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## Customary Justice Sector Reform

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# Research and Policy Note

## Customary Justice Sector Reform

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**Van Vollenhoven Institute  
for Law, Governance, and Development**



**International Development Law Organization**  
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## **Research and Policy Note: Customary Justice Sector Reform**

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## ABOUT THE PROGRAM

This program has aimed to expand the knowledge base regarding the relationship between the operation of customary justice systems and the legal empowerment of poor and marginalized populations, and has identified entry points and tools of engagement for working with customary justice systems to strengthen legal empowerment. Such knowledge has been generated through a number of individual research projects based in Namibia, Rwanda, Somalia, Tanzania, Mozambique, Papua New Guinea, Liberia and Uganda. These research projects have sought to evaluate programmatic interventions designed to enhance legal empowerment through improved operation of customary justice systems with a view to collecting empirical data on the effectiveness of such approaches, lessons learned and best practices. The results have been brought together in two publications that are being disseminated among international and national legal practitioners, country specialists and development actors working in the areas of customary justice and/or legal empowerment.

## PARTNERSHIPS

This program is being implemented by IDLO in partnership with the Van Vollenhoven Institute for Law, Governance and development, Leiden University (<http://law.leiden.edu/organization/metajuridica/vvi/>) and the United Nations Development Programme (UNDP), Somalia.

The Van Vollenhoven Institute collects, produces, stores, and disseminates knowledge on the processes of and relationships between law, governance and development, particularly in Asia, Africa, and the Islamic Middle East. Through research and teaching, the Van Vollenhoven Institute seeks to contribute to a better understanding of the formation and functioning of legal systems in developing countries and their effectiveness in contributing to good governance and development. The Van Vollenhoven Institute's research employs a socio-legal approach to develop insights into the workings of national legal systems in their historical, social and political contexts. It includes both state law and legal institutions, as well as customary and religious normative systems, with a special focus on access to justice. In their research projects the processes of law-making, administrative implementation, enforcement and dispute resolution have a prominent place. Local case studies help us to find out how law functions in society.

## DONOR SUPPORT

This research is being supported by the Bill and Melinda Gates Foundation ([www.gatesfoundation.org](http://www.gatesfoundation.org)) as part of IDLO's broader research program: *Supporting the Legal Empowerment of the Poor for Development*.

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# Research and Policy Note

## Customary Justice Sector Reform

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Janine Ubink

### Introduction

Customary justice systems are a distinguishing feature in the landscape of the contemporary Third World. In many developing countries, customary justice systems remain the most important system for dispute settlement as well as for regulating important aspects of life, including access to land, water and other natural resources, and family matters such as marriage, divorce and inheritance.

Africa is a prime example of where customary justice systems continue to dominate or made a comeback in the last decades. Also, in many Asian and Latin American countries, customary justice systems are vital. See for instance the role of *adat* in Indonesia and the disputes over recognition of customary indigenous group rights in Bolivia, Peru or Columbia. Customary justice systems even play a role in Northern America and Australia, where there have been intense struggles surrounding the recognition of 'native' group rights.

Over the last decade or more, customary justice systems have become an increasing priority for international organizations working in legal development cooperation. Traditionally, donor-led legal reform projects have emphasized formal institutions, such as the judiciary, legislators, the police and prisons, and paid less attention to customary justice systems. The prominence of customary justice systems has often been regarded as incompatible with the modern nation-state and therefore as something to be discouraged or ignored rather than strengthened or engaged with. Limited familiarity of both local and foreign lawyers with the concepts and content of customary law and pressure to achieve quick results are also mentioned as explanatory factors (Toomey 2011).

However, a growing body of evidence suggests that poor people in developing countries have limited access to the formal legal system. The limited effect of reforms in the state justice sector on the majority of the poor, combined with increased recognition of the wide reach and accessibility of customary justice systems have led to a changing attitude among donors towards customary justice systems and towards an interest in building on their positive elements for the benefit of the poor.

This approach is consistent with the rise of 'bottom-up' legal development cooperation approaches (Van Rooij 2009), which seek to directly reach the poor or marginalized groups through their interventions, instead of hoping that state law reform projects 'trickle down' to benefit those at the bottom of developing societies.

To enable policymakers, academics, and donor institutions to better understand the nature of customary justice systems and to critically assess their functioning and the opportunities and modalities of programs to enhance their functioning, this Research & Policy Note will discuss the following issues

- What are customary justice systems, why are they so important, and what are their most important positive and negative characteristics?

- What aspects of the complex nature of customary justice system need to be understood if legal reforms targeting customary justice systems are to be effective?
- What approaches can be used to improve the functioning and effectiveness of customary justice systems?
- What role does power play in these reforms? And can we come to a particular kind of legal empowerment for improving the functioning and effectiveness of customary justice systems?

## 1. Customary Justice Systems: what are they and why are they important?

There is no generally accepted definition of what constitutes customary justice. In general, customary systems of justice refer to the types of justice systems that exist at the local or community level, that have not been set up by the state, and that derive their legitimacy from the mores, values and traditions of the indigenous ethnic group. Although they are often indicated by the term 'informal' or 'non-state', they do not exist unrelated to, nor function independently from, state legal systems. On the contrary, customary and state legal systems define each other in their many interactions.

Many other terms are used in the literature to describe customary justice systems, including traditional, non-state, informal, indigenous, local, community and folk law systems. In addition, many communities have their own names for their customary justice systems or their laws and courts, such as adat in Indonesia, xeer in Somalia and kastom in the Solomon Islands.

