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## **Towards Customary Legal Empowerment**

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# Towards Customary Legal Empowerment

Inception Paper



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## TOWARDS CUSTOMARY LEGAL EMPOWERMENT – INCEPTION PAPER

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## ABOUT THE PROGRAM

This program aims 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 identify entry points and tools of engagement for working with customary justice systems to strengthen legal empowerment. Such knowledge will be generated through a number of individual research projects based in Namibia, Rwanda, Somalia, Tanzania, Mozambique, Papua New Guinea, Liberia and Uganda. These research projects seek 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 will be brought together in two publications that will be disseminated among international and national legal practitioners, country specialists and development actors working in the areas of customary justice and/or legal empowerment.

## PARTNERSHIPS

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## DONOR SUPPORT

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## TOWARDS CUSTOMARY LEGAL EMPOWERMENT

## INCEPTION PAPER

## Introduction

In the last few decades, tradition, or at least what has always been portrayed as tradition, has proved to be resilient, and in many countries customary justice systems<sup>1</sup> have returned to the fore. Africa is a prime example of where chiefs and customary law continue to dominate or have come back.<sup>2</sup> But also in many Asian and Latin American countries, customary justice systems are vital; one need only think of the role of *adat* in Indonesia<sup>3</sup>, the *Lok Adalat* tribunals in India<sup>4</sup>, or the disputes over recognition of customary indigenous group rights in Bolivia or Columbia<sup>5</sup>. Customary law even plays a role in Northern America and Australia where there have been intense struggles surrounding the recognition of 'native' group rights.<sup>6</sup>

At the same time, customary justice systems have over the last decade or more become an increasing priority for international organizations working on legal development cooperation.<sup>7</sup> Examples include the use of *Gacaca* courts to deal with the immense number of suspects of the Rwandan genocide,<sup>8</sup> and projects aimed at bridging customary and state tenure systems to create capitalization of customary land resources following the influential work of Peruvian economist Hernando de Soto.<sup>9</sup> One can also think of organizations that seek to improve the position of women in customary settings, for example through changing national legislation governing customary law, legal awareness training, or local level civil society engagement by paralegals.<sup>10</sup>

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<sup>1</sup> There is no generally accepted definition of what constitutes customary law. In general, it could be said that customary systems of justice refer to the types of justice systems that exist at the local or community level which 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, and function independently from state legal systems. On the contrary customary and state legal systems mutually define each other in their many interactions.

<sup>2</sup> B Oomen, *Chiefs in South Africa: Law, Power, and Culture in the Post-Apartheid Era* (2005).

<sup>3</sup> T Murray Li, 'Articulating Indigenous Identity in Indonesia: Resource Politics and the Tribal Slot' (2000) 42(1) *Comparative Studies in Society and History* 149-79.

<sup>4</sup> M Galanter and J K Krishnan, 'Debased Informalism: Lok Adalats and Legal Rights in Modern India' in E G Jensen and T C Heller (eds.) *Beyond Common Knowledge: Empirical Approaches to the Rule of Law*, (2003).

<sup>5</sup> R Sieder (ed.) *Multiculturalism in Latin America, Indigenous Rights, Diversity and Democracy* (2002); W Assies, G van der Haar and A Hoekema (eds.) *The Challenge of Diversity, Indigenous Peoples and Reform of the State in Latin America* (2000).

<sup>6</sup> A Kuper, 'The Return of the Native' (2003) 44(3) *Current Anthropology* 389-402; C Machlachlan, 'The Recognition of Aboriginal Customary Law: Pluralism Beyond the Colonial Paradigm-A review article' (1998) 37(2) *International and Comparative Law Quarterly* 368-86; M J Matsuda, 'Native Custom and Official Law in Hawaii' (1988) 3 *Internationales Jahrbuch für Rechtsanthropologie* 135-46.

<sup>7</sup> See for instance E Wojkowska, *Doing Justice: How Informal Justice Systems Can Contribute* (2006); UNDP, *Programming for Justice: Access for All: A practitioner's guide to a human rights-based approach to access to justice* (2005); CLEP, *Making the Law Work for Everyone, Volume 1 Report from the Commission on Legal Empowerment of the Poor* (2008); DFID, *Non-state Justice and Security Systems*. DFID Briefing (2004).

<sup>8</sup> See for instance B Oomen, 'Donor-driven Justice: The case of Rwanda' (2005) 36(5) *Development & Change* 887-910.

<sup>9</sup> H De Soto, *The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else* (2001).

<sup>10</sup> Wojkowska, above n 7.

Donor organizations not only recognize the importance of customary justice systems, but also try to overcome a number of negative aspects of such systems so that they function better for marginalized groups in the communities they govern, safeguard human rights, and become more suited to modern day economic structures and help to stimulate economic development. This approach, geared towards improving the internal functioning of customary justice systems for community members, should be distinguished from the issue of recognition and protection of customary group rights by the state, which is not addressed in this paper.

