore, made their societies the repositories of the folklore, myths and history and the conceptions of art and culture and learning and wisdom the tribes possessed.’

As indicated in the quote by Butt-Thompson, a primary function of the institution of the secret society was, and remains to this date, a safeguard against interests and exploitation of external actors. The town where I carried out my fieldwork is wholly dependent on diamond mining for income generation, and non-Kono tribes from across Sierra Leone and ‘investors’ from abroad are part and parcel of what defines the locality’s social make-up. Indeed, a part of the foundation story of the town is discursively produced as one of conflict and subsequent building of relations with the often exploitative ‘white men coming in’: ‘They would carry the diamond with something like a plier, say that it is the devil’s tool and that it will shock you if you touch it with your naked hand. When you saw the diamond, you’d identify it by taking a stick and put it near the diamond, and then leave it there.’ The strategic use of the secret society, however, is particularly important with respect to non-Kono tribes which live in the town. A number of rights follow directly from being a member. First, only by becoming a secret society member is it possible to become a chief, and outside the ‘secret society bush’ itself, the chief – together with the town elders – is the institution’s primary gatekeeper. Second, a number of disputes, particularly around land that is given and taken by the town chief are dealt with in the secret society context. Land is an all-important income and livelihood generating resource with respect to farming and mining. For the Konos that are in minority relative to other tribes in Sierra Leone, upholding secret society membership as a prerogative of the few therefore becomes vital.

James Kondeh, half Kono, half Madingo, explained when and how ‘boundary issues or any other issues’ ended up as a matter to be dealt with in the secret society. ‘So when the case reaches to a point where you say: now this case is not going to be decided, they are going to decide it in a different world. If the issue is between two members, they know how to decide it. Okay, if they know that really, you are right, you have the right
on a particular issue, they will foul you by calling the secret society members out.’ A secret society rule – bye law – is that when the members are out in the town, non-initiates are not allowed to leave their houses, ‘and you lock yourself inside.’ James continued, ‘while people [secret society members] stay outside and decide the matter. Then when it is over, they will tell you: I’m sorry, we are sorry, this place is no more yours.’ Land is not exchanged by a written contractual agreement, and rights to land are consolidated verbally. Effectively, this leaves much room for interpretation of who in fact owns land, which is taken and given according to allegiance to the town chief (who in the case of the town where I did my fieldwork is a close ally of the Paramount Chief of Kamara Chiefdom). Indeed, James’s family had land taken away from them, which they had used for farming since the early 1990s. It was suspected that there was political motivation behind the Kondehs’ loss. As a staunch supporter of the All People’s Congress (APC), the current ruling party in Sierra Leone, James had campaigned against the Sierra Leone People’s Party (SLPP), the party supported by the town chief.

A way of ensuring a say in how land is distributed, or indeed in how disputes are settled within the secret society, is done by seeking membership. It is only ‘sons of the soil’ that have a birth given right to become members. Even among the Konos, however, access to its inner circle is only for the select few. In general, because land is the all-important resource, status is directly linked to a person’s descent from the founders of a locality. It is discursively produced as an entirely parallel world with its own parliament, and where state-governed institutions are said to have no power. In the event of crimes committed in the context of secret society activities, the police, for instance have no role in resolving the matter. As explained by the town’s acting security officer, appointed by the chief: ‘We’ve got the Mendes, the Temnes, and the Kono [tribal groups]. They are all secret societal people. So when you tell them [the police], any one of the police officers, you tell them something against the society, not Kono alone, but even in the north, they will tell you: my friend, an issue for the society is arranged in the society bush. It’s not our concern. Except if the matter is being brought to town, then it will be their concern, but if it’s in the bush, it’s not theirs.’

Two issues follow from this statement, First, matters dealt with in the secret society that have clear implications for individual security and justice are effectively out of reach of state institutions. However, what the statement also indicates is that making clear distinctions between ‘state’ and ‘non-state’ in the case of secret societies is a misnomer. The police officers posted in Tombodu would make the point that they worked for the Paramount Chief, supporting his effort to provide security and justice in his chiefdom. Furthermore, the Police Commander in Motema all the way up to Inspector-General level in Freetown said that it was ‘unadvisable’ for the police to engage in the affairs of the secret society. Ultimately, many police officers are themselves members. James, because of his explicitly mixed heritage, had himself struggled to become a member. As one of his acquaintances noted: ‘Kondeh is not a Kono [because his father is not], he’s there because of ambition. He wants power, that’s why he’s going to the secret society.’ Indeed, James himself acknowledged the importance of the institution in this regard: ‘I didn’t have the right to become a town chief, but as long as I’ve become
society members it’s one of the identities that will authorize you to become a leader in Kono District as a Kono man.’ The normal procedure to become a member is for the family to approach the elders to confirm that their son is ready to go through the initiation ritual (which takes place during December and January). However, another way of becoming a member, and the only option that was available to James, is to either leave the house in the town while the secret society is outside or to enter the secret society bush while initiation takes place. Because of the power and access to key decision-making processes that membership gives at the local level, this has been the preferred way of access – until recently.

Sahr, the first born son of a former Section Chief and known as a particularly vociferous proponent of the rights of the autochthonous, explained that ‘before [the rule to not initiate non-Konos was instated in the mid-2000s, a decision taken at the level of Paramount Chiefs of which there are 14 in the District] we did initiate the different types of ethnic groups like the Madingo, the Karanko, the Fullah when they violate the law. But later we found out that when you initiate them, they will go and interpret our secret society, expose our secret outside. So we decided not to do it any longer. We saw them violate the law so that they could be initiated, coming in large numbers.’ And so, while the secret society constitutes one way of enforcing and maintaining tribal tradition, it is also a key institution of, essentially, marginalization. If an individual has no access to the inner circles of the secret society, he loses rights and access to both livelihood options for his family and, ultimately, security and justice.

**Security sector reform in Sierra Leone**

In Sierra Leone, transforming those agencies that provide security and justice became integral to what was essentially state-building. Substantial support was given by the UK to contain the armed forces, which had staged two coups during the 1990s, fight a war against rebel forces, re-establish the Sierra Leone Police (SLP), which had collapsed, and set up coordination mechanisms of the security sector and intelligence collection capacity. The collapsed, but internationally recognised Sierra Leonean state was to be rebuilt, and security was seen as not only a requisite for this process to begin, but also integrally linked to it (see Albrecht and Jackson 2009).

Today, police reforms – a key component of broader SSR efforts in Sierra Leone since 1998 – have strengthened police presence and visibility. This has been done by providing officers with vehicles, uniforms and communication equipment. In addition, several police stations and posts have been rebuilt. In the 2000s with the redeployment of SLP across the country and the introduction of Local Needs Policing, Sierra Leone’s variety of community policing, fear of state-sanctioned policing has partly given way to better communication and greater trust. However, as explored above, regarding secret societies, how security and justice are conditioned by institutions at the local level has only been affected to a limited degree by security and justice reforms. With the Local Policing Partnership Boards, introduced by the current Inspector-General of Police, the police have attempted to establish forums for discussing security at the community level, including in the town where I did my fieldwork.
As I suggest in the discussion of secret societies above, however, there are institutions which are not governed by the state, but nonetheless impact directly on how security and justice are provided. This becomes all the more relevant as already in 2002, it was stated in a review document that ‘80% of the SL [Sierra Leone] population will only find judicial access and redress from the Customary Courts or from the informal (and presently illegal) alternative dispute resolution mechanisms operated by the Paramount and Lesser Chiefs’ (DfID 2002, p. 40). However, because police reform has very much been focused on the national level, the engagement of chiefs has until now played a limited role in Sierra Leone’s SSR process. By implication this means that many of the institutional mechanisms at the local level, which support the administration of security and justice, have remained unengaged. Below, I will point to some of the reasons why this might be the case.

A primary reason why the security and justice-related institutions presided over by Sierra Leone’s chiefs have not been engaged in SSR efforts has to do with the difficult political environment in which they began – and the initial focus of support. In the late 1990s, SSR was primarily aimed at supporting a democratically elected government in winning a war, building up the capacity of the state to do so, and to provide internal security. This often leads to what may be referred to as ‘conscious ignorance’, which can be boiled down to the fact that because some options are too difficult, the easier ones are preferred. In short, ‘conscious ignorance’ kicks in in an attempt to reduce the reform process to something manageable. A vital element of this is that security-related programming at the local and national level is an inherently political process. At the national level, getting involved in political battles may very well lead to complaints about the behaviour of the adviser, and ultimately may lead to the adviser his or her job (Albrecht and Buur 2009:10-11). However, at least these battles are with institutions that resemble the state, and thus recognizable to those advisers that support SSR.

Unsurprisingly, attempting to change the way that security and justice are provided at the local level is no less political than trying to do so in institutions linked to a concept of the state. As indicated in the above discussion of secret societies, they deal with a significant number of disputes. To engage with this institution vis-à-vis security and justice reform would therefore be a considerably politicized process, impacting directly on how rights to and ownership of land are distributed, for instance. By extension, secret societies therefore end up establishing uneven access to security and justice at the local level, a condition that is fully accepted by the Sierra Leone’s state-sanctioned police.

This leads to the second obstacle, limited conceptual clarity. Supporting the state to deliver security and justice as public services ultimately becomes the ‘best solution’ for donors engaging in police programming and implementation. This is compounded by the circumstance that there still is no clearly developed language for discussing how to engage an institution such as the secret society in security and justice-related reform on par with the Sierra Leone Police (Albrecht and Buur 2009:12). Language reflecting the importance and hierarchical superiority of the state dominates. Thus, while it may be
logically understood that chiefs – and the institutions that fall under his administration – are primary providers of security and justice in Sierra Leone’s rural areas, there are few avenues available to address this in programming.

Their role is simply not easily comprehended. Indeed, precluding the possibility of establishing a coherent system of regulation, accountability and democratic governance – by a state entity – could be argued to be an ontological misnomer. Donors themselves represent polities where security and justice institutions are ultimately centrally governed, so to propose anything else through SSR will remain a considerable obstacle.

References
Introduction
This presentation is based on a case study on Sierra Leone carried out in the frame of the project Aftralaw ‘Addressing Traditional Justice in Post Conflict Judicial and Legal Development Aid in Sub-Saharan Africa’. The main topic discussed here is how different types of interventions that have been implemented or are planned in Sierra Leone address the tension between traditional justice and human rights. This analysis is based on qualitative field research carried out during April 2009 in the capital city, Freetown, and upcountry in Makeni and Bo towns, as well as in Moyamba district. Semi-structured interviews were conducted with a wide spectrum of international and local actors. Also program descriptions, annual reports and strategy papers were gathered, analysed and discussed with them. The findings emerging from this exercise were further interpreted in the light of a desk review of qualitative and quantitative studies on Sierra Leone’s legal landscape, as well as ethnographic and historical material.

Justice Sector Interventions In Sierra Leone: Key Contextual Features
Sierra Leone experienced a brutal civil war from 1991 to 2002. While aid in the immediate aftermath of the war focused on peace keeping and peace building, current interventions start to shift progressively towards long term sustainable development and addressing the causes of the war. This includes improved access to justice and the promotion of human rights. However, this takes place in a context characterized by at least the following challenges: (i) a history, and in particular the recent experience of brutal conflict, pointing to the compelling need to reform exclusionary practices and institutions, (ii) a legal landscape that combines official and unofficial legal pluralism, and where customary justice in its various forms is the most accessible to the majority of the population, (iii) and the fact that customary justice is often at odds with several human rights and it is composed by a multiplicity of layers that are not always easy to reach for outsiders.

The Legacy of the Conflict
With the end of the civil war, new opportunities opened for reviewing the organization of justice in Sierra Leone. In part, this results from the fact that the weaknesses found in the administration of justice after the conflict were not only associated to the legacy of the war itself, but went back to pre-war times (Thompson et al 2002:5). During the conflict, the judiciary was severely affected at all levels. However, endemic problems, such as a corrupt administration of justice, the lack of presence of formal courts in the provinces, underinvestment in infrastructure and underfunding, though aggravated seriously by the war, were not caused by it. On the contrary, the politicization and lack of independence of the judiciary (Thompson et al 2002) and the manipulation of justice by chiefs in pre-war times, in combination with the poverty and marginalization that affected the youth in particular, have been identified as factors lying at the roots of the conflict (Archibald & Richards 2002:345). These insights have led scholars to argue that
in order to avoid a repetition of violence, a revision of excluding social practices, and especially those found in the justice sector, is needed.

**Multi-layered Legal Pluralism**

Sierra Leone has a dual legal system, where two types of official law operate concurrently. On the one hand there is ‘formal law’ and on the other hand there is an institutionalized customary law system, which is often called ‘semi-formal’. The formal legal system is far from accessible for the great majority of Sierra Leoneans (Manning 2008; Dale 2008, 2007; Baker 2005; Alterman et al. 2002). Amongst the main reasons for this, we find the distances, costs and time required to litigate (Dale 2007:1-2). Moreover, there exist a number of social and cultural barriers, such as language, formality, lack of information and lack of trust (Dale 2007:1-2).

About 85% of Sierra Leoneans falls under the jurisdiction of customary law (Economist Intelligence Unit 2006 in Dale P. 2007: 1). ‘Local courts’ are presided over by a chairman and his assessors and they are legally empowered to hear and determine cases of customary law issues in the provinces. The law applied at this level is unwritten and varies from community to community. Outcomes depend on the case, ranging from retributive to restorative measures (ibid:6,22,24). Gender disparity is a salient feature of these forums, which is manifested both at the level of court membership and its users (Koroma 2007:5,6,26). This customary system is linked to the formal one by means of an appeal procedure that places the former below the hierarchy of the latter. In theory, a party unsatisfied with the decision of a local court can appeal to the districts appeal courts but in practice, the appeals procedure is rarely used. According to studies on the perception of the law in Sierra Leone, these forums seem to be the most accepted and best understood formalized system in the provinces, but they operate as the last recourse once other informal mechanisms have been tried (Manning 2008:3; Alterman et al. 2002, Koroma 2007:23). Amongst the main problems associated with these forums we find lack of supervision and judicial independency, with chiefs often interfering in rulings and local courts overstepping their mandate, for example by imposing abusive fines (Manning 2008:5). Further, the accessibility of the system both in terms of distance and costs is also problematic, though to a lesser extent than in the case of formal courts. Next to this dual system, there operate a range of informal traditional justice instances and authorities. Chiefs are present in each human settlement in Sierra Leone and they are legally empowered to mediate or arbitrate but not to adjudicate, though in practice they often do (Manning 2008:6, Manning et al 2006:13). They play an important role in solving disputes and providing more affordable and speedy solutions to conflicts (Sawyer 2008), but their popularity varies from chiefdom to chiefdom (Manning et al 2006). Religious leaders also play a role in mediation, as do women, youth and professional circle leaders regarding intra group disputes (Alterman et al 2002:30,31; Manning 2008:7). Also paralegals and peace monitors are often approached for advice and mediation, where modern and traditional laws and views of justice are combined in the treatment of cases with high rates of satisfaction (Sawyer 2008; Maru 2006:427,476; Baker 2005:381). Sorcerers and supernatural forces are part of the informal legal landscape too (Manning 2008, Sawyer 2008, Alie 2008, Fanthorpe 2007, Kane et al 2005,
Diviners are often relied upon for the identification of culprits or for planting curses (Sawyer 2008; Kane 2005:15; Alterman et al 2002:33). In addition, certain matters are handled by sodality groups called secret societies (Fanthorpe 2007:4, Kane 2005:15, Alterman et al 2002:31,32). These are single sex communities that prepare men and women for adult life by means of initiation ceremonies, forming solidarity networks amongst age groups who are initiated in the same event (ibid). Secret societies have their own laws, procedures and penalties, but because of their nature, they are difficult for outsiders to access.

The instance where conflicts are first reported depends on the type of conflict and the community (Foster et al 2008:34), but according to different studies, most Sierra Leoneans prefer to solve conflicts at the community or at the closest related unit since it is considered a failure to bring a case to a court (Manning et al 2006:13).

Access to Human Rights in Sierra Leone
Several aspects of the social organization in Sierra Leone have been identified as marginalizing and unfair. In varying degrees, this is reflected at all layers of the administration of justice, so it would be inaccurate to regard this problem as one of customary justice alone.

At the formal level, Sierra Leone is signatory to the main international and regional human rights conventions. Treaty provisions have to be domesticated into national laws, which according to the Sierra Leonean Human Rights Commission, has not been satisfactorily done. For example, the National Constitution is contradictory in that some sections grant the protection of the rights of women and discourage discrimination - section 6 (2), whereas other sections allow discrimination under laws of adoption, marriage, divorce, burial, property and aspects of personal law – section 27. In addition, the discrimination of women in customary law and justice is one of the most problematic human rights issues throughout the whole country (Human Rights Commission of Sierra Leone 2007:22; CEDAW Report Sierra Leone 2006; Amnesty International 2006, 2005). At present traditional justice in its various forms tends to be male-dominated and patriarchal, which is reflected in several customary laws. Moreover, only local ‘citizens’ have access to local courts, whereas ‘strangers’ can only access a local court through a local citizen protector (Archibald & Richards 2002:344). Another salient feature of customary law is its oral character, which in many cases has resulted in manipulation, abusive fines and arbitrary trials (ibid). Corporal punishments were reported to be in decline, though this is probably the case at local courts and adjudication by chiefs, whereas it remains unclear if it is also the case within secret societies.

Addressing Human Rights In Sierra Leone’s Customary Justice
Against this background, a sort of consensus seems to have arisen amongst national and international development actors active in the justice sector, whereby traditional or customary justice is seen as a key component of what these actors have termed ‘primary justice’, i.e. justice at the community level. As such, traditional justice plays an
important role in improving access to justice, especially for the poor. For this purpose, these actors point to the need to build on the positive features of traditional justice, while modifying or eliminating the negative ones, such as the tension with human rights. In our study of the interventions that have addressed this domain we have identified four main strategies, each dealing with customary justice at a different level:

**Enacting Legislation to Regulate Customary Law and Justice**

At the national level, the enactment of the Gender Acts, i.e. the Domestic Violence Act, the Devolution of Estates Act and the Registration of Customary Marriage Act, as well as the Child Act introduced a new frame for the regulation of several aspects of customary law. The Ministry of Social Welfare, Gender and Children’s Affairs (MSWGCA) is the lead agency in the implementation of this legislation through a three year (2009-2011) ‘Strategic Roll Out Plan’, which includes a series of initiatives related to primary justice. However, the implementation of this plan is seriously undermined by a lack of funding and capacity.

In addition, a ‘Local Courts Bill’ has been drafted with the support of the Justice Sector Development Programme (JSDP). This law reform aims at depoliticising the local courts and reviewing aspects of their functioning that interfere with the right to a fair trial, such as the appointment of local court chairmen on the recommendation of chiefs, which is proposed to be transferred to the Chief Justice, on the recommendation of a ‘local court service committee’.

**Restatement of Customary Law and Capacity Building at the Semi formal Level**

Local courts have been targeted by different initiatives, being the ‘restatement’ of customary law and human rights education amongst the main ones. Under a pilot project of JSDP in Moyamba district, a ‘restatement’ of the customary law of the local courts of the 14 chiefdoms of the district has been recently completed. The purpose of this intervention is to register the customary law as it is being used at the level of local courts, identify the areas that contravene human rights and modify them.

In addition, research on the functioning of local courts led JSDP to conclude that there is a need for capacity building, so a training manual is being developed for this purpose, including a module on procedures and jurisdiction of the local courts, a module on human rights, and a module on records management, which will be used to train the local courts’ staff. Support to the capacity of local courts extends to infrastructure as well, with the provision of material for record keeping, which would be used in case of appeals. Further, UNIPSIL and UNDP reported to support human rights monitoring and capacity building at local courts in collaboration with the customary law officer.

**Sensitising Traditional Authorities**

Development actors consider the role of chiefs as mediators at the grassroots as a valuable resource for improving access to justice and avoiding court congestions. However, traditional authorities have been criticised for a lack of transparency and fairness in the administration of justice and they are amongst the groups that contest
certain human rights. Consequently, chiefs and traditional authorities are targeted for sensitization about human rights in order to bring about change ‘from inside’. Such is the case of UNICEF’s initiative ‘Chiefs Champions for Children’, which aims at getting traditional chiefs to promote girl child education, the denouncement of early marriages and female circumcision, amongst other. UNFPA supports the formation of community leaders’ networks, with the purpose of reinforcing their capacity to promote human rights. The Pilot Project of JSDP in Moyamba district has also involved traditional authorities in their ‘task force’, and they are encouraged to collaborate in the promotion of human rights. At the same time, chiefs are sensitized to derive adjudication to the local courts, which would result in more fair trials. This is complemented by informing the communities about the official role of the chief in the justice sector. For example, JSDP is piloting a community mediation scheme that encourages people to reconcile when they have problems rather than resorting to chiefs’ courts for adjudication.

Raising Awareness at the Grassroots

Different awareness raising campaigns have been envisaged aiming at a better understanding of the justice sector and an internalization of human rights at the grassroots. The dissemination of the Gender and Child Acts at community level has been envisaged by various organizations, including JSDP; The Lawyers Centre for Legal Assistance (LAWCLA), and the MSWGCA. Further, JSDP plans to bring the results of the restatement of the customary law back to the communities, where traditional practices found to contravene human rights will be exposed with reference to the new national legislation. UNICEF has supported the incorporation of new curricula at schools, where children learn about their rights and more progressive gender roles. In addition, illiterate people are targeted by radio programmes, community drama and story telling, community cinema projections and music. The use of theatre, social drama, storytelling and songs for the promotion of community discussions on traditional values and human rights are popular techniques for opening up discussions on human rights issues since they build on the African oral tradition, which is culturally closer to the communities than formal trainings. Paralegals and ‘peace monitors’ also play an important role in raising human rights awareness at the grassroots. These organizations do not address the tension between customary justice and human rights directly, but they provide different services at community level, such as mediation, education, advocacy and free legal services, thereby constituting an alternative to other local channels to seek justice. Finally, it is worth noticing that interventions aiming at improving the quality of justice at the formal level can have an indirect positive impact on human rights in customary forums, either by providing for ‘negotiation resources’ in the interpretation of traditional laws or by providing for competition. (Oomen 2006)

DEALING WITH PLURALITY IN CUSTOMARY JUSTICE

The above mentioned strategies are in line with one of the main lessons learnt from the well known debate on human rights’ universality and cultural diversity, namely that justice systems, and culture in general, are open and dynamic, and that tradition and custom are not static, so that the tension between local perceptions of social order and human rights ideas can be bridged (Cowan et al. 2001). However, when turning to the
difficult question of how to achieve this in practice, we find pieces of answers that can inform interventions. An Na’Im argues that compliance with human rights should stem from their legitimacy in the societies where they are to be applied, which can become possible through an enhanced interpretation of cultural norms (1992). The exercise in restating the customary law seems to provide an opportunity for a more inclusive interpretation of customary rules, provided that there is room to hear all voices and contest interpretations that perpetuate oppressive understandings. There remains to be seen which approach will be followed regarding those customary norms that are found to contradict human rights.