Customary justice systems play a prominent role in the lives of many of the world's poor. They are the lived reality of most people in developing countries, especially in rural areas (see Box 1).

### BOX 1. The Prominence of Customary Justice Systems

"In many developing countries traditional or customary legal systems account for 80% of total cases" (DFID 2002, 58).

"(T)he majority of the population is often not in a position to access the formal legal system for various cultural, linguistic, financial or logistical reasons ... Their access to justice largely depends on the functioning of informal systems" (Danish Ministry of Foreign Affairs and Danida 2000, vi, quoted in Golub 2006, 118).

"(E)ven if the formal system were to operate fairly, free from corruption and in a timely manner, the average Liberian would still prefer the customary system. The customary system is perceived as more holistic, taking account of the underlying causes of a dispute and seeking to repair the tear in the social fabric, whereas the formal system is seen as overly adversarial, retributive, and narrow in its focus on the specific case at issue (Rawls 2011, 92).

Customary justice "governs the daily lives of more than three quarters of the populations of most African countries" (Sage and Woolcock 2006).

"(U)p to 90 percent of cases in Nigeria are settled by customary courts" (Odinkalu 2006).

People select customary justice institutions for various reasons. They can be attracted to the perceived positive attributes of customary justice institutions, their procedures and their outcome. Positive attributes associated with customary dispute settlement include physical accessibility, the use of familiar procedures and language, the limited costs of dispute settlement procedures, the short duration of case resolution, knowledge of the local context among the dispute settlers, and the more restorative nature of the process.

Disputants can also find themselves confronted with social pressure not to refer a dispute to a state court and some may fear reprisal or social ostracism should they enter the formal justice system. In addition, poor people's use of customary justice systems may reflect the limited access to and weakness of the formal justice systems, rather than an active choice for the former based on their satisfaction with them.

Notwithstanding the importance of customary dispute settlement for the majority of the poor, the prominence of customary justice systems in first instance lies more in the regulation of important aspects of daily life, such as access to land and natural resource management, and family issues such as inheritance and marriage, than in the settlement of occasional disputes. Several of the positive attributes of customary dispute settlement mentioned — including physical presence, familiarity with local context and limited costs — are also applicable to customary administration. In particular, in debates regarding natural resource management, food availability, and natural resource depletion and degradation, there are strong proponents of customary administration. They contend that the involvement of local people and their local normative systems enhance sustainable development. Local communities have a tradition of living close to nature and can thus provide insights into resource allocation, development and management that would not be exploited if a purely state-centric approach were adopted. In addition, the study of common pool resources management argues that customary, communal and natural resource management systems are more efficient and effective than their private or state alternatives (Ostrom 1999; UNDP 2005; Von Benda-Beckmann 2006).

Despite the well-known and often acclaimed positive attributes of customary justice systems, ample studies display serious concern about their functioning. The most-mentioned worries about customary justice systems include violation of human and constitutional rights, elite capture and the hampering effect of these systems on economic development.

#### *Violation human rights*

Customary law and customary dispute settlement and administration may violate human rights standards and constitutional provisions. This is partly caused by the fact that judges and community members are often not aware of human rights standards such as the right to equality and non-discrimination. Another problem is that customary criminal procedures do not necessarily provide victims and suspects with minimum fair trial and redress standards. Further, some local norms and practices, such as public humiliation and physical violence, or institutionalized discrimination of certain groups derived from traditional values and hierarchal notions may directly contradict human rights standards.

A typical example is where customary justice systems lack gender equality and violate rights of non-discrimination. Customary systems are widely regarded as patriarchal and detrimental to women's rights to assets or opportunities. This critique is leveled both against processes of customary dispute settlement and customary administration. Dispute settlement issues include the fact that courts lack women judges, women face cultural impediments to participate in court debates, and in some cases are even required to have their interests represented by their husbands or male relatives. Customary administration issues include that most leadership positions are held by men and that land ownership is often vested in men, while women exercise only derived rights. Such norms and practices operate to create a gender bias, for instance in cases of inheritance and divorce. Some studies see the gender bias of customary justice systems as an incorrigible trait, and advocate for a complete disengagement with customary justice (Khadiagala 2001; Whitehead and Tsikata 2003). Others reason that customary systems will not disappear in the near future, and therefore the issue of reform should be taken seriously (Nyamu-Musembi 2003). The latter view is well received by legal reformers.

According to Clarke (2011), a superficial engagement with customary justice systems leads most development agencies to put a narrow emphasis on the human rights implications of customary justice, while neglecting other possibly negative attributes of customary justice systems such as a lack of transparency, minimal accountability and vulnerability to elite capture. In considering the rise of customary law in justice sector reform, he concludes that most justice reform policies undertake a simplistic balancing of customary justice systems' practical benefits – including accessibility, efficiency, legitimacy, social cohesion and participation – against the possible violations of human rights.

#### *Elite capture*

Customary justice systems can be susceptible to elite capture. In a setting of mediated or negotiated dispute settlement, domination by power holders can be detrimental to the poor and disempowered. Elite capture is especially problematic when customary checks and balances have eroded, such as procedures to depose malfunctioning chiefs. Some therefore argue that customary dispute resolution can only work if it is backed up by state law and if there is a possibility of state law as a last resort (Nader 2001).