Facilitating change in the internal functioning of customary justice systems, however, is a difficult task and customary justice systems have proved to be highly resilient. This paper seeks to understand why this is the case and to outline what role research can play in improving donor engagement with customary law. First, it examines why donors have increasingly engaged with customary law and what changes they have sought. Second it discusses two general approaches for facilitating improvements in customary justice systems: stimulating linkages between customary and state justice systems and community-based activities directed at citizens governed largely by customary justice systems.

The paper concludes that apart from the complex nature of customary justice systems, power imbalances and resultant elite capture of or resistance to external change undermines donor-led improvements in customary justice systems. It argues for a concentrated research effort into combinations of state and community-based activities and their effects on change agents that can help overcome power imbalances. Such research should produce recommendations that can lead to Customary Legal Empowerment<sup>11</sup>: processes that 1) enhance the operation of customary justice systems by improving the representation and participation of marginalized community members, and integrating safeguards aimed at protecting the rights and security of marginalized community members and/or 2) 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.

### Why engage with customary law?

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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.<sup>12</sup> However, a growing body of evidence suggests that poor people in developing countries have limited access to the formal legal system and that their lives are largely governed by customary norms and institutions.<sup>13</sup>

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<sup>11</sup> In our definition customary legal empowerment refers to empowerment of customary community members within the customary system. This should be distinguished from the protection of customary group rights versus powerful outsiders such as the state or large skill investors, which is also often discussed in terms of legal empowerment. The latter type of cases mainly involve the recognition and protection of customary group rights by the state and not the internal functioning of customary justice systems, which is the topic of this paper.

<sup>12</sup> L Chirayath, C Sage, and M Woolcock, 'Customary law and policy reform: Engaging with the plurality of justice systems' (Prepared as a background paper for the *World Development Report 2006: Equity and Development*, 2005).

<sup>13</sup> 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 customary systems based on their satisfaction with these systems (See SDC, *Rule of law, justice sector reforms and development cooperation*, SDC concept paper (2008) 3.

As such, customary justice systems play a much more important role in the lives of many of the world's poor than state justice systems. One study refers to figures collected by development cooperation departments in Britain and Denmark, indicating that in some countries up to 80 percent of the population lives under customary justice systems and has little to no contact with state law.<sup>14</sup> These figures are corroborated by findings from academics studying African law showing that customary law 'governs the daily lives of more than three quarters of the populations of most African countries',<sup>15</sup> while according to one author 'up to 90 percent of cases in Nigeria are settled by customary courts.'<sup>16</sup>

Customary justice systems are thus the lived reality of most people in developing countries, especially in rural areas. This can be explained on the one hand by choice, in cases where people select customary legal institutions over state institutions for their positive attributes. On the other hand, it can be explained by necessity, in localities and cases where limited penetration of state institutions or lack of access to these institutions is combined with strong or at least stronger local presence of customary institutions.

Positive attributes associated with customary justice systems include physical accessibility, the use of familiar procedures and language, the limited costs involved in bringing a case, the short duration of case resolution, knowledge among the dispute settlers of the local context, and the more restorative nature of the process. Less positive aspects include social pressure on disputants not to refer a dispute to a state court and disputants' fear of reprisal or social ostracism should they enter the formal justice system.

Notwithstanding the importance of customary dispute settlement for the majority of the poor, the prominence of customary law in first instance lies in its regulation of important aspects of daily life, such as access to land, natural resource management, and family issues such as inheritance and marriage, more than in the settlement of occasional disputes. In fact, the administrative power and dispute settlement power of traditional leaders are intrinsically connected, in the sense that "(a)ny resident living under their jurisdiction who wishes to appeal a 'judgment' of theirs must think very carefully what the cost of that decision is going to be. Given the fact that they and their extended family may need the chief's goodwill for a future decision in relation to local government functions — allocation of land, invitation to be an *nduna* (advisor), inclusion in a development project, referral to any other government service — all these decisions are interrelated"<sup>17</sup>. Several of the positive attributes mentioned — including physical presence, familiarity with local context and limited costs — are also applicable to customary administration. Especially in debates regarding natural resource management, food availability, and natural resource depletion and degradation, there are strong proponents of customary law. They contend that the involvement of local people and their local normative systems enhances sustainable development. Local communities, it is put, 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

<sup>14</sup> S Golub, 'A House without Foundation' in T Carothers (ed.) *Promoting the Rule of Law Abroad: In Search of Knowledge* (2006) 105-36.

<sup>15</sup> C Sage and M Woolcock (eds.) *The World Bank Legal Review: Law, Equity and Development*, Vol. 2 (2006).

<sup>16</sup> C A Odinkalu 'Poor Justice or Justice for the Poor? A Policy Framework for Reform of Customary and Informal Justice Systems in Africa' in Sage and Woolcock, above n 15, 141-165.