In this sense, scholars have pointed out that taking seriously the social legitimacy of custom implies that reforms should result from an internal critique and cannot be imposed in a top down fashion (Kane et al 2005). In addition, Merry argues that ‘localizing’ human rights implies a process where on the one hand human rights ideas are translated into frameworks that are relevant to the life situations of grassroots people, and on the other hand, these ideas are appropriated by these people to the degree that they are useful in the advancement of their interests (2006:219). Kent refers to these processes as the ‘societal internalization’ of human rights into areas governed by customary law, so that the latter evolves in line with these international standards (Kent 2007:511). The recourse to community insiders and local agents of change, such as progressive traditional authorities, paralegals and peace monitors, as allies in the implementation of human rights could facilitate such processes of ‘translation’, but at the same time this requires some degree of monitoring, so that the emancipatory dimension of human rights ideas are not ‘neutralized’.

In this sense, the ‘plurality’ of customary justice is a key feature to consider, for it ranges from more or less formalized customary rules as applied at the level of local courts, to arbitration by chiefs and mediation by elders, family heads and respected persons. As the evidence from Sierra Leone shows, the great majority of ‘social order’ is negotiated rather than taken to a court and sorted out according to pre-established rules. This reality compels us to think of customary justice and legal pluralism in a ‘deeply pluralistic way’, where the focus not only goes to the diversity of courts and norms and how human rights can be implemented at that level, but to a deeper diversity that operates at the level of how societies imagine justice, or in the words of Geertz, other ‘legal sensibilities’ (1983:175). In Sierra Leone, this is exemplified by those instances that are more inclined to apply norms and rules explicitly, such as the local courts, as opposed to those that recur to negotiation and consensus building, such as family heads and local leaders. Therefore, a more explicit understanding is needed of how the different ‘layers’ of customary justice, their particular ‘logics’ and ways of operating present different challenges and opportunities to the implementation of human rights.

In turn, this brings us to a focus on how the different ‘layers’ of justice interact with each other. In this sense, we realize that the interplay between interventions at national, semi formal, informal and grassroots levels is crucial. In the present case study, we find that the different layers of traditional justice are differently targeted and affected by interventions. Customary justice, as it is found at the level of local courts, is
the one that is most explicitly engaged with for the promotion of human rights by means of the restatement of customary laws, the regulation by national legislation, trainings, and monitoring, whereas ‘deeper’ informal layers, such as the justice that is applied within secret societies, is hardly ever discussed in the frame of interventions. One wonders whether awareness raising initiatives and sensitization of chiefs and traditional authorities on human rights issues have an impact on the way justice operates within this realm.

Moreover, a gender perspective is required when engaging with plurality in customary justice. In Sierra Leone, most users of local courts are men. The fact that there exists a gender disparity at this particular layer of customary justice should lead us to a reflection on who is actually benefiting from each intervention. Should a focus on improving local courts guarantee better access for women? Should interventions instead focus on other instances where women currently have more access to? Or both? Resources are limited, so it is necessary to evaluate how the expected outcomes are likely to reach and benefit as many persons as possible, and in particular those that are frequently excluded.

Conclusions

Engagement with customary justice in the frame of post conflict justice sector aid is often guided by the aim to improve access to justice. At the same time, this entails an undertaking of initiatives that bring customary justice in line with human rights. Evidence emerging from the present case study on Sierra Leone points to the need to understand customary justice in a pluralistic way. The colonial experience of many sub-Saharan African countries has resulted in a multiplicity of ‘layers’ of customary justice. This implies that interventions intending to promote human rights in customary justice need not only identify these different ‘layers’, their actors, users and ways of operating, but also their different ‘logics’. In addition, in Sierra Leone, we find the difficulty of accessing layers of justice that are not easy to reach for outsiders, such as the secret societies. Each of these ‘layers’ and their dynamics present particular challenges and opportunities for the promotion of human rights. Moreover, they interact in ways that are necessary to understand. Therefore it is paramount to deal with the plurality in customary justice in an explicit way, so that strategies for action do not remain ‘at the tip of the iceberg’.

This project (2008-2011) is carried out at the Human Rights Centre at Ghent University and is financed by the Belgian Federal Ministry of Scientific Policy.

According to the 2004 National Census, 77% of Sierra Leoneans are Muslim, 21% are Christian and 2% follow no religion, but the majority combine the latter with traditional beliefs (Manning R 2008 at footnote 43).
In rural Sierra Leone, initiation is a requisite for full integration of the individual as a community member. In the case of women, this includes circumcision (Fanthorpe R 2007).

Human Rights Commission of Sierra Leone, The State of Human Rights in Sierra Leone 2007, p ix
Personal Interviews, April 2007. According to some authors, human sacrifices are carried out within the secret societies in order to assuage the spirits. Bellman B.L. (1975).

Personal Interviews, April 2009
Personal interviews Sierra Leone, April 2007
This plan was developed by the MSWGCA, with the technical support of the Human Rights Commission for Sierra Leone, the International Rescue Committee, UNIOSIL and Action Aid and with the financial support of UNIFEM and Irish Aid.

JSDP is a five year programme (2005-2010) of the Government of Sierra Leone funded by the UK Department for International Development and managed by the British Council. The programme is closely linked to the Justice Sector and Reform Strategy and Investment Plan of the Ministry of Justice and the Ministry of Local Governance.

Paramount chiefs would continue to form part of these committees, but their influence would be limited by the presence of other members. Interview at Court Monitoring Programme, April 7th 2009; Interview at JSDP, April 9th 2009
Interview with UNIPSII, Freetown, April 8th 2009
Interview with British Council, Freetown, April 9th 2009; Interview with Ministry of Justice Sierra Leone, Justice Sector Coordination Office, Freetown, April 9th 2009.
See Kane 2005:22
Interview with UNICEF, Freetown, April 8th 2009
Interview with UNFPA, Freetown, April 6th 2009
All national and international organizations that were interviewed coincided that the role of chiefs should be to mediate or arbitrate but no to adjudicate. Personal Interviews, April 2009.

Interview with Community Organization for Mobilization and Empowerment (COME) Sierra Leone, Bo, April 14th 2009. These activities have been financed by JSDP.

Interview with Timup, Freetown April 9th 2009, Interview with Timup, Bo April 14th 2009
SESSION IV: Putting Theory into Practice: Programming with Respect to Legal Pluralism
Panel 1: Developing the Knowledge Base for Policy

Women’s Rights and Legal Pluralism in Post Conflict Societies
An Analytical Agenda
By Tanja Chopra

Policy Developments

After the end of the cold war international support to post conflict statebuilding was aimed at the establishment of Westphalian sovereignty, democracy and rule of law. It was generally assumed that democratic countries do not go to war, and that rule of law is the ultimate model that guarantees peace, security and justice for all.26 These assumptions were challenged through the experience of the first international transitional administration in 1999/2000 in Timor-Leste, when the United Nations were given full political authority over a sovereign country and were tasked to build and administer the state apparatus of Timor-Leste. The lack of the UN’s success in Timor-Leste was partly based on the top-down establishment of Westphalian state structures, and the lack of any acknowledgement of local socio-cultural and political dynamics. As a result state institutions barely enjoyed any legitimacy in the eyes of the local communities.27

Lessons learnt from Timor-Leste led to increased policy focus on promoting a) participation of local populations in statebuilding exercises, based on the assumption that participation would increase the sense of local ownership and give institutions somewhat of a ‘local’ shade,28 and b) the integration of local structures into state institutions, in particular local justice systems.29 The Secretary-General’s report on ‘The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies’ from 2004 was one of the first official UN documents to call for more localized models in the establishment of Rule of Law.30 Up to now, policy literature has been driven by calls for

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the acknowledgement of local systems.\textsuperscript{31} Analytical work, in particular in relation to customary justice systems and the establishment of formal justice sectors has increased since – most of it approaching the topic in a dichotomic way, juxtaposing formal justice systems with ‘customary’ or ‘traditional’ justice.\textsuperscript{32}

**Policy Dilemmas**

In practice, the work with local systems in post conflict and conflict interventions has posed a few dilemmas. Most of them are related to the paradigmatic difference between the standards to which the international community has committed and local systems with their divergent concepts of authority and justice. Some of the fundamental challenges are as follows:

- Interventions based on local systems may fundamentally contradict the idea of the state in the long run;
- While local systems have the capacity to provide peace in society they do not always allow for the implementation of international standards of justice;
- The engagement with, and use of, local systems can contradict international human rights standards;
- In particular, local systems can work against international standards for women’s rights and gender equality;
- The availability of multiple systems may further empower the powerful.\textsuperscript{33}

**Women’s Access to Rights**

The dilemmas are particularly clear in the implementation of women’s rights and promotion of gender equity in post conflict and conflict societies. Women’s access to rights in post conflict or conflict situation is needed at two levels: a) women have often suffered significant violations during conflict that require redress, b) women require access to justice on a day to day basis that addresses the variety of women’s issues


\textsuperscript{32} For one of the earlier initiatives, see for example, DFID, ‘Non-State Justice and Security Systems,’ Briefing, May 2004; T. Dexter and P. Niahombaye, ‘The Role of Informal Justice Systems in Fostering the Rule of Law in Post-Conflict Situations. The Case of Burundi,’ Center for Humanitarian Dialogue, July 2005.

(from violence against women, to family issues, land rights etc...). While the use of local systems comes with advantages, for women it can pose some serious challenges.

For example, local concepts of justice often prescribe that sexual violence should be considered a violation against the entire kin group of the victim. Consequently, the kin group has to be compensated – but not to the victim herself. Or, sexual violence inside the community is stigmatized and not considered a serious crime; the victim may simply be married off to the perpetrator. In relation to personal law, women can lose out in divorces or inheritance since they may be regarded as ‘property’ of the male lineage. For the same reason, even in non-conflict scenarios, men control the majority of land or property.

In examples where customary law has been legislated these challenges have been formalized and cemented. Here women cannot even address the formal law in order to obtain their rights. In other examples, local systems have been legislated or their codification has been proposed – to allow more control over them and to rule out violations of women’s rights. However, recent research has indicated that in practice communities will navigate multiple legal systems in order to impose local concepts of justice. The same counts for scenarios where attempts have been made to ‘engineer’ customary justice systems to make them comply with women’s rights (for example by creating hybrid systems, or by requesting women to be integrated in decision-making processes), male-dominated community power structures ensure women’s rights – where they contradict their own order - are not implemented. In addition, the codification of customary law freezes a fluid order in time, and may negate important changes of attitudes towards women in society.

In the handling of serious crimes that have been committed against women during conflict, for example rape, the international community is usually vehement in applying its standards of justice. In reality, most violations against women remain unprosecuted due to a large amount of cases, lack of legal awareness from women victims and political pressures (such as in Kenya and Northern Uganda). The main perpetrators are usually prosecuted, through international or special courts while victims of lower level violence are forced to live side by side with their lower-level perpetrators. The acceptance of these circumstances is often reinforced by local concepts of justice, which may not entail punishment for sexual violence.

35 Ditto.
In tandem with the prosecution of serious crimes (or the lack thereof) Truth and Reconciliation initiatives are often set up in order to deal with the extensive requirements for reconciliation and healing. While on the one hand, Truth and Reconciliation Commissions have been outspoken in their final reports against specific customary practices,\(^{36}\) on the other, they have applied ‘traditional’ justice mechanisms to pacify societies. The assumption is that such mechanisms can deliver the most legitimate reconciliation for communities since they comply with peoples’ understanding of justice. This trend started as a local exercise in the mid 1990’s with the Gacaca courts in Rwanda, and has continued in other locales, such as Timor-Leste. However, it poses the same set of challenges for women, as mentioned above,\(^ {37}\) since it is likely to not recognize sexual violence as a crime, or is generally biased against women.\(^ {38}\)

Similar challenges are posed by other peacebuilding initiatives during or after conflict. Local level peacebuilding initiatives often build on local concepts of justice to ensure processes and solutions are legitimate in the eyes of the local populations. Since ending the fighting is often an urgent aim, the application of local concepts has been widely accepted. Using traditional systems, however, again jeopardizes women’s rights.

Furthermore, male authorities are usually in the centre of decision-making, since traditional authority structure prescribe the nearly exclusive involvement of men in peace and security issues. The exclusion of women’s voices on peacebuilding initiatives also means their cases are unlikely to be taken up (unless they play a political role for the community). In general, the empowerment of traditional concepts of justice and authority may drive society further from the implementation of women’s rights and cement a culture of impunity in some cases. The sole integration of women on peace committees has not brought the desired change.\(^ {39}\)

An Analytical Agenda

More recent analytical work has mentioned some of these challenges in regards to women’s rights and gender equity. While most of it clearly argues for the advantages in working work with local systems, it makes mention of the challenges for women’s rights, but often pushes those to the periphery. Furthermore, while research has pointed out challenges, it has been weak in the development of practical approaches on how to

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\(^{36}\) See, for example, in the case of Sierra Leone, The World Bank, ‘Gender, Justice and Truth Commissions,’ June, 2006, p.21.

\(^{37}\) It does not only challenge women’s access to rights, but also the fact that if women do not feel that they have received ‘justice’, peace in society at large may be challenged.


foster women’s rights. In fact, where analysis has focused on women, recommendations have proven to be contradictory, trying to suit whatever scenario given. Partly to blame is the stark focus on the formal – informal justice nexus. The implementation of women’s rights is not an issue of formal against informal, but requires a more nuanced approach.

On the other hand, practitioners have started implementing approaches that are supposed to promote women’s rights and gender equality. For example local stakeholders are trained in modern law, human rights elements are integrated into customary law, etc... However, in most cases there is no thorough analytical proof yet as to whether these approaches are efficient and whether they have unwanted negative consequences.

It is therefore important to set an analytical agenda that focuses on the role of women’s rights in pluralistic legal environments in post conflict and conflict countries. Key areas of such empirical work should aim to produce in-depth understanding in the following areas:

- **Trajectories of women’s cases in post-conflict or conflict scenarios.** Analysis should focus on which women’s issues require redress, assess what mechanisms are available and what results they grant, and hold the mechanisms against the long term objective of the state building enterprise.

- **Practical approaches that aim at fostering women’s rights in pluralistic scenarios.** New approaches aiming at fostering women’s rights while making use of customary justice systems need to be tested and analysed. What are their actual effects on society, do they increase women’s access to rights and are there unwanted consequences?

- **Local and national power dynamics, socio-cultural concepts and interests related to conflict.** Instead of just analyzing access to formal rights for women, or the negative impact of informal rights, more holistic analysis is required. It should focus on how access to any rights is mediated by community power holders, and the role that different legal systems and traditional and modern concepts play in that. Only by understanding this, practitioners will be able to design efficient mechanisms that can provide justice.

- **Women’s participation in peacebuilding initiatives.** Analysis needs to focus on understanding the role women play in peacebuilding initiatives, and how they

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can lobby for their rights. While project data often proudly states that women have been appointed to peacebuilding committees, or are integrated in hybrid justice institution’s decision-making structures, a qualitative approach should assess their substantive contributions. Do they actually contribute and have a voice, are they even allowed to talk?

- **Mechanisms of change.** What also needs to be understood is what the mechanisms of change are. Areas where women are strong need to be identified, and it needs to be assessed how these strength can be harnessed in order to integrate women better. How can women also have a voice that does not just support their own kin, or presents the opinion of men, but represents women? Where has positive change occurred and what were the mechanisms of this change?

This is a draft copy, and the author requests that it not be quoted for attribution.
Research on customary justice and legal pluralism is subtle, nuanced, and contextual. We know that customary justice systems can mitigate conflict; we also know that they can mask domination. We know that many prefer customary justice to formal legal systems; we also know that many are not aware of their formal legal rights. We know that titling can protect customary claims to natural resources; we also know that it can be a pretext for a land grab. We know that customary justice tends to disempower women and minorities; we also know that formal legal systems do the same.

When his council of economic advisors kept presenting their opinions in the form of “on the one hand, on the other hand,” the US president Harry Truman famously shouted, “Give me a one-armed economist!” If he were sitting here today, I’m sure he would demand a one-armed anthropologist.

The reasons to be chary of ambidexterity are partly political. Peace-keeping forces, international donors, and national governments have become ever more involved in demobilization and state building, and they are hungry for rules of thumb, policy principles, and other advice. But there is also a research case for one-handed research. At this stage of the research cycle, we know enough to begin the move from description to explanation, however tentative and qualified the explanations offered. We would like to know something about the social, political, and economic conditions necessary for customary justice to resolve conflict; the circumstances under which customary justice resolves disputes more equitably and more efficiently than the formal legal system; the institutional arrangements under which land titling can protect traditional and communal claims; and the forms of social networks and organization that might permit customary justice to empower women and minorities.

Research in this vein would have these characteristics:

1. It would be comparative. You need some variation in explanatory variables to identify necessary or sufficient conditions. I think at this point it would be useful to move beyond shadow comparisons and use explicitly comparative methods.

2. It would focus on causal processes. It would have to be predicated on a prior theory about the relationships between e.g., law, power, and social change; and then it would investigate whether these relationships hold in practice.

3. It would be large in scale, and probably collaborative. In a field so diverse, and in which human agency figures so large, one or two findings will not by themselves be able generate policy principles. Collaboration follows from the scale of research necessary as well as from the inter-disciplinary nature of the questions involved.

The questions to be posed about customary justice are large and varied, of course, and include queries regarding the relationships among law, custom, authority, democracy, justice, and legitimacy. But some of the questions are economic. In particular, I want to
focus on two questions that it would be useful to have some preliminary answers for: 1) what are the conditions under which customary justice can reduce inequality? 2) What are the conditions under which dispute resolvers in customary justice establish neutral, reliable rules?

To answer the first question, it is useful to begin by taking stock of the literature on the ways in which formal legal institutions can reduce inequality. First, judicial opinions regarding economic inequality tend to reflect the views of the broader political system from which judges are recruited and to which they are accountable. Second, supporting social, political, and civil organizations, such as NGOs and organized civil society, are crucial for the mobilization and enforcement of legal claims on behalf of disadvantaged groups. And third, dramatic, court-led social change is rare, and when it does happen, it requires sustained and continuous involvement on the part of litigants and courts. So if there are reasons to be skeptical about whether formal legal systems can reduce inequality, skepticism might be in order regarding customary justice as well. In addition, it is clear that customary legal institutions are rarely insulated from other forms of social power; the separation of powers is rarely even an aspirational principle. But note that this skepticism, as I have presented it, is not be related primarily to the content of local customs, which are typically unwritten and variable, but to the relative disparities in prestige, power, and material resources of the disputants, which can be used to influence legal decisions and evade sanctions. If true, this suggests that reforming local-level legal institutions may not be as daunting as changing local cultures, and that supportive institutions, such as NGOs, locally embedded paralegals, and other organizations, might be able to help customary justice institutions promote economic equalities. Basically, this is Charles Epp’s story in *The Rights Revolution*. It’s a hypothesis, and it would be useful to see research examining it.

The second question arises because neutral, reliable rules are thought to be an important underpinning of economic transactions, particularly long-distance trade and asset-specific investments. When disputes arise, one of the key tasks of formal system resolution systems is to supply information about fair solutions. Codification, precedent, and law faculty serve that purpose. Judges gain prestige from persuasive public opinions. In state-centered formal legal systems, dispute resolution processes can produce a snowballing effect as dispute resolvers, in order to maintain their own neutrality as they settle disputes, generate neutral rules, which, in turn, produce the conditions for economic transactions and other strategic behavior predicated on those rules, which then lead to an increasing number of agreements that require a return to the dispute resolver to clarify those rules. This kind of snowballing is less evident in customary legal institutions, where the dispute resolver faces a tension between maintaining the local social significations that maintain his authority and generating (more ontologically and culturally neutral) rules that accommodate outsiders. Local legal institutions, moreover, do not operate in a network or hierarchy of similar institutions from whom they can draw authority and support. This limits the willingness of customary legal dispute resolvers to refer cases to other venues, which in turns limits the range and power of their decisions. I would very much like to see comparisons of
dispute resolution in customary legal systems that are more or less accommodating to outsiders and non-ethnics, and assessments of the incentives for dispute resolvers in those systems. To summarize, I think it would be useful to move toward research that is less subtle, nuanced, and contextual, and more comparative, explanatory, and large in scale.
This paper attempts to outline the received wisdom on legal institutions and economic development and how legal pluralism fits into this literature, and why it is important to understand how legal reform in a context of legal pluralism may (or may not) affect justice provision and development. It highlights the gaps in our empirical understanding of legal reform and discusses some of the few systematic treatments in the literature. It goes on to discuss empirical evidence from one case study (Liberia), and the method of program evaluation used in this study.

**Legal institutions and economic development.** Recent work in the impact of legal institutions on development (Acemoglu and Robinson 2005, La Porta et al., etc.) shows some evidence that legal institutions matter for economic development outcomes. However, the evidence is more ambiguous than one might expect. Roughly, legal institutions may be said to comprise: 1. Rules and standards (via laws and regulations) that govern the operation of society; 2. enforcement mechanisms that uphold laws and regulations; and 3. dispute resolution mechanisms (Gray 1991). Acemoglu and Robinson (2005) try to ‘unbundle’ legal institutions and claim that of these three, laws and regulations are the most important, and indeed economists have spent most of their time studying the impact of laws and regulations – most frequently those governing property rights, and in micro-literature, particularly property rights over land (e.g. Besley 1995, Field 2007, Galiani and Schargrodsky 2007, Besley and Ghatak 2009). As analysis is predominantly of the formal sector, there are few studies of enforcement alone – in part because in the formal sector the threat of enforcement is usually implicit and therefore hard to disentangle from the rest of the legal process. Finally, researchers have documented positive impacts of strengthening dispute resolution interventions on credit use (Castelar Pinheiro et al. 2001, Japelli et al. 2005), debt recovery (Visaria 2006), entrepreneurship, and investment (Chemin 2007, 2009).