In studies dealing with customary land management, the danger of elite capture has also been widely recognized. A number of these studies demonstrate that local elites have been able to use their position and the ambiguities of customary law to appropriate land to further their own economic and political interests. This includes traditional leaders who have ruled arbitrarily, with few checks and balances on their administration, giving power considerations precedence over objectives of development (see Ubink 2008, 18 for an overview of this literature).

#### BOX 2: Elite Capture and Power Inequalities

Traditional and indigenous justice systems are susceptible to elite capture and may “serve to reinforce existing hierarchies and social structures at the expense of disadvantaged groups” (United Nations Development Programme (UNDP) 2005, 101).

“Villagers and village leaders preferred to resolve corruption cases informally, perceiving informal mechanisms to be easier, quicker, cheaper and less socially disruptive than the formal legal system. They also feared and distrusted the formal legal system, viewing it as corrupt, unfair and inaccessible. Yet despite this preference, informal institutions failed to resolve corruption disputes where there were gross power imbalances between the perpetrators of corruption and the poor and marginalized communities from whom they had embezzled money” (World Bank 2004, 59).

“(I)f there is any single generalization that has ensued from the anthropological research on disputing processes ... it is that mediation and negotiation require conditions of relatively equal power” (Nader 2001, 22).

Given that state systems can equally be captured by particular elites, a switch from customary to state law or disputing systems will not automatically solve this problem. Instead, both justice systems need to be harnessed against elite capture, incorporating proper checks and balances, stronger participation in norm formation, and guarantees for impartiality of adjudicators; this may be equally if not more challenging to do in customary than in state justice systems.

#### *Hampering economic development*

A third problem is that customary systems are deemed of limited effect in stimulating economic development. This view has been debated since the colonial period, but is now commonly linked to the Peruvian economist Hernando de Soto. He argues that most property and businesses of the poor are regulated in informal (non-state) normative systems and are not formally recognized by state law. This excludes them from participation in larger markets and hampers their access to formal loans. Proponents of

this view hold that “[e]conomic transactions remain unpredictable, insecure, and limited” (CLEP 2008, 26) and that assets regulated under a customary regime will not be linked to capital markets and thus remain underdeveloped. De Soto thus propounds the idea of finding bridges between informal non-state property arrangements and an accessible system of formal state law. De Soto’s work, while often criticized, has become influential in law and development studies, and even more so among policy makers.

#### *Taking customary justice systems seriously*

Thus, there are a number of issues regarding the operation of customary justice systems that need to be addressed, including elite capture, human rights protection, and, in certain cases, the integration of non-state arrangements in wider capital markets. Many studies show that mere statutory regulation of customary processes and practices often has a limited effect on the locality. Taking this into account leads to a conclusion that the customary ‘arena’, whether seen as an obstacle for legal empowerment of marginalized groups and community members or as an opportunity for such change, needs to be taken seriously. The current attitude of legal development practitioners towards customary justice systems seems to reflect an acceptance that they are simply too important to ignore, and that their flaws make the case for active involvement with customary justice systems only more compelling (Harper 2011). This is clearly demonstrated in northern Namibia, where the Owambo Traditional Authorities changed their customary laws through a process of self-statements (see Box 3).

#### **Box 3: Protecting Widows in Northern Namibia**

In the beginning of the 1990s, leaders of six Owambo traditional communities in northern Namibia embarked on a self-statement of the most important substantive and procedural customary norms. The aims of the self-statement process specifically included the improvement of the legal status of women in line with the requirements of the Namibian Constitution. The leaders decided that certain rights abrogating norms should be proscribed. The first concerned the customary inheritance norm that when a man dies, his estate is inherited by his matrilineal family, which leaves the widow dependent on the husband’s family. Despite a customary obligation of the husband’s family to support needy widows and children, this often resulted in the widow and her children being chased out of the house. A second, related customary norm in Owambo was that when women remained on the land they had occupied with their husbands, they were required to make a payment to their traditional leaders for the land in question. Research undertaken in one of the Owambo Traditional Authorities in 2010 concludes that these adaptations in customary law are locally well-known and accepted and have almost eradicated the practice of property grabbing. This is especially remarkable when compared with the experiences of other African countries. Many African countries have attempted to outlaw similar practices by statutory intervention, but these efforts have nearly all had a marginal effect on customary practices in rural areas (Ubink 2011).

## 2. The complexity of customary justice systems

If legal reforms targeting customary justice systems are to be effective, development actors must understand and address their complex nature. Central to this complexity is the difficulty in identifying the appropriate norm that applies to certain behavior or to a dispute.

#### *Multiple versions of customary law*

First, there are multiple versions of customary law. In many countries, it is possible to distinguish between unwritten living customary law and written versions such as codified customary law and judicial customary law. Codified customary law refers to legislation codifying the customary law of a certain jurisdiction, whereas judicial customary law refers to the norms developed by judges when applying customary norms in courts. Both written versions provide legal certainty and accessibility to the customary law, while at the same time unifying, simplifying and crystallizing it, often in a formal language that is

different from that used in the original community. There may be considerable differences between these written versions of customary and living customary law – which refers to the norms that govern daily life in the community at the local level – because living customary norms are inherently dynamic.

