



## Informal Justice Systems: Charting a Course for Human Rights-Based Engagement

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# INFORMAL JUSTICE SYSTEMS

**CHARTING A COURSE FOR HUMAN RIGHTS-BASED ENGAGEMENT**



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# TABLE OF CONTENTS

LIST OF ABBREVIATIONS IN ALPHABETICAL ORDER.....	5
ACKNOWLEDGEMENTS .....	6
SUMMARY .....	7
<b>CHAPTER I INTRODUCTION .....</b>	<b>29</b>
<b>CHAPTER II SITUATING INFORMAL JUSTICE SYSTEMS .....</b>	<b>34</b>
<b>CHAPTER III THE INFLUENCE OF HISTORY AND LEGAL FAMILIES.....</b>	<b>46</b>
<b>CHAPTER IV TOWARD A TYPOLOGY OF INFORMAL JUSTICE SYSTEMS .....</b>	<b>54</b>
<b>CHAPTER V USER PREFERENCES AND PROVIDER PROFILES.....</b>	<b>74</b>
<b>CHAPTER VI HUMAN RIGHTS AND INFORMAL JUSTICE SYSTEMS .....</b>	<b>88</b>
<b>CHAPTER VII WOMEN AND GIRLS’ HUMAN RIGHTS AND INFORMAL JUSTICE SYSTEMS..</b>	<b>98</b>
<b>CHAPTER VIII CHILDREN’S RIGHTS AND INFORMAL JUSTICE SYSTEMS .....</b>	<b>122</b>
<b>CHAPTER IX PROGRAMMING WITH INFORMAL JUSTICE SYSTEMS .....</b>	<b>137</b>
<b>BIBLIOGRAPHY.....</b>	<b>178</b>
<b>LIST OF ANNEXES .....</b>	<b>193</b>

## LIST OF ABBREVIATIONS

<b>ADR</b>	Alternative Dispute Resolution	<b>LADA</b>	Law and Development Association (Zambia)
<b>AusAID</b>	Australian Agency for International Development	<b>LC</b>	Local Council
<b>BLAST</b>	Bangladesh Legal Aid and Services Trust	<b>MHRC</b>	Malawi Human Rights Commission
<b>CBO</b>	Community-Based Organisation	<b>MGEP</b>	Mainstreaming Gender Equity Programme (Nepal)
<b>CCJP</b>	Catholic Commission for Justice and Peace (Malawi)	<b>MLAA</b>	Madaripur Legal Aid Association (Bangladesh)
<b>CEDAW</b>	Convention on the Elimination of All Forms of Discrimination Against Women	<b>NEB</b>	National Equality Body
<b>CIDTP</b>	Cruel, Inhuman and Degrading Treatment or Punishment (see UNCAT)	<b>NGO</b>	Non-Governmental Organization
<b>CRC</b>	Convention on the Rights of the Child	<b>NHRI</b>	National Human Rights Institution
<b>CS</b>	Civil Society	<b>NRM</b>	National Resistance Movement
<b>CVICT</b>	Centre for Victims of Torture (Nepal)	<b>NSJS</b>	Non-State Justice Systems
<b>DANIDA</b>	Danish International Development Agency	<b>OECD</b>	Organisation for Economic Co-operation and Development
<b>DFID</b>	United Kingdom Department for International Development	<b>PASI</b>	Paralegal Advisor Service Institute (PASI)
<b>ECHR</b>	European Convention on Human Rights	<b>PNG</b>	Papua New Guinea
<b>EPWDA</b>	Eastern Province Woman Development Association (Zambia)	<b>PRI</b>	Penal Reform International
<b>FGM</b>	Female Genital Mutilation	<b>PRSP</b>	Poverty Reduction Strategy Papers
<b>FRELIMO</b>	The Liberation Front of Mozambique (Frente de Libertação de Moçambique)	<b>SALRC</b>	South African Law Reform Commission
<b>GBV</b>	Gender-Based Violence	<b>SWAP</b>	Sector Wide Approach
<b>GJLOS</b>	Kenya Governance Justice Law and Order Sector (reform programme)	<b>ToR</b>	Terms of Reference
<b>GTZ</b>	German Society for Technical Cooperation (Deutsche Gesellschaft für Technische Zusammenarbeit)	<b>UAE</b>	United Arab Emirates
<b>HRBA</b>	Human Rights-Based Approach	<b>UDHR</b>	The Universal Declaration of Human Rights
<b>HRC</b>	Human Rights Council	<b>UK</b>	The United Kingdom
<b>HURIPeC</b>	Human Rights and Peace Centre (Uganda)	<b>UN</b>	The United Nations
<b>ICC</b>	International Criminal Court	<b>UNAIDS</b>	Joint United Nations Programme on HIV/AIDS
<b>ICCPR</b>	International Covenant on Civil and Political Rights	<b>UNCAT</b>	United Nations Convention Against Torture
<b>ICESCR</b>	International Covenant on Economic, Social and Cultural Rights	<b>UNDAF</b>	United Nations Development Assistance Framework
<b>ICHRP</b>	International Council on Human Rights Policy	<b>UNDP</b>	United Nations Development Programme
<b>ICTJ</b>	International Center for Transitional Justice	<b>UNESCO</b>	United Nations Educational, Scientific and Cultural Organization
<b>ICTR</b>	International Criminal Tribunal for Rwanda	<b>UN HABITAT</b>	The United Nations Human Settlements Programme
<b>ICTY</b>	International Criminal Tribunal for the former Yugoslavia	<b>UNICEF</b>	United Nations Children's Fund
<b>IJS</b>	Informal Justice Systems	<b>UNIFEM</b>	United Nations Development Fund for Women
<b>INGO</b>	International Non-Governmental Organisation	<b>UNODC</b>	United Nations Office on Drugs and Crime
<b>ILO</b>	International Labour Organisation	<b>UP</b>	Union Parishad (Bangladesh)
<b>JSC</b>	Judicial Service Commission	<b>UPR</b>	Universal Periodic Review
<b>JLOS</b>	Justice Law and Order Sector	<b>USIP</b>	United States Institute of Peace
<b>JSDP</b>	Justice Sector Development Programme (Sierra Leone)	<b>VAW</b>	Violence Against Women
<b>KSOL</b>	Kathmandu School of Law (Nepal)	<b>VMP</b>	Village Mediation Project (Malawi)
		<b>WLUML</b>	Women Living Under Muslim Laws
		<b>VSU</b>	Victim Support Unit
		<b>YWCA</b>	Young Women's Christian Association

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## SUMMARY

### A. PLACING INFORMAL JUSTICE SYSTEMS IN CONTEXT

Until recently, informal justice systems (IJS) were relatively invisible in development partner-assisted justice interventions. Yet, IJS form a key part of individuals' and communities' experience of justice and the rule of law, with over 80 percent of disputes resolved through informal justice mechanisms in some countries.<sup>1</sup> IJS may be more accessible than formal mechanisms and may have the potential to provide quick, relatively inexpensive and culturally relevant remedies. Given this central role and increasing government and partnering donor interest in IJS, it is key to build an understanding of IJS and how best to engage with them for the strengthening of human rights, the rule of law and access to justice.

In many countries, there is a prevalence of IJS, which demands that governments and development partners take these systems more seriously, especially with regard to IJS and women's and children's rights. This does not mean that development organizations should promote IJS at the expense of a functioning unitary legal order or that they should oppose the existence of IJS. Rather, it is recognition that IJS are an empirical reality, albeit a complicated one.

At the same time, growing numbers of countries are requesting UN assistance to engage with IJS and strengthen their ability to provide justice and legal protection. The UN's approach to engagement on rule of law and access to justice is as an effort to ensure international norms and standards for all who come into contact with the formal and informal justice system, including victims, witnesses or alleged offenders. IJS are complex and deeply varied; many drawing their normative structures and legitimacy from the local communities and society in which they operate. The UN does not presume that engagement with IJS can adopt a 'one-size-fits-all' approach. Like all legal mechanisms, IJS function within changing societies and communities and can be responsive to the particular individual circumstances of a case in the application of cultural norms.

The obligation to respect, protect and fulfil human rights, including through the provision of justice and legal remedies, extends to formal and informal systems alike. Both types of justice systems can violate human rights, reinforce discrimination, and neglect principles of procedural fairness. IJS in many contexts deal with issues that have a direct bearing on the best interests of women and children, such as issues of customary marriage, custody, dissolution of marriage, inheritance and property rights. The operative questions surrounding IJS and the rights of women and children are significant. While it is especially important to note that the structures, procedures and substantive decisions of some IJS neither safeguard nor promote women's rights and children's rights, the existence of IJS does not of itself contravene international human rights principles. Indeed, IJS can provide avenues for the delivery of justice and the protection of human rights, particularly where formal justice systems lack capacity, and IJS can enjoy widespread community legitimacy and support.

The study seeks to identify how engagement with IJS can build greater respect and protection for human rights. It highlights the considerations that development partners should have when assessing whether to implement programmes involving IJS, the primary consideration being that engagement with the IJS neither directly nor inadvertently reinforces existing societal or structural discrimination – a consideration that applies to working with formal justice systems as well. The study also examines the value of IJS in offering, in certain contexts, flexible structures and processes, cost-effectiveness and outreach to grassroots communities.

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<sup>1</sup> Wojkowska, Ewa 2006: *How Informal Justice Systems can contribute*, Oslo: United Nations Development Programme, Oslo Governance Centre.



In structure, this summary of the study, first describes IJS across the range of degrees of formality and informality and interaction with the state. It identifies the combination of factors that influence individuals' or communities' preferences and pressures to bring matters before IJS rather than before formal justice systems. These factors influencing preferences for IJS vary from geographical isolation, economic concerns, familiarity, trust and the perception that IJS better reflect local values. It then places IJS in the context of human rights, with particular attention to the rights of women and children. Finally, it frames the principles of programming engagement with IJS and suggests possible entry points for engagement with IJS, so that strategic engagement can strengthen IJS to better deliver justice and human rights.

## METHODOLOGY

Commissioned by UNDP, UNICEF and UN Women, the study involved a comprehensive literature review and country-specific case studies. Qualitative and quantitative data collection was carried out in Bangladesh, Ecuador, Malawi, Niger, Papua New Guinea and Uganda. The country studies were selected in consultation with the three UN agencies and the methodology was developed through a pilot case study in Malawi. The country studies employed a uniform methodology, and all of the country studies use identical or very similar categories of analysis. Interviews were conducted with individuals and groups representing various stakeholders at the local and national levels on the basis of an interview guide developed for each of the target categories. The quantitative part of the country studies included surveys for users of informal justice and informal justice providers, following a generic questionnaire format that allowed comparison across countries.

Desk studies of 12 countries were also conducted on the basis of literature from academia, UN agencies, NGOs, governments, websites and conferences. Wherever possible, they were developed in consultation with national experts on the informal and the formal justice systems, including scholars and human rights experts. The desk studies assessed the nature and characteristics of IJS (composition, decision-making, procedures), linkages among the different justice providers (particularly with formal justice systems), legal frameworks, human rights aspects and efforts made to date in programming by governments, national and international NGOs, the UN and other development partners.

## DEFINITIONS OF INFORMAL JUSTICE SYSTEMS

Any attempt to define IJS must acknowledge that no definition can be both very precise and sufficiently broad to encompass the range of systems and mechanisms that play a role in delivering rule of law and access to justice. IJS vary considerably, encompassing many mechanisms of differing degrees and forms of formality. Degrees of formality vary with respect to legal or normative framework, state recognition, appointment and interaction, control and accountability mechanisms, and systems of monitoring and supervision, including the maintenance of case records and the implementation of referral procedures. IJS also encompass systems that might have formal state recognition, such as alternative dispute resolution that operate at the community level, either facilitated by traditional mechanisms or facilitated by NGOs.

The study employs a relatively broad definition of 'informal justice system' encompassing the resolution of disputes and the regulation of conduct by adjudication or the assistance of a neutral third party that is not a part of the judiciary as established by law and/or whose substantive, procedural or structural foundation is not primarily based on statutory law.

In some settings, the word 'informal' may carry value-laden assessments, according to which a system may be held in lower esteem because of the 'informal' label. The study uses the word with no such value judgments. It is used rather than the term 'non-state' justice systems, as there are many forms of IJS that are tolerated, partially

state-linked or recognized along the formal-informal continuum. For example, customary courts or local courts are categorized as IJS, but are regulated under specific legislation, have a state-determined procedure for appointments, and may be attached to the judiciary.<sup>2</sup> Such courts seek to gain community legitimacy through their roots in a history of justice provision prior to the existence of the modern state or through their claim to draw on the local norms and customs of a specific locality of the country. The study looks at a wide range of systems outside classic state structures that include hybrid models of customary, religious and state-run ‘parajudicial’ systems. However, the study does not consider systems for the maintenance of law and order and local security nor the administration of rules by commercial or professional organizations.

The study distinguishes among informal justice mechanisms anchored in (i) customary and tribal/clan social structures, (ii) religious authorities, (iii) local administrative authorities, (iv) specially constituted state customary courts, and (v) community forums specially trained in conflict resolution, particularly in mediation. Types (iii) and (iv) often present a hybrid (parajudicial) model where officials of a state system apply customary norms. Nevertheless, these rough distinctions do not fully capture reality, which contains varying mixtures of these elements in which, for example, customary and administrative authority are combined.

This typology is used as a framework to examine IJS, looking at the composition of dispute resolution bodies, their relationship to the state, the jurisdictional limits and substantive norms applied, typical processes used to resolve disputes and the binding or voluntary nature of outcomes.

## LINKAGES BETWEEN FORMAL AND INFORMAL JUSTICE SYSTEMS

The nature of IJS and the extent to which they are incorporated into formal systems largely depends on the historical circumstances of each country. The legal system inherited from a colonial power and the new legal and state system established during decolonization influenced the role and status of customary law and IJS as well as the interaction between the IJS and the formal justice system.

In most countries, there are functional linkages between state justice providers and IJS’ providers. State law may define such linkages and provide for official forms of collaboration (including appeal procedures, referrals, division of labour, advice, assistance and so forth), but, even where this is not the case, there are often various forms of unofficial collaboration. There may also be the possibility of appeal to a court in the formal system and, in some circumstances, this could be precisely what renders it possible for people to trust informal mechanisms of justice. Thus, the formal system can exert influence even where its mechanisms are not directly invoked. Linkages may also be negative, with competition over jurisdiction including overt opposition or even hostility. Aside from functional linkages, there are instances of overlaps or ‘borrowing’ of norms, rules and procedures between IJS and state providers. Such norm and rule-based linkages may derive from long histories of interaction and coexistence. They point to the changeability and adaptability of different primary justice providers and/or to their interdependency.

The origins of the existence and tolerance of IJS are many and varied. Tolerating IJS or incorporating traditional, customary or religious law into formal systems may be a way for the state to accommodate different religious or ethnic traditions in a single state. It may also allow the state to regulate non-state or customary justice providers by, for example, limiting their scope of jurisdiction by defining tradition or custom as applying only to certain domains. The concept may also be invoked by IJS’ providers claiming knowledge of custom as a source of authority and spaces of power as compared to state officials.

<sup>2</sup> Examples of such structures are local courts in Sierra Leone and Zambia, the Village Courts in Papua New Guinea and the Community Courts in Mozambique

IJS deal with many cases that could have been brought to formal court. The study surveyed users' preferences and choices of system (preference between IJS or formal system), as well as the profiles of the individuals in the IJS who adjudicate, mediate and make decisions in the IJS. In the analysis of the data gathered, gender was included as a variable in all cross tabulations.

Explanations for individual preferences of system combine a number of factors, ranging from the in/effectiveness and popular il/legitimacy of the formal justice system, to power relations and social pressure. The study posits eight significant, partly interrelated aspects that can influence people's choices and uses of IJS. (See box 1)

### **BOX 1: FACTORS INFLUENCING PEOPLE'S CHOICES AND USES OF INFORMAL JUSTICE SYSTEMS**

1. In/effectiveness and popular il/legitimacy of the formal justice system: This could include the geographical distance and costs of access to the system as well as outcomes inappropriate for local preferences. There could also be a perception of corruption or of discrimination in the formal system against a particular community, causing people to question the legitimacy of the formal system itself.
2. IJS case settlement procedures: This involves a preference for less formalized settlement procedures, such as voluntary participation and the reaching of decisions on the basis of mutual consent.
3. IJS case settlement outcomes: The emphasis by many IJS on reconciliation, restoration, compensation and reintegration is preferred over the custodial sanctions that dominate many formal criminal justice systems.
4. Economic concerns: The emphasis of IJS on compensation as a symbol of reconciliation ensures that the victims' and offenders' families do not become economically destitute. IJS are not always preferred as the least expensive option; this depends on the context as some IJS charge fees.
5. Cultural, religious and/or customary beliefs and practices: The perception that IJS' procedures and substantive norms, compared to those of formal justice systems, are more in accordance with the local cultures and the social relations of people. This is particularly so where the formal justice system is an inheritance from the colonial past.
6. Habits or routines: A preference is based on individuals' or communities' long interaction with IJS for dispute resolution.
7. Power relations and social pressure: Preferences might be based on community, structural or societal pressures and on the view that certain systems support specific power relations associated with social status and identities (age, gender, ethnicity, class).
8. Legitimacy and authority of IJS' justice providers: Preference might be based on the individual or community perception that a justice provider, such as a traditional leader or religious leader, has the legitimate authority to adjudicate, decide or mediate a case.

## B. FRAMING INFORMAL JUSTICE SYSTEMS IN HUMAN RIGHTS TERMS

Providing accessible justice is a state obligation under international human rights standards, but this obligation does not require that all justice be provided through formal justice systems. If done in ways to respect and uphold human rights, the provision of justice through IJS is not against human rights standards and IJS can be a mechanism to enhance the fulfilment of human rights obligations by delivering accessible justice to individuals and communities where the formal justice system does not have the capacity or geographical reach.

Human rights obligations apply to IJS and states have an obligation to ensure the respect, protection and fulfilment of human rights, including where IJS are the main provider of justice. Analysing IJS for human rights compliance is complex. Both IJS and formal systems need to be analysed together in terms of their ability to deliver human rights-compliant structures, procedures and outcomes. In some circumstances, the human rights deficiencies will be common to the formal system and the IJS alike; in others, the IJS might show benefits over the formal justice system. For example, IJS could be a positive tool to divert juveniles from the more retributive aspects of formal criminal justice systems. Where there is limited or no access to formal juvenile justice mechanisms, IJS can emphasize restorative justice that, seeking harmony in the local community, attempts to reintegrate young offenders into the community.

**Human rights standards offer the possibility of fairness in three dimensions of justice:** structural, procedural and normative. The structural dimension consists of participation and accountability. Particular attention must be paid to the rights of groups not strongly represented in IJS, which include women, minorities and children. Procedural justice consists of guidance for adjudication processes that ensure that the parties to a dispute are treated equally, that their case is decided by a person with no interest in the case, who is obliged to render a decision solely on the basis of facts and objective rules rather than on personal preferences, and that anyone making an assertion or accusation must provide verifiable evidence to support it. Finally, normative justice consists of substantive rules that protect the vulnerable. Examples include the prohibition against marrying off children for the economic benefit of parents or guardians or the guarantee of the right of widows to inherit.

The human rights issues with respect to operation of IJS commonly involve decisions that are inconsistent with basic human rights, such as cruel and inhuman forms of punishment, or decisions that perpetuate the subordination of women or the exploitation of children. Weaknesses in procedural justice also mean that IJS do not always give the accused the chance to be heard or to be adequately represented. IJS can hold individuals accountable to social collectivities and broader social interests.

The key question for engagement with IJS must be the provision of effective rights protection in the particular context. In some countries formal justice mechanisms are inoperative or inaccessible to ordinary people, and are unlikely to be able to fill the gap in the short and medium terms. In such contexts, IJS may be better placed to achieve the principles of impartiality, accountability, participation and protection of substantive human rights.

It can be concluded that, in many contexts, the best access to justice and protection of human rights will be afforded when the different systems and mechanisms, formal and informal, are allowed (a) to exchange with and learn from one another, (b) to cooperate with one another, (c) to determine the best division of labour, guided by user preferences as well as state policy imperatives, and (d) to develop in order to meet new challenges.

## WOMEN'S RIGHTS

Discussion of respect for women's rights often remains tethered to the notion of 'balancing' these rights with culture and custom rather than taking a more dynamic and process-oriented view of culture. On the one hand, deeply embedded attitudes are often linked to patterns of economic survival and ethnic, religious or social identity. Consequently, IJS, especially custom and religion-based IJS, are likely to uphold rather than to challenge the values of the society around them, including attitudes and patterns of discrimination. On the other hand, the flexible and adaptable approach of customary law can allow it to change in ways that reflect changing values in society. The Human Rights Committee (HRC) notes that states should ensure that "traditional, historical, religious or cultural attitudes are not used to justify violations of women's rights to equality before the law and to equal enjoyment of all Covenant rights."<sup>3</sup> Even if there is no clear state recognition of IJS or other delegation of state functions to traditional chiefs, or enforcement or consideration of settlements reached through informal justice, the state remains obliged under Article 2 of the CEDAW to extend protection.<sup>4</sup> The HRC notes that inequality in the enjoyment of rights by women is often deeply embedded in tradition, culture and religion, so that many frequently occurring violations of women's human rights originate from social custom, belief or practice rather than (or as well as) from state law, and are perpetrated by individuals and social groups rather than by the state.

**IJS affect the rights of women in diverse and context-specific ways. The study identified various ones that include:**

### BOX 2. ADDRESSING BARRIERS TO WOMEN'S ACCESS TO JUSTICE

There are many social, economic or procedural factors that prevent women from bringing a matter before IJS. The Malawi country study describes how women were more likely to bring certain cases to village mediators (IJS facilitated by NGOs) rather than to traditional chiefs because mediation process offered confidentiality, whereas the traditional IJS offered by local chiefs involved public discussion of personal and intimate matters. The prominence (or absence) of women among the village mediators was also an important factor.

**Access and procedure:** This includes legal capacity and women's right to a remedy as well as barriers to women as witnesses or litigants. Many of the hindrances to women's access to formal justice systems also apply to IJS, such as the lack of access to economic and other resources, persistent fear of intimidation, and victimization by officials such as members of the IJS or community members. While the paucity or absence of procedural rules in IJS may facilitate women's access and participation, this may also disadvantage women by permitting prejudice and creating conditions for the abuse of power. An additional procedural barrier in IJS can be the potential lack of privacy and confidentiality, making women less willing to litigate personal and intimate rights violations such as those related to domestic violence.

**Women's rights in the area of family life, including dissolution of marriage separation and/or divorce:**

Some communities consider separation and divorce to be similar to the destruction of the social fabric and consequently these matters are not administered by some IJS. Marital problems are resolved, if at all, through family and community intervention. Several social pressures coerce women to remain silent about abuse in the family rather than to seek the protection of any legal system. The study notes that, since the practice of polygamy or polygyny is widespread in most regions where IJS also play a critical role in regulating family and marriage relations, there is not always community recognition of the practice's harmful economic and emotional consequences for women and their children and its violation of women's right to equality. Indirect ways to reduce the prevalence of this practice,

<sup>3</sup> Human Rights Committee, General Comment 28, Equality of rights between men and women (article 3), U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000).

<sup>4</sup> In the Americas, the Article 4 j) of the Belem do Para Convention stipulates that every woman has the right to equal access to the public service of her country and to take part in the conduct of public affairs, including decision-making. In Africa, Article 9 of the Maputo Protocol deals with the equal right to participation, including through affirmative action. Thus, Article 9.2 provides that States Parties shall "ensure increased and effective representation and participation of women at all levels of decision-making."

such as measures to tackle child marriage, forced marriage, teenage pregnancy and discontinued schooling which are likely to affect rates of polygamy may produce the most positive results.

**Women’s rights to property, including owning real property:** Women’s access to land – often the most important economic resource – is in many contexts through marriage or a woman’s father. Traditional mechanisms of land allocation may involve a purely male hierarchy and a traditional legal system that reinforces this arrangement. In some contexts inequalities arise out of the failure of the formal justice system to protect women’s property rights where jurisdiction over land is not under customary laws. In many contexts, both formal justice systems and IJS fail to protect women from discrimination in regard to property rights. While custom may not be in favour of practices such as property-grabbing (often committed against widows), IJS in many contexts have not been able to protect vulnerable women against such practices.

### BOX 3. INFORMAL JUSTICE SYSTEMS AND DOWRY OR BRIDE PRICES

Many social, economic or procedural factors prevent women from bringing a matter before IJS. The payment of dowry and bride price is widely practiced and may be considered necessary for the validity of customary marriages. Although the practice of dowry payments by the wife’s family has been legally abolished in some countries, including India and Bangladesh, dowry disputes reportedly still frequently arise in IJS in these and other countries. The Ugandan non-governmental organization MIFUMI has made bride price a campaign issue, having worked on the question for a decade or more using advocacy and strategic litigation (see <http://www.mifumi.org/>). A legal petition to have the custom declared unconstitutional (on grounds that it leads to violence against women and treatment of women as chattels) was defeated in the Constitutional Court of Uganda in March 2010. The Court criticized the lack of a factual foundation for the petitioners’ assertions, possibly indicating that the petition may have stood a better chance if the factual basis for the petition had been made clearer. The case has been appealed to Uganda’s Supreme Court and judgment was pending at the time of writing.

**Women’s rights to personal integrity and physical security:** The study finds that women have little faith in the capabilities of either formal or informal systems to protect them and to prosecute offenders. The widespread practice of ‘payment of dowry’ and ‘bride price’, which in some countries may be considered necessary for the validity of a customary marriage, may be closely connected to extreme forms of violence against women. Many issues can complicate how both formal systems and IJS handle gender-based violence. National law may not recognize a criminal offence of rape within marriage, for example. While recognizing the various factors that limit women’s access to justice in the formal system, as well as the importance of women’s participation in IJS, the study finds that rape and sexual violence should not be dealt with in IJS, but referred to ordinary courts. This principle must be known and accepted within IJS in order to be enforced. It is important that the key challenges of women’s own aversion to taking what society might consider ‘family matters’ before formal justice institutions and the barriers and societal pressures against turning to formal justice systems must be addressed.

Patterns of discrimination against women can be reflected in low levels of participation by women as adjudicators in IJS and, in some contexts, in the barriers to access and participation as parties and witnesses that women face. Provisions of the CEDAW and regional declarations and protocols obligate states to ensure representation of women in bodies exercising public authority.<sup>5</sup> The participation of women as adjudicators or justice officials is vital to ensuring that women can bring sensitive matters to the attention of justice providers. In the same way that women’s participation as police officers and in victims service units is a key part of dealing effectively with domestic violence and rape, it is equally important to foster their participation in IJS.

<sup>5</sup> CEDAW Article 9.2.

#### **BOX 4. PARTICIPATION OF WOMEN AS ADJUDICATORS IN INFORMAL JUSTICE SYSTEMS**

In many countries, customary authorities play a role in the nomination of candidates for office in parajudicial systems, with a judicial service system commission or government ministry making or approving the final appointment. It is possible to introduce affirmative action measures, particularly in parajudicial systems, as have been done with the Local Council Courts in Uganda and the Village Courts in Bangladesh and Papua New Guinea, where quotas for female representation have been set.

Although IJS do not fully respect and protect women's rights in many contexts, the study finds that women creatively seek a just resolution and the protection of their rights. While women may fare better in formal or parajudicial systems, they are often acutely aware of the necessity of maintaining collective structures that benefit communities as a whole. They also face social pressure and logistical and economic difficulties preventing them from accessing the formal justice system. Thus, they often seek to change IJS structures from the inside rather than to discard them outright. Engagement with IJS should therefore also be tied to raising awareness within IJS of women's rights and of the range of choices and access available to women to seek justice, remedy and protection.

### **CHILDREN'S RIGHTS**

There is little literature and research on children and IJS, although important issues arise regarding the rights of children in relation to IJS. Children have the same basic rights as any other person in proceedings before IJS, including the right to be heard, the right to a fair and impartial hearing, and the right to protection from arbitrary, cruel or inhumane punishment. In practice, however, these rights are often poorly respected and are more likely to be violated.

**The Convention on the Rights of the Child (CRC) recognises four principles that should guide the interpretation of the other articles, and must be taken into account in all matters concerning the rights of children. They are:** 1) the primacy of the best interests of the child, 2) the prohibition of discrimination, 3) the survival and development of the child, and 4) the right to be heard and to have one's views taken into account.

A number of instruments have been adopted that provide guidance on how these fundamental international standards about children and justice should be implemented. These instruments were designed mainly for application in formal legal systems, but much of the guidance they contain is also relevant to IJS. The most relevant are the Standard Minimum Rules on the Administration of Juvenile Justice and Guidelines on Justice in matters involving Child Victims and Witnesses of Crime.

Recognition of and respect for the principles of the CRC is linked, to some extent, to the type of IJS, and to the nature of the linkages to the formal justice system. IJS that are linked to the formal system such as parajudicial IJS often have an obligation to apply legislation as well as traditional law. Such IJS including those to which cases of juvenile offenders are diverted to avoid formal prosecution tend to have a better understanding of the rights of children and are more likely to respect them. However, links with the formal legal system and an obligation to respect the legislation does not of itself guarantee full respect for the rights of children.

In many societies, traditional values attribute little or no importance to the opinions and wishes of children, and many IJS ignore the right of children to be heard in matters that affect them. In addition, in many systems the extended family or the village community, rather than the nuclear family, has the responsibility for protecting the child. While this often serves to protect children, problems may arise when issues are brought before IJS. If the group responsible for protecting the child is also a party to the dispute, or participates as decision maker, the child's views and interests may not receive a fair and impartial hearing and the outcome might not be in the best interests of the child.

IJS could also enforce norms that are incompatible with rights recognised by the CRC. The application of norms regarding custody based on the child's sex and/or age, that fail to take into account the views and best interests of the individual, is another example. Norms regarding guardianship that perpetuate the practice of child marriages are yet another. Some IJS discriminate against children born outside of marriage, who have been orphaned or who have lost their father. Some fail to protect orphans against abuse of property rights by guardians, or fail to protect the property rights of widows, which, of course, has an adverse impact on dependent children. The failure of IJS to protect such property rights effectively can have profound consequences for the child's right to development, to protection against exploitation and even survival.

Reconciling the procedures followed by IJS with notions of procedural due process recognised by international human rights law often poses difficult challenges. In the criminal domain, the right of persons accused of a crime to legal representation and the confidentiality of proceedings involving children are not always recognised in IJS. Some IJS apply collective punishments, leading to the punishment of children for the acts of parents or other relatives.

#### **BOX 5. THE RIGHT TO BE HEARD AND INFORMAL JUSTICE SYSTEMS**

IJS can contain recognition and elements of children's right to be heard, which can provide the basis for dialogue on the issue. In Ecuador, in IJS cases within the family, the child would be represented by someone – generally another family member – to speak for the child's interests.

Deeply held attitudes regarding the role of children can present a major challenge for engaging with IJS. In some communities, children are viewed as property under customary norms, and child marriages can be seen as matters for the family or local community rather than a crime. Some IJS tolerate honour killings and killings related to sorcery. The limited reach of the formal justice system and strength of traditions authorising such violent enforcement of customary norms may lead IJS to tolerate such practices, even when the IJS do not directly enforce them. Equally, however, IJS can be more responsive to changing cultural attitudes, such as in Uganda where there is a preference for taking "defilement" cases before IJS because the formal system does not distinguish between sexual exploitation of a minor by an adult and consensual sexual relations between adolescents.

States have an obligation to make efforts to ensure that IJS respect the rights of children, and the study found some examples of such efforts. In South Africa, the Law Reform Commission carried out research on the compatibility of customary law with the rights of children before deciding the extent to which legislation would recognise customary law. In Bangladesh, legislation bans the application of corporal punishment by IJS.

It is clear that no single approach will be appropriate for every country, or society. The kinds of measures that may help to bring IJS into greater harmony with the rights of children will depend on the nature of the IJS and other circumstances, including the interaction between the formal system and the IJS. The most difficult and enduring barriers to children's access to justice are likely to be social and cultural, not formal, such as perceptions of the role of the child. Familiarity with the attitudes of young people to IJS is also important to understanding children's experience of justice in formal and informal mechanisms. In certain contexts, young people may be aware of the real power of IJS, but could feel alienated from the customs or society that the IJS represents. Social perceptions of children and young people are not static and IJS' flexibility to adapt to these changes is an important element to take into account when engaging with IJS to advance the rights of children.



## BOX 6. INFORMAL JUSTICE SYSTEMS AND CHILD PROTECTION

In Papua New Guinea, UNICEF has been working together with the Village Courts Secretariat within the Ministry of Justice to establish national training documentation, referral, monitoring and evaluation systems for village court judges and officers. This encompasses children's, women's and other constitutionally guaranteed rights and juvenile justice instruments. The study found this to be a positive example where IJS providers were incorporated into a child protection system, became familiar with international and constitutional child rights standards, and were placed in a network where they could seek external assistance or refer particular cases.

### C. PROGRAMMING IN INFORMAL JUSTICE SYSTEMS – PRINCIPLES OF ENGAGEMENT

Until recently, engagement with IJS was not a part of development interventions in justice systems. Consequently, there is relatively little documentation on the outcomes and impact of programmatic interventions, although there is now more consideration of IJS in sector-wide approaches to justice programming. The study found that, despite some overall similarities, a chief characteristic of IJS is their degree of adaptation to their socio-economic, political and cultural contexts. Consequently, programming for IJS needs to take its outset in the context in which they operate, including how they interact with formal systems. In addition, recognition of value of IJS to a society or a community and of their flexibility to individual circumstances can help avoid programming that would distort the positive elements of the IJS. Rigorous analysis of official and unofficial linkages, and explicit policy and operational choices based on these realities, are thus a prerequisite to programming. What is likely to work or succeed is highly context-specific and programmes should be open to a wide range of tools.

Attempting to engage with the cultural practices that are expressed in IJS' demands a multi-pronged and long-term approach that is sensitive to local communities' own priorities for development and survival. As IJS' programming does not occur in isolation to wider justice and human rights engagement, IJS' engagement should incorporate other justice, human rights and development interventions. Engagement with IJS may have limited impact unless it is part of broader efforts to build dialogue on values and beliefs, for example acceptance of the right of children to be heard. Thus, the holistic thinking behind sector approaches to formal justice systems, involving complementary interventions with a number of institutions, needs to be adapted and applied to IJS as players in the provision of primary justice.

## PRINCIPLES OF PROGRAMMING

### 1. Whether to Engage with Informal Justice Systems

At the level of official policy, development organizations have little difficulty in agreeing that all engagement with IJS should promote compliance with human rights. Strictly applying a criterion not to engage with IJS that violate human rights excludes many IJS from potential support, and applying the same criterion to formal systems would produce similar difficulties. In particular, the choice of whether to engage with IJS that discriminate against women and children is an unavoidable dilemma for development partners wishing to engage with IJS. The question should rather be one of openness to adapt to international obligations and changing societal norms. Targeting or affecting IJS must evidently be premised on realistic prospects of sustainable improvement in the fulfilment of human rights, particularly women and children's rights, underpinned by the principles of 'do no harm'.

While pragmatism is unavoidable in engagement on the ground, there can be no concessions in principle regarding the minimum international norms against which justice provision is measured. What some may consider the best or only choice in one context might be unacceptable in another. In extreme circumstances, programmers may

face a choice between supporting informal justice mechanisms that occasionally allow plainly abusive outcomes or countenancing trends that are even worse. A key consideration would be whether the engagement with IJS would directly or indirectly promote structural discrimination or other human rights violations. Engagement with IJS would best be based on mutual acceptance of core human rights principles, including gender equality and children's rights, and on a willingness to work to achieve goals that are themselves compatible with human rights.

Engagement with IJS should always consider alternatives and should not be a substitute for strengthening national justice systems. Alternatives to IJS' engagement could produce stronger justice and human rights outcomes. Such alternatives could include improving community policing, improving access to first instance and small claims courts, increasing community involvement in the formal court system through the employment of lay assessors, increasing the use of restorative and non-custodial punishment in criminal cases, and reducing the formality and adversarial nature of proceedings in the formal system. The consideration of whether to engage in IJS or in the formal system should be based on an understanding of why people do not choose the formal system in the first place; there may be engagements with the formal system that could address these barriers far better than working with IJS.

### **BOX 7. EXAMPLES OF BASELINE STUDIES**

In Niger, UNICEF and national agencies carried out a study on the protection of women's and children's rights that included analysis of IJS. In 2009, Timor-Leste conducted an independent needs assessment that showed that the formal system suffered from low capacity and outreach (despite important recent improvements) and that the informal system enjoyed familiarity, trust and accessibility.

## **2. Inclusion of Informal Justice Systems in Sector-Level Programming**

After deciding that engagement with IJS should be included in justice-sector strategies and programmes, the central question concerns the combination and sequencing of various kinds of interventions. To date, however, there are few reviews of IJS' programming to draw upon to assess progress and pitfalls.

Many of the lessons that have been learned about justice-sector programming can and should also be applied to IJS, including the need to holistically combine various forms of interventions and to coordinate the work of different actors and approaches. In a similar way to planning for sector interventions generally, a thorough baseline analysis is a necessary starting point if wishing to work with IJS. While planning for support of justice sector institutions requires information on caseloads, resources and linkages as well as needs, programming for informal justice demands greater understanding of people's legal preferences, needs and choices, as well as the cultural, social and economic realities that condition these needs. The assessment therefore should consider the whole justice system, not IJS in isolation, to encourage an understanding of the boundaries between the justice systems present.

Baseline studies should not only assess the capacities, resources, strengths and weaknesses of the formal and IJS, but also explicitly begin by identifying social realities, including the barriers to access to the formal justice system and IJS, each systems' responsiveness to the justice needs of ordinary people, and by disaggregating according to social and economic status. The studies would reveal why people choose IJS instead of the formal systems and would discuss the attitudes of young people to IJS and whether young people acknowledge the role of the system to administer justice that affects them.

It is also important to understand why a state or 'polity' chooses to permit or encourage IJS as part of justice provision. State leaders may have the same or different motivations than users for favouring or allowing IJS. They may favour one model over another to achieve political goals, such as to allow a particular group or community a degree of autonomy. Clarity on national goals and an explicit consideration of these goals by development partners are

important for programming. Development organisations and governments should guard against simply finding a cheap solution to the problem of satisfying the obligation to provide justice ('poor justice for the poor'), in engaging with both formal systems and IJS. While pragmatic solutions, such as strengthening IJS in communities that are geographically isolated from the formal justice system, may be necessary in the medium term, these measures should be consistent with a value-based long-term vision of a human rights-based justice system. Thus, baseline studies should provide the contextual analysis so that any intervention is based on an understanding of the power dynamics at play, particularly where certain communities are excluded from access to formal justice systems.

As human rights are a state obligation, the human rights dimension would be a clear part of the analysis at every stage of the programming cycle, including at the baseline study and planning phases. Principles of a human rights-based approach such as participation, accountability and empowerment can apply equally to the baseline study as to the programme of engagement with IJS. The baseline study should involve the participation of representatives of grassroots organizations, community groups, national human rights institutions, and gender equality bodies where they have the capacity to contribute to the analysis. It can help to determine which issues, wrongs or offences the IJS is capable of addressing, as well as the consequences of intervention or non-intervention. Preliminary assessments of human rights compliance must critically examine IJS' willingness and ability to change; in some contexts, the advancement of human rights would be better achieved through change in the formal justice system. Just as IJS are dynamic, formal justice systems can be too, as can the public attitudes to both of them. A popular mistrust of the formal justice system, for example, may be grounded in recent experiences of conflict or authoritarian or corrupt governance and can be addressed directly.

**While the study looks primarily at how IJS can be harnessed to improve access to justice, policy will occasionally go in the opposite direction:** towards the scaling-down of the role and reach of IJS and the creation of a more integrated formal court system. For example, social barriers may either prevent women and children from taking any steps at all to formally resolve legal problems or from using particular avenues or remedies. This information may be vital in determining the best programming approach. If social custom or pressure is discouraging women and children from availing themselves of – otherwise available – formal systems, support to IJS may have to balance very carefully between the palliative of attempting to improve IJS' procedures and remedies and the danger of reinforcing the social norms that make it 'unacceptable' for women and children to seek justice in the formal system.

### 3. Programming in Different Types of Informal Justice Systems

The possible modes and means of intervention with IJS will differ significantly, depending on the kind of system under consideration. Each kind of system is likely to have weaknesses and strengths for programming. Governments are often likely to favour systems linked to state structures, such as state customary courts (community, local, traditional) or those linked to administrative systems (e.g., Local Council Courts in Uganda), which may have the advantages of having administrative procedures and some infrastructure in place, of being easily reachable for large integrated programming, and of being somewhat amenable to change and regulation, particularly the building of stronger links to formal systems. There may be political considerations or implications inherent in the adjudicative and other functions of such bodies. In some cases, these parajudicial systems are based on voluntarism and are not always able to deliver on the large expectations placed on them. Large-scale programming might place further burdens on such IJS.

### BOX 8. PROGRAMMING IN CUSTOM-BASED JUSTICE SYSTEMS

The Malawi Primary Justice Programme of the faith-based organization, Catholic Commission for Justice and Peace, is the largest programme with a custom-based IJS in the countries reviewed in this study. The programme trained headmen and chiefs in all districts of Malawi, and was implemented at the local level through local government and NGOs. The programme developed a manual for the training (in English and Chichewa) and a case record book for use by traditional adjudicators. The programme also seeks to increase knowledge of legal rights among individual men, women and children in the targeted communities by means of semi-monthly meetings, facilitated by community-based educators. The Primary Justice Programme likewise facilitates opportunities for cooperation and coordination between chiefs and other primary justice actors, including through interaction with court users' committees.

Custom-based mechanisms would appear to present the advantages of sustainability and legitimacy, having stood the test of time and being solidly anchored in communities. They may, however, have difficulties in extending their reach beyond tightly knit communities that may be small and local. Changes in structures, procedures and the substantive standards applied by these bodies stand the chance of being adopted by the community and thus becoming sustainable. As with all programming, an influx of funds to such mechanisms could create dependency. At first sight, customary or traditional mechanisms are more difficult to reach by development partners, as there may be few obvious structures through which programming can be carried out.

Like custom-based mechanisms, religious IJS are likely to be relatively sustainable and legitimate within their communities. They may offer outcomes that will be respected because of strongly held values, although these values may not, or only partly, accord with principles in international human rights law, and religious doctrine may be resistant to change. In some countries, there may be either a high degree of state involvement in religious affairs or the presence of large and complex organizational structures – often with close links to the state – that would make some form of centralized programming initiative possible.

Working with religious IJS could raise sensitivities, but not necessarily more sensitivities than working with other IJS. For example, while the issue of women's right to own land may be a stumbling block with traditional leaders, it is rather uncontroversial to many religious authorities. Religiously sensitive themes, including women's reproductive rights, women's rights upon dissolution of marriage and women's inheritance rights, may be difficult to address at the beginning of a partnership, but issues of procedural equality, children's rights or improved participation may be easier to approach. It is important to remember that religion is only one influencing factor of IJS and that the application of religious doctrine differs according to social, economic and political factors.

NGO-based village or community mediation schemes, where NGOs are able to work in communities to assist them in devising new ways of solving disputes based on taught mediation schemes, can be freer of social pressure and the interests of powerful groups in the community. The schemes range from confidential forums to open public mechanisms adopting elements of traditional mechanisms or of learned mediation practice. These diverse NGO mechanisms all have in common that they are in principle based on volunteerism and are free of charge. Experience shows that much work, outreach and time is necessary to build acceptance of such schemes among local leaders, including traditional and religious leaders, as well as police and district officials. Where this has been done sensitively and carefully, these leaders have usually been well-disposed to the schemes.

## SPECIFIC PROGRAMMING INTERVENTIONS

**Under the framework of justice sector programming, the study identified specific interventions, which include support in<sup>6</sup>:**

1. State law reform processes to enhance compliance with international human rights guarantees
2. Selection and mandate of adjudicators
3. Education of adjudicators
4. Education of users
5. Procedural regulation and self-regulation
6. Accountability mechanisms: transparency, monitoring and oversight
7. Linkages among primary justice providers
8. Linkages to paralegals and legal aid providers
9. Linkages to wider development programming

It is important to emphasize that the programming initiatives described here are in no way exhaustive. One important caveat relates to the limited scope of the study, which focuses mainly on IJS rather than on formal justice systems, which frequently need greater understanding of IJS and customary law and governance. The country studies reveal that formal justice actors often know little about the informal systems that most people use and law school curricula, for example, pay little attention to customary law. Agents of formal justice systems often attempt to fill this gap by gathering knowledge of customary law in *ad hoc* ways, such as by consulting court personnel or others in their immediate circle. Supplementing formal justice providers' knowledge about IJS is a necessary element of an overall strategy of engagement on IJS.

### 1. State Law Reform Processes to Enhance Compliance with International Human Rights Guarantees

#### BOX 9. LAW REFORM AND INTERNATIONAL TREATY BODIES

When Zambia underwent the Universal Periodic Review process of the UN Human Rights Council, one of the recommendations made concerned the country's constitution. The constitution exempts customary law from the guarantees for equal treatment for women. Zambia supported the recommendation of the Universal Periodic Review to strengthen the prohibition of discrimination in the constitution as part of the constitutional review process in Zambia.

There are synergies between IJS' programming interventions and broader human rights engagement, such as encouraging the ratification, domestication and implementation of international human rights instruments, as well as the implementation of recommendations of international treaty bodies. Programmatic interventions to enhance compliance with international human rights guarantees may seek to bring IJS more clearly within the ambit of legislative and constitutional standards. Law reform is one – perhaps limited – way to influence structural, normative and procedural standards and practices surrounding IJS. As the study reveals widespread failure of IJS to comply with formal law, the impact of legislation should not be overestimated. Success may be more likely where an IJS is directly dependent on the state, as in the case of parajudicial IJS' mechanisms. Even so, change is dependent on IJS' adjudicators' knowledge and understanding of the law, as the literature on IJS as well as the findings of the study confirm. Second, the study found that the question of any possibility of oversight would influence the degree and prevalence of respect for the law by IJS.

<sup>6</sup> The study's approach was not to provide an exhaustive list rather a range of options.

### BOX 10. EXAMPLE OF SELF-STATEMENT METHOD

In Namibia, the process of ascertaining and recording customary law took place within the community itself and resulted in a product created within the community and binding upon it. It consisted of ten steps:

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

While the process might not be immune to the power of local elite to control the outcome and procedures, it contains important participatory mechanisms that can empower community members.

Linked to law reform is the tool of strategic litigation, which activist organizations can use to bring about change in legal standards. Where the legal environment is favourable, strategic litigation can help to change the law, raise awareness and build coalitions. National and regional courts as well as global UN treaty bodies can be relevant here.<sup>7</sup> Depending on context, strategic litigation may be an effective strategy to advance the protection of rights. In states where the rule of law remains relatively weak, expectations should be realistic as to results.

**The process of law reform in IJS does not differ from law reform in other areas, except that it needs to take particular account of stakeholder groups that are often far from the policy-making process:** the rural poor, indigenous communities and women. Any attempt at law reform should recognize that norms drawing from religion and/or custom are woven into the fabric of cultural, social and economic life, and are often not written down. Some sections of the population, including some justice officials, would resist the implementation of the required new laws. Legal change is not likely to succeed without parallel public outreach and awareness-raising and, in some circumstances, change must be incremental. Transitional measures would be required to regulate the situation and status of people who have organized their lives according to existing laws and rules.

Law reform or other programming can also attempt to intervene directly in the rules, customs or law applied by IJS. This can happen in various ways, although not always successfully. One intervention is laws that limit the application of customary laws to certain domains. Another is the attempts of the colonial (and the immediate post-colonial) era at 'codification' of custom. In numerous efforts at codification during the immediate post-colonial period, governments were quite explicit in their aims of not merely codifying or restating custom, but in actively modifying it to suit their values and purposes. This often contributed to rejection of the new codes. There are few recent examples of successful codification of customary law, especially across ethnic or tribal groups. Thus, legislation aiming at codification across the board has lost its appeal as a policy option in most contexts.

<sup>7</sup> The inter-American and African human rights systems as well as the increasing human rights role of regional judicial organs (under the Regional Economic Commissions) are relevant.

Ascertainment of customary law has also been attempted through the recording of decisions and precedents. Ascertainment methods that engage communities as a whole accord more with democratic principles and with the human rights-based principle of participation. Where the resulting norms and standards are to be applied by community-based structures, the 'self-statement' method seems to be a good starting point.<sup>8</sup> The ascertainment process should be open to facilitating any debates about the IJS' norms and processes for adjudicating disputes and whether more open, participatory and accountable processes should be adopted. Where the exercise seeks to assist parajudicial systems in ascertaining and applying custom, the human rights-based approach would still require consultation of more than tribal elders and local chiefs and would aim at including all members of the community, or at least a representative sample of them.

## 2. Selection of Adjudicators

### BOX 11. SELECTION OF ADJUDICATORS

In some countries, the state has exercised some leverage over the selection of traditional leaders. In South Africa, legislation demands that 40 percent of the membership of traditional councils must be democratically elected and 33.3 percent be female (Traditional Governance and Leadership Framework Act, 2003).

Village or community mediation schemes that are initiated by NGOs, such as the Village Mediation Project in Malawi, may be able to have some influence in relation to the qualifications and profiles of community mediators, including in gender balance. In the Malawian project, gender balanced selection was done in consultation with village headmen and chiefs.

A productive area for programming is to increase transparency and equality in the selection of adjudicators. The study confirms that measures to encourage gender equality in the selection of adjudicators are critical and will strongly influence women's preferences and access to justice. The approach will necessarily differ according to the type of IJS concerned. A state body such as a judicial service commission that plays a role in the selection of IJS' adjudicators for parajudicial mechanisms may be free to rewrite qualification rules and modernize selection procedures, making them more transparent and gender-equal. Similarly, it may be able to improve the enforcement of rules on disqualification and discipline (including removal) of adjudicators.

Village or community mediation schemes that are initiated by NGOs may be able to significantly influence the formulation of requirements concerning the qualifications and profiles of community mediators, including requirements for gender balance. Required qualifications could include educational attainment (both general education and specific courses and requirements concerning the function of adjudicators). Specialized courses could typically include elements and examinations on issues of national law, judicial organization and ethics as well as human rights standards.

Where local elders choose traditional leaders and adjudicators, it is difficult to influence selection rules and procedures. Nevertheless, these bodies generally do need to be legitimate in the eyes of the communities they serve. In some countries, government authorities finally appoint or approve traditional leaders, an arrangement that provides state leverage. Village headmen may also be upwardly accountable to a chief or a hierarchy of chiefs. In some contexts, women play a key role in choosing traditional leaders. In such contexts, programmatic interventions

<sup>8</sup> For the description of the self-statement method in Namibia, the authors are indebted to the paper by Professor Hinz and his references to the restatement project of the School of Oriental and African Studies (SOAS) of the University of London under Anthony Allott. Hinz, Manfred O., 2009, The Ascertainment of Customary Law: What is it and what is it for?, paper presented at Conference at USIP, Washington D.C., 18 November 2009.

could attempt to engage with the criteria that women use in choosing a leader and to build on structures to enhance accountability through voluntary codes. Such engagement will be possible only on the basis of trusting relationships with the communities or hierarchies concerned.

### **BOX 12. PROGRAMMING TO ADDRESS HARMFUL TRADITIONAL PRACTICES**

The Malawi Human Rights Commission's report of 2006 on cultural practices highlighted some key recommendations on programming, such as:

1. Changing harmful traditional practices is a complex process that must involve all stakeholders, including traditional leaders, community members and religious groups that may be reluctant to speak out about the practice, and the government.
2. It is important to understand the details of a practice and its cultural underpinnings. Offering substitute activities or a modified version of a practice is constructive, since the abolition or the practice would leave a vacuum.
3. The balance of power must be understood. Women and children may be especially vulnerable because of their lower social and economic status. Outreach programmes on gender equality targeting all sectors of society need to create public awareness through information.
4. Ministries of health should take a leading role in promoting healthy cultural practices by giving advice to all participants in cultural practices, such as circumcision, and discouraging the unhygienic practices.
5. Education for women is vital to the realization of their rights. Unless girls' education is promoted so that they realize their full potential, the status of women in Malawi will remain low and women's rights will likely continue to be violated.

### **3. Education of Adjudicators**

Education interventions can target training of current, practicing adjudicators. The content of training can, of course, encompass a range of subjects, from guidance on the law in relevant domains, to techniques of documentation, dispute resolution, legal procedure, as well as professional ethics, human rights and judicial organization. Training could be specific to build the awareness and capacity of adjudicators in relation to children's and women's rights. Training could also be provided to other participants in the proceedings, such as those who represent and assist children, fulfilling the right to be heard.

It may be perceived as easier to programme for the education and training of parajudicial adjudicators who are recruited, regulated and paid in state structures, than for the IJS' providers who are not part of the state structure and whose jurisdiction, functions and powers are not uniform and regulated. Sets of rules, practice guides and manuals already exist for adjudicators in many parajudicial systems, and education and training can be matched to these functional tools. However, the possibility of working with traditional justice systems should not be discounted. The study confirmed that traditional adjudicators are often eager to attend education and training courses. It is also notable that where women have succeeded in becoming traditional leaders, they have often been chosen because they are among the most successful and well-educated members of their communities.

Human rights training is often at the centre of educational efforts in the engagement with IJS. Training that is contextualized to fit the circumstances and mandate within which adjudication of disputes takes place is more effective. For example, training should not focus on abstract principles of constitutional or international law, but rather on the rights aspects of the kind of cases that adjudicators encounter. It should be recognized that human rights training for IJS' adjudicators is but one engagement and where IJS is upholding customs or beliefs that violate human rights, a broader approach would be more appropriate to address societal attitudes underpinning



these customs and beliefs. An attempt to modify practices that are deeply culturally embedded may require that matters of education, health, protection and justice all be addressed in an integrated manner through interventions that extend far beyond the justice sector.

#### 4. Education of Users – Legal Awareness-Raising

##### **BOX 13. AWARENESS-RAISING ABOUT VILLAGE COURTS IN BANGLADESH**

In Bangladesh, the Ministry of Local Government Division, UNDP and the European Commission are jointly undertaking a programme entitled, Activating Village Courts in Bangladesh, which supports the justice system in 500 selected Union Parishads. One key component is a comprehensive community awareness programme at the local and national levels on legal rights. Using several communication methods, it aims to raise awareness about the roles and functions of village courts among potential users, among community-based organizations, schoolteachers and religious leaders.

The raising of legal awareness and public information outreach efforts targeting the general population can usefully be developed in conjunction with the training of adjudicators. Strengthening legal awareness extends knowledge of rights, provides an important foundation for the community to demand the protection of those rights, and offers remedies where those rights have been violated. A lack of awareness and understanding of their rights often disproportionately affects the most disadvantaged groups in society, including women, the poor and geographically isolated communities. Community empowerment through the heightening of legal awareness is vital to encouraging IJS to be responsive to the community and mitigates the risk that the IJS could be captured by an elite.

Many programming initiatives include a legal awareness component, often focusing on educating the community on human rights and providing information about the institutions, mechanisms and procedures available to the community. Partnership with government or local authorities through the development of communication strategies to promote legal awareness is a useful entry point. NGOs also have considerable experience in undertaking initiatives to raise legal awareness. Such communication strategies should respond to the needs of disadvantaged groups by, for example, adopting user-friendly formats in local languages and informing those who face substantial physical, cultural or economic barriers to access.

In some contexts, the use of media, radio and television campaigns are effective. Among the other means of educating people are street theatre, information kits or flyers on how to initiate legal action or bring a dispute to IJS. Legal information kiosks or mobile legal clinics can also travel particularly to remote areas to conduct community education initiatives on legal rights. Trusted and familiar social networks, such as teachers, religious leaders, community groups or others with non-legal specialty skills, can substantially contribute to public awareness of the law and legal rights. In summary, a legally aware community translates into increased demand and higher expectation that IJS will deliver justice and be more accountable.

#### 5. Procedural Regulation and Self-Regulation

Emphasizing international human rights standards in IJS' procedures offers avenues for interventions. This is particularly important for meeting the obligation under the Convention on the Rights of the Child to respect the views and interests of children. IJS address many issues, such as ones involving land, custody and guardianship, directly relevant to children, so hearing and respecting the views of children is a critical procedural and substantive

consideration. Programming can influence IJS' procedures to better incorporate international guidelines on child victims and witnesses, and to all situations where the interests of the child are affected.<sup>9</sup> The challenge is to do so in such a way that places child rights firmly on the IJS' agenda without overwhelming and thereby alienating IJS' providers.

Practice manuals and guidelines promote adherence to procedures and are relatively common among parajudicial IJS (though they are often out of date and not always available to all adjudicators), which are generally obliged to follow a defined set of procedural, jurisdictional and substantive rules. NGO-sponsored mediation schemes may also use manuals and schematic guidelines. Improving, updating and distributing such tools are worthwhile programming activities and provide greater procedural transparency, consistency and fairness in IJS. Such guides can be extremely useful, but literacy levels and language proficiency must be taken into account. While it is less likely that manuals and guidelines will be used in custom and religion-based IJS, with sufficient time and engagement in education at the community level, good practice and procedures can be transmitted without written guides.

Many countries have national organizations or a state organ where traditional leaders are represented. These structures could play constructive roles in setting standards for the structures, substantive norms and procedures of IJS, for example, through voluntary codes or charters or through advice for and debate with the legislature. Encouraging the elaboration and adoption of an easily understandable text for IJS with fundamental substantive and procedural standards to which IJS' providers could declare their adherence, could be an initiative capable of broad societal reach through national organizations.

## 6. Accountability Mechanisms: Transparency, Monitoring and Oversight

Accountability in IJS can be strengthened through mechanisms that build greater transparency, oversight and monitoring of IJS. Requiring or promoting the recording of case outcomes is one measure that can promote transparency, enhance oversight, strengthen enforcement mechanisms and, in some circumstances, promote legal certainty. Recording is generally useful if the parties obtain copies, and the adjudicator safeguards a record for possible future reference. Recognizing that legal certainty is a value of formal systems and that IJS will typically be more concerned with flexibility and the circumstances of each individual case, it should be noted that the intervention could in some circumstances distort the nature of IJS.

Avenues of appeal are effective mechanisms to promote accountability of IJS' decision makers. The recording of decisions can facilitate an appeal or the registration or approval of these decisions by other structures, including a formal court. The outcomes of most parajudicial mechanisms are generally subject to appeal to the ordinary courts, though, in some instances, cases have to recommence *ab initio*. Tradition- or religion-based systems also often have hierarchies of authority through which cases can be appealed.

Other than appeal, accountability can involve the monitoring of decisions by outside parties, be they members of the public, organizations representing stakeholders, hierarchically superior adjudicators or official inspectors. Engagement with monitoring systems could be a valuable entry point for programming. The study found that parajudicial IJS and NGO-sponsored mediation schemes are most likely to have established mechanisms of inspection or monitoring. Systems that are subject to a defined set of rules and procedures and are directly subordinate to state authorities can naturally be more readily inspected than ones that are anchored in community structures and operate according to tradition.

<sup>9</sup> UN Guidelines on Justice Matters involving Child Victims and Witnesses of Crime, 2005.

### BOX 14. MONITORING BY NGOS

Unless it is developed in careful dialogue with IJS and the community, outside monitoring may be seen as an unwelcome intrusion into a traditional structure. In Bangladesh and Malawi, NGOs were able to gain access to traditional IJS by providing support and obtaining the trust of the leaders and communities.

Parajudicial systems generally have regulations providing for an official inspection and supervision framework, but they are often ineffective because supervisory organs lack resources. In some countries, supervision of parajudicial systems is also difficult because of unclear and overlapping supervisory mandates and the various monitoring frameworks are sometimes not coordinated with one another. Supervision by executive agencies also raises issues of the independence of the judiciary. Monitoring should take its point of departure in the mutually supportive role of IJS and (other) organs of the state. It should thus afford providers with an opportunity to voice their concerns. A monitoring system that is purely top-down and seen by the IJS' providers as an instrument that only serves to criticize them is unlikely to be successful.

### BOX 15. PUBLIC HEARINGS IN BANGLADESH

Public hearings can be an effective way to promote enforcement of IJS decisions, including through ensuring publicity for the hearings. The *Shalish* courts in Bangladesh use a highly public forum for decision-making and publicizing case outcomes. The recording of the decision takes place in the minds of community members rather than on paper and the collective conscience of the community is committed to enforcement.

Requirements of public hearings and open admission to the court or adjudication forum, including for the general public and observers from civil society organizations and the media, provide clear transparency measures. Where recording of decisions is not possible (perhaps due to literacy levels) or not accepted in IJS, public hearings can provide an accountability and transparency mechanism between IJS and the community. Community groups, such as grassroots women's groups,

can develop their own records of the proceedings and monitor the pattern of the decisions as well as procedures followed in IJS. Although not appropriate for sensitive cases (possibly where children are involved), public hearings can also strengthen the likelihood of enforcement of IJS' decisions, as such decisions will be more widely known and therefore accepted in the community. A further step would be to involve community groups in the decision-making; this could be done through consultation or jury-type assemblies. Such mechanisms could allow for women's participation, particularly where women are not represented among IJS' adjudicators.

Monitoring and oversight often require record keeping (and thus literacy) among providers and a clear structure that takes account of a set of standards (structural, procedural and normative) against which IJS are to be assessed. IJS providers may be working for no or very little compensation, and the imposition of additional work burdens may be unwelcome or unrealistic. Adjudicators and monitors may need to be trained in the reporting and monitoring methodology. These interventions can be costly and must be weighed against the benefits of using similar resources for other institutions.

## 7. Linkages among Primary Justice Providers

IJS should be seen as operating in conjunction with other avenues of primary justice. In many contexts, there could be several kinds of IJS operating in addition to formal systems. The numerous linkages in many countries between different primary justice providers, be they functional or norm-/rule-based, official or unofficial, ultimately challenge any notion of entirely separate and distinct legal systems. The propriety of programming aimed at better alignment between formal and informal systems will depend on the context of national justice policy, the jurisdictional division between formal and IJS, and an analysis of the desired and factual links between the two. In certain circumstances, the value of promoting linkages will consist of fostering better understanding between the systems and allowing for a discussion about division of labour, respective jurisdictions and better mechanisms for referral.

Programming should look at the totality of actors, preferences and patterns of justice provision at the local level. Addressing jurisdictional limits, *de facto* divisions of workload, and patterns of interaction may assist in developing useful synergies across different forms of IJS, law enforcement, administrative and political structures, statutory courts and legal service providers. For example, programming would not want to encourage IJS to handle serious criminal cases, but cooperation between IJS and the formal system may be precisely what is needed to ensure that these cases are transferred to the formal system and such referral could quite easily be a 'goal' to be achieved through the course of an intervention rather than a prerequisite to engagement.<sup>10</sup>

### **BOX 16. INTERACTION AMONG DIFFERENT INFORMAL JUSTICE SYSTEMS**

In Malawi, interaction was promoted among the custom-based IJS and the NGO-sponsored Village Mediation Project. In the areas where both are present, the NGO worked to build relationships between the mediation system and traditional cases. There are indications that an understanding of the division of the case burden has arisen; traditional leaders retain land cases, leaving family disputes to the mediators. Linkages to the police and the formal justice system are also a key part of the Village Mediation Project.

In some situations, the linkages required are not between IJS and formal justice systems, but between different forms of IJS. Such linkages would address similar issues such as jurisdictional limits, division of case burden, and building greater mutual understanding. Programming can work to build dialogue and mutual understanding between different types of IJS that could lead to a smoother relationship allowing for referral of cases. These programming initiatives can serve as a forum for learning and for improvement. The study illustrates that such initiatives also promote an interesting spillover effect between different systems, as when women who are educated and empowered in relation to one mechanism feel emboldened to work for their rights in relation to others.

Ensuring that programmes affect outlying and isolated communities is also an important factor for strengthening the provision of justice. Many programmes building linkages are in or close to provincial capitals because they are close to institutional and political hubs. However, community justice programmes may be especially needed in communities where there are no formal mechanisms, particularly if communal violence is an issue. While it might be more difficult to achieve results for programming, the establishment or strengthening of IJS in such communities can have long-term benefits in the form of peace, stability and legal empowerment. In some instances, though, the strengthening of IJS would be a temporary measure while formal justice systems develop the capacity to reach out and provide appropriate justice services to these communities.

## **8. Linkages to Paralegals and Legal Aid Providers**

Programming that fosters closer relations between IJS and local legal aid providers, such as paralegals, has had some positive results. Not all IJS will allow legal aid providers to act as representatives in proceedings, but even where this is not possible, such providers can advise individuals involved in those proceedings. Paralegals can also assume observation roles where proceedings are public. Government and non-government actors can be involved in making provision for legal aid and paralegal service.<sup>11</sup> Strategies can include institutionalization of community services to draw on law graduates and retired professionals in legal clinics. Paralegals and legal aid providers can offer particular services such as advice and assistance about whether a matter needs to be taken before a justice system or can be settled in another way. Paralegals can also coordinate referrals to non-legal expertise; for example, some matters might require health care intervention or financial assistance.

<sup>10</sup> Wojkowska cites a reduction in forced marriage of widows as the successful outcome of a project in Somalia. Wojkowska, Ewa 2006: *How Informal Justice Systems Can Contribute*, Oslo: United Nations Development Programme, Oslo Governance Centre

<sup>11</sup> Carried out with the judiciary section responsible for local courts and two NGOs that provide legal services to rural women. From an unpublished paper entitled 'Summary of Reports on Monitoring the Impact of Training Local Court Justices and Paralegals in the Southern and Eastern Provinces of Zambia', under a GTZ-supported project 'Improvement of the Legal Status of Women and Girls in Zambia', by Tina Hofstaetter, GTZ, Lusaka, July 2006.

### **BOX 17. PARALEGALS AND INFORMAL JUSTICE SYSTEMS**

In Zambia, a GTZ training programme of local court justices with the assistance of NGOs and together with community paralegals helped break down barriers between the two groups. Consequently, it became possible for paralegals to enter into and observe proceedings in local courts and monitor how the justices and court personnel treated women. The success indicators measured the degree to which intimidating language was used against women and whether women were allowed to speak before the court without being accompanied by a male relative, as these were problems observable in the baseline data.

Programming in linking IJS to legal aid and paralegal mechanisms requires particular efforts to ensure sustainability and cost-effectiveness. Legal aid schemes are usually expensive and governments often do not accord them priority. This is where university clinics and the participation of bar associations, paralegals, legal aid providers and other public advocates can play a key role and also be a lobby to ensure the continued provision of resources.

### **BOX 18. COMMUNITY JUSTICE AND CONFLICT RESOLUTION**

In Eastern Highlands and Simbu provinces of Papua New Guinea, there are a number of communities that have successfully resolved communal conflict through the establishment of their own peace-restoring and dispute resolution forums. In Kup District of Simbu Province, the organization Kup Women for Peace (KWP) was founded by a group of women in the village who wanted to fight back against the communal violence that was killing their husbands and sons and causing women and girls to live in fear of physical or sexual assault. KWP have also provided training on victim's rights, on the CRC and CEDAW to village leaders and to village court officials. KWP together with village leaders decided to appoint 'community police officers' who could be a link between the community and the nearest police station in Kundiawa.

## **9. Linkages to Wider Development Initiatives**

Attention to the proper sequencing of development initiatives, as well as respect for the human rights-based approach principles of participation and empowerment of local communities and individuals, require that IJS not be treated in isolation from other aspects of life and development. The entry point for discussion of justice issues can be through vital health, education or livelihood issues, rather than through treating justice as an isolated sector.

Phenomena that are visible in IJS, including discriminatory practices regarding marital and family relations, property ownership and inheritance, or superstitious practices and punishments, are not simply expressions of justice standards, but are expressions of how societies are structured. The best ways to change this may include broader development initiatives in education, livelihoods and public health. Broader development initiatives are also key to creating an environment where human rights can be respected and fulfilled. Consequently, it is important that IJS be included in child protection programmes that work to build protective environments for children. Similarly, national strategies and action plans to implement CRC or CEDAW should include a specific component on engaging with IJS for the implementation of these conventions.

Engagement with IJS therefore must be integrated as a component of broader development initiatives. This is an oft-ignored area of justice programming, but the efficacy of working with IJS requires that it be complemented by engagement with the formal justice system and with development programming that addresses the broader social, cultural, political and economic context of IJS.

# INTRODUCTION

## AIMS AND APPROACH

Until recently, informal justice systems (IJS) were relatively invisible in development partner-assisted justice system interventions. An evaluation of Danish justice sector support in 1999 found that “future justice, constitution and legislation assistance needs to be more responsive to existing, informal systems of justice, to understand the local context better and to focus more on the local rather than the central level.” The present study follows other efforts by governments and multilateral and bilateral development partners to redress this imbalance. Specifically, this study seeks to:

Produce a consolidated conceptual understanding of IJS based on academic research from different regions and countries, particularly from developing countries.

- Clarify international normative frameworks and informal justice processes and systems.
- Identify the human rights implications of these informal justice processes, particularly concerning the rights of women, children, and vulnerable and marginalized groups, and the context in which IJS operate.
- Determine the potential for strengthening in IJS with respect to human rights principles and practices, including accountability and transparency mechanisms, and identify key programming opportunities to strengthen alignment with human rights standards, including coordination between informal justice processes and formal justice systems.
- A framework based on access to justice and a human rights-based approach (HRBA) informs the study’s analysis and programming. This entails addressing norms and standards, the accessibility of providers and institutions, the effectiveness and fairness of procedures, and the availability and effectiveness of remedies. The access to justice factors lead to a rather individualistic approach, which takes less account of societal interests in justice. Nevertheless, the human rights principles of accountability, participation, equality and the protection of the vulnerable can counterbalance this. Participation and accountability have collective and individual dimensions. The study also discusses concepts of justice and the relationship between society and the individual, although less prominently.

## SCOPE: THE CHALLENGE OF DEFINING INFORMAL JUSTICE SYSTEMS

Any attempt to define IJS must acknowledge that it cannot be sufficiently precise and broad to encompass the range of systems and mechanisms that could help the UN and other agencies develop and improve access to justice. This study posits the definition as (i) the resolution of disputes and the regulation of conduct by adjudication or the assistance of a neutral third party that (ii) is not a part of the judiciary as established by law and/or whose substantive, procedural or structural foundation is not primarily based on statutory law.

Within this framework, the study encompasses the principal relevant systems in the countries concerned. The definition includes customary, religious and ‘parajudicial’<sup>1</sup> systems, as well as mediation schemes supported by organizations typically promoting human rights and development goals.

<sup>1</sup> The word ‘parajudicial’ is used in the USA to describe personnel such as law clerks and staff attorneys who assist judges in their work. The meaning of the word in the present context would be different, as IJS adjudicators officially decide or conciliate in cases rather than assist judges to do so, and usually in contexts where judges are not present. The word ‘parajudicial’ would thus be analogous to ‘paralegal’, which covers a number of functions where non-professionals provide legal services, usually in the absence of legal professionals in developing country contexts. The term is thus useful and here describes adjudicators in state sponsored informal and customary systems. Thus, the word refers to systems where a court or court-like body is presided over by a non-jurist who exercises state judicial authority in a structure that is separate from the judiciary.

The definition also imposes certain necessary limitations. Systems of great importance for the maintenance of law and order, local security and 'protection' are not within the scope of this study.<sup>2</sup> Because the distinction between security and justice in informal systems can be very fluid, this limitation is unavoidable. The country studies looked at rural or peri-urban areas rather than typically urban settings. The limitations that this causes for the kinds of systems studied are likewise acknowledged; for example, phenomena such as 'town chiefs' are not studied in depth. The study also does not deal with systems used by outlawed organizations or *ad hoc* groups for maintaining internal order. While the administration of sets of rules by commercial or professional organizations could in principle fit into the definition, such systems did not form part of the study. The definition also excludes processes and practices by formal justice sector actors who may employ alternative dispute resolution (ADR).<sup>3</sup> While this study does not treat these as IJS, the country studies and the main study analyse linkages between formal and informal justice processes.