**Political economy of legal reform.** The arguments in favor of ‘good’ laws have led to an “unfortunate tendency” of policymakers to initiate legal reform by ‘copy-and-pasting’ well-functioning laws from developed countries into poor country contexts (Aldashev 2009). Milhaupt and Pistor (2008) note the need for compatible legal infrastructure (e.g., familiarity of judges with the relevant legal doctrines, plaintiff incentives, etc.) and compatible political-economic institutions (e.g., how the laws would be used given the interest group structure). Berkowitz, Pistor, and Richard (2003) find that effective legal systems are either developed internally, heavily adapted, and/or have precursors in the local law with which the population is familiar. Furthermore, Aldashev (2009) reviews several recent models of political economy that show how legal reform, particularly of

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41 With due apologies to Abhijit Banerjee; see Banerjee, A. V. 2005. “Growth Theory Through the Lens of Development Economics” MIT.

42 Aldashev (2009) notes the coarse measures of legal institutions they use and cautions us against reading too much into this result.
laws and regulations, is conditioned by interest groups who stand to gain or lose from the reform, and suggests that the eventual nature and consequences of the legal change will in all likelihood be different from what was intended.

**Legal reform in a context of legal pluralism.** One context where formal legal change is unlikely to have its intended effects is in a setting of legal pluralism, where informal legal institutions play an important role. In just one example from the micro literature, Brasselle, Gaspart, and Platteau (2002), in a study of property rights in Western Burkina Faso, are unable to find a statistically significant effect of land titling on investment. Rather than concluding that land titling is unimportant, they show that this is because the pre-existing informal tenure system gives extensive guarantees of security of property (even in the absence of formal titles), but also strongly limits impersonal exchange. Because security of tenure already exists (albeit informally), and because there is less incentive for anyone to switch to the new ‘technology’ of formal title, the legal reform is unlikely to have a *measurable* impact. This is despite the fact that property rights are, in fact, important: for instance, Goldstein and Udry (2008) find that individual security of tenure within the informal system matters for the intensity of investments (the length of fallowing). But without empirically measuring these informal rights, any study of formal titling is bound to underestimate the impact of formal titling.

This also raises a clear concern for policy. Policymakers must account for and incorporate customary law and informal legal institutions into the parameters of formal legal reform. This may require engaging with local realities (e.g., informal rights of tenure) and values (e.g., emphasizing restorative rather than punitive justice) and bringing them into the formal system. This is hardly easy, and requires policymaking to be grounded in a deep empirical understanding of the landscape of customary law and local institutions. An illustrative case is Liberia’s law on rape, which takes a zero tolerance policy towards statutory rape, defining minors as under-18s; this sits uncomfortably with the law on customary marriage, which recognizes marriage for individuals aged 16 or older. Vigorous activism by civil society on the rape law has, at least anecdotally, led to a widespread understanding that rape is a serious crime – but at the same time, created an incentive to use rape accusations as a ‘threat point’ for bargaining over more mundane disputes; a strategy of dispute resolution for which there is some (anecdotal) evidence.

A second useful illustration is Uganda’s 1998 Land Act, which aimed to strengthen customary ownership rights by providing certificates of customary tenure and occupancy with the possibility of upgrading to freehold title (Government of Uganda 1999). The Act sought to recognize customary laws and institutions, and included progressive provisions to strengthen the land rights of women and children, especially widows and orphans. It also sought to decentralize land administration, establish specialized land tribunals for dispute resolution, compensate landowners for losses due to the new laws, and set aside tracts of land for communal use. Despite its laudable objectives, Hunt (2004) describes a series of unintended consequences of the 1998 Act, including: less credit availability for poor people as stronger occupant and dependent rights increased the number of potential claimants on a given parcel; greater ambiguity
for women’s rights over inherited property; strategic land procurement and transfer to prevent land from falling into the hands of dependents; backlogs of legal cases caused by the lack of capacity of new dispute resolution mechanisms; inadequate compensation for current owners, etc. Thus even when obvious contradictions between customary and formal systems are dealt with, it is far from easy to incorporate customary law into formal systems that are not designed for it.

**Theorizing legal reform in a context of legal pluralism.** One of the few systematic treatments of legal reform in a context of legal pluralism is conducted by Aldashev et al. (2008), who study the question of how substantive ‘progressive’ legal reform (defined broadly as reform that enhances the rights of disadvantaged groups such as minorities, women, or the poor) affects the behavior of informal justice providers (customary judges and mediators) and outcomes for the disadvantaged group. In their model, disputes arise between the rich and the poor, and a customary judge (normally on the side of the rich) first tries to settle the dispute. Dissatisfied plaintiffs can appeal to the formal court, but at the cost of the exclusion from the community. The customary judge wants to keep the community cohesive and therefore adjusts decisions in some way towards the preferred verdict of the poor. The key theoretical finding is that a pro-poor legal reform could cause the customary judge to become more or less pro-rich, depending on the distribution of outside options for poor plaintiffs. This also has an ambiguous effect on the welfare of the poor: while poor plaintiffs that opt out of the informal legal system are better off after the reform, those that remain within the ambit of the informal system might be hurt (as the customary judge becomes more pro-rich, and the community’s social capital goes down).

The paper looks at case-study evidence from Sub-Saharan Africa and India and finds that in the domain of women’s rights, moderate formal reforms have caused the custom to adjust in the right direction, thereby increasing the welfare of women. The model is founded on simple assumptions about individual entry and exit from the community, and crucially assumes that the formal system is not expensive to access and is impervious to ‘capture’ by the elite; which is a strong assumption given the high informational, social, and often logistical and financial costs of accessing the formal system. Nonetheless, it has not been empirically tested; one of the first attempts to do so will be by using new data from a household survey carried out by the author and colleagues in Liberia.

**Customary justice and legal pluralism in Liberia**

**Context.** In the wake of the Liberian civil war, international donors have led a push to reform the legal system. Community-level interventions by local and international NGOs have sought to improve human rights awareness through training and education programs. At the same time, governments and donors have strived to strengthen the rule of law by (a) expanding the reach of the formal legal system and (b) promulgating progressive new legislation, which as discussed earlier, is oftentimes at odds with local norms and customs. These measures typically encounter immediate constraints on the ground, in part because ordinary citizens know little about the formal law and are
accustomed to the form of justice meted out by traditional institutions, and in part because the formal system is hard to access, corrupt, and non-transparent (Lubkemann, Isser and N’Tow 2009). While such changes could in theory make customary law more progressive by creating a better alternative option, too-rapid or radical changes could also adversely affect the poorest individuals with the least recourse to outside options – a possibility outlined by Aldashev et. al. (2008). Finally, rapid changes in statutory law and in the allocation of judicial and administrative responsibilities have created widespread confusion about the substance of the law, the proper passage of appeal, and the rights and responsibilities of different actors in the justice system.

**Household survey.** From Sept. 2008 to Feb. 2009 the Centre for the Study of African Economies, in partnership with the Carter Center, the United States Institute of Peace, and George Washington University, conducted a baseline survey of approximately 2,300 households in 176 communities in five counties in Liberia. The study had two broad objectives: to describe the landscape of legal institutions in the dual legal system, with the broad idea of capturing the reality of the justice system and in particular the strategies and experiences of Liberians seeking justice; and to evaluate a mobile paralegal (‘community legal advisor’) program run by the Carter Center by means of a randomized controlled trial (RCT).

The survey collected a host of household socio-economic characteristics, as well as information on a wide range of conflicts and disputes, including assault, sexual violence, murder, theft, land, debt, property, and family. Respondents provided details of each incident that occurred within the past year, including the forums visited, the time and costs incurred, and details of the judgment including subjective satisfaction. In addition, the survey conducted more than 300 key informant interviews with local police, magistrates, commissioners and community justice providers (chiefs, elders, secret society leaders) to measure the overall incidence of crime and conflict, norms and beliefs, and the broader institutional context. Findings from the baseline study are summarized below (see also Tables 1, 2, and 3 in the appendix):

**Liberians prefer the customary system**

- Most Liberians agreed with the statement that decisions by traditional leaders should take precedence over the formal law, with little statistical difference across household head ages or level of influence in the community, suggesting a broad social consensus, with two notable exceptions:
  - Female-headed households are less likely to agree than their male counterparts, possibly suggesting that female-headed households get inadequate justice in the customary system.
  - Households that experienced war violence are more likely to agree with the statement, possibly because the experience of war and/or the lack of adequate response for war victims may have soured people from taking recourse to the state, or made them more likely to obey local social norms.
Liberians see formal legal institutions as more costly and harder to access, and as practicing laws and procedures that the ordinary Liberian considers hard to understand. The observed costs of the formal system are also higher, including ‘punishments’ (including compensation, fines, corporal punishment or apologies). This is most likely due to the nature of the cases that are taken there.

When disputes are taken to a third party, the informal system is overwhelmingly the system of choice along the entire spectrum of conflicts and disputes, with only the most serious crimes such as murder and rape being taken in any significant number to the formal system. This suggests a perceived bifurcation of formal and informal systems in which formal realm is seen as appropriate for grave crimes and the informal realm is seen as appropriate for less serious crimes. Nonetheless, even for grave crimes the cases are evenly split across the two systems.

The formal system of justice is widely perceived as less ‘fair’; one likely reason why it is less used. In the limited number of instances when the system is used, complainants seem to be roughly as satisfied with decisions issued by both systems. The accused on the other hand are significantly less likely to consider the formal system ‘fair’. This supports the idea that the formal system offers punitive justice and is less likely to offer avenues of compromise, so that accused individuals prefer the more ‘restorative’ justice of the informal system.

Women who take cases to the formal system report greater satisfaction with formal legal outcomes. Nonetheless, female complainants are less likely than male complainants to take cases to the formal system. This may not reflect a difference in perceptions of the formal system, but simply a ‘selection’ effect: because the costs of access are so high, women only take a small set of cases to formal forums, possibly those where progressive laws apply and are able to provide them better outcomes.

Insofar as this indicates real barriers for women to accessing the formal system, any rule of law strengthening needs to target women both in terms of education about rights, information about laws and institutions, and support in terms of advocacy and legal aid.

**But the customary system is not perfect**

The average Liberian household reported three disputes to the survey team; yet most people do not carry disputes to any forum. While many minor disputes may be resolved congenially by both parties, this is worryingly true of the most grave crimes and conflicts including murder, rape, assault, etc. This suggests that many people are not getting adequate access to justice in either system.

Although more proximate and socially acceptable, the customary system shows signs of being dominated by local influential.

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**Conference on Customary Law**

**Washington, DC**

**November 17-18, 2009**
Respondents confronting ‘powerful’ opponents (landowners, administrators, and other local elites) are uniformly less satisfied with the outcomes of their cases. This gap between ‘powerful’ and ‘powerless’ is largest (though only marginally so) in the customary system. This suggests that even while the formal system is hard to access, the informal system may also be captured by elites.

When are involved in a dispute, the case either goes to the formal system or is not reported at all. This suggests that individuals may be forced to compromise with influentials rather than get adequate redress from the customary system.

Poorer people (proxied by those who stated subsistence farming as their main or sole occupation) are less likely to take cases to any third party, suggesting that those with the least means are also the least able to access justice.

**Suggesting some avenues for policy**

- For policymakers, this suggests two avenues for policy: extending the accessibility and relevance of the formal system, and strengthening the customary system with an aim to make it more progressive and open. While both avenues should be pursued simultaneously, given scarce resources it is necessary that any rule of law interventions address both avenues as much as possible.
  - The research suggests that it is younger, female-headed households victimized in the war who are perhaps the strongest constituency for access to formal sector justice. Any interventions aiming to increase access to justice should target these constituencies, possibly through focused information, direct engagement, and legal advocacy.
  - Local attitudes are hostile to, or at the least unaccepting of the formal law and practices. Individuals may find their choices constrained due to peer pressure and social sanctions. Attitudinal change, through provision of information, is thus a supporting intervention. Such information could also improve the performance of the customary system by increasing the ‘outside options’ of those affected by crime and conflict.
  - A cost-effective and locally popular way to strengthen the customary system may be through engaging with local chiefs, elders, and others involved in the informal system, transferring further knowledge about the formal system and helping them develop comprehensive and fair dispute resolution skills.

- Civil society organizations (‘NGOs’) are typically not used as forums for dispute resolution, possibly because there are few justice-providing NGOs. At the same time there is clearly unmet demand for access to justice, and NGOs are considered more comprehensible, more fair, more respectful of local norms, and less costly than the
formal system. This suggests that NGO programs specializing in dispute resolution and access to justice that work in conjunction with customary norms and practices could be a good avenue for policy intervention.

Program evaluation. The second use of the survey was to evaluate the impact of a mobile paralegal program using a randomized controlled trial (RCT). RCTs have become a mainstream method for program evaluation, and have incited much discussion in the policy sphere. The benefits are straightforward: while most program evaluations will struggle to establish that any observed impacts are due to the program – as opposed to any third factor – an RCT can establish a causal relationship between the program and observed outcomes by randomly assigning units (individuals/households/communities) to a ‘treatment’ group (that receives the program) and a ‘control’ group (that does not). Comparison of outcomes after the program has been in place for a suitable amount of time provides a credible measure of impact. Methods of conducting RCTs have been refined and developed systematically over the last 15 years, and variations include measuring outcomes both before and after treatment, accounting for externalities or spillovers across treatment units, etc. Further discussion of these methods is not appropriate here, but a wealth of literature can be found on the subject (e.g., Duflo, Glennerster, and Kremer 2006).

The RCT method was considered appropriate for evaluating the policy intervention of interest in Liberia: a mobile community-based paralegal program administered by the Carter Center. Mobile, community-based paralegals are trained in mediation, advocacy, domestic law, and the roles of the different legal agencies, and provide free-of-cost legal advice and services to the village residents. They assist disputants in negotiating local problems and directly mediate disputes if so requested. The approach and methods of community-based paralegals are discussed in detail in Maru (2004), who looks at a similar program in Sierra Leone.

Following the baseline survey in 176 communities, half (88) communities were randomly allocated to treatment and control groups. Since May 2009 the treatment group has received regular visits from the paralegals, who typically visit each community 1-2 times a month, so as to gain the community’s trust and provide all members of the community ample opportunity to avail of the paralegals’ services. Follow-up surveys will be conducted in both treatment and control communities in Mar. 2010 after several months of exposure to measure possible differences in key outcomes: justice outcomes (incidence, reporting, and resolution of disputes); reported satisfaction and trust in the justice system; household-level economic outcomes; and the behavior of justice providers. Observed differences in outcomes between the two groups of communities can then be directly attributed to the presence of the program.

RCTs have become the ‘gold standard’ for program evaluation; like the original gold standard, they also face their challenges. The clear benefit of RCTs is high ‘internal validity’, i.e. it is possible to attribute any observed differences between treatment and control units as a causal consequence of the program of study. Nonetheless, RCTs have been criticized for being a) limited in applicability, as not everything can be or should be
randomly allocated, even in a pilot phase; b) large and expensive to administer, given
the requirements of statistical significance; and c) valid only for the particular context
and design of the program in question – i.e. low ‘external validity.’ The debate rages on about the use and applicability of RCTs, with
recent editions to be found in Deaton (2009) and Imbens (2009). Nonetheless, RCTs
have raised the bar for program evaluation, and more generally for the level of empirical
evidence required to assess the impact of reform.

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**Table 1. Forum Usage for Crimes and Disputes**

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<tr>
<th></th>
<th>Number of Cases</th>
<th>Percent of Cases Taken to</th>
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<tbody>
<tr>
<td></td>
<td>No Forum</td>
<td>Informal Forum</td>
</tr>
<tr>
<td>Bribery/Corruption</td>
<td>14</td>
<td>57</td>
</tr>
<tr>
<td>Debt Dispute</td>
<td>1497</td>
<td>67</td>
</tr>
<tr>
<td>Family/Marital Dispute</td>
<td>788</td>
<td>58</td>
</tr>
<tr>
<td>Labor Dispute</td>
<td>157</td>
<td>65</td>
</tr>
<tr>
<td>Land Dispute</td>
<td>430</td>
<td>32</td>
</tr>
<tr>
<td>Property Dispute</td>
<td>68</td>
<td>53</td>
</tr>
<tr>
<td>Witchcraft</td>
<td>227</td>
<td>56</td>
</tr>
<tr>
<td>Total Civil</td>
<td>3181</td>
<td>59</td>
</tr>
<tr>
<td>Assault</td>
<td>600</td>
<td>52</td>
</tr>
<tr>
<td>Domestic Violence</td>
<td>974</td>
<td>53</td>
</tr>
<tr>
<td>Murder</td>
<td>97</td>
<td>53</td>
</tr>
<tr>
<td>Property Destruction</td>
<td>548</td>
<td>78</td>
</tr>
<tr>
<td>Rape/Sexual Abuse</td>
<td>113</td>
<td>50</td>
</tr>
<tr>
<td>Theft</td>
<td>1420</td>
<td>78</td>
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<tr>
<td>Other Crime</td>
<td>303</td>
<td>55</td>
</tr>
<tr>
<td>Total Criminal</td>
<td>1877</td>
<td>53</td>
</tr>
<tr>
<td>Total Civil and Criminal</td>
<td>5058</td>
<td>57</td>
</tr>
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</table>

**Table 2. Selected Outcomes by Forum**

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<thead>
<tr>
<th></th>
<th>Complainant/victim</th>
<th>Accused</th>
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</thead>
<tbody>
<tr>
<td></td>
<td>None</td>
<td>Informal</td>
</tr>
<tr>
<td>Bribery/Corruption</td>
<td></td>
<td></td>
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<tr>
<td>Debt Dispute</td>
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<tr>
<td>Family/Marital Dispute</td>
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<td>Labor Dispute</td>
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<td>Land Dispute</td>
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<tr>
<td>Property Dispute</td>
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<tr>
<td>Witchcraft</td>
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<td>Total Civil</td>
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<tr>
<td>Assault</td>
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<td>Domestic Violence</td>
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<td>Murder</td>
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<tr>
<td>Property Destruction</td>
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<tr>
<td>Rape/Sexual Abuse</td>
<td></td>
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<tr>
<td>Theft</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Other Crime</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total Criminal</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total Civil and Criminal</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>
Table 3. Multinomial Logit Analysis

<table>
<thead>
<tr>
<th>Characteristic</th>
<th>Formal-Informal</th>
<th>Formal-No forum</th>
<th>Informal-No forum</th>
</tr>
</thead>
<tbody>
<tr>
<td>Complainant: Male [1=Yes]</td>
<td>62.8**</td>
<td>60.4**</td>
<td>-1.5</td>
</tr>
<tr>
<td>Complainant: Powerful [1=Yes]</td>
<td>7.5</td>
<td>-14.8</td>
<td>-20.8***</td>
</tr>
<tr>
<td>Complainant: Powerful relations [1=Yes]</td>
<td>35.6*</td>
<td>-3.2</td>
<td>-28.6***</td>
</tr>
<tr>
<td>Complainant: Subsistence farmer [1=Yes]</td>
<td>-44.0***</td>
<td>-42.3***</td>
<td>3.2</td>
</tr>
<tr>
<td>Accused: Ethnic majority [1=Yes]</td>
<td>1.7</td>
<td>6.0</td>
<td>4.3</td>
</tr>
<tr>
<td>Accused: Male [1=Yes]</td>
<td>155.1***</td>
<td>232.2***</td>
<td>30.2***</td>
</tr>
<tr>
<td>Accused: Powerful [1=Yes]</td>
<td>41.0</td>
<td>3.6</td>
<td>-26.5**</td>
</tr>
<tr>
<td>Accused: Powerful relations [1=Yes]</td>
<td>16.4</td>
<td>11.9</td>
<td>-3.9</td>
</tr>
<tr>
<td>Accused: Subsistence farmer [1=Yes]</td>
<td>-42.5**</td>
<td>-44.1*</td>
<td>-2.8</td>
</tr>
<tr>
<td>Respondent is Complainant [1=Yes]</td>
<td>-54.8**</td>
<td>-98.9***</td>
<td>-97.6***</td>
</tr>
</tbody>
</table>

N = 4987; dispute dummies not shown
*** p<0.01
** p<0.05
* p<0.10

Discussion of Table 3. Table 3 presents results from a multinomial probit analysis, looking at a single outcome: where people choose to take their disputes. Arguably, this is the most illuminating decision, since people are most likely to take disputes to places that are the least difficult to access and give them the greatest chance of a good outcome. In making this decision, they may take into account the costs of access, the likelihood of ‘winning’ the case, cultural and social norms, and other important factors. They may also consider the other party’s characteristics and choose a forum that gives them the most relative advantage.

The first column lists accused and complainant characteristics that may explain the choice of forum: whether they are male; from the ethnic majority in their community; in a position of power; related to a person in a position of power; and whether they identified subsistence farming as their main occupation. Conceivably, either or both parties could have played a role in deciding where a dispute is ultimately taken. By accounting for the characteristics of both parties, we allow for differences between complainant and the accused in bargaining power, but do not impose any assumptions about how this decision was made. We also account for whether the respondent was
the complainant or accused to account for differences in how the dispute was reported.