#### *Ascertaining living customary law*

Since written versions of customary law may be as alien in local communities as state law, today there is increased recognition that engagement with customary justice systems implies engaging with living customary law. Ascertaining the norms of living customary law presents its own challenges. First of all, the ideal norms quoted by community members can be quite different from the norms applied by dispute settlement institutions or observed by community members in daily life outside of exceptional dispute cases (Holleman 1973; Llewellyn and Hoebel 1941). It can be generally said that customary justice systems do not aim to resolve disputes through adjudication, deciding who wins and loses, but through mediation, seeking to facilitate a settlement that is acceptable to the parties. In this process, customary norms do not serve to produce direct outcomes, but are the starting points for discussions leading towards settlements. To ascertain norms of customary law, ideally a combination of research methods comprising hypothetical questions, observation of dispute settlements and normal practices should be used, a process that can easily become expensive and time consuming.

This complexity is compounded by the fact that within living customary law, there may be different or competing versions of particular norms both among and within different communities or customary groups (Chanock 1989). This is especially true in contexts where large economic or social transformations have occurred that have altered the social fabric and economic structures of the community, giving rise to competing values, for instance, concerning the position of women or what should be done with proceeds from newly available lucrative land deals. For this reason, who within the local community is asked about applicable customary norms, is critical. Relying solely on elite representatives, such as chiefs or elders, may easily lead to a biased representation of living customary norms, not only failing to capture the existing variety, but worse, failing to understand the versions that may benefit sub-altern community members.

The unwritten character of living customary law, especially where contested and competing versions exist, imbeds a high level of flexibility in customary justice systems. Some see the negotiability and the aims towards settlement and mediation as opening up access to justice even for marginalized community members; others, however, point out that, in practice, not everything is negotiable and that some are in a better bargaining position than others (Peters 2002; Ubink 2008; Woodhouse 2003).

Legal development actors, and the state and non-state organizations they work with, often lack knowledge about the different versions of living customary norms, the negotiable nature of customary justice, and the implications this has for engagement with customary justice systems. Time and resource constraints easily result in quick studies that accept elite representations of customary law. Such accounts can overlook the fact that there are different versions of such law or that the elite version is contested. Projects that adopt such norms as their starting point may actually be strengthening the position of elites in the community while weakening the marginalized group they seek to empower. Likewise, power differentials may be strengthened where the negotiable nature of customary law is not taken into account, and efforts subsequently fail to focus on harnessing weaker parties in the negotiated settlement processes.

#### Box 4: The elusive oral nature of customary law

Judges, policy makers and development agents all struggle to come to grips with the unwritten character of customary law. The main historical devices for recording customary law – codifications, restatements, and case law systems – all failed to become guidelines for local dispute settlement. Consequently, these efforts have created a large gap between living customary law and the recorded versions of customary law. Currently, the oral nature of customary law is hotly debated by rule of law practitioners. It is particularly distressing to proponents of the application of customary law in formal courts. In their opinion, if customary law cases are to be heard at or appealed to statutory courts, customary law needs to be documented. This is exactly what happened in Liberia, where the documentation of customary law is one of the main recommendations resulting from the National Conference on Enhancing Access to Justice. Also here, this proposal was put forward to assist and inform the formal courts in their application of customary law. But also in other cases, legal development agencies have shown an interest in the recording of customary law. In Aceh UNDP documented the best practices of procedural customary law. Similarly, in the World Bank's Strengthening Non-State Justice Systems pilot project in two areas of Indonesia (West Nusa Tenggara and West Sumatra) the codification and reform of customary rules and procedures are an integral part.

Writing down customary laws runs the risk of 'over-formalisation'. In the process of recognizing local institutions, their flexibility to match the process, remedy and sanction to local realities could be undermined, and procedural flexibilities that can contribute to greater substantial justice may be lost. An additional risk is that the version of customary law adopted reflects discriminatory attitudes or power imbalances. In such circumstances, putting customary laws into writing may entrench poor justice for the poor and marginalised. The latter points to the need for inclusion of adequate safeguards, such as participatory processes and mechanisms for popular endorsement of the principles adopted. Both can be simple ways for all community members to gain better knowledge about customary law and participate in its evolution

In several areas, including South Sudan, Rwanda, Ghana and northern Namibia, traditional communities or authorities are now undertaking their own recording efforts, or are considering to do so. The self-recordings undertaken by the Owambo Traditional Authorities in northern Namibia have been a success, in the sense that they have become the accepted new local law, informing customary dispute settlement. They are constantly referred to in traditional courts and are widely regarded as the normative framework upon which traditional leaders base their decisions. Obviously, the success of 'self-statements' raises questions in relation to the extent of and manner in which recordings can be stimulated or induced by external actors. An additional question is whether all customary norms are suitable for recording. For instance one can imagine that common procedural norms and criminal norms and sanctions are more easily codified than highly negotiable norms such as those regarding marriage, without locking in one person or group's interpretation of local norms (Clark and Stephens 2011, Clarke 2011, Harper 2011, Rawls 2011, Ubink 2011).

### 3. Two approaches

This Research and Policy Note discusses two general approaches for facilitating improved functioning and effectiveness of customary justice systems: stimulating linkages between customary and state justice systems, and community-based activities directed at citizens governed by customary justice systems and their leaders. It demonstrates how the different and complex character of customary law impacts on and offers challenges and opportunities for customary legal empowerment.

#### 3.1 The institutional approach: linking customary and state justice systems

An important method used to improve the functioning and effectiveness of customary justice systems is to develop institutional links between customary and state justice

systems. One can distinguish three types of linkages: between state and customary norms; between state and customary dispute resolution mechanisms; and between state and customary administration. Such linkages have the potential to incorporate human rights into customary norms, dispute resolution and administration, and to create checks and balances against elite capture. Linking customary and state justice systems is also seen as a means of enhancing the certainty and accessibility of local norms, which can help stimulate economic growth in customary settings.