## FORMALITY AND INFORMALITY

It is more correct to speak of a continuum between informal and formal justice providers or systems than of a sharp set of distinctions. The continuum ranges from different degrees of state recognition and interaction, accountability, monitoring and supervision by the state, referral mechanisms and guiding legal or normative frameworks. The systems encountered in the context of this study and the literature on this subject show that the notion of 'formality' has different aspects. Formality can be measured by different parameters, of which state recognition is only one. Other parameters include written versus oral procedures and records; written versus oral substantive norms; the degree to which the system favours conformity with rules rather than finding solutions satisfactory to the two parties; the binding or non-binding nature of outcomes (as seen by state law); and the stability and durability of the structures and procedures.

This study does not proceed from the assumption of a dichotomy between 'state' and 'non-state', as many of the systems most used by people have a basis both in state law and regulation or in other forms of state recognition.<sup>4</sup> Nevertheless, the state/non-state dichotomy is frequently the basis for understanding the separation between the two spheres that is shared by communities and officials, and it thus cannot be disregarded. So the study attempts to attenuate such a sharp dichotomy by using a 'continuum of formality': informality that includes the state/non-state dichotomy, but does not rely upon it exclusively. The section on the conceptual framework defines this further. It is emphasized that no value judgment is intended by the use of the word 'informal'.

## LEGAL PLURALISM

This study posits legal pluralism as a fact. Such pluralism exists when sets of norms and institutions that people use to regulate conduct derive from sources other than state legislation and jurisprudence, and many states legally recognize these. Even in the absence of state recognition, there are many norms and institutions in all countries. This is particularly apparent in post-colonial states. The study recognizes that custom and society are ever changing.

Pluralism can engender tension in the different sources of legitimacy existing with a state, ranging from legitimacy based on elections, lineage, local authority or on religious faith and learning.

2 For an excellent recent treatment of non-state security systems in developing countries, see Baker, 2010.

3 'Informal justice systems' are distinct from alternative dispute resolution. The latter would include informal practices and processes by the formal system. The Commission of the Legal Empowerment of the Poor defines informal justice differently, placing government-affiliated third-party arbitration systems under the rubric of informal justice. For purposes of policy-making and programming, though, it may be relevant to make a clearer distinction with the aid of different terminology for these practices and processes. In many countries, and particularly in European and other Western countries, such practices are termed 'alternative dispute resolution'.

4 On the various parameters that are of relevance in relation to legal pluralism, de Sousa Santos uses official/unofficial, formal/informal, traditional/modern and monocultural/multicultural. See de Sousa Santos, B., 2006.

It may be better to conceive of this power rather as ‘authority in the social sphere’ to which people may freely submit in conformity with their beliefs and preferences. Traditional and religious leaders are not chosen by universal democratic suffrage of the people over whom they exercise authority. All individuals do not have equal ability to put themselves forward as candidates for these ‘offices’. Furthermore, traditional leaders might exercise their power on assumptions of status, class and gender roles that might be incompatible with principles of non-discrimination enshrined in the international human rights framework. However, some mechanisms might be in place for traditional leaders to be downwardly accountable and participatory, and may offer greater capacity to uphold human rights than highly imperfect state structures.

States seek structures that accommodate social, cultural and historical realities. Many states rely on sources of legitimacy outside democratically elected legitimacy; monarchies and state churches in Europe are examples of this. Moreover, because the mechanisms of participation and accountability in the state structure are sometimes highly imperfect, traditional structures enjoy trust and legitimacy at least equal to or even greater than that of state organs. Colonial and post-colonial states, in most cases, have structurally accommodated authority that may be based on indigenous structures or religious authority. The terms of this accommodation and its ultimate aims have political and administrative dimensions as well as judicial ones.

The terms of the agreement by which non-state actors may provide security and exercise judicial function are at the core of debates on legal pluralism. This study discusses the different models found to manage that agreement. Some IJS are accommodated by the state on the basis that the IJS are a temporary measure until the state system develops the capacity to reach all geographical areas and social and legal domains. In other cases, the assumption is that pluralism is fundamental to the recognition of religious, cultural or ethnic identity. In yet other cases, state founders might have deliberately not resolved the issue of accommodating pluralism because they thought that it was too contentious.

The six country studies carried out under this study, as well as references to other situations, present various perspectives on the role of policy and politics in state involvement with IJS. As these studies demonstrate, politics – understood as strategies to gain and maintain political power or economic advantage – may be apparent at the local as well as the national levels.<sup>5</sup> The adjudication of important questions of resource allocation may be a vital – and contested – component of the maintenance of power, particularly where it is combined with other forms of power.<sup>6</sup>

## TYPOLOGY OF INFORMAL JUSTICE SYSTEMS

This study distinguishes among mechanisms anchored in (i) customary and tribal/clan social structures, (ii) religious authorities, (iii) local administrative authorities, (iv) specially constituted state customary courts, and (v) community forums specially trained in conflict resolution and particularly in mediation. Types (iii) and (iv) often present a hybrid model where officials of a modern state system apply customary norms. Nevertheless, these distinctions do not fully capture reality, which contain varying mixtures of these elements in which, for example, customary and administrative authority are combined.

Chapter IV uses this typology as a framework to examine IJS, looking at the composition of the dispute resolution body, the relationship to the state, the participation of women, the jurisdictional limits enforced, the substantive norms applied, the typical processes used to resolve disputes, and the binding or voluntary nature of outcomes. The typology is likewise an important basis for the discussion of programming interventions.

<sup>5</sup> See again, DFID, 2004.

<sup>6</sup> See, for example, Uganda, HURIPeC Working Paper No. 12, ISBN 9970-511-11-X, ‘Local Governance and Access to Justice in Post-Movement Uganda’.



The linkages and relationships between formal and IJS are examined in this study in terms of functional or operating linkages, normative and rule-based linkages, and overall state policy. Chapter IV shows how links are at so many levels and of so many kinds that it is impossible to speak of 'parallel systems working in isolation from one another'. Chapter III compares IJS with comparative law and the world's main recognized legal families and how these typically relate to IJS.

## THE APPROACH TO DEALING WITH INFORMAL JUSTICE SYSTEMS AND HUMAN RIGHTS

This study assumes that the normative framework of human rights is universally applicable, including to IJS. As An-Na'im and other scholars have demonstrated, the view that human rights are simply a product of the West is no longer tenable.<sup>7</sup> The conceptual framework on dealing with the question of universalism and cultural relativism illustrates that it is more useful today to focus on (i) the relationship between individual rights and collective cultural rights and (ii) the issues arising from the 'translation' of abstract, general standards and principles of rights into concrete contexts where culture, power relations, resources, legal systems and relations all play a role.

When dealing with informal justice and customary law, the human rights world has often exclusively considered legislative and constitutional standards, not always coming to grips with the reality of places where the rule of law is weak or almost non-existent. The literature on women's rights and access to justice has gone further, as has a growing body of work that critically examines how the intentions of human rights law and policy fare when they meet the embedded cultural understandings, social patterns, inadequate institutional resources and political realities that underlie the challenge of building a state based on the rule of law. Some current scholars and researchers bring sharp analytical skills to bear on the meeting between (partly) human rights-inspired justice reforms, with their paraphernalia of planning frameworks, project language and training methodology, on the one hand, and state officials or NGO representatives, on the other. In the analyses in this study, previous debates on universalism versus relativism give way to an examination of the two-way process of 'translation'.

While a critical approach to these issues is valuable, this study assumes that the standards and prescriptions of human rights law provide an analytical frame of reference that is systematically applicable to IJS. This may, though, be possible only if human rights standards as a whole are applied to the IJS. The analysis should not base its arguments solely on particular violations of human rights, but instead look at issues of structure, process and substantive norms and outcomes comprehensively in terms of human rights. In general, criticisms of particular human rights violations committed by IJS are unhelpful if they do not consider the human rights strengths and weaknesses of IJS together with an honest comparison of the successes, failures and prospects of the formal justice system.

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7 An-Na'im, A. A., 2000.

## METHODOLOGY

Commissioned by UNDP, UNICEF and UN Women, this study comprehensively reviewed the literature related to IJS and conducted country-specific case studies. Qualitative and quantitative data collection was carried out in Bangladesh, Ecuador, Malawi, Niger, Papua New Guinea and Uganda. The country studies were selected in consultation with the three UN agencies and the methodology was developed through a pilot country study in Malawi. The country studies were carried out according to a uniform methodology, and identical or very similar categories of analysis are used in all of the country studies. Interviews of individuals and groups were conducted with various stakeholders at the local and national levels, following an interview guide developed for each of the target categories. The quantitative part of the country studies included surveys for 1) users of informal justice and 2) informal justice providers, following a generic questionnaire format to make it comparable across countries. Annex 1 contains a comprehensive outline of the methodology, including the limitations of the study.

Desk studies of 12 countries were also conducted, based on available literature from academia, UN agencies, NGOs, governments, websites and conferences. As much as possible, the studies were developed in consultation with national experts, including scholars and human rights experts, on informal as well as formal justice systems. The studies assessed the nature and characteristics of IJS (composition, decision-making, procedure), linkages between various justice providers (particularly in relation to the formal justice system), legal frameworks, human rights, and the programming efforts of governments, national and international NGOs, the UN, and other development partners.

The study consists of three parts that look respectively at the background and context of IJS, their operation, and programming in relation to them. Chapter II develops the conceptual framework for understanding IJS based on theoretical and academic research. Chapter III examines factors influencing the evolution of IJS and how the past and present have shaped them. Chapter IV sets out a typology of some IJS and examines their characteristics. Chapter V discusses user preferences and providers' opinions on the basis of the study's hypotheses and examines how the study's quantitative methods can be useful. Chapter VI evaluates some key human rights issues that are generally applicable to IJS. Chapters VII and VIII then look at women's and children's rights, respectively. Finally, Chapter IX considers the implications for programming of the study.

# SITUATING INFORMAL JUSTICE SYSTEMS

## INTRODUCTION

This chapter provides the conceptual framework for the study and defines and discusses many key concepts and issues surrounding IJS. It is not intended as an academic study and cannot do full justice to the variety and depth of work of scholars, particularly on the complex issues of legal pluralism and how relativism and universalism relate to human rights.

## INFORMAL JUSTICE SYSTEMS – PARAMETERS OF ANALYSIS

IJS vary considerably and encompass many concepts. They exhibit different degrees and/or forms of:

1. Formality/informality with respect to legal or normative framework, state recognition, appointment and interaction, control and accountability mechanisms, and systems of monitoring and supervision, including case records, referral procedures, etc.
2. Justice, including the perception of justice, conformity of outcomes with legal norms as opposed to *ad hoc* solutions, individual vs. communal justice provision, different objectives of the IJS, the level of compliance with human rights standards (both as to process and outcome), etc.
3. System, including the level of standardization of norms and procedures, the level of internal coherence, institutionalization, guarantees of impartiality, independence and equal treatment, and legitimacy of the office holder/judge, including of election or appointment procedures.

Related noteworthy studies have attempted to define IJS. UNDP has used the term ‘informal’ “when referring to dispute resolution mechanisms falling outside the scope of the formal justice system. The term does not fit every circumstance, as many terms exist to describe such systems (traditional, indigenous, customary, restorative, popular), and it is difficult to use a common term to denote the various processes, mechanisms and norms around the world. [...] The term informal justice system is used here to draw a distinction between state-administered formal justice systems and non-state administered informal justice systems.”<sup>8</sup>

To address programming needs in Nepal, Steven Golub also employed a practical definition that, if used outside the Nepali context, would appear to exclude the ‘parajudicial’ systems relevant for this study: “Informal justice systems (IJS) are those types of Alternative Dispute Resolution (ADR) that operate on the community level, either as traditional mechanisms or as those facilitated by NGOs.” However, he then broadens the discussion considerably to discuss ADR: “Alternative dispute resolution (ADR) more broadly than in the present context is used to denote any alternative to court trials in settling disputes between individuals. It includes mediation that judges may conduct or have conducted by lawyers or other persons and dispute resolution (often arbitration) by quasi-judicial forums that decide on issues such as land conflicts. Finally, the term includes forums and processes through which community members help resolve disputes between other persons from their area, including many family matters that may have very important implications for the way in which women and children are treated by a community and for their human rights.”<sup>9</sup>

8 Wojkowska, UNDP, 2006.

9 Proposed Formulation for Subcomponent 2.B (Access to Justice) for Phase III of Denmark’s Human Rights and Good Governance Programme (HRGGP-3) in Nepal, Final Draft Annexes, paper prepared for DANIDA programming in Nepal. The author did not necessarily intend this definition to be generally valid for numerous contexts and countries.

Given the many and ambiguous relationship(s) between the state and the many justice providers in many states today, any precise definition that demands distinctness from the state is likely to exclude many mechanisms and systems worthy of study. Likewise, the terms 'formal' and 'informal' are multidimensional and subject to interpretation according to different parameters. Besides the parameter of state control of structures, other parameters of norms and procedures include:

1. Whether procedures and records are written or oral
2. Whether substantive norms are written or oral
3. The degree to which the system is oriented toward conformity with rules rather than toward finding solutions satisfactory to the two parties
4. Whether outcomes are binding
5. The stability and durability of the structures and procedures.<sup>10</sup>
6. Thus, neither the 'state/non-state' dichotomy nor the 'formal/informal dichotomy' is fully satisfactory on its own, and the definition must include – but not rely exclusively on – the parameter of state links.

Consequently, this study takes as its definition the resolution of disputes and the regulation of conduct by adjudication or the assistance of a neutral third party that is not a part of the judiciary as established by law and/or whose substantive, procedural or structural foundation is not exclusively based on statutory law. Nevertheless, these factors alone would still leave the field very open in terms of the many other systems to be analysed. Thus, the systems examined are those that have a degree of effectiveness, stability and legitimacy within a relatively broad local or national constituency. As stated in the Introduction, this study omits systems that national law treats as illegal.

### CONTINUUM OF FORMALITY/INFORMALITY AND STATE RECOGNITION

It is more correct to speak of a continuum between informal and formal justice providers or systems than of a set of sharp distinctions. The continuum ranges from different degrees of state recognition and interaction, accountability, monitoring and supervision by the state, referral mechanisms and guiding legal or normative frameworks. The phrase 'official/unofficial continuum' refers to a political-administrative definition of what state law recognizes as state-originated (official) and what is not (unofficial). Between these two extremes, there is a continuum of degrees of official status granted to IJS and different degrees of linkages to the state, including IJS that were established by the state or originated from state institutions. Different types of IJS can shift their position within the continuum if there are changes in state legislation.<sup>11</sup> The following is a table of the Continuum of Formality/Informality and State Recognition.

10 The work of Yrigoyen Fajardo, Rady and Phan on Cambodia (2007) is among the most useful on the 'formal/formal dichotomy'. Forsyth (2007) employs an analytical typology of the relationships between justice orders that is similar to the continuum of state recognition below. This is discussed further in the final chapter of this study.

11 Consider, for example, the ban that some African states placed on customary courts after gaining independence.

**TABLE: CONTINUUM OF FORMALITY/INFORMALITY AND STATE RECOGNITION**

State-banned or criminalized: Systems or providers that are banned by state legislation or prosecuted by state institutions. The origins of these IJS are usually local forms of vigilante organizations or, more rarely, traditional/customary structures. There may be situations where they have previously enjoyed some state recognition (such as customary courts, recognized by colonial legislation, but banned by socialist regimes, or socialist militias/vigilantes banned by democratic regimes).

State-originated: Systems or providers that are entirely constituted by state law, which refers by definition to formal justice systems (FJS).

**UNOFFICIAL**

Not State-recognized/ignored: Systems or providers entirely outside state legislation, ignored by formal state institutions and thus without even informal collaboration between FJS and IJS. Their origin is usually traditional, customary or local, but they may have previously enjoyed some state recognition and regulation (such as customary courts, recognized by colonial legislation, but banned by present legislation, or socialist people's courts created by former legislation).

Not State-recognized/Tolerated: Entirely outside state legislation, but tolerated. Tolerance may imply forms of informal collaboration between state institutions and IJS. Usually of traditional, customary or local origin, but may have previously enjoyed some state recognition and regulation (e.g., customary courts, recognized by colonial legislation, but banned by present legislation, or socialist people's courts created by former legislation).

State-recognized/Unregulated: Fully recognized by legislation, but unregulated by the state. Relatively autonomous coexistence with FJS, no official procedural links. May have state origin, but more often traditional, customary or local.

State-recognized/Regulated: Fully recognized by legislation and regulated by the state (appeal procedures, compliance with legislation monitored, financial or material support), but coexistence rather than integration. Origin perhaps legislative or traditional, customary or local.

State integration: Integrated into FJS, fully recognized by legislation, but differing from FJS by having non-state personnel and using procedures and norms that go beyond state law. The origin of these IJS may be entirely based on state legislation or be traditional, customary or local.

**OFFICIAL**



**FORMAL/INFORMAL CONTINUUM**

Ad hoc or spontaneous Groups	Well-defined groups, often based on ethnic or regional identity	Well-defined groups, often based on ethnic or regional identity	Personal jurisdiction determined by legislation (often on basis of identity or geography)	Fixed institutions
Negotiable norms	Norms and standards relatively stable, subject to gradual change through interpretation, some borrowing from state system	Norms and standards relatively stable, subject to gradual change through interpretation, some borrowing from state system	Norms and standards in a framework set by state legislation or jurisprudence	Fixed legal norms (codified/statutory/law or well-established jurisprudence)
Negotiable procedures	Procedures relatively fixed, though unwritten and capable of change, some borrowing from state system	Procedures relatively fixed, though unwritten and capable of change, some borrowing from state system	Procedures flexible, but within a framework set down in state standards of due process	Fixed procedures (by statute)
Negotiable penalties or remedies	Penalties and remedies relatively fixed, some borrowing from state system, some adaptation to cash economy and other contemporary conditions	Penalties and remedies relatively fixed, some borrowing from state system, some adaptation to cash economy and other contemporary conditions, some informal regulation by state bodies (e.g. discouragement from taking criminal cases)		Fixed penalties or remedies (by statute)
	Unstable institution/highly negotiable	Stable institution/mostly negotiable norms and/or procedures	Stable institution/ fixed & negotiable norms or Procedures	Very stable institution/mostly fixed



The term ‘informal justice’ may have negative connotations in languages other than English.<sup>12</sup> In some contexts, including where new ‘plurinational’ constitutional dispensations have been adopted in Latin America, the term ‘informal’ may be resisted because it is seen as an indication of the “lesser” value or status that was sometimes accorded to customary or indigenous systems of justice. In those contexts, terms such as ‘indigenous jurisdictions’ are preferred. This study assigns no value to the term ‘informal’.

## JUSTICE SYSTEMS

For the purpose of clarity, it is necessary to explore what is meant by ‘justice systems’. There is often a distinction in legal writing between ‘legal systems’ and ‘justice systems’. While the notion of a legal system is broad and generally considered to encompass the system of laws as such, including principles of how laws and branches of government relate to each other, the phrase ‘justice system’ usually has a more limited application, referring to the institutions that interpret, apply and enforce the law rather than to the normative framework of laws applied.

The choice of ‘informal justice systems’ rather than ‘legal systems’ seems more appropriate for this study, as it is today rarely possible to speak of ‘informal legal systems’.<sup>13</sup> Thus, Barbara Oomen states that:

“[T]here is no such thing as a ‘system’ of customary law, there is a flexible pool of shared values, ideas about right and wrong, and acceptable sources of morality, that are commonly acknowledged and rooted in local cultural orientations.”<sup>14</sup>

Even if this view is debatable (and may actually go to the heart of debates on legal pluralism and the nature and definition of law), this distinction between justice and legal systems holds for the purposes of the present, practically oriented study.

## THE RULE OF LAW

The major legislative and policy documents of many states and international organizations refer to the rule of law and any attempt to devise policy or programmatic interventions for IJS may have implications for the rule of law. It would be useful to have a definition of this concept. Ian Brownlie’s well-known definition includes the following elements:<sup>15</sup>

1. Officials’ action is based upon authority conferred by the law
2. The law conforms to substantial and procedural standards
3. There is a separation of power – the judiciary is not subject to the executive
4. All legal persons are subject to the law on a basis of equality
5. There is an absence of wide discretionary powers in the government

The United Nations Secretary-General has proclaimed that the rule of law refers to “a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws

12 During the Niger study, justice actors felt that the term had pejorative connotations.

13 The customary law frameworks in question (including their normative frameworks) do not fulfil the stringent criteria laid down by scholars such as Austin, Kelsen or more modern writers such as J. Raz (1970) as to what constitutes a legal system. See Kelsen, 2002. Moreover, as the literature on customary law and governance shows, a clear separation of powers is not generally a feature of these systems, so that it is often difficult to distinguish clearly between political and legal governance. Legislation often takes place through a gradual development in adjudicative forums rather than through any distinct legislative process. Even in the case of religion-based systems of law such as Mosaic or Islamic Law, the field of application today is generally reduced to particular domains (especially family and personal law), so that it is no longer really possible to speak of these as complete legal systems. See references to the work of authors such as An-Na’im below.

14 Oomen, B., 2003.

15 See Brownlie, I., 1998.

that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.”<sup>16</sup>

These principles are similarly applicable when assessing the accountability of IJS procedures and providers. Although discussions of legal pluralism are often concerned with the fourth of these elements (i.e., the equality of all before the law), all of these elements are useful in assessing IJS on their own terms.

## ACCESS TO JUSTICE

There have also been attempts to define the concept of access to justice. UNDP’s 2004 Practice Note on the subject, going beyond mere access to institutions, deals with access to justice as a process leading from grievance to remedy and requiring the following elements:

1. Legal protection (in terms of the legal framework that sets down acceptable substantive and procedural standards)
2. Legal awareness
3. Legal assistance (of various kinds, including legal aid and counsel)
4. Adjudication of disputes
5. Enforcement or remedies
6. Oversight of the operation of the system

International standards and the work of practitioners and scholars elaborate these elements and their applicable criteria. Later chapters of this study explore this and, together with the qualitative and quantitative studies, use well-established parameters of accessibility, including distance, cost, time and opportunity cost, familiarity and complexity of procedures, and social and psychological barriers.

## LEGAL PLURALISM

Providing accessible justice is thus a state obligation according to (most) national and international human rights standards.<sup>17</sup> These standards do not necessarily require that all justice provision be centred in state courts or be based uniquely on national legislation. Ultimately, human rights law is concerned with results – the effectiveness of protection and enjoyment of rights – rather than with its sources or mechanisms. Thus, human rights law as such is not opposed to legal pluralism or IJS.

Legal pluralism is a fact, though a complicated one, and this study remains principally neutral on the subject. It neither advocates nor opposes development organizations’ promotion of legal pluralism at the expense of a functioning unitary legal order. It does take as its outset, though, that states and international actors are obligated to respect, protect and fulfil human rights, including through the provision of justice and legal remedies.

A legally pluralistic approach does not relieve states of their human rights obligations, and it is a potential way to satisfy those rights. A variety of mechanisms for the delivery of justice may present fewer difficulties for human rights than a variety of normative sets and frameworks. Indeed, a pluralistic approach to normative sets, mechanisms

16 Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, UN document (S/2004/616).

17 Rights to a remedy, a fair trial and equality before the law, among other things, are relevant.

and systems may provide or even enhance compliance with human rights. The key question concerns how states facilitate the compliance with these sets, mechanisms and systems with standards of human rights.

Whereas the notion of informal justice typically focuses on systems and mechanisms, legal pluralism often focuses primarily on the normative frameworks and standards applied.<sup>18</sup> Besides recognizing or accepting non-formal providers of justice, states may also recognize a plurality of normative frameworks applicable to different groups or classes of persons in the society, often based on religious or ethnic identity. The various normative frameworks applied may coincide with the variety of institutions adjudicating disputes and dispensing justice. In some instances, the same state court may apply different sets of norms, depending on the religious, ethnic or social identity of litigants, as is the case when Indian or Sri Lankan courts apply family law on the basis of religious identity. In other cases, courts or adjudicative forums apply only one legal framework and may have jurisdiction in relation to a particular ethnic or religious group. While the latter situation is within the scope of this study, the former is generally not.<sup>19</sup> Thus, while legal pluralism is closely related to this study, it is not identical to it.

Some scholars of legal pluralism point out that it is primarily state agents (policy makers, legislators, legal experts and judges) who maintain the state vs. non-state dichotomy as the most significant way to distinguish among systems of rules. They note that strict distinctions between state law/institutions and non-state norms or systems exist only in representations (policies and rules) and do not reflect everyday practice. Many cases show that there are multiple mergers – an untidy but creative mixing – among sources of law or rules applied by adjudicators and that these rules change in relation to each other. The mutually constitutive nature of these legal orders central to these scholarly studies renders notions of separate but equal systems of law untenable.<sup>20</sup>

All countries have legal pluralism; there is no single source of legal rules. Anne Griffiths, John Griffiths<sup>21</sup> and others have written extensively on pluralism that goes beyond a notion of the state as the only source of law. This applies to industrialized Western countries and to developing countries.<sup>22</sup> Developing countries often especially exhibit this, due to the legacy of colonialism.

The oft-heard call from policy makers for state law and customary law to ‘work better together’ may erroneously assume that there are indeed separate but complementary systems, beyond the separations that exist in legislation. A long tradition of scholarship in legal pluralism has challenged this dualistic notion of law.<sup>23</sup> Numerous scholars of the post-colonial condition have noted that the plurality of justice providers is not the same as the plurality of different, internally coherent systems of law, customs or rules. In its broader version, legal pluralism pertains to a situation in which behaviour is pursuant to a legal order that need not be state-centred.

Legal pluralism as a policy concept (as recognized in constitutions and laws) may have a clear political dimension. Adopting a plural legal order may be a way for the state to acknowledge the existence of non-state systems or to domesticate non-state or customary justice providers by, for example, limiting their scope of jurisdiction, by defining tradition and custom as applying only to certain domains, or by otherwise attempting to ‘domesticate’ what is outside the control of the state.<sup>24</sup> The concept may also be invoked by IJS’ providers claiming knowledge of custom as a source of authority to discriminate against some groups or as the foundation for their claim of spaces

18 A useful text on the history and development of ‘legal pluralism’ is the chapter by Griffiths, A. in Banakar and Travers, 2002.

19 Even this distinction is nevertheless hard to maintain in practice, and an exception is made in the country study on Niger, where state courts apply the customary law of the parties. Omitting this would result in an incomplete picture in the country study.

20 Demian, M., 2003: 111.

21 1986.

22 ILO Convention 169 deals with indigenous law. Amnesty International in October 2009 highlighted the case of Khristian Oliver in Texas, USA, where jurors referred to Biblical passages from the Old Testament in deciding to impose the death penalty in a murder case.

23 See Griffiths, A., 1997; and Demian, M., 2003: 111.

24 An-Na’im points out how the field of application of Islamic law was originally much wider than its most frequent current application, which is to matters of family and inheritance. A report of the Zambian Law Reform Commission on the local courts leaves no doubt that the government’s intention in creating them was effectively to ‘kill off’ the traditional justice systems.



of power *vis-à-vis* state officials. Plural legal orders often exist in order to accommodate different religious or ethnic traditions in a single state.

## UNIVERSALISM VERSUS RELATIVISM OF HUMAN RIGHTS

The old dichotomy between universalist and (cultural) relativist views of human rights, where representatives of both sides of the argument frequently adopted a static view of culture, has lost some of its relevance, given the complexity of interactions between the local and the global.<sup>25</sup>

Culture is inherently dynamic, despite occasional tendencies to see it as unchanging. The static view of culture is an unfortunate continuation of colonial-era tendencies to attempt to codify culture and to fix structures and relationships that were fluid. Human rights are not a static, fixed quantity, either. New instruments, interpretations and understandings emerge from a constant interplay between standards and the legal, social, institutional, economic and political contexts in which they are applied. For the most part, this is a positive dynamic, leading over the longer term to increased freedom and rights. At the same time, human rights are (a) developed from a multiplicity of normative sources, (b) are not uniform, (c) are often contested,<sup>26</sup> and (d) are inconsistently applied and advocated.

While a main virtue of IJS might be their strong roots in local cultures, it may be a mistake to overemphasize the 'local' element over the variety of possible sources and influences. Likewise, migratory movements from rural to urban areas or across national borders often transfer norms and practices from one region to another and change these norms.<sup>27</sup>

An excellent brief treatment of recent literature on this subject is in the International Council on Human Rights Policy (ICHRP) study *Plural Legal Orders and Human Rights*.<sup>28</sup> The present study largely agrees with the viewpoints in that study, including on questions of rights within cultural systems.<sup>29</sup> Further, as the ICHR report notes, the tension between culture and rights is a dynamic process rather than a pair of static opposites. People are bearers of culture and of rights. They influence one another and the rights paradigm itself is a cultural phenomenon.

Today, it is more useful to focus on discussions of (i) the relationship between individual and collective cultural rights and (ii) the 'translation' of abstract and general standards and principles of rights into concrete contexts where culture, power relations and resources, as well as legal systems and relations, play a role. This study sees the normative framework of human rights as being universal, including within IJS. However imperfectly realized, the wider importance of human rights relates to the prevalence of the nation-state model in the world today.<sup>30</sup>

Recent human rights declarations adopted within the UN system, such as the 2007 UN Declaration on the Rights of Indigenous Peoples, emphasize the collective right to promote and develop culture, customs and institutions in accordance with standards of human rights.<sup>31</sup> The ICHR cites authors such as Merry, Yrigoyen Fajardo, Charters and An-Na'im in support of a non-static view of culture that gives room for rights-based social and political development within cultures.

25 Griffiths, A., 2007; Hellebrunn, A., 1999: 418; Cowan, Dembour and Wilson, 2001.

26 A recent example of lively contestation is the question of freedom of expression and what was referred to as 'defamation of religion' up to the 2009 Durban II conference.

27 See, for example, *Mobile People, Mobile Law*, edited by Anne Griffith and von Benda-Beckmanns, 2005, Ashgate.

28 International Council on Human Rights Policy, 2009.

29 See International Council on Human Rights Policy, 2009, paragraphs 60 – 71.

30 An-Na'im, A. A., 2000.

31 See Article 34 of the Declaration.

## CULTURAL RIGHTS AND THE LINK TO QUESTIONS OF AUTONOMY, SELF-DETERMINATION AND SOVEREIGNTY

Article 2 of the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW) emphasises the need to take all appropriate measures to modify or abolish existing laws, regulations, customs and practices that constitute discrimination against women.<sup>32</sup> This is relevant particularly in view of the discrimination against women that a resort to cultural values may often mask. Dialogue on addressing such discrimination is one approach and would have to include and empower women to participate on equal terms. As described in the country study, the Ecuadorian constitution's provisions on indigenous justice reflect an emphasis on dialogue:

**Article 171** *The authorities of the indigenous communities, peoples and nationalities will exercise jurisdictional functions, based upon their ancestral traditions and law, within their territorial area, with the guaranteed participation of and decision by women. The authorities will apply their own norms and procedures for the solution of their internal conflicts, and which are not contrary to the Constitution and the human rights recognized in international instruments.*

*The State guarantees that the decisions of indigenous jurisdiction will be respected by the public institutions and authorities. The said decisions will be subject to constitutional control. The Law will establish mechanisms of co-ordination and co-operation between the indigenous jurisdiction and the ordinary jurisdiction.*<sup>33</sup>

The question of cultural rights and distinct cultural identities is inextricably linked to political debates and struggles on autonomy, separatism and sovereignty. The 2007 UN Declaration and instruments such as ILO Convention 169 represent a certain level of international consensus on these issues as they affect indigenous peoples and communities. At the time of publication, though, Latin American countries, first and foremost, had ratified the latter instrument.<sup>34</sup> This reflects the important mobilization of indigenous peoples and communities that has taken place there since the 1970s and 1980s and the constitutional developments (including the recognition of 'pluri-culturalism' and territorial and collective land rights) that these changes have led to, as discussed in the country study on Ecuador.<sup>35</sup>

Similarly, Article 190 of the 2009 Constitution of Bolivia<sup>36</sup> in relation to the indigenous native/aboriginal rural jurisdiction provides that:

32 Hellum, A., 1999; Griffiths, A., 2007; Banda, F., 2004.

33 Unofficial translation by DIHR.

34 <http://www.ilo.org/ilolex/cgi-lex/ratifce.pl?C169>. There are currently 20 ratifications, 14 of which come from Latin America. Outside Latin America, some countries in Europe and Asia (including Nepal and Fiji) have ratified the convention. No African countries have done so.

35 See Van Cott, D. L., 2000.

36 La Constitución política del estado de Bolivia, 2009.

Capítulo Cuarto Jurisdicción Indígena Originaria Campesina

**Artículo 190.** I. Las naciones y pueblos indígena originario campesinos ejercerán sus funciones jurisdiccionales y de competencia a través de sus autoridades, y aplicarán sus principios, valores culturales, normas y procedimientos propios. II. La jurisdicción indígena originaria campesina respeta el derecho a la vida, el derecho a la defensa y demás derechos y garantías establecidos en la presente Constitución. **Artículo 191.** I. La jurisdicción indígena originario campesina se fundamenta en un vínculo particular de las personas que son miembros de la respectiva nación o pueblo indígena originario campesino. II. La jurisdicción indígena originario campesina se ejerce en los siguientes ámbitos de vigencia personal, material y territorial: 1. Están sujetos a esta jurisdicción los miembros de la nación o pueblo indígena originario campesino, sea que actúen como actores o demandado, denunciantes o querellantes, denunciados o imputados, recurrentes o recurridos. 2. Esta jurisdicción conoce los asuntos indígena originario campesinos de conformidad a lo establecido en una Ley de Deslinde Jurisdiccional. 3. Esta jurisdicción se aplica a las relaciones y hechos jurídicos que se realizan o cuyos efectos se producen dentro de la jurisdicción de un pueblo indígena originario campesino. **Artículo 192.** I. Toda autoridad pública o persona acatará las decisiones de la jurisdicción indígena originaria campesina. II. Para el cumplimiento de las decisiones de la jurisdicción indígena originario campesina, sus autoridades podrán solicitar el apoyo de los órganos competentes del Estado. III. El Estado promoverá y fortalecerá la justicia indígena originaria campesina. La Ley de Deslinde Jurisdiccional, determinará los mecanismos de coordinación y cooperación entre la jurisdicción indígena originaria campesina con la jurisdicción ordinaria y la jurisdicción agroambiental y todas las jurisdicciones constitucionalmente reconocidas.

- I. The indigenous native/aboriginal rural nations and peoples exercise their jurisdictional functions and responsibilities through their authorities, and apply their principles, cultural values, own norms and procedures.
- II. The indigenous native/aboriginal rural jurisdiction respects the right to life, and the right to the defence of the other rights and guarantees established in the present Constitution.

Moreover, Article 191 defines the users of indigenous justice and the personal, subject matter and territorial jurisdiction of this justice, while also referring to a future law on jurisdictional limits. It is also interesting that public authorities and persons must respect indigenous justice decisions and that the state promotes and strengthens indigenous 'native/aboriginal rural jurisdiction'.<sup>37</sup>

Some Latin American countries, particularly Colombia, have important judicial precedents on constitutional issues concerning the relationship between the law and justice systems of indigenous communities and those of the non-indigenous majority. The legal protection of rights and the relationship between individual and collective rights have been central questions for much of this jurisprudence. Issues such as the constitutional, rather than the ordinary legislative, basis of the law-making and jurisdictional authority of indigenous peoples and communities have come to the fore. Colombia's 1991 Constitution was one of the first in Latin America to recognize indigenous authorities' exercise of judicial functions.<sup>38</sup> The constitution foresaw the adoption of legislation regulating the coordination of jurisdiction between indigenous justice and the ordinary justice system. Due to a failure to pass such legislation, the Constitutional Court had to attempt to regulate aspects of the relationship in its jurisprudence, finally settling on a far-reaching interpretation of the judicial autonomy granted to indigenous peoples and communities.<sup>39</sup> The discussion of human rights and IJS in Chapter VI deals with some of these issues in greater detail.

When dealing with IJS, the process by which norms, rules and regulations are translated from the international to the regional, national and local levels is very important. This process assumes various forms with differing effects that involve what Sally Engle Merry has termed the 'vernacularization' of human rights.<sup>40</sup> As Harry Englund points out,<sup>41</sup> people involved in the process of translation may nominally invoke the language of human rights in order to create or consolidate unequal social relations.<sup>42</sup>

The importation of rights frameworks and the 'translation' process do not necessarily diminish the position of customary law as a normative framework for IJS. There are many similarities between the core values of human rights and customary law. In some areas, IJS may offer greater compliance with human rights standards than the formal justice system, either normatively or practically.<sup>43</sup> The question of the relationship between culture and rights then becomes one of how to square norms and practices with human rights without undermining the authority and cohesiveness of local communities and their systems of governance.

Exploring this question requires an analysis of how values and norms become contextualized and subject to change. It also requires an effort to negotiate or adjust the norms, structures and procedures of IJS that do not comply with human rights. What was formerly a confrontation may change into a concrete and practical discussion about

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37 Translated texts of these provisions are in the Ecuador country study.

38 See Article 246 of the Constitution of Colombia.

39 Van Cott, D. L., 2000, *op cit*.

40 Merry, S. E., 2006.

41 See *Prisoners of Freedom: Human Rights and the African Poor*, California Series in Public Anthropology, 2006.

42 A valuable recent contribution to this literature is *State Violence and Human Rights* by Steffen Jensen and Andrew Jefferson, 2009.

43 This is particularly true of the right to a remedy and to process-oriented rights more generally. IJS generally avoid the violations of human rights that are associated with dysfunctional criminal justice systems, such as prolonged detention without trial and poor conditions of detention.

who approaches the informal justice provider and how.<sup>44</sup> Any approach should begin with a human rights-based approach: through dialogue, participation and empowerment rather than in a top-down and invasive manner.

## THE UNIVERSALITY AND INDIVISIBILITY OF HUMAN RIGHTS

The interdependence and indivisibility of human rights<sup>45</sup> are relevant to this study. Practically, it is natural that orally based and local systems of governance and justice retain their importance when a large part of the population is illiterate and relatively immobile. The inability of many to use systems based on writing may in some ways make oral systems more egalitarian than mechanisms that confer power on a small literate elite. Even the absence of pens, paper and a reliable method of preserving written records may be an obstacle where many users of IJS suffer extreme poverty. Systems of health and medicine, education, transport and communication are key priorities. The development of justice cannot be seen apart from human and social development more generally. Respect for the guarantees of a legal remedy for human rights violations or for a fair trial requires infrastructure and resources as well as education or health services. Development of the requisite infrastructure to meet these guarantees requires long-term commitment and planning as well as much coordination, as experience from many justice reform programmes shows.<sup>46</sup>

## LEGAL PLURALISM AND THE DIVERSITY OF NORMATIVE BASES OF INFORMAL JUSTICE SYSTEMS

Faith-based IJS have a specific mandate or derive their authority from notions of 'divine authority' and they are examined, like other IJS, from the point of view of access to justice and compliance with human rights standards. While the different normative bases of these systems and, in some cases, explicit state commitment to upholding religious values (which even leads some states to make formal reservations to international human rights instruments) require special consideration, conformity with international standards of human rights and accessibility and amenability to development and change all remain the keys to analysis and discussion in the study.

The country case studies show that faith interacts with custom and state law in various ways. Custom is rarely free of metaphysical beliefs and religious doctrine often becomes mixed with local tradition. Faith and custom are two complexly interrelated normative frameworks that often underlie IJS. The study analyses how 'divine authority' as a normative basis influences how a faith-based informal justice provider administers justice, whether, in fact, this makes a significant difference to the provision of justice and the possibilities for influencing justice provision through policy and programmatic initiatives. Another issue is how the IJS function differently, depending on whether the state is secular or faith-based, whether the state religion differs from that of the IJS, etc. The context of how social actors more generally use faith or religion in their decision-making illustrates this.

When attempting to understand and develop policies or programmes on the roles and mandates of IJS, it is important to address each informal justice system not in isolation, but as part of the wider landscape of primary justice providers in each particular context. State institutions and the laws that regulate them are significant and the primary justice providers referred to as representing IJS seldom, if ever, exist in isolation from formal state institutions. As subsequent chapters explore, there are multiple layers of overlap, collaboration, competition and/or mutual interdependence between state institutions and IJS. The mandates, roles and legitimacy of IJS are often defined and understood in relation to the state and its justice institutions. This may be in the form of laws or decrees that recognize, regulate and/or establish IJS.

44 This was, for example, the case during a workshop on IJS in relation to a conference on Legal Aid in Africa (Rwanda, December 2008) at which legal practitioners and researchers debated the issue.

45 Especially as declared in the Vienna Declaration and Programme of Action of 1993.

46 On the need for an integrated approach to development generally, as well as within the particular field of justice reform, see, for example, Sen, A., 2000, and An-Na'im in *The Amherst Series in Law, Jurisprudence, and Social Thought*, edited by Thomas R. Kearns and Austin Sarat.

Understandings of IJS in relation to the state are also manifested in the popular views of users. People's comparisons of IJS to the state courts often determine whether they turn to IJS. Moreover, IJS providers often define themselves in relation to the state. They can do this positively or negatively: IJS providers may claim to derive their authority from their distinctness from the state or from the state's recognition of them. There is a corollary to this in how state justice systems rely on their differences to IJS to constitute their identity.

## CONCEPTS OF JUSTICE

While it is beyond the scope of this study to present a treatise on the many meanings of 'justice', it is necessary to explore this theme briefly to achieve conceptual clarity.

## ADJUDICATION, DISTRIBUTION AND JUSTICE

This study is generally concerned with 'adjudicative' justice, i.e., the settlement of disputes and the sanctioning of wrongs against the rights and entitlements of individuals and society. While adjudication will often include dispositions on the distribution of wealth, goods and burdens, justice systems are not the forum in which larger concerns of the distribution of wealth and private and public goods in society are determined. Thus, social or distributive justice on this scale is not the central focus here. Nevertheless, economic, social and cultural rights will be relevant in the adjudication of private disputes and the state's responsibilities toward those rights.

## RESTORATIVE AND RETRIBUTIVE JUSTICE

The notion of adjudicative justice contains elements of restoration and retribution. The balance between these is a matter of societal values and political choices, within an overall framework provided by international human rights standards. Restoration focuses on restoring the victim, the perpetrator and the surrounding society to a pre-existing or desired balance. Retribution may ultimately have the same goal, but the immediate focus may be on the necessity of sanctioning a wrong as an instrument to establish social order and the sense of right of the victim. It is often motivated by a strong element of deterrence. Human rights law places limits on what is acceptable as retribution (outlawing the death penalty as well as torture and placing limits on who is liable to be punished and for what, especially in the case of juveniles). Human rights law also makes certain prescriptions for restoration. In the case of juveniles, the requirements are even more pronounced.<sup>47</sup> Discussion on this subject sometimes suffers from a misleading dualism, whereby 'Western' justice is seen as retributive and 'customary' justice as restorative. In fact, all justice systems contain mixes of both elements and modern justice systems in Western countries are replete with restorative elements. It may be true that, in post-colonial countries, only the retributive aspect of state justice systems touches the majority of the population, leading to this perception.

## PUBLIC AND PRIVATE, AND COLLECTIVE AND INDIVIDUAL ASPECTS OF JUSTICE

Crimes are wrongs against the collective interest of society as well as against the individual victim. Society's interest in deterrence and social harmony can take priority over individual motivations in relation to restoration and retribution. The line between public and private is fluid and socially and politically defined. In some legal systems, crimes are often also civil wrongs and the adjudication of one of these often influences the other. Some wrongs that were often traditionally considered to exist in the private sphere, such as domestic violence, have become a matter of public concern.

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<sup>47</sup> This is explored in more detail in Chapter VII on Children's Rights and IJS under the heading 'IJS and Children in the Criminal Justice System'.

The country studies show that the line between crimes and civil wrongs is often blurred in customary law, where the nature of 'society' as a collective may be based more on extended family, clan and tribe structures than on formal states and where the demands of conformity differ accordingly. In the custom of many countries, responsibility for wrongs and the duty to make amends and avoid repetition rests on families, villages or clans rather than on individuals. The Papua New Guinea country study notes how the rupture caused by a dispute is not considered healed through the formal criminal justice system alone and requires reconciliation through the customary social structures. Even non-criminal matters of private law (such as the regulation of family law) and performance of social duties (such as attending funerals or engaging in communal work) are semi-public matters. Religions or social orders may seek to regulate them for moral or social reasons or because of the influence of societal interests and human rights claims related to empowerment.

## SUBSTANTIVE AND PROCEDURAL DIMENSIONS OF JUSTICE

Human rights law imposes a clear set of structural and procedural justice standards, particularly in relation to criminal law. While not as detailed, there are also clear rules and principles in relation to civil and administrative justice. Basic principles such as the obligation to hear both parties on equal terms and the obligation of an adjudicator to be impartial perhaps exist in some form in all cultures. A further set of rules applies to particular sets of persons, particularly juveniles, and recent human rights law on the rights of persons with disabilities is also relevant.

Beyond the (minimum) standards of human rights law,<sup>48</sup> academic work in the study of access to justice emphasizes various aspects of procedural justice, subdividing the quality of procedure into the strictly procedural as well as the interpersonal and the informational categories.<sup>49</sup> Substantive justice is closely related to legality at several levels, both in relation to entitlements in national legislation and higher-level guarantees in constitutions and human rights instruments.

## TRANSITIONAL JUSTICE

According to the International Centre for Transitional Justice (ICTJ), transitional justice is a response to systematic or widespread violations of human rights. It seeks recognition for victims and promotes possibilities for peace, reconciliation and democracy. Transitional justice is not a special form of justice, but justice adapted to societies transforming themselves after a period of pervasive human rights abuse. In some cases, these transformations happen suddenly; in others, they may take place over many decades.<sup>50</sup>

Transitional justice is chiefly concerned with truth, justice and reconciliation at the societal level and the necessity of the individual level for truth. An initial focus of the field on the possible tension between political settlements and criminal law retribution, increasingly in contexts of societal division and weak rule of law infrastructure, has to some extent given way to a broader focus that also includes restoration of economic and social rights and entitlements. Nevertheless, this study does not focus on the use of IJS in contexts involving transitional justice.

The concepts defined and presented here should be useful in the discussion and policy debate on IJS. These discussions are simplified when IJS are seen as a way of supplementing or complementing formal systems that share fundamental values. Although there are different orientations between formal and informal systems, open consultative processes can reach fundamental agreement on values and aims. More difficult issues arise where value sets differ, but dialogue on basic concepts and some values on access to justice can produce greater harmony between the systems.

48 See *infra*, Chapter VI on human rights guarantees in IJS.

49 See Klaming and Ivo Giesen, *Access to Justice: the Quality of the Procedure*, University of Utrecht, 2008.

50 See the International Centre for Transitional Justice for more information: [www.ictj.org](http://www.ictj.org), and *Traditional Justice and Reconciliation after Violent Conflict Learning from African Experiences*, International IDEA, 2008.

# THE INFLUENCE OF HISTORY AND LEGAL FAMILIES

## INTRODUCTION

This chapter explores aspects of how (primarily) civil and common law systems have addressed IJS. Many studies have noted that the nature of traditional and IJS and the extent to which they are incorporated into formal systems largely depends on a given country's history.<sup>51</sup> The commonly accepted view is that the legal system inherited from the colonial power and the legal and new state system established during decolonization influenced the role and status of customary law and IJS as well as the interaction between IJS and the formal justice system.<sup>52</sup> This chapter also briefly examines the distinction between civil law and common law systems inherited from the colonial power, and considers whether such a historical perspective and basic legal divide are now relevant for programming and working with IJS.

## THE RELEVANCE AND IMPACT OF HISTORICAL CIRCUMSTANCES ON INFORMAL JUSTICE SYSTEMS AND THEIR RELATION TO FORMAL JUSTICE SYSTEMS

Richard Dowden summarizes a difference between the British approach of indirect rule and that of French or Portuguese colonialism in Africa:

*“While the British never pretended that their subject nations would be British, the French and Portuguese based their empires on the Roman empire, planning their colonies to be as French as Paris, as Portuguese as Lisbon. They created administrative systems in Africa similar to their own domestic structures. They tried to turn the chiefs into official administrators. In practice, they still had to deal with chiefs as traditional rulers. Under all imperial systems traditional kings and chiefs had little direct power, though they could exert considerable influence. If they co-operated with the imperial rulers they could become local dictators without the checks and balances of Africa’s traditional political systems. On the other hand, if they disobeyed the orders of their imperial bosses, traditional rulers were removed and replaced. Most pursued their own interests, helping, hindering or obstructing the imperial power as it suited them.”<sup>53</sup>*

The differences to which these two approaches gave rise are still apparent in the country studies. For example, the state is deeply involved in the selection and the functions of chiefs in Niger (a former French colony) and in the application of customary law by ordinary courts. This contrasts with the more ‘hands-off’ approach taken to chiefs in some Anglophone countries.

It is difficult to generalize about the colonial powers’ influence on the different transitions toward independence and IJS. Post-colonial states themselves have influenced the current situation of IJS and their degree of recognition. While the intentions of individual colonial powers may have differed, those powers were dealing with locally determined situations, and it is not clear whether the various colonial projects changed or even intended to change the nature of traditional authority.

Country examples show that historical processes are relevant for today’s IJS. Gundel explains how “[i]n Somalia, the traditional structures developed and changed hand in hand with the socio-political structures established by the colonial rulers. [...] The attempts by the modernising independent Somali state to suppress and eradicate the

51 Penal Reform International, 2001; Schärf, W., 2005; International Council on Human Rights Policy, 2008.

52 Mamdani, M., 1996.

53 Dowden, *Africa: Altered States, Ordinary Miracles*, Portobello Books, London, 2008.

traditional authority structures failed because the traditional social structures of the Somali clan system remained vital for the survival, protection and cultural identity of the Somalis.”<sup>54</sup>

When colonies became independent, various transformations occurred. In this respect, “the process by which the state configured itself in the decolonisation period, the post-1960s” is important for understanding the nature and shape of informal and non-state justice systems in developing countries.<sup>55</sup> The maintenance of ties with the former colonial master is also relevant. According to Mamdani, “[m]ost post-colonial states in Africa did not fundamentally alter the basic edifice of colonial law except in some cases to alter the basic frame from racial to ethnicity or tribal origin.”<sup>56</sup>

There were two parallel but somewhat opposite trends in the newly independent states. On the one hand, post-colonial states needed to supervise their existing customary institutions more closely in order to ensure the respect of their international obligations, particularly over time as human rights became increasingly enshrined in international law. IJS could be seen as a threat to the unity of the new state: “For political elites in fledgling independent states, both the diversity of systems and the lack of judicial control were seen as problematic and potentially divisive.”<sup>57</sup> On the other hand, customary law was gaining legitimacy in some parts of the world as part of a movement away from both colonial rule and, later, Western hegemony. The recognition of customary law in such cases is also a way to legitimize state authority and to extend that authority throughout the territory: “The state may well be seeking to enhance the power and legitimacy of its own law even while riding on the ‘greater popular legitimacy’ of the customary.”<sup>58</sup>

Civil law, common law, Islamic law and socialist law have often been recognized as the world’s four major legal families and all are relevant for the countries in this study. Nevertheless, their relevance for the role played by IJS in a specific state must be seen in combination with a number of other factors that are particular to the specific state context. Furthermore, limiting consideration to these four legal families risks denying proper consideration of the nature of customary law. For these reasons, there is a brief discussion of typical characteristics of customary law below.

None of the four main legal families is monolithic, and the phrase ‘customary law’ also represents a great diversity of substantive norms. There are significant differences within each group (for example, both Iran and Saudi Arabia have Islamic law systems, but observe them very differently) and they have influenced one another for historical reasons. There are ‘mixed systems’ that combine aspects of common and civil law systems, as in South Africa, Scotland, the Philippines and Quebec. Civil law systems are by no means uniform and can be classified again in major subgroups, such as French civil law, German civil law, Polish civil law or Scandinavian civil law. The legal systems of the socialist law family generally owe a lot to the civil law family.

## **SOCIALIST SYSTEMS OF LAW**

Socialist law is based on the ideology of Marxism-Leninism, and can involve Communist Party members who play a central role in legal, judicial and political decision-making processes rendering decisions of justice. In this system, law is often largely subordinate to Party policy, which was more important than the rule of law. The socialist states and legal regimes have often been hostile to sources of law and legitimacy that are anchored outside the ruling party. One example is Mozambique, where the FRELIMO revolutionary government abolished the powers

54 Gundel, J., 2006, pp.42-43.

55 Schärf, W., 2005.

56 Mamdani, 1996, cited in ICHRP, 2008.

57 Chirayath, 2005: 7.

58 ICHRP, 2008.



of traditional authorities after gaining power in 1975,<sup>59</sup> replacing them with local 'People's Courts', which, in turn, were replaced by community courts or *tribunais comunitarios* in 1994. Adaptations to particular circumstances of time and place nevertheless temper the overall picture of hostility to custom. Socialist power holders' manner of resolving disputes appears to have been pragmatic, especially at local levels and during revolutionary periods. In attempts to win support, they often gave room to the resolution of conflicts according to the intuitive sense of the local people. In such cases, local custom may have combined with party ideology, at least in the short term. Sometimes, the pre-eminence of Party policy, rather than the strict letter of the law, made it easier to adopt a pragmatic approach to conflict resolution, as long as this did not conflict with Party directives.<sup>60</sup>

Some authors dealing with legal pluralism in China<sup>61</sup> highlight the importance of the traditional use of social networks to conduct business (the so-called 'Guanxig rules'). There are indications that custom remains relevant in the settlement of disputes in rural areas of the country. Chinese courts, like their counterparts all over the world, are overburdened and are attempting to ease case pressures through mediation. An experiment in Yaodian that attempted to bring justice closer to the rural people of the area introduced 'special mediators' who played a variety of roles in the administration of justice locally, including mediation and conciliation of disputes. Local custom is reportedly among the sources used.<sup>62</sup>

## ISLAMIC LAW

Islamic law is based on *Shari'ah*, the primary sources of which are the Qur'an (seen as the word of God) and *Sunnah* (the life of the Prophet Mohammed). Legal methodology in classical Islamic law is closely similar to that of the common law system in that Islamic scholars' jurisprudence or interpretation (*fiqh*), rather than codified legislative texts, plays an important role. In modern Islamic states, including the Islamic Republic of Iran, though, there is an Islamic civil code.

In classical Islamic law, courts, like all other official institutions, are subordinate to the *Shari'ah*. In former times, Islamic law functioned in many legal domains, including contracts, business and economics as well as penal and family law, besides regulating matters of social conduct, sexuality, diet, personal hygiene and the religious obligations of adherents of Islam. In several countries of the Middle East<sup>63</sup> and North Africa, as in some West African states, religious courts deal with matters of family law and inheritance. In states with large Muslim populations, including India or Lebanon, matters of family law and the personal status of Muslims may be left outside the adjudication of the courts, being regulated instead by *Shari'ah* and interpreted and applied by religious authorities. Islamic law exists also as an informal source of law in some countries, often through customary law and traditional practices, as, for example, in West Africa (Mali, Niger, and parts of Benin and Burkina Faso). The Niger country study looks at the confluence of Islamic law and customary law, which blends the two traditions across variations among different ethnic groups. .

Scholars such as An-Na'im have pointed out how, in countries with Muslim communities, the prevalence of Islamic norms exclusively in family law is a relatively recent phenomenon, being historically linked to colonialism and the

59 See, for example, Carbone, G. M., 2003.

60 See, for example, Wei, D., 2005. The article refers to the 'Ma Xiwu itinerant' justice in the 1940s, for which no structures – such as court buildings – were necessary.

61 See, for example, Zhang, J. and Jing, Y., 2006: 208.

62 Ibid. "The 'special mediators' are either village cadres, villagers who are recognized as trustworthy, or respected older persons. These village elites, after a short training in law, can act as jurors during cases, and as mediators at the court to settle disputes and help resolve conflicts, while acting as educators on the law for the population. Each village generally has between three and five special mediators, chosen jointly by the court and the legal administration of the locality. They carry out several functions. When civil cases are heard in the framework of a simple procedure, magistrates have the legal documents conveyed by the mediators, and question them about the context of the case and about local customs.

63 Including Israel.

emergence of modern nation states.<sup>64</sup> According to this view, as *Shari'ah* ceased to be an overall framework for political and economic life as such, its focus and control over matters of personal and family life increased.

## CIVIL AND COMMON LAW SYSTEMS

Judges create and develop common law. A decision in a given case depends on decisions in previous cases and affects the law to be applied in future cases according to the well known doctrine of *stare decisis*. When there is no authoritative statement of the law, judges have the authority and duty to make law by creating precedent that is binding on future decision makers. Such setting of precedent frequently considers the prevailing moral views and standards in the community. Historically, the system has allowed considerable flexibility and local variation, notably through the influence of juries. The relatively wide scope given to the judicial role and to community standards has perhaps influenced the acceptance of customary and religious law in common law countries. Even today, customary and religious law enjoys some recognition in the legal system of England and Wales in family law, and there has been much public discussion about whether to extend this recognition to religious traditions that are newer to the UK.<sup>65</sup>

In contrast, legislation is the primary source of law in civil law, also known as 'continental' or 'Roman' law. Courts base their judgements on the provisions of codes and statutes, from which solutions in particular cases are to be derived. Courts have to reason extensively on the basis of general rules and principles of the code and statutory law, which include drawing analogies from statutory provisions to fill *lacunae* in the law and to achieving coherence. Judges are not supposed to or are even forbidden from creating law (according to a strict separation of powers). Nevertheless, jurisprudence plays an increasing role in civil law systems.

It is well documented that Europe had many legal norm systems and justice mechanisms until the Renaissance and even beyond.<sup>66</sup> The continental European tradition's tendency toward greater centralization and codification, going back to Roman law and its revival in medieval times, was by its nature less disposed to adopt inputs and processes from local custom, which could have disturbed the certainty and uniformity of Roman legal doctrines. The strong tendency of the Napoleonic system toward codification was carried to French colonies in Africa and beyond.

Common law legal systems are widespread in those countries that trace their legal heritage to England, such as the United States, and in other former colonies of the British Empire, including much of eastern and southern Africa, India, Canada, New Zealand, Australia and Hong Kong. There is nevertheless an important sub-division within this legal family between those countries that followed the US republican model, in which the judiciary has a prominent role in adjudicating constitutional (and especially human rights) questions,<sup>67</sup> and those that, like the UK, stuck to a more traditional notion of parliamentary supremacy. Most former British-ruled countries and territories use common law, except those that other nations had previously colonized.

## CUSTOMARY LAW

In an attempt to generalize about customary law in order to consider it alongside legal families, this study notes some assertions or postulates about customary law. Although these inevitably involve simplification and generalization, it is perhaps useful in the context of this study to consider customary law as a family on a par with

64 An-Na'im problematizes this development whereby legal norms in one area of life remain anchored (though through modern legislation) in religious tradition and are separated from laws governing other aspects of life. See Na'im, A. A., 2002.

65 See, for example, BBC news story of 7 February 2008, 'Sharia law in UK is "unavoidable"', retrieved at [http://news.bbc.co.uk/2/hi/uk\\_news/7232661.stm](http://news.bbc.co.uk/2/hi/uk_news/7232661.stm)

66 See, for example, Tamanaha, 2008.

67 Australia, India and the Republic of Ireland are examples, and the majority of former British colonies do in principle allow for constitutional adjudication.

others. The first assumption is that customary or traditional law generally aims at preserving peace and community harmony in a society where people's attachment to family and clan defines the people themselves, their role and their status. Customary law will generally value these aims more than the vindication of individual legal claims that are founded on a literal reading of the law.<sup>68</sup> Consequently, there is no clear distinction between criminal and civil wrongs, and responsibility for wrongs is placed on collectivities as much as or more than on individuals. Second, the customary law processes are mostly oral and its procedures flexible and simple. Standards of proof are based on assumptions of probability. Adjudicators are chosen through mechanisms that are often based on status or reputation, and sometimes on heredity. The mechanisms to ensure accountability of such providers are often found in community bonds, mutual obligations and reputation, so that failure to live up to the demands of fairness and impartiality would bring shame and a consequent loss of status. Substantive rules are derived from tradition that people may think has existed since time immemorial and that common sense and perceptions of community consensus then supplement. Such rules may be developed and change gradually through negotiation, discussion and the various influences that prevail on the community. The system is often oriented to a local framework and a stable social structure that is conscious of well defined social and gender roles, with corresponding rights and obligations.

In a report dealing with customary justice forums in Malawi, Wilfred Schärf and his colleagues observed that customary justice was based on the following key principles:

***“The constitution of the legal subject is an integral part of a community in which there are ongoing reciprocal dependencies. By contrast the state system constitutes the legal subject as a single social atom, separated from others and devoid of reciprocal dependencies.***

- ***Reconciliation***
- ***Restoration of social harmony***
- ***The application of traditional and customary law***

***It is forward-looking towards the maintenance of social harmony rather than backward-looking at the act, which precipitated the dispute to be brought to the customary justice forums. The question is to what extent the customary justice system applies customary law as opposed to custom. The law applied is uncodified and therefore more subject to flux from area to area.***<sup>69</sup>

## THE IMPORTANCE OF PRECEDENT AND THE ROLE OF THE JUDICIARY

There are many differences between common law and civil law mainly regarding the place of case law and statutory law, and the place of codification, on the one hand, and the recruitment, training and roles played by judges, prosecutors and police (especially in criminal proceedings), on the other hand. Nevertheless, the actual differences between the two systems are less sharp.

In parallel, the importance of jurisprudence and case law for the development of the law has increased in civil law systems, and traditionally common law countries have moved toward increased legislative regulation and codification in recent decades, so that the gap between the two systems has narrowed. Increased international harmonization of legislation and the greater prominence of international judicial organs have also played a role in this. Some authors point out how conditions in developing countries, where a lack of codified law in many areas renders it necessary for the higher courts to play a more active role in determining the law, belie the standardized

68 See, for example, Manfred O. Hinz in 'Justice for Justice and Justice for Peace: Legal Anthropological Observations on Traditional and Informal Justice Systems', Hinz and Mapaure, 2010.

69 See Schärf, Banda et al. on Malawi, 2002.

models of common and civil law.<sup>70</sup> There are similarities between the more expansive role of the judge in common law systems and the latitude given to adjudicators in traditional systems, although the latter would sometimes appear to have more latitude in relation to the obligation to follow precedent.

An important feature of international human rights law is that civil law systems generally adhere to a monist doctrine concerning the relationship between national and international law. This doctrine proclaims the unity of national and international legal orders, so that duly ratified international treaties are immediately applicable in national courts on the same basis as national legislation.<sup>71</sup> As a general rule, the dualist doctrine prevails in countries of the common law tradition. According to this approach, international law is a different sphere of law, binding on states in their dealings with one another, but whose guarantees cannot be invoked in national courts unless those guarantees have been transformed or incorporated into national law. The doctrine remains a stumbling block for the application of international standards in common law countries.

### PROCEDURAL DISTINCTIONS BETWEEN CIVIL AND COMMON LAW SYSTEMS

The main distinctions between the civil and common law systems concern the role of judges, the law of evidence, and judicial procedures, especially in criminal matters. The highly technical and specialized law of evidence that is a feature of common law systems is in many ways a response to the role that juries play as the main arbiter of questions of fact.<sup>72</sup> In civil law countries, rules of evidence are generally less technical, reflecting trust in the ability of judges to sort the testimony heard, and, where relevant, to instruct juries accordingly. The role of juries in civil proceedings has declined steadily over the past 150 years in most common law countries with the professionalization of the judiciary and the use of technical experts in many fields. Most common law countries in Africa have moved away from the use of jury trials, with a correspondingly less technical approach to the law of evidence.

Even where distinctions remain, there is some evidence of a trend toward convergence. International criminal courts and tribunals, such as the International Criminal Tribunal for the former Yugoslavia, the International Criminal Tribunal for Rwanda and the International Criminal Court, have adopted features from both systems. Especially in Europe, the influence of the European Court of Human Rights and harmonization efforts under the Justice and Home Affairs pillar of the European Union have contributed to this convergence. Countries like the UK have in recent decades introduced reforms owing something to civil law systems, such as the introduction of a specialized prosecution service, while trials for minor criminal offences in magistrate's courts, as well as an increasing number of more serious offences in Crown Courts, are held without juries. Reforms to the civil law in common law countries have increased the role that judges play in directing civil proceedings by means of case management practices, so that the traditional role of the judge as a somewhat passive neutral arbiter has to some extent given way to a more proactive role more commonly associated with civil law systems.

A further point of comparison between common and civil law systems relates to an issue of structure. It is well known that judges in common law countries are generally chosen from among the more senior ranks of the legal profession, rather than, as generally happens in civil law systems, recruited and trained as judges from the beginning of their careers. This is often linked to (a) greater independence of the judiciary in common law systems and (b) greater uniformity of practice in civil law systems. In addition, the UK has a long tradition of lay magistrates that persists to this day. Finally, the role of juries as the exclusive arbiters of fact is a feature of common law systems that does not apply in civil law systems. These factors may have influenced the willingness of common law systems to 'delegate' matters of custom to adjudicators outside the realm of the state.

70 Jan Michiel Otto, 1998, *op. cit.* "In this respect Niger's realities have falsified the grand design of comparative law which distinguishes continental law families from common law families by contrasting codified law with judge-made law."

71 Or, depending on the status given to international legal obligations in constitutional texts, international obligations may have primacy over ordinary legislation.

72 In civil law criminal justice systems, judges often determine the facts in cooperation with the jury.

## HISTORICAL PARALLELS TO THE GRADUAL CONVERGENCE OF STATE AND NON-STATE LAW IN POST-COLONIAL STATES?

In Europe, the historical development from local systems of law based on the power of communities, feudal lords or ecclesiastics toward norms and standards common to larger political units has been long and gradual. Developments in the rate at which legislation could be passed, communicated and applied have broadly followed developments in the technology of transport and communication as well as of systems of political and administrative control and the political struggle for parliamentary supremacy in legislation.

Many of the traditional features of the common law system show clear origins in community or informal justice. These include the use of judge-made law and precedent that allow some organic development and local variation (with some parallels to the use of customary law), a strong element of community involvement in the extensive role of juries, and reliance on local intellectual and social elites in the widespread use of non-professional, non-jurist magistrates (or justices of the peace) as judges.

These parallels to the IJS raise the question of whether similar features of IJS can be incorporated into formal systems, as this would bridge the gap between the two domains. The formal systems of former British colonies introduced some of the popularly rooted features of common law systems, but those features did not survive very long after decolonization. Professional judges replaced justices of the peace or lay magistrates in countries such as India, Pakistan and Malaysia. Juries are not prominent in post-colonial common law countries, although lay assessors have been re-introduced in post-apartheid South Africa and are also used in some other common law countries, where they are seen as a way of enhancing popular participation and the legitimacy of the legal system.

## THE RELEVANCE OF THE DIFFERENT LEGAL SYSTEMS FOR THE INTERACTION AND LINKS BETWEEN THE FORMAL SYSTEM AND THE INFORMAL JUSTICE SYSTEMS

The types of law involved in the interaction between the formal system and IJS is an important issue. In terms of judicial organization, there is a difference between the solution adopted in many former British colonies in Africa – where state ‘customary’ or ‘local’ courts apply customary law<sup>73</sup> and remain distinct from the ordinary court system – and the *chambres coutumières* that are part of the ordinary courts of first instance in some countries that were formerly French colonies.<sup>74</sup> Here, judges of the formal courts apply customary law, usually with the assistance of customary assessors. As discussed in the country study on Niger, the roles of and relationships between judges and customary assessors are also decisive.

The incorporation of informal and customary law as common law in the decision-making process in common law systems seems a more likely possibility than an eventual codification of customary law. Thus, the *stare decisis*, or precedent system, may offer some opportunities for interaction through the recognition of notions of customary law in state courts. The doctrine of precedent, if it succeeds in gaining ground among IJS providers as a system, may also help IJS to incorporate norms derived from state law and constitutional and human rights. This study contains some examples from Zambia of the interaction between the development of legal doctrines in courts applying customary and statutory law. So-called ‘repugnancy clauses’ and what might be called their successors that require conformity to constitutional norms can play a role. Chirayath observes that “[m]ost colonial regimes introduced colonial repugnancy clauses, thereby recognizing customary law only to the extent that it conformed to European legal norms. Similarly, most African constitutions now recognize customary courts only insofar as they do not violate any of the fundamental rights enshrined in state constitutions.”<sup>75</sup> While the wording of these clauses

73 The successors to what were called ‘native’ courts in colonial times.

74 Including Niger, Mali and Cameroon.

75 Chirayath, 2005: 9.

may differ slightly between countries that were formerly French and British colonies, their intention is the same. There is a legal difference in that the 'escape clauses' (from constitutional equality provisions, for example) found in some former British colonies are not found in the former French ones.

Certain legal systems may be more amenable than others to the incorporation or extension of recognition to IJS. Nevertheless, the country studies show that the sheer variety of factors at play excludes an analysis solely on the basis of this aspect. Moreover, civil and common law systems have each found their own ways of interacting with customary and informal justice, particularly in the all-important areas of family and real property law. The differences in outlook are not fundamental, especially given the importance of global standards. The demand for effective justice institutions from the poorest communities will dictate a continued role for IJS, but the programming strategy – specifically, the extent to which a programme energetically promotes links between formal and informal justice mechanisms – will vary depending on the operating context.

# TOWARD A TYPOLOGY OF INFORMAL JUSTICE SYSTEMS

## INTRODUCTION

This study speaks of a continuum between informal and formal justice providers or systems rather than of a set of sharp distinctions. Depending on their context, different types of IJS occupy different points on the continuum between informal and formal according to their structural, procedural and normative features. This chapter provides a short overview of different categories of IJS outlining their main characteristics, which include composition and appointment, sources of legitimacy, organizational structure, process and outcome, linkages to the formal system, normative and legal frameworks, monitoring, supervision, appeal mechanisms and fees and costs.

This study considers the following types of IJS:

1. Traditional leaders
2. Religious leaders
3. Local administrators with an adjudicative or mediation function
4. Customary or community courts where the adjudicator is not a lawyer
5. Community mediators

The first two types will often not have official or formal links to the state, although this may depend on the nature of the state. The third and fourth categories involve typical 'parajudicial' systems, regulated by law and subject to state authority. The fifth category, community mediators, are rarer and play a smaller role than the other providers. Their function in dispute resolution often originates in initiatives from civil society organizations and systematic training programmes, sometimes inspired by human rights principles and national legislative guarantees. In addition to these five categories, other actors, including paralegals, trade organizations or community groups may often resolve disputes on a more *ad hoc* basis. Their work generally falls under the rubric of legal services, occasionally mediating or conciliating disputes, and they sometimes represent one party rather than a neutral third party.

Given the great variety of mechanisms around the world and even within particular countries, this typology inevitably involves generalization. Often, the border between types is rather fluid. Chiefs may function as administrative authorities at the local level or the term 'customary court' may refer to 1) a local administrator with adjudicative functions in one country, 2) a state-established court that is part of the judiciary in another country, and 3) a chief's court in a third. The local courts in Uganda fit partly into the two of the types (categories 3 and 4), depending on the level of the local court involved. Moreover, there may be many systems or mechanisms that do conform to the somewhat standardized typology.