The rest of the table looks at a simple metric: how does any single characteristic of either disputant change the probability that a dispute goes to a particular forum? We have classified forums, as earlier, into three categories: “Formal” (police, courts, govt agencies, justices of the peace, etc.); “Informal” (chiefs, elders, secret society members, soothsayers, local influentials, community members and senior family members); and “No forum” (the dispute was not taken anywhere, which means that either the parties resolved it within themselves, or it remained unresolved). The three columns of statistics capture the choice an individual makes between any two ‘forum-pairs’ (“Formal-Informal”, “Formal-No forum”, “Informal-No forum”). For each characteristic in the first column, the numbers in columns 2-4 show the percent change in the likelihood (technically, in the ‘log-odds ratio’, which is a measure of probability) that a dispute goes to the first forum in the pair as the characteristic changes, i.e. as we move from ethnic minorities to majorities; female disputants to male; powerless people to powerful; etc. The sign of the numbers tell us whether the probability of going to the first forum goes up or down (a positive number means that it goes up), while the size tell us exactly how much more or less likely on average. Finally, the number of *s on each coefficient tells us how likely it is that the result reflects a tendency of the general population. No *s mean that it is probably just an artifact of the survey sample.

For example, holding constant a complainant’s occupation, ethnicity, power and social connections and all characteristics of the accused, a male complainant is more likely than a female complainant to take a case to a formal forum than an informal forum (column 2) or nowhere at all (column 3). This effect is statistically significant as evidenced by the *** on the coefficient in each column. Thus holding all else constant, male complainants are more likely to take cases to formal forums, while female complainants are more likely to use informal forums or not report the case at all. This is the ‘pure’ effect of the complainant’s gender (at least, holding constant ethnicity, occupation, power and connections) on their decision.

Findings:

- Males comprise four-fifths of complainants and three-quarters of accused. All else equal, male complainants are more likely than female complainants to take cases to any forum. Women typically do not take cases anywhere. Cases that make it to the formal system are far more likely to be taken there by a male and not a female complainant.

- Controlling for other characteristics, the dispute is also more likely to be taken to a third party when the accused was male.
Complainants from households with powerful people or related to powerful people are most likely to take cases to formal forums. If not, the case is not taken to a third party at all. They are least likely to take a case to an informal forum.

Being an ethnic minority in one’s village seems not to affect one’s choice of system.

Three quarters of the sample report subsistence farming as their main occupation. Subsistence farmers are less likely to report cases to a third party, and disputes where the accused were subsistence farmers are less likely to be taken to a third party as well.
The ascertainment of customary law: What is it and what is it for?
By Manfred O Hinz

Background

1 Comparative law informs us that different legal orders have different ways of manifesting law. While some keep law orally, others opt for law in writing. While some limit the writing of law to writing law incidentally, i.e. in the application of cases, others opt for writing law in an abstracted manner, eventually by way of selective statutory enactment or even comprehensive codification.

2 Common law systems (English, American, Roman-Dutch) prefer the appearance of law through its application in cases. Civil law countries show a practice of codification going back to the end of the 19th century.

3 It is important to recall these differences in order to underscore that it would not be appropriate to point at one way of manifesting legal rules as the only acceptable way of manifesting it. If one goes deeper into the history of given legal systems, one will detect that very concrete societal circumstances prompted the developments of the various legal systems.

4 A very enlightening current debate is the debate between proponents of common law, on the one side, and proponents of civil law, on the other, who argue about the adequacy of both approaches to provide legal answers to societal challenges. Do we need more or less statutory interventions? Is common law able to provide the necessary certainty in a globalising world? Would statutory interventions not contribute better to legal pro-activity whereas common would only be reactive?

African customary law: The call for codification

5 African customary law systems have, as the Anglo-Nigerian lawyer Effa Okupa holds, survived thousands of years as orally transmitted codes of law. They will not become more law when codifying them. Common law has survived the times of history and remained a highly valued system of law without being codified. Why then argue lawyers that African customary law has to be codified? An argument that accompanied the discourse in African jurisprudence since the days when many of the now independent African states achieved their independence!

6 Looking closer, it becomes obvious that many western-educated lawyers did never take it on them to enquire about the nature of African law. For them, African customary law was very different from the law learned in school. In actual fact, not only just different, as French law is different from Dutch law! African customary laws show differences to western law because they are based on different concepts of justice and maintain procedure rules geared towards
achieving their concepts of justice. In view of this and in view of the fact that there was no administration of justice comparable to the administration of common law that would produce reliable precedents, the call for codification appeared to be the easiest way to uplift African customary laws to the standard (1) of real (!) law.

Lawyers in French or Portuguese-speaking countries could even employ a more radical positions as the legal education obtained in these systems did basically not provide a place for customary law in their respective codified systems. The result we see up today in former French of Portuguese African countries is that African customary law lacks recognition and has remained second class law.

What is ascertainment of customary law?

Having said this, we can now explore the meaning of ascertainment of customary law and also discuss methodological aspects related to its ascertainment. What do we refer to when talking about the ascertainment of customary law? What do we expect when calling for the ascertainment of customary law?

The Namibian Community Courts Act deals (influenced by similar legislative practice in many former British colonies) with the ascertainment of customary law in its Section 13. This section prescribes the procedures to be applied by courts in case of doubt as to the existence or content of a rule of customary law. In such cases, courts have the power to ascertain customary law by consulting cases, text books and other sources or by calling for oral or written opinions. In other words, ascertainment of customary law means, in legal understanding, more than having customary law in one way or the other, recorded. The act of ascertainment awards the ascertained version of customary law a legal qualification.

Mere academic records of customary law based on questionnaires, court observations, analyses of case books of traditional courts, collections of cases and cases-complementary information from parties to cases, cannot be considered as an ascertainment of customary law. As useful records of this nature may be, as much as they may potentially contribute to the ascertainment as evidence a court may or may not rely on, they remain aids for a possible subsequent ascertainment in the above-stated legal sense.

The Traditional Authorities Act of Namibia supports this view. According to the Act, ascertainment can be defined as any kind of authoritative transfer of orally transmitted customary law into a written form. According to Section 3(1) of the Act, it is one of the tasks of traditional authorities:

to ascertain the customary law applicable in that traditional authority after consultations with the members of that community, and assist in its codification; ...
consolidation in writing, as long as the results of the transfer of orally transmitted customary law into writing contribute to certainty with respect to customary law.

13 We can, therefore, speak of ascertainment of customary law in cases of codified customary law, i.e. where we have a statutory instrument that transforms a written form of customary law into a binding act. We can, however, also speak of ascertainment when customary law is transferred into what has become known as the **restatement of customary law**. I refer here to the restatement project conducted by the School of Oriental and African Studies of the University of London (SOAS) under Antony Allott. Allott defines the restatement approach, *borrowed*, as he says, *from the American Restatements*, as follows: Restatements were authoritative, comprehensive, careful and systematic statements of common-law rules in such fields as torts, contracts and property. Necessarily cast in semi-codified form, they were still not codes, as they lacked the force of legislated law. Instead they were the most accurate and precise statements of what those producing them had concluded were the main principles and rules as evolved by the courts, and, as such, courts and practitioners alike could turn to them as guides.

14 But we can also speak of ascertainment of customary law when traditional communities produce their own versions of their customary law in writing, versions of customary law, for which, in the Namibian context, the term **self-statement of customary law** has been accepted.

15 Self-stating customary law refers to a process of ascertaining customary law by the owners of the law to be ascertained, the people, the community, the traditional leaders as the custodians of customary law. The procedures of self-stating may differ from community to community; the most important element in self-stating is that the end-result will be a product created in the community, which is to follow and apply the law. Instead of injecting into the communities what the law ought to be, it is left to the community to decide what part of their law is to be consolidated in writing, as the community and community stakeholders will know best, what their law is and where certainty through writing is called for.

16 The result of self-stating is binding to the community. Nevertheless the quality of self-stated customary law as binding will not prevent the community to change their law as need arises. As the self-stated law is owned by the community, the community has authority and power to amend the law. Self-statements come close to codification, codification not by the organs of state, but by organs of the traditional communities themselves. In actual fact and seen from the perspective of the communities, self-statements of customary law are codifications by the communities.

17 The following is a model for the ascertainment of customary law. The model is based on experience with the ascertainment of customary laws in Namibia through self-stating the law by the communities. The model consists of ten steps:

1) Identify the target community(ies);
2) Do legal background research with respect to the community(ies);
3) Draft policy on ascertainment of customary law;
4) Develop a comprehensive enquiry guide;
5) Agree with community on the ascertainment process and structure;
6) Recruit and train ascertainment assistants;
7) Conduct respectively supervise the ascertainment project;
8) Conduct complementary research in identified community(ies);
9) Promote the compilation of the ascertainment texts;
10) Prepare publications in, at least, two languages, the vernacular language and English.

Who needs ascertained customary law and how should ascertainment be done?

Who needs ascertained customary law? Do customary law applying traditional leaders need customary law ascertained? Before the many interventions by statutory law, and, more so, before the development of independent nation states, traditional leaders could state with good reasons: Why to ascertain customary law? We know our law; it is only you, coming from outside, who want to impose on us some kind of written versions of the law, which, anyway, will not be our law! This attitude to the ascertaining of customary law has changed. More and more traditional leaders understand the reasons for ascertaining customary law, accept ascertainment undertakings, even request to have the laws of their communities ascertained and take the lead in ascertainment projects. Traditional communities are not homogeneous communities anymore, where basically everybody knew what the law of the community was; and where traditional ways to communicate knowledge provided the necessary education of young people to grow into the value framework of the community.

There is a growing understanding that the legal complexity experienced in urban settlements where various customary laws apply need attention by ascertaining and even standardising customary law. There is a growing acceptance that the verdict of the chiefs is not necessarily the last word anymore; dissatisfied parties may take the verdict of a chief to appeal. The judges sitting on appeals will not necessarily know what the customary law applied by the court a quo is and fail to get knowledge unless there is something in writing to inform the judge.

Conclusion: Customary law – living law!

There are important lessons which legal anthropological research developed over the years and which also have been acknowledged by courts of law.

These lessons support the voices today who speak against the codification of customary law, because codification will destroy one of the most important qualities of customary law, namely its openness to accommodate reconciliatory solutions to problems instead of allowing the law (whatever this may be) to win over the parties. The very famous US-American legal anthropologist Hoebel compared once customary law with international law as for both reaching solutions acceptable to all concerned is the ultimate objective. This is also why in some fields of international law, the doctrine of stare decisis does not apply.
22 It may be noted and this also in view of the repeated reference to Namibia, that the once very relatively strong opinion in favour of the codification of customary law was not able to produce one piece of codification since independence. To my knowledge, there are also no other recent attempts of codification of customary law recorded in Africa.

23 South African courts support the vote against codification. South African courts were faced with the situation where the law lived in communities had developed away from the law as it was offered in old records of customary law. It was found that the living law was the customary law to be accepted by courts and not the so-called official laws of the books. This really challenging jurisprudential development accepts – as promoted by legal pluralism – that customary law as the local law of the people would lose its quality to be the people’s law when codified into a statutory type of document.

24 However, it will ultimately be a political decision which way the ascertainment of customary law in a given situation will take:

- the way of codification, resulting in an act of parliament (or several acts of parliaments);
- the way of restating the customary law in the sense of the then SOAS restatement project;
- the way of self-stating customary modelled after the Namibian experience; or
- any other way in between the three alternatives.

The political decision will also have to consider:

- the scope of ascertainment;
- its format; and, in particular also,
- the interaction between the various local stakeholders who may play a role in the process of ascertainment.
Customary law regimes are a common target for efforts to improve national administration of justice due to the perception and often reality that the body of customs that form the basis of decisions violate international human rights standards. However, there is increasing recognition that customary systems are more transparent and better understood to local populations than the formal justice systems and that consideration for traditional beliefs and practices are necessary for a broader and more effective human rights dialogue.

A defining characteristic of customary justice systems is their accessibility. Many customary or community justice systems around the world exist in parallel from the formal judicial system, largely due to the inaccessibility of the formal system due to geographical/infrastructure reasons – courts are nonexistent or located only in central cities; cultural/educational reasons – laws/procedures of the formal system are not generally understood or act in contrary to cultural beliefs; or financial reasons – court fees are too high, often due to corruption, and lawyers are too expensive. In reality customary justice systems have long been the primary dispute resolution body in many countries, far predating the professional development of formal justice systems. They were created to solve community problems according to local customs and their utility to these communities has never been usurped by the state-backed formal system. In any discussion of customary justice reform it is important to realize this role and the underlying reasons why the systems continue to exist with the overwhelming support of local populations.

**Customary Justice Study in Southern Sudan**

To frame the context of what needs reform in customary justice systems and the challenges, I present the results of a UNFPA study conducted on customary justice administration, particularly as relates to gender-based violence (GBV) in southern Sudan. In 2007 I led a team of consultants to gather data and present analysis on the state of administration of justice on gender-based violence cases in customary courts in four regions – Rumbek, Yambio, Juba and Bentiu – covering approximately six tribes over nine customary courts. The study used researchers from each region to document daily cases over a 2-month period. The researchers kept detailed notes on the facts, applicable law, rulings, and punishments for each case. In all 609 cases were observed. The researchers also conducted interviews with litigants from the cases on their opinion of the courts.

In southern Sudan customary courts are open and held in highly public places such as under large trees. Litigants (except children) and observers attend the courts daily. Typically a panel of chiefs will hear and decide a case, discussing the case openly between them. Rarely do chiefs convene privately to discuss a ruling. As a result the rationale behind each judgment is apparent and the process generally transparent. This
is both a defining element in the faith people place in the courts and a driving mechanism for accountability on the part of the chiefs.

Reporting of results by the observers were geared toward GBV cases in particular, but revealed interesting and evolving interpretations of customary law, especially in relation to human rights concepts from the Interim Constitution of Southern Sudan (ICSS). The interviews revealed a strong preference for the customary courts, even by those litigants who had cases decided against them.

As illustrated below a large portion of the cases observed, 72%, were GBV cases. 86% of those interviewed felt the punishment was fair, with more, 95%, more generally indicating faith in the court to provide justice.

Summary of Findings

contained in the Annex, related to GBV reveal a strong propensity for restorative punishments – a common element in family law across many tribes of the region – and a mixed, often inconsistent application of law and punishments for spousal abuse.

Improving Customary Justice

As part of the study the results from the court observations were presented in community-wide meetings including chiefs, women’s groups, police, judges and other local leaders. The rulings of certain cases were reviewed and discussed openly, with particular emphasis on the ICSS and whether decisions and certain laws were in violation of the rights it protects. The initial purpose of the meetings was to cross-reference the case data with reaction from the communities, but in reality the meetings served to initiate (or continue) a community-wide dialogue on reform of customary justice in line with changing community norms and national law.
The reform discussion held in these communities represent a promising initiative for improving customary justice and one that is based in the community and embraces the very nature of the community dialogue process that is part of law reform in any society. The relative transparency and openness of the customary courts and application of customary law allows this.

In addition to initiating these types of community dialogues based on empirical research and real-life cases, I have listed four other “bottom-up” activities that have shown promise in improving customary justice:

- **Direct collaboration and training of chiefs or customary court judges.** In my experience working with chiefs, including training on human rights and revision of cases and judgments is one of the most effective methods for advancing internal change. I have found chiefs generally very open to collaboration and receptive of human rights discussions. Chiefs have incentives to be responsive to changing community norms, as their judgments and other decisions partially determine their level of respect within the community.

- **Increasing community awareness of human rights and alternative options for legal remedies.** In relation to the previous point an increasingly educated citizenry will tend to demand greater recognition of human rights and associated reform in customary courts. Given the open nature of most customary courts and the constant presence of chiefs in communities, they generally need to be responsive to changing community norms. Educating communities on other legal options for remedy of rights abuse in the formal system increases the pressure on customary courts to be responsive or risk losing relevance vis-à-vis the formal judiciary.

- **Paralegal networks and monitoring of abuses in customary courts.** Developing paralegal networks in communities is an activity that can help realize the previous two points, but that also has additional advantages to reform. Paralegals can be a strong community presence that educate community members on legal structure, rights and remedies and actively monitor cases in customary and formal courts for violations. My work with paralegals and project consultants in southern Sudan demonstrated that their presence monitoring the courts can actually lead to consultation from the chiefs while deciding a case. In multiple instances paralegals were requested by chiefs for information on human rights standards for particular cases. Paralegals are a good resource for training efforts with chiefs due to their standing in the communities and can also help link customary court users to legal representation for cases that they want to bring to the formal system.

- **Case review and remand system.** Building off of the monitoring and legal counseling activities of paralegals, increased linkages to the judiciary reinforces reform efforts in individual customary courts. Ideally a system exists or can be created of appeal/referral of cases from the customary courts to the judiciary and remand of cases back to the customary courts for cases not decided in accordance with human rights standards or national laws. However, linkages
such as these between the formal and informal systems are most often nonexistent or poorly developed. Linkages can be encouraged between the two systems even without an established structure. Legal aid organizations and public interest lawyers can play a role in linking the two systems by bringing customary court cases to the formal system or providing legal counseling on the two options. Having judges participate in trainings with chiefs to fulfill their technical oversight role is another option. The more formal system judges are involved in some capacity with the customary courts the more it encourages reform of bad judgments.

ANNEX – Sample Cases

The following are excerpts from cases observed and reported by local consultants from a UNFPA study on gender-based violence cases in customary courts in southern Sudan from January-March 2008.

Case 1
Date: 4/2/08; Kator B Court, Kator Payam, Juba

On this date there were approximately 40 men and 40 women at the court. Three cases were heard, including one on GBV. In this case a wife, 30 years old, from the Bari tribe brought a case against her husband, 32 years old, also from the Bari tribe. The wife accused the husband of failing to give her money for food, medication and welfare of the children and drinking alcohol and beating her. The husband was found guilty of drinking too much and being under the influence of alcohol while beating his wife. He agreed and admitted to drinking alcohol. He was made to swear according to Bari customs by licking a traditional spear in public while pledging not to drink alcohol and beat his wife. The husband was charged 10 Sudanese Pounds (SPds) for the spear swearing and 25 SPds for court fees. The woman was hopeful that the husband would change his behavior.

Case 2
Date: 27/2/08. MTC Court, Juba

There are four Mundari chiefs from Terekeka and Tali today at the Juba MTC Court. There are approximately 30 women and 50 men. The court is held under a large tree behind the Juba Stadium. The wife brought a case against her husband for abuse. She was beaten badly by her husband because she had been drinking too much alcohol and insulting everyone at home. The chiefs said beating your wife is a crime and that if she does something wrong she should be spoken to instead. The wife was punished for drinking alcohol and sworn by the spear and Holy Bible to not drink again. She paid 25 SPds for court fees and 25 SPds for table fees. The man was reprimanded for beating his wife but was not punished.

Case 3
Date 5/2/08; Malual Bap Customary Court, Rumbek
Malual Bap is a regional customary court located in Rumbek town that serves three rural payams in Rumbek Central County south of Rumbek town. Cases are heard daily by an executive chief, approximately three sub-chiefs, and a court secretary. The court is held under a large mango tree near the main market in Rumbek town. On this day there were approximately 60 men and 10 women at the court. One case was heard, a GBV case. The parents of a woman, 20 years old, brought a case of rape against a man, 35 years old. Both are from the Dinka tribe. Dinka law prohibits a man forcing a woman to have sex. The chiefs found the man guilty and sentenced him to three months in prison. The man was ordered to pay five cows to the woman’s parents. One cow was sold for treatment of the woman.

*Case 4*
**Date: 26/2/08; Mayom Town Court, Bentiu**

The Plaintiff’s brother was murdered by his wife. He opened the case against the wife and her family. The Defendant, a 14 year old Nuer woman, was married to the deceased against her will. Her father gave the girl to the husband for 5 cows. She refused to go but the deceased took the girl and she stayed with him for 20 days until she escaped and returned to her father. She was pregnant. The girl then stayed with her father for 2 years while the husband left as a soldier with the SPLA. After two years the husband came back for the girl and the child. She refused to go with the husband and the father and husband beat her until she accepted. After two days with the husband she killed him at night by slicing his neck with a knife. The court found the woman guilty and ordered compensation from the woman’s family of 40 cows to the deceased’s family and 10 cows as a fine. The woman was given 5 years imprisonment.

*Case 5*
**Date: 13/3/08; County Court, Yambio**

The County Court for Yambio has one chief and his secretary. This is the fifth case and only GBV case heard today. A man of 27 years is accused of raping a 10 year-old girl. The girl was badly off and in the hospital for some time. The man was under police custody. The chief applied statutory law. He sent the man to prison for 3 years without bail and ordered to pay 400 SPds to the girls parents, to clear all expenses for the court, and to pay for the girl’s school fees. The man apologized before the court.
SESSION IV: Putting Theory into Practice: Programming with Respect to Legal Pluralism
Panel 3: Seeking Coherence in the Overall Justice System: Linking State and Customary Mechanisms and Creating Hybrid Institutions

Typologies, Risks and Benefits of Interaction Between State and Non-State Justice Systems
By Matt Stephens

[The state] is corrupt…distinct and distant from the mass of people, who look, absent a viable alternative, to old ways as a means of sustenance. Yet the old ways are not what they were, debilitated by labour migration, partial industrialization, urbanization and more generally by capitalism.

H. Patrick Glenn, Legal Traditions of the World

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

Commonwealth of Australia, Strategic Framework for Access to Justice, September 2009

Introduction

The first quotation above encapsulates the dilemma at the heart of this seminar. In most, if not all, countries in the world, court-based adjudication of legal disputes is considered an expensive and unwanted last resort. As a direct consequence, so-called alternative dispute resolution mechanisms are – as a forest of surveys and research will attest – more commonly used and invariably more popular. And yet at the same time, many of these systems suffer equally from systemic inequities that reaffirm existing power relations to the detriment of the socially excluded.

The phenomenon of the distant state and/or the debilitated community institution is more common in the developing world, and exacerbated further in fragile and conflict-affected states.

So, assuming we buy the statement that effective justice systems and means of dispute resolution are crucial to development, equity and poverty reduction, what should be done in such a situation?
Until recently, donor efforts have focused almost exclusively on building capable institutions of the state. Much has been written on the challenges this presents. Success has proven elusive.43

And yet, partly as a result of the growing understanding of the need to ground justice in cultural realities and perhaps equally due to the difficulties faced by the state-centric approach, increasing interest has been paid in recent years both by governments and international development agencies to customary or non-state justice systems and the role they can play in a comprehensive approach to delivering justice.

The first point I wish to make is that unquestionably this is a welcome shift in emphasis. After years of mostly ignoring non-state justice systems in favour of building western-style formal justice systems the increasing acknowledgement is an overdue recognition of the reality of legal pluralism.