#### Box 5: Hybrid justice systems

Institutional linkages between state and customary justice systems can and do take many forms. Samuel Clark and Matt Stephens propose to call the result 'a hybrid justice system', thereby highlighting the interconnectedness of institutions and norms with various origins and sources of legitimacy – state and 'tradition'. The term marks the indivisibility of the resulting justice system and thereby refutes the constructed dichotomy between state and customary justice systems. In addition, it questions the one-sided attention to incorporating the strengths of customary justice systems into state justice systems (while mitigating their weaknesses), but rather advocates for blending the strengths and mitigating the weaknesses of *both* customary and formal justice systems. Rather than idealizing one justice system over the other, they propose a more realistic strategy by focusing on overcoming the specific injustices of both state and customary systems (Clarke and Stephens, 2011).

#### 3.1.1 Linking norms

The weakest institutional normative linkage is when a state recognizes customary law without specifying its contents, for instance through a provision in the constitution or in another relevant law relating to the application of customary law. Such general recognition can improve the effectiveness and strength of customary norms vis-à-vis external parties, but little affects the intra-communal issues mentioned above.

A stronger institutional normative linkage can be created through the codification of customary norms into state legislation. This involves a process of selecting between the different versions of customary law that exist within a country (as occurs in any type of codification) through which the norms deemed unfavorable in terms of human rights, protection of marginalized groups or the stimulation of economic activity can be adapted or discarded. Codification has the additional benefit of making complex and varied norms more certain and accessible, including to those outside of local communities or those lacking the research resources necessary to understand local norms. Accordingly, the increased accessibility and certainty of customary norms could theoretically allow for economic transactions at a larger scale, and thus help support economic activities between the community and external markets, hence stimulating economic growth. There are, however, also a number of reasons to be hesitant about codifying living customary law, as this can affect the fluid, informal and accessible character of the original customary norms. Additionally, codification without a proper study of the variations of customary norms within a community, and especially when sub-altern versions are not taken into account, may have the effect to strengthen the norms governing elite interests. Moreover, codification of customary norms faces grave problems of credibility and acceptability, and might be ignored by many as not reflecting their rules of customary law. Ultimately, such codification may lead to another layer of written customary law while doing little to address the problems within the living customary justice system.

#### 3.1.2 Linking dispute resolution mechanisms

A first method of linking customary dispute resolution mechanisms to the state legal system is through the establishment of customary courts presided over by traditional authorities as the first tier of the legal system. Thus incorporated, traditional authorities can be required to administer justice in accordance with certain procedures and while

maintaining human rights standards. When a system of appeal is established, this opens up possibilities for state courts to oversee the adjudicative work of customary courts, and for the development of checks and balances that can ensure adherence to procedural and substantive standards. The question is whether such checks and balances would work in practice. First, citizens may not be able to invoke their rights in state courts even when the right of appeal exists because the basic conditions required for access are still lacking. Second, appeal judgments may do little to affect the work of customary dispute resolution mechanisms outside of the case in question (Ubink 2002-4).

A different method for linking dispute resolution mechanisms is through allowing state courts to adjudicate cases on the basis of customary rules. This creates a link between customary and state justice systems that involves norms as well as dispute settlement mechanisms – and thus straddles the divide between this section and the latter. The advantage of this type of linkage is that state judges may be well placed to safeguard human rights and fair procedural standards when applying customary law. The involvement of state courts also diminishes opportunities for elite cooptation. Due to their written character, state customary judgments may offer increased certainty and accessibility of customary law, which may in turn enhance predictability and security of economic transactions and thus facilitate participation in larger economic markets. On the other hand, state courts are less accessible, especially to marginalized citizens, and their judgments may have limited impact on living customary norms (Ubink 2002-4). The formal character of state court decisions is exacerbated because many judges are trained to base their decisions on written texts and thus prefer to apply codified or judicial customary law (based on earlier decisions) rather than attempt to understand and apply living customary law.

The integration of state and non-state law in state courts is thus highly difficult and can lead to situations where court decisions are out of step with local realities and thus have limited impact. Alternatively, they can result in courts strengthening elites who may play a dominant role in providing information, especially about contested norms.

Recently, some innovative approaches to incorporating customary dispute settlement systems into the state legal system have been undertaken that seem to enhance the quality of the customary as well as the state justice system, for example in Eritrea (see Box 6).

#### Box 6: Community courts in Eritrea

In 2003, Eritrea established a system of community courts. This system was created with the aim of bringing the state legal system both physically and psychologically closer to the people while integrating and formalizing customary dispute resolution processes into its lowest tier of courts. To achieve this effect, these courts combine the powers of both systems in an attempt to reconcile disputants, most likely on the basis of customary law and practices, and when such negotiations fail, to pass judgement based on national laws. The courts consist of three judges, who are locally elected. Uniform election rules have not been formulated, with the intention to allow each community to resort to its preferred, most probably customary, processes of electing community leaders and judges. Although not specifically required by law, in practice, it is expected that as far as practicable at least one of the judges of each community court must be a woman. This resulted in 20 percent women judges in 2003 which increased to 28.4 percent in 2008.