<sup>17</sup> W Schärf, *Non-state justice systems in Southern Africa: how should governments respond?* (2003).

that customary, communal, natural resource management systems are more efficient and effective than their private or state alternatives.<sup>18</sup>

The limited effect of reforms in the state justice sector on the majority of the poor, coupled with increased recognition of the wide reach and accessibility of customary justice systems has led to a changing attitude among donors towards customary justice systems, and an interest to build on their positive elements for the benefit of the poor. Such an approach is consistent with the rise of so-called 'bottom-up' legal development cooperation approaches<sup>19</sup>, 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.

This new donor engagement not only focuses on enhancing the positive aspects of customary justice systems, but also tries to overcome a number of negative aspects of such systems. Customary justice systems can be susceptible to elite capture. In a setting of mediated or negotiated dispute settlement domination by existing power holders can be detrimental to the poor and disempowered. Discussing options for alternative dispute resolution based on customary institutions in Africa, Nader states "if 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."<sup>20</sup> She therefore argues 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: "The ideal of equal justice is incompatible with the social realities of unequal power so that disputing without the force of law is doomed for failure".<sup>21</sup> In its study of access to justice based law reforms, UNDP similarly finds that 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."<sup>22</sup> A World Bank sponsored study of dispute resolution in Indonesia, carried out within the World Bank's Justice for All program, made similar conclusions. It found that while villagers preferred to solve disputes informally and outside of state structures, such dispute resolution was not successful in cases where there were large power imbalances between the parties.<sup>23</sup> Elite capture is especially problematic when customary checks and balances, such as procedures to depose malfunctioning chiefs, have eroded.

In studies dealing with customary land management the danger of elite capture has also been widely recognized. A number of studies regarding customary tenure in African countries reveal the social differentiation within communities and emphasize the importance of power structures. They describe internal processes of contestation, assertion and transformation and portray political struggles to define and redefine social relations in the customary sphere. 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,

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<sup>18</sup> F Von Benda-Beckmann, 'The Multiple Edges of Law: Dealing with Legal Pluralism in Development Practice' in Sage and Woolcock, above n 15, 51-86; E Ostrom, 'Private and Common Property Rights' in B Bouckaert and G de Geest (eds.) *Encyclopedia of Law and Economics* (1999); UNDP, above n 7.

<sup>19</sup> B Van Rooij, *Bringing Justice to the Poor: Bottom-Up Legal Development Cooperation*, Working Paper (2009) available at <<http://ssrn.com/paper=1368185>>.

<sup>20</sup> L Nader, 'The Underside of Conflict Management — in Africa and Elsewhere' (2001) 32(1) *IDS Bulletin* 19-28.

<sup>21</sup> *Ibid.*

<sup>22</sup> UNDP, above n 7, 101.

<sup>23</sup> World Bank, *Village Justice in Indonesia: Case Studies on Access to Justice, Village Democracy and Governance* (2004). See Asian Development Bank, *Law and Policy Reform at the Asian Development Bank* (2001) 66.



with few checks and balances on their administration, giving power considerations precedence over objectives of development.<sup>24</sup> 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 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 law.

A second issue is that 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 the right of non-discrimination. Another problem is that customary criminal procedures do not necessarily provide victims and suspects with minimal standards of protection or procedural rules of due process and evidence.<sup>25</sup> 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 therefore "systematically deny women's rights to assets or opportunities".<sup>26</sup> Customary gender perspectives may even be so deeply inculcated that they "leave many women (...) resigned to being treated as inferior as a matter of fate, with no alternative but to accept their situation."<sup>27</sup> This critique is levelled both against processes of customary dispute settlement and customary administration. Dispute settlement issues include that courts may lack female 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 in, for instance, cases of inheritance and divorce. Some studies see the gender bias of customary law as an incorrigible trait, and advocate for a complete disengagement with customary law.<sup>28</sup> Others reason that customary systems will not disappear in the near future, and therefore the issue of reform should be taken seriously.<sup>29</sup> The latter view is well received by legal reformers.

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<sup>24</sup> K S Amanor, *Land, Labour and the Family in Southern Ghana: a Critique of Land Policy under Neo-Liberalisation* (2001) 127. K S Amanor, 'Global Restructuring and Land Rights in Ghana' in *Research Report No 108* (1999) 156. S Berry, 'Chiefs Know Their Boundaries: Essays on Property, Power, and the Past in Asante, 1896-1996' in A Isaacman and J Allman (eds.) *Social history of Africa* (2001); J Carney and M Watts, 'Manufacturing dissent: work, gender and the politics of meaning in a peasant society' (1990) 60(2) *Africa* 207-41; E Daley, and M Hobley, 'Land: Changing Contexts, Changing Relationships, Changing Rights' (Paper prepared for the Urban-Rural Change Team, DFID, 2005); K Juul, and C Lund, *Negotiating Property in Africa* (2002); Oomen, above n 2; P E Peters, 'The limits of negotiability: Security, equity and class formation in Africa's legal systems' in K Juul and C Lund (eds.) *Negotiating Property in Africa* (2002) 45-66; J C Ribot, 'Local actors, powers and accountability in African decentralisation: A review of issues' (2001) *Georgetown International Environmental Law Review*; A Whitehead and D Tsikata, 'Policy discourses on women's land rights in sub-Saharan Africa: The implications of the re-turn to the customary' (2003) 3(1) *Journal of Agrarian Change* 67-112; P Woodhouse, 'African enclosures: A default mode of development' (2003) 31(10) *World Development* 1705-20.