The next quotation above from the Australian government’s recently released access to justice strategic framework captures the second point I’d like to make. Engagement with justice systems outside the state is not merely an interim strategy for developing countries until such time as customary systems can be “modernized” and fully integrated into the state or until the formal legal system somehow miraculously expands to adequately meet all the dispute resolution needs of a society. Understanding and working with non-adversarial dispute resolution systems outside the courts is a permanent and necessary element of a functioning justice system, regardless of level of development. The evolution of justice in the developed world is unequivocally in the direction of compulsory mediation, restorative and diversionary justice, alternative sentencing and community-led processes.

That said, strategies to engage non-state justice systems often present particular challenges to the state. Attempts to do so in the developing world often draw criticism from an unlikely coalition of the unlike minded. On one side, some human rights activists argue that customary justice systems are repugnant to human rights and should not be supported or acknowledged in any way. On the other hand, many indigenous peoples’ rights activists argue against any form of intrusion of often weak and corrupt states into the community realm.

Against this background of complexity, many post-colonial states have attempted to abolish customary systems. Most such efforts have failed. Customary legal systems and processes have proven durable. Grounded in local practices, speedy, inexpensive and simple in process, non-state justice systems carry many natural advantages.

But as we know, for all the benefits, many violate not only international human rights norms, but also national constitutional and normative frameworks.

43 See Carothers, Golub and the Commission on Legal Empowerment of the Poor.
So, while there is a need to acknowledge and respect the reality of legal pluralism in order to forge a functioning and culturally relevant justice system, the potential for a clash of norms and values represents a significant policy and practical challenge, particularly for fragile and conflict-affected states.

Given the complexities and challenges, therefore, the recent trend towards recognition of and engagement with non-state justice systems is encouraging but also high-risk, particularly given what we know about how international development agencies tend to operate.

In the rush to become more culturally aware, the development industry imperative to transplant “best practices” must be avoided.

In this brief paper, drawing on existing literature I will lay out a typology of potential engagement with non-state justice systems. Drawing on case studies from the region I work in, including Indonesia, Timor Leste, the Philippines and Bangladesh I will also provide some examples of potential action to bring about a “middle ground” between the authority, relative neutrality and accountability of the state with the social legitimacy and accessibility of customary justice systems.

In doing so I examine both some of the potential benefits and risks inherent in attempting to link or integrate state and non-state justice and superficially begin an exposition of the conditions in which such a process of “forging the middle ground” may or may not be appropriate.¹⁴

**A Typology of Recognition**

Policies of engagement with non-state justice usually have one or more of the following aims:

1. expanding state control of the justice system
2. attempt to enhance the cultural relevance of the formal system by aligning it with customary systems
3. attempt to ‘improve’ the quality of informal justice through state oversight and the insertion of legal or constitutional human rights standards
4. attempt to subjugate informal processes in a structural hierarchy below the state

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¹⁴ The Indonesia example draws from the recently launched publication of the Justice for the Poor program, *Forging the Middle Ground: Engaging Non-State Justice in Indonesia*. A 5-province 18 month study, this research drew on 34 ethnographic case studies, including from 2 post-conflict provinces, and a 12,000 respondent quantitative survey on conflict and justice. The study is now being backed up by a program of activities working with the Supreme Court of Indonesia, local NGOs and government agencies and community leaders in two provinces.
Drawing mostly from a 2005 article by Connolly, there are four general approaches for engaging with non-state justice systems, which reflect the different objectives stated above.45

Abolition is when the state insists on legal uniformity and abolishes non-state justice systems. This approach is often justified with reference to the tendency of non-state justice to contravene human rights.

At the other extreme, full incorporation involves the state fully integrating non-state justice with a dedicated and defined role vis a vis the formal system.

Non-incorporation grants full reign to local communities to apply and follow their local values, norms and customs. In this approach, informal and formal justice co-exist but operate independently, with strict jurisdictional boundaries drawn between the two. This approach is often utilized to accommodate traditional customary law from indigenous communities.

Finally, the partial incorporation approach attempts to blend the advantages and disadvantages of both formal state and informal non-state justice. Informal and formal justice systems operate relatively independently, but with informal justice receiving recognition, some resources and oversight from the state. This final model is a compromise between full incorporation and non-incorporation.

As mentioned above, many post-colonial independent states pursued abolition by actively seeking to abolish customary systems or, alternatively, failing to back up Constitutional rhetoric of recognition of customary norms and legal systems. Pursued in the name of legal unity, certainty and “modernity”, these approaches usually failed. Non-state justice systems have proven remarkably resilient.

Full incorporation was a trend pursued by a number of countries through the 1970s. This often takes the form of hybrid institutions that carve out a defined jurisdiction for village-based dispute resolution processes, which are in turn acknowledged by state courts.

The recent trend has been more towards non-incorporation. In Latin America, for instance, in the 1990s alone, seven countries (Chile, Colombia, Ecuador, Guatemala, Paraguay, Peru and Venezuela) altered their Constitution to respect the rights of indigenous peoples to apply their own dispute resolution systems, provided these do not violate the Constitution.46

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Engagement of course is not a one-way street from the state down. As governments pass regulations, policies and administrative procedures to regulate the interaction between formal and informal justice, there are also multiple example of non-state justice institutions adapting themselves to better integrate with state systems.

Justice for the Poor research in Indonesia and other recent studies from the Pacific demonstrate a growing trend towards customary authorities of their own volition codifying local norms and formalizing local structures. Jaap Timmer, an anthropologist from Leiden University, has dubbed this “being seen like a state”, though it might equally be described as “being seen by the state.”

In short, some customary authorities, are adopting state-like forms through codification of local norms and formalization of dispute resolution structures. This looks like an attempt to grasp the authority of the state to strengthen legitimacy but it could also perhaps be a strategy to avoid state intrusion by taking a form that the state recognizes, understands and will then leave alone.

**Selected Examples of Interaction**

In this next section we briefly examine a few different examples of engagement between state and non-state justice systems, focusing on full incorporation hybrid institutions and non-incorporation legal recognition.

**Hybrid Institutions**

**Philippines: Barangay Justice System (BJS)**

The BJS is a program of compulsory conciliation and mediation at barangay or village level. The system seeks to promote speedy and accessible settlements of legal problems without recourse to the judiciary. It is implemented in all 42,000 barangay in the Philippines.

Impetus for the BJS derived from the limitations of the formal system. Following a remarkably rapid, top-down policy development process, the system was introduced in 1976 by Presidential Decree 1508 (PD 1508) and later enshrined in the 1991 Local Government Code. The BJS was created with very clear objectives, namely to:

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1. promote speedy administration of justice;
2. perpetuate the time-honoured tradition of settling disputes amicably for the maintenance of peace and harmony;
3. implement the constitutional mandate to preserve and develop Filipino culture; and
4. relieve the courts of docket congestion and thereby enhance the quality of justice dispensed by them.

While some commentators felt the BJS was merely an attempt by then President Marcos to extend state control into the village, others assert that it was mostly a community empowerment initiative.

Presidential Decree 1508 established a mediation board in each village known as the Lupong Tagapayapa or Lupon. The village head, or barangay captain, chairs the Lupon which comprises 10–20 members depending on the size of the village. The captain appoints the members of the Lupon based on selection criteria established in the legislation.

Cases are brought initially to the barangay captain for conciliation. If a settlement is reached, it is written up and signed by both parties. The settlement then has the legal effect of the final judgment of a court. Legal representation is prohibited, case fees are low or non-existent and time limits for settlement are between 15-30 days.

Cases covered are minor civil disputes and criminal infractions.

While, like most ADR, the Barangay Justice System has not reduced case backlogs, the system has proven popular. During the first 10 years over 800,000 disputes were heard. Current caseloads are now in the order of 200,000 per year. This volume of cases represents a vote of confidence in the system.

Most assessments of the system have been positive in terms of quality of justice. Settlement rates are consistently high, ranging from 65 per cent to 89 per cent. The most authoritative nationwide survey, conducted by the Social Weather Stations, reports satisfaction rates of up to 69 per cent (Mangahas, 1999). Similarly, the evidence which exists on compliance rates suggests that BJS decisions are highly durable. Voluntary compliance with mediated agreements is reported to be as high as 91 per cent (Tadiar, 1988: 317).

In contrast to the costly Philippine judiciary, the barangay system delivers a highly affordable service. Infrastructure costs are negligible, as mediation usually takes place in the barangay captain’s house and Lupon members serve without payment. Case filing fees range between zero and 50 Pesos (around US $1).

Other regional initiatives: PNG and Bangladesh
While in theory a mediation system, in reality most cases submitted to the Barangay Justice System are arbitrated by the village head.

Similar hybrid institutions were established around the same time in other countries in the region. Both Papua New Guinea and Bangladesh, for instance, established Village Courts to adjudicate minor disputes and criminal offences. We turn now to a brief examination of experience with these institutions.

Papua New Guinea

Headed by village leaders appointed as “magistrates”, the PNG Village Courts cover most of the country, including rural and urban areas. Like the Barangay Justice System, the Courts are an accessible forum for dealing with petty disputes and criminal acts. Although far from perfect, the Village Courts are considered by many analysts to be the bright spot in a problematic justice sector, a successful synthesis between different traditions.

Bangladesh launched its own Village Courts in 1976 pursuant to the Village Court Ordinance. Established with the authority to resolve minor civil and criminal cases, the Courts are headed by a local official and include a panel of peers as judges. The Courts were intended to marginalize traditional dispute resolution processes known as shalish by introducing a more formalized process, primarily to mitigate what were considered unduly harsh punishments handed down by shalish tribunals, particularly with respect to women’s rights.

Experience suggests that where supported by local NGOs, particularly the renowned Madaripur Legal Aid Association (MLAA), the system is functioning well. However, legal aid organizations are estimated to cover around 1% of villages in the country.

Where NGOs do not provide oversight, assistance for socialization, documentation and community education, the Courts are either yet to be established in any meaningful way; or are simply an extension of shalish processes. As Golub has observed, ‘often the reality of village courts does not differ substantially from that presented by the traditional process.’

Implications and Challenges

So, what does the experience of these hybrid institutions in three quite different countries tell us? The picture is mixed. In PNG – a state with minimal presence outside urban areas – and the Philippines – a middle income country that nonetheless suffers

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from pockets of violent social conflict – hybrid institutions have operated with some success.

Perhaps counter-intuitively, central to their success seems to be the absence of substance or structure to the Village Court reforms. Avoiding prescriptive regulations on process and substance effectively created “delegalized” environments that seemingly helped the BJS and Village Courts to effectively adapt to the range of social, ethnic, religious and cultural contexts in the Philippines and PNG. Locally legitimate processes fill the space.

In the Philippines as well, a very strong civil society has been partly able to compensate for the state governance deficit by providing training and other assistance to barangay councils across the country.

By contrast, the Bangladesh Village Courts diverged from existing institutions and attempted to be more prescriptive in terms of the nature of the hybrid institution. This could explain the failure of the courts to take root.

Besides this observation, a number of other challenges emerge that can inform future thinking on the issue of hybridization. These are broken down by: (i) scale and resources; (ii) quality of justice; (iii) formalization of the informal and; (iv) minimal state capacity for oversight.

**Scale and Resources**

As discussed above, the State generally seeks to engage with informal justice to either “improve” the quality of informal systems and/or enhance the social relevance of the formal systems.

Institutional challenges in rolling out a new hybrid institution are significant in such contexts. In the Philippines, the Barangay Justice system does not exist in many remote, rural locations. In some heavily conflict-affected locations in the south it reportedly does not function at all.

The experience in Bangladesh also highlights the challenges of establishing a new institution. Similar efforts in Indonesia, for instance, to establish new village-based mediation mechanisms have failed, collapsing after external funding dried up.

**Quality of Justice**

Delivering high-quality justice is equally challenging. In the Philippines, the majority of Barangay Justice mediators have never been trained as the scale is simply too large. In Bangladesh and Papua New Guinea the Village Courts have enjoyed very little government support.
Quality of justice is also undermined by the absence of supervision or monitoring. Village Courts in PNG are often reported to overstep their jurisdictional limitations, deciding over serious criminal cases such as rape and murder.

**Formalizing the informal**

Another risk is the potential that state engagement with customary systems can formalize and delegitimize the informal, in the process undermining its very advantages, namely flexibility to match process, remedies and sanctions to local realities. This is particularly the case if non-state justice actors are paid by the government.

Codification of norms in particular is of course extremely controversial. While carrying the advantage of encouraging transparency and consistency, the process itself risks locking in one person’s or group’s interpretation of local norms, when these are almost inevitably contested.

On the other hand, formal recognition of village justice systems also risks legitimizing the illegitimate and entrenching “poor justice for the poor.” As Sally Engel Merry memorably once said of informal justice systems, they inevitably reflect ‘what the stronger is willing to concede and the weaker can successfully demand’ (Merry, 1982: 23).

**Absence of supervision and oversight**

Thus, while the harmony imperative of local justice systems might well be logical for rural communities, it is questionable whether the state should extend recognition to such systems where it lacks the capacity to provide supervision and oversight.

A live policy debate on this issue is currently underway in one of the world’s newest countries, Timor Leste. In Timor a Bill on Customary Law and Community Justice has been drafted, with the aim to ‘improve the access to justice of the population at community level through the establishment of a regime of recognition and limits of customary law.’ (Draft Law, Section 1).

Replete with admiral aims to enhance gender equity, prevent cruelty towards children and regulate forced marriages, one nevertheless has to question the merits of a law that the state itself clearly has little capacity to enforce.

While government policies can and should be aspirational, laws should not. Alternative reform measures such as sub-national regulations, court administrative circulars or locally-based empowerment activities might be more effective means to achieve the same end.

**Non-incorporation**
Hybrid institutions are not the only means of recognition of course. Equally or more common is the approach of *non-incorporation* whereby government legal frameworks provide recognition of non-state justice systems so long as processes and norms are not inconsistent with state law. This form of recognition has the advantage of not introducing new institutions, but building on what already exists. This has been the dominant form of engagement in Latin America over the last thirty years.

It is also the approach of the Justice for the Poor program in Indonesia, and I will finish this presentation by providing a little detail on our “Strengthening Local Justice Systems” program. This is not to sell the idea, but merely to present an example with which I am familiar.

Quickly by way of background, the Indonesian Constitution and multiple laws recognize the existence of customary law and the role of village leaders and councils in dispute resolution. Courts are also required to take into account the outcomes of customary law tribunals in deliberations. In reality, however, for most of the history of post-independence Indonesia, the government systematically sacrificed the rights of customary communities in the name of development.

Since 2001 the implementation of wide-scale regional autonomy has opened up the prospect of enhanced recognition of local customary forms of governance, including for dispute resolution. Where this reform space has been exploited, it has exclusively been to reinvigorate what Glenn calls “the old ways”; customary systems of dispute resolution building on the power of indigenous ethnic male elites.

Indonesia’s non-incorporation mode of recognition suffers from a number of problems. The authority and jurisdiction of village heads and tribunals to resolve disputes is not defined. Judges who are required to take into account local customs and habits often do not understand them.

The discretion of formal justice actors to prosecute, mediate or refer cases back to village institutions is wide. In our research, many serious cases, including sexual assault and domestic violence, were referred back to village institutions by the police, only then to be neglected. On the other hand, a number of cases, again mostly sexual offences against women, were mediated at the local level, often with outcomes unsatisfactory to the victims.

**A Typology of Interaction**

So, we return to the dilemma posed by Glenn at the beginning of this paper. In countries where the state is weak, but traditional justice systems have been undermined by social mobility and modernization, what is left? Glenn suggests an inevitable slide into violence. Experience in many conflict-affected countries, including post-Suharto Indonesia, tends to bear that out.
However, he hints at — and the Justice for the Poor program in Indonesia has explicitly sought to forge — a “middle ground” between formal and informal justice. One that marries the authority, relative neutrality and accountability of the state with the social accessibility and legitimacy of customary authorities.

The main aim of this “middle ground” approach is explicitly to improve the performance of both systems — by bringing in a stronger recognition of local customs and practices into the formal system; and introducing state oversight and Constitutional principles that protect human rights and the interest of marginalized groups into non-state justice systems.

In practice, what does this look like? The first point to make is that it doesn’t look the same everywhere. The program in Indonesia operates in two provinces that have very different traditional justice systems. West Sumatra has very well-established traditional customary tribunals, with a standard structure and widely understood legal norms in the context of a dominant indigenous ethnic culture.

In West Nusa Tenggara, the other program location, the situation is more fluid. Ethnically the island is more heterogeneous and a broad range of actors, encompassing village heads, traditional customary leaders and Islamic leaders, are active in dispute resolution.

In both locations, following eighteen months of field research, Justice for the Poor has facilitated the establishment of multi-sector working groups comprising relevant local government agencies, the formal justice sector institutions, academics, NGOs and local community leaders to strengthen both the recognition of and, hopefully, the performance of, non-state justice systems.

What the middle ground looks like in both locations is determined by these local stakeholders. By definition, therefore, we are not aiming at an ideal justice system, but a definition of interaction between the formal and informal that seeks gradual and incremental change based on local realities.

Hence, in West Sumatra, given the limited space for institutional change, activities focus on grassroots empowerment for women and policy advocacy to include an expanded role for women on local dispute tribunals.

In West Nusa Tenggara, the program exploits the greater space for change and is more far-reaching. It seeks to support existing efforts to define mechanisms, structures, processes and even norms in a number of villages. The main purpose being to empower communities to both understand and better utilize local justice systems. Training is also provided to local mediators, with a strong focus on involving women and minority groups.

Framework for Engagement
While the nature of activities on the ground varies, our framework for engagement – to forge the middle ground – entails a mix of policy, regulatory and grassroots change. Action is at four levels.

1. Firstly, at the **grassroots level** to *support downward accountability and empower weak and marginalized groups* to demand better quality service from informal justice. This is the most important priority as it tackles the main weaknesses head on.
2. The second priority is to work at the **mezzo level** to *develop the capacity and technical skills* of non-state justice institutions and actors.
3. The third priority is to look **beyond the village** to *enhance access to the formal justice system* in order to open up options and enlarge the shadow of the law.
4. To underpin the grassroots work, the final priority is **national and regional government policy change** to support *upward accountability* through the establishment of (i) national guidelines that strengthen the interface with the formal sector; and (ii) regional guidelines to institutionalize a core set of principles for equitable and inclusive non-state justice that it is consistent with constitutional standards.

These priorities are laid out in tabular form below.

<table>
<thead>
<tr>
<th>Level</th>
<th>Priority Action</th>
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<tbody>
<tr>
<td>Grassroots/Community</td>
<td>▪ Empower women and minorities through rights awareness</td>
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<tr>
<td></td>
<td>▪ Open up access to the formal system through legal literacy and circuit court programs</td>
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<td></td>
<td>▪ Support social mobilization and organization to address trans-communal disputes</td>
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<tr>
<td>Village Institutions and Non-State Justice Actors</td>
<td>▪ Build the skills and capacity of non-state justice actors to resolve disputes professionally</td>
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<td></td>
<td>▪ Support clarification of structures and norms</td>
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<tr>
<td></td>
<td>▪ Support representation for women and minorities in village institutions</td>
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<tr>
<td>District Level</td>
<td>▪ Establish a regional regulatory framework that enshrines constitutional standards ensuring right of appeal, humane sanctions and representation for women and minorities</td>
</tr>
<tr>
<td></td>
<td>▪ Build upward accountability by supporting civil society and government monitoring and oversight of non-state justice</td>
</tr>
</tbody>
</table>
| National Level | - Issue court regulations clarifying the jurisdiction of non-state justice *vis a vis* the courts  
- Establish a Community Justice Liaison Unit in the Ministry of Law and Human Rights to encourage compatibility and consistency between non-state and state justice (along the lines of the Papua New Guinea model) |

It is worth pointing out that we deemed this range of operational options as feasible in only two of the five research locations. In other provinces, such as Central Kalimantan, ethnic conflict between indigenous Dayaks and migrant Madurese had sparked a strong reassertion of Dayak identity, to the exclusion of other ethnic groups. Little room appeared politically for change to support more inclusive local dispute resolution practices. In Maluku province, another post-conflict location, government capacity and willingness to oversee and supervise informal justice systems was highly limited. Supporting strengthened recognition, therefore, appeared to be too high a risk for the Bank.

**Conclusion**

In the rush to acknowledge the reality of legal pluralism, care and caution is called for. Successful reforms to integrate the virtues of state and non-state justice are those that take a light touch, build incrementally on existing systems and are defined by local stakeholders. These are generic development principle and thus should come as no surprise.

However, if not based on a deep understanding of local context and appreciation for capacity of the state, regulatory recognition of customary justice systems can be counter-productive or simply unproductive.

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**On the Politics of Legal Pluralism: the case of post-war Mozambique**  
By Helene Maria Kyed

**Introduction**

What happens when *legal pluralism* becomes a policy concept - when it is no longer alone an analytical concept used by academics to explore and theorise the plurality of normative systems and institutions that enforce norms within a political organisation? While the exact meaning of the concept is debated, and not all agree on its normative
value, legal pluralism is today widely accepted as an empirical ‘fact’ by governments in the South and by international organisations engaged with justice and security issues in developing countries. State law and its institutions do not have a monopoly on ordering society, but co-exist with other institutions, whether referred to as ‘informal’, ‘customary’, ‘religious’, or ‘non-state’. 52

Legal pluralism as a policy concept is reflected in state laws and constitutions that recognise legal pluralism as a principle describing the justice system of the country. 53 It is also present in many current development donor programs, and it is increasingly embraced by international human rights documents. 54 As a policy concept, legal pluralism officially signifies recognition of the socio-cultural diversity of the legal domain within a nation state. This is exemplified by inclusion of non-state law into state law and/or by the recognition of non-state authorities’ role in providing justice. Such inclusion differs from the previous dominance of state-centralism. However, legal pluralism as a ‘policy field’ seldom alone implies a benign recognition of the empirical manifestations of socio-cultural diversity. 55 It also implies a framework for state intervention, regulation and reform, which has political implications.