Research in 2009 highlights the successful role community courts have played in tackling barriers to justice and reaching out of court settlements and in increasing community participation and the role of women in the legal process. The congestion of state courts is eased by the cases that are settled amicably. In addition, access to the state justice system, at least to the first tier of the courts system, is significantly enhanced by the fact that the local dispute settler is the same person as the local state judge. This will bring statutory law and fora closer to the people. Knowledge and proximity will increase the 'shadow of state law' which in turn can have a positive effect on the quality of customary dispute settlement. As parties now have the opportunity to opt out of the customary system and seek the protection of the state justice system, they can more easily reject

the pressure of accepting what they regard as an unfair settlement. All they have to do is refuse to settle and they will automatically receive a judgment on the basis of statutory law.

This research furthermore suggests that the incorporation of customary dispute settlement into the state justice system allows for innovations to customary dispute settlement, such as the inclusion of women 'judges', and the infusion of ideas and norms emanating from the state justice system. Simultaneously, it seems able to preserve some of the positive attributes of customary dispute settlement, such as proximity, limited financial barriers, local language and basic procedures. By creating such an inseparable linkage between the forum of dispute settlement and the formal court of first instance, the Eritrean approach is thus able to overcome a number of the weaknesses of customary or integrated ('hybrid') justice systems: that they are not effective when powerful third parties are involved, that they fail to protect the rights and interests of women, that they sometimes ignore the punitive and deterrent justice objectives, and the fact that state institutions accidentally or deliberately overlook certain customary cases (Andemariam 2011).

### 3.1.3 Linking administration

A third form of state and customary institutional linkages that may improve the functioning of customary justice systems is by linking state and customary administration. Administration, often neglected by policymakers and practitioners engaging with customary justice systems, needs to be addressed as it plays an important role in the implementation of customary law. Moreover, customary administrators can be involved in local power abuses or human rights violations. Linking customary and state administration should ideally increase the accountability of customary administration, prevent power abuse and human rights violations, and enhance predictability and security of customary administration, and thus facilitate local transactions for external economic actors. However, it should do so without undermining the local legitimacy of customary administrators. There are four main ways in which state and customary administration can be linked (Bako-Arifari 1999; Hlatshwayo 1998; Ubink 2008). The state can recognize customary administration without defining official roles for traditional leaders, nor interfering with their activities as long as the law is not broken. This does little to reform customary administration. For this to occur, a more elaborate linkage is necessary, for example, by integrating customary administrators into the state administration system and defining their customary functions and/or delegating them formal state functions. The state can establish a local state structure parallel to the customary administration, aiming to achieve a local balance of power. Hybrid local structures can be established in which both state and customary administrators are represented.

In the four above-mentioned links, the extent to which customary administration is made subordinate and answerable to state organs varies. Several mechanisms can be employed to boost the accountability of customary administrators. When states formalize customary administration, they can legally define their authority as well as provide details as to the way it should be exercised. Such forms of regulation can then be implemented legally when administrative abuses are questioned in court. Customary authorities may also be bound to regulations through political or administrative means. Payment of salary establishes a certain amount of administrative control, and can also be seen as a way to transform chiefs into civil servants, accountable to senior civil servants and subject to disciplinary sanctions (Englebert 2002). Additionally, the provision of a salary could diminish chiefs' incentives for self-enrichment or corruption in the discharge of their responsibilities and for holding on to outdated customs that yield financial benefits. Another political mechanism is the state exercising the power to ratify the appointment of traditional leaders, and thus also to withhold such ratification. It should be noted that the motives for replacing customary administrators often involve power-political considerations as well as issues of customary maladministration.

Formal recognition of the institution of traditional authority by the state can transform the position and legitimacy of traditional leaders. On the one hand, it can strengthen the

position of traditional authorities or, in countries where such positions had previously been abolished such as in Guinea and Mozambique, it can assist their resurgence. On the other hand, formal recognition may cause leaders to lose their independence and risk that they be identified with state politics and state failure. State influence on the selection of individual candidates further impacts their independence. Achieving accountability can therefore come at a cost of undermining the position of customary administrators. At the same time, there is a real danger that administrative linkages will fail to deliver results in terms of accountability and prevention of power and human rights abuses. Mechanisms to ensure compliance with formalized limits of delegation and standards of administration remain weak, especially since they are often not strongly exercised. Here, local and national power structures are influential. In countries where customary authorities have a strong national power base, either for historical reasons or through their role in national elections as vote brokers, state authorities may not be able or even willing to ensure compliance through legal, administrative or political mechanisms. Even a highly formalized customary-state linkage may have little effect in such situations. Linking customary and state administration may even run the danger that local state institutions aligned with customary administration, and especially hybrid state-customary institutions, are co-opted by customary power holders. Ironically, then, linkages sought to deal with power abuses may only strengthen them.

#### 3.1.4 A Balancing Act

Clearly, institutional linkages, whether sought through norms, disputing mechanisms or administration, are important mechanisms for improving the functioning of customary justice systems; however, establishing links that help attain this goal remains difficult. Linkages may alter customary arrangements, changing their nature in such a way that the original strengths of customary justice systems, its informal and accessible character, no longer exist. One needs to be cautious, for instance, that institutional linkages do not place so many restrictions and conditions on customary forms of administration, dispute settlement and management of resources, that in effect there is no real space for customary institutions and decision-making processes to function (see Box 7 for an example). Alternatively, the effect of linkages may be thwarted or co-opted by customary elites and therefore fail to accomplish its goal. The main challenge for approaches to institutional linkages, therefore, is to find a balance between retaining the informal character, local accessibility and legitimacy of the customary justice system, while making sufficient improvements on its functioning.