In describing the processes that IJS employ, attention needs to be paid not only to the description of the process, but also what actually happens. An example is the word 'mediation', which is sometimes falsely applied to conciliation processes (where an external party encourages the parties to make concessions to bring them closer together), or even 'arbitration', rather than to mediation *per se*, whereby a neutral third party, purely by facilitating discussion, assists the parties in exploring their interests and needs in order to reach a solution. The Madaripur Mediation Model in Bangladesh or the Council of the *Abunzi* in Rwanda are examples of 'mediation' processes that actually have elements of conciliation and arbitration.

The country studies illustrate various processes employed in IJS; some of these are very public, while others are closed and private. Depending on the level of public 'stake' in the outcome and the precedent it creates, there may

be good reasons why people prefer private processes in some cases and public ones in others. In local communities, social expectations and sanctions may be just as effective as formal enforcement of a court judgment. This is especially so for enforcement in more public processes, as in, for example, the Madaripur Mediation Model in Bangladesh. On the other hand, some members of the community, particularly women, may appreciate the confidentiality of more private mediation processes that enable them to broach issues that remain socially taboo, as seen in the Malawi country study. In the Malawi country study, women often cited the confidentiality of the process as one of the primary reasons for preferring the community-based mediation alternative, as it allowed them to discuss issues – domestic violence, for example – they would not be able to take up as part of the dispute in other forums. In Ecuador, cases are mainly addressed in public at the General Assembly of the community, although, in some cases (such as in intra-familial questions), the users interviewed mentioned the possibility of a more private process.

## TYPES OF INFORMAL JUSTICE SYSTEMS

### TRADITIONAL LEADERS

A system of kinship-based leadership provided justice in many developing countries prior to colonization. Today, this is often referred to as ‘traditional authority’ involving chiefs and headmen. In the colonial period, there was often mutual adaptation between the colonizers and these traditional authorities, depending on the ideology and policies of the colonizer. Many authors on Africa, such as Mahmood Mamdani, have explored how these traditional authorities were drawn into state governance, a process that decreased their power in some ways, yet consolidated or even strengthened it in others.<sup>76</sup>

The persisting influence of the colonial era should not be underestimated in relation to the powers of the chiefs and the norms applied by such chiefs’ or headmen’s courts. In the post-colonial period, the formal legal powers of chiefs in many countries were severely curtailed, if not abolished outright, as in Tanzania and Mozambique. Since the 1990s, many states have returned formal legal powers to chiefs as part of a wider process of recognizing traditional authority, including in justice enforcement matters, to varying degrees.<sup>77</sup>

For traditional chiefs, the adjudication of disputes is only one function among many. Chiefs and headmen may allocate rights concerning land and represent the community, clan or tribe in relations with other groups and official state authorities. They may often have certain administrative and law-and-order-related functions on behalf of the state.<sup>78</sup> At a daily, practical level, development workers and researchers know well that it is necessary to get the permission of chiefs before undertaking any activities in communities.

### Composition and Appointment

The local community may elect or select traditional leaders on the basis of moral standing, integrity or heredity. In some southern African countries, such as Malawi, Zimbabwe and Mozambique, there is a combination of these two factors: certain families have the right to the chieftaincy, but the person in those families who is seen as the best candidate actually is selected. Generally, tradition establishes whether a male or female will be chief. Most chiefs are males, though there are instances of a division of authority between senior males and females. While there are few matriarchal societies, some are matrilineal, so that the (male) chieftaincy is passed down through

76 See, for example, *When Victims Become Killers: Colonialism, Nativism, and the Genocide in Rwanda*, Princeton University Press, 2001.

77 See, for example, Buur and Kyed (2007) and the work of Barbara Oomen on South Africa.

78 A Norwegian funded report on traditional chiefdoms in Southern Zambia found that “[t]he traditional leaders are important not only as custodians of tradition and custom, but in almost all aspects of people’s lives, as they tend to represent the only authority that is within people’s reach. They play an important role in upholding law and order in the chiefdoms. They pass laws, enforce them, as well as being the ones people report to in case of an offence or a dispute. The traditional leaders also control land allocation, keep a register of the population, call community meetings to discuss issues of importance for the community, and will often play a central role in the management of development projects (government as well as NGO projects).” Study on drivers of change in three chiefdoms of Southern Province in Zambia, Commissioned by the Royal Norwegian Embassy in Lusaka Oslo, August 2007.



a female line, and there may be some governmental and important ceremonial functions that women perform. There are also some examples of patrilineal societies where females can become chiefs. It is rare for the whole population within a given chieftaincy area to have the right to elect chiefs. Usually, representatives of the most important families in an area participate in elections. Where the state recognizes traditional authority, as in Mozambique, Zambia and Zimbabwe, the government has sometimes interfered in the choice of a candidate to suit state or political interests, even though this is not part of official procedure. The same occurred during colonial rule.<sup>79</sup> In other countries, such as Niger, the state will officially and directly play a role in choosing and appointing chiefs.

The IJS will typically be composed of the chief and a (generally elder male) council of elders.<sup>80</sup> Like the traditional authority structure, generally, it will most often exist at several levels, so that a dispute would initially be brought to a village headman (often after having been discussed at the family level), with a hierarchy extending through zones, districts and chiefdoms. In some cases, there might be a cross-national paramount chief (as with the Ngoni in southern Africa) or a regional government-like structure (as with the Kuta court system in Zambia). While this structure exists mainly in Africa, there are similarities in the structures in Bangladesh and Papua New Guinea.

### State Links

The workspace of traditional chiefs may sometimes be physically located in local administration offices.<sup>81</sup> The state may pay salaries to traditional leaders. Particularly if they undertake administrative tasks in addition to providing justice, they are more likely to receive a stipend or a contribution to running costs from the district administration. In most cases, though, this is paid only at the top level of the structure (i.e., the chieftaincy). The payment is unlikely to be large. Where this is done, the traditional leaders are likely to be linked more closely to the administration (executive) than to the district court. Where there is a direct link between the traditional leaders and the formal justice system in the form of appeal mechanisms and enforcement procedures, the link to the formal justice system may be closer. This is generally the case only where the traditional leaders' courts are legally a part of the judicial structure, as in Zimbabwe,<sup>82</sup> or, to a lesser degree, where the traditional leaders can nominate or be represented as adjudicators in the state system, as in Zambia.

The Ecuador study notes that Latin American countries are taking a somewhat different direction. The constitutional changes recognizing the traditional councils' exercise of judicial power could, in some cases, give those councils full autonomy to handle cases covering all kinds of subject matter, and the Constitutional Court may exercise the power of review only guardedly.

### Typical Normative Frameworks Employed and Jurisdiction

Traditional leaders generally use custom as the main normative source, but they may combine this with elements of statutory law. In some countries, some attempts at codification of customary law may have influenced standards and procedures toward greater formalization, and the interaction with formal justice system actors over a long time may also have influenced things in this direction. In countries where the state recognizes IJS, traditional leaders are almost always obliged to provide justice in compliance with national legislation and human rights (Kenya, Zimbabwe and Ethiopia are exceptions). There may, though, be exemptions to equality provisions.<sup>83</sup>

79 See, for example, Kyed and Buur, 2007.

80 See country studies on Malawi and Niger.

81 In the Karamoja region in northeastern Uganda, the office of the Chief's Council is located on the premises of the district administration.

82 Customary law and Local Courts Act, Cap. 7:05, Laws of Zimbabwe (Nos. 2/90, 22/92, 22/95).

83 See Chapter VII on women's rights and IJS for discussion of the exemption of customary and family law matters from the equal treatment clause of the constitution, including in Kenya. One report on the customary system in Kenya states, "[t]here is no specific statutory authority, except for a broad mandate under the Chiefs' Authority Act to maintain law and order. The quasi-judicial powers they exercise are not officially recognized, so there are no guidelines and the practice is very uneven from one location to the next." Nyamu-Musembi, C., 2003, p. 23.

The types of cases that traditional headmen's or chiefs' courts deal with range from civil cases such as divorce (of customary marriages), land disputes and conflicts and inheritance, to severe criminal offences, but this depends very much on country context. A distinction should be made between the formal legal powers of chiefs' courts and their actual practices. Legislation may have curtailed the powers of chiefs' courts, and this may be more or less effectively enforced. State recognition (especially in Africa) may confer authority to deal only with certain types of cases, such as certain civil matters and petty crimes.

Some country studies (e.g., those of Niger, Uganda and Malawi), show that, even where traditional leaders do not try serious criminal cases, they may take preliminary measures, such as detaining suspects in unofficial cells, waiting for the police to arrive or waiting for the suspect to be brought to the police (which can take a long time, depending on distance and resources). Unofficially, though, some chiefs' courts have tended to continue to handle serious criminal cases, despite this having been declared illegal. In Karamoja in the northeastern region of Uganda, the traditional courts, which are councils of (male) elders, continue to deal with all disputes, including all civil and criminal matters, despite attempts to (re)establish the formal structure. Specific areas such as witchcraft and land disputes may also be under the adjudication of the chiefs, even in countries where state law does not recognize witchcraft as an offence or where land tribunals have been created.

### Typical Processes Employed and Force of Outcomes

Most often, traditional leaders follow a process of discussion, negotiation and arbitration, with the council of elders. The traditional leader conducts the process through which the parties are heard and the traditional leader formally makes a final decision on outcome or sanction; this decision is then seen as the consensus. Many traditional IJS proceed on the basis of a degree of consent from the parties that they will accept a decision of the chief, who may be reluctant to embark on an adjudication process without assurances that the parties will abide by the outcome.<sup>84</sup> The process of mediation, which involves listening to the parties and helping them to reach a mutually acceptable solution, seldom occurs in such forums. In Niger, the law prescribes that chiefs can only conciliate in cases, though it is widely acknowledged that they do not confine themselves to this role. One weakness of traditional leaders' systems is that they may apply only to those perceived to be members of the group, so that those falling outside clan or lineage structures may have no customary entitlement to protection and thus no right to be heard.<sup>85</sup> This may also compromise the ability of these systems to deal with inter-group disputes.

Only rarely do processes in traditional courts have a formally binding outcome. When they do, this may be due to a link to the formal system, so that people know that the decision will be directly enforced through the formal system (which is possible in Niger if the decision is registered with the court) or where the IJS themselves have the authority and the means to enforce a decision. This is the case in Papua New Guinea and, to a certain extent, in the local courts in Sierra Leone with the chieftain police. In some contexts, as in central Mozambique, chiefs' courts may also combine binding with non-binding litigation, with the former being enforced through informal procedures. For example, in cases involving the violation of sacred places or accusations of taking life through the use of witchcraft, the offenders are obliged to pay a fixed fine to the chiefs' court and to the families of the victim. The country studies show that traditional leaders' IJS often have difficulty in complying with rules and guidelines requiring that case outcomes be written and recorded. Where this is a problem, the main obstacles are literacy, habit and access to materials. The wish to record a 'verdict' may itself distort the character of traditional systems. Penal Reform International (PRI) notes how traditional processes may often result in mutual apologies, criticism of both sides to a dispute, and an airing of the pre-existing hostility between the parties that may underlie the immediate dispute. A written 'verdict' may well have difficulty in reflecting this complexity.

84 Penal Reform International 2000, p. 32.

85 See International Development Law Organization 2010.

Processes in traditional systems are often public. Where the wider community is involved in the process, the public presence may also suggest a good way to resolve a case. Social pressure may also result from this wider process or consensus, bringing the process closer to conciliation or even arbitration rather than to mediation. In some instances, traditional justice systems may still resort to ‘supernatural divination’ and ordeals, although this is now less common in many countries than before.<sup>86</sup>

As the Papua New Guinea country study illustrates, outcomes are most likely to be restorative, involving the payment of compensation and the offering of conciliatory gestures, often from both parties, although there may occasionally be the imposition of corporal punishment and banishment. Detention and imprisonment were unknown in most societies prior to the arrival of colonial powers, but now exist. PRI reports that IJS do not impose corporal punishment on women and girls in traditional justice in sub-Saharan Africa.<sup>87</sup> The country studies uncovered no evidence to the contrary.

### Appeal and Oversight

In traditional or customary systems, cases can be referred to a higher level within the same system if the traditional leader at the lower level fails to resolve them. Difficult cases may be referred to a higher level before they are tried in the lower ‘court’. In countries like Nepal, there is a great variety of IJS: almost one informal justice system for each ethnic group, of which there are an estimated 96. In this case, the referral options are limited because numerically smaller ethnic groups have fewer levels of chiefs within a given structure. There are only a few examples of traditional systems where monitoring consistently occurs.<sup>88</sup>

### Fees and Costs

Many courts of traditional chiefs charge a fee or demand some form of payment, such as cash, livestock or food, for dealing with disputes and hearing cases. Some chiefs’ courts also issue fines as punishment. One difficulty with this tradition is that no standard payment is set; consequently, one party can try to gain favour by making a better offering than the other party. The parties may also cover the cost of paper and pens.

## RELIGIOUS LEADERS

Religious organizations are often very interested and involved in justice issues. The Commissions on Justice and Peace (or Justice Development and Peace) that operate under the auspices of the Catholic Church in many countries frequently provide legal assistance and mediation services may be a part of the package of services offered. Likewise, many other Christian churches and organizations linked to them, such as the YWCA or the Catholic Commissions for Justice and Peace, often provide legal services to poor people. Such involvement of religious organizations is often important in programming for primary justice and thus for informal justice. Nevertheless, this kind of work in itself is beyond the scope of this study, which limits itself to an examination of religious leaders or authorities directly adjudicating or settling disputes.

Religious officials or leaders often settle disputes in settings of varying formality. People, whether individually, in couples or in groups, may consult a religious expert for an answer to questions about the propriety of personal conduct or other particular questions. More formally, a matter may be submitted to a religious official for determination.

86 PRI 2000.

87 *Ibid.*, p. 33.

88 One is the NGO-modified *Shalish* court system in Bangladesh. Here, of course, NGOs rather than the state do the monitoring, which is therefore not official. In addition, it is debatable whether these courts are a traditional system. The heavily regulated Gacaca genocide courts in Rwanda were subject to a relatively rigorous monitoring system, with a specially constituted unit in the country’s Supreme Court, in addition to monitoring by national and international NGOs and a high level of research interest. This modernized version of Gacaca could hardly be deemed a traditional system, though.

There are few examples of religious courts on matters affecting lay people outside Islam. Jews in many countries refer to religious authorities (*beth din* courts) on some matters of family law. In some countries, such as Israel and the United Kingdom, legal recognition is given to settlements reached in these frameworks. Catholics may occasionally seek the annulment of a Catholic marriage, and canon law procedure and rules deal with this.

The significance of all of these examples (and probably others) of 'legal' approaches pales in comparison to the role of *shari'ah* law and of religious officials in Islam. Islamic law is generally considered to be one of the major world legal traditions. Millions of Muslims in many countries rely on *shari'ah* courts and the precise prescriptions of Qur'anic religious law or other Islamic sources of interpretation to settle various questions, particularly ones of family law and inheritance. In its consideration of religion-based IJS, this study thus exclusively treats the role of Islamic courts and religious officials.

### Composition and Appointment

*Imams*, *cadis* (judges) or *marabouts* (religious leader or teachers) are not usually members of an organized clergy, but rather are community leaders recognized and locally selected for their piety and knowledge. Depending on the size of a particular mosque or Muslim community, a local *imam* or *cadi* may interpret or apply Islamic law. Similarly, the judgement of scholars, who are variously called *sheikhs* or *muftis*, may be sought to pass judgement and to formulate general interpretations (*fatwas*) on different questions.

### State Links

Given the variety of countries where Islamic law is practiced in some way or another, it is difficult to generalize about its relations to the state. Many secular states with large Muslim communities employ normative legal pluralism, whereby a set of state laws that incorporate precepts of Islam governs matters of family law and personal status. The country study of Niger shows that state links are unofficial but deeply embedded. This is distinct from countries that explicitly proclaim adherence to Islam, such as Saudi Arabia, Iran or Sudan, or parts of federal states, such as Nigeria, where *Shari'ah*-based penal laws are in force and generally applicable.

Some other countries permit legal recognition of arbitration settlements reached by religious bodies or officials. In recent years, countries such as Canada have had vigorous public debate about recognizing such settlements. In Tanzania, state courts apply Muslim religious law in family matters. Other countries, such as Lebanon, may assign responsibility for family and inheritance law to religious courts for the Muslim community, with parallel arrangements for other religious communities. The legislation of some states allows a choice between civil or religious marriage and family law regimes. Kenya, for example, allows Muslims to regulate matters of personal status in religious courts under Islamic laws. The courts and legislations of some states have left marriage and family law relatively unregulated, leaving the field mainly to religious law and authority.

### Typical Normative Frameworks Employed and Jurisdiction

There are a few countries where Islamic law applies to penal matters. Today, family law (marriage, divorce, guardianship) and inheritance matters are the main fields in which Islamic law applies. The laws and constitutions of many predominantly Muslim countries formally recognize the legal determinations of Islamic religious authorities in these fields. The normative frameworks applied generally have their basis in the Qur'an and other sources of Islamic law, as interpreted by religious scholars of the different Islamic traditions. The more direct source of law in some countries, such as in Egypt and Morocco, may be codified family and inheritance law, which, while rooted in the Qur'an, has been somewhat modified.

### Typical Processes Employed and Force of Outcomes

Proceedings of religious-based IJS are generally in vernacular languages, though senior religious officials will often be conversant in Arabic. In matters likely to have a clear legal interpretation, adjudication by a religious authority is likely to have the character of a ruling, and thus to be somewhat akin to an arbitration or litigation process. It is nevertheless very possible that particular *imams* or other religious authorities or advisers will attempt to reconcile the parties, perhaps through a mediation-like process within the framework of a clear set of values. In Niger, most religious officials interviewed clearly favoured doing everything possible to promote reconciliation in marital disputes and emphasized the importance of the 'cooling off' period set down in Islamic law regarding repudiation of a wife. The combined roles of legal authority and spiritual and social adviser may result in a holistic approach to problem solving.

The process is unlikely to be public. Settlements or decisions may gain their force from the authority of the religious official within the community. Depending on the relations between the state and religious authorities, state authorities may officially or unofficially recognize and enforce such settlements.

### Appeal and Oversight

In some countries, it is unlikely that the state will supervise religious courts, though a government ministry may exercise general oversight of the activities of religious communities (as in Egypt and Turkey). It may be possible to refer matters of legal interpretation from a local mosque to a higher religious authority.

### Fees and Costs

Practice regarding fees and costs vary greatly. In countries where religious courts are formal (as in Jordan and Malaysia), court fees are payable. Where the system is a non-state IJS, donations may be given or expected. In Niger, there were some reports of payment of 'summons fees' to Islamic organizations or payment of a share of the value of the litigation. Payment may be waived for poorer people.

## LOCAL ADMINISTRATORS WITH AN ADJUDICATIVE FUNCTION

Many places in Africa and Asia have a decentralized government structure in which the lowest level consists of local administrators. These administrative structures may either be established by the modern state or confer state functions on traditional governance chiefs, systems and structures. This continues, to some degree, the model established in colonial times and is especially true of former British colonies. In several countries of southern Africa, the pre-existing 'traditional or customary authorities' (as they are called in Malawi) have been engaged as local administrators. The pattern in Malawi is broadly similar to that found elsewhere in southern Africa, including in Mozambique and Zimbabwe. Local administrators take on tasks such as sensitizing community members on development issues, election issues and/or other issues.

Where courts and other state authorities are distant, a government official may enjoy much status and power in the community, so that people turn to the official's authority to solve a dispute. In this way, local officials have long helped to solve local disputes, even those that are unrelated to the exercise of administrative power. In some countries, this role has been formalized so that local officials are formally authorized to solve disputes either through mediation or with some binding force. In Ecuador, local administrators formerly had an adjudicative function, which has now been abolished by law.

In Uganda, the judicial tribunals of the kingdoms were abolished when the country became independent. The Local Council system (initially the Resistance Committee Council and Court system), springing from its revolutionary origins in the National Resistance Movement (NRM) insurgency, was established nationwide with an

adjudicative function from its origin.<sup>89</sup> The Local Council courts (LC courts) were set up to provide ‘grassroots’ justice, to ‘popularize’ the administration of justice, and to reconnect the people with their customary traditions.<sup>90</sup> The Local Council system introduced important innovations, especially in the representation of women, requiring that a minimum of 30 percent of representatives be women and that the roles of chair and vice-chair be equally distributed between men and women.

### Composition and Appointment

Local administrators with adjudicative functions may be popularly elected, as in the Philippines or in Uganda. They can also be administratively appointed, as with the administrative officials in Malawi and Mozambique, who often settle disputes like in many other developing countries. In many instances, they may be fulfilling an adjudicative function without a clear legal basis to do so. The administrators’ close links with the executive branch are a major challenge for this type of mechanism. In Uganda at the village and parish levels, the LC court is entirely comprised of members of the Executive Committee elected in local elections. At the district level and above, the Executive Committee appoints the members of the LC court. The village courts in Bangladesh present an interesting model, whereby five-member panels are composed on a case-by-case basis with the participation of the parties, with representation by elected *Union Parishad* (UP) representatives and members of the community. Parties to a case can claim that the UP chairman is disqualified due to potential bias.

### State Links

Local administrators are typically salaried by the district or sub-regional administration, although the salary may be insufficient as full-time employment and many local administrators at the village level have other sources of income, such as farming (in addition to income-generating court functions). In Uganda, the principle of voluntariness in the LC court system is emphasized where only the upper levels of the system receive an allowance or salary. Inadequate ‘facilitation’ (provision of support and resources) of LC court officials is usually the reason for the failure to comply with the fee structure, with much higher fees charged for the services and incidents of corruption. In the countries where this model is prevalent, there is a persistent question about the government agency or agencies to which the courts belong. There are often links to ministries responsible for local government (Bangladesh, Uganda), but many respondents believe that it is desirable to strengthen institutional links to the judiciary and the Ministry for Justice. As mentioned above, the combination of executive, political and judicial functions gives rise to difficulties.

### Typical Normative Frameworks Employed and Jurisdiction

In principle, these adjudicative bodies should usually settle civil disputes without violating state law. Legal texts are seldom available, known or understood. Local custom and a pragmatic approach to dispute settlement are likely to be paramount. Generally, bodies such as these are supposed to confine themselves to civil matters and petty crimes (as in Uganda and Bangladesh). The LC courts in Uganda have sometimes been criticized for overstepping their legal mandate and deciding matters of criminal law. In both Uganda and Bangladesh, the restricted jurisdiction of courts at this level motivated litigants to take their cases ‘downward’ to informal village-level *Shalish* courts rather than, as intended, upward to the District Courts.

### Typical Processes Employed and Force of Outcomes

The types of processes and the force of decisions or outcomes vary, often depending on the degree of state control and involvement, but also on the levels of literacy and the seriousness of the matter. The LC courts in Uganda reach formal decisions after public hearings that resemble court hearings, though without technical rules of evidence

89 The 2006 Local Council Courts Act now governs LC courts.

90 Kane, Oloka-Onyango and Cole, 2005.

or legal representation; decisions are binding. Decisions of the *Barangay* justice system in the Philippines are like binding arbitration settlements that the courts can enforce. Hearings do not resort to rules of evidence. Legal representation is generally not allowed.

### Appeal and Oversight

In Uganda, LC court decisions can be appealed through the LC court system up to the chief magistrate. The chief magistrate, who is supposed to visit to check records and orders issued by the LC courts, has the legal mandate to supervise the LC courts. The local government structure is also responsible for monitoring, but, because of the large number of LC courts at all levels and the limited resources available to the local governments and the judiciary, the monitoring of the LC courts is not considered a priority. While the court function of the LC court system is under the judiciary and the Ministry of Justice, the local council system is tied to the administrative local government structure and is under the Ministry of Local Government. This not only creates potential problems of coordination, but also entails that the responsibility for monitoring and supervising of the LC court function is neither clear nor exercised.

### Fees and Costs

LC courts in Uganda are authorized to charge fees and may also levy fines. In recent years, there has been increased regulation of this in an attempt to prevent abuses, yet it remains problematic. In the *Barangay* justice system in the Philippines, small filing fees are payable.

## CUSTOMARY OR COMMUNITY COURTS WHERE THE ADJUDICATOR IS NOT A LAWYER

Customary courts or community courts categorized as IJS can be distinguished from the category of traditional leaders mainly by the method of appointment, which is through a state agency, and the specific legislation regulating them, which imparts uniformity of structure and procedure. They are distinguished from local administrators because they have only an adjudicative, rather than executive, function and they may be attached to the judiciary and made subject to codes of judicial discipline and ethics. The local courts in Sierra Leone and Zambia, the village courts in Papua New Guinea, and the community courts in Mozambique are examples of community courts, as they do not have an administrative function. Such courts attempt to gain legitimacy by having roots in a history of justice provision prior to the existence of the modern state and/or by claiming to draw on the local norms and customs of a specific locality of the country. These structures' norms and hereditary power are often rather tenuously related to tradition and custom. The reason for this is that the state has re-established or modified some of the local court and mediation structures with more or less focus on their original features and traditional sources of legitimacy. The *Abunzi* in Rwanda is an example of an innovative institution in a context where cataclysm and reconstruction have dramatically changed the face of traditional patterns of power. The community courts established by law in Mozambique in 1994 after the civil war are, on the other hand, based on the former popular courts, which were part of the socialist-revolutionary system that sought to substitute the traditional courts that were abolished after the country gained independence. Consequently, the community courts have a history of strong affiliation with the ruling party, FRELIMO, although today they are supposed to be independent institutions with locally elected judges.

While they are often respected locally, these courts may not enjoy respect from legal professions (the private legal profession and the judiciary). Nevertheless, this varies greatly among different localities, often depending on the personal attitude of, for example, magistrate or district court judges toward the local courts.

### Composition and Appointment

Persons locally elected or appointed on the basis of their reputation (good moral standing) or heredity (or both) preside over these IJS. Justices and judges are very unlikely to have had legal training. Where appointment is not based on heredity, there is usually a relatively standardized procedure of appointment. The law may also provide

for clear selection criteria and contain provisions on discipline and dismissal. In Zambia, a judicial commission appoints local court justices on the basis of nomination by local chiefs, whom the president appoints. Local councils in Zambia were originally associated with state and political party power. In Sierra Leone, the Minister of Local Government appoints the chairperson of the local court and the other officials are a panel of elders, a court clerk and the chiefdom police.

Some years ago, an Afronet report on the local courts in Zambia<sup>91</sup> pointed out shortcomings in relation to judicial independence, as the Minister for Justice is effectively able to establish and abolish local courts at will. The process of appointment lacked transparency and was dominated by headmen and chiefs, and local court justices (now local court magistrates) tended to have a background in the civil service. In recent years, the Zambian judiciary has made efforts to broaden the recruitment base of local court magistrates and to make the process more transparent by advertising vacancies. The Minister of Local Government in Sierra Leone appoints and has the power to remove local court officials, which effectively means that the tenure of the officers depends on the executive branch; this opens the system to political abuse.<sup>92</sup>

### State Links

The chief's courts in Botswana are part of the country's formal legal hierarchy of justice. They apply customary and common law, but have limits to their jurisdiction and they are at the bottom of the formal legal system. The local courts in Zambia and Sierra Leone are at the lowest level in the judicial structures. They administer customary law, and have jurisdiction over all cases of a customary nature as well as minor criminal cases. The community courts in Mozambique are not part of the formal legal hierarchy of justice, but they are allowed by law to deal with civil cases and petty crimes not subject to imprisonment. Although created by law, they have no formal links (such as appeal mechanisms) to formal state courts. In practice, though, many refer cases to the police or the district courts and vice versa, if only informally.

### Typical Normative Frameworks Employed and Jurisdiction

There is likely to be use of customary<sup>93</sup> and statutory legal orders. The material or substantive jurisdiction of Sierra Leonean or Zambian local courts varies with respect to types of cases, the size of civil awards, and the gravity of crimes that they are legally mandated to deal with. Local courts have no discernible tendency toward a wider mandate than that of IJS that are not integrated into the state. While remedies for certain civil wrongs may be more standardized in local courts than in chiefs' or headmen's courts, this might not always be the case. In some cases, statutory law stipulates remedies and sanctions, while customary law guides the process and the investigation of the case (as in Papua New Guinea). There may be some competition between local or customary courts and other mechanisms of justice, such as traditional chiefs. This would involve competition over clients and the handling of specific cases. There are also reports of local courts exceeding their mandates. In Zambia, the Intestate Succession Act of 1989 was introduced to, among other things, ensure that women get a share of the joint estate, a move deemed necessary because traditional customs among most ethnic groups hinder or prevent women from inheriting property. Reports say that some local courts sometimes subvert the clear intention of this legislation, using the Local Courts Act to override the Intestate Succession Act. The fines that these courts impose for property-grabbing are very low and inadequate to tackle the problem.<sup>94</sup> Conversely, policies designed to limit jurisdiction might have unintended effects in some situations. The Papua New Guinea country study shows that, when the authority of the village courts to handle some matters is limited to a relatively low monetary ceiling, disputes are brought not to the (formal) District Court, but rather to even less formal traditional mechanisms.

91 Op. cit.

92 Kane, Oloka-Onyango and Cole, 2005.

93 Customary legal orders are occasionally even faith-based, as in the case of Niger.

94 African Human Security Initiative, Zambia, 2009.



## Typical Processes Employed and Force of Outcomes

Such courts do not use technical rules of evidence. Legal representation may be expressly excluded.<sup>95</sup> Procedures, such as those in Zambia, may be more formalized than those in traditional justice systems, but may nevertheless borrow from local custom. Local languages will be used. The Zambian local courts are obliged to follow the rules and procedures set down in specific national legislation (legal representation is not permitted before them) and are subject to some supervision and control by (and support from) state officials at the district, provincial and national levels; this support and supervision may be strong or weak, according to the resources and competences available to the supervising officials. Conversely, there is currently no state system of supervision and control in Mozambique, as the draft law regulating community courts has never been passed. Consequently, there is ample room for a variety of relationships between community courts and the state administrations and district courts.

## Appeal and Oversight

There may be a close link or direct appeal mechanism to the magistrate or first instance courts. Nevertheless, this may pose some difficulties in that (in Zambia, for instance) the local courts are not considered to be courts of record. Thus, all factual issues must be fully heard and determined again from scratch. The same applies to the relationship between community courts and district courts in Mozambique. While the 2007 Organic Law of the Judicial Courts (Law 24/2007) notes that judicial courts “may articulate with other existing conflict resolution instances”, it does not spell out any clear procedures for appeal mechanisms. When such appeals are made, they are based on local initiatives by the judges themselves, which leads to a lack of uniformity across the country.

## Fees and Costs

Customary courts of this kind are generally authorized to charge fees, which may be centrally determined (as in Zambia). Ignorance of the fee structure may be a problem, permitting clerks and adjudicators to demand other payments. The Papua New Guinea study notes how adjudicators of the village courts are grossly underpaid, even compared to local representatives, although their workloads are similar.

## COMMUNITY MEDIATORS

In many parts of the world, NGOs train members of local communities to mediate in local disputes. This is too often done on an *ad hoc* basis and suffers from the weakness that there may often be only a single training session with no follow-up. This study does not include ‘mediators’ who are not part of a structure or system with institutionalized procedures and support.

In some parts of the world, community mediation structures have been developed. The country studies of Bangladesh, Malawi and Papua New Guinea provide some examples of this, and there are also fairly well known programmes of this kind in countries such as Nepal and Albania. The community mediation structures are very often NGO-initiated, usually with the help of financing from external donors. The cooperation between the two is often based on a shared wish to introduce alternatives that take more account of human rights, including gender equality, than traditional structures. There may also be an intention to alter those local power balances, which may be seen as corrupt and nepotistic. In most cases, and partly for similar reasons, actors in the formal justice sector approve of the mediation schemes, seeing them as supplementary to the formal system and to the justice provision by traditional leaders. Justice system actors may also see these efforts as presenting an opportunity to ease the burden of large case backlogs on lower court systems. This also seems to be the view of local administrators who have an adjudicative function.

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<sup>95</sup> See South African Law Commission, Discussion Paper 82, referring to some examples.

## Composition and Appointment

The target groups for the appointment of mediators may be paralegals, representatives of local CBOs and the staff of police-linked victim support units. They may be ordinary people who volunteer to participate in training and projects of this kind. Mediation structures are generally embedded in the local communities themselves. Trainers and coordinators – these are paralegals in Malawi and lawyers in Nepal – serve as backup and supervisors for the mediators. A village mediation committee was established in Bangladesh; it consists of ordinary community members who are trained in monitoring the mediation process to ensure that it is fair and in accordance with human rights. Depending on the approach of the particular NGO or agency promoting such initiatives, local authorities, traditional leaders, or local community-based organizations may influence the choice of persons chosen for training as mediators.

## State Links

In Albania, a legal framework has been established that recognizes the community mediation programme within the context of the provision of justice. The same type of legislation is under way in Nepal and is being considered in Malawi. Community mediation structures are sometimes connected to the local administrative structures (see below). In Nepal, the village development committees house the community mediation programme in some places and the office of the village development committee can host mediations as well.

## Typical Normative Frameworks Employed and Jurisdiction

In such schemes, village mediators receive cases involving civil issues and petty crimes. In the examples in this study, there is an emphasis on compliance with human rights standards and principles and with national law, though custom and ideas of equity are also likely to play a role. Thus, mediators are trained in the nature of more serious cases and instructed to refer them to the formal court system or to the traditional leaders, depending on the case. In this way, they also serve as diversion agents within the local community. In Nepal, Malawi, and Bangladesh, the mediation programmes 'work' (their efforts are voluntary) parallel to the provision of justice by the traditional leaders. The country studies address some of these systems in an attempt to determine, for example, who uses these systems and why.

## Typical Processes Employed and Force of Outcomes

The established methodology for such efforts is usually third-party mediation rather than arbitration or conciliation. Evidence from some contexts nevertheless suggests that the 'mediators' occasionally stray from mediation processes and engage in arbitration or other activities to influence outcomes, often out of a (legitimate) concern to protect the weaker party, and NGOs may be playing more than one role in the process, facilitating, advising adjudicators and assisting parties. While the process of mediation is confidential in Nepal and Malawi and therefore differs from the communal process that traditional leaders conduct, the mediation process in Bangladesh looks very much like the dispute resolution process that traditional leaders pursue within the *Shalish* system.

## Appeal and Oversight

The level of NGO supervision and interaction with the mediation processes largely depends on factors such as the mediators' and supervisors' level of training and the amount of working time and resources available. Unstable NGO funding may play a role. The Malawi country study shows that some representatives of the judiciary are interested in the community-based mediation programme as a way to divert civil and potentially minor criminal cases from the formal system, with the possibility that the courts could enforce settlements; this has yet not been piloted or implemented.

## Fees and Costs

The programmes encountered generally promote free services, instructing mediators not to charge fees for their services. A dependence on external funding is a weakness of this model. Potentially closer integration with the formal structure (i.e., with the judiciary or local government) could strengthen the sustainability of the programmes.

## LINKAGES BETWEEN INFORMAL JUSTICE SYSTEMS AND FORMAL JUSTICE SYSTEMS

In most operating contexts, there will be certain functional linkages between state providers and IJS' providers. State law may define such linkages and provide for official forms of collaboration (including appeal procedures, referrals, division of labour, advice, and assistance), but even where this is not the case, there are often various forms of unofficial collaboration. Linkages may also be negative, with competition over jurisdiction and even overt opposition or hostility.

Aside from functional linkages, there are instances of overlaps or 'borrowing' of norms, rules and procedures between IJS and state providers. Such norm and rule-based linkages may derive from long histories of interaction and coexistence. They point to the changeability and adaptability of different primary justice providers and to their interdependency.

### FUNCTIONAL LINKAGES

Functional linkages between primary justice providers refer to the kinds of collaboration that exist in the handling of cases; examples include appeal procedures, the sharing of information, cross-referrals, jurisdictional division of labour for types of cases handled, financial and logistical support mechanisms, regulation and monitoring of performance by the state of IJS providers, etc. Such functional linkages may exist directly between primary justice providers, such as between the lowest level state courts and customary courts, or they may be through intermediaries, such as the state police or paralegals. It is important to distinguish between official and unofficial linkages, which often coexist.

### Official Functional Linkages

Official functional linkages are those written into state law; they exist where there is some state recognition of informal (including non-state) justice providers. These may include linkages between state and non-state primary justice providers and among different non-state providers (such as within a hierarchy from state customary courts to traditional authorities consisting of chiefs, headmen and village heads). Generally, levels of state recognition can be placed on a continuum between independent coexistence, limited integration and substantial incorporation of state and non-state justice systems (see the Continuum of Formality/Informality and State Recognition table in Chapter II).

'Coexistence' pertains, for example, in the handling of disputes by chiefs and community courts in Mozambique. Officially, functional linkages are confined to the state, which recognizes the non-state providers and stipulates the basic rules for how they should be constituted (i.e., the s/election of adjudicators) and the boundaries of their jurisdiction. Legislation outlines the types of cases that they are allowed to treat, namely, only civil and family-related cases. Coexistence does not involve legally established procedures of appeal, cross-referrals and formal sharing of information between the state courts and the non-state providers. Thus, state law understands the handling of cases by non-state providers, which the state recognizes in Mozambique, as taking place separately from the formal justice system. They handle distinct types of cases: the formal system handles criminal cases and the informal systems handle (some) non-criminal cases. This division is not watertight, though, and permits some forum shopping, depending on knowledge and resources.

‘Limited integration’ refers to situations where a range of legal procedures link the functioning of state-recognized IJS to formal state courts and the police, but where the IJS are not part of the official hierarchy of courts. Procedures of recourse, from the informal to the formal, the sharing of information, documentation of cases, and the like, coexist with various state mechanisms for the regulation and monitoring of IJS performance. Examples include the *Rondas Campesinas* in Peru, the traditional courts in South Africa, and the customary courts in Zimbabwe (or the local courts in Zambia or Sierra Leone). In these situations, the types of cases that IJS and state courts handle may overlap, but there are usually limitations on the mandates of IJS (they are not, for example, permitted to handle serious criminal cases). There are also often limitations on the amount of compensation or damages they can award in a civil suit. In countries where the formal state courts can also apply customary law, IJS may be subject to such monetary limitations. In Zimbabwe, the Local Courts Act of 1990 provides for strong functional links between the headmen’s and chiefs’ courts, which constitute the local court structure, and the magistrates’ courts. Despite the links, the two are seen as distinct structures. The chiefs’ courts are considered first instance courts with limited monetary jurisdiction. If damages exceed that amount, the case must be sent to the magistrates’ court, irrespective of whether customary law is applied. Moreover, the chiefs’ courts must register any ruling with the clerk at the magistrates’ court.<sup>96</sup> Thus, legislation concerning limited integration defines different jurisdictions on the basis of the degree of criminality or the amount of compensation or damages that may be awarded, rather than in terms of entirely distinct cases handled by each. According to this model, local or customary courts may not be considered courts of record, so that cases restart from the beginning in the magistrate’s court and factual matters need to be proved afresh.

‘Substantial integration’ (also referred to as ‘incorporation’) refers to situations in which IJS are an integrated component of the formal court system – for example where customary courts are the lowest tier of the formal court system below the magistrate’s court. This is the situation in Botswana with chiefs’ courts or chiefs’ *kgotlas*; other examples are the village courts in Papua New Guinea and the island of Bougainville. Generally, IJS that are substantially integrated into the formal state system are granted roles or mandates that apply to civil disputes, small-scale conflicts or petty crimes. This is based on the idea that they can help end conflicts that would otherwise become severe, which would require the intervention of the police and higher courts. Substantial integration can thus also be a way to reduce the burden on formal state institutions. In many contexts, such as in Papua New Guinea and Bougainville, the incorporation of IJS into the formal court structure can also involve a distinction between the kind of law and procedures applied, such that, for example, the lowest level courts apply primarily customary law and use informal procedures, whereas higher level courts apply common law and formal legal procedures.

In some cases of substantial integration, cases that are heard before the ‘customary’, local, community or similar court can be appealed to a higher court within the formal system. Whether this is possible in the specific context may depend on whether IJS use case records and whether the decisions of IJS accord with national legislation and applicable international human rights standards. Even when there is no option of direct appeal, it may be possible to bring the case again at courts of first instance in the formal court system. In some contexts, such as the *Abunzi* in Rwanda, the established scheme provides that only those cases in which there has been an attempt to resolve the dispute through IJS are eligible for consideration by the court.

The different degrees of state recognition reflect the variety of official functional linkages between IJS and formal state providers; assessment of these depends on the country context. The categories above, while perhaps a useful guide, are not exhaustive and it may be difficult to determine the most appropriate category in some cases. Nevertheless, it is noteworthy that not all IJS within a given country may be subject to the same kind of state recognition: some may coexist, others may be integrated in a limited or substantial way, and others may not be recognized at all. There are also instances in which state recognition reaches farther than the categories discussed here. Chapter

<sup>96</sup> African Rights 1996 in Penal Reform International, 2001.

VI on human rights notes that the Colombian constitution and the jurisprudence on its interpretation by the Constitutional Court provide for some delegation of judicial power that amounts to *de facto* federalism, with only limited power of judicial review left to the Constitutional Court.

Moreover, irrespective of the official model employed (coexistence, limited integration or substantial integration), unofficial practices may be more important in practice than formal functional linkages in many contexts.

### Unofficial Functional Linkages

Despite the lack of legislation outlining linkages, unofficial functional linkages between state and non-state providers can be established. Court officials of formal courts and adjudicators of IJS may collaborate with each other in various ways. Usually, this happens on an individual basis, based on the judgement and interest of particular individuals within the formal state system and their relationship to informal justice providers. This necessarily implies a lack of uniformity across a given country: different layers of collaboration exist in different regions and are not centrally regulated.

One example is Mozambique, where there are different kinds of unofficial functional linkages between chiefs' courts, community courts, the police and the district courts. In the central part of the country, for example, the state police have communicated 'informal rules' for how IJS should perform and relate to each other and the state institutions. The police have assumed the role of distributing caseloads and litigation between the informal and formal courts. They also communicate informal rules for the division of labour and even jurisdictional boundaries among different informal courts and between these and the police. These rules include a prohibition on informal courts from settling criminal cases, reserving 'traditional' cases for chiefs and civil cases for community courts. The police unofficially punish the informal justice providers if they do not abide by the informal rules. Community courts are situated within the premises of the lowest level state administration and use papers and official stamps from the state administration on their notifications. The police strongly encourage chiefs to use handwritten notifications when passing on cases to other informal courts or to the police. While links to the police are strong, functional linkages to the formal district court are weak in this part of the country.

In other areas of Mozambique, the (formal) district courts also play a role in formulating informal rules with chiefs' and community courts. Case studies show that, in some areas, the police and the formal courts bring in traditional leaders to provide advice or evidence in court cases. In Mueda in the north, there is much informal collaboration between the district court, the community courts and chiefs' courts that includes joint discussions of division of caseloads, definition of sanctions, and referral mechanisms. In practice, this institutionalizes informal appeal procedures between the IJS and the official courts, even if this is not based on legislation. In other areas of the country, state administrations informally assist the community courts by providing basic stationery, official stamps on notifications and declarations, and logistical support.<sup>97</sup>

The reasons behind such forms of unofficial functional linkages vary, but usually depend on the views and interests of the individual justice providers. In particular, local state judges' and police officers' personal views of customary authorities can influence the extent to which they collaborate. State officials do not always share the same views. In the Sussundenga district in central Mozambique, the local police were clearly interested in working directly with chiefs, whom they considered to be important for reducing crime and conflicts, but the district judge had no such interest, as he saw the chiefs' courts as backward and irrelevant to the administration of justice in his court. The opposite was true in Mueda in the north, where the district court judge viewed collaboration with chiefs as a key element in providing evidence and information and in handling civil cases.

In contrast to these examples, there are other cases in which justice officials do not abide by official functional linkages in the context of limited or substantial integration. The country study on Uganda, for example, describes how

<sup>97</sup> De Sousa Santos, B. and Trindade, J. C., 2003; Kyed, H., 2007.

some LC courts do not refer cases to the magistrate court, even when such cases are beyond the official jurisdiction of the LC courts.<sup>98</sup> On the other hand, power relationships and informal agreements manifest themselves in various ways. Before consenting to take a case, other state institutions often require letters of referral from the LC courts showing that there has been an attempt to solve it at the LC court level. Ordinary people feel that they may suffer from the LC courts if they bypass it, although there is no provision for this in the relevant law or regulations. In Zimbabwe, there have been instances in which chiefs' courts ignore state law by handling cases that exceed the maximum amount for damages or compensation as well as by failing to report cases to the magistrate.<sup>99</sup> In Kenya, hostility towards IJS by higher and lower ranking state court judges results in functional linkages being ignored or downplayed in some contexts.<sup>100</sup> Thus, while officially there might be a high level of integration or incorporation, state courts and local non-state courts may operate relatively independently, leading to a kind of *de facto* coexistence. Seldom, however, is such coexistence by abstention completely free of conflicts and contradictions. Rather, abstention may be a way for non-state courts to avoid the kinds of state regulation and restrictions that accompany functional integration with the state legal system, as is the case with some chiefs' and LC courts in Zimbabwe and Uganda, respectively. Abstention from collaboration can also be seen as a kind of resistance to state regulation (particularly on the part of IJS). It should therefore not be taken for granted that primary justice providers always equally endorse functional linkages.

### Norm and Rule-based Linkages

Norm and rule-based linkages refer to overlaps, intermixes or 'borrowings' of norms, rules and procedures among different primary justice providers. Such linkages often derive from long histories of interaction and coexistence, whether based on official or unofficial functional linkages or a combination of both. Many case studies show that IJS draw on different normative sources. There are also examples of formal state institutions drawing on legal sources other than statutory law.

## INFORMAL JUSTICE SYSTEMS APPLYING DIFFERENT LEGAL ORDERS – LEGAL PLURALISM IN THE PRACTICE OF INFORMAL JUSTICE SYSTEMS

The same justice provider can apply different sources of law or norms to treat different types of cases, such as state criminal law to deal with homicide and customary or traditional rules to deal with marital issues. There are, however, also examples in which different sources of law are applied as explanations for the same result, either by the same justice provider or as the case moves from one justice provider to another.

Intermixing occurs when norms deriving from different sources of law are applied to the same incident. One example of this, taken from rural Mozambique, involved an incidence of theft. The case was perceived as both a crime and a manifestation of evil spirit possession: the offender served a prison sentence and, when released, paid compensation to the victims and underwent an exorcism.<sup>101</sup> In this case, the two systems and their respective normative bases operate in parallel. In other cases, the two may operate together, applied by the same justice provider. Thus, in Papua New Guinea, the local village courts, headed by salaried magistrates (laymen), mix elements of state law and custom within the process of settling a single case. In Niger, there is a merger of Islamic law and local custom, as that country's study examines.

Thus, when speaking about norm or rule-based linkages, it is useful to distinguish between 1) situation-specific shifts between legal systems or types of laws in which justice providers explicitly refer to different sets of laws (state law, customary law, religious law, etc., as is the case with higher courts in Papua New Guinea) and 2) mergers of

98 Khadiagala, G., 2001.

99 African Rights, 1996.

100 Nyamu-Musembi, C., 2003.

101 Kyed, H., 2007.

standards in which there is no explicit distinction between legal systems or types of laws (as is the case with village courts in Papua New Guinea). Legal hybrids, or what academic literature refers to as ‘interlegality’,<sup>102</sup> occur where a rule or ruling combines elements originating from different and often contradictory legal orders or normative systems. In such situations, it can be difficult to clearly distinguish between state and non-state law. There may also be a blurring of the historical periods to which different types of law belong. An adjudicator (state or non-state) may invoke hybrids or mixtures of standards to deal with a particular case and new legal orders, thereby creating new legal meanings and actions.<sup>103</sup>

There is necessarily a qualitative difference between situation-specific shifts and legal hybrids. In the former, adjudicators consciously invoke a particular law to handle particular cases. Their choice can therefore be predictably based on certain interests and convictions that they might have or on regulations to which they are bound. In the latter instance, mergers of elements originating from different sets of rules or law are implicit and may therefore result from historical developments rather than from explicit interests, choices and/or regulations.

### STATE POLICIES DEFINING LINKAGES BETWEEN LEGAL ORDERS

Examples of state policies that forge official linkages between rule and norm-based systems include:

1. State codification of customary law applied by non-state providers, which fixes oral traditions, rules and norms in legislation
2. State regulations that oblige non-state or customary justice providers to adopt procedures that are similar to state legal procedures, such as documenting or reporting cases, etc., even if these cases involve the enforcement of customary law according to ‘informal’ procedures (as in Uganda, Zimbabwe, and Zambia)
3. Cultural or religious exceptions written into state law, for example, within the area of personal law (marriage, divorce, land inheritance, etc.). (See, for example, Kenya, Zambia, Sierra Leone and Zimbabwe, where indigenous customary law overrules the constitution with respect to religious and marital issues.)<sup>104</sup>
4. Legislation to regulate formal courts’ consideration of compensation payments made in customary or informal forums, as in certain legislation in Vanuatu<sup>105</sup>
5. So-called ‘repugnancy’ clauses
6. Some less invasive successors of repugnancy clauses, where appellate or collateral review<sup>106</sup> is built into the statutory courts’ powers of oversight to ensure conformity with legislative and constitutional standards having primacy
7. Codification and integration of customary, indigenous or religious norms and procedures into written state law to be applied by formal state courts, as in the case of states with predominantly Muslim populations

These different types of state policies share some recognition of non-state law by state law or state legitimization of the authority of non-state or customary justice providers. Nevertheless, such policies simultaneously imply

102 De Sousa Santos, B., 2006: 46.

103 Ibid., pp. 46-47.

104 ICHRP, 2008: 8-9. On how Kenya’s constitution protects customary and religious family law systems (often to the detriment of women’s rights), see Nyamu-Musembi, C., 2003: 28. Note that this does not take account of the changes to the constitution adopted in August 2010.

105 The Penal Code, (Amendment) Act, 2006 moved the legal position from one that permitted the courts to consider compensation to one that compelled them to do so.

106 David Pimentel proposes collateral review as a possible option that is less invasive and more respectful of custom and of the dynamism and flexibility of customary justice systems. See, for example, ‘Legal Pluralism In Post-Colonial Africa: Principles for Linking Statutory and Customary Adjudication in Mozambique’, a conference paper presented at ‘State and Non-State Public Safety and Justice Provision: The Dynamics Of Legal Pluralism In Mozambique’, International Conference, Maputo, 28-30 April 2010. Collateral review would normally refrain from re-examining the merits of claims. Higher courts would confine themselves to ensuring that lower courts respect fundamental guarantees of human rights and due process.

transformation of customary, indigenous or religious norms, as these become subject to codification and regulation by state law. They become fixed and non-negotiable state law until legislative amendment or judicial interpretation changes them. There may be restrictions on the authority of customary courts to redefine customary law. An example of this was in Zambia, where some local courts began accepting cases for 'marriage interference', whereby wives pursued legal action against their husbands' new 'partners'. The practice was a break with tradition, which permitted only husbands to bring actions against wives for adultery. The High Court issued an instruction forbidding the local courts from entertaining such actions, reminding them that only the Legislature could introduce new legal remedies. In some cases, codified customary law may also exclude elements of 'lived' or oral customary rules. Such limitations play a role in restrictions placed on the adjudications of, for example, customary courts that are not allowed to handle witchcraft or dowry cases, as in South Africa and Bangladesh, respectively. State recognition on the basis of coexistence, limited integration or substantial integration (incorporation) always involves some restrictions on the substantive jurisdiction of non-state justice providers. These restrictions can be on the maximum permissible monetary compensation, the subject matter, the gravity of the offence, or permissible remedies and sanctions. Thus, while official functional linkages may imply that the state endorses and recognizes the role and importance of non-state justice providers, those linkages can also enable the state to regulate or domesticate non-state providers. It places limits on the scope of operations of non-state providers, as it brings them under the authority of state law and institutions.

Through state codification and recognition, the state also assumes the authority to define customary, religious or indigenous law. This harks back to the approach that colonial powers took when they allowed indigenous communities to decide customary law – as long as it supported the values and interests of the colonial state. With codification, the authority of definition is however largely removed from the non-state domain (i.e., from the authority of clan elders, priests, indigenous leaders and chiefs). This is even more so with respect to 'repugnancy clauses'. While the integration of religious and traditional procedures into state law might be an instance of adapting the (inherited) legal system to local or contemporary conceptions and norms, it can sometimes also be a means to boost the popular legitimacy and authority of the state. Many observers have noted the particular position and religious authority of the monarchy in relation to the changes to family law in Morocco in recent years, which have significantly improved the status of women.

In the case of cultural or religious exceptions being written into state law, cultural exceptions have come about not simply as a benign recognition of cultural differences, but also as a way for the state to avoid conflicts with traditional and religious authorities.<sup>107</sup> This is important because the national political leadership depends on the allegiance of these authorities to maintain its power base.

From the perspective of non-state providers, the codification of customary law can be both a straightjacket and a source of additional authority. It can be a straightjacket because it fixes rules and reduces the scope for adapting to new challenges and for negotiating settlements according to the procedures and norms that have been customarily used. It also reduces non-state providers' ability to define customary law. Nevertheless, the process of change and redefinition may continue where most customary law is practiced. Conversely, non-state providers can make claims to represent customary law as a means to assert authority *vis-à-vis* the state and the local population. They may also challenge state codifications or restatements of what constitutes customary law.

In short, the official norm and rule-based linkages provided by state policies simultaneously recognize and transform IJS. IJS become 'official', yet remain distinct from state law. Importantly, different interests of authority and regulation are at stake, a fact that influences the respective authority of the state and non-state institutions. Indeed, as the ICHRP has concluded,<sup>108</sup> the state may use the recognition of customary law just as much to strengthen the

<sup>107</sup> Nyamu-Musembi, C., 2003.

<sup>108</sup> 2009, *op. cit.*



power and legitimacy of its own law and institutions as to assert control or exercise influence over IJS. Conversely, non-state providers may also draw, unofficially, on state law and recognition as a means to bolster their authority to enforce decisions within the domain of ‘informal justice.’

‘State’ law can also incorporate norms and precedents from IJS. Griffiths (1997) gives examples of how state law on divorce in Botswana was transformed by a customary norm that was applied to exclude estate cattle from forming part of the matrimonial property that was being divided according to non-customary rules of law.

## THE ROLE OF POWER AND INDIVIDUAL INTERESTS

Power and interests also influence the operation of functional linkages and the effects of those linkages on the roles and mandates of different primary justice providers. Local state officials may develop unofficial functional linkages not only as a means to ease their work through collaboration, but also to ensure that non-state providers do not perform the functions that state institutions claim as their monopoly (such as handling cases of serious crime). In Mozambique, for example, local state police prohibited chiefs from dealing with any criminal case, although they had been accustomed to doing so in the past. The prohibition underpinned strict regulation in practice of the performance of chiefs.<sup>109</sup> Some scholars refer to such kinds of state recognition through regulation as ‘weak legal pluralism’, which is opposed to ‘strong legal pluralism’ in which non-state legal systems are allowed to operate on their own terms.<sup>110</sup>

Weak legal pluralism underpins aspects of power and authority and is often more in the interest of the state than in the interest of those non-state providers that the state recognizes. It does so by drawing boundaries between the jurisdictions of state and non-state providers and integrating non-state authorities into the lowest tier of the state hierarchy of courts. This can affect the popular authority of non-state providers in the eyes of users. This is particularly the case when non-state providers have traditionally laid claims to roles and jurisdiction that overlap with those of formal state courts.

In Mozambique, the prohibition on settlement of criminal cases by chiefs considerably undermined their legitimacy among the people. It prevented chiefs from dealing with offenders ‘on the spot’ and from enforcing the kinds of compensation that people preferred in cases of theft, arson and homicide, for example. Instead, collaboration with the police obliged chiefs to refer crimes to state authorities, which, in the eyes of users, could be a cumbersome process that could lead to a failure to obtain compensation when the case ended up in the statutory court. Consequently, some chiefs sometimes refused to collaborate with the police and continued to settle crimes according to the wishes of the users.

Chiefs in Zimbabwe also felt that state recognition of their role as first instance courts in the state hierarchy endangered their popular legitimacy. Here, state integration imposed a limit for the jurisdiction of chiefs in terms of the amount of damages/compensation they can issue not only in criminal, but also in civil cases. As one chief noted: “We feel we are very much restricted over which cases we should sit and over which cases we should not. Take, for instance, *lobola* [marriage payment] cases where one claims five or six head of cattle. If you value them [at Z\$500], this court has no jurisdiction to try that case or settle the dispute between the parties. We have to refer them to the magistrates. It is a very big problem because *lobola* cases are the most common in the area. The claimants don’t like to have to go all the way to the Magistrate’s Court [a trip over 40 kilometres long on a dirt road, taking over eleven or twelve hours by bus and costing at least Z\$8 round-trip]. It involves a lot of expense.”<sup>111</sup>

109 Kyed, H., 2009.

110 Griffiths, J., 1986; Vanderlinden, 1989 in Benda-Beckman, 1997.

111 African Rights, 1996: 33.

According to African Rights (1996), this situation led some chiefs to refuse to collaborate with the state<sup>112</sup> and to some people seeking justice from those customary authorities that were not integrated into the state court system. These cases show that functional linkages are not simply technical issues related to the establishment of a division of labour between different justice providers with respect to court hierarchies or jurisdictions. Functional linkages can also challenge or reduce the authority of non-state providers *vis-à-vis* the state. In practice, this often gives way to a complex interplay of collaboration and competition in which it can be difficult to define the respective mandates and roles of state and non-state justice providers. Power aspects are apparent in the widespread competition for litigants and jockeying for ultimate authority to decide significant cases related to people, land and property. Paradoxically, this competition may coexist with cooperation and collaboration among the different providers. Consequently, the relationship between IJS and the state is often profoundly ambivalent, varying at different levels and deeply embedded in micro and macro-political considerations.<sup>113</sup>

Policies on legal pluralism often ignore such issues and tend to claim that the formal state legal system and customary or other non-state providers represent distinct, internally coherent systems of norms and rules, which can fulfil different mandates either in terms of the types of cases they deal with or the scale of problems they handle.<sup>114</sup> Often, policies assume a division of labour, but ignore how state and non-state providers often make claims to the same or similar areas of jurisdiction. Moreover, this analysis also ignores how different histories of functional linkages, official and unofficial, have given rise to various layers of mergers and intermixing of the norms and rules that state and non-state providers actually apply.

While distinctions between the systems are certainly present in political practices and representations (in official texts or oral descriptions), the jurisdictional boundaries are usually blurred in everyday case settlement. Linkages among different primary justice providers often involve an ambiguous relation of interdependence and competition. Functionally, formal state courts may rely on non-state providers to provide social order and to help prevent petty conflicts from escalating into severe crime and disorder. At the same time, non-state or informal providers may pose a threat to the authority of state legal institutions, as they claim jurisdiction that state agents perceive as their monopoly. Conversely, non-state providers may rely on state recognition as a source of authority to enforce resolutions in their communities, yet thereby simultaneously risk inadvertently ceding authority to state institutions. The multiple linkages in countries between different primary justice providers, whether functional or norm/rule-based, official or unofficial, ultimately challenge any notion of entirely separate and distinct legal systems.

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112 In, for example, providing records of cases to the magistrate.

113 ICHRP, 2008: 5.

114 Starr and Collier, 1989, cited in Benda-Beckmann, 1997.

# USER PREFERENCES AND PROVIDER PROFILES

## INTRODUCTION

This chapter looks at methods to gather information on user preferences and provider profiles in order to contribute background information and, to a certain extent, analyses the preferences of users and providers of IJS. This chapter is thus partly based on quantitative data acquired through the six country studies. While quantitative data does not necessarily provide the 'full picture', it does provide an indication of preferences and profiles. The first part concerns users' preference and choice of system, which various conditions of access, including cost, distance, familiarity, time spent, complexity, and case type, influence. The second part on provider profiles gives some insight into the legitimacy, authority and (legal) sources of IJS.

Rather than making an attempt to compare across countries and continents, this chapter presents the results of an exploration of methodologies to gather and analyse quantitative data about IJS. It is safer to conclude that the factors affecting choice (if there is any at all) are many and varied, and so it is not easy to draw conclusions about the relative significance of different factors.

For experimental purposes, the quantitative surveys operated with a very comprehensive survey instrument. In practice, it is necessary to narrow down the questions to a limited number of possible factors influencing choice.

## LEGAL DOMAINS/SUBJECT MATTER OF CASE

Variation is also to be expected, depending on the type of case at stake. In a survey of widows involved in inheritance disputes in Malawi, 44 percent of those who decided to seek help referred their cases to the district assembly (administrative personnel), 33 percent went to chiefs, 15 percent went to a family member, while the remaining 8 percent went to their deceased husband's employer.<sup>115</sup>

The survey similarly shows that preferences greatly vary depending on whether the issue is a civil matter, a criminal case, or a matter related to domestic violence. Civil and criminal matters in this table cover three specific types of cases for civil matters (i.e., land disputes, divorce under customary marriage, and wife desertion) and for criminal cases (i.e., road accidents, theft and capital offences). Analysis of the data for preferences of criminal cases indicates a tendency to prefer the IJS and to avoid the formal system (such as in cases involving theft). The table below illustrates how types of cases influence people's preferences, although this should presumably also be related to the types of available providers in the country as well as the other contextually dependent data, such as the legal framework, customary law and traditions and perceptions of justice.

It is useful to keep in mind comparable research from industrialized countries. In a study of access to justice in Scotland published in 1999,<sup>116</sup> researchers found that about 26 percent of the population had, within the five-year survey period, experienced legal problems (of a civil nature) for which there was a legal remedy. People's responses to problems for which there was such a remedy were as follows:

	<b>Scotland</b>	<b>England and Wales</b>
No action taken .....	<b>3%</b>	<b>5%</b>
Self-help .....	<b>32%</b>	<b>35%</b>
Outside advice sought.....	<b>65%</b>	<b>60%</b>

<sup>115</sup> See Chiweza, Asiyati, L., 2005.

<sup>116</sup> Glenn, H. G. and Paterson, A., 2001.

People typically sought outside advice from a solicitor or a Citizens' Advice Bureau. Of those who sought advice, very few actually resorted to legal proceedings. This study found that "[a]lmost nine in ten justiciable problems were dealt with either successfully or unsuccessfully without any legal proceedings being commenced, without an ombudsman being contacted or any other ADR processes being used. This is despite the fact that almost two in three members of the public took some advice about trying to resolve their problem, and that of those, about half received advice from a solicitor at some point about their problem." This indicates that professional advice about the options available, e.g., process, costs, time and the merits of the case, is equally important to an external solution. Allowing an informed choice by providing adequate information and advice through informal mechanisms of justice can help to keep cases from entering the formal justice system and possibly reduce the pressure on it.

These statistics do not indicate that public funding should not be spent on the court system. The ultimate possibility of court action may in fact be precisely what moves people to work toward an agreement or engage in informal mechanisms of justice. Scholars and commentators refer to this as 'the shadow (or indeed the light!) of the law'. Thus, the law exerts a great influence even where its mechanisms are not directly invoked. Likewise, as the ICHRP study warns,<sup>117</sup> the temptation to conflate empirical realities with normative guidance or to interpret these realities as the expression of satisfaction with the *status quo* must be avoided. Organizations like PRI (2001), echoing Galanter,<sup>118</sup> suggest that an approach that recognizes many 'rooms of justice' is favourable, as it provides people with a variety of choices. This is, however, a policy option only when there are justice alternatives; in many places, IJS are the only choice available.

## THE CHOICE OF INFORMAL JUSTICE SYSTEMS OVER FORMAL STATE LEGAL SYSTEMS

Questions frequently asked about IJS include, "What aspects of IJS tend to influence why so many people in some countries use them? How do perceptions of the formal state legal system influence people's use of IJS?" Currently, the academic literature provides two main explanations to these questions:

1. The state failure explanation: The physical and economic inaccessibility of the formal system and its incapacity to deliver justice are principal reasons behind poor citizens' use of IJS. State courts are geographically distant and costs to travel to state courts and file cases prevent people from using them. State institutions lack capacity (human and material) and are corrupt, bureaucratic, inefficient, and slow in processing cases. Moreover, they are seen as serving the rich and the powerful rather than as being impartial and independent.<sup>119</sup> The failure or crisis of the state legal system to live up to its official mandates explains the success of IJS.<sup>120</sup>
2. The culturalist explanation: The specific characteristics of IJS themselves *vis-à-vis* the nature of the modern state justice systems explain why people use them. The procedures and substantive norms used and remedies that IJS dispense are, when compared with the state justice system, more in accordance with the local culture and the social relations of people in small-scale societies of developing countries. Where state justice systems are an inheritance from the colonial past, IJS are significant because they address cultural or religious beliefs, norms and practices that state courts and legislation ignore. These include, for example, witchcraft and sorcery, behaviour around sacred places, marital norms, and beliefs in the spiritual dimensions of acceptable and unacceptable behaviour. The use of reconciliation and restorative types of justice centred on compensation and restoring social relationships in the community – strong elements of many IJS – is

117 ICHRP 2009 study on plural legal orders.

118 Galanter, M., 1981: 1-25.

119 Penal Reform International, 2000: 6; Abel, 1982.

120 This is naturally more acute in collapsed, failed or war-torn states (see, for example, Scheye, 2006).

perceived as the most appropriate form of justice in small-scale societies with multiplex relationships (i.e., ones in which there are close relationships that are based on economic and social dependence and which intersect with ties of kinship).<sup>121</sup>

In contrast, state justice systems are often associated mainly with retributive justice and incarceration. The Uganda study discusses how people prefer informal mechanisms in cases of defilement, while the Bangladesh study notes how jurisdictional restrictions on village courts sometimes tend to push cases 'downward' into *Shalish* adjudication rather than upward into district courts, as intended by the legislator. The view that state justice systems are only retributive (and informal ones are only restorative) may result from the fact that the penal system is usually the most visible aspect of formal systems. Ordinary people in some countries may be unable to access state civil justice, even if it may actually employ restorative approaches. The language used by IJS can be more comprehensible to local people, who feel alienated by the technically, legally and linguistically foreign languages used in formal state courts. According to the culturalist explanation, the popular perceptions and accessibility of justice, informed by cultural differences, rather than the institutional availability and effectiveness of justice providers, explain the success of IJS. The state legal system, on the other hand, is based on a concept of justice that diverges from local perceptions.

3. Jurisdictional rules: The third, rather obvious factor is that the state legal system often lays down rules about jurisdiction. In many countries, traditional leaders are the legal arbiters of matters concerning customary land<sup>122</sup> (at least at first instance) and various other issues. Forms of IJS are also the recognized first instance of adjudication in (customary) family, inheritance and some matters of criminal law.<sup>123</sup> There may be rules or practices mandating recourse to some form of IJS in almost all civil cases.<sup>124</sup>

None of these explanations alone is adequate to explain the contemporary significance of IJS. As documented in the country studies (particularly the Ugandan study), a combination of factors, as well as power relations, social control and pressure, account for the preference of IJS. Based on these considerations, the following eight significant, partly interrelated aspects can influence people's choices and use of IJS:

### 1. The In/effectiveness and Popular Il/legitimacy of the State Legal System

When explaining the significance of IJS to people's access to justice, it is important to analyse how the state legal system functions in each context and how users view it. This requires an assessment not only of its formal mandates and legislation, but also of its actual practices and scope of operation, including geographical outreach and transactional and opportunity costs.

People's use of IJS cannot be seen in isolation from other available options. People often weigh IJS against alternatives, especially the state system, which might not be easily available. People often associate state courts with the following characteristics and thus choose IJS instead:<sup>125</sup>

- Unavailability: State courts and/or the police are far away and expensive to travel to. IJS are closer to the people.<sup>126</sup>
- Excessive cost: Fees and other costs in state courts may simply be too high for most people.

121 See, for example, Penal Reform International, 2001: 22.

122 Including Malawi; see Malawi country study.

123 Including with the LC courts in Uganda; see Uganda country study.

124 Ibid.

125 See Penal Reform International, 2001; UNDP, 2006; Scheye, E., 2006; Kyed, H., 2007.

126 In addition, there may be situations in which state courts and the police no longer operate, as in the case of failed or collapsed states. Here, IJS are simply the only option available, often operating in parallel to or controlled by transient forms of security providers such as militias, vigilantes, warlords, etc.

- Ineffectiveness: Settlement of cases takes a long time due to bureaucratic procedures and the necessity of 'hard' evidence.<sup>127</sup> IJS tend to settle cases 'on the spot'.
- Inappropriate outcomes: State courts tend to dispense types of justice (especially in criminal justice) that do not satisfy the people, who prefer the restorative justice that many IJS apply. Police, prosecutors and state courts may not have such a broad range of approaches in criminal cases and may be seen as overly retributive, imposing harsh penalties.
- Inadequacy: State courts do not deal with all the types of cases that emerge in rural societies, but IJS do (i.e., witchcraft, misbehaviour around sacred places, misconduct, insults, adultery, etc.).
- Inappropriate procedures/unfamiliarity/alienness: State courts apply legal formal language and seldom translate proceedings into local dialects, making procedures incomprehensible to many people.
- Illegitimacy: People may see the state legal system as illegitimate not only due to the above characteristics, but also, in some situations, due to the history of state-citizen relations in particular areas; the existence of corruption exacerbates this view. People see IJS providers as more legitimate because those providers are part of the local community and serve its interests.<sup>128</sup>

The data across countries and contexts are presented here with reservations. It would be misleading to draw conclusions of purported general validity on the basis of the surveys in this study. The graphs on preferences below are thus illustrations of how one might conduct quantitative surveys at the country level rather than a basis for global conclusions about preferences.

Distance to the formal state legal system is evidently a barrier to access. Nevertheless, the data from the surveys suggest that it is far from being the only important factor. Even for people living within five kilometres of the formal courts and the police, various forms of IJS are still the preferred justice provider. It is important to point out that this is not conclusive in itself, as the significance of a distance of five kilometres depends very much on contextual factors such as the state of roads, the availability of transport, cash income, the ability of women to travel on their own, etc., as well as on issues of jurisdiction and availability. The following graph is an illustration of the relation between the data on the preferred justice provider and the measured distance to the formal court.