This paper explores the consequences of legal pluralism as a ‘policy field’, and in doing so discusses what I refer to as ‘the politics of legal pluralism’. Using the example of post-war Mozambique, I argue for the need to critically scrutinize the official policy claims that often underpin legal pluralism, and which tend to mask key political aspects. In contrast to such claims, a plurality of justice providers seldom reflects the peaceful coexistence of distinct ‘normative orders’ or ‘legal systems’, but rather a reality of competing, partly overlapping jurisdictions and claims to authority. As a result, legal pluralism often becomes not a pure recognition of ‘what already exists’, but a means by the state to regulate non-state justice providers, (re) define their areas of jurisdiction, and establish a hierarchical boundary between ‘legal orders’. Central are attempts to (re)assert the superior authority of the state.

State recognition of non-state legal orders is therefore not a technical, neutral process, but an inherently political one. The state legitimises the authority of non-state justice providers, but also assumes the authority to define what counts as legitimate non-state justice institutions and rules. The result is often restrictions on how non-state justice providers can operate, which has implications for how they assert authority. Thus while recognition of legal pluralism can be an instance of state law adapting to local socio-

53 Legal pluralism as a principle of the justice system differs from a situation in which the state recognises selected non-state, customary or informal justice providers, which has occurred for a long time, including colonial rule.
54 On the recognition of legal pluralism in Human Rights declarations, General Comments and Covenants, especially relating to indigenous people and minorities, see ICHR (2009: 27-31).
55 Here the concept of state centralism refers to the ideologically informed claim that there is or should be only one law and legal system for a political organisation, in this case state law and its legal institutions (see Tamanaha 2000).
cultural norms, it also involves a re-ordering of authority and power. Recognition can also be appropriated to boost the popular legitimacy of state institutions or to avoid conflicts in contested, post-war contexts, through alliances with non-state authorities. It can also become an instrument of the political party in power to consolidate its local power base. However, the politics of legal pluralism is not the purview of state officials and party politicians. Non-state providers can also use state recognition as a source of authority to enforce decisions or to assert power vis-à-vis other non-state authorities. In fact, local state efforts to apply legal pluralism policy may further invigorate competition between state and non-state providers over authority and ‘clients’.

Legal pluralism as a policy concept is easily subjected to political manipulation or itself a political tool to assert authority and manifest power. This, I argue, is intimately related to the politics of justice provision: providing justice is a source of authority and income. As illustrated with the Mozambican case, the politics of legal pluralism can at least cover three layers of politics.

1) The politics of asserting the superior authority of state law over other legal orders, exemplified by the use of legal pluralism by the state to regulate non-state providers and redefine their areas of jurisdiction.
2) The political party interests, exemplified by the use of legal pluralism to boost the power of politicians or the regime in power by ways of creating alliances with non-state authorities.
3) The politics of local contestations over authority and clients to sustain the authority of a given institution or of specific personal power positions, including of local state officials. This aspect often predates legal pluralism policies, but can be exacerbated by or take new forms due to the implementation of such policies.

In the remainder of this paper I address first the national politics behind the state recognition of legal pluralism in Mozambique, and then move to consider the politics of legal pluralism in practice in the district of Sussundenga. Finally, I conclude with some reflections on what I consider as important political issues to consider in international support to legal pluralism policies.

The politics behind State recognition of legal pluralism

In Mozambique legal pluralism was officially recognized in the 2004 revised Constitution: “the state recognises the various normative systems and the resolution of conflicts that co-exist in Mozambican society, as long as they do not contradict the fundamental values and principles of the Constitution” (Republic of Mozambique 2004: art. 4). The Constitution also calls for institutional and procedural mechanisms that link formal-state courts with other, non-state mechanisms of justice (ibid: art. 212). This official commitment to legal pluralism is reiterated in the Government’s Integrated Strategic Plan for the Justice Sector (PEI II, 2008-2012), which should be the framework for any government initiatives and donor supported programs on the justice sector. This marks a clear shift in policy.
The constitutional recognition of legal pluralism can be seen as the accumulated effect
of an increased shift from state centralism towards state recognition of non-state,
community-based and customary authorities since the 16 year civil war ended in 1992
and the country embarked on a democratic transition. Until 2000 donor-support justice
sector reform focused exclusively on reforming formal state institutions in accordance
with ‘the rule of law’ and ‘human rights’. The village-level popular courts established by
the socialist regime in the 1980s, and comprising lay judges using procedures based on
local customs, were delinked from the formal court system, renamed ‘community
courts’ and downgraded to informal conflict resolution bodies. Village secretaries and
popular vigilantes, who formed part of the Frelimo-state structures to resolve conflicts
and maintain order at the local level were also excluded from post-war legislation.
Reform further ignored those non-state justice providers such as chiefs, traditional
healers, and religious leaders who, outside state law, played a significant role in justice
enforcement on the ground (Kyed 2008). Overall reform focused on not only
democratising and making the formal system more effective, but also on re-extending
state institutions and law to the vast territories of the country where these had been
weakened or disappeared due to the protracted war. Non-state institutions were seen
as an impediment to this development. Implicitly it was assumed that they would seek
to be significant once the state legal system was in place.

The drive towards recognition of legal pluralism in 2004 owed partly to changes in donor
trends and partly to the meagre results of initial reform efforts: formal state institutions
were still not able to provide adequate justice and security and lacked popular
legitimacy. This was confirmed by a number of studies in the 1990s, which provided
evidence of the continued significance of traditional authority and other forms of non-
state justice providers. One particularly influential donor-funded study argued that the
formal system ignored the needs of the poor, who preferred restorative to punitive
justice. It held that the judicial system ought to be adjusted to this reality through legal
and functional linkages between the formal courts, community justice and traditional
authorities, thus establishing a de jure system of legal pluralism (Trindade and Santos
2003: 581-2). This would make the justice system more efficient and adjusted to local
socio-cultural notions of justice.

There were also clear political interests behind the recognition of legal pluralism.
Studies arguing for the role of traditional authority in administration, conflict resolution
and national identity formation instigated intensive media and parliamentary debates
between the ruling party Frelimo and the opposition, Renamo. While Frelimo was split
on the issue, Renamo wanted full recognition of traditional authority. However, after
the 1999 elections, the Frelimo government became convinced that Renamo had a
strong voter-base in many rural areas, because it had aligned itself with chiefs during

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56 After independence in 1975, chiefs and traditional healers were officially banned by the Frelimo government.
With regard to chiefs, this marked a clear break from colonial indirect rule, which relied on chiefs. However, in
practice many chiefs continued to perform significant roles in justice enforcement and policing. Some also
aided the rebel movement Renamo during the war (see more in Kyed 2007).
the war. On the ground this was matched by conflicts between traditional authorities and the former Frelimo village secretaries, as well as by pockets of resistance by chiefs to the state police and administrators. Simultaneously, local state officials began to depend on informal collaboration with traditional authorities to re-establish state institutional outreach in the rural areas. The Frelimo party structures also benefitted from such alliances (see Kyed 2007a).

Thus in 2000, the Frelimo government passed a ministerial decree, Decree 15/2000, which gave way to recognition of traditional authorities and the (former Frelimo) village secretaries as ‘community authorities’. Aside from a range of state administrative tasks, these authorities were obligated to assist the police and courts in order enforcement and conflict resolution. In return they received uniforms and subsidies from the state. The Frelimo government also committed itself to strengthening the role of the community courts, including improving election procedures and establishing links to the formal courts. However, this was a less politically controversial area for the government, because existing community court judges were associated with the ruling party, as they had been built on the popular courts. The recognition of village secretaries under the same title as traditional authorities was also seen by Renamo as means to ensure that some ‘community authorities’ came from Frelimo ranks.

These political interests behind state recognition of non-state institutions, merging party politics with state administrative gains, have unsurprisingly been masked in the official policy claims that also underpinned the subsequent constitutional recognition of legal pluralism. Officially it has been cast as the recognition of ‘what already exists’, namely traditional and community-based forms of justice that draw on the socio-cultural norms of the variety of local communities across the country. The 1992 law on community courts and Decree 15/2000 also posit the unproblematic co-existence of state and non-state institutions, as representing distinct domains of justice enforcement who handle different issues and who can mutually benefit from collaboration.

While this policy claim has little resonance in practice, it may help explain why recognition of legal pluralism has not been supported by any clear legal framework that outlines the respective roles, mandates and jurisdictions of the patchwork of non-state institutions that co-exist within the same geographical areas (i.e. community courts, traditional leaders, village secretaries, traditional healers). Nor has any substantial legislation been provided on how these institutions should interact with the formal

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57 It is important to note that the recognition of traditional authority is based on a decree and not a law, which means that it was not approved by parliament, but by the Council of Ministers. This reflects, I suggest, how the Frelimo government aimed to decide on its own the terms of such recognition.

58 In 1998 associations of traditional healers were also officially recognized. It bears noting that because official law denies the existence of sorcery, recognition of the authority and scope of action of healers only extends to traditional medical treatment of illnesses, and not to any role of healers in conflict resolution.

59 This patchwork of non-state institutions has since 2005 been expanded with the introduction of community policing forms, whose agents also engage in conflict resolution and act, unofficially, as judges (on this theme see Kyed forthcoming).
justice system, despite the clear constitutional requirement. Whereas the 2005 draft legislation on judicial reform envisioned an integrated judicial system with legal and functional interaction between the formal courts and non-state justice providers, the actual legislation passed in 2007 - the Organic Law of the Judicial Courts (Law 24/2007) - merely notes that judicial courts “may articulate with other existing conflict resolution instances” (Boletim da República, Lei 24/2007, art. 6). There is no mention of what ‘instances’ this may include or how such articulation may be put into effect. The law does introduce the possibility of an appeal system between the community courts and the district courts, but it is unclear how exactly this should work (ibid: art. 5). Thus what exists is a set of dispersed laws and decrees that recognize different non-state authorities’ role in conflict resolution.

Drawing on the case of Sussundenga district, I tentatively suggest that what appears to be a reluctance to pass a law or develop a strategy on institutional linkages and mandates is not alone a question of policy claims about non-state justice. It is also informed by the politics behind legal pluralism. Lack of clear mandates and of legal mechanisms for monitoring non-state institutions, leaves ample room for political instrumentalization by local state officials and ruling party cadres. In fact, as I address next, the stifled policy-making process at national level has been overtaken by developments on the ground.

The politics of legal pluralism in practice: Sussundenga district

Despite any clear legal framework, official recognition of legal pluralism has in practice been creatively appropriated by local state officials as a de facto ‘framework for action’ to endorse, but also to regulate non-state justice providers and to define their respective jurisdictions vis-à-vis the state. The de facto framework for action is marked by different forms of articulation that in essence take place outside of official law. While such efforts aim to bring more clarity to the plural legal landscape and provide more effective case-handling, they have also been driven by local state as well as party political interest.

At least in some areas, the de facto framework for legal pluralism has been used to (re)expand the reach and authority of the state in areas where that authority is contested and the state’s legitimacy is weak. In such instances local state articulation with non-state institutions often is an effort to subjugate those who have competing sovereign claims, - i.e. who like the state claim the ultimate authority to define and prosecute severe transgressions. This has merged with efforts to re-vitalize or strengthen those non-state institutions that are loyal to ruling party Frelimo, such as the community courts and the village secretaries, and/or to create alliances with those who historically have not, such as traditional healers and chiefs. Such efforts are however contested in everyday case-handling, and coexist with competition, as different actors defend their jurisdiction based on power interests and efforts to maintain authority.
The initial ground for local state appropriation of legal pluralism was laid during the process of state recognition of traditional leaders or chiefs, which began in 2001-2. A good example of this process can be seen in the rural District of Sussundenga in Manica Province. This area was hotly contested during the civil war, in which the rural areas were controlled by Renamo, and some chiefs, and in which the state institutions, including the police, popular courts and village secretaries were essentially dissolved. Renamo’s influence in this area continued to be strong after the end of the civil war. This was marked in the mid-1990s by pockets of open resistance by Renamo and some chiefs towards state police and administrative (re)establishment outside of the district capital.

Decree 15/2000 became an essential tool to reverse the situation of state weakness in Sussundenga. It gave local state officials a tool to establish alliances with chiefs in the contested territories, based on promises not only of official recognition, but also of development benefits and state subsidies. Such promises initially sparked conflicts among different candidates to the chieftaincy, as war, migration and shifting alliances had considerably reshuffled traditional authority positions and territorial jurisdictions. While state officials accepted ‘traditional’ criteria of leadership selection, there were instances in which state officials intervened to support candidates that showed loyalty to the state and the ruling party.

The alliances that recognition allowed for became a direct root to the territorial-institutional expansion of the state: in the most rural hinterlands it was followed by the re-establishment of police posts, administrative offices and Frelimo party cells. In one area, the recognition ceremony for a chief also marked the first visit of a post-colonial state administrator to the area. Such encounters allowed state administrators, always accompanied by police officers and Frelimo secretaries, to engage with and promulgate the government’s program to the rural population. Today recognition also facilitates everyday forms of state governance, as chiefs are obligated to collect personal tax, produce population registers, denounce criminals to the police etc. While local state officials place emphasis on the value of the ‘traditions’ that chiefs are custodians of, the general message is that state recognition means that chiefs ‘now have to obey the orders of the government’. This has merged with party political requirements. Chiefs are drawn into election campaigns, such as being obligated to mobilize votes for Frelimo and display its posters at their homesteads. Beyond elections chiefs are also expected to hold Frelimo membership cards in order to draw their benefits from the state. While some chiefs still covertly support Renamo, and many alone stage compliance at public state meetings, the message is that their state recognized authority is conditional on their politics, i.e. loyalty to Frelimo.

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61 For a discussion of tradition not as a fixed, but a mutable set of rules and practices see Buur and Kyed (2007).
From 2003 the local politics of legal pluralism was expanded with the revitalization of village secretaries and the establishment of community courts at the sub-district level. In contrast to legal requirements for the community election, village secretaries and community court judges were appointed by a group consisting of the First Frelimo secretary, the local administrator and the chief of the police. Digging into the history of the candidates revealed that they all had a history in the former Frelimo-state structures, with many having been in exile in the Frelimo controlled areas during the war. Thus while a criterion for appointment was knowledge of conflict resolution and local customs, the choice of Frelimo-loyal adjudicators can also be seen as part of the effort to consolidate party-state power.

The year 2004 also saw an increased effort by the state police, in coordination with administrators, to regulate what in essence had become a rather complex and competitive field of justice enforcement and policing. The reason for this is that community courts and village secretaries claim jurisdictions that in effect overlap with chiefs’ courts: they settle some of the same types of cases, apply similar justice procedures and outcomes, issue client fees and have a fixed weekly day for court sessions. More importantly, the chiefs also claim forms of authority that overlap with the criminal law jurisdictions of the state. This includes the right to settle severe crimes and enforce non-negotiable penalties akin to those prescribed by statutory law. For chiefs this covers homicide as in state courts, but also violation of sacred places and disrespect for authority. At times chiefs’ courts also resort to physical punishment, which challenges the state’s claim to a monopoly on the use of legitimate force.

At sub-district level, the local state police, who alone represent the formal justice system at the sub-district level, have played a vital role in trying to bring some semblance of order to this field of overlapping jurisdictions. This they have done by enforcing what in effect is a new form of local police law comprising de-facto rules for articulation and jurisdiction. It is enforced in the name of ‘state law’, but clearly differs from it. In some ways the local police law even violates codified law by allowing for the arbitration of sorcery and endorsing extra-legal sanctions against non-compliance. The local police law recognizes three rough categories of cases, social, traditional and criminal, which serve as the basis for assigning jurisdiction. The non-state providers are strictly prohibited from handling any serious crimes, which cover those acts that violate the land and inflict violence on human bodies - e.g. homicides, fights in which blood was spilt, rapes, large thefts, armed robberies, arson. Community courts and village secretaries are only allowed to handle what the police refer to as “social cases,” such as adultery, beating without bleeding, minor threats and insults, divorce cases, marriage payments and land disputes between neighbours. Finally, so-called “traditional cases” are reserved for chiefs. The local police law recognizes sorcery as a traditional case and requires that these are referred to chiefs. However, because the police prohibit chiefs from handling serious crimes, the police’s definition of “traditional cases” excludes a whole series of offenses – such as the taking of life - that chiefs, and many other local citizens consider as having a “traditional dimension”. As a result traditional customary law is redefined by the police.
The local police law also sets out procedures for case-handling and appeal of social and traditional cases among the non-state institutions, including a prohibition on the use of expulsion and physical force. The police also require chiefs to arrest and report criminal suspects, and bring them to the police post. This in effect turns chiefs into an extension of the police, although it is still an offence if chiefs resolve crimes, or if they use force. The police do not hesitate to resort to extra-legal sanctions to enforce ‘its’ law. On several occasions chiefs have been punished with physical force, or through mandatory public work and/or days of incarceration for disobeying local police law. While recognizing local justice mechanisms and using chiefs to boost their enforcing power in the hinterlands, the police have criminalized significant justice enforcement practices of chiefs that underwrite their authority within local communities. Ultimately, even if enforced by formal law officials, this system of local police law operates largely apart from the formal court system.\(^{62}\)

In the final analysis the practice and structure of the local police law is driven by a variety of overlapping power interests. Foremost, among these is the local police interest in consolidating the state’s monopoly on handling crimes, on distributing litigation, and on using force. However, in practice, the personal power interests of local police officers and their interest in defending their authority vis-à-vis non-state authorities often merges with and is rather difficult to distinguish from broader interests in protecting state sovereignty. Partisan political power is also often at stake, and is an interest that plays an accentuated role in how local law plays out in practice. This is exemplified by random arrests of and excessive punishments of Renamo supporters (see more in Kyed 2007b).

**The politics of local contestations over authority**

The local police law has had a number of unintended consequences. The situation is complicated by the fact that this law is frequently contested in everyday case-handling, even by state police officers themselves. Despite collaboration with the police, chiefs continue to settle crimes, including the serious ones (in 2004-5 they resolved 21 % of the crimes in Sussundenga). Many community courts and village secretaries also refrain from forwarding ‘traditional cases’ such as sorcery to chiefs.\(^{63}\) People frequently take their cases to the ‘wrong’ authorities or ‘forum shop’ between them. Interviews with citizens suggest that this occurs not because people are unaware of the local police law but because it can be a strategic means to gain satisfactory outcomes (Kyed 2007a). It also has to do with a discrepancy between police categories of cases and local views of what constitutes justice.

It is common that a case of crime such as theft results in witchcraft accusations or that a crime such as arson or homicide is seen as also having an evil spiritual dimension. Rural

\(^{62}\) 2004-5 formal court case settlement figures for Sussundenga shows that only 13 % of the criminal cases and 3 % of the civil cases were handled by the formal courts.

\(^{63}\) These figures are based on fieldwork conducted in Sussundenga District (see Kyed 2007).
citizens prefer to have such disputes resolved holistically as they have been in chiefs’ courts. Settling crimes with chiefs or other non-state providers is also preferred because of the emphasis on compensation for the victim. By contrast, formal court resolutions are associated with imprisonment, which most rural citizens view as payment to the state, not to the victims. Thus, victims themselves often beg chiefs to refrain from forwarding crimes to the police. For chiefs the continued practice of settling crimes can therefore be seen as a response to popular demands. At the same time it brings in important client fees. Much the same can be said for the handling of sorcery cases by village secretaries and community courts. Conversely, most chiefs have also begun to make oral reference to state law and to highlight their status as state-recognized authorities, who can enforce compliance in criminal cases by threatening to send contenders to the police. The community courts and village secretaries avail themselves of similar kinds of references to state law, but as opposed to chiefs they seldom settle serious severe crimes.

Perhaps most intriguingly, the police themselves have begun to handle sorcery and other non-criminal cases. In such cases, the police use procedures that resemble those of chiefs, while also adding notifications with official stamps and threats of physical discipline to dissuade non-compliance. People thus increasingly take non-criminal cases to the police as a last resort when resolutions elsewhere fail. However, such recourse only makes sense because the police settle cases by applying principles that realize local notions of justice. Police officers are well aware that if they simply enforce the statutory law, and do not adjust to local requirements, they risk losing their status vis-à-vis chiefs.

In short, local police efforts to establish bounded jurisdictions between different ‘systems’ have resulted in new forms of procedural and jurisdictional overlap, without entirely replacing old practices. Ultimately, this result revolves around contestations over authority by parties with different interests. The police face a dilemma: they depend on chiefs to enforce law and order, which underwrites police authority, yet also feel threatened by the chiefs’ capacity to draw upon locally legitimate mechanisms of enforcement that challenge state authority. For the chiefs, their authority is precarious, because local demands and criteria for justice are often at odds with state requirements. Chiefs must constantly balance their fear of punishment by the police and their own constituents’ preferences.

For most rural citizens the plurality of available forums is a resource to strategically negotiate. However, it is usually the more resourceful and powerful people who can take most advantage of the plural terrain. Equal access to justice is compromised, and there are no real signs that a link to the formal courts is forthcoming anytime soon. From both rule of law and human rights perspectives, the practical forms of articulation pose serious challenges. Not only do the local police act as judges and law-makers, but the de facto situation also sustains a culture of extra-legal police violence that is deployed to protect their monopoly on the use of violence - in particular against chiefs. When this politics of legal pluralism merges with ruling party political interests and
loyalty - as is often the case, not least around elections –then the legitimate, state availed spaces for diversity and pluralism seems to become even more closed.

Conclusion

In this paper I have, drawing on the case of Mozambique, tried to bring attention to how legal pluralism as a policy concept can easily become subject to political manipulation or itself be a political tool to assert authority and manifest power by local state officials, local party cadres and by extension the national government itself. Local appropriations of legal pluralism or reactions hereto can also spark new forms of local contestations over authority or exacerbate existing ones. This may particularly be the case if legal pluralism policy involves the setting up of new or the revitalization of old forms of hybrid institutions, such as the community courts and village secretaries, alongside ‘old’ providers, such as chiefs. However, contestations may also occur because the reality often is that state and non-state institutions have competing sovereign claims, even as they at the same time rely on conflicting conceptions of justice. The histories of state engagement with non-state justice providers and their relationship to political configurations in the past, such as community court judges relationship to the ruling party, equally inform how policies of legal pluralism are appropriated in practice.