##### Box 7: Recognition of indigenous rights and structures in Peru

The Peruvian Constitution provides that peasant and native communities are autonomous in their organization, in the use and free disposition of their land, and in the economic and administrative management within the framework established by law. The qualification "within the framework established by law" strongly limits the apparent organizational autonomy, as Peruvian regulations prescribe an organizational structure consisting of a general assembly and a board of directors, periodically elected by means of a "personal, equal, free, secret and obligatory" vote, which is foreign to indigenous communities' customary organizational forms. Also with respect to land use and economic issues, peasant and native communities are not as autonomous as the Constitution portrays them as being. In reality, economic policies are decided by the national government, with little or no involvement of indigenous peoples. The autonomy in administrative management is furthermore limited by the system of political authorities installed by the Peruvian state, which represent the executive power in the locality and are charged with watching over the implementation of government policies as well as with monitoring compliance with the Constitution and laws. The Peruvian Constitution also establishes the judicial autonomy of peasant and native communities, again under a qualification, viz. "whenever the fundamental rights of the person are not violated". Recent research argues that in all these domains, one remains within the logic of state law and there is no real space for customary institutions and decision-making processes to function (Desmet 2011).

It should be noted that donors may find it difficult to make institutional linkages an object of project-type intervention, because they are often bound up in larger historical transformations occurring within national politics, and their reform is usually a national affair where international donors play only a limited role (see Box 8). Linkages remain important, however, because they impact on the functioning of customary justice systems and can serve as entry points for inducing change. International donors should thus be aware of existing institutional links and the extent to which they can be altered within the national or local polity as a means of affecting the functioning of customary systems. Here, reform can also address state institutions that are linked to customary justice institutions, as improvement in the functioning of state institutions may benefit the functioning of the linked customary institution.

#### Box 8: Justice reform in Liberia

Over the last few years, the Liberian government has engaged in a process of analyzing, re-considering, and restructuring the interaction among customary and statutory law and justice mechanisms in the country. This process was supported by research, funding and policy advice from several donors. Research undertaken in 2009 and 2010 suggests that the priorities of the Liberian government to a certain extent differed from the considerations of outside rule of law practitioners. Local research clearly showed that the formal justice system is not the forum of choice for most Liberians, and that this would probably remain unchanged even if its functioning were improved. Despite this popular feeling, government displayed a strong preference for building trust in the formal legal system. This was fueled partly by an awareness of the international community's concern with human rights violations under customary law. The influence of legal scholars and certain government branches and individuals also worked against policy options that would take away too much power from the formal legal system. Justice reform is often seen as a project of decades that cannot be rushed without jeopardizing the quality of the result. At the same time the Liberian government has an urgent need to establish and maintain a government monopoly on the use of force and decrease the incidence of mob violence and violent crime, which created pressure for policy options that provide fast results. The need to balance the power of government branches, ministries, agencies and individuals with a stake in the structure of the justice system also serves as a constraint on any policy options that might shift power from one part of the government to another (Rawls 2011)

### 3.2. Community-based approaches

Another approach to improve the functioning and effectiveness of customary justice systems is to target activities at marginalized community members. Such activities include the deployment of paralegals, legal literacy training, community mapping of local land rights and rights education campaigns. Such interventions can stimulate a demand for rights within the community, which can then translate into pressure on customary justice systems to better protect human rights. They can also empower marginalized community members and reduce power imbalances and elite capture. Such interventions are promising because they seem better equipped to directly benefit marginalized citizens governed by customary law, and may be able to address issues of power imbalances as they occur within the customary systems, without pushing for an alteration of the system's basic tenets.

#### Box 9: UNDP's experiences with community-based approaches

Successes:

- Dialogues with elders and community leaders in Somalia helped to improve local dispute resolution mechanisms to make them more aligned with human rights standards and the protection of weaker groups;
- legal awareness training through literacy courses, information groups, education campaigns, the publication of guidebooks on state and non-state laws, and itinerant street theatres helped improve the position of vulnerable groups and provided entry points for human rights in Bangladesh, Malawi, Timor-Leste, Indonesia and Cambodia;

- legal aid was enhanced through paralegals, lawyers' networks, dispute clearing houses, dispute resolution panels and ADR training in Sierra Leone, Thailand, Timor-Leste, Puerto Rico and Cambodia;
- capacity development for informal justice actors in the areas of mediation and citizen's rights worked reasonably well in Burundi, Sierra Leone, Timor-Leste, Rwanda and Bangladesh.

Challenges:

- It was difficult to train lay persons into paralegals in Thailand;
- capacity-building of informal justice institutions brings about challenges when
  - \* ceremony becomes more important than capacity (encountered in Burundi);
  - \* gender quotas for dispute settlers undermine community cohesion (Burundi);
  - \* reconciliation emphasis is unsatisfactory for aggrieved parties (East Timor);
  - \* strengthening informal dispute mechanisms perpetuates the absence of formal institutions (Peru); and
  - \* newly built capacity lacks sustainability (Peru, Bangladesh) and local legitimacy (Bangladesh).(Wojkowska 2006)

Community-based approaches often explore the use of national or international state norms and institutions. They seek to contrast the functioning of customary justice with norms of state justice, for example, by raising awareness of state justice norms, organizing debates among customary authorities about international human rights standards, or providing legal aid to pursue litigation of customary abuses in state courts. Such strategies thus try to improve the functioning of customary justice systems by invoking the authority and power of justice institutions external to the local community. Community-based approaches can also focus on intra-community institutional changes, with a less explicit recourse to the state, for example, through local activists who work to improve customary dispute procedures and administrative checks and balances or to make structures of customary leadership or dispute settlement more inclusive.