<sup>25</sup> UNDP, above n 7.

<sup>26</sup> Chirayath, Sage, and Woolcock, above n 12, 4.

<sup>27</sup> Asian Development Bank, above n 23, 31-32.

<sup>28</sup> L S Khadiagala, 'The failure of popular justice in Uganda: Local councils and women's property rights' (2001) 32 *Development and Change* 55-76; Whitehead and Tsikata, above n 24.

<sup>29</sup> See C Nyamu-Musembi, 'Review of experience in engaging with 'non-state' justice systems in East Africa' (Paper commissioned by Governance Division, 2003) 27.

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.<sup>30</sup> Proponents of this view hold that “(e)conomic transactions remain unpredictable, insecure, and limited”<sup>31</sup> 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.<sup>32</sup> De Soto’s work, while often criticized,<sup>33</sup> has become influential in law and development studies, and even more so among policy makers.

Thus, while there is growing recognition of the importance of customary justice systems, there are a number of issues regarding their operation 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. It is on these issues that legal reform projects could possibly play a role.

### **The complexity of customary justice systems**

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If interventions aimed at improving the operation of customary justice systems are to be effective, development actors must understand and address the complex nature of these systems. Central to this complexity is the difficulty in identifying the appropriate norm that applies to certain behavior or to a dispute at hand.

First of all there are multiple types of customary law. In many countries one can distinguish between codified customary law, judicial customary law, textbook customary law, and living customary law.<sup>34</sup> Codified customary law refers to legislation codifying the customary law of a certain jurisdiction, thus providing legal certainty and accessibility to the customary law, while at the same time unifying, simplifying and ‘freezing’ it, often in a formal language that is quite different from that used in the original community. Judicial customary law refers to the norms developed by judges when applying customary norms in courts and as laid down in national law reports. Here also, customary law is made more certain and accessible but at the same time can be frozen, unified and formalized. Textbook customary law refers to authoritative texts written by state administrators or anthropologists, often used by state courts or administrators when trying to ascertain appropriate customary norms. Textbook customary law offers a non-legal and less formalistic source on the appropriate customary law, and one that can offer more room for different customary norms in different communities. The drawbacks of textbook customary law include that they only exist for certain groups and therefore fail to provide as much legal certainty, and also that they freeze the norms of the groups discussed. Finally, living customary law refers to the norms that govern daily life in the community at the local level. Between these different versions of customary law there may be considerable difference, especially between the living and written versions, as living customary norms are inherently dynamic.

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<sup>30</sup> De Soto, above n 9.

<sup>31</sup> CLEP, above n 7, 26.

<sup>32</sup> De Soto, above n 9.

<sup>33</sup> The vast body of mainly specialist land tenure related work remains outside the scope of this paper.

<sup>34</sup> For an overview of the literature see J M Ubink, *In the Land of the Chiefs, Customary Law, Land Conflicts, and the Role of the State in Peri-Urban Ghana* (2008); Oomen, above n 2.

Today, there is increased recognition that engagement with customary justice systems implies engaging with living customary law, as written versions of customary law may be as alien in local communities as state law. Ascertaining the norms of living customary law presents its own challenges. A first problem lies in what questions to ask in order to determine the living customary law. Different questions may lead to different answers and thus different norms. For example, one could ask a community member directly what the appropriate norm is, or pose a hypothetical question asking what would happen in a fictional case. Alternatively, one could try to ascertain the appropriate norm empirically by gathering data about what norms are applied in disputes<sup>35</sup> or what norms are observed in daily life outside of exceptional dispute cases.<sup>36</sup> Asking directly or hypothetically, however, may lead to answers that portray an idealized norm that is seldom practiced.<sup>37</sup> Further, norms derived from dispute practices may be different and exceptional when compared to those observed in daily life.<sup>38</sup> And it may be difficult to distill customary norms solely by investigating disputes or observed behavior.<sup>39</sup> Ideally one requires a combination of these methods, designed in such a way that they offer sufficient representation and validity, a process that can easily become expensive and time consuming. Even when thorough research has been conducted there is no certainty that a single appropriate norm may be identified as the methods may produce different results.

This complexity is compounded by the fact that within living customary law there again can exist different or competing versions of particular norms both between and within different communities or customary groups.<sup>40</sup> This is especially so 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 about, for instance, the position of women or what should be done with proceeds from newly available lucrative land deals.<sup>41</sup> 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.