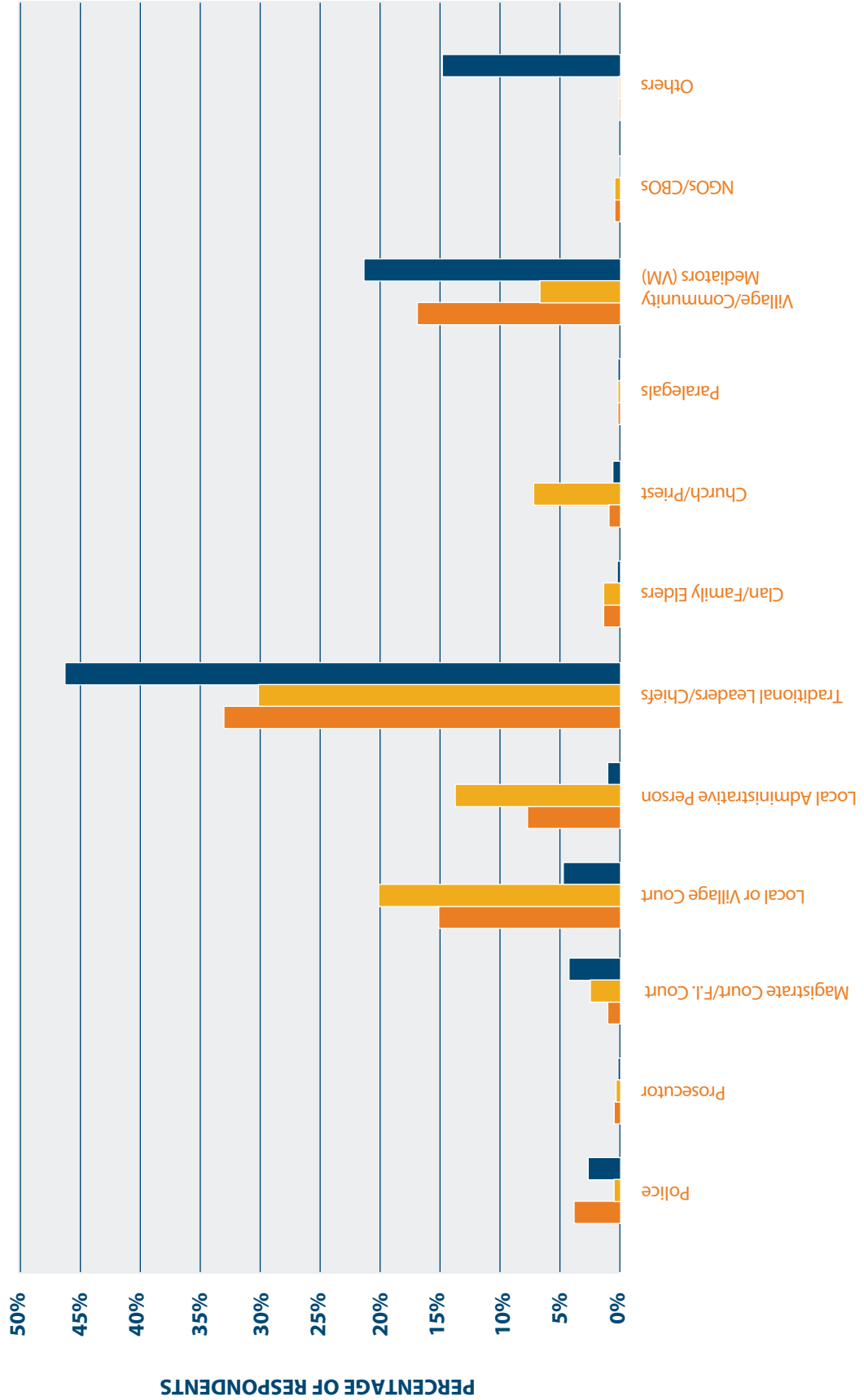
127 In many countries, people are also dissatisfied with the police and formal system when people accused of and arrested for a crime are released due to lack of hard evidence.

128 South Africa under apartheid, where people preferred to resort to local people's courts when available, was a particularly striking example of this. These, though, were often not identical with the 'traditional' structures that the apartheid government co-opted and used.

**REMOTENESS OF HOME COMMUNITY OF RESPONDENTS**  
 DETERMINED BY NUMBER OF KILOMETRES TO CLOSEST POLICE STATION

- Not Remote: 0-5 Kilometres
- Moderately Remote: 6-15 Kilometres
- Remote: 15+ Kilometres

**PREFERRED JUSTICE PROVIDER**  
 DISTANCE AND PREFERENCE



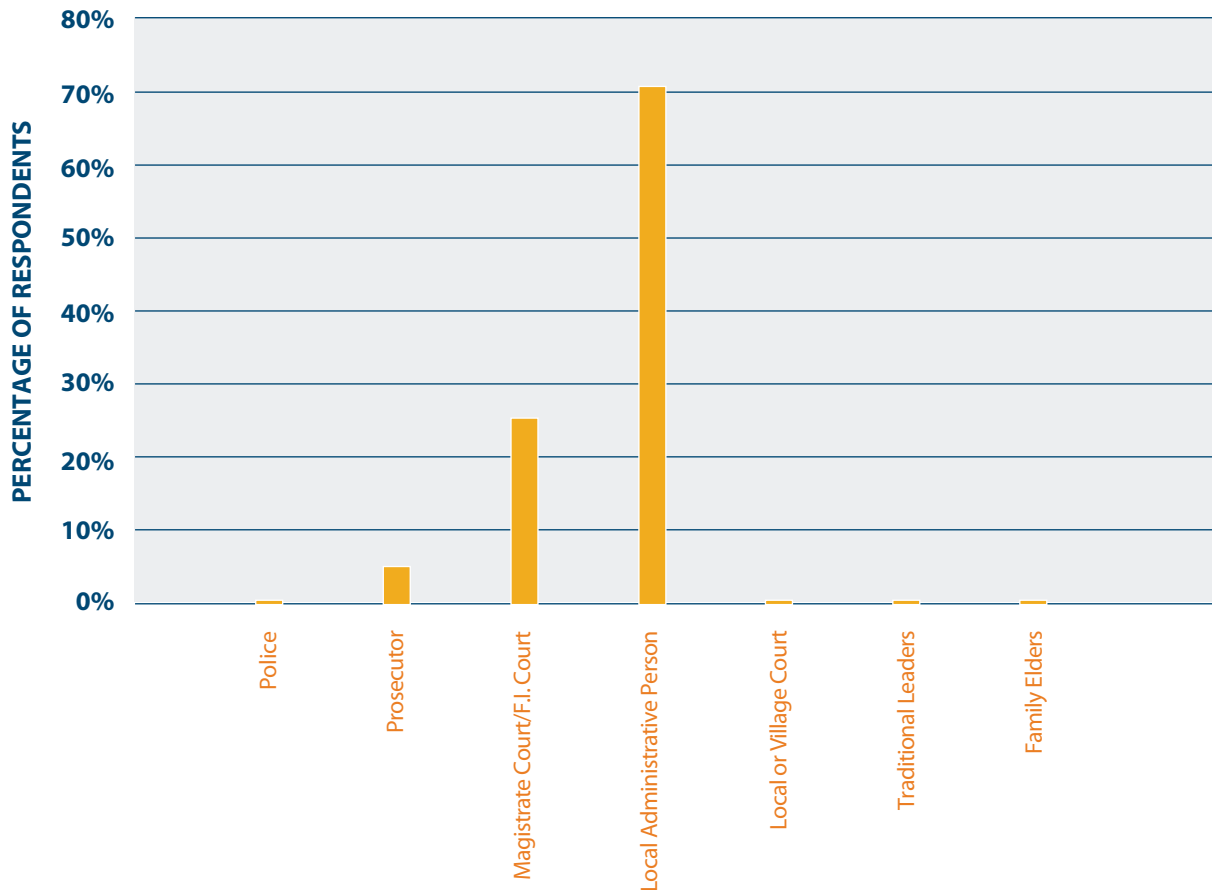
**PREFERRED JUSTICE PROVIDER**

Total Number of Respondents: 819

Nevertheless, the data also appear to support a finding that distance has an influence on the choice of IJS if more than one provider is available to the community, as the example from Bangladesh illustrates below. This should again be approached with reservations, as the data conflate all kinds of cases, and other factors can play a role.

### PREFERRED JUSTICE PROVIDER DISTANCE AND PREFERENCE, BANGLADESH

**LOCAL ADMINISTRATIVE PERSON IS CLOSEST TO COMMUNITY BY DISTANCE**



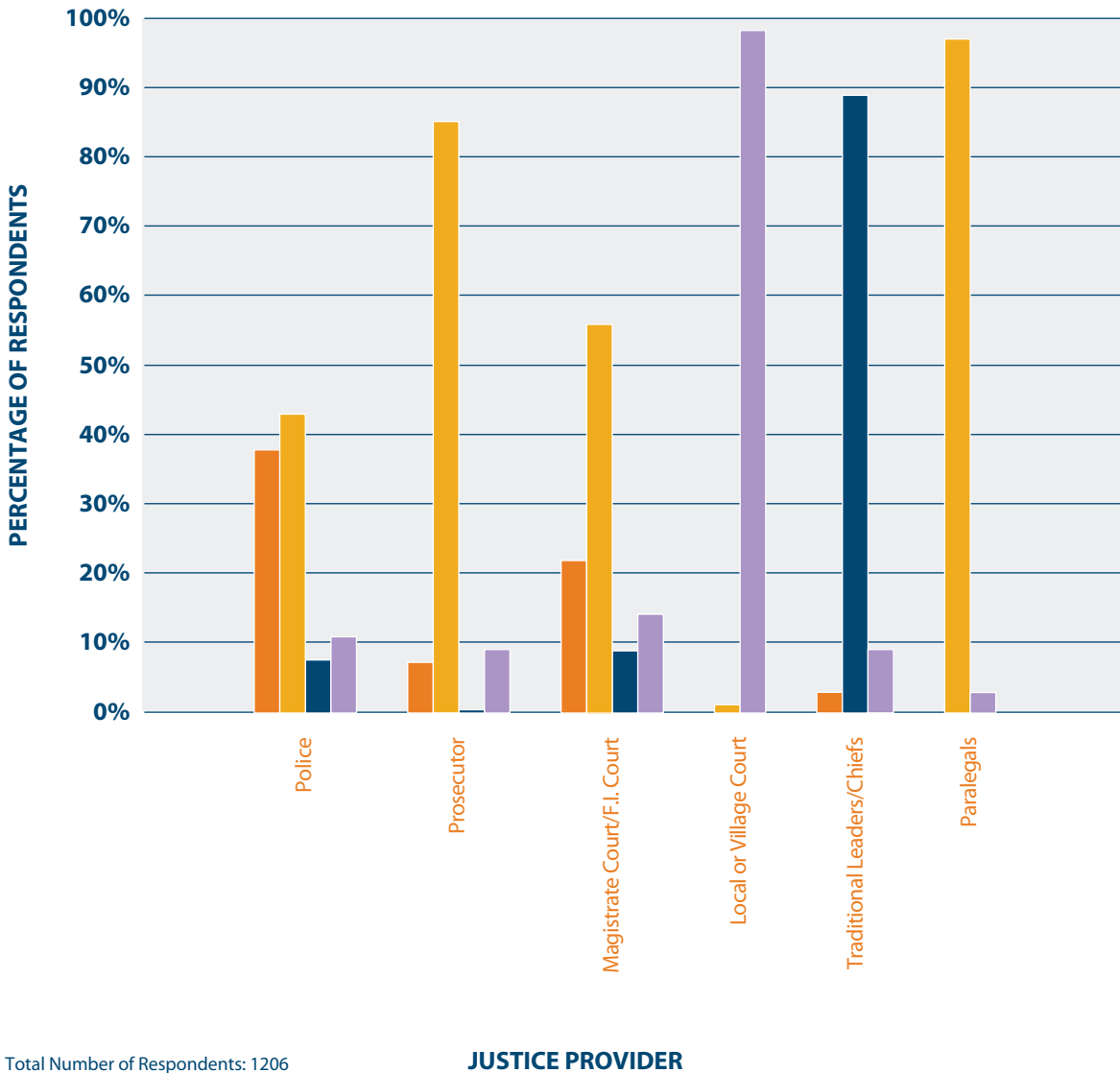
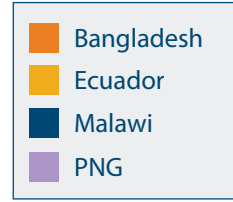
Total Number of Respondents: 108

### PREFERRED JUSTICE PROVIDER



The graph and figures below illustrate, not surprisingly, that, of the 12 types of justice providers included in the survey instruments, the formal state justice institutions, (i.e., the police, public prosecutor and the magistrates' courts) alone incur prohibitive costs .

**WHICH OF THE JUSTICE PROVIDERS WOULD YOU NOT BE ABLE TO APPROACH BECAUSE OF PRICE/COST?**



## 2. Informal Justice Systems' Case Settlement Procedures

The literature often highlights the less formalized case settlement procedures and the voluntary nature of participation and the role of mutual consent in reaching decisions as significant to people's preference for using IJS providers.<sup>129</sup> Nevertheless, the question of power is always present.<sup>130</sup> Many IJS combine consent or voluntarism with coercion and negotiable with non-negotiable rules. Furthermore, not everyone might perceive the procedures as just: procedures associated with reconciliation, consensus and holism do not preclude discrimination or selective rulings. There has been mention that respondents in Bangladesh preferred UP officials' organization of *Shalish* mediations over adjudication in the village courts.

## 3. Informal Justice Systems' Case Settlement Outcomes (Types of Remedies, Resolutions, and Punishments) Related to Local Conceptions of Justice

Remedies available in IJS dispute settlement are very significant to people's preference for IJS and say a great deal about particular conceptions of justice. Yet, when assessing what remedy types mean to people's sense of adequate access to justice, it is also important to examine sustainability and time (i.e., timely remedy).

Reconciliation, restoration, compensation and reintegration dispensed by IJS are important to many rural people's sense of adequate access to justice, i.e., *vis-à-vis* the custodial sanctions, which still dominate criminal cases in the state system, despite efforts to encourage alternatives to custody. There are economic, cultural, and religious reasons for this.

## 4. Economic Concerns

A preference for IJS associated with restorative justice outcomes, such as compensation, is very significant in many poor societies for important economic reasons. Aside from being a 'symbol' of reconciliation, the significance of compensation is closely related to sustaining the local economy. It can ensure that victims' and offenders' families do not become economically destitute. The local economy of informal justice is not without disadvantages for users. Various material exchanges surround dispute resolution. These can give way to corruption among IJS providers and the more powerful can use them to exploit the less powerful. It is also incorrect to assume that people prefer IJS because IJS are cheap or free. This is very context-dependent. In some countries, there are reports of traditional leaders pegging their 'court fees' to the same level as the lowest level of the state system.<sup>131</sup>

## 5. Cultural, Religious and Customary Beliefs and Practices

Preferences for types of justice associated with compensation, restoration and reintegration can evidently not be divorced from people's particular world-view, associated with cultural, religious and/or customary beliefs. It is relevant to analyse how people perceive notions of right/wrong or good/evil, as such notions inform how they think justice can best be achieved and wrongs be corrected.

Culture, religion and custom also influence how different categories of people are differently treated in the dispensation of justice. During hearing procedures, social attitudes may reinforce inequalities based on gender, age, etc.<sup>132</sup> There are also cultural practices that inform discriminatory outcomes, such as inheritance rules or marital rules that discriminate against women (such as rapists being required to marry the women they have raped). Such cultural practices are clearly context-specific and any understanding of how they impact access to justice for different categories of people must be assessed empirically.

129 See Penal Reform International, 2000; UNDP/Wojkowska, 2006.

130 See Abel, R.L., 1981.

131 Discussion with NGO representative in Zambia, 2009.

132 Penal Reform International, 2000: 127.

## 6. Habits or Routines

Although habits and routines tell us little about people's subjective sense of adequate access to justice, they may be important in explaining why people use a particular IJS provider rather than other available options. The quantitative studies were unable to measure this factor.

## 7. Power Relations, Social Pressure and Social Control

In many descriptions of IJS, the focus on reconciliation, consensus and public participation tends to overshadow the significance of power relations and social control mechanisms in case settlement. Egalitarian ideals associated with small-scale communities in many understandings of informal justice are often flawed.<sup>133</sup> While overt power struggles are prevalent, such as those over land and resources, there is also a more structural level of values and norms that support specific power relations associated with social status and identities (age, gender, ethnicity, class, etc.). The latter play a fundamental role in the way justice is dispensed. Simultaneously, power interests contest and manipulate the meanings of norms, values and justice, which often are not equally shared.<sup>134</sup>

## 8. Legitimacy and Authority of Justice Providers

Public perceptions of justice providers are another important factor that influences peoples' choice to take (or not to take) their cases to a given justice provider.<sup>135</sup> Central to such perceptions are the authority of a justice provider in the eyes of users and the sources of legitimacy on which such authority is based. Authority here refers to 'an instance of power which seeks at least a minimum of voluntary compliance and thus is legitimated in some way'.<sup>136</sup> It therefore neither refers to pure coercive power nor to simple persuasion presupposing equality. Authority is a hierarchical relation that requires recognition of the legitimacy of the ruler or the person executing compliance.

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133 McCold and Wachtel, 1997: 2.

134 ICHRP, 2008: 15.

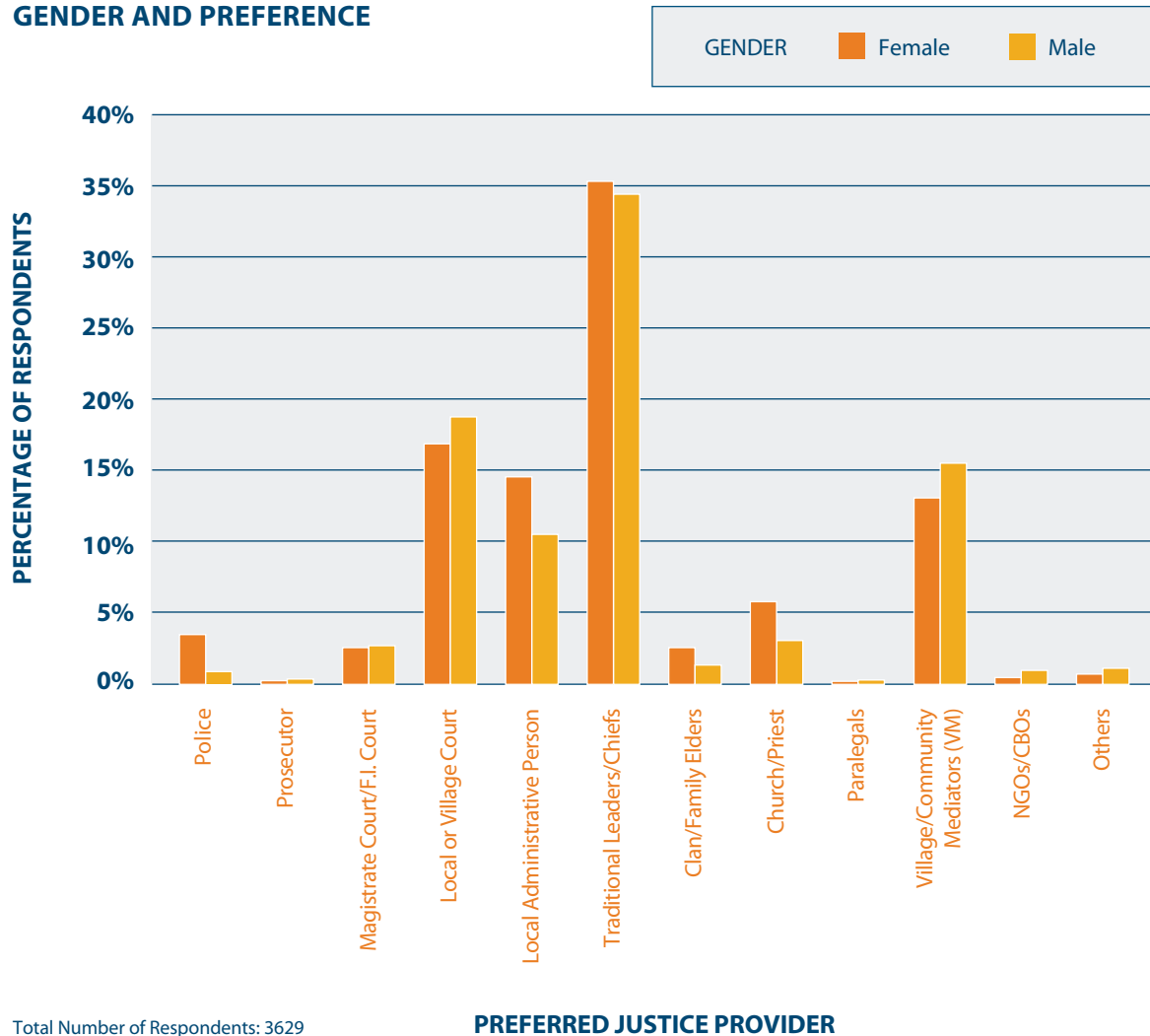
135 As discussed earlier, though, aspects of social pressure and power may constrain the freedom of such choices.

136 Lund, C., 2006: 678.

## PREFERENCES AND GENDER OF USERS

In the data analysis, gender has been included as a variable in all cross tabulations. On this broad and generalized level, the samples did not clearly establish that gender alone influences users' choice of providers; the graph below illustrates this. Nevertheless, the country studies further explore the relevance of gender for a person's preference of IJS, where it is related to qualitative analysis. Again, though, no conclusions should be drawn here, as the exercise did not allow sampling where women had a real choice of provider for the cases most relevant to them. Neither was it possible to survey for factors such as variations where female providers were available. Significantly more work is necessary to identify the effects of such factors.

### GENDER AND PREFERENCE



## INFORMAL JUSTICE IN THE VIEW OF THE PROVIDERS<sup>137</sup>

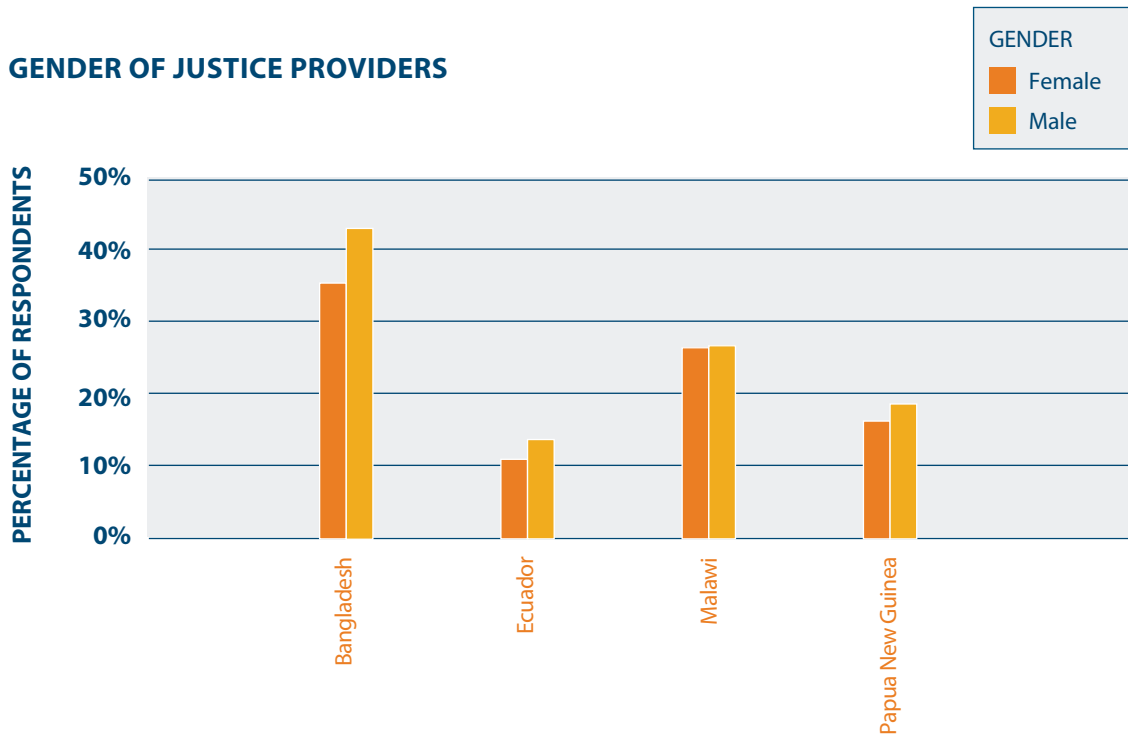
### LEGITIMACY: ACCESS TO POSITIONS WITH INFORMAL JUSTICE SYSTEMS

According to the providers, people rise to high positions, such as that of chief council member of IJS, mainly through election, although suffrage may not be universal. When looking at the country data, there are subtle differences. In Bangladesh, most IJS providers seem to be elected, although some are also chosen by the leadership or a superior judge. In Ecuador and Papua New Guinea, they are mainly elected. In Malawi, the village head is usually chosen, but can be elected or even inherit the position from his or her father or mother.

### AUTHORITY: GENDER AND AGE OF JUSTICE PROVIDERS

A general assumption is that informal justice providers are typically elderly men. The graph below presents providers' impressions of the gender balance of IJS. In general, IJS are indeed mainly composed of men, although it is interesting to see that, according to the providers in Ecuador, there is quite a high proportion of women. According to some interviewees in the qualitative survey, wives of community leaders may be perceived as leaders, too, although they have not necessarily been directly elected as leaders. In all countries surveyed, women are present in IJS. In Malawi and Papua New Guinea, women apparently represent approximately one third of the providers.

#### GENDER OF JUSTICE PROVIDERS



Total Number of Responses  
from Justice Providers: 879

#### PREFERRED JUSTICE PROVIDER

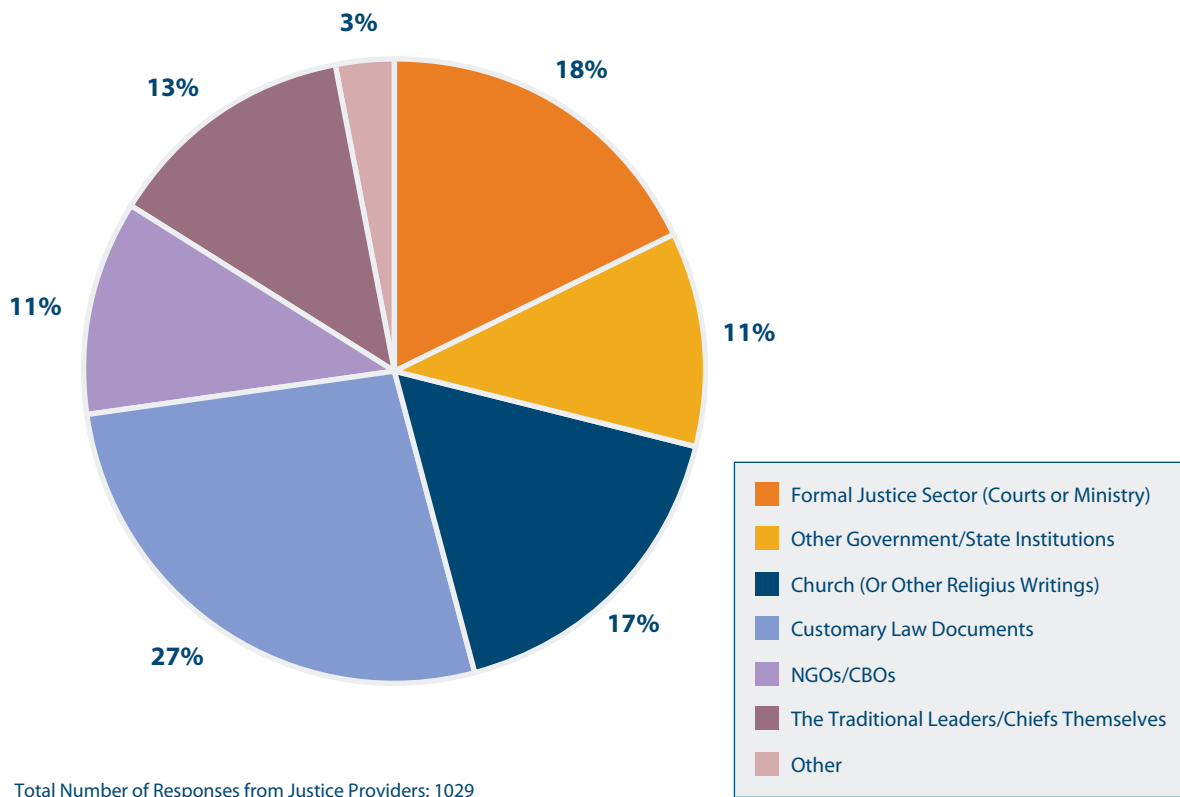
Another general assumption is that IJS' providers are mature or elderly, although, according to the providers, there are some variations. In Bangladesh, Malawi and Papua New Guinea, between 40 percent and 50 percent of the providers are above 50 years of age. In Ecuador, more than half and, in Malawi, approximately one third of the providers are between 36 and 49 years old.

<sup>137</sup> As concerns data on providers, the data from Mali did not include sufficient samples for to be able to be used. Consequently, this part considers only data from Bangladesh, Ecuador, Malawi and Papua New Guinea.

## KNOWLEDGE AND USE OF LAWS AND LEGAL DOCUMENTS

The providers in all of the surveyed countries confirmed that laws and legal sources and documents are used in IJS and that the sources vary greatly. Customary law is a central source (27 percent), which, in combination with the views of the traditional leaders (13 percent), is a significant normative source for IJS. Moreover, nearly 30 percent of written legal sources and documents derive from the formal justice sector (18 percent) and other government and state institutions (11 percent). Interestingly, church, mosque or religious writings accounted for 17 percent of the sources in the sampled countries. This could indicate that many of the laws and documents used in IJS are not necessarily customary sources of law.

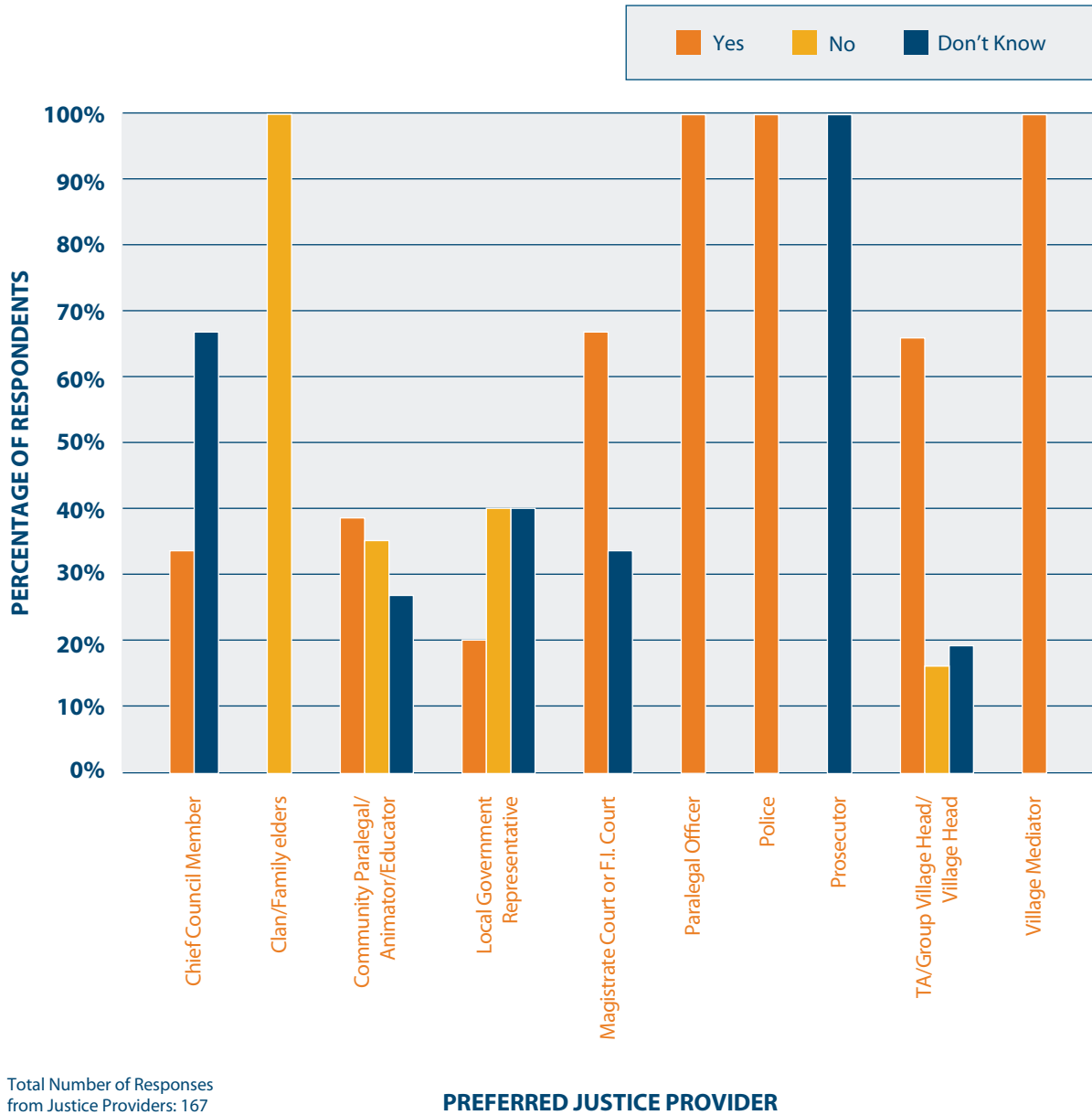
### DO YOU USE ANY WRITTEN DOCUMENTS THAT YOU REFER TO WHEN YOU DECIDE CASES? IF YES, WHERE DO THESE DOCUMENTS COME FROM?



### KNOWLEDGE OF STATE LAW RECOGNIZING INFORMAL JUSTICE SYSTEMS

There was considerable variation in the responses to the question about recognition of the IJS ‘court’ in national legislation or regulations. The graph below illustrates IJS providers’ varied opinions and ideas on the matter in Malawi. According to the majority of group or village heads in Malawi, the IJS are legally recognized, whereas nearly equal proportions of the chief council members agreed or disagreed about this and some replied that they did not know. This indicates that justice providers were unaware that national legislation recognizes IJS.

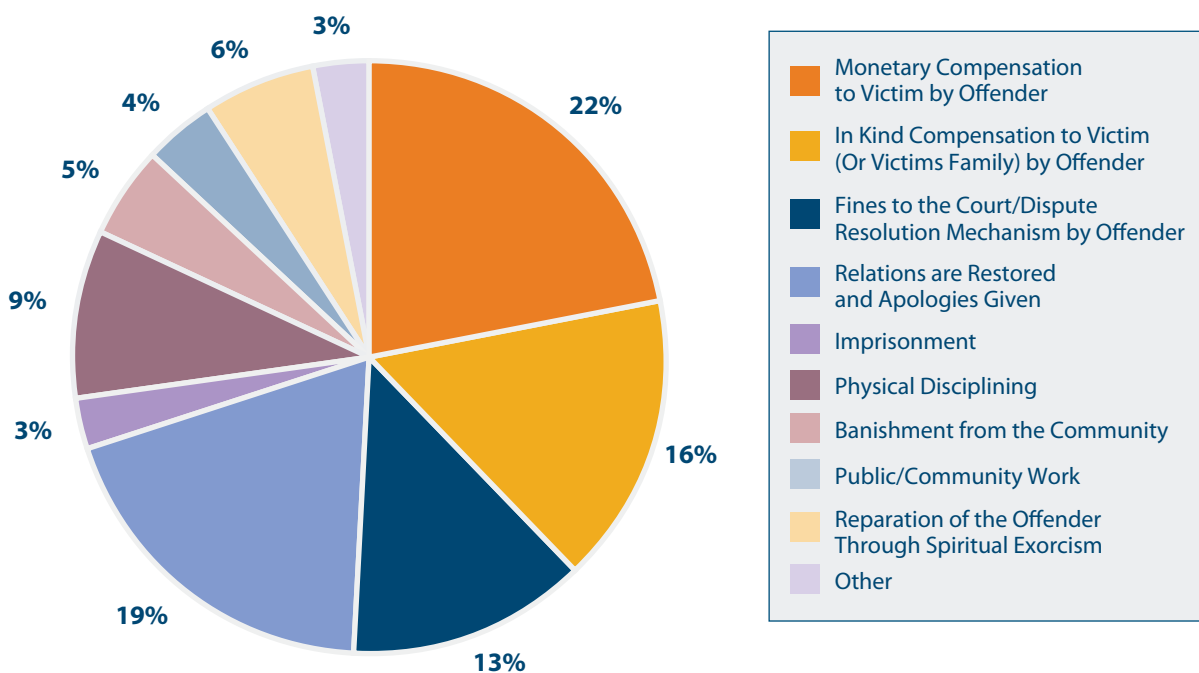
### IS THERE ANY NATIONAL/STATE/GOVERNMENT LAW (THE CONSTITUTION AND OTHER KINDS OF LAWS OR POLICY DOCUMENTS) THAT RECOGNIZE THIS COURT? MALAWI



## CASE OUTCOMES

Providers indicate that there are many possible outcomes in the form of remedies and sanctions. Data from all surveyed countries reveal that pecuniary compensation accounts for 22 percent of outcomes, while apologies and the restoration of relations account for 19 percent. In-kind compensation, accounting for 16 percent, is also relatively high. Imprisonment and physical disciplining are mentioned as outcomes. Providers also acknowledged the existence of measures for the offender through spiritual exorcism and even banishment from the community. Of these mechanisms, imprisonment, banishment and physical disciplining are human rights issues, especially if they involve torture or inhuman or degrading treatment as outlined in CAT. Data about the type of crimes or offences for which these punishments were inflicted was not included in the survey.

### WHAT KINDS OF RESOLUTIONS DO YOU AWARD IN THIS COURT/DISPUTE RESOLUTION MECHANISM?



Total Number of Responses from Justice Providers: 3039



# HUMAN RIGHTS AND INFORMAL JUSTICE SYSTEMS

## INTRODUCTION

This chapter reviews the applicability of human rights law to IJS and the typical human rights challenges related to IJS. The obligation of the state under human rights law to provide justice and remedies to its people for violations of their rights encompasses at least three distinct areas, all of which have given rise to detailed bodies of human rights law and discussion. They can briefly be described as:

- The obligation to provide remedies for violations of rights committed by the state or its agents (e.g., Article 2.3 of the ICCPR or similar obligations under the UNCAT)
- The obligation to provide the possibility of a fair hearing to determine the “civil rights and obligations in a suit at law” of all persons, thus encompassing many issues of private legal relations between individuals (Article 14.1 of the ICCPR)
- The obligation to protect people against violations of their rights (usually crimes) committed by private persons (rights to bodily integrity, freedom and property, as per Article 2.3 of the ICCPR) and the parallel obligation to treat those accused of such crimes according to fair trial standards (Article 14 of the ICCPR)

The first important issue in examining the applicability of human rights norms to IJS (i.e., those that are not administered by state agents) is whether, to what extent, and under what conditions the state can satisfy its obligation to provide justice through available systems and mechanisms of informal justice. A second issue arises when IJS exist and operate independently from the state and to what extent these systems (i) are bound to respect human rights norms in their processes and decisions and (ii) are legally and practically capable of respecting human rights norms.

The UN treaty body system and, to a certain extent, the charter-based special procedures have addressed some issues relating to customary law and justice in their concluding observations and recommendations. Where IJS have been addressed in analytical or policy documents by UN bodies and agencies (e.g., the UN Permanent Forum on Indigenous Issues), two issues are highlighted: 1) the importance of incorporation of and/or respect for traditional cultural norms and practices and 2) a concern that such norms and practices may violate international human rights norms and/or hinder certain groups, such as women, children or minorities, from obtaining access to justice and equal treatment.

Nevertheless, there is a pressing need for more legal and sociological research about the interplay among IJS, formal justice systems and international norms. NHRIs can play a key role in developing the understanding and engagement with IJS. The 2008 International Conference of NHRIs recognised the important role that NHRIs play in ensuring an effective administration of justice<sup>138</sup>.

## APPLICABILITY BY INCORPORATION OR RECOGNITION OF THE INFORMAL SYSTEM

Human rights norms can become binding on IJS through the formal incorporation of parajudicial systems into the state legal system (examples of this are seen in some African countries such as Botswana, Zambia, Uganda or Sierra Leone, and village courts in Bangladesh, Papua New Guinea, etc.). In this way, those systems become state organs and are thus bound by human rights norms (as a matter of international law). Even if informal justice organs (typically chiefs, councils, etc.) are not formally recognized as part of the national system of justice, the state may robustly support them in some way, for example, by paying stipends or expenses to the chiefs for exercising

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<sup>138</sup> Nairobi Declaration of the Ninth International Conference of National Institutions for the Promotion and Protection of Human Rights, 2008

these functions or by legally recognizing their adjudicative powers or decisions. In these circumstances, there is a clear legal link to the state, so that the state is legally responsible for the decision or conduct of the informal justice organ.

### **APPLICABILITY BY VIRTUE OF THE STATE'S DUTY TO PROTECT**

The state's duty to protect individuals against violations of their rights is the second way in which human rights norms may protect litigants in IJS. Thus, in the cases where there is no legal nexus between the informal justice mechanism and the national justice system, a state may be legally obligated to actively suppress harmful practices and to protect the vulnerable. This is founded *inter alia* in the obligation in Article 2(1) of the ICCPR to "respect and ensure" the rights protected in the Covenant. While the extent of the state's obligation in this respect is limited and not wholly clarified in international law, it has been legally acknowledged, especially in relation to the right to life.<sup>139</sup> Subsequent chapters of this study discuss many other aspects of the state's duty to protect women's and children's human rights.

### **APPLICABILITY BY VIRTUE OF THE HORIZONTAL APPLICATION OF HUMAN RIGHTS NORMS OR BY VIRTUE OF ORDINARY LEGISLATION**

The legal doctrine of the horizontal application of human rights offers a third possibility for the protection of human rights. According to this legal principle or doctrine, human rights are not only binding on the state itself, but are also incorporated as fundamental principles of the legal order and thus binding in legal relations between natural and legal persons. The doctrine is illustrated by the question of whether it is permissible for private individuals or corporations to discriminate on the basis of sex, religion, ethnicity, etc. in ways that would be illegal for the state to do. Here, the picture varies from one country to another. Section 8.2 of South Africa's constitution offers an example of the horizontal application of human rights.<sup>140</sup>

In other states, the issue of horizontal application may not be so clear and, indeed, an unequivocal constitutional mandate for such an application is comparatively rare. Even in South Africa, horizontal application will vary from one right or field of rights to another. In many countries, the protection of human rights between private individuals will depend on ordinary legislation rather than on direct invocation of the constitution, yet, even then, it may not apply in all areas. The prohibition of private discrimination, for example, may be relatively well anchored in legislation and judicial precedent, and the criminal law will typically outlaw many forms of behaviour that would violate civil and political rights. On the other hand, obligations pertaining to economic, social and cultural rights may not extend beyond the public sphere. Thus, one cannot speak of a clear 'either/or' distinction between horizontal and vertical application.

States parties to the ICCPR (and some other human rights instruments that contain provisions relating to justice) are, in most civil legal domains that informal justice typically covers, legally obligated to ensure the possibility of equality before the courts and tribunals and a fair and public hearing before a competent, independent and impartial tribunal established by law. Irrespective of whether states actually recognize or incorporate IJS into their national legal orders or whether customary justice systems are simply tolerated procedural aspects of IJS must be measured against this standard.

### **REGULATING THE RELATIONSHIP BETWEEN INDIVIDUAL AND COLLECTIVE RIGHTS**

Human rights law is primarily interested in seeing the enjoyment of effective protection, whatever its source. In some spheres, informal justice may contribute to that protection particularly where the reach and effectiveness of the formal system is weak.

<sup>139</sup> See, for example, the case of the European Court of Human Rights: *Osman v. UK*, judgment of the European Court of Human Rights, 28 October 1998.

<sup>140</sup> "A provision of the Bill of Rights binds a natural or a juristic person if, and to the extent that, it is applicable, taking into account the nature of the right and the nature of any duty imposed by the right."

The contribution of IJS to human rights protection may not necessarily be only temporary or provisional. Under certain conditions, recognition of traditional or customary justice may be seen as protection of the social, cultural and economic rights of indigenous groups or peoples. The CERD Committee, for example, expresses this viewpoint in a General Recommendation<sup>141</sup> and developments in recent decades in some countries, particularly in Latin America, as well as ILO Convention 169 also reflect this. As the discussion of legal pluralism and IJS in Chapter II shows, the rights of indigenous peoples and communities to enjoy cultural rights and the historical background of serious violations of those and other rights have led to various developments in international human rights law and national legal orders over the past three decades. Latin America presents several examples of legal pluralism and some of the most remarkable of these are discussed below.

### TYPICAL HUMAN RIGHTS CHALLENGES: SUBSTANTIVE, STRUCTURAL AND PROCEDURAL

In discussing human rights, this study divides human rights issues into three main categories: 1) substantive norms and standards that IJS and/or outcomes of cases apply; 2) structure related to IJS, particularly with respect to accountability and participation; and 3) procedural fairness. This categorization affords a reasonable possibility of assessing IJS according to the same criteria used to assess formal justice systems. Where a human rights assessment is carried out that takes account of all of these criteria and is compared on all of these criteria with the performance of the formal system, it may be that IJS afford greater possibilities of respecting human rights than formal systems. Assessments of this kind can lead to a far more nuanced discussion of human rights and IJS.

The human rights issues that typically arise with respect to the operation of IJS are quite well known and numerous reports on the subject have cited them. Wojkowska (2006),<sup>142</sup> for example, describes the following weaknesses in human rights protection in IJS:

- I. IJS do not always give the accused the chance to be heard or adequately represented;
- II. IJS sometimes take decisions that are inconsistent with basic principles of human rights – for example, by imposing cruel and inhuman forms of punishment such as flogging or banishment – or that perpetuate the subordination of women or the exploitation of children; and
- III. IJS often hold individuals accountable to social collectivities and broader social interests by restricting freedoms, such as that of young people to choose a spouse.

Interestingly, almost all other weaknesses with IJS that Wojkowska (2006) describes could be characterized as failures of the IJS, the state or both to protect human rights:

- IV. Unequal power relations and susceptibility to elite capture
- V. Unfair and unequal treatment of women and minority groups
- VI. Unsuitability of IJS for certain disputes that are important for security and sustainable development (e.g., cases of serious crimes, inter-community disputes, dealings with government agencies or with private companies)
- VII. Insufficient accountability and opaque interface between informal and formal justice systems (e.g., lack of transparent procedures or documentation of the outcome reached, non-recognition of or failure to apply constitutional or statutory provisions that entrench fundamental rights, the inability to appeal from the decision of an informal tribunal).

<sup>141</sup> General Recommendation XXXI of the CERD Committee on the Prevention of Racial Discrimination in the Administration and Functioning of the Criminal Justice System, which states: 5. States parties should pursue national strategies the objectives of which include the following: (e) To ensure respect for, and recognition of the traditional systems of justice of indigenous peoples, in conformity with international human rights law; UN Document A/60/18, 2005.

<sup>142</sup> UNDP/Wojkowska, 2006: 20-23.

## SUBSTANTIVE ISSUES

The core issue here is the state's obligation to ensure that IJS do not breach fundamental human rights standards and, where such breaches occur, to apply appropriate remedial measures and policies for preventing future breaches.

### THE EXERCISE OF CRIMINAL JURISDICTION BY INFORMAL JUSTICE SYSTEMS

The UN Human Rights Committee observes in its General Comment No. 32 that “[c]riminal charges relate in principle to acts declared to be punishable under domestic criminal law. The notion may also extend to acts that are criminal in nature with sanctions that, regardless of their qualification in domestic law, must be regarded as penal because of their purpose, character or severity.”<sup>143</sup>

Thus, even if national law, including through recognition or delegation of jurisdiction to IJS, does not characterize IJS' sanctions that can be meted out to individuals as penal *per se*, international human rights law may nevertheless regard them as such. The same General Comment specifically addresses the question of customary or religious courts.

Article 14 is also relevant where a state, in its legal order, recognizes courts based on customary law, or religious courts, to carry out or entrust them with judicial tasks. It must be ensured that such courts cannot hand down binding judgments recognized by the state, unless the following requirements are met: proceedings before such courts are limited to minor civil and criminal matters, meet the basic requirements of a fair trial along with other relevant guarantees of the Covenant, and their judgments are validated by state courts in light of the guarantees set out in the Covenant which can be challenged by the parties concerned in a procedure meeting the requirements of Article 14 of the Covenant. These principles pertain notwithstanding the general obligation of the state to protect the rights under the Covenant of any persons affected by the operation of customary and religious courts.

When IJS occasionally handle cases that human rights law or a formal system would consider petty criminal cases and when those systems may mete out punishments, including to juveniles, special issues and problems arise in relation to compliance with human rights standards. In some circumstances, these could include the potential criminal and civil liability of the IJS providers for deprivation of liberty or physical violence, in addition to state responsibility under national and international human rights law. The Ecuador country study describes some of the punishments ordered by IJS in that country, including ones that may violate national law and human rights standards. As the country study describes, the relevant constitutional provisions in Ecuador have not yet been fully clarified through the passage of ordinary legislation, so it remains unclear how far the delegation of jurisdiction to indigenous courts and organs of law enforcement will go.<sup>144</sup> As the Papua New Guinea country study notes, the distinction between criminal and civil cases, as well as between criminal acts and violations of other social norms (such as obligations to respect elders and to work hard), is often blurred in IJS.

If the courts and tribunals of indigenous jurisdiction are considered to be “courts based on customary law” within the meaning of UNHRC General Comment No. 32, other countries, such as Colombia, have already gone further than what the Human Rights Committee would consider permitted by the ICCPR. There are no clear limitations on subject matter jurisdiction that would limit the jurisdiction of indigenous courts to minor criminal matters. Citing national legal experts in Colombia, Yrigoyen Fajardo notes their subject matter jurisdiction covers the most serious offences, including homicide.<sup>145</sup> Moreover, the indigenous organs are clearly understood to have wide-ranging coercive powers. Yrigoyen Fajardo writes:

<sup>143</sup> Human Rights Committee, General Comment No. 32, Article 14: Right to equality before courts and tribunals and to a fair trial, CCPR/C/GC/32 23 August 2007, Ninetieth session Geneva, 9-27 July 2007.

<sup>144</sup> The courts and tribunals of indigenous jurisdiction are here considered to be “courts based on customary law” within the meaning of the above General Comment. They are thus the General Assemblies of the Kichwa communities surveyed.

<sup>145</sup> *Beyond Law, Informal Justice and Legal Pluralism in the Global South*, Vol. 10, Issue #27, 2004.

***“Acts of personal coercion derived from the exercise of the special jurisdictional function (within its territory and according to its laws) do not, by definition, constitute the usurpation of functions of ordinary jurisdiction, or the crime of kidnapping, illegal privation of freedom or any other type of crime, but are rather like the arrest, communal labour, imprisonment, seizure or containment to which people are subject under the legitimate order of ordinary jurisdiction. As recognized by the constitution itself, this represents the exercise of a right – the right of peoples and communities to exercise jurisdictional functions. As the exercise of a right cannot be considered a crime, not only can its exercise not be prohibited, it must moreover be protected and legitimized. The Constitutional Court of Colombia has repeatedly recognized these powers of special jurisdiction. This clearly includes not only general coercive powers, but also specific punitive powers which are outside of the realm of ordinary criminal jurisdiction.”***<sup>146</sup>

What is more, the Constitutional Court found that collective cultural rights and the constitutional dispensation of autonomy had primacy over individual rights in many cases. Van Cott explains that:

***“The Court further defined the scope of indigenous special jurisdiction in a 1996 ruling on a claim [...] that [a] *cabildo* (a form of community government imposed on Colombian Indians by the Spanish crown and later adopted and ‘indigenized’ by indigenous cultures) had violated [the defendant’s] right to due process, ruling that the standard for interpreting indigenous jurisdiction must be ‘the maximum autonomy for the indigenous community and the minimisation of restrictions to those which are necessary to safeguard interests of superior constitutional rank’. Restrictions on the right to autonomy must protect a more important interest than that of cultural diversity (i.e. national security, the right to life, prohibition of slavery and torture) and must represent the manner of protecting that right that is least destructive to indigenous autonomy. As the minimum basis for ‘intercultural dialogue’ the Court offered the limitation of indigenous autonomy by the right to life and freedom from torture and slavery, arguing that indigenous cultures in Colombia do not practice torture or slavery, but do sanction murder. According to these criteria, the defendant did not have a right to ‘due process’, as that term is understood in Western law, but only to the legitimate procedures used by his community in similar cases.”*** [Emphasis added].<sup>147</sup>

Von Cott also notes that the Constitutional Court nevertheless did impose some limits on the indigenous judicial organ, denying it the power to impose a sentence of imprisonment in a state prison on the grounds that the relevant customary law did not permit this punishment. In doing so, the Court implicitly recognized its own power to determine what constituted valid customary law. In terms of procedure, the Constitutional Court of Colombia confirmed its policy of deferring the maximum possible authority to the indigenous courts by deciding that the indigenous organ should have the possibility of retrying the case thus imposing a more traditional sanction or of remanding the case to the ordinary courts.<sup>148</sup>

As mentioned above, it is as yet unclear whether legislation and/or judicial interpretation will take Ecuador in the same direction as Colombia in terms of the relationship between the ‘ordinary’ and ‘indigenous’ justice systems. Van Cott cites one of the leading justices of the Constitutional Court for the view that “only a high degree of autonomy would ensure cultural survival”.<sup>149</sup> These decisions should be seen and understood in the context of the extremely serious situation facing indigenous communities in Colombia and of the historical legacy.

<sup>146</sup> Ibid., citing San Martín, César, 1999, *Derecho Procesal Penal*, Vol. I, Grijley (ed.), Lima, pp. 90-91.

<sup>147</sup> Van Cott, D.L., 2000, op. cit.

<sup>148</sup> Ibid.

<sup>149</sup> Van Cott, D.L., 2000, citing Magistrate Gaviria Diaz in case T-523, 1997.

The path that the Court has chosen in some of these decisions poses risks for the protection of human rights, including those of indigenous people, and differences of opinion among the justices of the Court are acknowledged. The thinking behind this and similar decisions of the Colombian Constitutional Court would seem to show that it might be better to understand the constitutional order adopted as a version of federalism rather than as the delegation of some judicial powers to customary or traditional organs in accordance with the Human Rights Committee's General Comment.

Nevertheless, from the point of view of international human rights law, reference to the constitutional order adopted does not solve the problem of the indigenous judicial organ's failure to observe international guarantees of a fair trial. The recognition of the dynamism of culture and customary law and the wish of the indigenous communities to enjoy respect for their observance of human rights may nevertheless be the best way to motivate the indigenous judicial organs to respect rights of due process. The wide scope that the Constitutional Court in Colombia has given to indigenous communities and peoples perhaps reflects a trust that they will indeed work toward these aims.

There are many similarities between the historical injustices perpetrated against indigenous peoples and communities in Colombia and those committed in other countries of the region, including Ecuador and Bolivia. Nevertheless, the extreme circumstances of civil conflict are fortunately not present in Ecuador or Bolivia and, as the proportion of indigenous inhabitants is higher there, it is possible that concerns around the cultural survival of the indigenous population are not as pressing.

Another consideration is that many IJS traditionally adopt to bring about peace and reconciliation after there has been a crime that disturbs social harmony. As this study also observes elsewhere, imprisonment as a punishment for serious offences, including murder, was unknown in many societies prior to the advent of (most often) European colonists. As there was no distinction between civil and criminal matters – a distinction ultimately derived from the notion that a communal society rather than a formalized state is the governing organ – homicide, for example, could be settled by the payment of a number of cattle.<sup>150</sup> It is interesting here that human rights law, apart from laying down prohibitions on torture and cruel, inhuman and degrading treatment or punishment (CIDTP), generally does not impose requirements about the propriety of penalties for particular categories of offences. This is a matter left to states parties to determine, and international law may thus offer no obstacle to recognizing some customary practices of these kinds, provided victims' rights are respected.<sup>151</sup>

## **USE OF COERCIVE POWERS AND THE LACK OF OUTREACH OF THE FORMAL JUSTICE SYSTEM**

The Papua New Guinea study describes how the village courts, applying customary law, can impose penalties in the form of 'work orders'. Failure to obey a work order can result in an order for imprisonment, but the formal justice system (i.e., the district court magistrate) must approve this sanction. When there is any requirement of such approval, it is important to determine the extent to which it is actually exercised and followed. The study on Papua New Guinea also notes providers' acknowledgement that village courts do overstep their jurisdiction and that they are powerless to tackle the epidemic of violence related to accusations of sorcery in the highlands.

Other country studies also deal with the difficulties that the lack of outreach of state justice institutions causes. The difficulties that justice systems in many poor countries have in complying with national and international standards related to the question of arrest and detention, including protection against arbitrary detention, are well

<sup>150</sup> See the Uganda country study and the discussion of practices in Karamoja.

<sup>151</sup> One important instrument is the UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.

documented.<sup>152</sup> In this regard, it is particularly important to abide by time limits for bringing suspects before judicial authorities, to regularly renew remand detention orders, to hold trials within a reasonable time, and to respect the right to legal assistance. When police lack necessities such as the presence of police posts within the reach of the communities that they are supposed to serve, transport necessary to carry out investigations, take suspects into custody and bring them before a judge, and telephones to maintain contact with witnesses, colleagues and local authorities, they and the local communities are left with few choices.

Justice officials in various countries acknowledge this problem. In practice, many judges in developing countries are sensitive to the possibility of mob justice and to the fact that people may lose respect for the state and the law if they think that the justice system is ineffective. Justice officials may often be taking a pragmatic approach to concepts of 'apprehension' as opposed to arrest, 'citizen's arrest' and detention by the police, in some cases effectively turning a blind eye to irregularities when the circumstances of the offence seem to justify detention. The Uganda study illustrates some aspects of this dilemma. The problem is relatively mild in relation to LC courts in the centre of the country and rather extreme in the Karamoja region, where state justice has been almost absent for generations. In order to avoid the risk of conflict, dialogue must ease the assertion of state jurisdiction for serious crimes in such circumstances. State agencies beginning to operate must gain the trust of communities by being fair and effective and by cooperating with family, clan and chiefdom elders.

In some cases, the best way forward to overcome limitations in policing resources might be to give local officials limited power to detain persons, pending handover to the police and subject to rules on conditions of detention and supervision by the police. In some countries, though, chiefs previously had such powers, but frequently abused them (see the Niger and Malawi country studies).

The state can promote accountability, minimize the risk of abuse, and build informal-formal linkages at a sustainable level until it is able to extend the reach of law enforcement services to outlying districts and gain the trust of communities. It could promote local justice coordination groups similar to the pilot mechanisms that the Ministry of Justice in Papua New Guinea is establishing, as discussed in Chapter IX. In this way, the local IJS providers are accountable to others in the community who have an interest in and insight into matters of communal justice, security, rights protection, etc. Such a group can be in periodic contact with the closest state law enforcement and justice authorities. In this way, the state can be kept informed about developments and can step in where a pattern of unlawful or rights-threatening conduct emerges. An approach such as this requires that relevant state officials have knowledge, sensitivity, and integrity and that the authority be flexible under responsibility. There is no 'risk-free' strategy here. Measures such as these are subject to abuse, and resources could continue to be a concern.

## THE PROBLEM OF ACCUSATIONS OF WITCHCRAFT

Human rights implications are also present in the holding of individuals accountable according to norms based on animist religion, including witchcraft. It is well documented in various countries, and discussed in the Malawi country study, that socially vulnerable persons (often especially including orphans or elderly widows) are both more likely to face accusations of witchcraft and to be less able to effectively rebut such accusations.<sup>153</sup> Likewise, women in positions of power are more likely than men to face such accusations.

<sup>152</sup> See, for example, the literature and programmes of Penal Reform International in many countries or the studies carried out by the Open Society Justice Institute: [http://www.soros.org/initiatives/justice/focus/criminal\\_justice/articles\\_publications/publications/pretrial-detention-corruption-20100409/summary-pretrial-detention-corruption.20100409.pdf](http://www.soros.org/initiatives/justice/focus/criminal_justice/articles_publications/publications/pretrial-detention-corruption-20100409/summary-pretrial-detention-corruption.20100409.pdf)

<sup>153</sup> See, for example, the cases cited by WLSA Malawi, as mentioned and cited in the country study. There are numerous reports from Ghana on efforts to eliminate the traditional practice of 'Trokosi'. Elsewhere, see: <http://news.bbc.co.uk/2/hi/africa/2089875.stm> (Mozambique). See, similarly, news reports on victimization of albinos in Tanzania. On the vulnerability of children to such accusations, see [http://www.unicef.org/infobycountry/car\\_49658.html](http://www.unicef.org/infobycountry/car_49658.html) (Central African Republic, where witchcraft is an offence for which imprisonment is often imposed). See also: Medical Research Council of South Africa, Factsheet Witch Hunts In Modern South Africa: An Under-Represented Facet Of Gender-Based Violence, Yaseen Ally, June 2009, retrieved from: <http://www.mrc.ac.za/crime/witchhunts.pdf>

This area is difficult to regulate in a way that gives satisfactory legal protection to all. As is seen in the case of Malawi, existing laws make it an offence to accuse another person of practicing witchcraft, but this does not prevent banishments from villages or settlements, nor does it even protect those suspected of witchcraft from being prosecuted on other charges. This, in turn, may perpetuate the power of some to play on superstition as a means to persecute others for personal gain.

The Malawi case study discusses how criminalizing the accusation of a person for witchcraft means that these cases are often only taken to IJS rather than the formal system.

The Papua New Guinea country study illustrates a particularly grievous phenomenon known in various countries whereby children become suspected of involvement in witchcraft, either alone or by association with their parents, which leads to violence or banishment. Formal and informal justice officials, community leaders and police might not intervene either because of their own fears in this respect or because of the strength of community sentiment in this regard. Violence related to witchcraft accusations can reach an epidemic level. It is to be emphasized that in Papua New Guinea, the IJS neither order nor perpetrate this violence, but they are also currently often powerless to prevent it. The country study concludes that, in the short term, only the police can intervene against groups committing violence against people accused of witchcraft. Courageous church organizations or NGOs can perhaps protect the accused. In the longer term, community education on the true sources of illness, which is often attributed to witchcraft,<sup>154</sup> is the only solution.

## HUMAN RIGHTS ISSUES AND THE STRUCTURE OF INFORMAL JUSTICE SYSTEMS

Some of the principal human rights issues here concern:

- 'Lawfulness': Are IJS' rules made in accordance with oral or written laws where such laws exist or have been written down?
- Predictability (non-arbitrariness) of IJS' decisions
- The process by which rules are adopted and changed: Are they public, transparent and participatory?
- Independence and impartiality of adjudicators/decision makers (including a consideration of s/election procedures, panel composition with gender or other balance, the means by which tribunals address conflicts of interest)
- Effective enforcement of IJS agreements and provision of appropriate remedies, where applicable; penalties for non-compliance, where appropriate
- The means to ensure the accountability of actors (adjudicators and 'gatekeepers') in IJS

As indicated above, the main issues here concern participation and accountability. Questions of participation essentially are: Who decides what is custom? How is this decided? Who sits and adjudicates cases? How are adjudicators chosen? Accountability is, of course, closely related to participation, and some key questions to ask are: What mechanisms ensure that IJS adjudicators are accountable? What does this mean in practice? Can they be used to remove or discipline corrupt or incompetent adjudicators? Do these mechanisms function effectively? Do IJS users have access to these mechanisms? Do users know IJS standards in advance? Is the motivation behind IJS decisions transparent? Are they comparable to decisions in other, but similar cases?

When there is a broad human rights view focussing on principles, the mechanisms for accountability do not have to be the same as those in formal systems. Whereas formal systems rely on appointment qualifications and procedures, appellate review and formalized disciplinary procedures, informal systems may rely on the importance of

<sup>154</sup> In Papua New Guinea, the word 'sorcery' is generally used to describe what is believed to be harmful magic. In some countries of Anglophone southern Africa, a distinction is sometimes made between 'witchcraft', which is seen as malign and evil, and 'sorcery', which may not always be ill intentioned and may incorporate elements of traditional religion and healing.



reputation in the community, the presence of various counsellors in the adjudication process, the impossibility of keeping secrets in a tightly knit society, and social pressure to hold adjudicators to account. A major focus should be the effectiveness of each set of measures in achieving accountability and participation.

### **ISSUES RELATED TO THE FAIRNESS OF INFORMAL JUSTICE SYSTEMS' PROCEDURES**

Some of the principal human rights issues here concern:

- Accessibility of the forum with respect to cost, distance, language, cultural familiarity, and procedure
- Right of the parties to the dispute to be present at the hearing and to be heard
- Issues of procedural fairness related to the opportunity to present evidence and witnesses and to the questions taken into account when determining the outcome of the dispute
- Non-discrimination, participation
- Means to ensure that the adjudication is based only on the material facts and the rules that are applicable to those facts
- The protection of the needs of vulnerable persons and groups, particularly children
- Right of parties to be informed of the nature of the dispute and to understand the procedure and rules to be applied
- Support mechanisms for forum users, e.g., legal assistance, representation, and protection of applicants and/or witnesses, psychological and material support
- Effectiveness of forum, i.e., timeliness in processing and determining applications and cases and in enforcing remedies
- Guaranteed right of appeal and *non bis in idem*
- Use of coercion to enforce case resolutions

As in the discussion on structure, the key question here concerns the extent to which IJS actually succeed in protecting the acknowledged procedural rights. The country studies show that IJS will often actually 'score' highly in accessibility and perhaps in effectiveness. Some of the other standards cited here are by their nature less applicable to some forms of IJS. The issue of coercion is linked to the typology of the IJS concerned, the kinds of cases handled, and the procedural guarantees that are afforded. In general, the demands for procedural due process will be greater if IJS are recognized as having greater coercive powers. A completely voluntary and non-binding system will not be bound by rules of due process.

## IMPLICATIONS FOR PROGRAMMING

The primary question with respect to human rights and IJS must concern the provision of effective protection. If formal accountability mechanisms are often inoperative or inaccessible to ordinary people and are probably unable to fill the gap in the short and medium terms, the way is open to discuss how IJS compare to the formal justice system in terms of their ability to be impartial, accountable and participatory, to protect substantive human rights, and to offer accessibility, effectiveness and fairness in their procedures.

Lack of human rights compliance by IJS is no reason in itself for development agencies not to work with IJS, any more than it is reason not to work with a failing formal justice system. A key consideration is whether engaging with IJS will strengthen the protection of human rights, which will necessarily be a gradual process of change. The protection of the customs and laws of indigenous and minority groups, at least to the extent that those customs and laws do not breach other international legal norms, is itself a concern of international human rights law. Therefore, engaging with IJS should seek to make incremental improvements while simultaneously considering the longer-term perspective and also the rights of indigenous and minority groups to maintain their own cultural heritage.

# WOMEN AND GIRLS' HUMAN RIGHTS AND INFORMAL JUSTICE SYSTEMS

## INTRODUCTION

Asymmetrical and hierarchical gender division means that men and women do not have the same opportunities to achieve their potential. Widespread, serious gender-specific constraints on women and girls opportunities and choices exist in almost all parts of the world. This study takes as its point of departure the gendered world in which women and men operate and how their gendered roles with respect to access to resources affect their respective access to formal and informal systems of justice.<sup>155</sup> Keeping in mind the legal and principled position that all human beings are born equal<sup>156</sup> and that gender relations are about power,<sup>157</sup> it is relevant to examine women's human rights as a tool for creating gender equality, also in IJS.

Over the years, the human rights movement has been criticized for failing to take women's rights sufficiently seriously, including through the maintenance of a distinction between the public and private spheres.<sup>158</sup> However, "just as women's gender-specific vulnerabilities can no longer stand as justifications for denying human rights protection to women more generally, neither should 'differences among women' be allowed to marginalize some women's human rights problems, or to deny them equal solicitude and concern under the prevailing human rights regime."<sup>159</sup>

The formal recognition that women are entitled to enjoy all of the rights in international human rights law is the result of sustained effort since the 1950s. In addition to the requirement of equality and the principle of non-discrimination in the main human rights instruments, specific instruments such as the Declaration on the Elimination of Discrimination against Women (1967) and the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW, 1989) require states to pay particular attention to eliminating discrimination in law and in practice.

The Human Rights Committee (HRC) notes that inequality in the enjoyment of rights by women is often deeply embedded in tradition, culture and religion, so that many frequent violations of women's human rights originate in social custom, belief or practice rather than (or as well as) in state law and are perpetrated by individuals and social groups rather than the state.<sup>160</sup> The crucial state obligation in relation to these rights is to protect and fulfil as much as to respect, and thus the nature of the challenge in combating violations is also somewhat different. It is worth remembering here that culture can be a protector as well as a violator of human rights in the global south and north.

Since the Beijing World Conference and Platform for Action (1995),<sup>161</sup> impetus has come through developments such as the continuing work of the CEDAW Committee; the entry into force of the Optional Protocol to the CEDAW; and the inclusion of gender equality among the Millennium Development Goals. At the regional level, the entry into force of the (Maputo) Protocol to the African Charter on Human and Peoples Rights on the Rights of Women in Africa<sup>162</sup> and the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belem do Para, 1994) and are also relevant developments. The clear recognition that

155 See Griffiths, A., 1997, and others, such as WLSA publications.

156 UDHR, Article 1.

157 Women's power is often subordinate.

158 See Peters, J. S. and Wolper, A. (eds.), 1995; and Rebecca J. Cook (ed.), 1995.

159 Crenshaw, K. W., 2000.

160 See HRC General Comment No. 28.

161 See full references and follow up at <http://www.un.org/womenwatch/daw/beijing/index.html>

162 The Protocol entered into force in 2005.

violence against women (VAW) is a human rights violation and the actions of INGOs and the UN Special Rapporteur have done much to redress the imbalance on the level of action by the international human rights system.<sup>163</sup>

Despite these positive developments, the ICHRP notes that the discussion on respect for women's rights often remains tethered to the notion of 'balancing' these rights with culture and custom, rather than taking a more dynamic and process-oriented view of culture.<sup>164</sup> On the one hand, the deeply embedded patterns that the HRC refers to are often linked to patterns of economic survival and ethnic, religious or social identity. Thus, custom or religion-based IJS are especially likely to uphold rather than to challenge the values of the society around them, including attitudes and patterns of discrimination. On the other hand, the syncretic, flexible and adaptable approach of customary law can allow it to change in ways that reflect changing values in society. The HRC notes that states should ensure that "traditional, historical, religious or cultural attitudes are not used to justify violations of women's rights to equality before the law and to equal enjoyment of all Covenant rights."

It is sometimes difficult to isolate the adjudicative function of IJS mechanisms from the prevailing practices and norms within communities. The problems or human rights violations may indeed occur outside of or prior to any process of adjudication. From a programmatic point of view, it may thus be inadequate to address the adjudicative IJS without addressing the norms and even the world-views that inform them. In relation to the difficult area of real property and land allocation, the formulation of a national policy may itself be a major hurdle. Norms having a basis in religious faith may require a specific approach best developed by women themselves.

Tackling the social practices and beliefs themselves is outside the scope of this study. This recalls the treaty bodies' recommendations of using multi-pronged strategies over time to address these issues. In practice, the same community leaders – traditional or religious – who would be called upon to adjudicate disputes in the event of a conflict are those who are upholding the problematic practices – including, for example, child marriages, and discriminatory inheritance practices.

A key challenge for agencies engaged in programming for justice support and reform when engaging with IJS is to combine the familiar tools of justice reform, such as processes for change in legislation and institutional practice, with sets of tools designed to be effective in more diffuse settings. There is wide recognition that 'modifying social custom and practice' requires multi-pronged and long-term strategies. Change in IJS is likely to be associated with various factors, including women's education, breaking the isolation of rural communities, and encouraging participation in ways that represent a natural development rather than an abrupt intrusion.

This chapter looks at women's rights in relation to:

1. Legal frameworks: Discrimination and equal treatment
2. Structure: The right to participation, and an analysis of nomination and appointment mechanisms
3. Procedure: Gender-related barriers and issues
4. Substantive rights: Women's rights and legal domains in IJS based on customary law (marriage, family, property, inheritance, personal integrity and physical security)

<sup>163</sup> One could also point to developments in international criminal law, including landmark decisions by the ICTR recognizing systematic rape as constitutive of the crime of genocide.

<sup>164</sup> ICHRP, 2009.