Community-based activities can be most effective when they are able to make use of the opportunities offered by the flexibility and negotiability inherent in customary justice systems. Improvements can be achieved by identifying, voicing and supporting versions of living customary norms that favor marginalized groups, by supporting the marginalized in dispute-related negotiations, or by seeking to reinvigorate customary administrative checks and balances. The full possibility, potential impacts and limits of using the opportunities offered by customary justice systems, however, remain largely understudied.

Community-based activities are an important addition to institutional approaches when seeking to improve the functioning of customary justice systems. They are a critical component of donor-led reforms as they can be initiated more easily than institutional linkages, which are more dependent on national politics. Community-based interventions and institutional linkages reinforce each other. On the one hand, community-based activities help to improve the functioning of institutional linkages, by enhancing awareness of state norms and invoking state rights and related state dispute and administrative procedures in customary settings, and by diminishing resistance against state norms and institutions. On the other hand, community-based interventions often require linkages to strengthen the functioning of customary justice.

## 4. Addressing power - Customary legal empowerment

The distribution of power plays a vital role in improving the functioning of customary justice systems. Legal reforms that aim to empower marginalized groups may decrease the relative local power base of original elites. However, insufficient knowledge of the complexity of customary justice systems may cause linkages to be forged between state institutions and elite norms and institutions in the customary justice system, thereby strengthening the subordinate position of marginalized community members. Elite power is also a hindrance for institutional and community-based activities as customary power holders have been able to resist and co-opt reforms, especially when they are seen as a threat to the elite power base.

Bottom-up legal development approaches stress the importance of taking into consideration that law and power are intrinsically linked, expressing this most clearly through the concept of 'legal empowerment'. This concept, used (albeit with slightly different meanings) at the international level, including by the Commission for Legal Empowerment of the Poor (CLEP), UNDP, the World Bank, the United States Agency for International Development (USAID) and the FAO, reflects that legal tools may be used to empower marginalized citizens and attain greater control over the decisions and processes that affect their lives (ADB 2001; CLEP 2008; Cotula 2007; Golub 2005; USAID 2007). Legal empowerment could also refer to activities undertaken to tackle power asymmetries that undermine the effective functioning of legal tools for marginalized citizens, preventing access to justice and ultimately their development (Tuori 1997).

Addressing problems in customary justice systems requires a form of legal empowerment. Organizations working on community-based activities have experimented with borrowing from state law attempts at legal empowerment, employing a combination of education and action by enhancing awareness, improving legal aid, and advocating for better rights. It is important to recognize that rights awareness, legal aid or rights advocacy may require rethinking when undertaken in the context of customary justice systems. Such activities often refer to state law: awareness of human rights or national legislation, legal aid to pursue actions in state courts or advocacy to obtain better legal protection under national legislation. However, it is possible to envisage customary legal awareness, customary legal aid or customary rights advocacy that focuses on the norms and institutions in the customary system to press for favorable change from within.

Therefore, improving the functioning and effectiveness of customary justice systems requires a particular kind of legal empowerment – 'Customary Legal Empowerment'. This can be defined as processes that: i) enhance the operation of customary justice systems by improving the representation and participation of marginalized community members, and by integrating safeguards aimed at protecting the rights and security of marginalized community members; and/or ii) improve the ability of marginalized community members to make use of customary justice systems to uphold their rights and obtain outcomes that are fair and equitable.

In this regard, we need to highlight the relevance of historical knowledge. When historical processes have disempowered certain segments of customary communities these imbalances must be addressed if state recognition of rights of customary groups is to benefit marginalized community members. This is also one of the main lessons learned from failed attempts to increase tenure security and production through the formalisation of land rights. As processes of disempowerment may have started long ago, this necessitates an approach that understands contemporary practices as embedded in history. The importance of an historical approach is underscored by the realization that most encounters with colonial powers as well as missionaries have significantly altered customary justice systems, and almost exclusively in favor of male elders. Failing to

address historical power imbalances can lead to the contradictory result that legal empowerment of a customary community can simultaneously lead to the disempowerment of certain groups or individuals within that community (see Box 10).

#### Box 10: Land Tenure in the Solomon Islands

On the Bareke Peninsula in the Solomon Islands, the colonial legal system facilitated a strategic simplification of the land tenure system, by enabling certain male leaders to consolidate their control over the land. In many instances, the foreigners' perceptions of property and authority enabled male leaders – who historically had been "caretakers" of the land – to claim rights wholesale. The resulting alteration in power relations is currently reified by provisions in the state legal system regulating logging activities on customary land. Legislation provides that any person who is interested in logging customary land must negotiate with the owners of the land. As was the case with traders, missionaries and colonial administrators before them, logging companies desire to identify and engage with individuals rather than the entire customary community. This is facilitated by the requirements of the state legal system, which provides for the selection of certain individuals to negotiate with the logging company on behalf of the customary community. This enables a small number of individuals to carve out a 'big man' status and strengthen their power base within their tribe by obtaining and distributing logging revenue. While many men are marginalised by these processes, women as a social group are particularly likely to be excluded (Monson 2011).

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