The politics of legal pluralism is, I suggest, of utmost importance to consider in any international efforts to support state recognition of non-state legal orders or to assist in the establishment of new hybrid institutions or alternative dispute resolution forums. At the heart of the issue, is that justice enforcement and by extension social ordering, are not neutral, apolitical activities, but political ones: they provide a route to authority and also often an income. Moreover, it is important to note the asymmetrical power relations that inhere in the coexistence of multiple legal orders. This is not a new phenomenon, but harks back to pre-colonial, colonial and earlier post-colonial encounters. For historical reasons state and non-state justice ‘systems’ are not inherently distinct systems that cater for separate spheres of social ordering, but rather systems that have evolved together, albeit through an often ambiguous relationship of interdependence and competition. Current policies on legal pluralism, at least as far as local level appropriations are concerned, can be expected to further create a situation of various layers of merger and intermixes, as shown by the Mozambican case.

The politics of legal pluralism described in this paper may be more the case when there is no clear legal framework for how state and non-state providers should interrelate or where no monitoring mechanisms are in place that ensures that local state officials adhere to an overriding set of rules for how to engage with non-state justice providers. However, even when such a framework is in place, it is still necessary to consider how such a framework could be implemented and by whom. If implementation is left in the hands of local police officers and/or local court judges, a range of irregularities can be expected to occur, precisely because of the inherent politics of justice and order enforcement. Representative councils or committees that include relevant state officials, non-state justice providers, civil society organizations and ordinary citizens
could be a way to ensure check and balance mechanisms that supports equal access to justice and prevents political manipulation. Equally important are continued efforts to reform politically partisan and under-resourced official law enforcers, such as the police, who are with few exceptions the representatives of the formal justice system outside of towns and semi-urban administrative capitals.

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Hybrid Policing in Sub-Saharan Africa
By Bruce Baker

Hybrid Policing for Hybrid States
‘Failing’, African states may be, in terms of their conformity to Western models, but it could be argued that they are following an alternative governance model and one more suited to their limited resources. From this perspective they have been called ‘hybrid political orders’ (Boege et al. 2008). In this conceptualization it is non-state authorities that undertake for the most part the distribution of public goods. In other words, African states have retained, ‘indigenous mechanisms of socio-legal and political organization from their own historical experiences’ since these ‘are considered more appropriate’ than those offered by international donors (Roberts 2008: 79). In this hybrid context it is not just the institutions that are different.

People do not perceive themselves as citizens or nationals (at least not in the first place). They define themselves instead as members of particular sub- or trans-national social entities (kin group, tribe, village). This is particularly true where state agencies are not present on the ground and the state does not deliver any services with regard to education, health, infrastructure or security. Rather, it is the community that provides the nexus of order, security and basic social services. People have confidence in their community and its leaders, but they have no trust in the government and state performance. ‘The state’ is perceived as an alien external force, far away not only physically (in the capital city), but also psychologically. Individuals are loyal to ‘their’ group (whatever that may be), not the state. As members of traditional communities, people are tied into a network of social relations and a web of mutual obligations, and these obligations are much more powerful than obligations as a ‘citizen’ (Boege et al. 2008: 10).

In post-conflict Africa there are many orders at the nonstate level, each being enforced by their own policing. The state does not have a monopolistic or privileged position as the provider of security. It has to share authority, legitimacy and capacity with other actors. Those orders may overlap in co-operation or in competition. It may be that the state hardly penetrates society. But even in such parts of the country with a minimal state policing presence, there is a social order that is policed to some degree.

Though nonstate policing is the dominant and the preferred policing for everyday security across post-conflict Africa (Baker 2009), it is very often linked in some way with state policing. Links between the state and nonstate can occur at most levels and within most aspects of policing throughout the African continent. Links can be initiated by both sides in formal and informal ways at the national and local level for enhancing performance and legitimacy. They can be ‘natural’, initiated by local actors themselves; ‘natural’ but ‘strengthened’ by externals; or ‘artificial’, the creation of externals.

What Policing Links Do
Links are about transactions (transfers of resources, particularly security intelligence), interactions (physical interaction of actors because of their assigned power-roles or their presence in the same place at the same time) and enrolment (one actor aligns its own objectives to some degree with the direction given by another actor). Just how those links operate is determined by institutional and/or personal needs; and by opportunities.

The driving force behind the desire for relational links is the desire by all security providers to increase capital – whether economic, social, cultural or symbolic (Bourdieu and Wacquant, 1992). The state police dominance is based on its economic capital, that is, its state and donor finances; its cultural capital, that is its corporate knowledge and skills acquired by training and experience; and its social capital, that is all that it has gained through possessing a longstanding officially recognised role. Where the nonstate actors may score, however, is in symbolic capital, that is, in prestige, honour and attention. Few policing actors have adequate supplies of all these and therefore seek partners who can supplement their resources. As a result links are beneficial to most actors and many are open to negotiating them.

Four main categories of policing links are apparent.

1. **Intelligence sharing.** The informal local government structure introduced in Rwanda after the civil war has become the policing agency of first choice for everyday policing. The lowest levels of local government have wide responsibility that includes recording strangers to the neighbourhood and reporting deviant behaviour to the state police and central authorities.

2. **Shared equipment and training.** In Zinder, Niger, a local group established to protect local businesses was provided by the mayor with torch lights for night patrol and with a pair of handcuffs by the police commissioner.

3. **Joint patrols and operations.** The activities of the Community Police Forums in Monrovia, Liberia include: ‘watch teams’ that patrol every night, sometimes with the police.

4. **Enlisting others to undertake work or delegating work to them.** Sierra Leone Police asked Community Police Forums to devise action plans to combat violence in schools in Freetown. In some instances delegation may occur outside the law. And in southern Sudan, police are often asked by customary courts to maintain order in the court house; and may carry out a sentence of the court by ‘whipping’ the convicted individual.

**How Policing Links Work**

Links imply mutual benefit of a symbiotic nature. Yet as Les Johnston has noted, though symbiosis is often used loosely to describe security links, symbiosis can be a variety of relationships, each with different consequences for the partners.

1. **Links where both partners benefit:** a southern Sudan market association in Yei has an arrangement with the police whereby any arrested market traders are handed over to the association on request for the association to resolve the issues and report their resolution to the police. Elsewhere the police in southern Sudan often seek the assistance of the customary chiefs when attempting to find
a person; routinely testify in customary courts; and frequently act as prosecutors in customary courts after bringing the case to them.

2. **Links where one partner benefits while the other is weakened**: community policing introduced in rural areas of Mozambique saw the police order each chief to provide two community policing members for 24 hour weekly shifts at the police post. They were sent to arrest suspects; to beat people under interrogation inside the police post; to clean the post; and to cook for the officers. At night they were ordered to enforce the curfew; to maintain peace around the bars; and to inspect vehicles for stolen or smuggled goods. As Kyed observes, community policing has become a means by which the state police, out of sight of supervision, draw young men and elderly leaders into using or threatening violence on local people. The latter perceive the link with the police as harmful.

3. **Links where one partner benefits while the other sees little benefit**: in Freetown, Police Partnership Boards experience an unequal relationship with the police. The Board provide most of the effort, enthusiasm and funding; the police draw the most benefits in terms of the Boards initiative concerning tackling school violence; starting anti-crime school clubs; securing funding for workshops; lobbying the Inspector General of Police for extra resources for their local police divisions; doing sensitisation among the community; and even doing patrols with (or without) the police. The Boards feel as if they are ‘alone’ in fighting crime.

**Policy making responses**

*Incentives for establishing links*

Links with nonstate actors will rarely be seen by governments as a perfect solution. State monopoly of provision offers an easier route to centralised control, co-ordination and service equality (it avoids dealing with diverse groups; evaluation of who is ‘acceptable’; and opposition from political figures and police senior management keen to protect ‘their patch’). Who in government wouldn’t prefer a centrally imposed normative and legal uniformity of security provision? Yet links:

1. Enable **extension of an acceptable level of security to a larger range of people**. They are potentially attractive economically and politically. Of course governments will have an eye to international standards, yet they will not be without the political realism that knows that, in supporting locally owned (and popular) security groups, a government will secure greater popularity. A Regional Police Commander, Central Province, Rwanda, 2006: ‘A priority is to promote partnership with other agencies. We are a very small police force. We are thin on the ground, not just in the rural areas, but in the towns. We cannot do it by ourselves. In Kigali urban I have just ten patrol vehicles; in Kigali rural just two. We need partnerships with local authorities and local leadership; with health centres; with women’s groups; with transport operators; with [genocide] survivors’.

2. Prevent **nonstate actors from being totally autonomous** and instead bring them under some control/oversight (if only under the ‘shadow of the law’) and allow a degree of co-ordination with them. Actively developing linkages offers the opportunity of state oversight according to defined standards.
3. Allow monitoring for what are mutable groups. NB the Bakassi Boys, Nigeria; PAGAD - People Against Gangsterism and Drugs- of South Africa; and The Union of Islamic Courts of Somalia, all mutated from useful local providers to violent and criminal/terrorist groups. There are also instances where sustainability has come into question because the initial enthusiasm of the first post-war generation was not found in their children e.g. lowest level of local authority security in Uganda and Rwanda.

4. Prevent dependency on the state. When strengthening state institutions ‘becomes the main or only focus it threatens to further alienate local societies by rendering them passive, thereby weakening both a sense of local responsibility for overcoming problems and local ownership of solutions’ (Boege et al., 2008: 11).

5. Can raise standards on both sides: the state increasing its understanding of local needs and its access to local knowledge; and the nonstate conforming more to international standards, especially in its treatment of women and children and as regards its forms of punishment. Such an integrated system might be a win-win linkage.

A policy of linkages is not a panacea for all problems. It does not deny the fact that there are some nonstate groups that neither the police nor the government would want to link up with because of their failure to meet (or want to meet) even minimum standards and perhaps because of their lack of local support. On the other hand, there may be nonstate groups that will resist linking with the police for fear of losing their credibility if they were seen in alliance with a perceived corrupt and repressive state police.

The reality of state police that are not readily reformed and that cover so little national territory, has led donors to consider harnessing nonstate local knowledge and personnel by including these nonstate groups in their security reform. Increasingly, a holistic approach that recognises the reality of nonstate actors is seen as ‘particularly relevant in postconflict contexts’ (Hänggi and Scherrer, 2008: 6). The OECD Handbook on SSR argues that security sector reform (SSR) will be enhanced if programmes:

Consider the need for a multi-layered or multi-stakeholder approach. This helps target donor assistance to state and non-state justice and security providers simultaneously, at the multiple points at which actual day-to-day service delivery occurs. A multi-layered strategy helps respond to the short-term needs of enhanced security and justice service delivery (2007: 17).

Likewise, DFID’s Safety, Security and Access to Justice Programmes maintains that the approach to the security sector ‘has to be comprehensive in nature, taking into account the main actors of the security sector and their functions; namely, all jurisdictions with a capacity to use force, both statutory and nonstatutory’ (Law, 2006: 2). And in the context of post-conflict countries, where state systems have been decimated or discredited, the World Bank’s Conflict Prevention and Reconstruction Unit reasons that:
‘informal mechanisms may be crucial to restoring some degree of law and order’ (Samuels, 2006: 18).

**Methods of facilitating links**

State-building presumes the state is or should be the only actor. When the predominance of nonstate actors in policing is recognized, it becomes apparent that a better way to deliver policing is through utilizing the existing providers at the non-state level, whether they be customary, community-based, commercial or informal. To persist in holding to the state-centric paradigm and its normative position about the necessity for a state monopoly of violence will only bring disappointment. It is to build security sector reform on two false assumptions, namely: that the African state is able to deliver policing to a majority of its population; and that it is even the principal actor in policing provision.

When ‘fragile’ post-conflict states are re-conceptualized as ‘hybrid’ political orders, new options for governance can be envisaged – ones where security is not the sole prerogative of the state; ones that are multi-layered. These would recognize not just the layer of the state, but that of the commercial, community-based, customary and informal provision as well.

Links can be facilitated through:

- A multi-layered strategy by state and donors and international agencies. NB this is not a strategy of abandoning support for the state providers of policing. It is one that offers to support both state and nonstate, believing that programmes that support, ‘either state or nonstate institutions, one to the exclusion of the other, are unlikely to be effective’ (OECD, 2007: 17). Police reform that is preoccupied with state providers when a state has very limited capacity to deliver security to the majority of its population, is unlikely to enhance security and justice for the poor.

- Identifying both those that are suitable to establish links with and those already existing links that can be profitably supported. It means broadening what is understood by the security sector. Yet in Liberia the overarching Governance Reform Commission has considered SSR without the presence of representatives from commercial or customary structures – those who secure the principal economic assets; and those who secure the countryside.

- Establishing an overarching national framework of principles and supervisory structures. Without these the partnership will not genuinely assist or even transform local security structures so that their standards improve. Unfortunately the most obvious provider of this oversight, the state, is not always in a strong position to provide this.

- Improving the quality of the state security sector is also required. People will not entertain partnerships with state agencies regarded as violent, corrupt, incompetent and at times complicit with criminal activity. Inadequacy of the state provision will only further entrench the view that state actors are illegitimate and are not suitable partners.
Skills training. Linkages are more likely to work as the skills of both partners improve. Practical steps to improve the quality of nonstate providers might include, for instance, enhancing their skills. The taxi drivers association of Uganda, UTODA (60,000 members; 10,000 minibuses) polices the bus parks of the country, has in Kampala a 100 strong traffic warden department that works with the police, and has responsibility for enforcing traffic regulations by taxi drivers and in directing traffic at rush-hour. Its Law Enforcement Department was trained by the police. In urban crime hot spots across Africa, such as markets and taxi parks, there could be the bringing together of the police and traders’ associations to develop co-operative arrangements, an agreed division of labour, training programs in the law and its enforcement, and joint problem-solving forums.

Security governance systems at the local level. Mkutu’s thesis is that a key factor in effective security linkages is good governance and monitoring. He cites the example of a successful state/nonstate co-operation to curtail cattle rustling in Kenya. Two communities, Seku and Ilingwesi, decided to form a joint security system:

With the help of some NGOs and in collaboration with the local Member of Parliament and other leaders, they selected a commandant and an assistant and resolved to hire five Kenya Police Reservists... [Donors provided] a jeep, uniforms, boots, radios and batteries, and even a small salary. The Kenya Police Reservists work alongside Rangers employed by large-scale ranchers to repel cattle raiding. Attacks by Samburu and Isiolo have declined markedly. Because their welfare is well catered for, the Home Guards have not been tempted to use their arms to go raiding, but instead protect the community. The police also have a radio connection with the Home Guards, the government provides daily monitoring of the guns and ammunition issued them (Mkutu, 2008: 152).

Good governance in the nonstate policing sector might also include an accreditation programme, where demonstrable knowledge and skills in legal and human rights, documentation and gender awareness could lead to their accreditation by a state institution. This would offer a degree of legitimacy to the nonstate actors and the opportunity to monitor and improve standards.

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CONFERENCE ORGANIZERS

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STEPHEN LUBKEMANN, (Ph.d 2000, Brown University), is Associate Professor of Anthropology and of International Affairs at The George Washington University. He has conducted extensive fieldwork in Mozambique, South Africa, Liberia, and Angola and among African refugees and migrants in Portugal and in the U.S. His current projects include a study of the political and socio-economic influence of the Liberian diaspora; and research on internal displacement and urbanization in Angola. Since 2007 he has been the PI on the USIP-sponsored policy research project Customary and Informal Legal Systems in Liberia: Rule of Law Options for the First Post-Conflict Decade. He has published articles in the Journal of Refugee Studies, Anthropological Quarterly, Journal of Peace Research, International Migration, and Diaspora, and numerous book chapters and reports. His book Culture in Chaos: An Anthropology of the Social Condition in War (University of Chicago Press, 2008) examines how displacement and violence effect social change in protracted conflict settings and critically reviews how international humanitarianism fails to account for new transnational realities. He has co-edited volumes on the topics of: Warscape Ethnography in West Africa (2005), Social Science and Humanitarian Action (1999), and Kinship and Globalization (2007). Dr. Lubkemann served as a core consultant for the Humanitarianism and War Project (1998-2005), on the first Roundtable on Forced Migration of the National Research Council (1999-2001), and currently is appointed as a senior social scientist for the US Census Bureau’s Statistical Research Division. He has consulted for many organizations including USAID and CARE. He currently serves on the Technical Advisory Board of the GWU African Center for Health and Human Security, is a co-founder of the GWU Diaspora Research and Policy Program, and the associate editor of Anthropological Quarterly.
CAROLINE SAGE is a Justice Reform Specialist in the Legal Vice Presidency of the World Bank. She currently heads up the Justice for the Poor program, which focuses on Legal empowerment and mainstreaming justice and conflict management concerns into broader governance and development efforts. The program is currently operating in 9 countries across African and the East Asia and pacific region. Caroline’s research interests include regulatory and justice focused reforms in fragile and conflict affected environments, with a particular focus on legal pluralism, customary institutions, state-society relations, and the role of law in processes of social change. She has written numerous articles and edited books on law and development, and continues to lead an in-depth research effort focusing on these issues, as part of the Justice for the Poor program. Caroline holds degrees in history and film, and graduate degrees in Law and Anthropology.
CONFERENCE PARTICIPANTS

JUDY ADOKO (CO-AUTHOR SIMON LEVINE) is a lawyer with many years’ experience working with Oxfam in Uganda, Burundi and Tanzania. Having grown up in the customary tenure system and seen the changes and distortions taking place in practice, she was moved to establish LEMU with her personal vision. She is the Executive Director, and gives the overall direction to the organisation, as well as being the organization’s main lobbyist. Simon Levine has worked as a volunteer/consultant for LEMU since its creation. He was first introduced to legal pluralism during post-graduate studies in Wageningen University. He is the lead researcher and policy analyst of the organisation, prepares the publications and most of the presentations for the organisation, and supports Judy in advocacy as necessary.

ZUBAIR AHMAD is the chief legal officer for the United States Institute of Peace’s office in Kabul, Afghanistan. Previously, Mr. Ahmad worked on USAID’s Parliamentary Assistance Project and for the International Rescue Committee as a Human Rights Officer. Mr. Ahmad studied law at the International Islamic University in Islamabad, Pakistan and Human Rights and Democracy at the University of Birmingham as a Chevening Fellow.

PETER ALBRECHT is currently a Governance and Conflict Adviser to the UK Government, based in London. He is on leave from his PhD studies at Copenhagen Business School (CBS) and the Danish Institute for International Studies (DIIS), researching local level implementation of security sector reform in Sierra Leone. Previously, he was a Senior Program Officer in International Alert’s Peacebuilding Issues Program with an emphasis on the Balkans and West Africa. His main focus was policy relevant research, training, international advocacy, and support to program implementation. Before joining Alert, Peter worked for the UN Mission in Kosovo and the Kofi Annan International Peacekeeping Training Centre in Accra, Ghana, and for the Danish Institute for Foreign Affairs.

SARA ARAÚJO is a researcher at the Centre for Social Studies University of Coimbra (CES). She was part of the Permanent Observatory for the Portuguese Justice (CES) and has been a member of the bi-national research team for the Revision of the Judicial Organization of Mozambique (CES and Mozambican Centre for Juridical and Judiciary Training). Since 2008 she is an associated member of the Centre for African Studies of the Eduardo Mondlane University, Maputo. She concluded her Master Degree with the dissertation “Legal Pluralism and access to justice. The role of community justices in Mozambique.” She is currently a PhD candidate in the Law, Justice and Citizenship program at the University of Coimbra.

BRUCE BAKER is Professor of African Security and Director of the African Studies Centre at Coventry University, UK. His published articles and books cover African democratization, governance, policing, security sector reform, popular justice and informal justice. His current research focus is informal and formal policing in post-conflict African states and...
has led to *Multi-choice Policing in Africa* (Nordiska Afrikainstitutet, 2007); *Security in Post-conflict Africa: The Role of Non-State Policing* (CRC Press 2009); and numerous articles (see www.africanpolicing.org). He has conducted fieldwork in Zimbabwe, Mozambique, South Africa, Rwanda, Uganda, The Gambia, Sierra Leone, Cape Verde, Seychelles, Liberia, Southern Sudan and Comoros.

**Philip A. Z. Banks**, III, is Chairman of the newly constituted Liberia Law Reform Commission which has the mandate to coordinate and drive the legal reform process of Liberia. Prior to his appointment to the Law Reform Commission, Counsellor Banks was Minister of Justice and Attorney General of Liberia. A graduate of the University of Liberia in Sociology, the Louis Arthur Grimes School of Law, University of Liberia, with a LL.B. degree, and the Yale Law School with an LL.M. degree, Counsellor Banks served as Director of the Legal Department of the National Constitution Commission that drafted the current Liberian Constitution. He also served as Dean of the Louis Arthur Grimes School of Law and Minister of Justice and Attorney General between 1990 and 1994 of the Interim Government of National Unity of Liberia. He is the prime editor of the Liberian Law Reports (vols. 28-41), the Liberian Codes Revised, and Liberia Corporate Domicile Treatise, all of which are currently used officially in Liberia, including by the Liberian Supreme Court and Government agencies.

**Deng Biong** was born in Abyei, Sudan in 1960. Graduated from University of Khartoum, faculty of law with LL.B in 1985. He joined the Movement SPLM/A in 1986 where he served as a freedom fighter, a legal officer and a Judge in the liberated areas. In 1995, Mr. Biong was appointed as president of the high court for the then Greater Equatoria region. After peace in 2005, he joined the Ministry of Legal Affairs of the Government of Southern Sudan as a Counsel General/Director for Training and Research. In August this year, he was appointed the Undersecretary for the MOLACD. He picked an early interest in the customary law and traditional justice in Southern Sudan and wrote some works including, “The Traditional Systems of Justice and Peace in Abyei” in 2004.

**Naomi Cahn** is the John Theodore Fey Research Professor of Law at George Washington University Law School. She has written numerous law review articles and several books in the areas of family law, international law, and feminism. Her co-authored book on gender and the post-conflict transition process, with Professors Fionnuala Ni Aolain (Minnesota and Dublin) and Dina Haynes (New England School of Law) is forthcoming in 2010 from Oxford University Press. Professor Cahn is co-chair of the Women in International Law Interest Group (WILIG) of the American Society of International Law, and a member of the Yale Cultural Cognition Project. From 2002 to 2004, Professor Cahn was on leave in Kinshasa, Congo.