Apart from the different types and versions of customary laws, customary justice systems are particular for their flexibility and negotiability, even where norms are clear. 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. Some see such negotiability and the aims towards settlement and mediation as opening up access to justice even for marginalized community members; others, however,

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<sup>35</sup> Following the dispute method, advanced first by Llewellyn and Hoebel. See K N Llewellyn and E A Hoebel, *The Cheyenne Way. Conflict and Case Law in Primitive Jurisprudence* (1941).

<sup>36</sup> Following Holleman's trouble-less case method. J F Holleman, 'Trouble-Cases and Trouble-Less Cases in the Study of Customary Law and Legal Reform' (1973) 7 *Law and Society Review* 585-609.

<sup>37</sup> Ibid.

<sup>38</sup> Ibid.

<sup>39</sup> J L Comaroff and S Roberts, *Rules and Processes: The Cultural Logic of Dispute in an African Context* (1981).

<sup>40</sup> M Chanock, 'Neither customary nor legal: African customary law in an era of family law reform' (1989) 3 *International Journal of Law and the Family* 172-87.

<sup>41</sup> See for example H Becker, "'New Things after Independence': Gender and Traditional Authorities in Postcolonial Namibia' (2006) 32(1) *Journal of Southern Africa Studies* 29-48; Ubink, above n 34.

point out that in practice not everything is negotiable and that some are in a better bargaining position than others.

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.

In the next sections, this paper discusses two general approaches for facilitating improvements in customary justice systems: stimulating linkages between customary and state justice systems, and community-based activities directed at citizens governed by customary justice systems. It proceeds to demonstrate how the different and complex character of customary law impacts on and offers challenges and opportunities for customary legal empowerment.

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

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An important method to improve the functioning of customary justice systems, and one used since colonial times, is to develop institutional linkages between state and customary justice systems. There are three types of linkages: linkages between state and customary norms, linkages between state and customary dispute resolution mechanisms, and linkages 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 assisting the poor to capitalize on their informally owned assets and help stimulate economic growth in customary settings.<sup>42</sup>

### **Norms**

The weakest institutional normative linkage is state recognition of customary law by, for example, a provision in the constitution or in another relevant law relating to the application of customary law.<sup>43</sup> This is not, however, what is meant by a linkage aimed at improving customary justice systems, as it does little to deal with the 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 (as happens in any type of codification)<sup>44</sup> through which those norms deemed unfavourable 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. As such, codification

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<sup>42</sup> Chanock, above n 40.

<sup>43</sup> See D Fitzpatrick, "'Best Practice' Options for the Legal Recognition of Customary Tenure' (2005) 36(3) *Development and Change* 36, 449-75, 457.

<sup>44</sup> For an explanation of this see B Van Rooij, *Law's Dimension, Understanding Legal Failure Spatially* (Y Yan trans 2004) 109-17 [trans of *Falü de Weidu, Cong Kongjianshang Jiedu Falü Shibai*].



could theoretically help support economic activities between the community and external markets, hence stimulating economic growth. Those serious about engaging with living customary law are often hesitant about codification as it can affect the fluid, informal and accessible character of the original customary norms.<sup>45</sup> 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 unconsciously 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.<sup>46</sup> Ultimately, such codification may then lead to another layer of written customary law while doing little to address the problems within the living customary justice system.

### Dispute resolution mechanisms

There are two main possibilities for linking customary and state dispute resolution mechanisms. The first is through incorporating customary dispute settlers into the court structure. This can be done by establishing customary courts presided over by traditional authorities as the first tier of the legal system. Thus incorporated, traditional authorities can then 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 such procedures 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 as the basic conditions required for access are still lacking. Second, appeal judgements may do little to affect the work of customary dispute settlers outside of the case in question.<sup>47</sup>

When customary law is recognized as a source of law, state courts can adjudicate cases on the basis of customary rules, creating a second type of disputing linkage that may improve the functioning of customary justice systems. The advantage here is that state judges may be well placed to safeguard human rights and fair procedural standards when applying customary law. This also diminishes opportunities for elite cooptation. Due to their written character, state customary judgements may offer increased certainty and accessibility inside as well as outside of the local community, thereby enabling larger scale economic exchanges. On the other hand, state courts are less accessible, especially to marginalized citizens, and their judgments may have limited impact on living customary norms.<sup>48</sup> The formal character of state court decisions is exacerbated as 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 South African Constitutional Court has recognized this problem and encourages judges to apply living law by providing that living customary law can overrule codified versions.<sup>49</sup> This opens up an additional set of problems however, as judges have

<sup>45</sup> Ubink, above n 34; J M Ubink, *The Quest For Customary Law in African State Courts* (Forthcoming).

<sup>46</sup> See Ubink, above n 34.

<sup>47</sup> J M Ubink, 'Courts and peri-urban practice: Customary land law in Ghana' (2002-2004) XXII *University of Ghana law journal* 25-77.