## LEGAL FRAMEWORKS: DISCRIMINATION AND EQUAL TREATMENT

The UN and regional treaty systems and their reporting requirements are among the most important tools for addressing legal frameworks. The CEDAW obliges states to take all appropriate measures, including through legislation, to strive for the full development and advancement of women and to commit to modifying social and cultural patterns to eliminate prejudices and customary practices based on the presumed inferiority of either sex.<sup>165</sup> Regional human rights instruments, including the Maputo Protocol,<sup>166</sup> impose almost identical obligations, whereas the Belem do Para Convention<sup>167</sup> mentions states' measures to counteract prejudices, customs and all other practices based on the presumed inferiority or superiority of either sex.<sup>168</sup> For those African states that have not yet acceded to the Protocol, the provisions of the African Charter on Human and Peoples Rights remain essential.<sup>169</sup>

A legal analysis of some of the provisions of the African Charter by UN HABITAT observes that:

***“[T]he Charter (Article 18 (1)) recognizes that the family ‘as the natural unit and basis of society’ and the ‘custodian of morals and traditional values’ has to be protected by the State. On the other hand, Article 18 (2) and (3) makes clear that the States parties have to ensure that ‘every’ form of discrimination against women is eliminated and that the rights of women and children, as stipulated in international instruments, are protected. Thus, the possibility of considering an unequal relationship between men and women – as often found in customary laws and practices today – as a ‘traditional value’, is firmly ruled out: ‘every’ form of discrimination against women is to be eliminated and can therefore not constitute a traditional value. Moreover, the duty to preserve ‘positive’ African cultural values in the spirit of tolerance, dialogue and consultation, as laid down by Article 29 (7), seems to indicate that not all African values have to be preserved and that some cultural values that are not seen as ‘positive’ may change over time.”***<sup>170</sup>

States ratifying the CEDAW assume a positive obligation to promote social change wherever discrimination is found. This presents numerous difficulties, including political and institutional resistance and the limited effect of legislative change where the law and the state have limited reach. For example, Burkina Faso's rather modern and progressive 1989 Family Code is reportedly seldom followed in practice.<sup>171</sup> The issues that customary and religious law most often adjudicate relate to personal and family status and questions of real and personal property, including inheritance.<sup>172</sup> Moreover, IJS will often deal with perceived transgression of norms that relate to social conduct, including deeply held notions regarding gender and social roles and supernatural beliefs.<sup>173</sup>

<sup>165</sup> CEDAW, Articles 3 and 5.

<sup>166</sup> The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa

<sup>167</sup> The Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women

<sup>168</sup> See Article 2 of the Protocol, which, at the time of writing of this study, 27 countries have ratified. <http://www.africa-union.org/root/au/Documents/Treaties/treaties.htm>

<sup>169</sup> Article 1 of the Charter obliges States parties to undertake to adopt legislative or other measures to give effect to these rights and freedoms. Article 2 stipulates that every individual is entitled to the enjoyment of the rights and freedoms laid down in the Charter, without distinction of any kind, including that of a person's gender. Article 3 recognizes equality before the law and equal protection of the law for everyone without distinction, while Article 25 obliges States parties to promote and ensure the respect of the rights and freedoms contained in the Charter. In Article 28, the Charter extends into the private sphere by obliging every individual to treat others without discrimination, while Article 29 speaks of the duty of every individual to preserve the 'positive' African cultural values in the spirit of tolerance, dialogue and consultation.

<sup>170</sup> Women's Equal Rights to Housing, Land and Property in International Law, UN Habitat, 2006.

<sup>171</sup> See OECD Development Centre's Social and Gender Index: <http://genderindex.org/country/burkina-faso>. See also Country Specific Desk Study on Burkina Faso.

<sup>172</sup> Reference is made to Chapter II on Conceptual Framework and specifically on Legal Pluralism.

<sup>173</sup> Please refer to Chapter II on Conceptual Framework and specifically on Legal Pluralism and Chapter IV on Typology.

The CEDAW reporting guidelines<sup>174</sup> provide that states' reports should explain whether and to what extent the provisions of the Convention are guaranteed by law. If not, information should be submitted on whether CEDAW provisions can be invoked before and given effect to by courts, tribunals and administrative authorities. The report should outline any restrictions or limitations imposed by law, practice or tradition, or in any other manner, on the enjoyment of each provision of the Convention.<sup>175</sup> The domestication of the CEDAW and other international human rights instruments, particularly in countries that subscribe to a dualist legal doctrine, is thus critical.

Few African countries have made reservations to the CEDAW in respect of *prima facie* discriminatory customary law. Thus, the concluding observations of the CEDAW Committee frequently call on these countries to bring their national law into line with their obligations under the Convention.<sup>176</sup> An increasing number of states in Africa have constitutional guarantees of equal treatment for women, thus complying with their obligations under the CEDAW. Nevertheless, several African countries, including Zambia, Zimbabwe and Sierra Leone maintain constitutional provisions exempting customary law from the reach of constitutional guarantees of equality.<sup>177</sup> The constitutional provision tolerating *prima facie* discrimination in customary law in Zambia, similar or identical to those in many countries in Africa, has been taken up by UN treaty bodies,<sup>178</sup> including in the examination of Zambia under the Universal Periodic Review (2008). Zambia accepted the recommendation to strengthen the prohibition of discrimination in the context of the current constitutional review process and to introduce legislation to give effect to the CEDAW.<sup>179</sup> In recent years, the legislative tolerance of discrimination in customary courts has been removed in Lesotho.<sup>180</sup>

The situation is different in states where the influence of Islamic *Shari'ah* is behind a lack of equal treatment under national legislation. Many states with predominantly Muslim populations<sup>181</sup> have made reservations to some of the CEDAW provisions on equal treatment in participation and marital relations<sup>182</sup> and the CEDAW obligation to modify social customs and practices. Reservations of these kinds are highly controversial and in some cases considered invalid.<sup>183</sup> In these countries, there may be less readiness to change national legislation and constitutional provisions in accordance with treaty body recommendations. Nevertheless, this will depend on the particular context of the country concerned.

Despite attempts to limit the application of the Convention, these states, like all others, remain bound by similar, if less explicit provisions in other human rights instruments. Few states have made reservations in respect to gender (in)equality in relation to the other instruments, including the ICCPR, the ICESCR and the CRC. The Human Rights

174 HRI/GEN/2/Rev.1/Add.2, 5 May 2003.

175 CEDAW reporting guidelines, D.2.5.

176 See, for example, the list of issues regarding the examination of Ghana, where the Committee asked the Government of the Republic of Ghana to 'explain how the Government plans to harmonize civil, religious and customary law with the Convention, in particular in relation to Article 16 of the Convention'. CEDAW/C/GHA/Q/5.

177 E.g., Constitution of Zambia, Article 23 (4), Constitution of Kenya, 82 (4) (b) and (c), and Constitution of Zimbabwe, s. 23 (3) (b). The 1999 Magaya case in Zimbabwe obtained notoriety among women and human rights lawyers in southern Africa when the Supreme Court found that the constitution effectively shielded discrimination against women in regard to inheriting land.

178 UN document A/57/38(SUPP) (CEDAW, 2001), paragraph(s) 251 bis.

179 UN document A/HRC/8/43/Add.1.

180 See US State Department Report on Human Rights for 2006 for Lesotho: <http://www.state.gov/g/drl/rls/hrrpt/2006/78741.htm>

181 Including Niger, which is the focus of a country study.

182 As observed elsewhere in this chapter, though, there is little uniformity of practice in respect of the Convention among states with predominantly Muslim populations or that have adopted Islam as a state religion. While Pakistan, Mauritania and Saudi Arabia have reservations purporting to subject the entire Convention to the primacy of Islamic law, Saudi Arabia's neighbour Yemen contents itself with a reservation in respect of binding arbitration under Article 29, in common with many Western countries.

183 The CEDAW Committee has repeatedly expressed alarm and concern at the number and extent of reservations to the Convention. The Committee considers Articles 2 and 16 to be core provisions of the Convention, in respect of which reservations are contrary to its object and purpose (UN document A/53/38/Rev.1). Some Western countries have objected to the reservations, arguing that they are incompatible with the object and purpose of the Convention (under Article 28) and are therefore invalid, meaning that the Convention would remain in force in its entirety.

Committee and the Committee on the Rights of the Child<sup>184</sup> have made their position clear on the inconsistency of discriminatory customary law in marriage, divorce, inheritance, property and participation.<sup>185</sup>

Human rights law recognizes several dimensions of this category of rights, including equality in relation to structure and participation, to access and process, and to substantive outcomes. Through the obligation of States parties to establish legal protection on an equal basis with men through competent tribunals, etc., the CEDAW convention clearly recognizes the importance of access to justice.<sup>186</sup>

### STRUCTURE: THE RIGHT TO PARTICIPATION

For the purpose of CEDAW, any body that exercises public authority or power is a public authority or institution. This would include local, traditional or religious bodies to which the exercise of public authority<sup>187</sup> may be delegated. Even if there is neither a clear link between states and IJS in the form of recognition, nor some other delegation of state functions to traditional chiefs, nor enforcement or consideration of settlements reached through informal justice, the state remains obliged under Article 2 of the CEDAW to extend protection. In the Americas, Article 4 (j) of the Belem do Para Convention states that every woman has the right to equal access to her country's public service and to participate in public affairs, including decision-making. In Africa, Article 9 of the Maputo Protocol deals with the equal right to participation, including through affirmative action. Thus, Article 9.2 provides that States parties shall "ensure increased and effective representation and participation of women at all levels of decision-making".

These provisions, like the corresponding obligations in the CEDAW,<sup>188</sup> obligate states to ensure representation of women in bodies exercising public authority. It is clear from the work of the treaty bodies that adjudicative bodies are included as 'decision-making' or 'public functions'.<sup>189</sup> State recognition thus includes not only the formal delegation of authority or the payment of stipends, but also the recognition of IJS settlements and possibly other forms of *de facto* recognition. The participation of women as adjudicators or justice officials is vital to ensuring that women can bring sensitive matters to the attention of justice providers. The reasons for determining how the police deal with domestic violence or rape and for establishing police victims' service units (VSUs) apply similarly to IJS. Attention must thus be given to the mechanisms of nomination and selection of judges, adjudicators, mediators, assessors or other titles of persons exercising authority within IJS, insofar as they enjoy any sort of state recognition.

African countries with dualist legal systems, whereby state courts<sup>190</sup> apply customary law, often do not comply with these obligations. Zambia exemplifies a typical pattern, yet some promising developments. According to Zambia's Local Courts Act,<sup>191</sup> the Judicial Service Commission appointed local court magistrates. The law was silent

184 The Committee on the Rights of the Child frequently includes a general recommendation to states to ensure that customary law conform to the provisions of the CRC. This includes, of course, the non-discrimination provisions, CRC, Article 2. See, for example, the recommendations to Burkina Faso: CRC/C/15/ADD.193 (CRC, 2002), paragraph 8.

185 On action by the Human Rights Committee in relation to state equal treatment obligations under the ICCPR, see, for example, the examination of Gabon, CCPR/CO/70/GAB (HRC, 2000), paragraph 9. The Committee recommended that Gabon 1) review legislation and practice to ensure women have the same rights as men (rights of ownership and inheritance); 2) increase involvement of women in political, economic and social life; 3) ensure there is no discrimination based on customary law (in marriage, divorce and inheritance); and 4) abolish polygamy, repealing Article 252 of the Civil Code. The 2007 examination of Zambia by the HRC is also relevant, see: CCPR/C/ZMB/CO/3 (HRC, 2007), paragraph(s) 13.

186 CEDAW, Article 2 (c) and Article 2 (d).

187 Be it executive, legislative or judicial.

188 CEDAW, Article 7.

189 See General Recommendation No. 23 (16th session, 1997) Article 7 (political and public life). "The obligation specified in Article 7 extends to all areas of public and political life and is not limited to those areas specified in subparagraphs (a), (b) and (c). The political and public life of a country is a broad concept. It refers to the exercise of political power, in particular the exercise of legislative, judicial, executive and administrative powers."

190 The local courts in Zambia or the Tribunais Comunitarios in Mozambique are a good example.

191 Section 6 of the Law.

on procedures for appointment. According to one report, the appointment process relied on local chiefs. Several factors contributed to the local courts' bias toward male justices, including the fact that "there are no standard qualifications laid down for the local court justices. Secondly, these courts still carry the ancient stigma of being traditional courts where the male gender takes the centre stage. Thirdly, in rural areas, whenever a vacancy occurs for a court justice, the local court officer requests the area chiefs to submit three names for consideration by the Judicial Service Commission. We discovered that the chiefs were inclined towards male candidates."<sup>192</sup> In recent years, though, the Zambian judiciary has taken serious steps to begin to redress the balance. Qualifications requirements have become more standardized and vacancies are publicly advertised more often, especially in urban areas, where the chiefs hold less sway. The judiciary has become more conscious of gender.<sup>193</sup>

In many countries, traditional customary authorities play a role in the nomination of candidates for office in the parajudicial or 'hybrid' systems involving local or customary court justices or, by extension, for customary assessors,<sup>194</sup> whereas a body such as a judicial service commission (JSC) or a government ministry makes or approves the final appointment. As long as most traditional customary chiefs are male, they are likely to perpetuate the exclusion of women, and any reform effort will probably need to start with the government body exercising some influence in the selection process. The Beijing Platform recommendation would demand that the bodies such as JSCs adopt transparent criteria for the appointment of local court justices. These criteria should at the least be gender-neutral or even contain elements of affirmative action. In addition, instead of relying on an all-male group of chiefs to nominate candidates, government bodies such as JSCs could consider introducing regulations to ensure that the nominating body itself adequately represent women. Affirmative action measures have been taken with the Local Council courts in Uganda and the village courts in Bangladesh and Papua New Guinea, where quotas for female representation have been set.<sup>195</sup> Measures of this kind are possible to introduce – at least on paper – in the parajudicial systems.

The problem of a gender imbalance is likely to be more serious in traditional chiefs' or headmen's courts. If states recognize these courts, the function of chief or councillor is a public office and, consequently, the state is obligated to respect women's right of access to these offices. Article 3 of CEDAW outlines that:

***"States Parties shall take in all fields, in particular in the political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, of the purpose of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on a basis of equality with men."***

In recent years, there have been some notable developments in this field. The 2007–2008 Shilubana judgement of the South African Constitutional Court is particularly noteworthy.<sup>196</sup> In that case, the Court found in favour of a woman's right to accede to the office of chief. It is interesting that the Court was thus supporting the decision of the tribal councillors to overturn a discriminatory tradition in this respect and essentially found in favour of the right of the tribal authorities to apply a dynamic approach to culture that allowed them to change a tradition based on male succession. The South African Commission for Gender Equality and a national NGO, the National Movement of Rural Women, intervened as *amici curiae* in favour of this dynamic interpretation. The chances of

<sup>192</sup> See Afronet, 1998, 'The Dilemma of Local Courts in Zambia', [http://www.oneworld.org/afronet/reports/l\\_courts.htm](http://www.oneworld.org/afronet/reports/l_courts.htm)

<sup>193</sup> Interviews in Lusaka, February and March 2010.

<sup>194</sup> Found in many countries, such as Niger, where the ministry responsible for local government approves the selection of traditional chiefs, while the Ministry of Justice does so in relation to customary assessors. See Niger study.

<sup>195</sup> See country studies on Uganda, Bangladesh and Papua New Guinea. See also the discussion, in Chapter V on typology, about the participation of women.

<sup>196</sup> Shilubana and Others v. Nwamitwa (Commission for Gender Equality; National Movement of Rural Women; Congress of Traditional Leaders of South Africa as Amici Curiae), Case CCT 03/07, 2008, ZACC 9. Available online at: <http://www.saflii.org/za/cases/ZACC/2008/9.html>



a full and satisfactory enforcement of a judicial decision like this one would undoubtedly have been more difficult had tribal elders opposed it.<sup>197</sup> Tribal elders might be more likely to propose women for these offices where there are women candidates available who, by virtue of their abilities and qualifications, are likely to benefit the community and/or where qualified male candidates are unavailable.

Some countries operate local justice systems on the basis of local democratic elections. Examples of these are the *Barangay* justice system in the Philippines or the local council court system in Uganda. Selection of *Barangay* officials in the Philippines and, through them, of local mediators, is through local democratic processes. The same applies to Uganda, with the difference that there is a mandatory representation of at least three women out of a nine-member executive council.<sup>198</sup> Rwandan government policy stipulates that female judges should comprise one third of the *Gacaca* tribunals.<sup>199</sup> As these mechanisms belong to the category of IJS that are run by locally elected administrations with an adjudicative function, the question of qualifications is less relevant. Qualifications to run for public elected office are typically fairly broad, but several studies as well as informants interviewed for the country studies actually point out that officials' lack of formal training or qualifications affects the officials' understanding and ability to follow the regulations.

There is some discussion as to whether affirmative action measures alone can make a difference in the local context. The social status of women in the family and community can continue to limit their independence and decision-making power despite women's representation in elected bodies. If these are the only women in decision-making positions in the communities, the impact might be limited. A male-dominated and conservative 'electorate' that subscribes to traditional norms can also influence how progressively the elected women actually are in their action. More equal gender representation does not guarantee less bias against women litigants in adjudication processes. Change here requires a more general shift in the social power structure.<sup>200</sup> Change is more likely to come from a multi-pronged strategy and will in all cases take time.

Finally, few religious creeds traditionally welcome women in positions of authority. As discussed in the Niger country study, this may be a barrier to women accessing positions of authority in secular and religious structures alike. Article 7 of the CEDAW presents difficulties for countries delegating responsibility for legal matters – most often related to marriage, the family and inheritance – to traditionally all-male religious courts. The governments of Israel and Malaysia recognized this difficulty and chose to express formal reservations. Israel's reservation to the CEDAW concerned the religious laws of the country's religious communities that prohibit the representation of women on religious courts, whereas Malaysia's concerned *Shari'ah*.<sup>201</sup>

## ACCESS AND PROCEDURE: LEGAL CAPACITY AND WOMEN'S RIGHT TO A REMEDY

The ICCPR guarantees the right to a remedy<sup>202</sup> for violation of any of the rights laid down in the Covenant, the equality of all persons before the courts and tribunals, and the right of all persons to be recognized everywhere as persons before the law. Moreover, it lays down the entitlement of everyone to equal protection under the

197 At the national level, the Council of Traditional Leaders of South Africa opposed the decision.

198 See the Uganda country study below.

199 According to one estimate, 29 percent of judges were female. See *Strategies For Increasing Women's Participation In Government Case Study Of Rwanda*, paper presented by Mr. John Mutamba, Expert Group Meeting On Democratic Governance in Africa, 6–8 December 2005, Nairobi, Kenya.

200 See, for example, Kane, Oloka-Onyangco and Cole, 2005.

201 Other States parties applying *Shari'ah* have not followed suit, and one must therefore conclude that many states where *Shari'ah* courts exist are legally bound by international law to ensure representation of women on such courts. The list is long and includes Bahrain, Egypt, Jordan, Iraq, Kuwait, Lebanon, Libya, Morocco, Niger, Oman, Syria and the UAE. On the other hand, States parties such as Saudi Arabia, Pakistan and Mauritania, which have made reservations to the Convention, which are general and broad, would consider that the reservations also apply to this requirement.

202 Be it judicial or administrative.

law, without discrimination.<sup>203</sup> In Africa, Article 8 of the Maputo Protocol focuses particularly on women's right to access justice. States parties are obliged to take all appropriate measures to ensure women's access to legal services, including legal aid, as well as structures and measures to educate women (and everyone) about their rights. It speaks particularly of equal representation of women in the judiciary and law enforcement organs and of equipping these organs to effectively interpret and enforce gender equality rights. It also repeats the obligation to reform discriminatory laws and practices. In the Americas, the Belem do Para Convention states that "[e]very woman has the right to the recognition, enjoyment, exercise and protection of all human rights and freedoms embodied in regional and international human rights instruments. These rights include, among others: [...] f) the right to equal protection before the law and of the law; [and] g) the right to simple and prompt recourse to a competent court for protection against acts that violate her rights."<sup>204</sup>

The CEDAW obliges states to accord women equality with men in legal capacity and before the law, equal rights to conclude contracts and administer property, and equal treatment at court procedures. It also provides that all contracts directed at restricting the legal capacity of women shall be deemed null and void. The CEDAW Committee points out that a woman's right to bring litigation may be limited by law, by her access to legal advice and her ability to seek redress from the courts, or, in turn, by her status as a witness or because her evidence is accorded less respect or weight than that of a man.<sup>205</sup>

The violation of women's rights in this area may lead to violations of the rights of others, particularly of dependent children. The Committee's reference to women's "ability to seek redress from the courts" covers a wide range of factors and difficulties. While some of the obstacles to women are common to the population in general (e.g., distance, cost, cultural and social accessibility), they may be more serious in the case of women. Women may be intimidated from seeking redress before state courts or IJS either by officials of the court systems or by members of their communities.

The CEDAW reporting guidelines require states to inform the Committee of the range of remedies available to persons whose rights may have been violated in particular to provide information about "the judicial, administrative and other competent authorities having jurisdiction with respect to the implementation of the provisions of the Convention." For many states, these 'authorities' and remedies include IJS. Any activities of bodies such as NHRIs, specialized commissions for women or equality, or ombudsman institutions in relation to IJS would also be relevant. While the Committee's recommendations refer to customary law mechanisms, these recommendations usually involve legal frameworks. An examination of states' reports to the CEDAW or other treaty bodies (or the UPR) shows that little attention is given to the practical operation of IJS and customary law. When the treaty bodies do not receive information, they are unable to respond with observations and recommendations. Programming in IJS should increase the flow of information, both nationally and internationally, in order to facilitate a qualified dialogue.

## GENDER-RELATED BARRIERS TO ACCESS TO JUSTICE IN PRACTICE

Even when constitutions and family law have more or less recognized the concept of non-discrimination against women, the extent to which such legislation has helped to improve the situation of women remains in doubt.<sup>206</sup> As many scholars have pointed out, legislative reform is no guarantee of social change.<sup>207</sup> Law may fail to take account of the social reality of women's lives, potentially exacerbating their problems. In Kenya, for example, state

203 ICCPR Articles 2.3, 14 and 26.

204 Excerpt from Article 4 of the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women.

205 CEDAW Committee General Recommendation No. 21.

206 An-Na'im has warned of putting too much emphasis on law when it comes to human rights, especially in contexts where states are 'weak'; see 'The Legal Protection of Human Rights in Africa: How to Do More with Less'. An interesting analysis of the obstacles to the realization of women's inheritance rights in Malawi is Chiweza, A. L., 2005, 15: 1, 83-89. This article examines constraints at several levels, from threats of witchcraft to petty corruption and system dysfunctionality.

207 See Cook, R. J., 1995, op. cit.

laws formalized and individualized property rights in a way that impeded women's right to property.<sup>208</sup> Thus, state laws may disenfranchise women by not considering the contextual realities of their lives.

In addition to existing gender-specific constraints, women also suffer from the generally dysfunctional state of justice systems. In this regard, research in Pakistan documented how normal procedures such as filing cases, getting cases 'fixed' for hearing, obtaining copies of court orders, and inspecting files are matters that never proceed without payment.<sup>209</sup> If women are poorer than men, they will be less able to pay. Factors such as these will influence people's choices between formal and informal systems. The enforcement of judgements and legal entitlements even where there is no litigation or dispute or where the matter has been settled in a court judgement is a major difficulty in many developing countries with relatively weak justice systems. The enforcement of judgements is usually left up to local executive officials or even traditional chiefs, which, on the one hand, can lead to problems if they are not in agreement with the principles of the law or the judgement. On the other, if they are subject to pressure from powerful constituents, local notables or 'big men', then judgements or settlements may simply not be enforced. The section below on women's property rights contains some examples of problems with enforcement. As mentioned below, community involvement, such as that in some of Bangladesh's *Shalish* courts, may provide some protection against non-enforcement.

### THE PROBLEM OF LACK OF AWARENESS

The lack of awareness of women's rights is a major problem for users and providers of IJS, as the country studies acknowledge. Indeed, the problem can be severe, amounting to much more than a lack of familiarity with the content of the CEDAW. It can involve deep ignorance of national legislation and may be coupled with wider exclusion of women from education and community education awareness-raising campaigns.<sup>210</sup> Addressing this problem is frequently a first step in the programmes of NGOs (including those involved in the provision of legal aid), government agencies and development organisations.

### PROCEDURAL BARRIERS TO WOMEN AS WITNESSES OR LITIGANTS

There may be no basis for discriminatory treatment of women in the relevant law. This section should thus be seen together with the one below on social barriers. While written rules and procedures are less likely to be present in most IJS, this is not necessarily a problem in itself. Nevertheless, the lack of procedural rules, while having the advantage of rendering proceedings less technical and easier for people to participate in without lawyers, can also permit prejudice and the abuse of power. In patriarchal societies, this can easily disadvantage women.

Procedural problems may be seen in some courts applying *Shari'ah* law. A section of one authoritative report dealing with the requirement that witnesses be present in order for Muslim religious marriages to be valid states:

***"[I]n most systems based on Muslim laws, the presumption is that the two witnesses have to be male. However, the laws in Sudan and Yemen note that one man and two women may act as witnesses. Most laws do not expressly permit four women to witness a marriage. The lesser 'worth' of women as marriage witnesses is said to be based on Qur'anic provisions (2:282) regarding the witnessing of contracts involving future financial obligations."***<sup>211</sup>

***In the legislation of some countries, such as Pakistan's much criticized (former) Hudood laws, trials in religious courts explicitly required that rape be witnessed by four males in order to be proven.***

208 Griffiths, A., 2007.

209 Mehdi, 1994.

210 For more information on 'educational poverty', see the EFA Global Monitoring Report on Deprivation and Marginalization in Education, UNESCO at <http://www.unesco.org/fileadmin/MULTIMEDIA/HQ/ED/GMR/html/dme-3.html>

211 See *Women Living Under Muslim Laws*, 2006.

***While law reforms in 2006 removed these cases from religious courts and thus improved the situation of women in relation to evidence, laws that give women's testimony a lesser value than men's persist in Shari'ah religious courts in many countries.***<sup>212</sup>

Other procedural issues, including the question of privacy and confidentiality, are very important to women's participation. The Malawi country study shows that women were more likely to bring certain cases to village mediators rather than to traditional chiefs because this process offered more confidentiality than the public discussion of personal and intimate matters that would take place in the traditional IJS offered by local chiefs. The prominence of women among the village mediators was also an important factor. The experience in Bangladesh, as seen in the study of that country, is also instructive here in that NGO-sponsored *Shalish* courts systematically address women's participation. In contrast to the confidential mediation offered in Malawi, modified NGO-sponsored *Shalish* courts in Bangladesh retain emphasis on the tradition of community involvement. This can be a guarantee of enforcement of decisions and can play a pedagogical role in the community, including in relation to women's status and rights.<sup>213</sup>

Written rules of procedure have the virtue of setting out an indisputable and transparent standard of conduct. People can use them as a tool for accountability only if the rules are available and they are aware of them. Introducing new procedural rules and practices will require training and monitoring.

## **SOCIAL BARRIERS**

While women's ignorance of their rights provided under national legislation is a major barrier to women's empowerment, social constraints may in some circumstances be an even greater barrier than a lack of knowledge. Women's resources cannot be determined *a priori* and are affected by age, religion, ethnicity and class.<sup>214</sup>

The country study in the Ungai-Bena District in Papua New Guinea shows that women live in constant fear for their lives: "When it comes to someone dying or being ill and the cause is decided (by the family) to be related to sorcery we just know one of us will be attacked, tortured or even killed. Our husbands cannot stand up for us against the accusation unless we have given him many sons. We simply have no rights."<sup>215</sup>

Families, beyond being unhelpful, "can also be main source of threats and possible danger to a woman who embarks on a decision not of their making nor to their liking."<sup>216</sup> Women may face varying degrees of pressure from the IJS at every step when seeking justice. They may thus need assistance to cope with the social ramifications of their actions. Women may face implicit or explicit threats of social ostracism, further mistreatment or violence as the price of defying norms or powerful actors.<sup>217</sup>

In Baluchistan and Afghanistan, where IJS are strong, women do not use the formal courts, as to do so would be taken as an action against the honour of a family.<sup>218</sup> One researcher observes that many people associated with IJS in Pakistan perceive the formal state laws of Pakistan as representing a 'rival' legal power that threatens the very ideology and existence of IJS; consequently, most people would not invoke state laws for the purpose of justice, but rather only to negotiate their cases. These are some of the reasons why women stay away from state courts. As the Niger country study reveals, violations of substantive and procedural rights can reinforce one another, in that the very existence of the possibility of 'repudiation' of a marriage can be a powerful disincentive for women to bring complaints, whatever the forum.

212 In its 2008 report *Perpetual Minors: Human Rights Abuses Stemming from Male Guardianship and Sex Segregation in Saudi Arabia*, Human Rights Watch documented how a male guardian is still required for women to be able to deal with many aspects of court proceedings.

213 It should be noted that sexual violence cases were not involved in either setting.

214 See Bentzon et. al., 1998; Griffiths, A., 1997.

215 Focus group interview with women in Ungai-Bena District, Papua New Guinea, October 2009.

216 Shaheed, F., 1997: 58.

217 See Chiweza, A. L., 2005, op. cit.

218 Mehdi, R., 2002: 171.

## PROGRAMMING CONSIDERATIONS FOR TACKLING SOCIAL BARRIERS IN COMMUNITIES

Addressing social barriers involves engaging the women themselves and their communities. This task goes beyond justice interventions, which must be coordinated with programming for women's empowerment more generally. Specific justice-related interventions help provide legal education and paralegal and legal services to the women themselves and raise awareness, a task that goes beyond the simple provision of information. This can be coupled with interventions addressing the knowledge and attitudes of traditional leaders. Malawi provides some good examples. A DFID-financed programme run by the Catholic Commission on Justice and Peace (CCJP) trains traditional authorities and their communities in human rights, national legislation and mediation technique. Another programme, run by the Paralegal Advisory Service, adopted a different approach, whereby mediators based in the villages are trained to assist people in resolving disputes. Mediators noted the strong presence of women and the design of the training has been highly participatory and contextualized.

## SOCIAL BARRIERS REFLECTED IN JUSTICE PROVIDERS AND INSTITUTIONS

There may be a widespread assumption that courts are not 'meant' for women. Research in Pakistan found that the very atmosphere of state courts was harsh and unfriendly for women. The court buildings did not have female toilets, signifying that the courts of justice did not expect to host women at all.<sup>219</sup> There are almost no female clients and males dominated the lower courts at all levels.<sup>220</sup> Similarly, issues of personal security may be important. State courts may be places associated with police, criminals and corrupt middlemen and may thus be perceived as insecure and threatening environments. Seeking justice may entail accusations of improper conduct. One researcher has noted that, in some divorce cases in Pakistan, advocates have added irrelevant moral accusations to the basic plea.<sup>221</sup> Sensitising adjudicators to prohibit conduct of this kind can be addressed through training and example setting by senior figures in the judiciary. The *Shalish* courts in Bangladesh that were exposed to significant external influence and reform through NGO involvement generally treated female and male litigants and witnesses substantially equally.<sup>222</sup>

## PROGRAMMING CONSIDERATIONS FOR TACKLING SOCIAL BARRIERS PRESENT IN INSTITUTIONS AND PROVIDERS

While many of these barriers may be present in any court, it may be easier to address them systematically in state courts or more recognized IJS than in other IJS. In Zambia, a GTZ training programme<sup>223</sup> of local court justices with the assistance of NGOs and community paralegals<sup>224</sup> helped break down barriers between the two groups. Consequently, it became possible for paralegals to observe proceedings in local courts and to monitor how the justices and court personnel treated women. The success indicators measured the degree of intimidating language used against women and whether women were allowed to speak before the court without the accompaniment of a male relative, as the baseline data collected for the programme revealed these problems.<sup>225</sup>

219 Mehdi, R., 2002: 98; Ali, 2007.

220 Mehdi, R., 2002: 133.

221 Mehdi, R., own observations.

222 See the case study on Bangladesh for details.

223 Carried out with the judiciary section responsible for local courts and two NGOs that provide legal services to rural women.

224 EPWDA and LADA.

225 From an unpublished paper entitled 'Summary of Reports on Monitoring the Impact of Training Local Court Justices and Paralegals in the Southern and Eastern Provinces of Zambia', under the GTZ-supported project Improvement of the Legal Status of Women and Girls in Zambia, by Tina Hofstaetter, GTZ, Lusaka, July 2006.

## SUBSTANTIVE RIGHTS: WOMEN'S HUMAN RIGHTS, CUSTOMARY LAW AND INFORMAL JUSTICE SYSTEMS

### WOMEN'S RIGHTS IN MARRIAGE AND FAMILY LIFE, INCLUDING THE DISSOLUTION OF MARRIAGE

Article 17 of the ICCPR prohibits arbitrary or unlawful interference with a person's privacy, family or home and recognizes the right of every person to legal protection in this regard. Article 23 (4) requires States parties to take appropriate steps to ensure equality of rights and responsibilities of spouses in the contracting of marriage, during marriage and in the event of its dissolution. Article 16 of the CEDAW similarly entitles women and men to equal rights before, during, and at the dissolution of marriage and invokes various international standards of women's equality in marriage and the family.

### POLYGAMY

The UN Human Rights Committee<sup>226</sup> adopts an unequivocal position against polygamy, which is elaborated by the CEDAW Committee: "Polygamous marriage contravenes a woman's right to equality with men, and can have such serious emotional and financial consequences for her and her dependents that such marriages ought to be discouraged and prohibited."<sup>227</sup> The Committee notes that, while most countries report that national constitutions and laws comply with the Convention, custom, tradition and failure to enforce these laws in reality contravene the Convention. As noted, some states have expressed reservations to Article 16 of the CEDAW. Many of these states have also done so in relation to Article 23.4 of the ICCPR, which deals with equality in marriage and the family.

Given the extremely widespread practice of polygamy in Africa, the Middle East and parts of Asia and the centrality of IJS in family law, the unequivocal stance of these two global human rights bodies on the issue of polygamy will undoubtedly cause debate on engagement with IJS that uphold and support the practice. Reconciliation of these two positions is not easy. The issue raises particularly complex social and welfare issues in that a failure to recognize the reality of polygyny could injure the rights of women in polygamous marriages and their children in the short term.

### PROGRAMMING CONSIDERATIONS REGARDING POLYGAMY

While it is well known that Islamic *Shari'ah* law permits polygamy, it does not require it, so regulation or even a prohibition at the level of national law is not necessarily excluded in predominantly Muslim countries.<sup>228</sup> Given a favourable environment, strategic litigation on the issue can also have an impact. Benin is one of the few African countries to have legislated against polygamy, with the Supreme Court upholding the prohibition on the basis of constitutional guarantees of equality. The Malawi country study shows that draft legislation and political statements about the abolition of polygamy have been made, but not yet enacted. Nevertheless, legislation or judicial decisions against polygamy are likely to be ignored in practice in many countries, and the Niger country study shows that many in the judiciary would be reluctant to interpret the equality clause in the constitution as forbidding polygamy. The Bangladesh country study notes legislation that, in principle, bans polygamous unions but provides a loophole whereby arbitration councils can approve such marriages.

Furthermore, measures to tackle child marriage, forced marriage, teenage pregnancy and discontinued schooling are likely to affect rates of polygamy, so governments might best influence this practice through indirect means. Despite more than 20 years of advocacy and political discussion, Uganda's attempts to regulate such practices through a legislative compromise that would allow a man no more than two wives and to ensure economic support and equitable treatment for both of them, have not come to fruition. Nevertheless, the widespread debate

226 ICCPR, General Comment No. 28.

227 General Recommendation No. 21 (13<sup>th</sup> session, 1994), Equality in marriage and family relations.

228 Morocco and Turkey are examples.

and increased awareness of the issues that the political process and legislative attempts have engendered should also be seen as programming results. Such wide social change as that sought through such legislation requires time and a multi-pronged approach that may emphasize education, health and economic and social empowerment as much as – or even more than – justice.

### **CUSTOMARY AND CIVIL MARRIAGE**

The CEDAW Committee notes that “many countries in their legal systems provide for the rights and responsibilities of married partners by relying on the application of common law principles, religious or customary law, rather than by complying with the principles contained in the Convention. These variations in law and practice relating to marriage have wide-ranging consequences for women, invariably restricting their rights to equal status and responsibility within marriage. Such limitations often result in the husband being accorded the status of head of household and primary decision maker and therefore contravene the provisions of the Convention.”<sup>229</sup> Thus, the Committee has adopted a rather sceptical position regarding the compliance of customary marriages with the obligation to provide equal rights during marriage.

The CEDAW General Recommendation<sup>230</sup> outlines that States parties should also require the registration of all marriages, be they civil, customary or religious. This measure can help to ensure compliance with the Convention and establish equality between partners, a minimum age for marriage, prohibition of bigamy and polygamy and protection of the rights of children.

### **PROGRAMMING CONSIDERATIONS REGARDING CUSTOMARY AND CIVIL MARRIAGE**

Good practices could involve providing for the option of civil marriage. This can be done through legislation and programming that extends the reach of the authorities empowered to celebrate civil marriages, as well as making the contracting of civil marriage less expensive. Similar considerations apply to the dissolution of marriage. In some countries, dissolution of civil marriages requires a high court action that is expensive, time-consuming and procedurally cumbersome. Nevertheless, the effect of measures such as this alone are likely to be only marginal, as the unavailability of civil marriage is not one of the main reasons that people usually prefer customary marriage.<sup>231</sup>

Many countries have difficulty in making registration of civil status (e.g., birth, marriage and death) socially, economically and geographically accessible to people in rural areas. Late registration can be a demanding and expensive procedure if it is not accomplished within a set period following one of these events.

The issue of marriage registration is linked to that of polygamy, as countries may permit civil marriage to only one spouse while permitting or tolerating polygamy according to customary marriage. Registration of one union to the exclusion of others could harm the wives and children who are not the subject of the registered marriage. Court action in a formal court may be possible or even legally necessary in some instances in relation to a civil marriage, but not to a customary one. The possibilities of differentiated treatment on this basis alone could cause injustice. The legal recognition of customary marriage and the issuance of certificates to this effect could possibly avoid these difficulties. This can provide better legal protection in case of desertion or death of a spouse. It may require a harmonization of the legal requirements necessary for the validity of a customary marriage. Sierra Leone took this step through legislation passed in 2009.<sup>232</sup> Because the legislation is so recent, it is too early to evaluate its effects. It nevertheless contains interesting safeguards against child marriages as well as provisions for the recognition of ‘common law marriage’, defined as the parties’ cohabitation for five years. South Africa passed legislation on

229 General Recommendations of CEDAW on Article 16 (1) (c), paragraph 17.

230 Ibid., paragraph 39.

231 Questions put to interviewees during the country studies in several countries confirmed that even educated, middle-class Africans often prefer to enter into customary marriages.

232 See the Registration of Customary Marriage and Divorce Act, 2009, accessed at: <http://www.sierra-leone.org/Laws/2009-01.pdf>

the recognition of customary marriages in 1998. Unlike the Sierra Leonean act, the South African legislation also addresses the question of property ownership in marriage, providing for co-ownership and joint control of property.<sup>233</sup> Zambia's Law Reform Commission is also working on a draft bill on this.

## ARRANGED AND FORCED MARRIAGES – THE RIGHT TO CHOOSE A SPOUSE

On Article 16 (1) (a) and (b), the CEDAW Committee comments that a woman's right to choose a spouse and enter freely into marriage is central to her life and to her dignity and equality as a human being. Paragraph 36 of the General Recommendation refers to the Vienna Declaration and Programme of Action (VDPA),<sup>234</sup> where states are urged to repeal existing laws and regulations and to remove customs and practices that discriminate against and cause harm to the female child. Article 16 (2) of the CEDAW and the provisions of the CRC oblige States parties to deny validity to a marriage between persons who have not attained their majority. States parties' reports show that forced marriages or remarriages are permitted in some countries on the basis of custom, religious beliefs or ethnic origins. In some parts of the world, particularly in Pakistan and Afghanistan (but also in parts of Africa), forced marriage may be practiced in connection with dispute resolution processes between tribes and clans. In some cases, IJS may thus be closely involved with the practice in these countries. In Africa, the custom or practice of levirate is widespread in some regions, according to which a woman may be forced to marry the brother of her deceased husband.

The CEDAW Committee recommends<sup>235</sup> the abolition of different marriage ages for men and women. Moreover, it underscores that the betrothal of girls or family members' undertakings concerning girls' future marriage contravene the Convention and should not be allowed.

Another aspect is the freedom to enter into a marriage of one's own choosing. Customary law in matrilineal cultures in Malawi traditionally did not permit a marriage without the consent of marriage guardians (*chinkhoswe*). Interestingly, the Malawian courts seem to have rejected this requirement as a bar to the validity of marriage, applying constitutional provisions securing the right of all persons to marry and the recognition of *de facto* marriages after a set period of cohabitation.<sup>236</sup> The court's decision runs against traditional practices requiring agreements and exchanges between the spouses' families. The following chapter discusses the issue of child marriage, which may be seen by some as forced marriage by definition.

## DOWRY AND BRIDE PRICE

The payment of dowry and bride price is widely practiced and may be necessary for the validity of customary marriages in many countries. In Islamic law, dower (paid by the husband) may be a part of marriage consideration. In some countries, a dowry payment from the husband becomes the woman's property upon eventual divorce.<sup>237</sup> The practice of dowry payments from the wife's family has been legally abolished in some countries, including India and Bangladesh, but dowry disputes are reportedly still matters that frequently arise in IJS in these and other countries. In South Asia, such disputes have been connected to extreme forms of violence against women, such as acid throwing. In much of Africa, the payment of bride price is legal and nearly universal.<sup>238</sup> Reports from several countries indicate that high bride price may trap women in undesirable marriages, as repayment of the bride price may be a prerequisite to dissolution of the marriage under customary law.<sup>239</sup> Likewise, bride price (particularly if it is high) may

233 South Africa, Recognition of Customary Marriages Act, 1998.

234 Adopted by the World Conference on Human Rights, held at Vienna on 14-25 June 1993.

235 General Recommendation No. 21, paragraph 38.

236 See Mwambene, 2005, cited fully in Malawi study.

237 *Women Living Under Muslim Laws* (WLURL), 2006, op. cit.

238 A challenge to the legal recognition of bride price brought by a Ugandan NGO failed in Uganda's Constitutional Court in March 2010. See : <http://allafrica.com/stories/201003290749.html>

239 The field visits were told that this could be the case (with some differences among various ethnicities) in Malawi, Uganda and Zambia. A study in Tanzania linked bride price to violence against women. See <http://www.irinnews.org/report.aspx?reportid=59032>



limit the freedom of young people to choose whom they wish to marry, as the approval of parents and relatives may depend on obtaining a certain price. In Zambia and much of southern Africa (particularly in patrilineal cultures), bride price, known as *lobola* or *lobolo*, is generally one of the legal conditions of a valid customary marriage. While bride price may be less widespread in matrilineal cultures, there are variations from one place to another.

## PROGRAMMING CONSIDERATIONS REGARDING BRIDE PRICE

An early UN Convention, the Supplementary Convention on the Abolition of Slavery, the Slave Trade and Institutions and Practices Similar to Slavery,<sup>240</sup> deals with issues that include forced marriages, wife inheritance and any form of ‘wife trading’ for value. It commits States parties to bring about the abolition and abandonment of such practices as soon as possible. In relation to bride price, the key issue in this instrument is the voluntariness of the practice, or right of the woman to refuse consent. Some countries where bride price and dowry are practiced either succeeded to obligations under this Convention or ratified it independently. As early as the 1960s, countries such as Mali attempted to regulate bride price by setting limits on the amount permitted.<sup>241</sup> As noted above and in the Bangladesh country study, that country adopted legislation prohibiting dowry payments by the wife’s family in 1980, in part because of a link between such payments and violent acts against wives.<sup>242</sup> Although subsequent legislation combating repression of women and children provides for imprisonment or a fine for taking or demanding a dowry, data in the Bangladesh country study casts doubt on the effectiveness of the law.<sup>243</sup>

A legal argument can be made that having bride price payment as a condition for the validity of a customary marriage is a violation of individuals’ right to marry, so litigation based on constitutional or human rights law could be an element of a strategy to combat the practice. Nevertheless, the limited probable impact this would have in the absence of popular agreement with any such decision would have to be considered. The Ugandan NGO MIFUMI<sup>244</sup> has made bride price a campaign issue, having worked on the question for a decade or more and using advocacy and strategic litigation. A legal petition to have the custom declared unconstitutional on grounds that it led to violence against women and treatment of women as chattels was defeated in the Constitutional Court in March 2010. The Court criticized the lack of a factual foundation for the petitioners’ assertions, possibly indicating that their case may have stood a better chance if the assertions had been clearer. The case has been appealed to Uganda’s Supreme Court.

Well-designed campaigns to limit the amount paid as bride price would be helpful. MIFUMI organized a referendum in Tororo, Uganda, on the issue in 2001, obtaining a vote in favour of bride price being considered a non-refundable gift rather than a necessary payment that is refundable on any eventual dissolution of marriage. This was followed in 2008 by the passing of a local ordinance to the same effect, a step preceded by the organization’s lobbying over a number of years and using Uganda’s decentralization structure to make change at the local level. Among a range of interventions related to the issue, the organization has assisted and facilitated research in Uganda in cooperation with international partners.<sup>245</sup> The research produced recommendations on how to reform bride price, which include: pursuing legislative reform at the national government level; encouraging policy reform through government initiatives and civil society; instituting legislative and policy reform at the local level, e.g., through the Tororo District Bridal Gifts Ordinance; introducing educational initiatives in the education system; and raising community awareness and promoting sensitization.

240 United Nations, *Treaty Series*, Vol. 266, p. 3. Geneva, 7 September 1956. 123 countries are parties, including all of those included as country studies for the present report, with the exception of Papua New Guinea. [http://treaties.un.org/doc/Publication/MTDSG/Volume II/Chapter XVIII/XXVIII-4.en.pdf](http://treaties.un.org/doc/Publication/MTDSG/Volume%II/Chapter%XXVIII/XXVIII-4.en.pdf)

241 Loi No. 62-17, 5 *Juris-Classeur d’Outre-Mer*, 3 février 1962; Code sur le Menage et la Tutelle.

242 The WLUMI guide *Knowing Our Rights* (available on the WLUMI website) gives a good overview of law and practice concerning dowry payments and similar practices and attempting to eliminate negative effects of dower and dowry customs in predominantly Muslim countries.

243 See Bangladesh country study.

244 <http://www.mifumi.org/>

245 For example, the University of Warwick in the UK. See [http://www2.warwick.ac.uk/fac/soc/shss/swell/bride\\_price\\_report\\_-\\_executive\\_summary\\_-\\_final\\_fin.pdf](http://www2.warwick.ac.uk/fac/soc/shss/swell/bride_price_report_-_executive_summary_-_final_fin.pdf)

## CUSTODY OF CHILDREN

The CEDAW Committee recommends recognition of the custody rights of women in *de facto* marriages. This follows from the clear wording of Article 16 (d), whereby women in such marriages should share equal rights and responsibilities with men for the care and raising of dependent children or family members. The CRC principle of the best interests of the child is also an issue here. Many states with predominantly Muslim populations or that have adopted Islam as the state religion have made reservations to Article 16 (f), which deals with the guardianship, wardship, trusteeship and adoption of children. The Niger country study reveals that, according to Islamic law in that country, women should generally have custody of children younger than 7, whereas those older than 7 should go to the father. Interestingly, a similar practice prevails in the customs of Papua New Guinea. The following chapter on the rights of children and IJS discusses this in greater detail.

## DISSOLUTION OF MARRIAGE GENERALLY

Both customary and Islamic law as applied in many countries are unlikely to live up to the CEDAW requirement of equality in dissolution of marriage. Customary law in many countries and among many peoples, particularly those with patrilineal cultures, allows a man the right to divorce for a greater number of reasons, and with greater ease, than a woman, as the Malawi, Niger and Uganda country studies show. The substantive grounds for divorce are likely to be different for women who initiate dissolution, as is the possible requirement to repay the bride price in order to be freed from a marriage she no longer wants. The Niger country study illustrates the issue of repudiation, which is available only to men according to Islamic law. Reservations to the CEDAW by some predominantly Muslim countries confirm this position. Thus, the UAE reservation provides that “*Shari’ah* makes a woman’s right to divorce conditional on a judicial decision, in a case in which she has been harmed.” *Shari’ah* therefore restricts the wife’s rights to divorce by making it contingent on a judge’s ruling, whereas no such restriction is laid down in the case of the husband. Thus, men are permitted under *Shari’ah* to divorce their wives by *talaq*, i.e., by thrice repudiating her. If cultural or religious barriers to women going to either religious or state court compound this inequality,<sup>246</sup> then women are even more vulnerable to mistreatment and abuse. As the section in this chapter on social barriers and the Niger country study point out, the threat of repudiation may be a powerful barrier to women seeking redress in any justice forum. It is important to carefully analyse the concrete application of precepts of Islamic law in each context, as interpretation and practice may differ widely and may be mixed with elements from national statutory law or custom. In some contexts, women may have limited ability to seek a divorce in a religious court and her husband’s permission may be required. In other contexts, she may be obliged to pay compensation and lose rights to maintenance that she might otherwise have had if the husband had initiated the divorce.<sup>247</sup> Aspects of Islamic law that are more favourable to women include the rules that the woman retains rights to her own property and her rights to inherit land and real property (which is often not possible under customary law), and that the man must economically support female relatives.

Mwambene (2006) cites a number of authors on the issue of the comparative possibilities for women to initiate divorce proceedings and the ease with which divorce can be obtained in matrilineal and patrilineal cultures in Malawi. Her conclusion, and that of other researchers, is that it is easier for women to divorce their husbands in matrilineal cultures and that these cultures allow women more initiative in seeking dissolution of marriage. These cultures may allow ‘no-fault’ divorce based on incompatibility of the parties. As stated earlier, patrilineal cultures are more likely to view the marriage as based on the *lobola* (bride price) contract, concluded between the husband and the wife’s father or male relatives. In this system, the husband, as a party to the agreement, is relatively free to terminate the contract for a wide variety of reasons. Differences between these systems are also apparent in dissolution of marriage due to the death of one of the spouses. Mwambene cites some authorities’ view that the death of a husband does not terminate a marriage for a wife, who remains a wife at the husband’s family home. The

<sup>246</sup> See reference to Saudi Arabia above.

<sup>247</sup> The ‘*Khul*’ form of divorce may be available to a Muslim woman, generally upon compensation of the husband. Interpretations, laws and practices differ regarding the husband and/or the court’s role and agency and whether this is an irrevocable divorce.

tradition of wife inheritance, widely practiced in many patrilineal cultures in Africa<sup>248</sup> and traditionally a guarantee of support for widows and orphans, is linked to this idea. In some cases, rituals and harmful practices such as so-called 'sexual cleansing' may be associated with this tradition.

## WOMEN'S RIGHTS TO PROPERTY

Article 17 of the UDHR recognizes every person's right to own property alone as well as in association with others. Article 25 of the UDHR confirms the right to an adequate standard of living, including with respect to housing. Apart from these provisions of the UDHR, the principal global human rights instruments are rather silent on the question of the right to property as such.<sup>249</sup> Nevertheless, several provisions of international human rights law touch on the question, particularly in relation to equality.<sup>250</sup>

## WOMEN'S RIGHT TO HOUSING

Article 11 of the ICESCR recognizes the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The right to adequate housing is considered to be one of the main elements of the human right to an adequate standard of living.<sup>251</sup> The UN Committee on Economic, Social and Cultural Rights explains that the right to adequate housing consists of: 1) legal security of tenure; 2) availability of services, materials, facilities and infrastructure; 3) affordability; 4) habitability; 5) accessibility; 6) location; and 7) cultural adequacy. Article 14 (h), coupled with Article 11 of the ICESCR, obligates states to ensure not only that women do not face discrimination in relation to housing and living conditions, but also that they enjoy a certain minimum standard.

The HRC<sup>252</sup> emphasizes that states must ensure that the matrimonial regime contain equal rights and obligations for both spouses, including with regard to the ownership or administration of property, "whether common property or property in the sole ownership of either spouse." Upon the dissolution of marriage, the decisions about property distribution should be the same for men and women, and "women should also have equal inheritance rights to those of men when the dissolution of marriage is caused by the death of one of the spouses."

The right of everyone to be recognized everywhere as a person before the law<sup>253</sup> implies "that the capacity of women to own property, to enter into a contract or to exercise other civil rights may not be restricted on the basis of marital status or any other discriminatory ground. It also implies that women may not be treated as objects to be given together with the property of the deceased husband to his family."<sup>254</sup>

It is important that the HRC found this to be an obligation under the ICCPR, particularly as many states have reservations to the CEDAW in this regard. It is also significant that the HRC bases the equal rights of women in this regard on the right to recognition as a person before the law. Thus, with regard to married women, the reservations that some states have made in relation to equality in marriage (ICCPR Art. 23.4) are irrelevant in this regard, if they are also parties to the ICCPR.

Islamic law protects women's right to own property as such. In respect of customary law, it is difficult to generalize across so many different countries and contexts. While custom may not favour practices such as property-grabbing (often committed against widows), its structures seem to be poorly adapted to protect vulnerable women, who

248 See, for example, Human Rights Watch, 'Double Standards: Women's Property Rights Violations in Kenya'.

249 In contrast to, for example, the European Convention system, where the right is protected in the first protocol to the Convention.

250 It is beyond the scope of this study to consider the literature and specialist field related to land. IJS and land issues in rural areas are often interconnected and profound reform of IJS will have key impact on land.

251 See the 1991 General Comment No. 4 of the Committee on Economic, Social and Cultural Rights on the Right to Adequate Housing.

252 The General Comment (28) of the Human Rights Committee.

253 UDHR Article 6; ICCPR, Article 16.

254 HRC, GC 28.

may be far from their own families and who would often be dependent on a male in-law for protection. Numerous reports confirm that, especially in patrilineal societies, the biggest threat to widows and orphans comes from relatives of the deceased male.<sup>255</sup> The country studies in Africa, as well as other work among NGOs in southern Africa, report this as a widespread problem, particularly in the context of HIV/AIDS-related death. Property-grabbing may include housing, and law and custom differ as to whether a dwelling will be considered real or personal property.

## WOMEN'S RIGHT TO OWN PROPERTY

The CEDAW General Recommendation on 'Equality in Marriage and Family Relations'<sup>256</sup> deals with the risks for women's economic survival if women are prevented from entering into contract, from having access to financial credit, or can do so only with the concurrence or guarantee of their husbands or a male relative. This denial of autonomy prevents her from holding property as the sole owner. Article 13 (b) of the CEDAW requires States parties to "take all appropriate measures to eliminate discrimination against women in areas of economic and social life to ensure women's equal right to bank loans, mortgages and other forms of financial credit." This would include ownership provisions that are discriminatory, including any recognition of customary title that recognizes men's rights to the exclusion of women. Article 14 of the CEDAW recognizes the obligation of states to promote the right of rural women to participate in community activities, have access to credit, and benefit from development.

In property law, well-entrenched norms make it difficult to litigate significant legal issues in many countries, particularly in Africa. According to traditional ways of allocating collectively owned land in much of Africa, a chief will allocate land rights to sub-chiefs, who re-allocate it to others along a tribal or clan hierarchy that is generally exclusively male (in patrilineal cultures). This power remains perhaps the most important plank on which the power of chiefs and headmen rests.<sup>257</sup> Women's access to land – often the most important economic resource – is through marriage or their father.

In some countries, including Malawi, matriliney (matrilineality) is still relatively widespread. This may mean that land is understood to belong to a female member of the family and will revert to female relatives on the death of persons in possession.<sup>258</sup> This does not necessarily mean that women exercise power over land in traditional communities, as the senior member of the family (often male) and the headman or chief may also play a role. It may, however, make it more difficult for a husband to alienate land without the consent of his wife or at least of a member of her family. Men may continue to exercise authority over the land that nominally belongs to their sisters, while farming and deriving an income from land belonging to the family into which they have married. Males may be seen as 'borrowing' the land. Women have some security in matrilineal cultures in Malawi, where they may also be considered the owners of the matrimonial dwelling, which the husband is obliged to build for her.<sup>259</sup>

The Papua New Guinea study also shows that, in matrilineal cultures, women are less vulnerable to risks such as expulsion from the matrimonial dwelling when a husband dies. Generally, the male relatives of the woman whom a man marries exercise authority.<sup>260</sup> Because of these systems, women may simply have few customary or legal rights that can be the subject of litigation.<sup>261</sup> While even patrilineal custom would generally have given some

255 Among a number of sources, see, for example, (1) Kaori Izumi, 'Gender-based Violence and Property-Grabbing in Africa: A Denial of Women's Liberty and Security' in *Gender & Development*, Vol. 15, No. 1, March 2007. ISSN 1355-2074 print/1364-9221 online/07/010011\_13 – Oxfam GB 2007 and (2) Human Rights Watch, *Suffering In Silence: The Links between Human Rights Abuses and HIV Transmission to Girls in Zambia*, New York, 2002

256 CEDAW, General Recommendation No. 21, 13<sup>th</sup> Session, 1994, available at: <http://www.un.org/womenwatch/daw/cedaw/recomm.htm>

257 See, for example, Oomen, 2000.

258 *Final Report Of The Presidential Commission Of Inquiry On Land Policy Reform, Malawi Government Volume I Main Report*, 31 March 1999.

259 Op. cit., Mwambene, 2006, cited in the Malawi country study. See also Kaarhus, R., 2010, 37: 2; 171-192, and Peters, P. E. and Kambewa, D., 2007.

260 Authority and responsibility for the welfare of the family is likely to be with a male *nkhoswe*. See Mwambene, cited in Malawi country study.

261 For a brief description of customary law and practice in this area, see Adams and Turner, *Legal Dualism and Land Policy in Eastern & Southern Africa*, UNDP.

protection of usufructuary rights to widows (imposing a responsibility on the male heir) prior to death or remarriage, enforcement is reportedly increasingly uncertain in many places.<sup>262</sup>

There can be little doubt that customary law and structures, as well as state ones, are failing to protect women from discrimination in regard to property rights in many contexts. This is especially the case when custom meets modern, individualistic forms of ownership and the advent of a cash economy. Today, the problem is often that those traditionally charged with upholding and enforcing customary law are precisely those who may benefit from breaking it, and neither the statutory nor the customary courts are well placed to stop them. While tradition did not typically mean that men or the chiefs owned the land personally, the *de facto* power of chiefs and modernized customary law may mean that traditional ownership is interpreted as doing precisely this. As some African NGOs have pointed out, the worst inequalities may be the result of the failure of state law to fill the gap left when customary law can no longer be applied, rather than the result of customary law as such.<sup>263</sup> The country study on Uganda deals rather extensively with IJS involvement with real property issues and the extensive legal and academic work carried out in this domain there. Also in South Africa, social scientists and jurists have done a great deal of work on the question of land rights. The work of many NGOs dealing with the protection of women's rights in Africa seeks to address the question of property-grabbing,<sup>264</sup> especially as the mechanisms of customary justice may be unable to provide practical protection against this. The problem is also known in other parts of the world, including Papua New Guinea, as the country study shows. Some aspects of the UNICEF programme in the Eastern Highlands of Papua New Guinea as well as programmes dealing with assistance to AIDS orphans that address these issues are mentioned below and in the Papua New Guinea country study.

## PROGRAMMING CONSIDERATIONS IN RELATION TO REAL PROPERTY

It is thus important to remember the limitations of IJS and customary law in relation to achieving change in some legal domains. Because of the very complex nature of the land and real property issue in Africa and the difficulty of achieving satisfactory reform in this area, state law may be of little help. For example, Malawi developed a national land policy in 2002, the result of a process commenced in 1996, yet the policy has still not been transformed into national law.<sup>265</sup> Despite real improvements in the legislative framework in Uganda, confusion about the interpretation and application of the law causes difficulty for various reasons explored in the Uganda country study. Reform of land law may well involve head-on political battles with entrenched interests, including among chiefs and headmen. In many contexts, enforcement of law will depend on the good will of these actors.

The 1998 Ugandan land reform is a good example of legislation that attempted to remove many of the legal handicaps often placed upon women; many aspects of the process of adopting the legislation, as well as of the Act itself, are relevant to programming for IJS. The Land Act gives full legal status to all land held under customary tenure, including customary rules and institutions. Customary ownership of land is recognized as private property. The legislation introduced many positive provisions, including legal protection of all persons having proprietary rights in customary land, requiring their consent before it could be legally disposed of. Various groups can form communal land associations, and the founding documents of these bodies can include women's rights. While most commentators in Uganda recognize the positive intentions and provisions of the legislation, it has been impossible to fully implement them due to problems with capacity and prioritization. Organizations such as LEMU<sup>266</sup> criticize the government for not devoting more resources to customary title and preferring to promote individual freehold.

262. See generally [http://www.law.utoronto.ca/students\\_content.asp?itempath=2/8/5/4/1&contentid=1199&ctype=webpages](http://www.law.utoronto.ca/students_content.asp?itempath=2/8/5/4/1&contentid=1199&ctype=webpages), especially McPherson, *Property-grabbing and Africa's Orphaned Generation: A Legal Analysis of the Implications of the HIV/AIDS Pandemic for Inheritance by Orphaned Children in Uganda, Kenya, Zambia and Malawi*. For another useful source, see Aili Mari Tripp, 'Women's movements, customary law, and land rights in Africa: the case of Uganda', *African Studies Quarterly*, Spring, 2004.

263 See especially the study on Uganda.

264 A woman's husband dies and her household property is seized by the relatives of her husband, in whose community she lives. See McPherson, op. cit.

265 See Chiweza, A. L., 2008.

266 Land and Equity Movement in Uganda. See: <http://www.land-in-uganda.org/>

The 1998 Ugandan legislation was the subject of intense work and lobbying by NGOs that attempted to introduce progressive provisions on women's ownership. One paper dealing with this subject noted that the general sympathy of African legislators to patriarchal values and powerful lobbies of customary leaders makes it very difficult to pass statutory reforms to protect the property of widows and (especially female) children, pointing to the efforts – and ultimate failure – of NGOs to ensure recognition of spousal co-ownership of land in the legislation. "These activists succeeded in eliciting a promise from the government to include the clause, only to see it removed in last-minute parliamentary debate." The article goes on to observe that "development organizations from the World Bank to Oxfam have concluded that the best way to encourage property rights reform in sub-Saharan Africa, including tenure security for women, is to 'build on' customary property systems, not to try and overrule them with statutory regimes." However, the paper also cites some authors who "underscore that African feminist lawyers generally remain sceptical of the ability for customary or habitual local norms rooted in patriarchy to offer meaningful change, without serious pressure from a progressive statutory regime."<sup>267</sup>

The author concludes that the best approach is for legislation not to try to sideline customary structures, but to oblige them to provide protection for widows and orphans, and for campaigns to make them into partners in combating land and property-grabbing against widows and orphans. The article cites positive examples of chiefs and headmen making a real difference once they are prepared to act on this issue and recommends further that religious organizations be mobilized to spread a message of the obligation to protect the vulnerable, including widows and orphans.

Studies of matrilineal marriage and land ownership patterns in Malawi show that some efforts to modernize and formalize title rights may have disempowered women. It is vital to ensure full understanding of existing patterns of rights, ownership and use prior to embarking on reforms.<sup>268</sup>

The UNICEF programme in Papua New Guinea's Eastern Highlands, whereby village court magistrates have received training, has seemingly moved these magistrates to consider other issues besides the amount of bride price paid when making property settlements, including the number of years that the marriage has lasted, the number of children, and the woman's economic position. Unsurprisingly, the fairly recent appointment of a woman magistrate has helped women there to speak out in hearings on such issues. The example shows that good training programmes that are well anchored in the needs of the community involved and in the practical application of rights and access to justice principles can have a positive impact.

## WOMEN'S PROPERTY RIGHTS ON DISSOLUTION OF MARRIAGE

The question of women's real property rights is often most important when marriage ends, either through dissolution or death. A CEDAW Committee General Recommendation<sup>269</sup> describes many of the disadvantages facing women upon the dissolution of marriage. It recognizes the widespread phenomenon of single mothers, noting that this belies the premise that men have sole responsibility for the women and children of his family and that unequal division of property based on this premise is unrealistic and incorrect.<sup>270</sup> Regarding judicial assessments of contributions to marital assets and income, the Committee states that financial and non-financial contributions should be accorded equal weight. Likewise, property laws and customs that discriminate in this way against married or unmarried women with or without children should be revoked and discouraged.

<sup>267</sup> See McPherson, *op. cit.*, and the references cited in that paper.

<sup>268</sup> Kaarhuus, R., 2010, *op. cit.*

<sup>269</sup> No. 21.

<sup>270</sup> CEDAW General Recommendation No. 21 on Equality in Marriage and Family Relations, paragraph 31. "Even when these legal rights are vested in women, and the courts enforce them, property owned by a woman during marriage or on divorce may be managed by a man. In many States, including those where there is a community-property regime, there is no legal requirement that a woman be consulted when property owned by the parties during marriage or *de facto* relationship is sold or otherwise disposed of. This limits the woman's ability to control disposition of the property or the income derived from it."

## INHERITANCE

The General Recommendation mentioned above provides that states shall ensure that men and women in the same degree of relationship to a deceased person are entitled to equal shares in the estate and to equal rank in the order of succession.<sup>271</sup> That provision has not been generally implemented. Women may receive a smaller share of the husband's or father's property upon his death than would widowers and sons. In some instances, women are granted limited and controlled rights and receive income only from the deceased's property. Often, inheritance rights for widows do not reflect the principles of equal ownership of property acquired during marriage. Such provisions contravene the Convention and should be abolished.

The problems noted above were generally borne out in the country studies. In some states, there have been notable improvements in legislation concerning women's inheritance rights. Nevertheless, women may have difficulty in enforcing the legal rights that they have according to national law. Rwanda's 1999 Inheritance and Marital Property Law won the praise of national and international activists for women's rights, but reports say that, in practice, "social and cultural obstacles prevent women from inheriting."<sup>272</sup> Moreover, in common with legislation in other African countries,<sup>273</sup> the law does not apply to real property.

Property-grabbing is most apparent in situations of intestate succession. Asiyati Lorraine Chiweza describes how women's inheritance rights to personal property in Malawi depend in practice on district assemblies and, in turn, on traditional authorities for the payment of inheritance sums payable to widows.<sup>274</sup> State obligations to ensure that local officials and traditional chiefs act in accordance with national legislative and human rights guarantees are clear, but the system may be incapable of guarding itself against contrary notions, local prejudices and corruption. These problems illustrate the well-known principle that justice systems are only as strong as their weakest link. Polygamy and the coexistence of various marital regimes complicate women's right to inherit from their husbands; the fact that even customary law sometimes does not recognize some informal unions as marriage – which may require the payment of dowry or bride price – only complicates this even further. While matrilineal traditions may provide better protection to women in some respects, the picture is convoluted. One study in Malawi observed that:

***"Under a matrilineal system, chieftaincy is handed down through the female line. Under this system, women's rights to customary land tend to be primary. However, this is not always the case. Under matrilineal the inheritance of customary land does not appear to be very problematic, the same cannot be said of leasehold estates, especially where the leaseholder dies intestate. Under the matrilineal system of marriage, a man's rightful heirs are his sister's children. Hence, it is often the case that on the death of the leaseholder, his sister's children claim the farm as their property at the expense of their cousins, the children of the deceased. The Presidential Commission in Malawi identified the rule that a man's rightful heirs are his sister's children and not his own as a major cause of conflict over property (including leases), between cousins. The Commission also noted public preference for a rule that would permit direct inheritance to all categories of property by surviving spouses and children."***<sup>275</sup>

Thus, widowers and their children in matrilineal cultures may suffer obstacles similar to those that widows suffer in patrilineal ones. While informal justice forums could present some advantages for poor and vulnerable persons, like eliminating formalities such as the requirement to show a death certificate in order to inherit customary land, insufficient knowledge or a failure to accept statutory requirements often far outweighs these.

271 The General Recommendation refers to the UN Economic and Social Council resolution 884 D (XXXIV) to this effect.

272 See the OECD Development Centre's Social Institutions and Gender Index reports. <http://genderindex.org/country/rwanda>

273 Including Malawi and Zambia. See Strickland, R. S., 2004.

274 2005, op. cit.

275 See Mbaya, 2002.

Again, a distinction must be made between Islamic law and the law prevailing in countries with Muslim populations. The Qur'an lays down specific rules about inheritance. While Sunnism and Shi'ism, for example, have differing interpretations of these, the precept that male and female shares are unequal is rather clear. The Niger country study explores this in more detail and points out that Islamic authorities – particularly those in the country's urban areas – tend to recognize women's right to inherit real property, albeit in a smaller portion than would go to male relatives. In rural areas, people generally disregard this principle in favour of more discriminatory custom concerning real property, because they are either ignorant of it or unwilling to apply it.

## PROGRAMMING TO COMBAT PROPERTY-GRABBING

Programming to combat property-grabbing needs to situate the problem within the context of combating poverty. Links between IJS and other primary justice providers, including the police, are vital. While large-scale criminal proceedings against almost equally impoverished relatives may not be the best way forward, law enforcement agencies nevertheless need to show that the issue is taken seriously in order to push chiefs, headmen, clan and family leaders to take action against it.

## OTHER ISSUES

While not addressed within the framework of the CEDAW Committee General Comment, gender roles and responsibilities in marriage may figure differently in IJS. The focus is less likely to be on equality than on the obligations assigned to the spouses in marital relations, thus demanding consideration of public versus private and even personal spheres. There are cases being dealt with in IJS where spouses bring matters such as a husband's obligation to provide maintenance of a certain standard, a wife's obligation to obey her husband, fulfilment of sexual needs, relations with in-laws, and relations between different wives and their respective children in polygamous marriages. The gap between international standards and the standards prevailing in local communities may be very wide. Women may demand remedies that seem entirely appropriate in their specific context and culture, but that have no clear counterpart in international human rights law, which assumes gender neutrality.

## RIGHTS TO PERSONAL INTEGRITY AND PHYSICAL SECURITY<sup>276</sup>

### LEGAL FRAMEWORK

A number of international instruments now address the problem of gender-based violence. Where these treaties have not been ratified or domesticated, this can be a programming aim. The CEDAW Committee recalls Articles 2 and 5 of the Convention and the obligation on states to act to protect women against discrimination and violence in the private sphere "by any person, organization or enterprise". States may also be responsible for private acts if they fail to act with due diligence to prevent violations of rights or to investigate and punish acts of violence; they may also be responsible for providing compensation.<sup>277</sup> Thus, IJS that endorse or tolerate any form of violence against women incur a state obligation to act in protection of women, using all necessary measures, even if the state does not recognize those IJS. If the state recognizes IJS in some manner, its liability is even clearer.

In the Maputo Protocol, the African Human Rights system defines 'harmful practices' as "all behaviour, attitudes and/or practices that negatively affect the fundamental rights of women and girls, such as their right to life, health, dignity, education and physical integrity."<sup>278</sup> The Protocol<sup>279</sup> obliges States parties to prohibit and condemn such practices. The measures they should take to eliminate them include the fostering of public awareness in all sectors of society through information, formal and informal education and outreach programmes; furthermore,

<sup>276</sup> This discussion draws largely on the relevant General Recommendation of the CEDAW Committee on Violence against Women, General Recommendation No. 19, 11<sup>th</sup> session, 1992.

<sup>277</sup> Mention should also be made here of one specific international instrument concerning ending violence against women: the Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women.

<sup>278</sup> Article 1, definitions

<sup>279</sup> Article 5



they commit themselves to “prohibition, through legislative measures backed by sanctions, of all forms of female genital mutilation, scarification, medicalisation and para-medicalisation of female genital mutilation and all other practices in order to eradicate them.”<sup>280</sup> Moreover, states are obliged to ensure provision of “necessary support to victims of harmful practices through basic services such as health services, legal and judicial support, emotional and psychological counselling as well as vocational training to make them self-supporting.” Finally, the Protocol obliges states to provide “protection of women who are at risk of being subjected to harmful practices or all other forms of violence, abuse and intolerance.”<sup>281</sup>

In the Americas, the Belem do Para Convention concerns the prevention, punishment and eradication of violence against women. According to the Convention, violence against women shall be understood as any act or conduct, based on gender, which causes death or physical, sexual or psychological harm or suffering to women, whether in the public or private sphere.<sup>282</sup> Moreover, it includes physical, sexual and psychological violence that occurs in the family or domestic unit, in the community, workplace or educational institution and even that the state or its agents perpetrate or condone, regardless of where it occurs.<sup>283</sup> The Convention thus broadly defines violence and distinguishes between the private and public spheres, taking into consideration violence in the community and ‘any other place’. The role of the States parties is also well defined and includes refraining from violence against women, applying due diligence and addressing it through legislative measures, procedures and mechanisms to create effective access to restitution, reparations or other just and effective remedies.<sup>284</sup>

At the level of national law, several of the countries examined for this study had adopted legislation dealing with violence against women; these include Bangladesh (1983) and Malawi (2006).