**Sarah Callaghan** is an Australian lawyer with experience in governance and refugee programmes in Egypt, Liberia, Afghanistan, South Sudan and Uganda. She advised the Liberian National Elections Commission on civic education and training and the Afghan government on political office structure. Ms Callaghan worked with the Norwegian Refugee Council’s Information, Counselling and Legal Assistance Afghanistan/Pakistan.
programme with a particular focus on customary justice issues. Ms Callaghan is currently a governance programme officer with Irish Aid Uganda and holds the position of Chair of the Justice, Law and Order Sector, Development Partners Group in Uganda. This position coordinates and harmonises donor support and policy positions and represents these views on policy and budgetary matters to the sector.

Tania Chopra (PhD Social Anthropology) currently serves as Regional Women, Peace and Security Adviser for UNIFEM in East & Horn of Africa. She was previously the Program Coordinator of the World Bank’s ‘Justice for the Poor’ Program in Kenya. Among other positions, she served as a Political Affairs officer for United Nations Transitional Administration in East Timor (UNTAET) and as Electoral Officer for the United Nations Assistance Mission in East Timor (UNAMET), as a Social Development Specialist with the World Bank in West Bank and Gaza and a Visiting Fellow at Watson Institute (Brown University). She has worked as a consultant for UNDP, USAID, King’s College, and other organizations. She has authored a number of journal articles and research reports on the interplay of local socio-political structures and state institutions.

Patricia Cingtho is a Program Development Officer for Northern Uganda Transition Initiative (NUTI), part of USAID’s Office of Transition Initiatives (OTI) program to assist with the transition to recovery and development in northern Uganda. The Northern Uganda Transitional Initiative (NUTI) presently works in partnership local governments and with Ker Kwaro Acholi, a network of traditional chiefs, elders, women, and youth from Acholiland. This partnership supports community level reconciliation interventions, often with involvement and guidance from the traditional, cultural, and religious leaders. Activities that celebrate and involve traditional culture reinforce dignity and respect to areas where violent events took place and help to bring communities closer together. Ms. Cingtho spearheads the The Truth and Reconciliation Project mentorship. Patricia Cingtho previously served as a State Prosecutor for the Directorate of Public Prosecutions for 9 years since 1999 mainly working in the case management department. Institution of criminal proceedings, witness handling, interviewing and decision making upon perusal of complaints was among the many duties assigned. Worked with the Legal Aid Project of the Uganda Law Society as a Social Worker before joining the Directorate of Public Prosecutions in 1998. She is currently pursuing a bachelor of Laws degree at IUIU in Kampala.

Sarah Cliffe has worked for the last twenty years in countries emerging from conflict and political transition, covering Afghanistan, Burundi, CAR, DRC, Guinea Bissau, Ethiopia, Haiti, Indonesia, Liberia, Rwanda, Sudan, South Africa, and Timor Leste. Prior to joining the Bank, she worked for the United Nations Development Program in Rwanda, the Government of South Africa, and the Congress of South African Trade Unions, as well as for a major management consultancy company in the United Kingdom on public sector reform issues. She holds degrees in History and Economic Development from Cambridge and Columbia Universities. Since joining the Bank, her work has covered post-conflict reconstruction, community driven development and civil service reform. She was chief of mission for the Bank’s programme in Timor-Leste from 1999 to
2002; led the Bank’s Fragile and Conflict-Affected Countries Group from 2002-2007 and was Director of Operations for East Asia and the Pacific from 2007 – 2009. She is now Special Representative and Director for the World Development Report on Conflict, Security and Development.

**Noah Co7burn** is an anthropologist for the United States Institute of Peace in Kabul. He is also a Presidential Fellow and doctoral candidate in the anthropology department at Boston University. His dissertation focuses on local political structures and reasons for violence in a district in the Shomali Plain, north of Kabul. Mr. Coburn has conducted research on the recent elections for Afghanistan Research and Evaluation Unit and on several neighborhoods in Kabul’s old city for the Aga Khan Trust for Culture. Mr. Coburn has an MA in Russian and Central Asian studies from Columbia University, New York.

**Giselle Corradi** holds a Bachelor in Law (Buenos Aires University, Argentina) and a Masters in Comparative Studies of Culture (Ghent University, Belgium). She is currently a PhD candidate at the Human Rights Centre at Ghent University, where she works as a researcher in the project ‘*Addressing Traditional Justice in Post Conflict Judicial and Legal Development Aid in Sub-Saharan Africa*’ (2008-2011). She has previously worked as a consultant for the Belgian private foundation Durabilis. Her field experience covers Latin America (Argentina 2004-05, Peru 2007, Guatemala, 2006-07) and Sub-Saharan Africa (Sierra Leone 2009, Mozambique 2009).

**Tom Crick** joined the Carter Center in 1994 and is currently associate director of the Center’s Conflict Resolution Program. He has worked on numerous Carter Center election and conflict projects, primarily in Africa, including the Carter Center-brokered peace efforts in Sudan, Uganda, Ethiopia and the Great Lakes peace. Currently, he directs the Center’s “Access to Justice” work with the Government of Liberia. Mr. Crick has a BA from Bristol University and a Masters from the Queen's University of Belfast. He has conducted doctoral research at the London School of Economics and at Emory University. Prior to joining the Center, he lectured in political science in the U.K. and worked as a journalist and project leader for an interdenominational youth project in Northern Ireland. Mr. Crick is a licensed mediator in the state of Georgia and adjunct faculty at the Emory University School of Law.

**Sinclair Dinnen** is a Senior Fellow in the State, Society & Governance in Melanesia (SSGM) Program at the Australian National University. With a background in law and sociology, he worked previously at the University of Papua New Guinea and the National Research Institute in Port Moresby. He has undertaken extensive research and policy work in the Melanesian countries of the SW Pacific around issues of conflict and peacemaking, policing, regulatory pluralism, and state-building. He is author of *Law and Order in a Weak State: Crime and Politics in Papua New Guinea* (University of Hawai’i Press 2001) and co-editor of *Reflections on Violence in Melanesia* (Asia-Pacific Press 2000), *A Kind of Mending – Restorative Justice in the Pacific Islands* (Pandanus Books 2003), and *Politics and State Building in Solomon Islands* (Asia Pacific Press & ANU E Press 2008).
**Kate Fearon** works as the Rule of Law Governance Advisor to the Helmand PRT, based at Lashkar Gah. Her portfolio includes Community Engagement across all of the Rule of Law institutions, the Justice and the Security Committees of the 4 ASOP Community Councils in Helmand, and has conducted extensive research on attitudes to and the workings of, informal justice in Helmand. Prior to working in Afghanistan she was the Deputy Head of the Political Department for OHR and also Political Party Programme Director for the National Democratic Institute in Bosnia and Hergovina. She was a founder member of the Northern Ireland Women's Coalition and acted as Chief of Staff to the NIWC in the Northern Ireland Assembly and in the all-party negotiations that led to the Good Friday Agreement. She is the author of numerous articles on conflict resolution, post conflict politics, gender and conflict in Northern Ireland and Bosnia, and on informal justice mechanisms and social context in Helmand Province, Afghanistan.

**Varun Gauri** is a Senior Economist in the Development Research Group of the World Bank. His research focuses on politics and governance in the social sectors, and aims to combine quantitative and qualitative methods in economics and social science research. He is leading research projects on the impact of legal strategies to claim economic and social rights, and on the impact of international laws and norms on development outcomes. He has published papers on a wide variety of topics, including social rights and economics, public interest litigation in India, political economy of government responses to HIV/AIDS, the strategic choices of development NGOs, the use of vouchers for basic education, and immunization in developing countries. He is the author of *School Choice in Chile: Two Decades of Educational Reform* (University of Pittsburgh Press 1998), and the editor (with Daniel Brinks) of *Courting Social Justice: Judicial Enforcement of Social and Economic Rights in the Developing World* (Cambridge University Press 2008). Since joining the World Bank in 1996, he has worked on and led a variety of operational tasks in the World Bank, including operational evaluations, investments in privately owned hospitals in Latin America, a social sector adjustment loan to Brazil, several health care projects in Brazil, a study of the decentralization of health care in Nigeria, and was a core team member of the 2007 *World Development Report*.

**Manfred Hinz** studied law and philosophy at the University of Mainz (Germany) where he graduated in 1960. He did his legal practitioner examination in 1964, the year in which he also obtained his doctor degree in law from the University of Mainz. After studying sociology, anthropology and African languages at the same university, he was appointed full professor at the University of Bremen (Germany) in 1971. This appointment completed his studies for the higher doctorate (*Habilitation*). In 1975, he founded the Centre for African Studies at the University of Bremen, from which he started co-operating first with SWAPO and later with the United Nations Institute for Namibia, Lusaka. In 1989, he went to Namibia where he, after independence, assisted the Ministry of Justice. He was later seconded to the office of the Vice Chancellor of the University of Namibia to help build up the UNAM’S Faculty of Law. He joined the Faculty as professor with its inception and was Deputy Dean and Dean of the Faculty for several
years. When Prof WJ Kamba, the first incumbent of the UNECO Chair: Human Rights and Democracy in the Faculty of Law of the University of Namibia returned to his home country, Zimbabwe, Prof Hinz acted for the chair from 1 January 2000 to 31 March 2001. Since 1 April 2001, Prof Hinz holds the chair in his own rights. Manfred Hinz has published in his areas of specialisation, in particular in the field of legal and political anthropology, constitutional and international law.

**Tarcisius Tara Kabataulaka** is an associate professor at the Center for Pacific Islands Studies at the University of Hawai‘i at Mānoa. He received his undergraduate and MA degrees from the University of the South Pacific and a PhD in political science and international relations from the Australian National University. He joined the Center for Pacific Island Studies in January 2009. Prior to that, he was, for six years, a fellow at the East-West Center’s Pacific Islands Development Program. Before moving to Hawai‘i he taught history and political science at the University of the South Pacific. Kabataulaka’s research interests focus on governance, development, natural resources development, conflicts, post-conflict development, international intervention, peace-making, Australian foreign policies, and political developments in Melanesia in general, and Solomon Islands in particular. He has written extensively on the Solomon Islands civil unrest and the Australian-led regional intervention. He is the co-editor (with Greg Fry) of *Intervention and State-building in the Pacific: the Legitimacy of ‘Cooperative Intervention’* (Manchester University Press, 2008). In 2000, following two years of civil unrest in Solomon Islands, Kabataulaka participated in the peace talks in Townsville, Australia as the chief negotiator for one of the parties in the conflict. He comes from the Weather Coast of Guadalcanal in Solomon Islands, and was educated in Solomon Islands, Fiji, and Australia.

**Massoud Karukhil** is currently the head of the Liaison Office (TLO) in Kabul. He is also the chief coordinator of TLO’s work with tribes in southern Afghanistan. As the head of TLO, Mr. Karukhil focuses on institutional engagement with tribal structures, community leaders and civil society organizations. TLO helps facilitate the interaction between the Afghan government and the international community.

**Fergus Kerrigan** is the acting head of the Access to Justice Department at the Danish Institute of Human Rights.

**Professor Abdul Qader Adalat Khwa** is the Deputy Minister of Justice for the Islamic Republic of Afghanistan. He has also been a professor of family law at Kabul University since 1992. Previously, Professor Adalat Khwa was head of the legal rights department at the Ministry of Justice and was a public defender in his home province of Kunduz. He has PhD in law from Tashkent University.

**Harriet Kuyang**, right after the signing of the CPA, Ms. Kuyang joined UNDP and started to work with traditional authorities in Southern Sudan; not only to strengthen their judicial roles, but also to emphasize that customary law be applied subject to the transitional legal framework. She has worked closely with consultants, scholars on
customary law, written articles, and, of recent, worked with Professor Manfred Hinz to inform the process of formulating a customary law strategy for Southern Sudan. Alongside the Judiciary and the Ministry of Legal Affairs she works to strengthen the role of chiefs and customary courts. At the moment Ms. Kuyang is undertaking the task of doing a capacity mapping exercise for traditional authorities; and will later support the process of developing a methodology and manual to conduct trainings on human rights and promote the eradication of harmful traditional practices.

**Helene Maria Kyed** (hmk@diis.dk <mailto:hmk@diis.dk>) is a researcher at the Danish Institute for International Studies. She has an MA in Social Anthropology and a PhD in International Development Studies. Kyed has eight years of fieldwork-based research experience in Southern Africa, especially Mozambique, covering the themes of traditional authority, state formation, decentralization and legal pluralism. Her PhD dealt with the state recognition of traditional authority in Mozambique, and theoretical questions on authority and citizenship. The past four years Kyed has specialized in research on the interaction between state and non-state justice and security providers. A current post-doc project deals with community policing in Mozambique and Ghana. Kyed is co-author of the book anthologies, State Recognition and Democratization in Sub-Saharan Africa. A New Dawn for Traditional Authorities? (Palgrave, 2007), and State Recognition of Local Authorities and Public participation. Experiences, Obstacles and Possibilities in Mozambique (Kapicua, 2007), and she has published a number of articles and book chapters on the topics of traditional authority and local justice enforcement and policing.

**Vivek Maru** co-founded and co-directed for four years Timap for Justice, an experimental legal aid program in Sierra Leone. Timap has been recognized by independent institutions such as the International Crisis Group, the UN Commission on Legal Empowerment, and Transparency International for pioneering a creative, effective methodology for delivering justice services in the context of a failed state and a dualist legal system. During his time in Sierra Leone Vivek also co-supervised the Human Rights Clinic at Fourah Bay College, Freetown, and was a fellow with the Open Society Justice Initiative. In October 2007, Vivek joined the Justice Reform Group of the World Bank. Maru previously worked at Human Rights Watch in the AIDS and Human Rights program. He clerked for Hon. Marsha Berzon on the U.S. Court of Appeals for the Ninth Circuit. He has also engaged in human rights and development work in India, Bangladesh, South Africa, and New Haven. His recent publications include *Between Law and Society: Paralegals and the Provision of Justice Services in Sierra Leone* in the Yale Journal of International Law, which describes the methodology of Timap for Justice. Maru graduated from Harvard College, magna cum laude, with an A.B. in Social Studies, and received his J.D. from Yale Law School.

**Tiernan Mennen** is Senior Project Manager for the Legal Empowerment of the Poor initiative, based in Budapest. Tiernan has years of experience as a technical advisor and project manager on rule of law and anticorruption programming in Africa, Latin America, the Middle East and Southeast Asia. Most recently, Tiernan served as Deputy
Chief of Party for USAID’s Administration of Justice Project in La Paz, Bolivia including an access to justice program based on community-run justice and legal aid centers. Tiernan has also served as Senior Associate with DPK Consulting on various global rule of law projects, Coordinator for an access to justice and community paralegal project in southern Sudan, as an anticorruption consultant for the World Bank, and as legal advisor for community human rights litigation and advocacy efforts in Peru. He holds a J.D. from Cornell Law School and a Masters of Arts in International Development and Economics from the School for Advanced International Studies at Johns Hopkins. Tiernan is fluent in Spanish.

Jose Muñoz is Research Fellow at Universidad Autónoma de Madrid’s African Studies Group, and Visiting Lecturer at George Washington University. Muñoz’s work combines his background in business law with a thorough immersion into the history and ethnography of West and Central Africa. His doctoral dissertation, *The Eye of the State: The Production of Public Authority in Northern Cameroon* (Northwestern University, Anthropology, 2009), is now evolving into a book manuscript. Based on extensive fieldwork, it explores how repertoires of economic action enable distinct modes of public authority in Adamaoua Province (Cameroon). It examines four segments of the provincial economy—the cattle trade, transport, public contracting, and non-governmental organizations—as well as their interactions with the state, especially the tax administration. Muñoz has published articles and reviews in the international journals *Politique Africaine* and *Revista de Libros*. A forthcoming article in the *African Studies Review* analyzes the practical effects of recent reforms that have refashioned business taxation in Cameroon.

Vijay Kumar Nagaraj is a Research Director at the International Council on Human Rights Policy in Geneva. He has previously worked with the MKSS, a rural mass-organisation in North India; Amnesty International and the Tata Institute of Social Sciences, Mumbai. His research interests include human rights, law, social movements and philosophy.

Lene Østergaard is the Coordinator of the Justice for the Poor program in Timor Leste. She is an anthropologist with extensive experience in Indonesia, where she worked as a consultant to Justice for the Poor 2003 and 2004. She has recently completed an MA in Conflict Resolution and Mediation at University of Copenhagen. Her areas of work includes ethnic minorities, natural resource management, justice sector reform, community development, cooperatives, non-formal training, and conflict resolution. She has worked as an independent consultant from 2000-2009 with various assignments for the World Bank, EC, bilateral donors and NGOs. From 1993 to 2000 she was the Country Program Director of a national cooperative training development program in Indonesia. Prior to that, she worked as Center for Development and the Environment at University of Oslo on a rain forest management research program.

Frank Nigel Othemb is the Secretary and Chief Executive Officer of the Uganda Law Reform Commission – a Constitutional public sector organization mandated to review, revise and reform the law in Uganda. Mr. Othemb is a lawyer with a Bachelor of Laws
David Pimentel, before joining the Florida Coastal School of Law faculty in 2007, Professor Pimentel headed the Rule of Law efforts in Southern Sudan for the United Nations mission there, and has led court reform projects in Bosnia and Romania as well. He was the Chief of Court Management at the International Criminal Tribunal for the former Yugoslavia for four years and spent eleven years with federal courts of the United States, including one as a Supreme Court Fellow. He clerked for a federal District Judge Martin Pence, in Honolulu, after two years or practice with Perkins Coie in Seattle. He studied economics and law at BYU, Berkeley and Harvard. He has written on issues of judicial independence and accountability, judicial discipline, international judicial reform and rule of law reform. He and his wife of 25 years, writer Annette Bay, have six well-traveled children who are woefully ill-versed in American popular culture.

Doug Porter is Economics and Governance Coordinator for the Bank’s work in Timor Leste and the Pacific islands. Doug holds a PhD from the Australian National University, and his work in conflict-affected countries includes long term assignments in Kenya, Uganda, Malawi and Zambia, Cambodia and Vietnam, Pakistan and southern Philippines. During 2007-2008, Doug was based in Timor-Leste, working on public finance management and is currently leading a study of Solomon Islands long term growth prospects, and analytic work on the viability of Pacific Islands countries. His research interests include the political economy of institutional change in fragile states, with a special interest in decentralization, state-society relations and justice reforms. Doug is the author of several books and articles on development and change, including Development Beyond Neoliberalism? Poverty reduction, governance, political economy (Routledge, London 2006), and is currently working on a study of post-conflict transition in Cambodia entitled Winning the Peace: new institutions, neo-patrimonialism and post-conflict in Cambodia, (Michigan UP, 2010).

Isaac Robinson holds a BA (Hons) in Jurisprudence from University of Oxford, and an LL.M. from Columbia University in New York. He is a Barrister-at-Law in the United
Isaac Robinson is legal aid Program Manager of Norwegian Refugee Council (NRC), Uganda. His project aims at removing legal obstacles to durable solution for the internally displaced people (IDP) of northern Uganda. At NRC, he previously implemented legal aid projects for Serb IDPs in Serbia-Kosovo; Albanian and Roma refugees in Macedonia; Tsunami and civil war IDPs in Sri Lanka; Afghan Refugees/IDPs in Afghanistan-Pakistan; and earthquake and flood IDPs in Pakistan. His skills in legal aid program management received positive endorsement when he was selected to lead the earthquake legal aid scheme rolled out by the Government of Pakistan and the Asian Development Bank. Prior to NRC, Isaac joined the United Nations Mission in Kosovo in 2000 and worked in various capacities under the Department of Public Services and Department of Justice.

ERIC SCHEYE is a consultant in justice and security sector development and conflict management. He has worked for the United States, United Kingdom, Netherlands, Brazil, Argentina, OSCE, OECD, and the UN. He has also had assignments with various research institutes and non-governmental organizations, such as the Democratic Control of the Armed Forces, Clingendael Institute, United States Institute of Peace, and Saferworld. In the field, Mr. Scheye worked for three years on an UK-sponsored integrated justice program in Yemen, two years for the Brazilian Secretariat for National Security; and three years in Bosnia and Herzegovina on a peacekeeping assignment. He conducted an assessment of non-state/local justice and security networks in southern Sudan for the US and UK and has undertaken other assignments in Brazil, Argentina, Guatemala, Kyrgyzstan, Belize, and organized a conference on Iraqi de-Ba’athification. He has written or co-written reports for the Dutch on how conduct effective justice and security programming and the need to engage in non-state/local justice and security initiatives; for OECD on justice and security delivery in fragile states and their distribution as public and private goods in relation to their being ‘outsourced,’ provided by private security companies, and the de facto privatization of state agencies; for DFID on the politics of justice development and on how to set up a performance measurement regime; and for USAID on suggesting ways in which to integrate policing into its rule of law programming; and for OECD’s security sector reform implementation framework. Prior to his consulting career, Eric Scheye worked for almost ten years with the United Nations Department of Peacekeeping and United Nations Development Programme in Albania, Bosnia and Herzegovina, East Timor, Honduras, Kosovo, and Serbia. Eric has a Ph.D. in political science, an M.B.A., and has taught at John Jay College of Criminal Justice in New York and Potsdam Universität, Potsdam, Germany.

MONFRED SESAY is the Lead Customary Law Officer and a Senior Public Prosecutor for Sierra Leone.

BILAL SIDDIQI is a PhD candidate in Economics at the Centre for the Study of African Economies, Oxford University. His research focuses on institutions, law and conflict. He is currently engaged in two large-scale research studies of interventions in the justice sector: a randomized controlled trial of a rural mobile paralegal program in Liberia, run by the Carter Center; and a quasi-experimental study of Timap for Justice's criminal
justice program in Sierra Leone, in partnership with the Open Society Justice Initiative. Bilal was previously based at the Center for Global Development in Washington, DC, where he worked on aid delivery, global health, and education governance. He holds an MPhil in Economics from Oxford, where he studied as a Rhodes Scholar.

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