<sup>48</sup> J B Danquah, *Gold Coast: Akan Laws and Customs and the Akim Abuakwa Constitution* (1928); I Schapera, *A Handbook of Tswana Law and Custom: Compiled for the Bechuanaland Protectorate Administration* (1938).

<sup>49</sup> *Bhe & others v Magistrate Khayelitsha & others* 2005 (1) SA 580 (CC), 2005 (1) BCLR 1 and *Alexkor Ltd & another v Richtersveld Community & others* 2003 (12) BCLR 1301 (CC). See also T Bennet, "'Official" vs "living" customary law: dillmmas of description and recognition' in A Claassens and B

to somehow identify what the living norms are, often by relying on (expert) witnesses or assessors.<sup>50</sup> Ideally, such aids would have knowledge of local culture, language and customs, and could inform the state judge on a case-by-case basis as to the appropriate norm. While in theory this method could help preserve the original and fluid nature of the customary norms to be practiced in state courts, several problems may impact upon the impartiality of such state adjudication. First, impartiality of local experts may be especially difficult when norms are contested and when there are different customary norms at play. Second, the particular nature of customary norms, with their inherent informality, flexibility and negotiability, plus the inherent unpredictability of dispute settlements, does not accommodate the precision and certainty generally required by assessors and expert witnesses when testifying about customary norms in court proceedings.<sup>51</sup> 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 existing elites who may play a dominant role in providing information, especially about contested norms.

### 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 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 enable a form of local administration that facilitates economic growth. However, it should do so without undermining the legitimacy of customary administrators that enables them to be a locally accessible form of governance that performs important social, economic and cultural services.<sup>52</sup> There are four main ways that state and customary administration can be linked.<sup>53</sup> First, 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.<sup>54</sup> This, however, 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 delegating to them formal state functions.<sup>55</sup> Third, the state can establish a parallel local state structure that exists alongside the customary administration, aiming to achieve a local balance of power. Fourth, hybrid local structures in which both state and customary administrators are represented can be established.

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Cousins (eds.) *Land, Power and Custom. Controversies generated by South Africa's Communal Land Rights Act* (2008) 138-153.

<sup>50</sup> Llewellyn and Hoebel, above n 35.

<sup>51</sup> A N Allott, 'The people as law-makers: custom, practice, and public opinion as sources of law in Africa and England' (1977) 21(1) *Journal of African Law* 1-23.

<sup>52</sup> J M Ubink, *Traditional authorities in Africa: Resurgence in an era of democratisation*, Research and Policy Note (2008). 11 For an elaborate debate about why African states have welcomed the resurgence of traditional authorities see P Englebert, 'Patterns and theories of traditional resurgence in tropical Africa' (2002) 30(118) *Mondes en Développement* 51-64; G Lutz, and W Linder, 'Traditional Structures in Local Governance for Local Development' (2004) 52.

<sup>53</sup> For an overview of this see Ubink, above n 52; N Bako-Arifari, 'Traditional local institutions, social capital and the process of decentralisation. A typology of government policies in developing countries' in *Working papers on African societies* (1999) 5-15; B Hlatshwayo, 'Harmonizing traditional and elected structures at the local level: Experiences of four Southern African Development Community countries' in F M d'Engelbronner-Kolff, M O Hinz and J L Sindano (eds.) *Traditional Authority and Democracy in Southern Africa* (1998).

<sup>54</sup> Bako-Arifari, above n 53, 5-15; Hlatshwayo above n 53.

<sup>55</sup> Such linkage can for instance be found in Cameroon, see *Ibid.*

In the four abovementioned linkages, 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 the delegated authority as well as provide details as to the way it should be exercised. Such forms of administrative 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.<sup>56</sup> Additionally, the provision of a salary could diminish chiefs' incentives for self-enrichment or corruption in the discharge of their responsibilities and for clinging to outdated customs that accord 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. The history of Ghana shows that in different political constellations this power can be exercised in different ways. Some Ghanaian regimes have exercised constraint, almost automatically endorsing local selections, while others have used such authority as an important tool for political interference in the selection of chiefs.<sup>57</sup> When no such formal power lies with the state, state organs may seek replacements of customary administrators by exploiting fragmentations within the local polity, aligning themselves with a rival traditional power group to replace the original administrator. It should be noted that the motives for replacing customary administrators often involve power political considerations as well as issues of customary maladministration.<sup>58</sup>

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 them being identified with state failure. State influence on the selection of individual candidates impacts their independence further. 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 voter brokers<sup>59</sup>, 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.

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<sup>56</sup> Englebert, above n 52.

<sup>57</sup> D I Ray, 'Chief-state relations in Ghana - Divided sovereignty and legitimacy' in E Van Rouveroy van Nieuwaal and W Zips (eds.) *Sovereignty, Legitimacy, and Power in West African Societies: Perspectives from Legal Anthropology* (1998) 48-69.