## HUMAN RIGHTS ISSUES AND PROBLEMS IN PRACTICE

The terms of interaction between law enforcement agencies (primarily the police) and IJS are very important. The country studies systematically reviewed the attitudes of the police and IJS providers toward violence against women. In Niger, law enforcement officials who were interviewed<sup>285</sup> agreed that the focus now placed on this issue makes it more difficult for justice providers to ignore it. Nevertheless, they agreed that still only a small minority of cases – the most serious ones and those in which the victim had access to some form of assistance – make it to state justice institutions. In Papua New Guinea, a minority of women who are aware of and within geographical reach of towns where there is a sympathetic NGO may seek legal and practical assistance. This is simply unavailable to other women. Community-based efforts to sensitize men through suitable role models seemed to be a promising way of tackling the root of the problem. Efforts such as this could target IJS members relatively easily. The country study emphasizes the importance of support from the police and state justice system for this kind of initiative, both to prosecute serious offenders and to protect complainants.

Many issues can complicate how IJS handle gender-based violence. National law may not recognize a criminal offence of rape within marriage, for example, as seen from the 2009 controversies surrounding Afghanistan.<sup>286</sup> While national legislation is somewhat amenable to international influence, different attitudes may predominate under the

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280 Article 5

281 Article 5

282 Article 1

283 Article 2

284 Articles 7 and 8

285 One should note, though, that the interviews were carried out in parts of the country that had been exposed to relatively high levels of programming and donor involvement and that thus may not be representative of the country as a whole.

286 See CNN report ‘Afghanistan ‘rape’ law puts women’s rights front and center’ <http://www.cnn.com/2009/WORLD/asiapcf/04/06/afghanistan.law/> Following international objections, including by US President Obama, who called the provisions “abhorrent”, changes were made to the text. Recent reports (July 2009) state that problematic clauses still remain. See ‘Afghanistan revises marriage law but women still required to submit to sexual “intercourse”’ <http://www.telegraph.co.uk/news/worldnews/asia/afghanistan/5790702/Afghanistan-revises-marriage-law-but-women-still-required-to-submit-to-sexual-intercourse.html>

surface and be reflected in customary law and the implementation of statutory law. Reference has been made above to customs of payment to families or the arrangement of a marriage as compensation for rape, for example.

### **PROCEDURAL ISSUES LINKED TO SEXUAL VIOLENCE AND MARITAL CASES**

Given the strength of taboos around sexuality and women's vulnerability to gender-based violence, issues of social pressure and access, as discussed above, are likely to surface very strongly. The participation of women as judges can be a major factor in assisting women to overcome their reluctance to present stories of rape, sexual violence or sexual harassment. The participation of women as *Gacaca* judges in Rwanda has been an important measure in assisting women to come forward with stories of this kind; confidential hearings and investigation procedures are also important. This study has already noted the strong presence of women as village mediators in Malawi and the confidentiality of the mediation process; the Malawi country study presents this in greater detail. Both factors have helped the mediators to attract cases on behalf of female disputants.

The general parameters concerning access – including direct financial cost, opportunity cost in terms of time, distance, language, and social, cultural, educational, procedural and institutional barriers – may take on a particular significance in relation to violence against women or gender-based violence. From the (little) available literature, it is not possible to write or conclude much on links between IJS and the formal justice system in relation to violence against women. While rape and sexual violence should not be dealt with in IJS, but referred to the ordinary courts, IJS must know and accept this principle in order for it to be enforced. Sensitization and the participation of women in the IJS can be vital here; state systems' capacity to deal with these cases is also a major concern. The country study on Ecuador indicates that IJS users are aware that rape cases should be taken to formal justice systems, yet it also indicates that this type of violence is 'new'. The country studies contain some discussion of this. It nevertheless remains the case that women's own attitudes and preferences are vital. Except in cases of serious (and often repeated) violence, women often remain reluctant to bring family matters before formal justice institutions, usually because they calculate that they and their children will be the losers if they do so.

### **WOMEN AS AGENTS OF CHANGE**

The country studies and the literature analysed clearly reveal that women's organizations and other NGOs can affect the substantive, procedural and structural aspects of IJS. Although IJS do not fully respect and protect women's rights in many contexts, the study finds that women creatively seek a just resolution and the protection of their rights. While women may fare better in formal or parajudicial systems, they are often acutely aware of the necessity of maintaining collective structures that benefit communities as a whole. They also face social pressure and logistical and economic difficulties preventing them from accessing the formal justice system. Thus, they often seek to change IJS structures from the inside rather than to discard them outright. Engagement with IJS should therefore also be tied to raising awareness within IJS of women's rights and of the range of choices and access available to them to seek justice, remedy and protection.

# CHILDREN'S RIGHTS AND INFORMAL JUSTICE SYSTEMS

## INTRODUCTION

This chapter addresses children's specific position in relation to IJS in normative frameworks, particularly of customary law and the procedural operation of IJS. It examines how perceptions of childhood and the role of children can affect how IJS treat them and how this treatment can collide with the implementation of standards on the children's rights.

Important issues regarding children's legal and rights protection arise in relation to IJS. Children should be able to enjoy the same basic rights as any other IJS users; these rights include compliance with normative frameworks, fair procedures, impartiality of decision makers, meaningful representation in proceedings, and protection from unlawful punishments. At the same time, the rights of children and women are more likely to be violated, as they are both often 'structurally' vulnerable parties before IJS, especially in more traditional systems, which are frequently dominated by middle-aged and elderly men. In addition, children, and particularly very young children, are unable to speak for themselves, and, in the proceedings, their interests will either go unrepresented or be represented by another person, perhaps a relative of the child, who may have an interest in the case. Vulnerability increases where the best interest of the child does not coincide with that of his parents or guardians or his or her close family.

There has been surprisingly little research on the legal situation of children in IJS. The research that does exist addresses mostly the co-opting of IJS – traditional or NGO-sponsored – in juvenile justice diversion programmes.<sup>287</sup> But children's interests are involved in many other matters dealt with within the framework of IJS: social conflict, inheritance, land, family disputes, underage or forced marriages, and accusations of witchcraft. Even in disputes that do not, on the face of it, involve children at all, the outcome of the case may have direct and serious implications for a child or for children in the community. This is most obvious where, for example, IJS impose a punishment on a family in the community on the basis of the actions of one of the family members.<sup>288</sup>

## KEY HUMAN RIGHTS OF CHILDREN OF PARTICULAR RELEVANCE TO INFORMAL JUSTICE SYSTEMS

The Committee on the Rights of the Child has encouraged States parties to "take all appropriate measures to ensure that the concept of the child as rights holder with freedom to express views and the right to be consulted in matters that affect him or her is implemented from the earliest stage in ways appropriate to the child's capacities, best interests, and rights to protection from harmful experiences."<sup>289</sup> It goes on to state "all law and policy development, administrative and judicial decision-making and service provision that affect children must take account of the best interests principle."<sup>290</sup> This would indicate that it applies to IJS.

There are four general guiding principles in the Convention on the Rights of the Child (CRC): 1) the protection of the best interests of the child; 2) the prohibition of discrimination; 3) the safeguarding of the survival and optimal development of the child; and 4) the child's right to be heard. These four principles should guide the interpretation of the other articles and are relevant to all aspects of implementation of the Convention. This study addresses the

<sup>287</sup> See, for example, Banks, 2009, writing on southern Sudan and East Timor.

<sup>288</sup> See also, for example, the description of young girls being offered by a *jirga* (village council) for marriage as compensation in family disputes in Afghanistan.

<sup>289</sup> Committee on the Rights of the Child: General Comment No. 7, *Implementing child rights in early childhood*, 2005, CRC/C/GC/7/Rev.1, 2006, paragraph 14.

<sup>290</sup> Committee on the Rights of the Child: General Comment No. 7, *Implementing child rights in early childhood*, 2005, CRC/C/GC/7/Rev.1, 2006, paragraph 13.

four guiding principles from the Convention in the context of IJS. In addition to these principles, there are international guidelines addressing children's participation in the justice system,<sup>291</sup> including their participation in IJS, which are outlined in this chapter.

## 1. PROTECTION OF THE BEST INTERESTS OF THE CHILD

The protection of the best interests of the child is the universal principle guiding the protection of the child in all matters concerning his or her rights and welfare. It is linked to perceptions of the particular nature of childhood and children as well as attitudes toward children that can vary notably from one part of the world to the other.<sup>292</sup> Article 3.1 of the CRC reads:

***“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”***

The principle of the best interests of the child should be a primary consideration in any IJS' proceedings in which the decision will have consequences for the welfare of a child or children; such proceedings might concern personal status, custody, foster placement, property and inheritance matters, disciplinary sanctions and so forth. It is possible to consider the best interest principle at two levels: for each child individually and for children as a group in the community.

In IJS, the level of protection of the best interests of the child may to some extent be linked to the degree of formalization of the justice system and the kind of IJS concerned. As the Uganda country study notes, the local councils, including their judicial arms, have a responsibility to protect children under the Children's Act. The Local Council Courts are obliged by the Act to “have due regard” to some procedural protection measures.<sup>293</sup> In most traditional systems, it is the group (i.e., the extended family or the village community) rather than the nuclear family that protects the child. While this has obvious strengths, the problem is then that ‘the group’ will frequently have multiple, competing interests: not only is it the ‘protector of the child’, but it may also be a ‘party to the dispute’ and/or a ‘decision maker’ in the proceedings.

In the Committee's opinion,<sup>294</sup> there may be a distinction between the best interest of the individual child and the best interests of children as a group. In decisions regarding individual children, including decisions made by IJS, the best interests of the individual child are the primary concern. However, considering the collective cultural rights of the child is part of determining the child's best interests.

The content of the principle of the best interests of the child has not been precisely defined; rather, the principle requires states to systematically apply the principle by considering the implication of their decisions and actions for children's rights and interests.<sup>295</sup> Nevertheless, guidance on the substantial and objective elements of the principle can be found in the contents of the CRC itself, including: the right of the child to enjoy the highest attainable standard of health, provision for and protection of the child's physical integrity, the right of the child to education, and the right of the child to an adequate standard of living sufficient for the child's physical, mental, spiritual, moral and social development. The generality of the concept requires that administrators and adjudicators, including those in IJS, be understanding and flexible in their approach.

291 *UN Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime*, 2005; *UN Guidelines for Action on Children in the Criminal Justice System*, 1997.

292 Alston, P. and Gilmour-Walsh, B., 1996: 17-23; Breen, C., 2002.

293 See Articles 92 and 16 of the Act.

294 Committee on the Rights of the Child, General Comment No. 11: *Indigenous children and their rights under the Convention*, 2009, CRC/C/GC/11, paragraph 32.

295 Committee on the Rights of the Child, General Comment No. 5: *General Measures of Implementation*, 2003, paragraph 12.

The Committee has frequently<sup>296</sup> called on States parties to take all appropriate measures to ensure that the general principle of the best interests of the child is appropriately integrated into all legislation, judicial and administrative decisions, and policies, programmes and services affecting children. The Committee<sup>297</sup> has also expressed concern on occasions that respect for the views of the child remains limited within the family, in schools, in the courts and before administrative authorities, and in society at large, owing to traditional attitudes.

In its consideration of the periodic report of Niger, the Committee recommended that the State party develop a systematic approach to increasing public awareness of the participatory rights of children in the best interests of the child, particularly at local levels and in traditional communities, with the involvement of community and religious leaders, and ensure that the views of children are heard and taken into consideration in accordance with their age and maturity in families, communities, schools, care institutions and the judicial and administrative systems. As the Niger country study notes, UNICEF has worked to sensitize chiefs in an attempt to combat the practice of child marriage.

### **THE BEST INTERESTS OF THE CHILD, INFORMAL JUSTICE SYSTEMS AND THE ISSUE OF CUSTOMARY OR INFORMAL ALTERNATIVE CARE MEASURES**

On several occasions, the Committee has considered informal alternative care (also including informal adoptions) and voiced concern that such practices are in conflict with Articles 8, 9 and/or 21 of the CRC and are generally not predicated upon or monitored with respect to the best interests of the child.<sup>298</sup> With respect to Papua New Guinea, the Committee warned that informal adoption may lead, *inter alia*, to the use of young informally adopted girls as domestic servants.<sup>299</sup>

South Africa is an example of a state that has systematically addressed the issue of children in customary law. The South African Law Reform Commission (SALRC) addressed the issue of customary law and children in its Discussion Paper Number 103 of 2001<sup>300</sup> and in its subsequent report<sup>301</sup> on the review of the Child Care Act. In general, SALRC sought a future child law system in which core children's rights and concerns would be equally respected and protected, independent of the system of personal law in which a child has been raised, while also ensuring that the State respected to the maximum extent the cultural and religious rights of children and families. As is clear below, the SALRC recommended that some customary practices involving adoption be accepted, but also that authority and procedures on adoption be anchored solely in state organs.

With respect to adoption, the SALRC proposed extending joint adoption beyond married couples. This measure would allow extended family structures recognized in customary law – including, for example, a polygamous husband and all of his wives – to adopt a child jointly. Thus, the approach here is to draw informal and customary practices that protect the child into the arms of the state system. The proposal was reflected in the legislation adopted.<sup>302</sup>

The SALRC held workshops and received submissions on types of adoption and fosterage traditionally practiced in customary law, noting that there were variations in rules and practices among different groups. These models were of interest to the SLRC in examining options for the regulation of adoption. There was no proposal to authorize

296 See, for example, Lebanon, CRC, CRC/C/114, 2002, 11, paragraph 56; Malawi, CRC, CRC/C/114, 2002, 104, paragraph 405.

297 Malawi, CRC, CRC/C/114, 2002, 104, paragraphs 404 and 405; Bangladesh, CRC, CRC/C/133, 2003, 93, paragraphs 463 and 464; Niger, CRC, CRC/C/118, 2002, 37, paragraphs 157 and 158.

298 Papua New Guinea, CRC, CRC/C/15 Add.229, 2004, paragraphs 41 and 42; Rwanda, CRC, CRC/C/15/Add.234, 36, paragraphs 40 and 41.

299 Papua New Guinea, CRC, CRC/C/15 Add.229, 2004, paragraphs 41 and 42.

300 See Discussion Paper No. 103, 2001. ISBN: 0-621-31810-8.

301 Project 110 Review of the Child Care Act Report, December 2002. <http://www.doj.gov.za/salrc/reports.htm>, <http://www.doj.gov.za/salrc/dpapers/dp103.pdf>

302 See the Children's Act of 2005, Section 231.

customary leaders to carry out adoption. Provision of adoption services is restricted to a limited number of legally authorized persons.<sup>303</sup> It is worthwhile remembering that this may nevertheless occur in practice and informally.

## THE BEST INTERESTS OF THE CHILD, INFORMAL JUSTICE SYSTEMS AND CHILD MARRIAGE

International actors may see marriages of children as forced marriages by definition, in that informed consent is impossible where a child is concerned. In Niger, rural IJS providers cited opposition to arranged marriages as one kind of dispute that was frequently brought before them. Custom in some parts of Africa may permit much older men to marry very young girls against the girls' will. While there may be an age of consent to marriage, this may apply only to civil marriage, which only a small portion of the population chooses. State courts may be overburdened with so-called 'defilement' cases, frequently involving two teenagers of proximate age who have had consensual sexual relations.<sup>304</sup> This illustrates a double standard: young teenagers (or, occasionally, even younger children) may marry or be married against their will, but even consensual sexual relations with peers outside of marriage can render teenage males liable to severe punishment. In some countries, particularly where civil marriage is widespread, child marriages may be consummated, but in order to avoid the risk of legal sanctions, not be registered until the age of majority is reached. IJS may endorse such unions. Representatives of customary IJS are likely to hold positions of authority in communities, influencing such practices. UNICEF is working to combat child marriage,<sup>305</sup> and one effort involves raising the awareness of traditional chiefs in Niger to combat child marriages.

## 2. THE PROHIBITION OF DISCRIMINATION

The entitlement of everyone to the rights and freedoms laid down in the UDHR, without any form of discrimination, is repeated and further elaborated in respect of children in Article 2 of the CRC. States must respect and ensure the rights of children irrespective of the child's or his or her parents' race, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth, or other status (Article 2.1). Furthermore, states must ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of his or her parents or family members (Article 2.2).

The significance of the prohibition against discrimination in Article 2 is that it extends beyond discriminatory conduct on the basis of the child's own characteristic(s). It also encompasses prohibition against all forms of discrimination or punishment on the basis of activities, opinions or beliefs of the child's parents or family members.

## CUSTODY OF CHILDREN AND INFORMAL JUSTICE SYSTEMS, INCLUDING PROGRAMMING ASPECTS

Another area where the Committee has called for a more systematic application of the principles of non-discrimination and the best interests of the child has been child custody disputes, where customary and/or religious practices are sometimes applied to determine custody solely on the basis of the child's age or gender, without consideration of the views of the child and the child's best interests. In its consideration of the periodic report of Niger,<sup>306</sup> the Committee recommended 'that the State party take all necessary measures to stop these practices and reinforce its efforts to sensitize the population on the obvious negative impact and the contradiction of these practices with the best interests of the child and other relevant provisions of the Convention.' During the Niger country study mission, members of the judiciary appeared to be aware of the requirements of human rights law, but most custody matters are apparently resolved outside the formal courts, so the practice largely persists. Several interviewees mentioned an age limit of seven years as being determinant, where women retained custody of children under the age of seven and men were entitled to custody after this age.

<sup>303</sup> Children's Act, Section 250.

<sup>304</sup> This problem is well known in Uganda, among other countries in Africa.

<sup>305</sup> See, for example, UNICEF, 2008, *Handbook on Legislative Reform*.

<sup>306</sup> Niger, CRC, CRC/C/118, 2002, 37, paragraph 163; see also Pakistan, CRC, CRC/C/133, 2003, 37, paragraphs 198, 199, 210 and 211.

Further research could also usefully distinguish between issues of custody and guardianship, where the latter refers more to the right to exert parental authority and hence to decide on many issues relating to the upbringing of a child. (This could be an important factor in decisions relating to arranged marriages, particularly when girls reach the age of puberty.) Where marriage is seen as a contract between families, or between a man and the father or other senior male person in the wife's family (as in many patrilineal cultures), the children of a marriage are generally regarded as belonging to the husband's family or clan. In matrilineal cultures (where the husband usually moves to the wife's family's village, a custom known as 'uxorilocality'), the children are considered to belong to the wife's family or clan. As this implies that responsibility for the child resides with the family to whom the child 'belongs', the child's best interests may often (but not necessarily) be best served if the child remains with the family that recognizes a responsibility toward that child.<sup>307</sup>

### CHILDREN'S INHERITANCE AND PROPERTY RIGHTS

In many countries, land disputes are often dealt with at the local level and according to traditional practices. Children born outside marriage ('illegitimate children'), orphans, or children whose father has died may not have any right to inherit land or other property; in many traditional settings, female children and women cannot inherit their husband's or father's land.

For example, Nigerian religious authorities' interpretation of Islamic law does not recognize succession rights for children born outside of marriage. The principle of the best interests of the child does not prevail over this long-standing custom or legal rule in Nigerian courts. While religious officials may exhort parents to marry or to recognize a child born in this way, the rules on succession quite clearly state that such children have no rights of inheritance. This is an accepted fact of life, according to the provider interviewees, and such cases do not normally even come to court.<sup>308</sup> While numerical data on the practice of the different legal instances were not available on this question, this would seem to be true for chiefs' courts, religious authorities and for the application of custom by the courts.

Guardians of children who have lost their parents may mistreat them and deny them their inheritance and property rights.<sup>309</sup> These problems have become more acute as HIV/AIDS has directly or indirectly affected more and more children and has changed society and the role of the family and the traditional family structure.<sup>310</sup> It is therefore important to identify how decisions concerning the guardianship of orphans are made at the local level and what role traditional chieftaincy plays in this. There are presently few, if any, studies that deal directly with the specific problems linked to land and property and the custody of orphans.

In this respect, the Committee has very clearly defined the obligations of the state in relation to orphans: on the one hand, states must "support and strengthen the capacity of families and communities of children orphaned [...] to provide them with a standard of living adequate for their physical, mental, spiritual, moral, economic and social development, including access to psychosocial care." On the other hand, states must ensure that "both law and practice support the inheritance and property rights of orphans, with particular attention to the underlying gender-based discrimination which may interfere with the fulfilment of these rights."<sup>311</sup>

With respect to providing an adequate standard of living for orphans, it is difficult for customary justice to protect against property-grabbing. Although custom generally offers widows some protection of usufructuary rights, the

307 See Mwambene, 2006, and authors cited in her study of these issues in Malawi and South Africa, discussed in the Malawi study.

308 Similarly, unmarried 'partners' or 'concubines' have no succession rights.

309 UNAIDS: *2004 Report on the global AIDS epidemic*, 2004, p. 63.

310 Committee on the Rights of the Child, General Comment No. 7: *Implementing child rights in early childhood*, 2005, CRC/C/GC/7/Rev. 1, 2006, paragraph 19.

311 Committee on the Rights of the Child: General Comment No. 3: *HIV/AIDS and the rights of the child*, 2003, CRC/GC/2003/3, 2003, paragraph 33.

enforcement of such rights is uncertain in patrilineal and matrilineal systems alike. Property-grabbing is thus likely to affect orphans and children with a widow or widower parent. Law enforcement agencies and IJS should therefore seriously consider how to counter property-grabbing in a context of combating poverty.

### 3. SURVIVAL AND DEVELOPMENT OF THE CHILD

Children have the right to protection against arbitrary loss of or damage to life and to benefit from economic and social policies that will allow them to survive into adulthood and to develop in the broadest sense. The Committee has stated<sup>312</sup> that it expects states to interpret development in its broadest senses as a holistic concept, embracing the child's physical, mental, spiritual, moral, psychological, and social development. Implementation measures should be aimed at achieving the optimal development for all children. The Committee has highlighted the support of traditional practices of some IJS, such as marriage of female children,<sup>313</sup> as a contravention of State party obligations under Article 6 of the Convention to ensure the development of the child.

#### HARMFUL PRACTICES AFFECTING CHILDREN AND INFORMAL JUSTICE SYSTEMS, INCLUDING PROGRAMMING ASPECTS

The Committee has also drawn attention<sup>314</sup> to the practice of honour killings in some traditional societies and urged States parties to develop and implement awareness-raising campaigns, education programmes and legislation to change prevailing attitudes and address gender roles and stereotypes that contribute to harmful traditional practices. Further, States parties should facilitate the establishment of multidisciplinary information and advice centres to inform people about the harmful aspects of some traditional practices, including child marriage and female genital mutilation.

Some states have addressed harmful traditional practices through legislation on equality and non-discrimination. In South Africa, equality legislation includes "any practice, including traditional customary or religious practice, which impairs the dignity of women and undermines equality between women and men, including the dignity and well-being of the girl child" as discrimination for the purposes of the legislation.<sup>315</sup> By outlawing the practice of forced virginity testing, the Children's Act of 2005 incorporated the South African Law Reform Commission's recommendation to remove the possibility of invoking customary law as a defence to charges of having engaged in this practice.

The imposition of beatings, lashings or any other forms of extra-judicial punishment by *Shalish* (traditional mediation) forums is illegal under Bangladeshi constitutional and criminal law. There is a high level of knowledge amongst *Shalishkars* (traditional mediators), local communities and government officials of this prohibition, and they apparently generally comply with it, at least in the Union Parishads in which the country study was conducted. From time to time, though, there are reports of physical punishments having been ordered and carried out, also against juveniles. Where such cases arise, law enforcement officials appear reluctant to 'interfere in' decisions made by local religious elders or village elders. Bangladeshi legal aid organizations and NGOs have drawn attention to this problem and have occasionally taken successful legal action<sup>316</sup> to compel the government to investigate such cases and to provide justice and redress to any victims.

312 Committee on the Rights of the Child, General Comment No. 5: *General Measures of Implementation*, 2003, paragraph 12.

313 Committee on the Rights of the Child, General Comment No. 3: *HIV/AIDS and the Rights of the Child*, 2003, paragraph 11.

314 Committee on the Rights of the Child, General Comment No. 4: *Adolescent Health and Development in the Context of the Convention on the Rights of the Child*,

315 Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000, Section 8.

316 See, for example, joint Press Release of 22 August 2009 of Bangladesh Legal Aid and Services Trust, Bangladesh Mahila Parishad, Ain o Salish Kendra, BRAC and Nijera Kori, 'Extra-judicial penalties in *Shalish*: High Court Directs LGRD, Law enforcing agencies and Union Parishads and Paurashavas to take immediate measures.'



In the Papua New Guinea highlands, many young children, especially girls, find themselves directly or indirectly caught up in sorcery accusations. Young girls or women accused of carrying out *sanguma* are sent away by their family to relatives, to another province or to Port Moresby to avoid being tortured or killed. There is no way of proving or disproving the allegations. The violence is often carried out by mobs of young men who are beyond the control of village elders or community leaders. Those who speak out in defence of a person accused of sorcery risk being accused or attacked themselves. For this reason, traditional leader courts (village elders) and village courts (a statutory body comprised of laypersons applying traditional custom) are reluctant to deal with such cases, as are local police. The ongoing social impact of such a climate of violence and fear on affected children and families is devastating. Children risk being ostracized as the offspring of the sorcerers and are considered to be devilish.

## THE ISSUE OF DEFILEMENT AND INFORMAL JUSTICE SYSTEMS

Defilement cases, being serious criminal offences, officially fall outside the mandate of IJS in all countries that this study examined. Nevertheless, the study has found that it is most common for such cases to be dealt with at the family or community level by family elders and village leaders rather than through the criminal justice system. In Uganda, IJS typically treat defilement cases as civil customary matters, and legal procedures<sup>317</sup> for referral to the formal system, to police and to child welfare officers. Nevertheless, this practice needs to be seen in the context of the Ugandan criminal law provisions that criminalize consensual sexual relationships between teenagers under the age of 18. In the Highlands of Papua New Guinea, tradition recognized that a family member, such as an uncle, has a responsibility to protect children if the parents fail to do so (in cases of child sexual abuse) and the authority to step in and take custody of a child. As in Uganda, defilement cases are reportedly rarely referred to criminal justice agencies.

## 4. THE RIGHT OF THE CHILD TO BE HEARD

### SCOPE OF THE OBLIGATION

The CRC provides for the right of children to be heard and their views to be taken seriously in all matters and all decision-making processes affecting them (Article 12.1). Article 12 obligates governments to ensure that the views of children be sought and considered in all matters affecting their lives. It goes without saying that children are also fully entitled to recognition as persons before the law, including by IJS. It is nevertheless important to start with an understanding of the ambit of this obligation. It does not mean that states are obligated to allow minors to exercise full legal capacity (i.e., to sue and be sued) in formal or IJS. In many – or even most – jurisdictions of the world today, the legal capacity of children in civil matters is very restricted for the child’s protection, so that, for example, they cannot be held accountable in contract law. Likewise, tort law is more likely to impose responsibility on parents for the intentional and negligent damage caused by the actions of minors than to impose liability on the children themselves. There is a trend in many countries toward greater independent representation of children in civil cases. In criminal law matters, the age of criminal responsibility is set by law, varying considerably from one state to another, and is often subject to tests and restrictions.

The Convention does not imply that IJS or formal justice systems should give full legal capacity to children. Article 12 of the CRC should thus rather be seen as requiring that decision makers and adjudicators allow a child’s views to be heard in a manner appropriate to the child’s maturity and development. This varies with age and from one child to another. As holders of rights, even the youngest children are entitled to express their views, which should be “given due weight in accordance with the age and the maturity of the child” (Article 12.1)<sup>318</sup> Thus, in its

317 As contained in the Children’s Act, 2004.

318 Committee on the Rights of the Child: General Comment No. 7: *Implementing Child Rights in Early Childhood*, 2005, CRC/C/GC/7/Rev. 1, 2006, paragraph 14.

consideration of the periodic report of Malawi, the Committee recommended that “the State Party launch campaigns to change the traditional attitude and values which do not allow children to express their views.”<sup>319</sup>

Ensuring genuine and meaningful participation by children in IJS is very difficult to achieve and requires careful consideration in any advocacy, training, support or monitoring programme. The Committee has developed an extensive checklist of basic requirements for the implementation of Article 12 of the CRC.<sup>320</sup> Ensuring that children have the right to be heard in IJS and that this right is afforded meaningfully and effectively requires that states inform and provide appropriate training to IJS decision makers and the members of the local communities in which they operate. It is important to note that children’s participation must be inclusive, avoid existing patterns of discrimination, and encourage opportunities for marginalized children – girls and boys alike – to be involved. Although not directly discussing IJS, the Committee has stated in broad terms that:

***“Achieving meaningful opportunities for the implementation of article 12 will necessitate dismantling the legal, political, economic, social and cultural barriers that currently impede children’s opportunity to be heard and their access to participation in all matters affecting them. It requires a preparedness to challenge assumptions about children’s capacities, and to encourage the development of environments in which children can build and demonstrate capacities. It also requires a commitment to resources and training.”***<sup>321</sup>

The country studies in this study underline fundamental challenges to securing meaningful participation by children in IJS.<sup>322</sup> Children are rarely, if ever, heard in cases affecting their interests; they rarely participate in the proceedings, even as observers. Again and again, interviews with stakeholders and focus groups in the country studies confirmed that children are not considered to be an independent actor in dispute resolution processes. If a child’s interests are affected by a dispute, a parent (almost always the father) or another relative will speak on the child’s behalf or the child’s interests will be treated as an extension of the parent’s. Existing programmatic efforts addressing IJS have often understandably focussed on improving women’s participation and protection of women’s financial and physical security. Deeply held cultural perceptions of the role of children in traditional societies present a major challenge for informal justice sector programming. IJS tend to incorporate these societal views by favouring the position of adults over children by giving adults a stronger voice in the dispute resolution process.

In traditional Papua New Guinean society, men reportedly widely regard children (and women) as personal property and there are few, if any, opportunities for children to express their views on issues of community or family life. In addition to this understanding of children’s place in the society, Melanesian societies value the maintenance and restoration of community peace and good order over claims of the individual to obtain compensation or some other form of redress for a wrong done to him or her.<sup>323</sup> The same is true in many of the other countries studied. At the same time, the extended family and close community structure can also be a source of protection for the child, although within a framework of traditional norms and roles.

As in matters involving children’s inheritance rights, IJS providers are generally unaware of the principle of the best interests of the child and the other guiding principles of the Convention – particularly the right of the child to be heard – and IJS forums’ procedures or practice in child custody matters rarely reflect them. This situation underlines the challenge to implementing the CRC at the national level. Nevertheless, IJS will often contain blocks on which dialogue and programmes can be built. The Papua New Guinea country study illustrates how an adult relative may be appointed to speak on behalf of a child’s interests when the child’s parents are in dispute. The Ecuador country

319 Malawi, CRC, CRC/C/114, 2002, 104, paragraphs 408-409.

320 Committee on the Rights of the Child, General Comment No. 12: *The Right of the Child to be Heard*, 2009, CRC/C/GC/12, paragraphs 132-135.

321 Committee on the Rights of the Child, General Comment No. 12, paragraph 135.

322 See, for example, the section on children in the Bangladesh country study.

323 Focus group discussions, interviews conducted in PNG in August and October 2009.

study revealed that, in cases within the family, someone – generally another family member – represents the child's interests. Thus, there is recognition of the principle that the IJS should hear the child's interest.

### **PROGRAMMING ON CHILDREN'S RIGHT TO BE HEARD**

Any attempt to influence IJS practice in regard to children's best interests and right to be heard must consider the IJS typology and procedures used. Written substantive and procedural law, as well as rules on appointment, structure, reporting and linkages to the formal justice system are much more likely to govern parajudicial IJS. In these instances, the formal procedural rights of children and adults are likely to generally reflect those of the legal system (though they may not be up to date in terms of requirements for the protection of children). Programming efforts may thus focus on attempting to improve procedural rules, taking into account the necessary capacity building that might be required to implement the new rules.

In all kinds of IJS in the country studies, the most difficult and enduring barriers to children's access are likely to be social, rather than formal, requiring a change in mentalities rather than rules. These barriers may be particularly high in the case of custom-based IJS. It is not simply a question of addressing mentalities among adjudicators, as those of users and the surrounding community may be equally or even more determinant. There must also be consideration of how cases are brought and heard. When there is no formal filing procedure, cases may proceed to some form of adjudication only if the dispute involves two persons of some standing in the community. The adjudication process may in many ways be more akin to a negotiation. In these circumstances, the quality of the person assisting or representing the child is fundamental, but the challenge begins with recognition by parties and adjudicators that there is a legal interest of a child at stake and thus a need to appoint a representative. Through support, training and interaction programmes, communities and adjudicators might grow to accept the principle of the representation of children's legal interests. Further steps might involve consultation with and training of adjudicators on the role of such representatives and to train the representatives in the performance of their role.

### **INFORMAL JUSTICE SYSTEMS AND CHILD PROTECTION SYSTEMS, INCLUDING PROGRAMMING ASPECTS**

The term 'child protection' refers to measures to prevent and respond to violence, exploitation and abuse against children. Violations of a child's right to protection take place in all countries, but are more likely to continue with impunity in poor and/or socially vulnerable communities. In its programmes worldwide, UNICEF and its partners work to build protective environments for children that can help to prevent and respond to violence where it occurs.<sup>324</sup> In view of the governance and justice functions that IJS have in traditional communities, it is important that they be included in child protection plans and programmes, perhaps initially through an advocacy programme to promote child-protective attitudes and practices, but also in training and capacity-building programmes and, wherever possible, as part of a community-based child protection mechanism or system.

In Papua New Guinea, UNICEF has been working together with the Village Courts Secretariat within the Ministry of Justice to establish national training, documentation, referral, monitoring and evaluation programmes, systems for village court judges and officers, encompassing children's, women's and other constitutionally guaranteed rights, and juvenile justice instruments, together with HIV/AIDS, governance and active citizenship education. This programme is a positive example of how IJS providers can be successfully incorporated into a child protection system, where they become familiar with the international and constitutional standards of child rights and child protection and, at the same time, find themselves in a network where they can seek external assistance or refer particular cases for specialized assistance or treatment. Ongoing collegial interaction between IJS providers, children's NGOs and support groups, the formal justice agencies and community liaison officers can be a dynamic and sustainable platform for change.

<sup>324</sup> For a summary of recent developments in understanding and designing child protection systems, see, for example, 'Adapting a Systems Approach to Child Protection: Key Concepts and Considerations', UNICEF, Working Paper, Fred Wulczyn, Deborah Daro, John Fluke, Sara Feldman, Christin Glodek, Kate Lifanda, January 2010.

## INFORMAL JUSTICE SYSTEMS, CHILD VICTIMS AND WITNESSES OF CRIME

Where children's interests are engaged in IJS, it is most likely to be as victims or potential victims of crime, or as the vulnerable party to a family, inheritance or property dispute. The UN Guidelines on Justice Matters involving Child Victims and Witnesses of Crime (2005) set out good practices on children's involvement in justice processes based on relevant international and regional norms, standards and practices.<sup>325</sup> These were designed mainly for application in formal legal systems, but much of the guidance they contain is also relevant to IJS. Even though traditional justice forums often operate more from the perspective of restoration of communal harmony than with issues of the rights of victims and responsibilities of perpetrators (and thus may not operate with a clear separation of the notions of civil and criminal, or individual and collective liability), the Guidelines are nevertheless applicable to IJS and governments have a responsibility to ensure their implementation. The challenge for governments and for development partners is to do this so that the rights of child victims and witnesses in domestic justice systems – including in IJS – are firmly on the agenda, yet so that IJS (or other justice) providers are neither overwhelmed nor alienated.

The following text box summarizes the ten fundamental rights of child victims and child witnesses, as these rights apply to IJS providers.<sup>326</sup> Implementing these rights in IJS raises many challenges. Some aspects of the Guidelines assume a level of juridical and administrative sophistication that simply does not presently exist in either the formal or informal justice sector in many countries. The Guidelines accord children a status in law and in society that they do not enjoy in practice in most traditional communities today and engagement with IJS could focus on building understanding around these aspects.

### FUNDAMENTAL RIGHTS OF CHILD VICTIMS AND WITNESSES IN INFORMAL JUSTICE PROCESSES

*(derived from the UN Guidelines on Child Victims and Witnesses of Crime)*

#### The Right to be Treated with Dignity and Compassion (see GL 5)

Recognizing that child witnesses and victims are particularly vulnerable; treating child victims and child witnesses in a sensitive manner.

#### The Right to be Protected from Discrimination (see GL 6)

Child victims and witnesses should not be discriminated against on the basis of their ethnic or national origin, age, disability, sex, religious beliefs, political beliefs, sexual orientation or any other consideration.

#### The Right to be Informed (see GL 7)

Child victims and child witnesses should be provided with sufficient information to give their informed consent to their participation in informal justice processes.

#### The Right to be Heard and to Express Views and Concerns (see GL 8)

Every child victim and child witness should be treated as capable of expressing his/her views and concerns; the child's informed consent should be obtained.

The child's informed consent should be obtained for all actions and decisions related to informal justice processes that affect her/him.

<sup>325</sup> ECOSOC Resolution 2005.20, Guideline 6.

<sup>326</sup> This summary is taken from UNODC's forthcoming *Special Training Module on Child Victims and Witnesses of Crime for Informal Justice Providers*, (first draft, February 2010).

**The Right to Effective Assistance (see GL 9)**

Child victims and witnesses should have the necessary emotional, psychological and legal support while participating in informal justice processes.

**The Right to Privacy (see GL 10)**

The justice process should limit interference in the child's private life to the minimum needed. Information that could reveal the identity of child victims and witnesses should be kept confidential.

**The Right to be Protected from Hardship during the Justice Process (see G 11):**

Child victims and child witnesses should be carefully prepared for the face-to-face encounter with the perpetrator.

Power imbalances between child victims and child witnesses on the one hand and the perpetrator – and his/her family – on the other hand should be taken care of.

**The right to safety (see GL12)**

Where appropriate, there should be implementation or support requests for measures for child victims and child witnesses to protect them from intimidation, threats and harm.

**The Right to Reparation (see GL 13)**

The needs of child victims who participate in informal justice processes should be taken into account and given due weight.

Child victims – and their parents or legal guardian – should be informed about the possibility of seeking restitution and compensation in court if informal justice processes fail to achieve an agreement between the child victim and the perpetrator.

**The Right to Special Preventative Measures (see GL 14)**

Child victims should not be victimized, re-victimized or otherwise additionally harmed.

The establishment of special preventive measures should be guaranteed for particularly vulnerable child victims and child witnesses.

Programmes to raise awareness, spread information and encourage education about primary victimization of children and risk of re-victimization should be promoted and receive contributions.

The Guidelines emphasize the importance of making adequate training, education and information available to relevant professional groups in order to improve and sustain specialized methods and approaches and attitudes for the protection and effective, sensitive handling of child victims and witnesses. Training should include, among other things, relevant human rights norms; information on the impact, consequences and trauma of crimes against children; appropriate child-communication skills; interviewing and assessment techniques; and skills to deal with child victims and witnesses sensitively and constructively. Child justice professionals should make every effort to adopt an interdisciplinary approach in aiding children by familiarizing themselves with the wide array of available services, such as victim support, advocacy, economic assistance, counselling, education, health, legal and social services.<sup>327</sup> As described above, such an interdisciplinary approach can be fostered through the establishment of child protection networks, which bring together informal and formal justice providers, community advocates, and health and social services personnel.

<sup>327</sup> See Guidelines 40-43, *UN Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime*, 2005.

In cooperation with UNICEF, UNODC has developed a model law and accompanying commentary<sup>328</sup> to assist states in adapting their national legislation to the provisions contained in the Guidelines. The model law has been drafted to allow informal and customary justice systems to use and implement its principles and provisions.

## **INFORMAL JUSTICE SYSTEMS AND CHILDREN IN THE CRIMINAL JUSTICE SYSTEM – APPLICABLE STANDARDS**

The term ‘juvenile justice’ encompasses a very broad range of juvenile misconduct, from minor breaches of rules of behaviour applying within a local community, which account for the large majority of instances of juvenile wrongdoing, to cases of serious criminality, up to and including cases of child soldiers who have perpetrated war crimes and crimes against humanity.

The CRC provides the same basic rights for all children; it does not differentiate between children who are in conflict with the law and those who are not. Article 40 of the CRC provides a set of fundamental principles for the treatment of children in conflict with the law, and several other provisions of the CRC are also relevant to juvenile justice.<sup>329</sup> A number of instruments have been adopted that provide guidance on how these fundamental international standards about children and justice should be implemented. These instruments were designed mainly for application in formal legal systems, but much of the guidance they contain is also relevant to IJS. The most relevant are the Guidelines on Justice in matters involving Child Victims and Witnesses of Crime outlined above and the Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) and the Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines). These texts deal with the core elements of juvenile justice, such as prevention, diversion, the minimum age of criminal responsibility, punishment, and the guarantee of a fair trial. Two further UN instruments, the Guidelines for Action on Children in the Criminal Justice System and the Basic Principles on the Use of Restorative Justice Programmes in Criminal Matters, are also important references for guidance on assessment of and programming in children and criminal justice and should be considered in relation to any IJS which considers matters involving child misconduct, whether *de novo* or in a case that has been diverted from the formal justice system.

IJS are bound by these rules and guidelines; they must, for example, provide children who are alleged to have committed offences with some means to defend themselves (e.g., representation, counselling, the possibility to contest the veracity of the allegations against them).<sup>330</sup> The confidentiality of the hearings, including protection of the child’s identity, must also be respected even within the community, especially when dealing with child victims of sexual violence, given the stigmatization that may follow from such acts. The legal frameworks of the countries visited for this study did not fully live up to these standards. As the Uganda country study shows, the Ugandan Children’s Act, although often considered to be a very progressive piece of legislation in Africa, does not allow for legal representation. Though, even if the legal framework regarding this were changed, there would be too few lawyers to take on this role. Thus, if the requirement of some form of representation is to be taken seriously, consideration should be given to using sufficiently trained non-lawyers, such as paralegals with appropriate qualifications.

The international legal framework for juvenile justice is well established and has been abundantly commented on.<sup>331</sup> By comparison, documentation on the levels of implementation of the rules and guidelines for juvenile justice in IJS is very scarce, particularly concerning IJS that have had little or no interaction with the formal justice system or with NGO-sponsored initiatives. There has been some penetration of international standards where there are initiatives to use IJS to divert cases from the formal criminal justice system, as the Malawi and Uganda country studies show.

328 UNODC/UNICEF, *Justice in Matters involving Child Victims and Witnesses of Crime – Model Law and Related Commentary*, UN, New York, 2009.

329 Committee on the Rights of the Child, General Comment No. 10, *Children’s Rights in Juvenile Justice*, 2007, CRC/C/GC/10, 2007.

330 See fair trial guarantees in, for example, ICCPR, Article 14; ECHR, Article 6; CRC, Article 40; American Convention, Article 8; African Charter, paragraph 7.

331 See, for example, UNODC’s *Manual for the Measurement of Juvenile Justice Indicators*, Soerensen and Jepsen, (eds.), 2005.

IJS are often seen as a positive tool to divert juveniles from the more retributive aspects of formal criminal justice systems. Concentration is on the limited or non-existent access to formal juvenile justice mechanisms, the restorative qualities of IJS, and the search for harmony in the local community and thereby the social reintegration of the young offenders. In fact, state or NGO-sponsored juvenile justice programmes may often attempt to build on pre-existing traditional conflict resolution systems. In dealing with child offenders, informal justice mechanisms have certain advantages over the formal justice system, in that they often “concentrate on rehabilitation, reintegration and fostering respect for the rights of others, which are also important juvenile justice principles. As traditional justice measures tend to take place at the community level, they are likely to facilitate reintegration of the child into that community.”<sup>332</sup>

Traditional practices – and possibly custom-based IJS in the form of traditional chieftaincy – can also be used to facilitate reconciliation and reintegration of child soldiers into their communities. In Sierra Leone, traditional ceremonies have been used to facilitate the reconciliation and reintegration of child ex-combatants into the community:

***“Child protection agencies, with the support of UNICEF and the Government of Sierra Leone, have turned to traditional ceremonies to help facilitate this reconciliation and reunification of children with their communities. These exercises, while varying from village to village, are a symbolic gesture that the child is forgiven and accepted back into the community. For example, in northern Sierra Leone, village members wash the soles of children’s feet and their mothers or female guardians then drink the water. In the south and east, the parents of the children dress in rags and take to the streets as community members follow, singing. In addition, village elders sometimes consider it appropriate to impose monetary fines”***<sup>333</sup>

Whatever the nature of the legal system in which juvenile justice is being administered, key human rights norms and procedural guarantees will always be applicable. Basic procedural guarantees should be respected<sup>334</sup> even if the justice forum is non-judicial. The ‘Beijing Rules’ set out a detailed list of principles for the administration of juvenile justice<sup>335</sup> and include, among other matters, the promotion of the best interests, well-being and safety of the juvenile, and, in this regard, consideration, wherever appropriate, of dealing with juvenile offenders without resorting to formal proceedings. The trying of juveniles below internationally accepted minimum age standards or the use of caning and whipping as a sentence for juvenile offenders constitute violations of the CRC,<sup>336</sup> irrespective of whether IJS or a formal court enforces the punishment.

## **INFLICTION OF CORPORAL PUNISHMENT AND INFORMAL JUSTICE SYSTEMS**

Article 19 of the CRC makes clear that juvenile offenders must never be subject to any form of physical or mental violence. States have a responsibility to protect juveniles from any such punishments that IJS may apply and to monitor the activities of IJS to ensure that any disciplinary measures are consistent with the child’s human dignity and all provisions of the Convention. The Committee has stated<sup>337</sup> that eliminating violent and humiliating punishment of children is an immediate and unqualified obligation of States parties. Corporal punishment of children directly conflicts with the equal and inalienable rights of children to respect for their human dignity and physical integrity.

<sup>332</sup> UNICEF Innocenti Research Centre, 2002, pp. 131-136.

<sup>333</sup> Ibid.

<sup>334</sup> See, for example, Principle 7, UN Standard Minimum Rules for the Administration of Juvenile Justice (‘the Beijing Rules’).

<sup>335</sup> UN General Assembly Resolution 40/33 of 29 November 1985.

<sup>336</sup> See also Bangladesh, CRC, CRC/C/133, 2003, 93, paragraph 510; Kyrgyzstan, CRC, CRC/C/143, 2004, 50, paragraphs 278, 279 and 306-308.

<sup>337</sup> Committee on the Rights of the Child, General Comment No. 8, *The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment*, Article 19; Article 28, paragraph 2; and Article 37, *inter alia*, paragraphs 18-22.

The country studies in this study did not encounter evidence of widespread corporal punishment against juveniles following adjudication by IJS. This does not mean that such punishments are not being routinely imposed, although it may indicate that it is more likely to occur without any form of adjudication, administered by informal security providers or family members, as seen in the example from Papua New Guinea. In some instances, infliction of corporal punishment may be more severe where some of the customary IJS examined in this study have weakened and been replaced by more *ad hoc* measures. The quantitative studies conducted for this study show that, in some countries (e.g., Bangladesh), both users and providers in some districts appeared to be relatively tolerant of beatings; this included beatings of juvenile offenders by traditional leaders, which had slightly more approval than beatings by police. Local users may see solutions such as this as more humane to the offender than detention and subjection to a dysfunctional penal system.

In partnership with the Ministry of Justice in Papua New Guinea, UNICEF has sponsored the establishment of pilot Juvenile Justice Working Groups. These Working Groups promote child juvenile justice principles and seek to ensure that juvenile offenders are not treated as adults or subjected to extra-judicial sanctions at the community level, but are instead referred to juvenile justice services. Village courts receiving or becoming aware of cases involving juveniles are required to refer them to juvenile justice services. In Simbu Province, the provincial administration employs a juvenile justice liaison officer to inform people about juvenile justice and to maintain regular contracts with village courts and local community groups.

UNICEF's juvenile justice and child rights protection programmes in Papua New Guinea had the support of stakeholders at all levels of government and of relevant actors in local communities. They ensured the referral of cases involving children as defendants to the formal justice system or their handling through mediation within the community.

There is a need to couple this type of engagement with efforts to ensure that the formal system is indeed capable of handling the cases according to recognized standards. Broadening advocacy efforts by government agencies, actors such as the church, and civil society organizations for the protection of children in contact with the law is also key because there is widespread perception, also among traditional mediators, that physical abuse at the hands of family members is justifiable punishment and a matter for the family or the local community to resolve, rather than a crime against which the victim or victims deserves protection, support and redress.

## PERCEPTIONS OF CHILDHOOD AND PERCEPTIONS OF JUSTICE

All international human right standards concerning children are based on the development of attitudes and perceptions of childhood and children.<sup>338</sup> Academic research on societal perceptions of childhood and of the role of the child is relevant for IJS to comprehend and possibly influence how IJS handle children. It is important to understand how, in most traditional societies, children are seen as valuable to the family and the community as a whole. There are many studies on childhood in traditional societies, but it is also important to study the underlying social, cultural, economic and political factors that may shape how society perceives children and the position of children in IJS.

There is a link between the societal perceptions of the role of the child and the compliance of IJS with the rights of the child. Certain basic elements have to be in place in order for a child to receive the basic protection to which he or she is entitled; one such element involves understanding the age at which an individual is still considered to be a child in the community. If a child is not considered to be a child, it is also crucial to understand whether the child is then considered to be an adult or a 'non-person'. As the Committee states, "[i]n many countries and regions traditional beliefs have emphasized young children's need for training and socialization. They have been regarded as undeveloped, lacking even basic capacities for understanding, communicating and making choices. They have

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338 Veerman, P. E., 1992.



been powerless within their families, and often voiceless and invisible within society.<sup>339</sup> In many societies, such as Papua New Guinea, a man is not deemed mature enough to occupy positions of responsibility in the community until he has reached middle age.

Likewise, the attitudes of young people to IJS are important. A study conducted in recent years documents the perspectives that a selection of young people have on traditional justice structures in Somalia.<sup>340</sup> In the first place, youth acknowledge the role of the traditional elders in creating peace and stability and positive inter-clan relations through the rendering of traditional justice. They are also well aware that the real power resides with the traditional leaders. Nevertheless, they also have some objections. They see the elders as having ability and capacities that are often limited, as not adapting to social change, and as having a limited horizon, which can lead to clashes with younger people in the village. In addition, young people contest their own exclusion from active roles in traditional decision-making. Where punishment appears to be enforced collectively, a stronger individualism among the younger generation makes them react to the collective responsibility of the clans for the actions of its individual members; for them, it does not make sense to deter an entire clan collectively when rogue individuals need to be deterred from committing crimes. Finally, young people generally criticize traditional elders for sometimes misleading people and for being corrupted and manipulated by politicians, warlords and business people, which, according to these young people, causes such traditional leaders to follow their private and particular interests rather than the wider interests of the community. The consequences of alienation from tradition by groups of young men are also seen in some of the communities of Papua New Guinea. Youth gangs there commit some of the worst violence perpetrated against people accused of sorcery, none of which is sanctioned by the traditional leaders or IJS.

Engaging with IJS on issues of child rights requires greater efforts to fulfil their obligations under the Convention with respect to primary justice mechanisms. The state's responsibility to protect, ensure and fulfil children's rights does not stop at the lowest level of the formal justice system, but extends to IJS. National strategies and action plans for implementation of the Convention should include a specific component for increasing respect for the rights of children whose rights and interests are or stand to be affected by primary justice mechanisms, including IJS.

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339 Committee on the Rights of the Child, General Comment No. 7: *Implementing Child Rights in Early Childhood*, 2005, CRC/C/GC/7/Rev. 1, 2006, paragraph 14.

340 Gundel, J., 2006: 42-43.

# PROGRAMMING WITH INFORMAL JUSTICE SYSTEMS

## INTRODUCTION

Until recently, IJS often remained relatively invisible in donor-supported interventions in justice systems.

This chapter examines possibilities and practices in programming with and for IJS. It begins at the policy level and considers whether to use government and development organisation funds to support IJS. It then looks at support to IJS in the context of justice sector support, from the point of view of sector-wide approaches, and then from a project and component approach. While programmatic interventions are discussed separately, it is important to combine interventions that harmonize with one another and with other justice and development interventions. Thus, the holistic thinking behind sector approaches to justice, involving complementary interventions with various institutions, needs to be adapted and applied to IJS as players in the provision of primary justice. Programming for IJS needs to take its outset in the systems as they operate in their context, including their relations with the formal system. Rigorous analysis of official and unofficial linkages, and explicit policy and operational choices based on these realities, are thus a prerequisite to programming.

The analysis of programmatic interventions works through the programme cycle, moving from preliminary analysis and stakeholder consultation to identification, appraisal, implementation, monitoring and evaluation of a series of typical programmatic interventions. The typology of IJS employed in this study applies to these generic interventions; each kind of programmatic intervention is examined in terms of the broad categories of IJS though not exhaustively. It is important to remember that, despite some overall similarities, a chief characteristic of IJS is their degree of adaptation to their socio-economic, political and cultural contexts. The particularity of IJS makes a generic approach to them unreliable.

## PRINCIPLES OF PROGRAMMING

### WHETHER TO ENGAGE WITH INFORMAL JUSTICE SYSTEMS

Human rights activists and development practitioners must contend with the fact that the state sometimes has little or no reach and lacks the resources to extend it – at least in the short term. In favourable circumstances, the different mind-sets of these activists and practitioners can complement each other in a critical dialogue. Whereas the human rights system emphasizes the immediate responsibilities of individual states as duty bearers, development practitioners can sometimes understand their work more in terms of obligations and goals that are common to partnered donors and recipients. At the level of written policy, development organizations have little difficulty in agreeing that they should not engage with IJS that are likely to violate human rights or that all interventions should promote compliance with human rights.<sup>341</sup> Strictly applying the first criterion excludes many IJS from potential support, and applying the same criteria to formal systems would produce similar difficulties. In particular, the choice of whether to engage with IJS that discriminate against women is an unavoidable dilemma for development organisations wishing to engage with IJS. While day-to-day failure to measure up to international standards – in structure, process and outcomes – may be the inescapable reality, the demand to respect them is a legal requirement and a cherished aspiration. The 2009 ICHRP report is critical of what amounts to a ‘progressive realization’ approach to human rights in IJS<sup>342</sup> that fails to demand compliance with human rights. To development pro-

341 See DFID, 2004. “This Briefing Note suggests ways of working with NSJS systems that have positive aspects upon which to build, and that have the potential to improve poor people’s safety and access to justice. It is not applicable to situations where NSJS systems violate basic human rights such that donor engagement is both inappropriate and unlikely to achieve reform.” Likewise, the 2009 DANIDA strategy paper ‘Democratisation and Human Rights for the Benefit of the People’ proclaims that, “Denmark will only support informal systems of justice that respect human rights, or that are willing and able to change norms and practices that infringe on human rights.”

342 ICHRP, 2009: 124.

grammers used to the pragmatic demands of limited resources, limited power and everyday compromise, there will be nothing surprising in such an approach. They will likely note that practical enjoyment of human rights even in the formal justice system in many poor countries is precisely a matter of 'progressive realization', regardless of the prescriptions of law and of the human rights system. In other contexts and at the level of principle, an acceptance of a 'progressive realization' approach will be clearly retrogressive.

As Bruce Baker recommends in a recent work on security provision, the question should rather be one of willingness to reform.<sup>343</sup> While pragmatism is unavoidable in engagement on the ground, there can be no concessions in principle regarding the international minimum norms against which justice provision is measured or in the goal of partnership efforts. Programming should begin with an analysis of the current situation and practices, including strengths and weaknesses in protecting human rights. While the ICHRP cites criticism of reformers' low ambition for India's *Lok Adalat* system,<sup>344</sup> the operational context inevitably influences definitions of 'sufficiently ambitious' in terms of human rights and expectations for the speed of progress. The question of what minimum conditions to include, while seemingly simple on paper, depends on context and can be difficult in practice. The ICHRP report does not discuss the details of human rights standards as they relate to issues of structure, process and outcome in IJS. Minimum criteria for engagement would often include that the IJS provider subscribe in principle to (human rights-compliant) national law and broadly refrain from illegally asserting jurisdiction.

In extreme contexts, programmers may face a choice between supporting informal justice mechanisms that occasionally allow plainly abusive outcomes or countenancing trends that are even worse. An example is seen in war-torn regions of Afghanistan, where counterinsurgency and political considerations have influenced the choice of IJS partners in government and internationally sponsored programmes.<sup>345</sup> One paper on the subject describes how "the competition for justice service delivery in the districts is between the Elders and the Taliban". The government-sanctioned Elders may occasionally resolve murder cases through compensation or even employ "the use of women or girls as part of a compensation deal" (a practice known as *baadh*). Support to a government justice liaison committee can include human rights and basic legal education and other measures that may in time lead to a reduction of practices that violate human rights.

Another rather extreme example is Rwanda's *Gacaca* system, in which the extreme circumstances of post-genocide justice have led elected courts of ordinary community members to try large numbers of people for the most serious crimes without legal representation. Measures such as generous penalty reductions, community service and the openness of the forum in which adjudication takes place have somewhat mitigated these worrying compromises on due process standards. International development partners have supported *Gacaca* in various ways, including through financing for the training of judges.<sup>346</sup>

Thus, context is important, and what some may consider the best or only choice available in one context might be unacceptable in another. Partnerships should be premised on mutual acceptance of core human rights principles, including gender equality, and on a willingness to work to achieve various goals that are themselves compatible with human rights. The outline of the programming interventions below describes how programmers can choose among a number of partners and among a variety of interventions. There will often be a chain of partnerships reaching between international funding and the justice providers themselves. As described earlier, there is a process of 'translation' along this chain. Some partnerships and interventions will carry greater potential for change – and greater risks – than others, and success requires a willingness to run those risks.

343 Baker, B., 2010, op. cit. See also Scheye, 2009.

344 ICHRP, 2009, op. cit.

345 See Fearon, K., 2009.

346 See, *inter alia*, Uvin, 'The *Gacaca* Tribunals in Rwanda' in *Reconciliation after Violent Conflict*, International IDEA, Stockholm, 2003, ISBN: 91-89098-91-9. The extent to which *Gacaca* can be considered an informal justice system within the definition used in the beginning of this study is questionable, as state legislation, administration and finance have entirely established, created, maintained and control the system, which is used for the genocide trials.

Many standards on structure and procedure are ‘soft-law’ and the extent of the obligation to respect them may be contested or not fully understood. Normally, programming would not want to encourage IJS handling serious criminal cases, but cooperation with IJS may be precisely what is needed to ensure that these cases are transferred to the formal system, and such referral could quite easily be a ‘goal’ achievable through an intervention rather than a prerequisite to engagement.<sup>347</sup>

## CONSIDERATION OF ALTERNATIVES TO SUPPORT FOR INFORMAL JUSTICE SYSTEMS

Support for IJS should only proceed after careful consideration of the alternatives. It is important to repeat that IJS are not a substitute for a national justice or legal system. While the national system’s legitimacy may have suffered due to colonialism, corruption and neglect, the effort to build such a system remains a vital goal. Building a credible and legitimate legal and justice system may require at least two generations. If that estimate is accurate, then the 10 to 20 years of international assistance that have been undertaken in this field in many countries is short. Alternative measures to IJS’ engagement may include: improving community policing; increasing community involvement in the formal court system through the employment of lay assessors; hearing community representatives in bail hearings; increasing use of restorative and non-custodial punishment in criminal cases; reducing the formality and adversarial nature of proceedings in the formal system;<sup>348</sup> improving the availability and accessibility of first instance and small claims courts and increasing the availability of appropriate legal services for poor and vulnerable peoples. Thus, baseline studies should include an analysis of user and community preferences when trying to understand why people do not choose the formal system.

## DOING NO HARM

Equally important, interventions targeting or affecting IJS must evidently be premised on realistic prospects of sustainable improvement. It is important to avoid short-term interventions that serve only to create dependency or that risk damaging functioning systems without ensuring that something better replaces them. Difficult and rather fundamental questions must be asked about what is economically sustainable in a particular country and context. Schärf (2003) frankly warns: “Western models of justice have resource assumptions that no African country can afford. Consequently the western system in an African setting fails abysmally to do justice, and particularly for the poor.” Thus, programmers, both in national governments and their international development partners, need a measure of self-criticism and humility.

Second, because IJS may operate in very fragile social environments, the clear priority of local people will often be survival, and it is critical that IJS-related interventions be considered in terms of an overall assessment of sequencing and priorities that is respectful of culture. Thus, one lesson is that development programming that is participatory and sensitive to local wishes might well be unwelcome if it tries to influence IJS before helping with more immediate priorities.

## THE POLICY LEVEL: CLARIFYING THE AIMS OF SUPPORT TO INFORMAL JUSTICE SYSTEMS

### DECLARED AIMS AND OVERALL VALUES UNDERLYING RECOGNITION AND SUPPORT

Links should naturally be made between programming for IJS and sector-wide approaches to justice (‘Justice SWAPs’) aligned with poverty reduction strategy papers (‘PRSPs’) and with strategies for public sector management, governance, and anti-corruption interventions. There is general agreement that justice sector interventions should proceed from an agreed set of values that emphasize the rule of law and access to justice for all, especially for the poor and marginalized, as well as in a charter of human rights based on constitutional and international

<sup>347</sup> Wojkowska cites a reduction in forced marriage of widows as the successful outcome of a project in Somalia.

<sup>348</sup> We are indebted to PRI 2000 for some of these proposals. See pp. 94–95.

standards. Democratic participation, equality, good governance and international cooperation will usually also figure prominently among those values. Recipient governments and development partners should ensure that these declared values fully account for women's and children's human rights.

Beyond statements of basic values, it is important to know why a state or 'polity' and/or a government tolerates or encourages support for IJS as part of justice provision in the country, or conversely why the state may be attempting to move away from a pluralistic to a unitary system. Chapter V notes reasons why users choose IJS. State leaders may have the same reasons – or different ones – than users for favouring IJS or legal pluralism. They may favour one model over another to achieve political goals. Clarity about national goals and development partners' explicit consideration of these goals are important for programming. Development partners and governments should guard against simply finding a cheap solution to the problem of satisfying the obligation to provide justice ('poor justice for the poor'). While pragmatic, economical solutions may be necessary in the medium term, they should be consistent with a value-based long-term vision. In general, development partners can remain on more neutral political ground when there is a wide political consensus.

National governments may include IJS<sup>349</sup> in order to accommodate regional, religious, political or cultural differences or to respect the rights of minorities. In this case, national commitment to including IJS may be long-term and strategic, particularly if backed by a wide political consensus. It is important to note that recognition or inclusion may be a manifestation of underlying conflicts about authority or even sovereignty. Where there has been a history of unequal power relations and discrimination against (often large) indigenous communities, as in Latin America, recognition of IJS is often seen as a way to bolster local democracy and autonomy and is part of an explicitly political debate based on identity, backed by international instruments such as ILO Convention Number 169. In Latin America, the resource base (i.e., literacy, access to materials, communication, etc.) is also often better than that in some other parts of the world where IJS play a prominent role (although Latin American indigenous communities may still have relatively little such access in comparison with other groups in those societies). Opportunities to comply with demands for increased transparency and accountability may be correspondingly higher than in some other parts of the world. Indigenous peoples may be positively disposed towards a re-examination of discriminatory aspects of traditional normative frameworks.

In other cases, recognition of IJS may be based on an acknowledgement that the formal or state justice system has insufficient capacity or outreach and IJS have existed in the community for a long time. In such circumstances, recognition of IJS might be merely 'tactical', pending a (re)assertion of the strength of the state justice system. The Malawi country study illustrates that national policy may tend against IJS, as was the case with the effective abolition of traditional courts (at first instance and appellate level) in Malawi in 1994.

### **THE NECESSITY OF A POWER AND ENVIRONMENTAL ANALYSIS: THE ROLE OF POLITICS**

The six country studies and references to other situations present various perspectives on the role of policy and politics in state involvement with IJS. These studies show that politics – understood as strategies to gain and maintain political power or economic advantage – may be equally apparent at the local level as at the national level, if not even more so.<sup>350</sup> Adjudication of important questions of resource allocation may be a vital – and contested – component of the maintenance of power, particularly where it is combined with other forms of power.<sup>351</sup>

There are underlying and rather fundamental tensions between the republican and democratic principles on which post-colonial states are nominally built and the neo-patrimonial, family and clan-based, often-patriarchal

349 See DFID, 2004, 'Non-State Justice and Security Systems'.

350 See again DFID, 2004.

351 See, for example, Uganda, HURIPEC Working Paper No. 12. Schärf (2003) is brutally succinct on the situation in southern Africa: "The utility of the chiefs to the democratic polities now seems to be to deliver the electorate to the ruling party."

structures in which custom is embedded. It is important that external actors appreciate this political context and that there are ways to combat politicization of justice. There needs to be a power analysis in the context of IJS interventions. The Guiding Principles that the International Council on Human Rights Policy proposed in its 2009 report on legal pluralism and human rights can support analysis of the background for use of IJS.<sup>352</sup> The need for such an analysis may be controversial. It may be equally necessary when dealing with religious organizations.

The impact of support for IJS on the position of the judiciary is particularly important. A point of special consideration is that an assessment of the impact on the independence of the judiciary and the impartiality of IJS adjudicators' needs to be made at the structural and procedural levels. The procedural aspect can be approached operationally through programmatic interventions. The structural or strategic aspect, on the other hand, involves more political and legal analysis and discussion. The Uganda country study illustrates some of the tensions that arise when adjudicative and other governmental functions are combined in one organ and the resulting uncertainty as to whether ultimate authority rests with the judiciary or the executive. On the other hand, judiciaries are as vulnerable as other members of the state elite to accusations of being removed from the realities of the poor, and judges in all countries are occasionally suspected of using judicial independence as a means to block necessary reforms. Reference to an objective set of principles is therefore necessary. The existing international standards on human rights and justice, including the independence of the judiciary, can provide a useful framework for this purpose.

A human rights-based approach can provide an appropriate analytical guideline in determining whether and how to support IJS. Interventions in support of IJS can be considered, assessed, designed and evaluated according to whether they enhance participation, accountability, and empowerment, whether they are grounded in human rights standards, and whether they increase protection of the most vulnerable groups.<sup>353</sup> In the programming approaches and interventions presented in this study some are clearly more participatory than others. 'Self-statement' processes in relation to customary norms and standards, carried out appropriately, are apparently participatory and would seem to favour the development of relationships of accountability between traditional leaders and the communities they serve in ways that top-down codification processes do not.

As the most important questions for ordinary people not involved in policy-making often concern livelihood and access to basic resources and services (including security), an examination of the interaction of justice provision (including IJS) with these issues is very important. Thus, questions of whether IJS are capable of making decisions on access to water, land, food production, housing or other physical necessities more participatory, accountable and empowering as well as preserving human dignity in the process, should be central to programming choices.

## SUPPORT FOR STUDIES ON INFORMAL JUSTICE SYSTEMS AND STATE LEGAL SYSTEMS

Sector-level interventions should support the inclusion of IJS into broader policy debates and discussions, ensuring that the debates and studies are qualified by being:

1. Based on facts, the result of professional, inclusive studies (which takes time);
2. Open and inclusive with respect to debates on policy choices; and
3. Conducted where respect for human rights, equality, participation, access to justice and the separation of powers are the cornerstones of the choices

<sup>352</sup> ICHRP, 2009, *op. cit.*

<sup>353</sup> See Wojkowska, UNDP, 2006. "All informal justice systems should meet the following criteria and that any interventions or initiatives undertaken should work toward gradually enhancing the quality of dispute resolution and getting the informal justice systems to adhere to the following human rights based principles [...]."

While there may not be much experience with IJS in SWAPs, some countries and organizations have worked seriously with the issue of how statutory and customary justice systems can and should cooperate. The South African experience stands out because it has involved many studies and debates and particularly deep academic analysis of legal and social issues. The Traditional Courts Bill, still pending at the time of writing of this study after a decade of research and debate, has been the focus of extensive debate for politicians, academics and justice system stakeholders and the focus of two analytical studies by state organs.<sup>354</sup> The Bill tends toward recognition and regulation of traditional courts rather than incorporation of them into the ordinary judiciary, from which they remain distinct.

The 2000 study by Penal Reform International on Sub-Saharan Africa clearly recommends that existing traditional and customary systems should not be incorporated into the state system:

***“Linking the two systems tends to undermine the positive attributes of the informal system. The voluntary nature of the process is undermined by the presence of state coercion. As a result, the court need no longer rely on social sanctions and public participation loses its primary importance. At the same time, decisions which do not conform to procedural requirements, or which deviate from the strict law in the interests of reconciliation, may be reviewed and overturned on appeal to the higher courts. Procedural requirements invariably become greater and public participation is curtailed.”***<sup>355</sup>

The PRI study pointed to the colonial experience whereby traditional mechanisms that ensured participation and community accountability were rendered useless when traditional leaders were given the coercive powers of the state and no longer had to rely on community legitimacy for their force. According to this view, incorporation would risk repeating this phenomenon. This raises the question of making recognition conditional on participation and accountability, as seen in the South African legislation concerning traditional leaders.<sup>356</sup>

Although the South African experience has its own particularities from combating the legacy of apartheid, including its misuse of traditional structures, it also offers extremely valuable lessons and insights of more general validity. This study cannot do justice to the depth and breadth of this work.<sup>357</sup> In some other countries, including Malawi and Zambia, law reform commissions have seriously studied informal or non-state systems and their relationship to the formal or statutory courts, although these studies have apparently not yet been matched by wide consultations with the public and stakeholders. It is noteworthy that forms of links or integration between informal and formal systems are likely to vary significantly from one legal domain to another; national policy and institutional structures relating to land are likely to differ from those relating to marriage and the family, for example. In South Africa, legislation on the recognition of customary marriages preceded the debates about and analyses of traditional courts, and a court decision excludes interstate succession from the material jurisdiction of traditional courts.<sup>358</sup>

It is impossible to propose a single, universally applicable model for interaction between systems, and national representative organs need to make the political choices. In a study of legal pluralism in Vanuatu, Miranda Forsyth thoroughly and usefully compares models for the relationship of systems and assesses some of their advantages and disadvantages.<sup>359</sup> The study also proposes a methodology for policy development toward a model that is suited to the context in question and contains mechanisms of mutual recognition, adaptation and regulation.

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<sup>354</sup> There has been criticism, though, that there has been insufficient popular consultation. See a selection of media articles on the subject on the University of Cape Town's website at: <http://www.lrg.uct.ac.za/>

<sup>355</sup> Penal Reform International 2000: 129

<sup>356</sup> Traditional Leadership and Governance Framework Amendment Act, 2003.

<sup>357</sup> For further reading on the Traditional Courts Bill, see for example, Himonga, C. and Manjoo, R., 2009.

<sup>358</sup> *Idem*.

<sup>359</sup> Forsyth, 2007.