<sup>58</sup> For Togo see E Van Rouveroy van Nieuwaal, 'Chiefs and African states: Some introductory notes and an extensive bibliography on African chieftaincy' (1987) 25/26 *Journal of Legal Pluralism* 1-46.

<sup>59</sup> Ubink, above n 52.

### 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. Establishing linkages that help attain this goal, however, remains difficult. Linkages may alter existing 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. 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 institutional linkage approaches therefore, is to find a balance between retaining the informal character, local accessibility and legitimacy of the customary justice system, while at the same time making sufficient change to improve its functioning.

It should be noted that donors may find it difficult to make institutional linkages an object of project-type intervention, as these 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. 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 hence be aware of existing linkages as well as of what room there is within the national or local polity to alter them 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.

### Community-based approaches

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Another approach to improve the functioning of customary justice systems is to target activities directly at marginalized community members. Such activities include, for example, the deployment of paralegals, legal literacy training, community mapping of local land rights, and rights education campaigns.<sup>60</sup> Such interventions can stimulate a demand for rights within the community, as proposed by Ignatieff,<sup>61</sup> 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 as 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.

UNDP has summarized its experiences with these kinds of interventions by studying projects in Africa, Asia and Latin America and examining what has worked and what has not. It found, for example, that:

- 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.<sup>62</sup>
- Legal awareness training through literacy courses, information groups, education campaigns, the publication of guidebooks on state and non-

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<sup>60</sup> Wojkowska, above n 7.

<sup>61</sup> Ibid.

<sup>62</sup> Ibid.



state laws, and travelling street theatres helped improve the position of vulnerable groups and provided entry points for human rights in Bangladesh, Malawi, Timor Leste, Indonesia and Cambodia.<sup>63</sup>

- 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.

UNDP also discusses challenges encountered and programmatic failures. It lists that in Thailand it was difficult to train lay persons into paralegals. Further, that capacity-building of informal justice institutions brings about challenges when ceremony becomes more important than capacity, when gender quotas for dispute resolvers undermine community cohesion, when reconciliation emphasis is unsatisfactory for aggrieved parties, when strengthening informal dispute mechanisms perpetuates the absence of formal institutions, and when newly built capacity lacks sustainability and local legitimacy.<sup>64</sup>

An IIED/FAO sponsored report on practices to secure land rights in Africa discusses how civil society-type efforts have worked in the context of non-state law systems.<sup>65</sup> The report shows that interventions such as paralegals, legal literacy, public interest litigation, legal clinics, and rights information centres have been successful in improving land tenure security in Africa's customary regimes.<sup>66</sup> These studies, however, also show that interventions are no panacea and that persistent problems remain, including lack of capacity amongst paralegals,<sup>67</sup> resistant local elites who fear undermining of their power base,<sup>68</sup> donor dependency and lack of sustainability,<sup>69</sup> community lack of confidence and trust,<sup>70</sup> and 'cut-throat antagonism' between weak and/or poor communities and powerful outside investors.<sup>71</sup> Of these challenges elite resistance against change is especially troubling as elite dominance of the customary systems is a key impediments that interventions seek to overcome.

Community-based approaches often utilize national or international state norms and institutions. They seek to contrast the functioning of customary justice to norms of state justice by, for example, raising awareness of state justice norms, organizing debates amongst 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.

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<sup>63</sup> Ibid.

<sup>64</sup> Ibid.

<sup>65</sup> R H Aciro-Lakor, 'Land Rights Information Centers in Uganda' in L Cotula and P Mathieu (eds.) *Legal Empowerment in Practice, Using Legal Tools to Secure Land Rights in Africa* (2008) 71-77; B Ba, 'Paralegals as Agents of Legal Empowerment in the Banass Area of Mali' in *Legal Empowerment in Practice, Using Legal Tools to Secure Land Rights in Africa* in L Cotula and P Mathieu (eds.) *Legal Empowerment in Practice, Using Legal Tools to Secure Land Rights in Africa* (2008).

<sup>66</sup> E Mndeme, 'Awareness-Raising and Public Interest Litigation for Mining Communities in Tanzania' in Cotula and Mathieu, above n 65, 93-98; L L Barros, 'Legal Clinics and Participatory Law-making for Indigenous Peoples in the Republic of Congo' in Cotula and Mathieu, above n 65, 119-22.

<sup>67</sup> Mndeme, above n 66.

<sup>68</sup> A K P Kludze, *Restatement of African Law, Ghana. Volume I: Ewe Law of Property* (1973).

<sup>69</sup> S Roberts, *Restatement of African Law, Botswana. Volume I: Tswana Family Law* (1972).

<sup>70</sup> N N Rubin, 'The Swazi law of succession: A restatement' (1965) 9(2) *Journal of African Law* 90-113.

<sup>71</sup> W Twining, 'The restatement of African customary law: A comment' (1963) 1(2) *The Journal of Modern African Studies* 221-8.

Community-based approaches can also work within the customary justice system without recourse to the state, for example through local activists who work to improve customary dispute procedures and administrative checks and balances. Namibia offers two examples of this. In Uukwambi Traditional Authority, efforts have been undertaken to enhance the position of women in the customary justice system by instituting female deputies to male headmen. In the same area a few dozen people were trained as community legal activators to enhance the administration of justice in traditional courts. This training included a strong gender component. Another example is how Timap for Justice, a local legal aid NGO in Sierra Leone, deployed paralegals to eliminate adverse practices through negotiations with traditional authorities and educating them as to the harmful impact these practices have on communities.

These types of community-based activities can be especially 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 favour marginalized groups and by supporting the marginalized in dispute related negotiations or when seeking to reinvigorate customary administrative checks and balances. The full possibility, potential impacts and limits of using the opportunities offered by the characteristics of customary justice systems, however, remain largely understudied.

Community-based activities form 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 integrated more easily than institutional linkages. Such interventions, however, cannot be seen as separate from institutional linkages as they occur within the context of established linkages between state and customary justice institutions, and often require such linkages to strengthen the functioning of customary justice. Community-based activities also help to improve the functioning of institutional linkages, by enhancing awareness of state norms and the invocation of state rights and related state dispute and administrative procedures in customary settings. Working within the customary system is equally important, therefore, as it may contribute to preventing resistance against state norms and institutions, and as opportunities for effective changes may be derived from the flexible and negotiable nature of customary justice.

## Conclusion

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Recognizing that customary justice plays an important role in the lives of many of the world's poor, legal development actors have initiated projects to improve their functioning. This has occurred at a time when the poor have become central in legal development cooperation.<sup>72</sup> This paper has shown that improving the functioning of customary law presents certain challenges. Institutional approaches, linking customary and state norms, disputing mechanisms and administration, must find a careful balance between retaining the informal character, local accessibility and legitimacy of the customary justice system, while at the same time making sufficient change to reform its operation. Such balance is not easily found, especially in situations where local elites are able to resist or even co-opt linkages to state institutions. Community-based activities are less prone to upset this balance as they are unlikely to fundamentally alter the set-up of the customary justice system. Instead, they change its functioning by involving state norms and institutions or by inducing change from within the customary

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<sup>72</sup> Van Rooij, above n 19.

system itself. Community-based activities occur, however, within the context of established linkages between state and customary justice institutions, and are often dependent upon such linkages for their effectiveness.

The distribution of power plays a vital role in improving the functioning of customary justice. Often approaches, consciously or unconsciously, alter power relations within the local community. Consciously, projects aim to empower marginalized groups, and doing so may decrease the relative local power base of original elites. However, insufficient knowledge of the complexity of customary justice systems may mean that linkages are forged between state institutions and elite norms and institutions in the customary 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 dealing with the fact that law and power are intrinsically linked, expressing this most clearly through the concept of 'legal empowerment'. This concept, which is employed (albeit with slightly different meanings) by international organizations including the Commission for Legal Empowerment of the Poor (CLEP), the United Nations Development Programme (UNDP), the World Bank (WB), the United States Agency for International Development (USAID), and the Food and Agricultural Organisation of the UN (FAO), captures the possibility that legal tools can be used to empower marginalized citizens and attain greater control over the decisions and processes that affect their lives.<sup>73</sup> 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.<sup>74</sup>

Addressing problems in customary justice systems involves 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 through enhancing awareness, improving legal aid, and advocating for better rights.<sup>75</sup> It is important to recognize, however, that rights awareness, legal aid or rights advocacy may require rethinking when undertaken in the context of customary justice systems. Often such activities 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 favourable change from within.

Improving the functioning of customary law hence requires a particular kind of legal empowerment — 'Customary Legal Empowerment' — defined as processes that (1) enhance the operation of customary justice systems by improving the representation and participation of marginalized community members and integrating safeguards aimed at protecting the rights and security of marginalized

<sup>73</sup> See S Golub, 'Less law and reform, more politics and enforcement: A civil society approach to integrating rights and development' in P Alston and M Robinson (eds.) *Human Rights and Development: Towards mutual reinforcement* (2005) 297-324; Asian Development Bank, above n 23; USAID, *Legal Empowerment of the Poor: From concepts to assessments* (2007); CLEP, above n 7; L Cotula, *Legal Empowerment for Local Resource Control. Securing local resource rights within foreign investment projects in Africa* (2007).

<sup>74</sup> K Tuori, 'Law, Power and Critique' in K Tuori, Z Bankowski and J Uusitalo (eds.) *Law and Power: Critical and Socio-Legal essays* (1997) 7-29; Cotula, above n 73.

<sup>75</sup> Asian Development Bank, above n 23.

community members and/or (2) 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. Additional research is needed to identify and understand the possibilities for customary legal empowerment, in particular possible entry points, lessons that can be carried over from state-based legal empowerment interventions, and strategies for overcoming the above-listed challenges.