## INCLUSION OF INFORMAL JUSTICE SYSTEMS IN JUSTICE PROGRAMMING AT THE SECTOR LEVEL

Once there is agreement in principle on the inclusion of IJS in justice sector strategies and programmes, the central questions become how this should be done and what combination and sequencing of various kinds of interventions to use. The tendency to include IJS in justice sector strategies is growing and there are some recent examples. Support for IJS is especially apparent in the case of parajudicial ‘hybrid’ systems that exist in many countries. For example, the Uganda JLOS strategic investment plan (2007–2011), which is donor-supported, includes the local council courts, as the Uganda country study discusses. The Kenya GJLOS programme’s<sup>360</sup> medium-term strategy includes state and non-state justice systems to provide “improved access to justice that is affordable, speedy, relevant and effective”. In Timor Leste, an independent needs assessment report from 2009 found low capacity and outreach in the formal system (despite important recent improvements in this regard) and familiarity with, trust in, and access to informal systems.<sup>361</sup> The report first proposed that any law recognizing customary law processes at the community level should ensure that those processes comply with basic human rights and coordinate with the formal justice system and, second, that any initiative giving recognition should harmonize with the formal system and not operate as a parallel or separate system of justice. The recently adopted strategic plan for the justice sector in Timor Leste appears to follow this recommendation and posits one overall goal in relation to IJS: that the customary law and community justice mechanisms be regulated and the systematic monitoring of their conformity with human rights be implemented. The overall approach appears to be a top-down one, aiming at circumscribing IJS through a suitable legal framework (supported by preliminary studies and research) and the training of IJS providers.<sup>362</sup> Similar developments are apparent in many countries around the world, where, even if not explicitly mentioned at the strategic level, programmes contain components of support for IJS.

Inclusion of programming for IJS at the sector level is still relatively new, and there are few high-level evaluations and reviews that assess progress and pitfalls. While Uganda’s decentralization programme is often considered to be a success, the LC court system has been criticized for insufficient attention to human rights in the legal and policy frameworks surrounding it.<sup>363</sup> Other weaknesses, seen in the country study, are a gap between the tasks given to the LC court system and the intellectual and material resources available to these courts. Programming to integrate formal and informal systems better will depend on the national justice policy context, the jurisdictional division between formal and IJS, and an analysis of the desired and factual links between the two. Planning requires that these issues be thought out systematically and with an eye toward policy. This is a complex task, involving in-depth studies and qualified political debates, and should involve work by law reform commissions, public consultations, and consideration of consequences at various levels. Policy development should take account of human rights issues, including those of access, structure (including participation), procedure and substantive norms.

While this study looks primarily at how IJS can be harnessed to improve access to justice, occasionally the policy will go in the opposite direction: toward the abolition of IJS and the creation of a more integrated formal court system. The Malawi country study notes that, after the move to multiparty democracy and the adoption of a new constitution in 1994/95, Malawi quickly discarded the traditional courts that had operated in the country for decades. These courts were especially discredited because the executive (which controlled them) had abused them to persecute political opponents. Nevertheless, some studies<sup>364</sup> have pointed out that the traditional courts also fulfilled important functions for poor people through their jurisdiction over title to land, their power to dissolve marriage (especially customary marriage), and their authority to decide custody of children. Initially, the traditional

<sup>360</sup> Key Result 4, concerned with improved Access to Justice for the poor, marginalized and vulnerable.

<sup>361</sup> ‘The Justice System of Timor Leste – An Independent Comprehensive Needs Assessment’, Dili, October 2009.

<sup>362</sup> Judicial actors will also be trained in customary law, but within the objective of regulating and implementing community mechanisms.

<sup>363</sup> See Oloka-Onyango, 2007, ICHRP, 2009: 123.

<sup>364</sup> See especially Schärf, W., et al., 2002.



courts were abolished without the adoption of legislation transferring their jurisdiction over these matters to magistrates courts. For a while, the only court that had jurisdiction was thus the remote and expensive High Court. According to studies,<sup>365</sup> some magistrates courts continued handling such cases without jurisdiction to do so. Eventually, the Malawi parliament adopted legislation extending the jurisdiction of the magistrates courts, but knowledge of the new legislation was not found to be widespread among magistrates at the time of studies in 2002, so confusion over jurisdiction in these matters was still hindering access to justice. This process clearly illustrates the need for preliminary research and careful planning.

## PLANNING AND BASELINE STUDIES PRIOR TO INCLUSION OF INFORMAL JUSTICE SYSTEMS IN SECTOR PROGRAMMES

As when planning for sector interventions generally, a thorough analysis is a necessary start when addressing IJS. The scale of the analysis should match the scale of the intervention (local or national). While planning for support of justice sector institutions requires information on caseloads, resources and linkages as well as needs, programming for informal justice demands greater information about people's legal preferences needs and choices, as well as the cultural, social and economic realities that condition these needs, and a knowledge of the paths through the systems that people choose. The ICHRP report<sup>366</sup> documents the lack of empirical research on non-state legal orders and states that, in most cases, baseline studies do not exist.

To map justice needs and the choices of ordinary people, the World Bank's Justice for the Poor programme (JSDP) in Sierra Leone used combinations of the following:<sup>367</sup>

- Household survey data, using previous surveys of this kind and, as necessary, drawing on other data sources such as relatively recent government census data and biannual public expenditure tracking surveys
- Analysis of court records, comprising data from customary and common law courts, across different levels of courts and different areas of countries, as well as country study methods, combining and cross-referencing data to develop informative stories that are notable either for their frequency or their uniqueness
- Focus group interviews with a wide range of stakeholders at the district, chiefdom, and community levels (including chiefdom and local government authorities, customary and general law courts officials, police, NGO representatives, women and youth leaders, and 'ordinary' men, women, and youth, with an emphasis on the poor and marginalized in each community) and individual interviews with subsets of the population to provide in-depth information on individual experiences with justice systems

In relation to informal justice, the JSDP in Sierra Leone focused in its initial two years on conducting studies to inform future programming and policy-making, without having made prior prescriptive choices. The JSDP decided that understanding the role, importance and, where relevant, the strengthening of the IJS would be a key focus in the initial phase of the programme. It is important to recognize that understanding the context may require time and study.

The Governance Secretariat under the Ministry of Justice in Zambia is currently<sup>368</sup> undertaking an extensive Access to Justice Situation Analysis. The study involves both desk and field analyses and includes an explicit human rights framework.<sup>369</sup>

<sup>365</sup> Ibid.

<sup>366</sup> ICHRP, 2009: 118.

<sup>367</sup> Dale, P., 2008.

<sup>368</sup> January 2010. The Danish Institute for Human Rights is leading the study.

<sup>369</sup> These are merely a few of many relevant studies. There are similar studies, or plans for them, in Liberia, (US Institute of Peace and George Washington University), Indonesia (The World Bank's Justice for the Poor programme), Nepal, and Malawi (reportedly planned by DFID). What is perhaps still lacking is a more or less standard methodological 'toolbox' for the conduct of such studies. The extent of the study's need to be comprehensive depends, of course, on the extent of existing documentation on justice issues.

While the World Bank study in Sierra Leone did not appear to incorporate human rights analysis, a later JSDP study did examine some aspects of human rights.<sup>370</sup> As human rights are a state obligation, it would be appropriate to consider them at every stage, including at the identification and planning phases. It would be relatively simple to include representatives of national human rights institutions and gender equality bodies in such work where they can contribute substantially. In other cases, expertise in human rights and gender equality can be found elsewhere. The assessment can help to answer questions about which issues, wrongs or offences IJS are capable of addressing, as well as the consequences of intervention or non-intervention. IJS providers and user representatives should also be represented at the planning stage, as they are too often treated as the 'poor relative' during the planning and programming of justice interventions. The human rights analysis should be broad, not limited to critically examining the compliance or non-compliance of IJS with international or constitutional standards, but examining comparative strengths and weaknesses in structure, process and substantive outcomes *vis-à-vis* the formal system.

### RECOMMENDATIONS ON CONDUCT OF BASELINE STUDIES

Baselines should not only assess the capacities, resources, strengths and weaknesses of the formal justice system, but also explicitly begin by identifying social realities, including the barriers to access to the justice system and its responsiveness to the justice needs of ordinary people, and by disaggregating according to social and economic status. They should address the reasons why people choose IJS and do not choose the formal system. Just as IJS are dynamic, people may have had recent experiences of conflict or authoritarian or corrupt governance that has left them mistrustful of the formal justice system. Mistrust of the system does not necessarily have to be perpetual, though. As emphasized above, baseline studies need to have a critical perspective that includes an analysis of the political and economic interests that transform justice mechanisms into instruments of local power.

It is also important to recognize and address the many official and unofficial linkages between the formal justice system and IJS. In so doing, it is essential to consider, among other issues, the roles of power and individual interests as they affect the extent to which the primary justice provider finds collaboration worthwhile. Power, authority and the boundaries between jurisdictions are also at issue.

The human rights compliance of IJS should be an explicit part of the framework for examination of IJS. Such an analysis of this kind should incorporate human rights standards pertaining to substantive norms (contextualized to deal with the most prevalent kinds of disputes, whether they be land, property, family or criminal type issues), procedures and access criteria, and structural issues of participation and accountability.<sup>371</sup>

Understanding the social barriers that prevent women from taking any steps at all to resolve legal problems or prevent them from using particular avenues or remedies may be vital in determining the best programming approach. If social custom or pressure are discouraging women from availing themselves of otherwise available formal systems, support for IJS may have to balance carefully between the palliative of attempting to improve procedures and remedies and the danger of reinforcing the social norms that make it 'unacceptable' for women to seek justice.

In relation to procedures, it would be appropriate to attempt to understand women's preferences through testing and pilot schemes. Relevant questions include: Do women prefer more confidential proceedings that permit them to discuss difficult issues in a secure atmosphere, or do they favour public proceedings where social pressure may increase the chances of enforcement? Do they prefer one avenue for particular kinds of cases?

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370 Silenced Injustices in Moyamba District, paragraphs 33 et seq. documenting the failures of the IJS.

371 This is in line with the approach adopted by National Human Rights Institutions in paragraph 33 (c) of the 2008 Nairobi Declaration, cited above.

Similar considerations apply to children's access to IJS. Baseline research should investigate whether the access of children – as parties, victims, perpetrators or witnesses – can be most improved through programmatic cooperation with IJS or through making statutory mechanisms more available, accessible, acceptable and adaptable.

Preliminary assessments of human rights compliance must critically examine the willingness and ability of IJS to change. They must consider the complexity of change, particularly where IJS are applying norms that are broadly held within their communities. While some kinds of change – particularly process-related ones – might be relatively easy to change by focussing on providers or sets of rules, others will typically be deeply embedded in community norms. Although IJS providers, like other groups, are likely to defend their own interests, it may be a mistake to regard them as barriers to reforms that their user constituencies would wholeheartedly welcome. For example, rural women may be among the strongest upholders of patrilineal succession practices, expecting that their eldest sons, whom they have supported and nurtured, will remember them in their old age.

Baseline studies such as these should, of course, set up indicators and benchmarks for future achievement; these should be used in later phases of the programming cycle.

### INDICATOR FRAMEWORKS FOR ASSESSING INFORMAL JUSTICE SYSTEMS

Indicators can measure compliance with established standards (including those related to human rights and governance) or the performance of outputs and progress toward agreed goals and objectives. This section starts with a framework that is oriented toward measuring compliance with human rights standards in the substantive outcomes, processes and structures of IJS. The assumption is that the performance indicators for programming will often set objectives of greater human rights compliance.

Analysis of rule of law indicators generally maintains<sup>372</sup> that indicators should provide reliable information not only on whether there is progress toward an agreed objective, but also provide warnings when there are emergent problems. A high-level indicator system should permit the inclusion of project-level indicators to feed into it.

Previous work on this subject, such as the 2004 DFID study and the 2006 UNDP report, has suggested various indicators for IJS.<sup>373</sup> The DFID briefing paper emphasizes three categories: transparency, protection of rights, and cooperation between state and non-state institutions. In this proposal, transparency was mostly concerned with the recording of decisions. In regard to protection of rights, the proposal suggests including users' – and especially women's – knowledge, understanding and confidence and their perceptions of being treated equally and with dignity, as well as the proportion of cases solved through mediation (as opposed to more binding approaches, such as arbitration). The cooperation category looks at referrals going in both directions as well as at users' avenues of appeal (it would presumably also look at the formal availability of such avenues).

The 2006 UNDP paper, while at times less specific than the DFID brief when discussing the precise measures to be taken and the sources of data, adopts the category of transparency, accepting the proposed DFID indicators. The UNDP paper added indicators for the adoption of codes and guidelines on ethics, and included two indicators related to participation: 1) the existence of rules and procedures for the selection of IJS adjudicators and 2) whether there is a public forum to review and discuss the performance of IJS and, if so, whether it allows equal participation. Under the category of protection of rights, it goes a step further than the DFID briefing paper, proposing indicators of three important human rights themes: 1) measurements of IJS' use of physical punishment and force, 2) measurements of IJS' provider attitudes on gender issues, and 3) measurements on issues such as dowry/bride price payments and the age of marriage. Further, it looks at structural and procedural rights, proposing to examine levels of participation of women as adjudicators and awareness of the principle of equality before the law. Under

<sup>372</sup> See, for example, Vera Institute of Justice, 2003.

<sup>373</sup> See UNDP/Wojkowska, 2006: 45; DFID, 2004: 16.

the category of safety and security, the UNDP study includes the question of the effectiveness of IJS by looking for increases in the number of IJS decisions that are actually carried out.

Discussion of indicators for IJS should refer to justice indicators more generally and their efforts to include IJS. The World Justice Project uses four categories or bands, divided into 16 factors and 68 sub-factors. One factor, under the Access to Justice band, relates specifically to the fairness and efficiency of traditional justice. The sub-factors include independence and impartiality, respect of fundamental rights (without going into further detail, though) and the voluntariness of outcomes. Within the Access to Justice band that the World Justice Project proposed, a Vera Institute report<sup>374</sup> proposed an overall category or ‘basket’ of indicators comprising “transparency, fairness, and accountability to high standards of professional and ethical conduct” and added some additional sub-factors for the purpose of its study. These are similar to those proposed by DFID and UNDP and look at consistency in outcomes, public perceptions of fairness and corruption, the presence of a set of known standards that are available for review and consistently applied, the proportion of male and female users, and NGO reports on abuses.

### TABLE: PROPOSED FRAMEWORK FOR COMPLIANCE INDICATORS FOR INFORMAL JUSTICE SYSTEMS

For programming purposes, the following proposal would, like the efforts just described, be an indicator framework that takes its outset in access to justice across the three main parameters already mentioned: the substantive standards used and applied in IJS, the structure of IJS, and the fairness and effectiveness of procedures, including the remedies available. The indicators below are merely samples and may not be the best or most appropriate ones in all contexts. The inclusion of a column on indicators related to legislation is not a tacit assumption that legislative solutions will be the most effective. Effectiveness and appropriateness will vary from one context to another.

CATEGORIES	SUB-CATEGORIES	EXAMPLES OF ISSUES	SAMPLE INDICATOR – LEGAL	SAMPLE INDICATOR – PRACTICE	MEANS OF VERIFICATION
Norms and substantive outcomes	Personal status and family law issues	Child marriages	Clear age limit, applicable to customary marriages	IJS refusal to endorse child marriages	1. Legislation 2. Reporting, studies, monitoring
		Forced marriages (including ‘wife inheritance’)	Legal prohibition	IJS practice of verifying real consent to marriage	1. Legislation 2. Reporting, studies, monitoring
		Bride price/dowry	Repayment not a legal requirement for dissolution; recognition that payment does not reflect ‘ownership’	IJS practical application of (changed) legal standard; reduced amounts	1. Legislation 2. Reporting, studies, monitoring
		Dissolution of marriage	Legal recognition of equality in grounds for dissolution	IJS practical application of (changed) legal standard	1. Legislation 2. Reporting, studies, monitoring
		Maintenance and paternity	Clear rules on jurisdiction and proof in paternity suits	IJS practical application of (changed) legal standard	1. Legislation 2. Reporting, studies, monitoring
		Custody of children	Best interests of child principle applicable to IJS	IJS practical application of (changed) legal standard	1. Legislation 2. Reporting, studies, monitoring
		Polygyny	Legal and procedural incentives to monogamous <sup>375</sup> marriages	Reduction in polygyny	1. Legislation 2. Reporting, studies, monitoring
		Abandonment/desertion	Law provides protection that is applicable to IJS	IJS practical application of (changed) legal standard	1. Legislation 2. Reporting, studies, monitoring

374 Vera Institute/Altus Global Alliance, 2008.

375 See the discussion of this issue in Chapter VII on women’s rights. Procedural incentives could include making the option of civil marriage (and dissolution of civil marriage) more geographically, financially and procedurally accessible.

CATEGORIES	SUB-CATEGORIES	EXAMPLES OF ISSUES	SAMPLE INDICATOR – LEGAL	SAMPLE INDICATOR – PRACTICE	MEANS OF VERIFICATION
	Real property law issues	Individual title protected in customary law framework	Law provides an application framework that is applicable by IJS; development of customary norms to reflect changing forms of ownership	1. Indicators should reflect accountability of providers 2. Knowledge among the public of statutory law.	1. Legislation 2. Reporting, studies, monitoring
		Customary forms of collective ownership protected in legislation	Statutory law recognizes these forms of ownership	1. Indicators should reflect accountability of providers 2. Knowledge among the public and justice providers of statutory law.	1. Legislation 2. Reporting, studies, monitoring
		Gender equality in real property ownership	Legislation on title and intestate succession are gender-equal and apply to customary land; <sup>376</sup> development of gender-equal customary norms	IJS practical application of changed legal standard	1. Legislation 2. Reporting, studies, monitoring
		Succession (applies to personal property also)	Law provides an application framework that is applicable by IJS and poor users	Knowledge and use of testate succession	1. Legislation 2. Reporting, studies, monitoring
	Personal property issues	Protection for widows and orphans against property-grabbing (may apply to real property also)	Legislative clarity on ownership and succession as to 'family property'	Indicators of cooperation among primary justice providers, including referrals.	1. Legislation 2. Reporting, studies, monitoring Reporting by state primary justice agencies
	Issues of personal security, crime and social order	Jurisdiction of IJS in relation to petty crime	Clarity and realistic provisions governing subject matter and personal jurisdiction as well as the coercive powers of providers. Clarity and realistic provisions as to relations with state law enforcement.	Indicators of cooperation among primary justice providers, including referrals. Use of restorative measures. Resources of primary state agencies to cooperate effectively.	1. Legislation 2. Reporting, studies, monitoring Reporting by state primary justice agencies
		Illegal coercion and illegal punishments by IJS	Legislative prohibition and appropriate sanctions <sup>377</sup>	1. Quantitative indicators of use and attitudes 2. Quantitative indicators of use of dialogue, warnings and coercive sanctions by law enforcement officers	1. Legislation 2. Reporting, studies, monitoring Reporting by state primary justice agencies
		Juvenile justice	Legal frameworks for cooperation and use of restorative measures involving a role for IJS	Use of restorative measures. Linked to performance indicators of carrying out of capacity assessments, provision of training, resources and monitoring structures	1. Legislation 2. Reporting, studies, monitoring Reporting by state primary justice agencies
		Gender-based violence	Legislative prohibition and appropriate sanctions <sup>378</sup>	1. Quantitative indicators sanctions by IJS and attitudes (surveys), qualitative surveys on attitudes 2. Quantitative and qualitative indicators of referrals to law enforcement officers	1. Legislation 2. Reporting, studies, monitoring Reporting by state primary justice agencies
		Witchcraft accusations	Legislative frameworks that protect appropriately against intimidation through use and against accusations	1. Quantitative indicators of sanctions by IJS and attitudes (surveys), qualitative surveys on attitudes 2. Quantitative and qualitative indicators of referrals to law enforcement officers	1. Legislation 2. Reporting, studies, monitoring Reporting by state primary justice agencies

376 Any legislative reforms proposed in this area are likely to provoke highly political debate and the opposition of traditional leaders. Including them as an indicator here is not intended as advocating a simplistic approach to this issue that does not take account of the likely difficulties.

377 The issue of what is appropriate is highly dependent on the gravity of the offence and various other contextual considerations. The issue of sanctioning excess here is closely linked to the previous indicators concerned with realistic legislative provisions and powers that are capable of protecting people's right to security of person and property.

378 See discussion on GBV in the main study and the country studies.

CATEGORIES	SUB-CATEGORIES	EXAMPLES OF ISSUES	SAMPLE INDICATOR – LEGAL	SAMPLE INDICATOR – PRACTICE	MEANS OF VERIFICATION
Structure: accessibility, participation and accountability of providers <sup>379</sup>	Structural issues – participation	Gender equity in representation in IJS	Legislative and policy frameworks encouraging or mandating equitable representation <sup>380</sup>	Quantitative indicators of representation of women and men. Qualitative indicators of attitudes in communities and among bodies exercising authority	Surveys and qualitative studies, reporting by state- regulated IJS
		Forms of democratic appointment procedures, standard setting, performance review and application	Legislative and policy frameworks encouraging or mandating democratic forums	Quantitative indicators of operation of democratic forums and mechanisms. Qualitative indicators on attitudes in communities and among bodies exercising authority.	Surveys and qualitative studies, reporting by state- regulated IJS
	Structural issues: accountability, independence and impartiality	Forms of democratic accountability, including performance review of IJS	Legislative and policy frameworks encouraging or mandating democratic forums	Quantitative indicators of operation of democratic forums. Qualitative indicators of attitudes in communities and among bodies exercising authority.	Surveys and qualitative studies, reporting by state- regulated IJS
		Qualification requirements for adjudicators	Legislative and policy frameworks encouraging or mandating qualification requirements	Quantitative indicators of operation of qualification requirements. Qualitative indicators of attitudes in communities and among bodies exercising authority.	Surveys and qualitative studies, reporting by state- regulated IJS
		Disciplinary and removal procedures	Legislative and policy frameworks encouraging or mandating disciplinary and removal procedures <sup>381</sup>	Quantitative indicators of operation of disciplinary and removal procedures. Qualitative indicators of attitudes in communities and among bodies exercising authority.	Surveys and qualitative studies, reporting by state- regulated IJS
		Independence respected in appointment, hierarchy and remuneration rules and procedures	Links to state bodies are to judicial rather than executive organs	Quantitative indicators of operation of appointment, hierarchy and remuneration rules and procedures. Qualitative indicators of attitudes in communities and among bodies exercising authority.	Surveys and qualitative studies, reporting by state- regulated IJS
		Rules mandating impartiality, in appointment and disqualification	Regulatory frameworks	Data on practical operation	Surveys and qualitative studies, reporting by state- regulated IJS
		Rules mandating transparency in appointment procedures	Regulatory frameworks	Data on practical operation	Surveys and qualitative studies, reporting by state- regulated IJS
		Structural issues: accessibility	Distance	Number and distribution of IJS locations by population density	Number and distribution of IJS operating by population density
	Costs		Fees set	Fees demanded in practice	Surveys and qualitative studies
	Complexity		Written or unwritten Rules on form of complaints, pleadings, motions, etc.	Application of rules on form of complaints, pleadings, motions, etc.	
	Appropriateness of jurisdiction		Legislation provides jurisdiction to the most available primary justice forum (incl. IJS) in respect of the most immediate justice problems?	Data on people's justice needs	Surveys and qualitative studies

379 There is some overlap between structural and procedural factors.

380 See the discussion on programming interventions to ensure gender equity, as related to typology of IJS.

381 See the discussion of programming interventions as related to typology of IJS.

CATEGORIES	SUB-CATEGORIES	EXAMPLES OF ISSUES	SAMPLE INDICATOR – LEGAL	SAMPLE INDICATOR – PRACTICE	MEANS OF VERIFICATION
		Time	Time limits imposed on IJS for responses <sup>382</sup>	Data on whether time targets are met in practice	Quantitative and qualitative surveys and studies
		Effectiveness	Existence of official enforcement mechanisms	Data on operation of enforcement mechanisms	Quantitative and qualitative surveys, reporting by state primary justice providers
			Referral rules and procedures to more appropriate bodies and by those bodies to IJS	Data on operation of referral mechanisms	
Process: fairness (including independence and impartiality), equality and effectiveness	Procedural/operational impartiality	Disqualification rules and procedures	Adequacy of regulatory frameworks or voluntary codes	Data on operation of regulatory frameworks	Quantitative and qualitative surveys, reporting by state primary justice providers
	Procedural/operational independence	No combination of adjudicative and executive functions <sup>383</sup>			
	Procedural equality	All persons entitled and enabled to access IJS on same conditions	Rules and policies encouraging/equality of access	Data on operation of regulatory frameworks (or voluntary codes, as the case may be)	Quantitative and qualitative surveys, reporting by state primary justice providers
		Absence of prejudice and intimidation against categories of persons	Rules or voluntary codes allowing women, poor and vulnerable to be heard without barriers or intimidation		
		Procedure based on hearing of all parties – mechanisms to ensure child right to be heard	Rules or codes mandating hearing of all		
	Oversight and monitoring	Appeal procedures	Regulatory frameworks	Data on operation	Quantitative and qualitative surveys, reporting by state primary justice providers
		Referral procedures			
		Monitoring			
	Operational transparency	Publicity of hearings			
	Protection of vulnerable persons	Confidential hearings when appropriate	Regulatory frameworks	Data on operation	Quantitative and qualitative surveys, reporting by state primary justice providers
Possibility of 'legal' assistance, measures to ensure understanding of proceedings, including for victims as well as defendants					
Representative for children					
Predictability of outcomes – legal certainty	Publicized written or oral norms	Regulatory frameworks	Data on operation	Quantitative and qualitative surveys, reporting by state primary justice providers	
	Binding precedents and accessible recording of outcomes				

382 This will be most appropriate to forms of IJS that are state-regulated or where the IJS themselves set targets to be met.

383 This may particularly be an issue for parajudicial IJS.

## PROGRAMMING AND THE LINK TO TYPOLOGY OF INFORMAL JUSTICE SYSTEMS

Before discussing specific interventions in relation to IJS, it is necessary to briefly consider programming in relation to typology. The possible modes and means of intervention with IJS will differ significantly depending on the kind of system under consideration. There are similarly different programming challenges and advantages presented by different kinds of IJS. When considering approaches, this study has no general preference for one kind of informal justice system over another, but stresses the importance of recognizing the various roles of different mechanisms, all of which may be valuable; see the section below on fostering links between IJS and primary justice providers.

### PARAJUDICIAL TYPE MECHANISMS AND ADMINISTRATIVE OFFICIALS WITH ADJUDICATIVE FUNCTIONS

Broader and more centralized forms of intervention, involving planning on a national scale (whether for training, transparency and accountability measures or monitoring, research and documentation programmes), may be possible with parajudicial type mechanisms, such as the village courts in Papua New Guinea, (some levels of) the local council courts in Uganda, the *Tribunais Comunitarios* in Mozambique or the local courts in Sierra Leone or Zambia. The same is true of mechanisms using administrative officials to adjudicate cases, as in the village courts in Bangladesh. Chapter IV on typology notes that the links that both systems have to government structures and regulations provide some ‘leverage’ for influence and ready-made structures that may help in the management of funding and reporting. The possibility of larger interventions may make them attractive subjects for government and development partner programming, including at the sector level. UN agencies have some experience working with such mechanisms, as the example of the UNICEF programme described in the Papua New Guinea country study shows. The previous chapter briefly referred to the work of the Village Courts Secretariat in the Ministry of Justice in Papua New Guinea, which encompasses many aspects of assistance to village courts, including training, referrals and monitoring. The Bangladesh country study discusses UNDP’s support for the village courts in Bangladesh. The Bangladesh programme Activating Village Courts in Bangladesh, which UNDP and the European Union support, is an example of such a larger programme.<sup>384</sup> A large programme also makes an integrated programmatic approach possible. The Bangladesh programme has four components:

1. A review of the existing legal framework, which will result in the submission of a proposal for reform of the existing Village Courts Act to the Government of Bangladesh
2. Capacity development of UP chairmen, village police and staff of village courts, focusing on knowledge-sharing and best national and international practices
3. Awareness-raising about the roles and functions of village courts for potential court users, community-based organizations, school teachers and religious leaders
4. Technical assistance to the Local Government Department and the Ministry of Local Government, Rural Development and Cooperatives to strengthen oversight, monitoring and evaluation of VC activities

Nevertheless, these systems also present certain challenges. In some contexts, they may face resistance because they are seen as being a government attempt to replace traditional systems. Programming on a large scale for mechanisms like these brings with it increased demands on programming itself, including requirements for monitoring, regulation and reporting. The reporting and other requirements that will be demanded may deprive these mechanisms of the informality that makes them easy for local people to deal with. Increased workloads for provider officials may affect their willingness to work for little or no pay. It may likewise see rising costs, which are passed on to the public in the form of court fees, whether officially or unofficially. Furthermore, the greater the investment in such systems, the greater the demand will be that they conform to constitutional and international standards on independence, impartiality and the guarantees of due process, as seen in Uganda. The investments

<sup>384</sup> See Bangladesh country study.



that these requirements demand in turn raise the question whether the same resources should not be used to make the formal system more fair, accessible and effective. The Uganda country study looks critically at how the demands placed on LC courts are already outstripping what these volunteer-based organs are able to deliver. Critical assessments of capacity are necessary. A further difficulty, seen in Uganda, Bangladesh and other countries, is the uncertainty surrounding which state body is responsible for these courts. The affiliation to ministries responsible for local government makes sense from some points of view, but may also engender a ‘hands off’ attitude in the Ministry of Justice and the judiciary. In the long term, a gradual process of integration into the judiciary seems the most desirable path, even if this process requires years or even decades.

A further point relates to the jurisdiction of such mechanisms and particularly to the distinction between civil and criminal matters. Customary law often does not distinguish between civil and criminal matters. For minor offences, it is entirely correct not to unduly insist on such a distinction. People often want to be compensated for a wrong done to them rather than to see a fine going to the state. It makes very good sense to allow civil settlements and restorative measures to mitigate or even negate criminal penalties, as long as this is done transparently and accountably.<sup>385</sup>

### CUSTOM-BASED MECHANISMS

Custom-based mechanisms apparently present the advantages of sustainability and legitimacy, having stood the test of time and being solidly anchored in communities. They may, however, have difficulties in extending their reach beyond tightly knit communities that may be small and local. Changes in structures, procedures and the substantive standards applied by these bodies stand the chance of being adopted by the community and thus becoming sustainable. Nevertheless, an influx of donor funds can lead to the criticism that that funding will create dependency. As discussed above, programming would need to be mindful of not reinforcing patriarchal patterns and structures lacking in transparency and accountability. Customary or traditional mechanisms are at first sight more difficult to reach, as there may be few obvious structures through which programming can be carried out.

Based on the interventions considered in the country and desk studies, NGOs providing legal services are the organizations most frequently involved in working together with traditional structures – mostly through education programmes. Women’s organizations often appear to have comparatively good outreach networks at the primary level. The gender perspective that these organizations can bring may help in balancing the harmful aspects of patriarchal traditional structures. The interest that both of these parties have in perpetuating programmes, together with the general difficulty of documenting outcomes in this area, may make critical evaluations challenging. The Malawi country study presents the largest single attempt to programmatically address custom-based IJS. There, a (faith-based) NGO coordinated an overall programme that a variety of delivery agencies, from local government to NGOs and faith-based organizations, implemented at the local level. While there may be some challenges in achieving a uniform approach in this case, the choice of a local implementing partner (or, indeed, that of a national-level faith-based organization) did not seem to have any negative influence on the essential message of the programme. The Malawi Primary Justice programme focuses mainly on education and documentation of case outcomes, but also promotes interaction among primary justice providers and linkages to the formal system. The Bangladesh country study notes how direct engagement with traditional systems appears to have been rarely attempted as a programmatic response – traditional justice has been left alone. It notes some legal attempts by NGOs to agitate for the government to protect people against extra-legal penalties.

There has already been made mention of the 2000 PRI study’s recommendation against incorporation of traditional systems into state justice frameworks. The argument maintains that, procedurally, incorporation could entail the imposition of requirements of written decisions, some form of *stare decisis* and respect of procedural rules that would compel the informal systems to abandon the flexibility and speed that are part of what makes them attractive to users.

<sup>385</sup> See the discussion of Malawi in Schärff/DFID, 2003, p. 46.

The study cites Schärf's view that incorporation "(i) is likely to change, quite fundamentally, the basis on which these courts win their legitimacy and support the bureaucratisation and payment of some members of the community courts and not others is likely to cause division and jealousy (ii) the bureaucratisation is likely to lessen the degree to which the community courts are going to be responsive to community sentiments (iii) the low criminal jurisdiction might rob the court of its influence and power in civil matters (iv) the procedures may be beyond the reach of the local population (v) communities might continue to form and run courts that suit their needs as parallel or in competition to the newly acknowledged state courts (vi) the bureaucratisation and formalized procedures will diminish the capacity to combine multiple problems in a holistic manner (vii) there is likely to be a focus on individual cases rather than inter-linking issues that constitute a problem (viii) [formalisation of] these courts [will] reduce the ability of the community to tackle matters that are related to the cases that they hear, e.g. imposing a curfew on *shebeens* [and] (ix) the blend of policing decision-making and crime prevention performed by the community courts to date will in all likelihood be jettisoned for purposes of bureaucratic niceties and departmental homogeneity."<sup>386</sup> The recommendation is coupled with an equally strong recommendation to refrain from any moves to make the case resolutions of these IJS binding.<sup>387</sup>

In a 2003 study for DFID, Schärf warned that the seemingly inexorable decline in the authority of chiefs and headmen in southern Africa can have severely negative consequences and requires very careful handling:

***"The point here is that the reduction of power and status of chiefs, if it is going to happen, has to be managed very delicately, and donors may well want to assist in reducing the negative consequences of governance vacuums created by their downgrading. In the rural areas chiefs are all there is for local residents. Transition strategies should be clear and the relegation of the chiefs to cultural leaders with no administrative power should be given sufficient time."***

The Uganda country study also alludes to the gap in protection that arises when traditional systems decline and modern ones are unable to adequately replace them.

## RELIGIOUS INFORMAL JUSTICE SYSTEMS<sup>388</sup>

Like custom-based mechanisms, these systems are likely to be relatively sustainable and legitimate among their user communities. At their best, their outcomes may enjoy respect because of strongly held values. As is clear from the Niger country study, though, these values may accord not at all or only partly with principles of national and international human rights law, and religious doctrine may strongly resist influence or change. The question of how to reach religious IJS may also be relevant. In Niger, the non-hierarchical structure of Islam (with *imams* being selected locally by the followers of the faith) would make it difficult to impose a set of qualifications, procedural rules or a disciplinary mechanism from outside; indeed, even the large Islamic Association would find it difficult to do this.

In other predominantly Muslim countries, faith-based structures may be very different. In some countries, particularly in the Middle East, there may be either a high degree of state involvement in religious affairs or large and complex organizational structures – often with close links to the state – that would make some form of centralized initiative possible. In recent years, researchers and practitioners have paid more attention to development cooperation work with faith-based organizations.<sup>389</sup> Some may see their work as explicitly linked to an effort to strengthen religious faith, whereas, for others, religious values may be a foundation for more general and more secular charitable work.

<sup>386</sup> PRI, 2000, p. 135.

<sup>387</sup> 'Non-State Justice Systems in Southern Africa: How Should Governments Respond?', DFID, March 2003.

<sup>388</sup> Marie Juul Petersen of the University of Copenhagen kindly assisted on this topic.

<sup>389</sup> See, for example, Holenstein, 2006.

At present, there is little evidence or documentation of justice-related work in partnership with Islamic organizations. Nevertheless, it is evidently possible to build constructive working relationships with many of these faith-based organizations, also on justice-related themes. Marie Juul Petersen describes how some of the Islamic organizations in the Jordan study mentioned above are trusted partners of international agencies, including in UNICEF-funded work focusing on children's rights<sup>390</sup> and how Western-based Islamic organizations may be helpful in building bridges to understanding these themes. In its strategic plan for 2007–2010, UK-based Muslim Aid specifically commits to working for women's rights. Islamic Aid cooperated with *imams* in the implementation of the UNICEF-funded Facts for Life programme.<sup>391</sup>

It cannot be concluded that engaging with religious IJS involves dealing with more sensitive issues than other IJS. While women's right to own land may be a stumbling block with traditional leaders, it is relatively uncontroversial to Islamic authorities (as documented in the Niger study). It may be difficult to address religiously sensitive themes, including women's reproductive rights, women's rights on dissolution of marriage and inheritance rights, particularly if the outset is seen as a 'Western' agenda, but issues of procedural equality, children's rights or improved participation may be easier to approach. Importantly, it must be remembered that religion is only one factor; religions are not monolithic and their application and interpretation differ according to social, economic and political factors.

Some Christian priests and pastors assist in resolving disputes, but they do this less on the basis of religious law and are not very involved in informal justice processes in the countries studied. The action of faith-based organizations to support or influence justice providers is separate from this. In some countries, faith-based organizations, such as the YWCA and CCJP/CARITAS, have long worked with justice provision. In recent years, US-based or linked Christian evangelical organizations have joined them<sup>392</sup> and some of this work addresses IJS. One such organization trained many traditional leaders in Uganda,<sup>393</sup> and such interventions will probably become more common as programmers more widely understand the vital role of traditional leaders.

The influence of religious views is undoubtedly strong in matters of marriage and the family. The country studies do not examine how religion influences the legal services that Christian religious organizations offer in this area, as most of the work that this study considered relates to legal services *vis-à-vis* the formal system rather than IJS. Unfortunately, there are examples of Christian churches that are close to IJS that promote the idea of child witches and the necessity to 'save' them through exorcisms.<sup>394</sup> Thus, a critical examination is necessary in relation to religious organizations on the same basis as it is with any other organization.

## NGO-BASED VILLAGE OR COMMUNITY MEDIATION SCHEMES

Schemes where (usually) NGOs are able to help communities devise new ways to solve disputes based on taught mediation techniques have the advantage that outcomes can be freer of social pressure and the interests of powerful groups in the community. The schemes can either be completely 'modern', as the Malawi country study shows, or they can be an attempt to improve or modify traditional mechanisms, as the Bangladesh country study discusses in relation to the MLAA. A trade-off appears between open, public mechanisms, such as the modified *Shalish* in Madaripur, and the private and confidential mediation practiced in Malawi. The former gives the

390 *Id.*

391 Information provided in written comments by Marie Juul Petersen.

392 Two prominent examples are International Justice Mission and Advocates International.

393 <http://allafrica.com/stories/200910070047.html> 'Uganda: Lango Leaders Trained in Land Laws'. Advocates International provided support for the training, in partnership with Ugandan FBOs.

394 A UK Channel Four documentary programme entitled 'Saving Africa's Witch Children' describes the phenomenon and the work of two partnered British and Nigerian NGOs (Child Rights and Rehabilitation Network and Stepping Stones Nigeria) to protect the children.

advantages of ‘justice as theatre’ in setting an example of what is fair in a community and apparently helps in enforcing decisions. The latter provides a confidential forum that is more intimate and accessible in delicate cases, especially for women and vulnerable persons. An ideal model might give room for both.

What these diverse mechanisms have in common is that they are, in principle, based on volunteerism and are free of charge. Experience shows that much work is necessary before traditional and religious leaders, as well as police and district officials accept such schemes. Where this has been done sensitively and carefully, these leaders have usually been well-disposed to the initiatives, as the Malawi and Bangladesh country studies show. Evaluation at the project level and comparatively across projects and countries would be necessary to determine success rates in retaining mediators and effectively executing settlement outcomes and to gauge the necessity of continued monitoring and re-training.

### **SPECIFIC INTERVENTIONS AND OUTPUTS: AIMS**

Programming is likely to fit into the broad direction set by government policy, which can have widely varying aims and effects. Most interventions will broadly aspire to provide accessible forums to resolve disputes. Under the framework of justice sector programming, the study identified specific interventions, which include *inter alia*:

- State law reform processes to enhance compliance with international human rights guarantees
- Selection and mandate of adjudicators
- Education of adjudicators
- Education of users
- Procedural regulation and self-regulation
- Promotion of accountability through linkages, participation, monitoring and supervision
- Promotion of linkages between IJS and primary formal justice mechanisms
- Linkages to paralegals and legal aid providers
- Linkages to wider development programming

Law and regulatory reform may also concern specific legal domains, particularly including those that IJS are most often concerned with, i.e., family law, property law and criminal or conduct issues.

The programming initiatives described below are in no way exhaustive. One important caveat of this study is that it focuses mainly on IJS rather than on formal justice systems, which frequently do not understand IJS and customary law and governance. The country studies reveal the striking fact that formal justice actors often know very little about the informal systems that most people use and law school curricula, for example, pay little attention to customary law. Agents of the formal justice system often attempt to fill this gap by learning about customary law in *ad hoc* ways, such as by consulting court personnel or others in their immediate circle. Supplementing formal justice providers’ knowledge about IJS is a necessary element of an overall strategy.

The following table outlines programmatic interventions for IJS.

PROGRAMMATIC INTERVENTIONS		ASSUMPTIONS OF FEASIBILITY AND IMPACT BY TYPES OF INFORMAL JUSTICE SYSTEM					
		TYPICALLY EXTRA-STATE INFORMAL SYSTEMS <sup>395</sup>			TYPICALLY STATE HYBRID OR PARAJUDICIAL INFORMAL SYSTEMS		
Intervention area/aim	Specific interventions	Traditional Leaders	Religious Mechanisms	Community Mediation Schemes	State Customary Courts	Administrative officials with adjudicatory functions	Locally elected officials with adjudicatory functions
State law reform processes to enhance compliance with international human rights guarantees	Promotion of ratification of international instruments	Limited impact taken alone	Greatest impact where religious justice mechanisms are incorporated into the state	Some indirect impact, depending on sponsors of schemes	Potentially strong direct impact, though dependent on other programmatic interventions, including training / sensitization, monitoring and assistance	Potentially strong direct impact, though dependent on other programmatic interventions, including training / sensitization, monitoring and assistance	Potentially strong direct impact, though dependent on other programmatic interventions, including training / sensitization, monitoring and assistance
	Domestication of international standards, (including removal of discriminatory exemption clauses)	Limited impact taken alone	Greatest impact where religious justice mechanisms are incorporated into the state	Some indirect impact, depending on sponsors of schemes	Potentially strong direct impact, though dependent on other programmatic interventions, including training / sensitization, monitoring and assistance	Potentially strong direct impact, though dependent on other programmatic interventions, including training / sensitization, monitoring and assistance	Potentially strong direct impact, though dependent on other programmatic interventions, including training / sensitization, monitoring and assistance
	Supporting consultative / participatory processes on possible reforms to legislation	Potential for impact may be medium to long-term in the gradual integration of the local with the national. Limited immediate impact taken alone	Potential for impact may be medium to long-term in the gradual integration of the religious with the secular. Limited impact taken alone	Some impact, depending on sponsorship / partnerships in relation to community mediation schemes	Potential for significant impact – likely to be largest in state-controlled instances Limited impact taken alone – requires links to efforts aimed at applying the reformed standards in practice	Potential for significant impact – likely to be largest in state-controlled instances Limited impact taken alone – requires links to efforts aimed at applying the reformed standards in practice	Possible tension between local interests and national standards
	Introduction of conformity / 'repugnancy' clauses				Potential for significant impact – likely to be largest in state-controlled instances Limited impact taken alone – requires links to efforts aimed at applying the reformed standards in practice	Potential for significant impact – likely to be largest in state-controlled instances Limited impact taken alone – requires links to efforts aimed at applying the reformed standards in practice	Possible tension between local interests and national standards
	Support to civil society campaigns for law reform to comply with international standards	Potential mobilizing and sensitization effect Do the CS organizations have capacity to reach out to traditional leaders outside the urban elite?	Potential mobilizing and sensitization effect Do the CS organizations have capacity to reach out to religious leaders outside the urban elite?	Potential mobilizing and sensitization effect	Potential mobilizing and sensitization effect Potentially significant impact – likely to be largest in state-controlled instances Limited impact taken alone – requires links to efforts aimed at applying the reformed standards in practice	Potential mobilizing and sensitization effect Potentially significant impact – likely to be largest in state-controlled instances Limited impact taken alone – requires links to efforts aimed at applying the reformed standards in practice	Potential mobilizing and sensitization effect Possible tension between local interests and national standards

395 Here, as elsewhere in relation to the subject of IJS, the impossibility of applying valid generalizations is obvious. Traditional leaders, religious authorities and community mediation are usually, but not always, separate from the state. There are instances where any of these three are under the authority of the state.

PROGRAMMATIC INTERVENTIONS		ASSUMPTIONS OF FEASIBILITY AND IMPACT BY TYPES OF INFORMAL JUSTICE SYSTEM					
		TYPICALLY EXTRA-STATE INFORMAL SYSTEMS <sup>395</sup>			TYPICALLY STATE HYBRID OR PARAJUDICIAL INFORMAL SYSTEMS		
Assisting research efforts by law reform, human rights and equality bodies, academics NGOs, etc. The research can also form part of the national and stakeholder reports submitted to the UN treaty bodies, special mechanisms and the Universal Periodic Review		Research can attempt to document people's legal concerns, their choices and the reasons for them and/or the current operation of mechanisms. Necessary prior to programming. Useful if linked to law reform, advocacy or planning processes.					
Codification of customary norms – within a particular ethnic, social or religious group	Highly dependent on modalities chosen and local buy-in	Religious doctrines unlikely to be subject to change in this way	Highly dependent on modalities chosen and local buy-in	Highly dependent on modalities chosen and local buy-in	Highly dependent on modalities chosen and local buy-in	Highly dependent on modalities chosen and local buy-in	
Codification of customary norms – across ethnic social or religious groups	Unlikely to be successful. Unfortunate history of previous attempts of this kind.						
Regulation of jurisdiction (subject matter, personal, geographical, temporal)	Dependent on provision of real alternatives						
'Soft' attempts at ensuring consistency, including appointment of experts to assist in determining the content of customary law	Issues in relation to the source of knowledge, the legitimacy and knowledge of the 'expert'. Care should be taken not to completely destroy flexibility and dynamism of custom.						
'Self-statement' attempts at assisting communities to document their own substantive customary law with a view to promoting awareness and consistency and democratic processes among communities	Slower and more painstaking method. May not yield outcomes desired by outside parties in the short term, but potentially very respectful of values of participation, accountability and cultural rights. Requires buy-in of local leaders to permit a process where all community members are permitted a voice.						
Assisting engagement of IJS providers in participatory standard-setting processes inspired by human rights standards	Applies mostly to non-state actors. Can be self-regulatory processes (see below) or as part of state legislative process. Preliminary investigation required finding out if it is necessary to work separately with different ethnic/social/religious groups. While there may be benefits in engaging IJS providers across ethnic, religious, etc. divides, there will probably also be pitfalls. Strong ownership among the groups of any process is necessary. Support to a highly legitimate national political process to engage them may in some cases be an alternative.	Participatory processes may be useful in ensuring momentum, though the framework standards will typically be set centrally.			Elected officials may legitimately demand greater say in standard setting.		

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		TYPICALLY EXTRA-STATE INFORMAL SYSTEMS <sup>395</sup>			TYPICALLY STATE HYBRID OR PARAJUDICIAL INFORMAL SYSTEMS		
Selection and mandate of adjudicators	Requirements as to qualifications and procedures for selection, discipline and removal of adjudicators. Typical aims would be to secure adequate qualifications, gender balance and open, transparent and accountable selection processes.	State leverage for increased democratic control is present where there are forms of state recognition. Often difficult and highly political for state to interfere in selection process. Possible development partner leverage through funding of local development projects.	Some leverage among central religious authorities. Scope for working with religious bodies. Some state leverage, depending on nature of state.	Potentially high development partner leverage in relation to, e.g., ensuring gender balance, transparent selection processes, etc.	High level of state leverage available to further a human rights agenda.	High level of state leverage available to further a human rights agenda.	Some state leverage. Some leverage on the part of CS organizations and political parties: CS organizations can attempt to make political demands on parties to show results in gender balance.
Education of adjudicators	Compulsory education in national law and/or human rights standards	State may have limited leverage to impose this requirement. Most chiefs/headmen keen to receive training and knowledge. Tailoring of content to context and trustful relationships necessary for mutual learning.	State may have limited leverage to impose this requirement. Depends on nature of state and its links to religious bodies.	The sponsors of the community mediation initiative may have significant leverage. Tailoring of content to context and target group very necessary.	State has a high level of leverage. Tailoring of content to context and target group is necessary.	There may be greater leverage with the local state body that the officials belong to. Tailoring of content to context and target group is necessary.	
	Voluntary education in national law and/or human rights standards	Delivery mechanism for outside organization may need to be carefully negotiated to context and target group.	Religious groups will often want to manage delivery themselves, if willing Tailoring of content to context and target group is necessary.	Delivery requires a sponsor with legitimacy and outreach. Mediation implies an indirect application of HR. Tailoring of content to context and target group is necessary.	Delivery usually possible through organs of the judiciary, NHRIs, NGOs and academia may be partners. Tailoring of content to context and target group is necessary.	National or local programme? Is there a national body of local elected officials? Tailoring of content to context and target group is necessary.	

PROGRAMMATIC INTERVENTIONS		ASSUMPTIONS OF FEASIBILITY AND IMPACT BY TYPES OF INFORMAL JUSTICE SYSTEM			
		TYPICALLY EXTRA-STATE INFORMAL SYSTEMS <sup>395</sup>	TYPICALLY STATE HYBRID OR PARAJUDICIAL INFORMAL SYSTEMS		
Provision of legal materials and guidelines	Provision of legal materials and guidelines	Literacy levels may be an issue requiring precise tailoring of the materials.	Receptiveness to materials developed outside the region may be an issue requiring compromise on some issues. In some contexts, literacy levels may be an issue.	Literacy levels may be an issue requiring precise tailoring of the materials. Mediation implies an indirect application of HR. Materials should reflect this.	Literacy levels may be an issue requiring precise tailoring of the materials.
	Training in techniques for documentation of case outcomes	Literacy levels, linguistic variations and consideration of how documentation will be stored, retrieved and used are important issues.			
Education of users: legal awareness-raising	Training in different techniques of dispute resolution	Tailoring of techniques to the powers of the US, local cultural norms and the binding or non-binding nature of case outcomes is necessary.			
	General civic education / information	Literacy levels may be an issue requiring precise tailoring of the materials. Delivery mechanisms should be considered: radio programmes, portable TVs, drama, etc			
Procedural Regulation and Self Regulation	Education in national law	Literacy levels may require precise tailoring of the materials. Context and nature of disputes require precise tailoring of the materials. Delivery mechanisms should be considered: radio programmes, portable TVs, drama, etc			
	Provision of legal materials and guidelines	Consideration of target groups required. Are the materials aimed at community paralegals or members of the public directly? Literacy levels may require precise tailoring of the materials. Context and nature of disputes require precise tailoring of the materials.			
Procedural Regulation and Self Regulation	Training in different techniques of dispute resolution	Tailoring of techniques to the powers of the US, local cultural norms and the binding or non-binding nature of case outcomes is necessary.			
	As to procedural norms incl. impartiality, fairness, transparency, participation	May be explicit or implicit requirements of recognition – see typology. Simple, non-technical versions of basic due process rules need to be elaborated and communicated in an understandable and usable form.	May be explicit or implicit requirements of recognition – see typology. Simple, non-technical versions of basic due process rules need to be elaborated and communicated in an understandable and usable form.	May be explicit or implicit requirements of recognition – see typology. Simple, non-technical versions of basic due process rules need to be elaborated and communicated in an understandable and usable form.	Greater leverage for state-centred systems Simple, non-technical versions of basic due process rules need to be elaborated and communicated in an understandable and usable form.
	Processes to develop voluntary charters	More appropriate to non-state voluntary mechanisms where non-binding decisions are released			Greater leverage for state-centred systems Simple, non-technical versions of basic due process rules need to be elaborated and communicated in an understandable and usable form.



PROGRAMMATIC INTERVENTIONS		ASSUMPTIONS OF FEASIBILITY AND IMPACT BY TYPES OF INFORMAL JUSTICE SYSTEM				TYPICALLY STATE HYBRID OR PARAJUDICIAL INFORMAL SYSTEMS	
		TYPICALLY EXTRA-STATE INFORMAL SYSTEMS <sup>395</sup>					
Accountability mechanisms: transparency, monitoring and oversight	As to development and maintenance of norms	Community involvement in enforcing norms through participation and sensitization can be favoured.					
	Provision of advice services to adjudicators / providers	Requires pre-established relationships of trust with providers of legal services (often NGOs)	CS monitoring is often built into these schemes.	While this can be decided in a top-down manner through regulation with state-sponsored mechanisms, acceptance will still require relationships of trust.	Depends on decentralization model.	Depends on decentralization model.	
	Open attendance and civil society monitoring	Will require consent and trust of traditional leaders.	Monitoring by like-minded persons and organizations more likely to be accepted	CS monitoring is often built into these schemes.	While this can be decided in a top-down manner through regulation with state-sponsored mechanisms, acceptance will still require relationships of trust.	Depends on decentralization model.	
	Formalized mechanisms of inspection	Use of hierarchy of traditional leaders could usefully be considered for monitoring and inspection, with support of outsider expertise.	Monitoring by like-minded persons and organizations more likely to be accepted	Reasonable requirements likely to be welcomed. Requires that resources are available to ensure smooth communication and cooperation to avoid bottlenecks.	Often present, but not entirely functional in these systems. Sensitive inspection coupled with support likely to have greatest chances of success (local court officers in Sierra Leone or Zambia, for example.)	Depends on decentralization model.	
	Requirements of endorsement by courts or other external actors	Difficult to introduce without consultation and acceptance. Requires that resources are available to ensure smooth communication and cooperation to avoid bottlenecks.	Difficult to introduce without consultation and acceptance. Requires that resources are available to ensure smooth communication and cooperation to avoid bottlenecks.	Reasonable requirements likely to be welcomed. Requires that resources are available to ensure smooth communication and cooperation to avoid bottlenecks.	Often present, but not entirely functional in these systems. Sensitive inspection coupled with support likely to have greatest chances of success.	May be welcome when linked to mechanisms of support.	
Appeal mechanisms	Difficult to introduce without consultation and acceptance. Requires that resources are available to ensure smooth communication and cooperation to avoid bottlenecks.	Difficult to introduce without consultation and acceptance. Requires that resources are available to ensure smooth communication and cooperation to avoid bottlenecks.	Reasonable requirements likely to be welcomed. Requires that resources are available to ensure smooth communication and cooperation to avoid bottlenecks.	Often present, but not entirely functional in these systems. Sensitive inspection coupled with support likely to have greatest chances of success.	May be welcome when linked to mechanisms of support.		
Referral requirements	Difficult to introduce without consultation and acceptance. Requires that resources are available to ensure smooth communication and cooperation to avoid bottlenecks.	Difficult to introduce without consultation and acceptance. Requires that resources are available to ensure smooth communication and cooperation to avoid bottlenecks.	Reasonable requirements likely to be welcomed. Requires that resources are available to ensure smooth communication and cooperation to avoid bottlenecks.	Often present, but not entirely functional in these systems. Sensitive inspection coupled with support likely to have greatest chances of success.	May be welcome when linked to mechanisms of support.		

PROGRAMMATIC INTERVENTIONS		ASSUMPTIONS OF FEASIBILITY AND IMPACT BY TYPES OF INFORMAL JUSTICE SYSTEM
		TYPICALLY EXTRA-STATE INFORMAL SYSTEMS <sup>395</sup>
		TYPICALLY STATE HYBRID OR PARAJUDICIAL INFORMAL SYSTEMS
	Reporting requirements, including compulsory documentation of outcomes and processes	Same comment as above on training in documentation of decisions. (Literacy levels, linguistic variations and consideration of how documentation will be stored, retrieved and used are important issues.) Gravity of matters needs to be taken into consideration. Some issues more amenable to oral settlement.
	Support and advice functions	Often best anchored within institutions that will be most familiar to the particular kind of JS.
	Requirement of public written judgements	Same comment as above on training in documentation of decisions. (Literacy levels, linguistic variations and consideration of how documentation will be stored, retrieved and used are important issues.) Gravity of matters needs to be taken into consideration. Some issues are more amenable to oral settlement.
	Public hearings	Depends on the kind of issue and its gravity. There should be a possibility of confidential resolution of private disputes.
	Promotion of jury type assemblies	Strengths of participation and transparency. Depends on cultural context and willingness of people to participate.
	Explicit consultation on development/adoption of norms	See above on 'self-statement' exercises.
Linkages among Primary Justice Providers	Accessibility of small claims courts	
	Diversion and police / prosecutorial discretion	Links usually exist already. They should be documented and analysed prior to intervention. Capacity assessments on both sides are necessary.
	Promotion of links to primary legal service providers	Links usually exist already. They should be documented and analysed prior to intervention. Capacity assessments on both sides are necessary.
Linkages to Paralegals and Legal Aid Providers	Choice among/ accessibility of different kinds of JS	Often best promoted through public information and increasing accessibility. 'Jurisdictional' lines may need to be clearly set out and communicated.
		Provides the possibility of improved channelling and filtering of cases to the correct and most appropriate forum.
Linkages to Wider Development Programming	Mapping of typical conflict patterns in the areas/social groups concerned	Generally valid across all systems
	Conflict resolution through local accords	
	Conflict resolution through regulation	
	Conflict resolution through law enforcement	
	Conflict resolution through improved resource availability	
	Conflict transformation through empowerment of vulnerable/marginalized groups	

## TABLE OF PROGRAMMATIC INTERVENTIONS IN RELATION TO INFORMAL JUSTICE SYSTEMS

### HARNESSING INTERNATIONAL MECHANISMS FOR REFORM OF LEGAL FRAMEWORKS

Ratification of international human rights instruments can create an effective platform to address issues that arise in relation to IJS. Support for domestication of international standards will be a part of the law reform effort and will be particularly important in countries subscribing to the dualist doctrine of international law.

Earlier chapters discuss the basis of the relationship between statutory law and the law or rules applied by informal providers. The so-called 'repugnancy' clauses and their more recent successors that require conformity with statutory law, as well as exemptions to such rules, are a part of the relationship. Law reform can aim to adjust the terms of this relationship relating to equal treatment.

Programmatic interventions may seek to bring IJS more clearly within the ambit of legislative and constitutional standards. Such efforts may be linked to reporting and review processes in international treaty bodies or the like, which may in turn be linked to civil society engagement in advocacy and alternative reporting, often with external support. One important example concerns certain common law countries in Africa where, as mentioned elsewhere in this study,<sup>396</sup> customary law is exempted from certain constitutional guarantees, particularly related to discrimination.

Support for legislative and constitutional change of this kind is thus an intervention that (a) is in line with the demands of international law, (b) enjoys backing from the UPR system, and (c) appears to have the backing of a number of African governments and civil society movements, and should thus be considered within the range of programming options open to UN programmers. Where constitutional provisions tolerating discriminatory treatment still exist, UN agencies and other development partners should continue to support documentation and advocacy actions to ensure that these provisions are brought to the fore during the treaty body and UPR review mechanisms. In the African context, the constitutions of countries like Malawi, Uganda, South Africa and Mozambique provide inspiration.

Reservations to or non-ratification of the CEDAW should not hold women's and human rights actors back from engaging with these issues in relation to the treaty bodies or the UPR, as other global instruments can also provide an adequate platform, as witnessed by relevant recommendations of the Human Rights Committee, the Committee on Economic, Social and Cultural Rights and the Committee on the Rights of the Child.

### REFORM OF LAW, INCLUDING DOMESTICATION OF INTERNATIONAL STANDARDS

Programming should include support for national partners for the repeal of the offending provisions and the adoption of legislation giving effect to the international recommendations and strategies for implementation. In countries that do not yet have constitutional guarantees of equal treatment, there can be support for advocacy for their adoption. The momentous consequences that a change at the constitutional level would produce should not be underestimated. As Chapter VII on women's rights and IJS notes, full legal equality between men and women would demand changes in the law and customs relating to ownership of real and personal property and marital and family relations (including polygyny, dissolution of marriage and bride price). It would demand a legislative programme to regulate many of these and related issues as well as administrative measures and processes to carry them out, training for justices, law enforcement officials and customary leaders on the new norms and standards.

Transitional measures would be required to regulate the situation and status of people who have organized their lives according to the current laws and rules. It is almost certain that some sections of the population, including some justice officials, would resist the implementation of the required new laws. As indicated in the Niger country study, there are serious weaknesses inherent in a process that would introduce change on this scale at the

<sup>396</sup> Chapter VII on Women's Rights and IJS, section on discrimination in legal frameworks.

constitutional level alone, without legislation to regulate the details for reform. A constitutional change that leaves the details to be sorted out through litigation and judicial review is likely to be unsatisfactory and to subject the higher judiciary to unwelcome pressure. In short, a far-reaching programmatic response would be necessary to successfully introduce change on this scale.

Reform of law is, of course, a technically and politically complex process. Process in law reform in this area does not differ from that in other areas, except that it needs to take particular account of stakeholder groups that are often far from the policy-making process: the rural poor, indigenous communities and women. Achieving effective consultation of such marginalized groups is a major challenge. The Malawi country study illustrates some aspects related to law reform that are relevant to customary law and informal justice. In some ways, the 1994 Constitution provided an unparalleled platform for making laws that respect human rights, and the work carried out by the Malawi Law Commission took advantage of this platform in a wide range of areas, particularly on gender-related issues. At the same time, most of the proposals have remained as bills not considered by parliament or adopted into law. While this delay has thus far been due to political deadlock rather than opposition to the proposals as such, it shows the uncertainty that is inherent in political processes.

Law reform is one – perhaps limited – way to influence structural, normative and procedural standards and practices surrounding IJS. The country studies reveal that IJS failure to comply with the formal law is extremely widespread, so the impact of legislation should not be overestimated. Success may be much more likely where IJS directly depend on the state, as with the parajudicial IJS mechanisms. Even so, change depends on IJS adjudicators' knowledge and understanding of the law, as the literature on IJS and the country studies in this study confirm. Second, the question of any possibility of oversight will have a bearing on respect for the law.

## STRATEGIC LITIGATION

Linked to law reform is the tool of strategic litigation, which activist organizations can use to bring about change in legal standards. Where the legal environment is favourable, strategic litigation can be used as a tool to achieve both legal change and consciousness raising / coalition building. National and regional courts as well as the global UN treaty bodies can be relevant in this regard.<sup>397</sup> Depending on the context, strategic litigation may be a valuable strategy to advance the effective protection of rights.

However, in states where the rule of law remains relatively weak, there should not be unrealistic expectations for results. Previous chapters have mentioned the use of strategic litigation to tackle particular issues such as bride price in Uganda and polygyny in Niger. In the Niger and Uganda examples, the issue concerns the highest levels of the court system, but lower courts may in some contexts be competent to rule on the constitutionality of customs (and/or of statutory law). As discussed in those contexts, there are dangers inherent in a literal application of the law to populations that do not support it. In Malawi, a 2002 study found varying approaches among lower court judges to the application of constitutional principles to customary law.<sup>398</sup> The Niger country study notes that some were cautious about the risks of a backlash against the formal justice system if they did so. Others, applying a more 'progressive' approach, would try to interpret customs in the light of the constitution or, more radically, even strike down unconstitutional customs. The study observed a certain (unsurprising) correlation between the cultural background of the individual judge and the customs that they were prepared to uphold or strike down. Some magistrates did not believe in the norms they were enforcing. Although judges all over the world occasionally face this situation, the context is different where a judge is the sole upholder of a system of values that the community sees as alien.

397 The inter-American and African human rights systems as well as the increasing human rights role of regional judicial organs (under the Regional Economic Commissions) are relevant.

398 Schärf et al., 2002.

Insufficient knowledge of the constitution, the lack of a reliable system for distributing knowledge of important precedents in the country, and the difficulty of ensuring uniformity in interpretation, make it more likely that judges' rulings will be highly inconsistent if a very 'progressive' approach is adopted where judges are used to spearheading social change. The entire onus of change cannot realistically be placed on judges at the most local level of the court system.

One study in Malawi examined the willingness of the judiciary in asserting social rights on the basis of what is, comparatively speaking, a progressive set of constitutional guarantees.<sup>399</sup> The authors identify various factors, including the nature of the legal system and legal culture, the composition and social background of the judges, the degree to which they are sensitized to human rights concerns, and public discourses on social rights. Another environmental factor – the dynamism of the political system and particularly of the legislative process – is also important.

Too often, the gap between constitutional guarantees of individual freedom or human rights conventions and outdated legislation (or custom untouched by the hand of legislation) is both wide and deep. Where constitutional guarantees are not elaborated into more detailed legislative provisions as part of a democratic process involving widespread debate, political leadership and responsibility, it seems obvious that it may be untenable to make judges the vanguard of rather radical social change on the basis of rather vague and general constitutional or treaty provisions. Judges may be unwilling to play this role or, if they do, they may face severe political or social reactions.

Strategic litigation may be most likely to succeed where society is accustomed to the leadership of all three branches of government on social questions more generally, and depends on the extent to which society is disposed toward these governmental organs. While the specific relationship between legislation and constitutional adjudication is unique to each country, people may see judicial intervention as being a less radical step where there is greater consciousness of the rule of law and an active legislative process that tackles contentious societal issues through law. In the Ugandan, Malawian and Nigerian examples, judicial intervention was sought when it had not been possible to pass legislation that reformers desired. The Ugandan legislature is considerably more active in producing new law than the Malawian or Nigerian legislatures, as any perusal of the amount of legislation passed in these countries over the last decade will show.

The Bangladesh country study provides a different example, where NGOs took legal action in the High Court against government agencies to compel them to protect people against the imposition of extra-legal penalties. The High Court ordered the government to take immediate measures of investigation, punishment and protection.

## RESEARCH ON THE BASIS AND OPERATION OF INFORMAL JUSTICE SYSTEMS

Better research on IJS can serve many purposes, including those related to law reform and debates on policy and programming. Interventions in this area can include support for research by academics in developing countries and for bodies such as law reform commissions and think tanks, as well as human rights and equality bodies. Academic research in developing countries on informal justice gives important support to the broad policy and law reform debate. While individual researchers do much valuable work in many countries, this study formed the general impression that more systematic research programmes in traditional or informal justice, security and governance, as well as in primary justice more generally, remain all too rare. Despite the importance of these systems for the populations of developing countries, they are rarely strongly represented in the research and teaching activities of universities. The work of the University of Cape Town in South Africa, the University of Namibia, or Makerere University in Uganda (especially HURIPEC), or of law reform commissions, such as in Malawi and Zambia, are good examples of what can be done in this field. The Papua New Guinea country study mentions a research project carried out by the Village Courts Secretariat in cooperation with the Manus Provincial Government that

<sup>399</sup> Gloppen, S., and Kanyongolo, F. E., 2007, 5 (2): 258-293.

aims to document customs that promote gender equality and women's participation. The Malawi Human Rights Commission's work on cultural practices is one of the few studies of this nature and quality by an NHRI.

Research and reporting at the national level can inform the UN treaty body system and special mechanisms. The research can be used as information provided in stakeholder reports to treaty bodies, such as reports by NHRIs in the Universal Periodic Review, or NGO stakeholders. The research can also be used by governments in their national reports to the UN treaty body.

## **SUBSTANTIVE CONTENT: EFFORTS TO ADJUST OR CLARIFY THE CONTENT OF INFORMAL LAW**

Law reform or other programming can also attempt to intervene directly in the rules, customs or law that IJS apply. This can happen in various ways, from the attempts at 'codification' of custom that took place in the colonial (and sometimes immediate post-colonial) era to efforts at clarification or recording and also laws that require IJS to apply statutory rather than customary law in some domains.

### **CODIFICATION THROUGH LEGISLATION**

Efforts at codification in the colonial era were characterised by top-down processes or interference. Codification in this sense entailed formalising customary laws in legislation and not processes of ascertainment discussed below where decisions and standards are documented. One of the well-known examples of codification of customary law is the Codification of Zulu law in what was then the separate colony of Natal in 19<sup>th</sup> century South Africa. While this codification has perhaps been relatively successful in that it has survived, it was closely linked to issues of politics and identity and confused many indigenous forms and doctrines with those that the colonial government brought. There were numerous efforts toward codification in the immediate post-colonial period, including in Tanzania and Ethiopia. Governments were quite explicit in their aims of not merely codifying or restating custom, but in modifying it to suit their values and purposes. This interference often contributed to non-acceptance of the new codes. There are few or no recent examples of successful codification of customary law, especially across ethnic or tribal groups. As one scholar has pointed out, customary law does not become 'more' law through mere codification.<sup>400</sup> Thus, the Government of Zambia, which had initially intended to produce such a codification in response to the challenges of the country's dual legal system,<sup>401</sup> has reportedly abandoned the idea following a report by the country's Law Reform Commission, settling for the option to plan legislation governing customary marriages.<sup>402</sup> In relation to religious law, the South African Law Reform Commission likewise rejected the option of codification. Choosing one school of Islamic law over another would inevitably have provoked controversies between adherents of different schools.<sup>403</sup> It thus seems correct to say that legislation aiming at codification across the board has lost its appeal as a policy option in most contexts.

### **EFFORTS AT ASCERTAINMENT OF CUSTOMARY LAW**

Attempts by academics and administrators to define or clarify customary law through the recording of decisions and precedents and academic enquiry have been a feature of the formal legal systems' attempts to deal with customary law in various countries. The 'restatement' approach of Allott and the School of Oriental and African Studies led the way in this regard for a long time. This approach will generally be most relevant for the more 'locally owned' forms of IJS, where norms and structural and procedural standards are not set by legislation. As with codification efforts, these processes took place on a relatively large scale in some countries in Africa during and immediately following the colonial era, with varying degrees of fidelity to custom as actually practiced. Studies of this kind,

400 Hinz, M. O., 2009.

401 See *State Report to the Human Rights Committee*, 25 April 2006: CCPR/C/ZMB/3, 25 April 2006, paragraph 66.

402 CCPR/C/ZMB/CO/3/Add.1, supplemented by discussion with a representative of the Law Reform Commission. Also in Namibia, an initial intention to attempt codification was dropped; see Hinz, 2007.

403 SALRC 'Working Paper 103', 2001.

often referred to as ‘restatement’ processes,<sup>404</sup> continue to be carried out and advocated for. The Niger country study refers to a very recent effort carried out by academic experts. In processes of this kind, it is important to consider who is doing the asking and answering and by whom and for what purpose the restated ‘custom’ will be used.

In his book on customary law in South Africa,<sup>405</sup> T. W. Bennett cites research by other scholars showing that the normative outputs of processes like these are far from neutral, but rather depend on whether questions are put only to chiefs and headmen or to members of the communities themselves. This and other research shows that, far from being the subject of full consensus in a (mythical) harmonious society, custom may be highly contested, and that case outcomes are the result of a process of negotiation, as the country studies in this study confirm. Scholarship on other parts of the world, including Latin America, seems to fully support this observation.<sup>406</sup> Restatement processes that are blind to the power inherent in writing something down risk committing errors of various kinds, including cementing unequal relationships that may have more to do with political and economic power than with custom.

A further issue in ‘restatement’ processes concerns their intended purpose. If the resulting, clarified norms are for application by the same community-based structures that apply them and if there is real community input in drawing them up, there may be less risk of distortion. If they are intended for re-application by other bodies, such as state customary or local courts, there is a danger that restatement of only the substantive norms, divorced from the procedurally flexible and open community context in which they have developed, will result in unsatisfactory and unduly formalistic outcomes, and the dynamism and flexibility of custom will be lost. Thus, it is important to recall that customary law often relies less on fixed norms than on the negotiation of a durable, and hopefully fair, solution.

More recent efforts at ascertainment of customary law have used the method of self-statement,<sup>407</sup> whereby traditional communities produce their own version of customary law in writing. When analysing such efforts or intentions, it is important to go beyond the name given to them, as aims to change or influence the norms may be hiding behind a neutral-sounding word. In Namibia, the process of self-statement apparently contains no element of outside parties inserting their views of what the law ought to be. It involves a process within the community itself, where the end result is a product created in the community and binding upon it. The community may later employ a similar (or different) process to change the law afterwards.

The model used in Namibia<sup>408</sup> consists of a ten-step process:

1. Identify the target community or communities
2. Do legal background research with respect to the community or communities
3. Draft policy on ascertainment of customary law
4. Develop a comprehensive enquiry guide
5. Agree with the community on the ascertainment process and structure
6. Recruit and train ascertainment assistants

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404 Kane, J. Oloka-Onyango, Makerere University and Abdul Tejan-Cole, Sierra Leone.

405 Bennett, T. W., 2004. The reference (footnote 152) is to Roberts, Botswana Notes & Records, Vol. 3, pp. 12-14, 1971. See also ‘Customary Law and Zones of Chiefly Sovereignty: The Impact of Government Policy on Whose Voices Prevail in the Making and Changing of Customary Law’ in Land, Power and Custom: Controversies Generated by South Africa’s Communal Land Rights Act, Claassens, A. and Cousins, B., 2008.

406 See Van Cott, D.L., 2000, op. cit. citing several sources, including Sieder, *Customary Law and Democratic Transition in Guatemala*, pp. 17 & 19.

407 This description owes a debt to the above paper by Professor Hinz and his references to the restatement project of the School of Oriental and African Studies (SOAS) of the University of London under Anthony Allott.

408 Ibid.

7. Conduct/supervise the ascertainment project
8. Conduct complementary research in identified community or communities
9. Promote the compilation of the ascertainment texts
10. Prepare publications in at least, two languages, the vernacular language and English

While such a process might not be immune to the power of local elites to control outcomes and processes, it can potentially contain important participatory mechanisms capable of further empowering community members. Depending on the cultural and social context, this can obviously involve interference with local power relations and hierarchies. There is thus a certain formalization of the local 'legislative' process and outcome inherent in this method. This study does not have information about how often the use of this process leads to institutionalization of this way of 'legislating' at the community level or about the compliance with the 'restated' standards. The method has the virtue of firmly anchoring ownership in the community, though. It does not attempt to challenge the power structures in the community and does not attempt to inject higher norms. Pitfalls of this process, though, may include the practical difficulties of securing the participation of women and traditionally excluded groups and of scaling such an exercise up to cover large areas.<sup>409</sup>

The country study on Uganda notes a slightly contrasting approach in Acholiland. There, a working group consisting of elders from the community, but also including district political representatives and civil society groups, developed a draft set of 'Principles and Practices of Customary Tenure in Acholiland'. The Acholi governmental structure then approved a version of these. Some groups contested the principles and they were not being actually applied.

It was not clear whether the failure to secure full acceptance in the Acholi example was due to an overly prescriptive approach on the part of elders or outsiders or whether it is more due to internal disagreements in a post-conflict setting marked by long-term displacement and recent return, especially given the limited scope of the country study that was possible. Nevertheless, it seems that prescriptive approaches will run the risk of lack of acceptance. In some cases, it might be possible to convince the community that the 'new' or modified principles are worthwhile, though this attempt will obviously require a sensitive and inclusive process of engagement with the community. The Ugandan organization LEMU appears to have enjoyed success in this regard, building on its research efforts and in-depth engagement with this question.

## RECOMMENDATIONS ON PROCESSES TO CLARIFY NORMS AND STANDARDS

For the reasons of democratic principles and the human rights-based principle of participation, processes to ascertain custom should use methods that engage communities as a whole. Where community-based structures are to apply the resulting norms and standards, the self-statement method is a good starting point.<sup>410</sup> Documentation of principles and standards should include documentation of the process whereby norms can be changed and of the process for adjudicating disputes, and not be limited simply to substantive norms. The ascertainment process should be open to facilitating eventual debates about whether more open, participatory and accountable processes should be adopted. Where the purpose of the exercise is to assist 'parajudicial'-type courts (i.e., local or similar courts) in ascertaining and applying custom, the human rights-based approach would still require consultation not only with tribal elders and local chiefs, but all members of the community, or at least a representative sample of them.

This recommendation does not exclude less ambitious attempts to either ascertain the law or to exert some influence on it through more everyday engagement with adjudicators. IJS providers can be included or represented in

<sup>409</sup> See *Local Justice in Southern Sudan*, USIP, 2010, for a discussion.

<sup>410</sup> This study, though, was not able to evaluate the process. A study on comparative programming work would be a useful follow-up.



justice sector coordination groups, particularly at the local level, or providers can receive written material, advice and information; it is also possible to bring groups of providers together to exchange views and precedents in formal or informal settings.

The example from Acholiland, involving the mobilization of the Acholi governmental structure, highlights another potential avenue for programming. In many countries, there are national organizations or a state organ where traditional leaders are represented. These structures could play constructive roles in setting standards for structure, substantive norms and procedure relating to IJS. This could be in the form of voluntary codes or charters or through advising and debating the legislature. Encouraging the elaboration and adoption of an easily understandable and widely owned informal but quasi-'constitutional' text for IJS, with fundamental substantive and procedural standards, to which IJS could declare their adherence, could be an initiative capable of reaching many actors. Naturally, any such text should not contradict international standards.

### SELECTION AND MANDATE OF ADJUDICATORS

All research and study confirms that measures to encourage gender equality in the selection of adjudicators are crucially important and strongly influence women's preferences and access to justice. The Papua New Guinea country study shows that such measures can have a relatively quick impact and communities and users are inclined to welcome them. The Niger country study refers to the existence, but effective non-use, of disciplinary procedures, as well as the prospects for the nomination of women as customary assessors. Despite the conservative traditions of the country, NGOs have succeeded in making women focal points acceptable at the village level. Chapter VII on women's rights and IJS describes how the Zambian Judicial Service Commission has made the selection processes more transparent and gender-sensitive, so that vacancies are publicized and candidacies publicly canvassed. The Bangladesh country study, looking at the *Shalish* courts, illustrates how the work of NGOs has enhanced the role and status of women in these village courts over the years. The Uganda country study describes the election procedures for adjudicators with gender quotas that exist there. From its beginning, the NGO-sponsored village mediation programme, as documented in the Malawi country study, has achieved practically equal gender representation among mediators – apparently without alienating village headmen or male litigants and parties.

These examples, among many others, demonstrate that work to increase transparency and equality in the selection of adjudicators can be a productive area for programming in relation to IJS. They show that approaches will necessarily differ according to the types of IJS concerned. A first step can be to ensure that the body responsible for making or processing nominations itself contain an adequate representation of women. A state body such as a judicial service commission that plays a role in the selection of IJS adjudicators for parajudicial mechanisms may be free to rewrite qualification rules and modernize selection procedures, making them more transparent and gender-equal. Similarly, it may be able to improve the enforcement of rules on disqualification and discipline (including removal) of adjudicators. A judicial body such as this may also be more amenable to legal arguments such as those based on international human rights law as a reason to enforce change.

Village or community mediation schemes that are initiated by NGOs, such as the Village Mediation Project in Malawi, may be able to significantly influence the qualifications and profiles of community mediators, including with respect to gender balance. In the Malawian example, gender-balanced selection occurred in consultation with village headmen and chiefs.

Qualification requirements could include educational ones mandating general education and the completion of specific courses and requirements pertinent to the position of adjudicator. Specialized courses could typically include elements and examinations on issues of national law, judicial organization and ethics as well as human rights standards. Depending on resources, there could be training in a range of skills and competencies, from record keeping, court and case management to mediation and conflict resolution skills. Language skills may also be necessary.

Where local elders choose traditional leaders and adjudicators, it is not possible for outsiders to determine selection rules and procedures. Nevertheless, these bodies generally do need to be legitimate in the eyes of the communities they serve. Village headmen may also be upwardly accountable to a chief or a hierarchy of chiefs. The Malawi country study points out that women often play a key role in choosing traditional leaders. Programmatic interventions could attempt to develop, influence or clarify the criteria that women use in choosing a leader. It may be possible to build on these structures to enhance accountability through voluntary codes. This will be possible only on the basis of relationships of trust with the communities or hierarchies concerned. Some NGOs that work with the provision of legal services or rural development enjoy good relationships with these structures.<sup>411</sup> These relationships could provide a basis on which to construct or expand accountability mechanisms, whether upward, downward or horizontal (i.e., to a community of peers among providers). The country studies note no explicit examples of attempts to build on accountability mechanisms in this way, and more work is necessary to investigate such possibilities.

In some cases, government authorities ultimately appoint or approve traditional leaders, providing state leverage. In South Africa, legislation<sup>412</sup> demands that 40 percent of the membership of traditional councils must be democratically elected and 33.3 percent be female. Unfortunately, threats to the security of female chiefs in South Africa<sup>413</sup> may require additional protective measures for them. In Niger and Malawi, the government has varying degrees of influence in the process. Prescriptive approaches that leverage this power to achieve change are possible in principle; these might comprise steps such as linking appointment as a traditional leader to declarations of commitment to codes of conduct, including the elimination of harmful practices. Depending on the resources available – and undoubtedly on politics – there could be an examination of the process of installation or induction as a chief to see how that process could include obligations and/or the raising of awareness about the chief's responsibility to uphold national law and the constitution.

This study does not provide examples of programmatic attempts to influence the selection, professional discipline or the qualifications of religious IJS adjudicators. Depending on the context and the extent of the involvement of religious organizations with adjudication of disputes, it might be possible to work with these organizations on these issues. While the Catholic Commission for Justice and Peace (CCJP) in Malawi has perhaps the largest project working with informal justice in the country, the targeted IJS providers are not religious officials, but traditional leaders, and this Church-affiliated organization does not exert authority over their selection. The Niger country study documents how leaders of the two Islamic organizations that were interviewed for this study agreed that insufficient knowledge of Islamic law, also among *imams* and *cadis*, could be a problem, but the selection of *imams* is a local matter in which they have neither the authority nor the resources to intervene. It would seem that, given the right context and partnership relationship, there could be room for religious structures to improve the qualifications of persons engaged in dispute resolution and affiliated with it. Nevertheless, this would take place within a framework where the organization and religious doctrine set the terms.

## EDUCATION OF PROVIDERS

While the intervention above is concerned with selection and entrance qualifications, education interventions can also target current, practicing adjudicators. The content of training can encompass a range of subjects, from guidance on the law in relevant domains, to techniques of documentation, dispute resolution, legal procedure, professional ethics, human rights and judicial organization. Training could be specific to build the awareness and capacity of adjudicators in relation to children's and women's rights. Training could also be provided to

411 Some examples are the Madaripur Legal Aid Association in Bangladesh, TIMAP for Justice in Sierra Leone, Women for Change in Zambia, and the CCJP in Malawi.

412 Traditional Governance and Leadership Framework Act, 2003, p. 3.

413 See reference in the section on traditional or customary IJS in Chapter IV on typology.

other participants in the proceedings, such as those who represent and assist children, fulfilling the right to be heard. Some differentiation in approach according to the types of IJS, as well as adjustments to specific contexts will be necessary.

It would be somewhat easier to plan for the education and training of parajudicial adjudicators who are recruited, regulated and paid in state structures and whose jurisdiction, functions and powers are uniform and regulated. Sets of rules, practice guides and manuals already exist for adjudicators in many of the parajudicial systems encountered, and education and training can be matched to these functional tools. UNDP's project Support to Local Council Courts in the Conflict-Affected Districts of Uganda included (in addition to the building of courthouses) training for local court justices. It is also possible to include IJS adjudicators in joint training with other primary justice providers, such as paralegals. Joint training of this kind can foster cooperation and productive relationships between these two groups of primary justice actors.

Experience from several contexts tends to show that adjudicators at the higher levels of traditional systems – such as in chiefs' courts – often have more education than those in state-run local or customary courts. Traditional leaders are often well aware of the need to 'keep up', nominating well-educated members of the community as adjudicators. It is also notable that, where women have become traditional leaders, they have often been chosen because they are among the most successful and well-educated members of their communities. Education of women as mediators in Bangladesh had a 'knock-on' effect whereby women began to demand representation on traditional *Shalish* panels. The country studies confirm that traditional adjudicators are often eager to attend educational courses. When asked to describe their needs, adjudicators in all countries that were visited for this study prominently cited their wish for education and training. The Niger country study encountered training in documentation of case outcomes and the powers and jurisdiction of headmen and chiefs. That study observes that only a relatively small number of traditional leaders were literate. The Malawi country study looks more closely at the training that the CCJP, whose project intervention appears<sup>414</sup> to have succeeded in forging good working relationships at the village level in numerous areas across the country, provides to traditional leaders.

This study's evaluation of these efforts found that human rights training, which is often at the centre of educational efforts, needs to be contextualized to fit the circumstances and mandate of a given adjudication of disputes. Materials need to fit the needs of clearly identified target group profiles. Tendencies to focus overly on abstract and distant principles of constitutional and international law should be avoided, and instead attention should be paid to rights aspects in the kinds of cases that adjudicators are likely to encounter. Here again, programming can benefit from baseline studies that illustrate these issues.

## ADDRESSING CULTURAL PRACTICES

Special consideration must be taken of efforts that have the goal of engaging with cultural practices. A wide variety of cultural practices are potentially problematic with respect to human rights (bride price and child marriage, for example). It is not easy to isolate IJS or the adjudication function of chiefs, for example, as the primary locus where such customs are upheld. Previous studies of IJS have made this point.<sup>415</sup> The customs are woven into the fabric of cultural, social and economic life, surfacing in a variety of ways.

An attempt to modify cultural practices that are deeply culturally embedded may have significance not just for justice, but also for education and health. In some instances, they may be better tackled through interventions that adopt a multifaceted approach. Relationships with local communities or traditional leaders that are working in health or education may present the best opportunity for addressing harmful practices and for benefiting informal justice. The Malawi country study refers to the Malawi Human Rights Commission's (MHRC) 2006 report on cultural

<sup>414</sup> It was not possible to obtain an evaluation report of the project itself.

<sup>415</sup> See, for example, PRI 2000, p. 3.

practices,<sup>416</sup> which makes some useful recommendations on programming that addresses such practices, which is paraphrased in the following paragraphs. While they extend far beyond the field of justice, they may nevertheless be relevant to it.

Changing harmful traditional practices is a complex process that must involve all stakeholders, including traditional leaders, community members, religious groups that may be reluctant to speak out about the practice, and the government. Promotion of awareness of rights and the harnessing of traditional and religious leaders are necessary in the effort to spread knowledge of rights. In interacting with traditional or religious leaders, respecting positive or 'neutral' traditional practices and endorsing culture and diversity is important to demonstrating good faith.

Understanding the power balance is also key; women may be especially vulnerable because of their lower social and economic status. Outreach programmes on gender equality targeting all sectors of society need to create public awareness through information. Practices that directly or indirectly confer higher status on boys and men than on women and girls should be modified so that males and females enjoy equal status. Women, as one category of the main victims, must be given the opportunity to participate in the process of modifying the negative practices.

It is important to understand the cultural underpinnings of a given practice. People are naturally hesitant to sacrifice what is important to them, even if they understand that it is harmful. Offering substitute activities or a modified version of a practice is constructive since the abolition or modification of the practice could leave a vacuum.

People who perform harmful practices are often doing what they think is best for the children. The 'unwritten curricula' (used by Malawian *anankungwi*) during initiation should be reviewed by regularly engaging them in dialogue or interactive discussions. Information that is passed on to the initiates must be appropriate for them and must centre not on sexual performance but on good behaviour. Therefore, the *anankungwi* should undergo training on sex and sexuality and how information about this subject can be best passed on to the initiates. Regular interactive discussion between them and everyone interested in promoting the rights of children would help.

The Ministry of Health should take a leading role in promoting healthy cultural practices by giving all participants advice about cultural practices such as circumcision and discouraging unhygienic practices.

The education of women is vital to the realization of their rights. Unless girls' education is promoted so that girls can realize their full potential, the status of women in Malawi will remain low and women's rights are likely to continue to be violated.

Many harmful practices have legal and/or administrative implications. The MHRC recommends that the Law Commission thoroughly study the practices discussed in their study with a view to initiating a process of law reform pertaining to culture.

## **EDUCATION OF USERS: LEGAL AWARENESS RAISING**

The raising of legal awareness and public information outreach efforts targeting the general population can usefully be developed in conjunction with the training of adjudicators. Strengthening legal awareness extends knowledge of rights, provides an important foundation for the community to demand the protection of those rights, and offers remedies where those rights have been violated. A lack of awareness and understanding of their rights often disproportionately affects the most disadvantaged groups in society, including women, the poor, and geographically isolated communities. Community empowerment through the heightening of legal awareness is vital to encouraging IJS to be responsive to the community and mitigates any risk that IJS could be captured by an elite.

<sup>416</sup> 'Cultural Practices and their Impact on the Enjoyment of Human Rights, Particularly the Rights of Women and Children in Malawi'. See reference in the country study.

Many programming initiatives include a legal awareness component, often focusing on educating the community on human rights and providing information about the institutions, mechanisms and procedures available to the community. Partnership with government or local authorities through the development of communication strategies to promote legal awareness is a useful entry point. NGOs also have considerable experience in undertaking initiatives to raise legal awareness. Such strategies would respond to the needs of disadvantaged groups by, for example, adopting user-friendly formats in local languages and informing those who face substantial physical, cultural or economic barriers to access. The efforts of different development partners can usefully complement each other, even outside the context of a sector programme. Thus, the USAID-financed Spring Uganda programme, aimed at promoting peace, stability and reconciliation in northern Uganda, has produced accessible information brochures on the role and functions of the local courts while the UNDP project, Support to Local Council Courts in the Conflict-Affected Districts of Uganda, has financed the provision of simple-language guides on key pieces of legislation.

In some contexts, the use of media, radio and television campaigns are useful. Among the other means of educating people are street theatre, information kits or flyers on how to initiate legal action or bring a dispute to IJS. Legal information kiosks or mobile legal clinics also travel particularly to remote areas to conduct community education initiatives on legal rights. Trusted and familiar social networks, such as teachers, religious leaders, community groups or others with non-legal specialty skills, can substantially contribute to public awareness of the law and legal rights. In summary, a legally aware community translates into increased demand and higher expectation that IJS will deliver justice and be more accountable.

### **PROCEDURAL REGULATION AND SELF-REGULATION: DEVELOPMENT AND PROVISION OF PRACTICE MANUALS AND GUIDELINES**

Practice manuals for IJS providers exist in some IJS, particularly common among parajudicial IJS, although they are often out of date and not always available to all adjudicators. Parajudicial IJS tend to have more procedural regulation than other IJS and are generally obliged to follow a defined set of procedural, jurisdictional and substantive rules. Thus, the production of such a guide was a development partner-financed activity for LC courts in Uganda. It may be worthwhile for programming to improve, update and distribute such functional tools. These guides can be extremely useful, but literacy levels and language proficiency need to be taken into account. As with all such materials, a participatory approach, as well as pre-testing of draft materials and curricula, give results.

NGO-sponsored mediation schemes may also involve the provision of manuals and schematic guidelines, although they are less likely to be used in custom and religion-based IJS. Any initiative to promote this kind of tool with custom or religion-based IJS will obviously require a participatory approach involving credible representatives of the providers themselves. Regional, ethnic and other differences also need to be taken into account. With sufficient time and engagement in education at the community level, procedures and good practices in dispute resolution can be transmitted even without literacy or written guides, as illustrated by the work of the Madaripur Legal Aid Association with *Shalish* courts that is described in the Bangladesh country study.

As noted above, many countries have national organizations or a state organ where traditional leaders are represented. These structures could play constructive roles in setting standards, procedures, voluntary codes and charters of IJS. Programming could assist these organizations to elaborate and adopt such texts to which IJS providers could declare their adherence. The participatory approaches adopted to detail such a text could ensure its support and the national organization could also ensure broad societal reach for these kinds of codes and regulations.

## ACCOUNTABILITY MECHANISMS: TRANSPARENCY, MONITORING AND OVERSIGHT

### RECORDING OF CASE OUTCOMES

Requiring or promoting the recording of case outcomes promotes legal certainty and transparency and can enhance oversight. The Niger case study mentions one recent project that attempts to improve documentation of case outcomes (which in theory is obligatory, but in practice is neglected) through training and the development of a standard form. Literacy in French, the language in which outcomes are supposed to be recorded, poses a serious challenge, though. The primary purpose of documenting outcomes will generally be to give the disputing parties greater legal certainty about the outcome and to strengthen enforcement mechanisms. While documenting outcomes may have this effect in some contexts, in others it may not. For example, anecdotal evidence indicates there are cases in which providers as well as the parties are illiterate and in which literate court clerks, possibly corrupt or biased, record a settlement that is different from what was agreed or adjudicated by the IJS. A further consideration in this regard is that legal certainty is a value of formal systems. Informal systems will typically be more concerned with flexibility and the circumstances of the individual case. The intervention could in some circumstances therefore contribute to distorting the nature of the IJS, although this is not inevitable.

### SYSTEMS OF REFERRAL, APPEAL AND ENFORCEMENT

Besides giving the parties a record of the outcome, recording can also facilitate registration or approval of the settlement by other instances (including a formal court) or appeal. Coupled with avenues of appeal and the availability of legal services, recording can be effective. The outcomes of most parajudicial mechanisms are generally subject to appeal to the ordinary courts, although, cases sometimes have to recommence *ab initio*. In other contexts, decisions of IJS are subject to a magistrate's confirmation before they can become executory.

Interviewees in some country studies agreed that the recording of outcomes was useful in disputes concerning the delineation of real property, as it can prevent cases from being reopened such as when a new chief is appointed. Recording is generally useful if the parties obtain copies, combined with a record that is kept safely by the adjudicator that can be referred to later. Here as elsewhere in justice, though, the various links in the chain have to be effective and coordinated with one another. Without an accessible enforcement system that acknowledges the binding nature of the written decision or agreement, a written document is of limited value.

### SYSTEMS OF INSPECTION, MONITORING AND SUPPORT

Recording can also facilitate monitoring by outside parties, whether these are members of the public, organizations representing stakeholders, hierarchically superior adjudicators or official inspectors. The country studies observe that state-linked parajudicial IJS and NGO-sponsored mediation schemes are the IJS mostly likely to have established mechanisms of inspection or monitoring. Tradition or religion-based systems, on the other hand, often have hierarchies of authority through which cases can be appealed. Systems that are subject to a defined set of rules and procedures and are directly subject to state authorities can naturally be more readily inspected than ones that are anchored in community structures and operate according to tradition.

Parajudicial systems generally have a supervision framework and regulations providing for official inspection, but, in practice, few such systems operate effectively. In Sierra Leone, the Ministry of Justice and Ministry of Internal Affairs are responsible for monitoring the local courts; customary law officers are under the Ministry of Justice, whereas some other aspects of the functioning of these courts are the responsibility of the Ministry of Internal Affairs.<sup>417</sup> In Zambia, district and provincial local court officers belong to the judiciary. In both countries, local court officers have far-reaching powers over local courts, including the power to inspect all records, attend hearings, and

<sup>417</sup> World Bank, Kane, 2005, *op. cit.* and Local Courts Record Analysis Survey in Sierra Leone, World Bank, [http://siteresources.worldbank.org/INTJUSFORPOOR/Resources/SL\\_LOCAL\\_COURTS\\_RECORD\\_ANALYSIS\\_SURVEY.rtf](http://siteresources.worldbank.org/INTJUSFORPOOR/Resources/SL_LOCAL_COURTS_RECORD_ANALYSIS_SURVEY.rtf)

even to overturn decisions (provided that the decision has not been appealed). In Uganda, the local council courts are subject to general supervision by the chief magistrate. In most of these cases, though, supervision is reportedly ineffective because the supervisory organs have insufficient resources.<sup>418</sup> Justice agencies may question whether the establishment of elaborate (and expensive) monitoring frameworks for informal systems, instead of improving formal ones, is the best way to use resources. As seen in Uganda and Sierra Leone, supervision of these systems in some countries is also difficult because overlapping supervision mandates and the occasional use of a variety of uncoordinated monitoring frameworks create confusion. Supervision by executive agencies also raises issues concerning the independence of the judiciary. Monitoring should heed the respective obligations and requirements for support that IJS and (other) organs of the state possess. It should thus allow providers to voice their concerns. A monitoring system that is purely top-down and that the IJS providers see as an instrument that only criticizes them is unlikely to be successful.

When it comes to traditional mechanisms, outside monitoring may be an unwelcome intrusion. Providers and even communities may strongly resist it unless it is developed in careful dialogue with providers and users. Providers questioned for this study were often hostile to the idea of monitoring by persons unfamiliar with the local conditions and culture. The question is rather one of presence and trust. The examples from Bangladesh and Malawi, where NGOs gained access to traditional mechanisms by providing support and obtaining the trust of the leaders and communities, probably illustrate a more viable approach.

While there is little doubt that improved monitoring could be a helpful measure, some caution is necessary before seeing this as the best solution, for several reasons. Persons staffing the monitoring mechanisms may come from urban areas and be unfamiliar with the needs and conditions in rural and impoverished areas where IJS are strongest. Monitoring that does not make correct legal protection more available is of doubtful value. The utility of using resources to develop large-scale monitoring systems according to capacities, costs and benefits must be measured. Monitoring requires record keeping (and thus literacy) among providers, a clear structure that takes account of and documents a set of standards (structural, normative and procedural) against which IJS are to be assessed. IJS providers may be working for no or very little compensation, and the imposition of additional work burdens may be unwelcome or unrealistic. Both adjudicators and monitors may need to be trained in the reporting and monitoring methodology. These interventions can be costly and must be weighed against the benefits of using similar resources for other institutions.

## PUBLICITY OF HEARINGS AND PROCESSES

Requirements of public hearings in some cases and open admission to the court or adjudication forum, including for the general public and observers from civil society organizations and the media, can be useful transparency measures. Where literacy is low, publicity surrounding hearings, processes and outcomes might be more successful than written records of hearings and decisions. The model of the *Shalish* courts in Bangladesh comes to mind, where the highly public nature of the forum and the case outcome promote enforcement – recording takes place in the minds of the members of the community, rather than on paper, and the collective conscience of the community is committed to enforcement. In other contexts however, chiefs will be more authoritative than communities, and this method of the *Shalish* courts may not be applicable.

Importantly, public hearings are not appropriate for all types of cases and in all contexts. Confidentiality is central to the successful resolution of some disputes. For women in some communities, public hearings could prevent them from bringing a case forward. Further, sensitivities of having children as victims and witnesses in a case could dictate against public hearings.

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<sup>418</sup> Sierra Leone: Record analysis survey, above. In Uganda, interviewees mentioned this during the country study. In Zambia, some interviewees reported this.

## LINKAGES AMONG PRIMARY JUSTICE PROVIDERS

This study has emphasized that IJS should not be seen as operating in isolation from other avenues of primary justice. Programming should look at all actors, preferences and patterns at the local level. Jurisdictional limits, *de facto* divisions of workload, and patterns of interaction may promote useful synergies across different forms of IJS, law enforcement, administrative and political structures, statutory courts and legal service providers. The baseline studies recommended at the beginning of this chapter are likely to reveal the official and unofficial links that are in operation and the effects of support measures, and jurisdictional limits.

These studies and links may provide opportunities for exchange of information, referrals and mutual support. The Papua New Guinea study describes one initiative designed to promote exchange and improve linkages among primary justice providers in places known as Community Justice Centres. At the time of this study, this was a pilot activity. Such initiatives seem to be extremely valuable in promoting mutual understanding of the different roles that different providers play and in providing a forum for learning and improvement. The Papua New Guinea study observes that people may continue to see traditional dispute resolution as necessary to ensure community harmony and reconciliation between families and clans, even when the formal system has handled a matter and has approached a problem as a civil or criminal offence involving the liability or guilt of a single individual.<sup>419</sup>

As the Papua New Guinea study emphasizes in relation to the Centres, most programmes are in or close to provincial capitals. There are good reasons that such programmes should begin close to political and institutional hubs: it is best to start a new programme where there is a reasonable likelihood that it will meet its goals and objectives. There are also economies of scale: it is easier to connect to and service programmes that are close to communication, infrastructure and transport links. Nevertheless, well-functioning programmes must over time be extended so that they are also available to people in outlying communities. Development partners should be willing to take risks to introduce community justice programmes into some districts where government services are failing and also where communal violence is an ongoing problem. Here, there should be an understanding already at the outset of the programme that it will be difficult to achieve results and that it will take longer to change harmful practices and lawlessness that have 'been imported' into the local community due to the breakdown of traditional cultural norms. Likewise, police presence and support may be a vital element in enabling IJS to change and to lead the way in tackling harmful social phenomena. Relationships between police and LCs in Uganda often seemed positive and mutually appreciated, providing a platform for further efforts in this direction. Also in Uganda, courts' use of advice from traditional leaders in land disputes is a positive development.

The Ecuador study identifies some mechanisms of outreach by the formal justice system to indigenous communities and the informal systems. The Malawi study illustrates some aspects of interaction between two kinds of IJS: tradition or custom-based mechanisms and the NGO-sponsored Village Mediation Project (VMP). In the areas where both are present, the work of the NGO to ensure smooth relationships with traditional leaders has been helpful in avoiding conflict. There apparently is an understanding about the division of the case burden in some cases, whereby traditional leaders retain land cases, leaving many family disputes to the mediators. Linkages to the police and the formal justice system are an inherent part of the VMP and Primary Justice Programmes there and include efforts to secure recognition by the courts underway in respect of the VMP. In conclusion, linkages are vital and deserve monitoring.

<sup>419</sup> Other studies have also revealed numerous valuable approaches to this initiative. See, for example, Hinz, M. O. and Mapaire, C., 2010, *op. cit.*



The Niger country study examines the use of customary assessors in state courts. While this mechanism is formalized in countries such as Niger, it is informally widespread in many countries, including Malawi.

The Bangladesh country study illustrates interesting secondary effects that the representation and participation of women have on different types of IJS. Women who are educated and empowered in relation to one mechanism – NGO-sponsored *Shalish* – feel emboldened to work for their rights in others. Likewise, the quota of elected female UP representatives has seemingly had knock-on effects in communities. The country study also notes how ‘healthy competition’ among IJS providers in some areas has led to improvements in the traditional *Shalish*.

## LINKAGES TO PARALEGALS AND LEGAL AID PROVIDERS

The fostering of closer relations between IJS and local legal aid providers, such as paralegals, has had some positive results. Not all IJS will allow legal aid providers to act as representatives in proceedings, but even where this is not possible, such providers can advise individuals involved in those proceedings. Paralegals can also assume observation roles where proceedings are public. Government and non-government actors can be involved in making provision for legal aid and paralegal service.<sup>420</sup> Strategies can include institutionalization of community services to draw on law graduates and retired professionals in legal clinics. Paralegals can offer particular services such as advice and assistance about whether a matter needs to be taken before a justice system or can be settled in another way. Paralegals and legal aid lawyers can also coordinate referrals to non-legal expertise; for example, some matters might require health care intervention or financial assistance.

Programming in linking IJS to legal aid and paralegal mechanisms would require particular efforts to ensure sustainability and cost-effectiveness. Legal aid schemes are usually expensive and governments often do not accord them priority. This is where university clinics and the participation of bar associations, paralegals and other public advocates can play a key role and also be a lobby to ensure the continued provision of resources. In Zambia, a GTZ training programme of local court justices, with the assistance of NGOs and community paralegals, helped break down barriers between the two groups. Consequently, it became possible for paralegals to enter into and observe proceedings in local courts and monitor how the justices and court personnel treated women. The success indicators measured the degree to which intimidating language was used against women and whether women were allowed to speak before the court without being accompanied by a male relative, as these were problems observable in the baseline data.

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<sup>420</sup> Carried out with the judiciary section responsible for local courts and two NGOs that provide legal services to rural women. From an unpublished paper entitled ‘Summary of Reports on Monitoring the Impact of Training Local Court Justices and Paralegals in the Southern and Eastern Provinces of Zambia’, under a GTZ-supported project ‘Improvement of the Legal Status of Women and Girls in Zambia’, by Tina Hofstaetter, GTZ, Lusaka, July 2006.

## Linkages to Wider Development Programming

It has been emphasized that phenomena that are visible in IJS, including discriminatory practices in relation to marital and family relations, property ownership and inheritance, or superstition-based practices and punishments, are expressions not simply of justice standards, but also of the structure of societies. The best ways to influence change in these areas may include broader development initiatives for education, livelihoods and public health. Reducing dependency on land as the only source of subsistence may provide new opportunities to women, and improving education can change social power balances in the community. Attention to the proper sequencing of development initiatives, as well as respect for the human rights-based approach principles of participation and empowerment of local communities and individuals, require that IJS not be treated in isolation from other aspects of life. The entry point for discussion of justice issues can be through vital health, education or livelihood issues, and justice in relation to these questions, rather than about IJS as an isolated arena. Similarly, dialogue and participation aims at building an understanding of the local context in which people are attempting to live and survive. This can provide the basis for targeting an overall programme to that context.

Broader development initiatives are also key to creating an environment where human rights can be respected and fulfilled. Consequently, it is important that IJS be included in child protection programmes that work to build protective environments for children. Similarly, national strategies and action plans to implement CRC or CEDAW should include a specific component on engaging with IJS for the implementation of these conventions.

IJS engagement therefore must be integrated as a component of broader development initiatives. This is an oft-ignored area of justice programming, but the efficacy of working with IJS requires that it be complemented by engagement with the formal justice system and with development programming that engages the broader social, cultural, political and economic context of IJS.

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## METHODOLOGY

PROCESS .....	193
LITERATURE REVIEW AND DESK STUDY .....	193
COUNTRY DESK STUDIES .....	194
COUNTRY STUDIES.....	195
THE QUALITATIVE PART OF THE COUNTRY STUDIES .....	195
THE QUANTITATIVE PART OF THE COUNTRY STUDIES .....	196
SELECTION OF GEOGRAPHICAL AREAS FOR COUNTRY STUDIES.....	197
LIMITATIONS .....	198

## PROCESS

This study was commissioned by UNDP, UNICEF and UNIFEM (now UN Women) and commenced in January 2009.

A comprehensive desk study and literature review was undertaken and complemented by country-specific case studies for a large number of countries. From February 2009 to January 2010, the qualitative and quantitative data collection was carried out in the six selected countries of Bangladesh, Ecuador, Malawi, Niger, Papua New Guinea and Uganda.

## LITERATURE REVIEW AND DESK STUDY

This study is the fruit of a multidisciplinary approach to the question of IJS. The research team included human rights lawyers, academic researchers and practitioners, a specialist in conflict management, an anthropologist, and project managers in the field of human rights. The work of the core team was supplemented by (i) input in the form of an issues paper from a recognized expert in the field of programming for legal empowerment and (ii) comments on an early version of the desk study by a senior academic expert in the field of customary law and informal justice.

There are, broadly speaking, three sets of literature that have a bearing on this subject. The first, and by far the most extensive, is the anthropological literature that seeks to understand the phenomenon of legal pluralism and customary law, primarily in developing countries. This literature frequently provides an insight into the operation of systems in their social, cultural and economic context while also promoting an awareness of the political and

historical factors that have created the current situation. Second, there is a growing body of literature on justice reform, growing out of the extensive work and efforts in this field over the past 15 to 20 years, but also reaching back to the 'Law and Development' movement of the 1960s. Much of this literature is technical and project-oriented, reflecting a prescriptive and teleological perspective. Only very recently has it begun to concern itself systematically with informal or non-state systems of justice. Finally, there is the body of human rights standards, analysis and literature that is concerned with IJS. This takes its outset in state obligations, and, with a prescriptive approach, has often diagnosed state failures.

Combining the insights of these bodies of literature and practice was the major challenge of the desk study. With such a large field of inquiry – in both geographical and thematic terms – the ambition of the study is rather general. The aim was thus to marry the anthropological and analytical literature to the international standards somewhat more systematically than what appears to have been done hitherto.

Given the relative lack of understanding and acknowledgement of the importance of the role of IJS, it is clear that a good deal of future programming work will have to focus on knowledge gathering. The study thus attempts to propose typologies, working categories and definitions, as well as analytical tools that can assist further analysis, particularly for the purpose of programming. The annexes on method at the end of the report are seen as a contribution in this regard.

## COUNTRY DESK STUDIES

Country desk studies were carried out on the countries identified by UNDP, UNICEF and UNIFEM (now UN Women) as relevant in the ToR, as well as on some countries identified by the study team as being particularly interesting. Thirty country-specific desk studies were commenced, but, despite the time and effort dedicated to this, it proved impossible to gather sufficient quality information from all of the selected countries to conclude all of them satisfactorily, mostly due to a lack of reliable and updated information. The information and documentation gathered for these studies was obtained through available literature from academia, UN agencies, NGOs, governments, websites and conferences. To the extent possible, they have been developed in consultation with national experts on the informal as well as the formal justice systems, including scholars and human rights experts.

The desk studies assess the nature and characteristics of IJS (composition, decision-making, procedural aspects), linkages among the different justice providers and particularly in relation to the formal justice system, legal frameworks, human rights aspects, efforts made to date in the area of programming by governments, national and international NGOs, and UN and other development partners, etc. The volume and quality of information available from each of the countries varies, as it was often found that adequate or sufficiently reliable information was not available from any accessible source, at least in any of the five working languages of the team. Moreover, legal reform processes taking place in many countries affected the possibility of accessing updated normative documentation. To some extent, a similar challenge was faced in obtaining programmatic documentation, often only available through consultation with national experts or programmers. The desk studies reflect the varying levels of details and types of information provided.

The desk studies were used by the team members at different stages and for different purposes in the report. Primarily, they contributed to an overview of the various aspects that characterize IJS. Conducting the country desk studies proved to be of great value when selecting the countries studied through field visits. A comparative grid containing relevant and specific information extracted from the desk studies was made. On the basis of this analysis, a pre-selection of countries of interest for conducting field studies was agreed upon. The latter was then used for the selection of the final six country studies.

## COUNTRY STUDIES

The country studies were carried out in six countries, selected in consultation with the three UN agencies. The countries studied are: Bangladesh, Ecuador, Malawi, Niger, Papua New Guinea and Uganda. The methodology was developed through a pilot case study in Malawi. Qualitative and quantitative aspects were studied in five of the six countries. In Uganda, it was decided to focus on the qualitative part in order to include three very different areas (Karamoja, Acholiland and the Central Region) of the country characterized by three distinct contexts as regards IJS. The fact that a number of in-depth research studies on transitional, traditional, informal and primary justice have been and are being undertaken in Uganda also made the limited quantitative analysis that would have been possible for this study less relevant. In addition to these country studies, the study benefited from substantial involvement of members of the research team in relevant research and programming work in Mozambique and Zambia. The country studies were carried out according to a uniform methodology, and identical or very similar categories of analysis are used in all of the country study reports. At the same time, the countries were also selected precisely because of the dissimilarity of the issues that they could highlight. Substantively, family and inheritance law issues, particularly as they concern women and children, and the role of religious norms and providers are particularly prominent in the Niger study. The Uganda study permits a greater exploration of land issues and issues affecting children, particularly defilement (statutory rape), and the right to a hearing. The Malawi study allows some exploration of matrilineal family and inheritance customs. Malawi also presents an example of a progressive constitutional framework that has been taken very seriously in far-reaching proposals for law reform. Bangladesh and Papua New Guinea present some innovative perspectives on programming, the former particularly by civil society, and the latter through the active engagement of UNICEF. The Ecuador study presents a perspective that is so far absent from many other contexts: the dimension of identity, so central to discussions on legal pluralism, and perspectives on balancing of individual and collective cultural rights.

The country studies were carried out in partnership with national partner organizations in the respective countries to ensure contextual knowledge, assistance in the planning of the qualitative part, and the implementation of the quantitative part of the study.

## THE QUALITATIVE PART OF THE COUNTRY STUDIES

Interviews were conducted with a range of relevant stakeholders at the local and national levels and were both individual and group-based. To enable comparison across countries, an interview guide was developed for each of the target categories listed below, with a set of relevant themes and questions. The interview guides were open to adjustments to the specific context, ensuring the terminology used was relevant and understandable. Where necessary, the national partner organization performed the role of interpreter in interviews with local users and informal justice providers. Information was gathered on respondents' knowledge of, attitudes toward, and opinions on primary justice provision, with a particular focus on informal justice and the position of women and children.

Interviews were carried out with the following respondents:

- Representatives of donor and international organizations (involved in primary justice also in formal justice sector)
- Representatives of NGOs/CBOs (headquarter, district and community levels)
- Informal justice providers
- Representatives of the police (general service and specialized, e.g., victim support unit)
- Justice sector actors (national and district levels)
- Community members/users

- Group interviews with mixed community members
- Group interview with only women
- Group interview with only children between 12 and 18 years old

Besides the separate groups of women and juveniles, group interviews aimed to cover a representative sample of different relevant categories of people living in the selected area. In practice, however, one of the biggest challenges when arranging user interviews was influence on the selection of the group. The task was given to the national partner organizations, but as they, too, had to go through contacts in the selected areas, the composition would often be decided by this contact point. In many cases, it was necessary to go through the local leader or IJS, who would then insist on sitting in on the interview, which had an impact on the interviews and discussions. The scope of the study did not permit stays of any real length in the areas where interviews were carried out that might have permitted an easing of such restrictions. This limitation, in particular, as compared to anthropological studies, is openly acknowledged and serves to underscore the importance of more detailed observation and consultation.

In addition to the interviews and the qualitative part of the study, existing data from secondary sources was collected by the national partner organization. The data included documentation on legal frameworks, programmes addressing primary justice, documentation on the types of justice providers available and statistical information, as well as documentation of cases heard or disputes resolved by informal justice providers (including case records), if available.

## THE QUANTITATIVE PART OF THE COUNTRY STUDIES

The quantitative part of the country studies included surveys for (a) users of informal justice and (b) informal justice providers. The surveys followed a generic questionnaire format to make it comparable with data from other countries. Where necessary, written translations of the questionnaires were made from English into French or Spanish and oral interpretation of them into other national languages. The surveys followed the qualitative part, and the national partner responsible for carrying out the survey was instructed by the DIHR researchers. It should be noted that it was not possible to carry out studies of specific cases and the preference was to gather more wide-ranging information.

Interviews were carried out with different categories of respondents, according to different criteria (including age, gender, etc.) as established under the methodology of the study. Only individual interviews were conducted during this part of the study.

Individual interviews aimed to assess user knowledge on IJS providers, preferences and the use of IJS, notions of justice, organization and legitimacy of IJS, users' knowledge of programmatic interventions, knowledge of the law and human rights. These interviews also looked at providers' knowledge of the operation of IJS, including procedures, preferences and use, organization, knowledge of programmatic efforts, notions of justice and knowledge of legislation and human rights.

The various aspects raised by the questionnaires were contextualized, depending on the different places where the study took place. This required a high level of training for those carrying out the interviews to make sure that the right interpretation was given to questions in the different settings. The latter represented a bigger challenge in those places where translation from the original language to the local language was required.

After the data collection, a data clean-up process was undertaken in order to eliminate data entry mistakes, technical issues or any other problems that could affect the results.

## SELECTION OF GEOGRAPHICAL AREAS FOR COUNTRY STUDIES

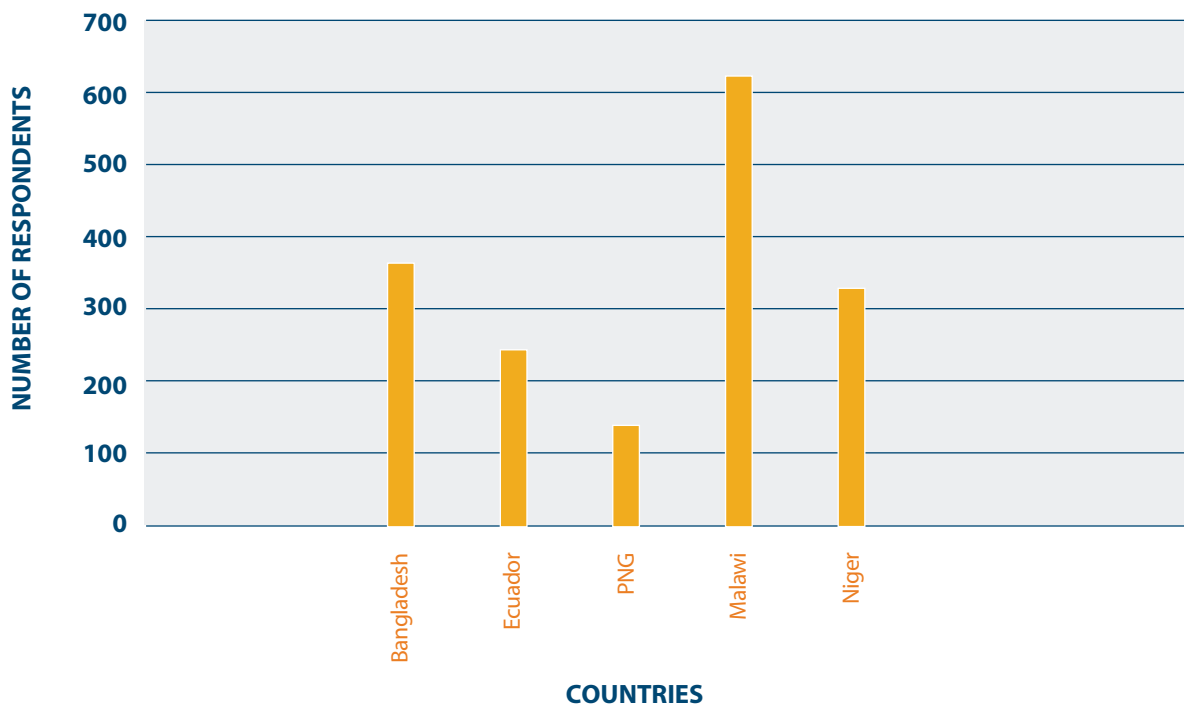
For the qualitative part, interviews were carried out in two or three selected districts, where programmes aimed at promoting primary justice and addressing primary justice providers have been carried out within the preceding three years. The districts chosen included areas representative of the type of IJS most widespread and most commonly used in the country, IJS with very specific characteristics, or new ways of addressing IJS, new ways of linking the informal to the formal justice systems, or the presence of an interesting combination of formal and informal justice providers/actors at the local level. In all countries chosen, there was a preference for rural as opposed to urban areas.

The minimal coverage of the quantitative surveys was equivalent to the areas covered in the qualitative part, while it was possible in some of the countries to cover additional areas with the quantitative survey. Within each district, smaller entities were selected that are either defined by administrative borders or traditional borders, depending on what is most relevant in a given area. Please see the country study methodology in the annex to the report for the criteria applied in the selection of respondents to ensure representation as well as coverage of marginalized and vulnerable groups.

The qualitative data was collected by small survey teams bringing printed questionnaires with them to the survey areas, completing them and handing them over to a national coordinator, who ensured entry of the data in an electronic format. This was sent to DIHR in Copenhagen to be read into the database and the subsequent analysis made using an internet-based data processing tool.

The total number of 1,675 respondents is distributed as follows :

### NUMBER OF RESPONDENTS



## LIMITATIONS

The countries studied are all non-OECD states. This choice is based on the aim that the study be used primarily as a programming tool for justice programming in developing and transitional countries. It does mean that the valuable insights that can be had through examination of experience of countries such as Australia, Canada and the United States of America have not been examined in any detail for the purposes of the report. Practitioners and researchers in search of these insights should refer to existing literature on these countries.

A similar limitation is acknowledged in relation to the question of collective rights of various kinds, including cultural rights and land rights. The scope of the report did not permit a detailed discussion of these issues or a specific chapter devoted to them, though they are referred to in the human rights chapter of the report and in the Ecuador study. While it is difficult to completely distinguish the discussions on informal justice from those on legal pluralism, the question is more central to the latter and is dealt with in greater detail in studies of this topic.

The overall focus of the study is on IJS in 'normal' situations, where development issues, rather than conflict, are the main concern. While questions of instability, internal conflict and transitional justice are present in relation to some of the country studies (in northern Uganda and to some extent in Papua New Guinea), the overall focus is on non-conflict situations. This distinction is necessary to make in studies of informal justice and the focus on non-conflict situations allowed for a greater discussion of overall policy and direction. Nevertheless, it also poses some limitations in relation to the applicability of its findings at national level.

Importantly, the present study explicitly examines IJS through the lens of positivist legal standards that have their origin in sources such as international human rights law and notions such as the rule of law. It can be (and has been) argued that any such attempt amounts to an imposition of standards, with individual biases on systems that are fundamentally different in character, valuing group harmony over individual rights. While a criticism such as this raises questions of a fundamental character, the approach is defended here as one that (a) provides an analytical framework that represents the widest consensus available throughout the world and (b) is most true to the declared values of the United Nations system. Moreover, on a practical and operational level, it is to be expected that these standards will represent those used as points of reference by programmers and other stakeholders.

Reference is made above to the general choice of rural and peri-urban as opposed to urban areas and the consequences of this choice for the operation of IJS and the issues in focus among users.

As with any survey, a number of limitations in the data collection and analysis need to be considered:

- The selection of respondents was carried out with the assistance of local organizations; this may have influenced the responses of respondents.
- The selection of areas visited was influenced by practical and logistical concerns, including time available, transport facilities and security (especially in Niger and Papua New Guinea). In Ecuador, it was influenced by the willingness of traditional authorities to facilitate or permit the study.
- The diversity of populations, IJS and social settings means that meaningful comparisons between countries, and sometimes even within countries, are difficult to make.
- The sample sizes in the countries are relatively small, which means that, when more than one question is crossed with other variables, the number of respondents in some instances is so small that it is not possible to make interpretations based on the data. This limitation is also due to the complexity of some of the questions, such as those on types of cases and choice of providers.

- There is a risk of a tendency to please the interviewer, where people can have a tendency to give the answers they think are those wished for by the interviewer. Moreover, respondents may answer in a way that they think favours more interventions and external support, influencing answers given about knowledge and impact of both government and donor programming efforts.
- The questionnaire was designed to be easy to administer by the local survey teams, but it has become clear in the analysis stage that the use of a questionnaire based on yes/no answers, presents difficulties for statistical analysis.

The above limitations mean that statements based on the quantitative data analysis are relative and not conclusive. Tendencies can be identified from a combination of the qualitative and quantitative parts of the studies, which can be the basis for further analysis.



# METHODOLOGY

METHODOLOGY .....	200
BACKGROUND .....	201
THE OPERATION OF INFORMAL JUSTICE SYSTEMS IN BANGLADESH .....	203
VILLAGE COURTS AND ARBITRATION COUNCILS .....	205
PREFERENCES OF USERS AND PROFILES OF PROVIDERS.....	210
HUMAN RIGHTS ISSUES ARISING OUT OF INFORMAL JUSTICE SYSTEMS.....	213
ASSESSMENT OF EXISTING PROGRAMMING AND GOVERNMENT INITIATIVES ON INFORMAL JUSTICE SYSTEMS.....	220

## METHODOLOGY

This case study draws on three sources of information: first, a review of the existing literature on IJS, on local governance, human security and justice in Bangladesh; second, on qualitative interviews conducted in June and July 2009; and third, on a quantitative survey of IJS users and providers carried out in Jessore and Madaripur districts in August 2009.

The two key study objectives were to understand the characteristics of IJS and to ascertain the scope for improving respect for human rights principles through programming opportunities.

As regards the qualitative interviews conducted in June and July 2009, a series of focus group interviews were conducted in Madaripur, Jessore, Rangpur, Sylhet and Rangamati districts with groups of:

- a. Traditional village-level *shalishkars* (mediators)
- b. NGO and/or NGO-supported mediators (the so-called modified *shalish*)
- c. Village Court/Arbitration Council members
- d. Young people
- e. Women
- f. A mixed group comprised of 15 people of different gender, economic status, education and occupation

Interviews were also conducted with district police chiefs and with District Court magistrates in each of the five districts visited. In addition, interviews were conducted in Dhaka with a range of interlocutors from the government, the judiciary, the legal sector, academia, NGOs, and international agencies.

The quantitative research, which was carried out in Madaripur and Jessore districts under the direction of the NGO, Bangladesh Legal Aid and Services Trust (BLAST), involved the administering of two survey instruments, one for informal justice providers (village *shalishkars*, Union Parishad (UP) members who sit as panellists on the village court and/or the arbitration council, mediators from NGO-supported *shalish* forums, and any other), and the other for informal justice users. In each district, four UPs were selected, and within each of the UPs, three wards were selected (i.e., a total of 12 wards for each district). In each of the wards, a minimum of 15 user questionnaires and five provider questionnaires were completed. Adding the two districts together, a total of 360 user and 120 provider questionnaires were administered.

## BACKGROUND

### OVERVIEW OF ADMINISTRATIVE AND JUDICIAL STRUCTURES IN BANGLADESH

In order to understand how IJS operate in Bangladesh, it is first necessary to understand something of the administrative, political and judicial structures in the country. Bangladesh is comprised of 64 *zilas* (districts), which can be further subdivided into 460 *uapzilas* (sub-districts), 4498 unions and about 87,000 villages.

At the district level, a District Commissioner has supervisory responsibility for scrutinizing union-level operations, although funds for union-level activities are allocated by administrative units at the *uapzila* level, from block grants received annually from the central government. The District Commissioner can, however, exert considerable influence through his/her responsibility for recruiting union-level public officials and approving all Union Parishad (UP) projects.

There are no elected representatives at district or *uapzila* levels, but at UP level there is an elected council comprised of 13 members (one directly elected chairman, nine general seats, and three seats reserved for women). The UP has responsibility for implementing a variety of development projects with funding distributed by the government at the *uapzila*-level. Although UP members may not formally seek election as the representative of one of the major political parties, in practice they normally have informal affiliations, as do other prominent community figures at union level and below: businessmen, leaders of village development and welfare associations, and so forth.

There have been several attempts in Bangladesh's post-independent history to establish an elected *gram sarkar* (village government) system, none of which have enjoyed bipartisan political support. The most recent experiment in village-level governance was discontinued in 2007.

As regards judicial institutions, the District Courts are the principal means by which formal justice is administered in rural locations throughout the country. The District Courts do not command the same respect as the Bangladeshi High Court, but this is in large part due to factors beyond the control of the judges and court officials who work in them. The courts suffer from a lack of human and financial resources and crumbling infrastructure. There are long case backlogs<sup>1</sup> and judges, in addition to their normal functions, are burdened with numerous administrative functions. Case backlogs and poor salaries are said to be contributing factors to significant levels of corruption within the District Courts. Having said this, however, the perception of local people interviewed in this study was overwhelmingly that the District Courts were fairer and more impartial than village courts or traditional village-based *shalish*, which is perceived to be often subject to elite capture.

At UP level, there exist statutory village courts<sup>2</sup> and arbitration councils, the members of which are primarily comprised of UP councillors. The village courts are mandated to hear a variety of civil and minor criminal law mat-

1 As of January 2010, there were 15 *lakh* (1.5 million) cases pending with the country's subordinate courts. (Source: report on a Parliamentary Law and Justice subcommittee report, *The Daily Star*, February 14, 2010)

2 The Village Court Act, 2006.

ters and have authority to award compensation up to a ceiling of TK 25,000.<sup>3</sup> The arbitration councils, originally established under the Muslim Family Law Ordinance,<sup>4</sup> have a mandate to hear and resolve various family disputes: divorce, polygamy and maintenance. In terms of their mandate and operating procedures, these institutions are in many respects much closer to informal dispute resolution, or *shalish*, than to the formal courts. The operation of the Village and Arbitration Courts are discussed in greater detail in the next section below.

Within the central government, responsibility for the UPs falls under the authority of the Ministry for Local Government, Rural Development and Cooperatives (MLGRDC). This reflects the important role of the UPs as vehicles for decentralized governance and rural economic development. But with respect to the UP members' roles as (occasional) members of the Village Court and Arbitration Council, the MLGRDC is not so well placed to exercise guidance and provide support as would be, for example, the Bangladesh Judiciary or the Ministry of Law, Justice and Constitutional Affairs (MoLJA).

It has been said that Bangladesh has one of the lowest ratios of police officers to heads of population anywhere in the world.<sup>5</sup> Police stations are established in all *uapzillas*. Below this level, there is no permanent police presence. Police can stay abreast of developments at the union level and below through operational contacts with the UPs, with traditional village leaders and with various formal local associations and social groupings. In some parts of the country, community policing arrangements at the ward level have been established or are being trialed. Community policing citizens committees, under the supervision of the UP chairman or another person appointed by the UP, meet to settle small-scale disputes, to maintain a register of crimes, and to report regularly to the police about law and order developments.

The police have a very poor reputation in rural communities; they are perceived as being susceptible to corruption, as unlikely to provide assistance without payment of a bribe, and as unlikely to protect poor people in the community or women from violence or threats of violence. People interviewed for this study said consistently that they feared the police. Many said that they would rather seek resolution of a crime through the village authorities or through the intervention of a UP member or NGO than by contacting the police. These findings are similar to those from several previous studies.

There is a great disparity between the level of training of police officers, who are selected from the very best performing candidates for the public service entrance exam, and regular police, who are poorly trained, poorly paid and resistant to change. In their defence, police in rural districts may also face considerable external pressure from influential members of the community: local elites, rich landowners and representatives of political parties, to compromise complaints of the poor.

As part of an ongoing police reform programme supported by UNDP and DFID, over 20,000 community police (laypersons) have already been appointed over the past three years with an ultimate goal of 40,000 community police countrywide. The programme is also addressing issues of gender mainstreaming, police responsiveness to vulnerable groups and protection for victims and witnesses. Six pilot victim support units were established in early 2009. There are plans to hire an additional 3,000 female police (at present, only 1.5 percent of the police force are women) so that there is at least one female police officer in every police station. Strategies are being developed to improve police responsiveness and sensitivity towards women, children and representatives of vulnerable groups who seek police assistance.

3 Equivalent to US \$532.44 (exchange rate quoted on [www.oanda.com](http://www.oanda.com), 1 September 2010)

4 The Muslim Family Law Ordinance, 1961.

5 Lewis and Hossain, 2008, p. 53.

## THE OPERATION OF INFORMAL JUSTICE SYSTEMS IN BANGLADESH

There is a saying in Bangladesh that ‘if you wish to take a goat to court, you have to sell a cow.’ Not only the courts, but the whole formal justice system is alien to many poor people’s lives. This is borne out by the surveys conducted for this study, which show that a large majority of people wish to resolve their disputes through mediation, either at the village level, or with the assistance of UP members or an NGO/community service organization. Although many informants also acknowledge problems with traditional village-based mediation, which are discussed in detail below, there is a tendency to try to find the best solution amongst the informal justice possibilities that exist rather than approaching the police or the district court.

### THE TRADITIONAL *SHALISH*

For many hundreds or even thousands of years, disputes in local communities in Bengal and elsewhere on the sub-continent have been decided through village-based dispute resolution or *shalish*, as it is most commonly known in Bangladesh. Even today, the large majority of civil or minor criminal disputes are resolved through *shalish* of one form or another, rather than through the formal courts or the intervention of the local government or the police.

### PROCEDURES

The *shalish* is not governed by formal rules or procedures. Some *shalish* may take the form of voluntary submission to arbitration, where the parties to the dispute submit to the judgment of the *shalish* panel; others take the form of a mediation, where the *shalishkars* assist the parties to find a mutually acceptable solution. Even in this form of *shalish*, there may be considerable pressure on the parties, by virtue of the public nature of the forum or the seniority of the *shalishkars*, to accept a proffered solution. Some respondents suggested that traditional *shalish* processes can occasionally be subjected to nefarious influences when middlemen ‘arrange’ *shalish* mediations on behalf of disputing parties.

The *shalish* normally takes place in public – under a tree or in a building owned by the local community. In addition to the *shalishkars* and the parties to the dispute and family members, there will also be onlookers, sometimes a sizeable group. *Shalish* sessions are not formal or static; on the contrary, they can be and often are lively and impassioned, with the parties, their supporters and even onlookers seeking to impress on the panel their point of view, sometimes several persons at the same time.

In general terms, the role of the *shalishkars* is to guide the parties to the dispute toward a resolution, and, in an appropriate case, to reach a verdict as to payment or compensation or some other form of reparations or the punishment of the guilty party.

As discussed in subsequent sections, NGOs in Bangladesh have succeeded in fostering reforms and improvements of traditional *shalish* through engaging at the community level in consultative and participatory approaches, bringing the process closer to mediation than traditional arbitration.

### SUBJECT MATTER AND OUTCOMES

The subject of the dispute might be a disagreement between neighbours, a conflict between a husband and wife or between their two families, or a minor criminal matter (a case of theft or damage of property). By Bangladeshi law, *shalish* committees do not have authority in relation to criminal cases or marriage and dowry disputes, but there is some leeway in how the law is administered at the local level. There is consensus at least that serious criminal matters – cases of murder or rape, acid-throwing or kidnapping – must always be dealt with by the formal

justice system. *Shalish* committees may order the payment of compensation by the guilty party, but must not imprison a person or order or carry out any other form of punishment. Extra-judicial punishment is unlawful in Bangladesh, but the practice of the imposition of punishments by *shalish* committees continues today in many rural communities. The guilty party may be forced to wear a necklace of shoes, may have his or her face ground in the dirt or be publically humiliated in some other way, or may be temporarily banished from the community.

In some cases, *shalish* committees have issued orders for imprisonment, whipping or other cruel and extreme forms of physical punishment. The Daily Star of 29 June 2009, for example, reported a case in Comilla District where a widow of 40 and a younger man, aged 25, accused of engaging in anti-social activity, received 202 and 101 lashes respectively, following a *fatwa* (religious edict) made by a village *shalish* committee under the guidance of a local religious leader. In the case in question, the police responded to a complaint subsequently made by the widow and arrested six people, including the members of the committee and the religious leader in question. The case is an illustration of 'cruel *shalish*', as it is commonly known.

It is very difficult to assess the extent to which this type of *shalish* takes place today and the study did not reveal any assessments on this score. Some commentators believe that the influence of *Shariah* Islamic law over village *shalish* is much less now than it was in the past, with the increasing involvement of UP members in local justice processes and the emergence of other elites in local communities, e.g., representatives of political parties, private businessmen, community development and women's empowerment organizations.

In the UPs in which this study was conducted, there was a high level of awareness amongst all stakeholder groups of those categories of cases that cannot be dealt with by IJS and of the prohibition on corporal punishment or imprisonment. On the other hand, various degrading or humiliating forms of punishment (e.g., the necklace of shoes) seemed to be still quite commonly practiced – and accepted – by informants. This study took place in Jessore and Madaripur, two of the provinces where there has been the most intensive NGO activity on reform of *shalish* and provision of community legal services and it is possible that the responses received in the user and provider questionnaires do not reflect conditions in a 'typical' Bangladeshi rural community.

## COMPOSITION

In the traditional *shalish*, the dispute is adjudicated/presided over by village leaders, who are mostly but not always exclusively men. As this study revealed, it is increasingly common for UP members to participate in village *shalish*, by virtue of their authority as elected community representatives. The traditional informal village leaders do not have the same level of authority in village life as they once had. Even though UP members have in many cases received no formal training to equip them to carry out their duties as Village Court judges, they are connected to the state administration at *upazilla* and district levels by virtue of their positions, and it could be expected that this would be reflected in the way in which they adjudicate village-level disputes, particularly as regards respect for the criminal law.

It is important to emphasize that *shalish* is not only a feature of rural village life; informal dispute resolution committees of one form or another are also commonplace in urban communities, as well as in public and private institutions: schools, public sector workplaces, clothing factories, and so forth. The resolution of interpersonal disputes through mediation or arbitration is a part of the fabric of Bengali society. This has been recognised by successive governments in Bangladesh through the establishment of statutory Village Courts. Likewise, community development advocates and legal empowerment organizations have made long-standing efforts to develop and support models for community-based mediation that draw on the strengths of the *shalish* tradition while incorporating norms of constitutional and human rights law as regards equal participation, fairness and impartiality in adjudication, sensitivity to the rights of women and children, and protection and redress for victims of crime. The Village Courts, Arbitration Councils, and NGO-promoted IJS are addressed in the following sections of the report.

## VILLAGE COURTS AND ARBITRATION COUNCILS

Both the Village Courts and Arbitration Councils operate under the aegis of the UP. The UP Chairman takes a leading role in relation to both institutions.

### ARBITRATION COUNCILS

The Arbitration Councils (AC) operate pursuant to the Muslim Family Law Ordinance. They have jurisdiction to hear and determine various family law matters for Muslim families, among them divorce, maintenance, the payment of dower, and polygamy. The tradition of dower, whereby a bride was paid or promised a sum of money and/or goods in kind by the bridegroom, is now less common in Bangladesh than previously. Polygamy is in fact banned by Article 5 of the Ordinance, although the AC retains discretion to approve the contracting of a polygamous union, on application of the would-be husband, if it is satisfied that the marriage is necessary. The AC does not have jurisdiction over disputes arising in non-Muslim families.

AC panels are comprised of three persons: the UP Chairman together with two other panellists, one chosen by each party. As with the VC, judgments are determined by a majority of the panel. There is no statutory financial limit specified for awards or compensation or maintenance made by the AC.

### VILLAGE COURTS

The Village Courts (VCs) were initially established under the Village Courts Ordinance of 1976 to handle minor civil and criminal matters at the union level, and, in so doing, to reduce the burden on the District Courts. VCs are currently regulated by the Village Courts Act of 2006, the main features of which are the following:

- **Jurisdiction:** The VCs' jurisdiction is limited to those matters specified in Schedules 1 and 2 of the Act. As regards criminal offences, the VC may hear cases concerning theft, theft in a dwelling house, criminal breach of trust, and dishonest misappropriation of property. Concerning civil matters, the court may hear suits for recovery of money due under contract, recovery of movable and immovable property, and claims for compensation for wrongfully damaging movable property. Subject to some exceptions, these matters cannot be dealt with by the District Court as a court of first instance.
- In criminal cases, the VC has jurisdiction to issue a fine and/or the payment of compensation to victims up to an amount of TK 25,000. Similarly, in civil cases, the VC can consider cases dealing with matters of up to TK 25,000, which is also the maximum amount it can award to an aggrieved party. VC decisions are taken by simple majority, declared publically and given in writing.
- **Composition:** VC panels are comprised of five members: the chairman of the UP (unless he or she is incapable of chairing or his neutrality has been brought into question by one of the parties) and two members selected by each party to the dispute, one of whom must be a member of the UP. The panel for each case is therefore comprised of three UP members (one of them the chairman) and two community representatives. The quota of a minimum of three women representatives on UPs ensures the availability of some women who can serve as adjudicators on the VCs.
- **Procedure:** Procedural and substantive laws and rules of evidence which apply to the District and High Courts do not apply to the VC.
- Lawyers do not have standing to appear in VC cases.
- Applicants to the VC pay a nominal fee of TK 5 or similar to file an application.

While it is difficult to assess the extent to which VCs are operational across Bangladesh, it is likely that many of them are either not functioning at all or are rarely utilized. The respondents in this study showed a very high level of

awareness of the VC, and VCs were said to be operational in each of the five districts in which qualitative interviews were undertaken. But since the study was focused primarily on Madaripur and Jessore, and the interviews were facilitated with the assistance of the legal services NGO, BLAST, it is possible that the key informants and interviews contained a disproportionate number of people who had had contact with them.

By contrast, a survey of 10,000 people from 500 UPs, conducted in early 2009 as part of the UNDP and European Union-supported 'Activating Village Courts' project,<sup>6</sup> found that only 24 percent of respondents were aware of the VCs' existence. Furthermore, the study found that a majority of UP chairmen and members interviewed did not have a clear understanding of the VCs' jurisdiction. In this regard, cases of violence against women were said to constitute a significant proportion of the cases considered by VCs in the UPs surveyed, even though this issue does not fall within the mandate of the VC.

## CASELOAD AND JURISDICTION OF VILLAGE COURTS

These findings on VC jurisdiction are broadly similar to those from this study. While there was a high level of understanding of the prohibition on hearing serious criminal matters (rape, acid-throwing, murder, trafficking and kidnapping), a number of VC magistrates said that they hear cases involving family disputes and domestic violence.

The study also showed that, while relatively few cases are heard by the VC each month (between five and 10, in most cases), UP members often participate in 20 or more informal mediation sessions, either in the UP office or in the village. Local people approach UP members and ask them to facilitate a mediation process rather than applying to the Village Court for an arbitrated resolution of the dispute. In the opinion of one UP chairman from Rangpur, UP members also prefer to act as mediators than as judges, since, as politicians, it is more in their interests to facilitate a mutually acceptable solution for all parties to the dispute rather than to favour one over the other.

The existing TK 25,000 limit provided for in the Village Courts Act was probably intended to ensure that more serious matters were not dealt with by the VC, but were instead filed in the District Court, where the formal legal and procedural rules apply and where conflicts of interest are less likely to arise. But, in fact, cases ineligible for hearing by the VC, either due to the financial limit or to the jurisdictional limitations, are more likely to be heard informally in the community than submitted to the District Court for adjudication. Here, there is also a paradox: while informants generally have a good opinion of the impartiality of the District Court and perceive it as a better forum to obtain justice, they nevertheless prefer to have a dispute settled in the local community, despite the weaknesses and potential injustices of community-based IJS.

There are good arguments for raising the TK 25,000 limit and for extending the jurisdiction of the court so that it can also hear some family and neighbour disputes or cases of domestic violence. As with those cases where the compensation sought is over TK 25,000, the tendency for cases of family violence is to ask village elders or UP members to conduct a *shalish* or to approach an NGO to mediate in the matter, rather than to go to the District Court. The AC and VC members have not received training in basic legal, constitutional or human rights principles that would assist them in dealing with matters involving the rights of women and children, but neither have the village elders. At least with the UP members, it is possible to hold them accountable for their actions in various ways, as discussed in the following section. The issue of training is also discussed below.

## LEGITIMACY, ACCOUNTABILITY, IMPARTIALITY AND INDEPENDENCE

Many anthropologists have documented the patron-client nature of rural power structures in Bangladesh and have argued that such structures are 'anti-poor' by nature, resistant to reforms that would improve access to justice for poor people or that would promote gender equality or women's empowerment and participation in society,

<sup>6</sup> This programme is considered in greater detail in Section 5 of this study.

including in IJS. Public perceptions of the VC are closely related to the profile and credibility of the UP chairman and the other UP members who sit as panellists. As discussed above, UP members have a high public profile in local communities and they have to a significant extent begun to share the role of local-level justice provision that has traditionally been the domain of village leaders. The dual roles of the UP chairman and UP members who sit as AC or VC magistrates can bring into question the impartiality of the VC. Such a blending of political, executive and judicial roles would not be considered acceptable at the higher levels of the judicial system.

It has been argued that, while the construction of the VCs and their placement within the UP structure is not ideal, there are at least some procedural safeguards in place through the ability of disputants to choose a majority of the panellists and to object to the involvement of the UP chairman if they feel that he will be unable to hear the matter fairly and objectively.

At the structural level, while the UPs are not the ideal 'home' for the VCs or ACs, they do have some indirect accountability features built into them: to the central government and to parliament, through their responsibility to account for use of finances; and public accountability, through administrative law principles (the VCs and ACs, as organs linked to the UPs currently fall within the mandate of the MLGRDC) and through local government elections.

Ideally, the VC and AC could operate independently of local government representatives and structures. The only feasible alternative would be to place the VCs and the ACs under the administrative responsibility of the MoLJPA, but this is not feasible given that the District Courts are already severely overburdened and that none of the infrastructure necessary to establish a physical presence of the MoLJPA at UP level is in place. For the foreseeable future, the VCs and the ACs will continue to be connected to the UPs, and the challenge for justice sector programming will be to develop and implement accountability measures that can guard against the potential for abuse.

## **SUPPORT AND TRAINING OF VCS, INCLUDING PROGRAMMING CONSIDERATIONS**

It is this recognition of the potential of the VC as a cheap and accessible alternative to the village *shalish* for ordinary people, one which is not alien to poor people's lives in the way the formal justice system can be, which lies behind several initiatives to activate the village courts and to improve their capacity and effectiveness.

One of the major challenges for improving the quality of decision-making in the VCs (and ACs) is that neither of them receives budgetary or logistical support from the government. From interviews conducted in the five districts in which this study was undertaken, it seems that the UP chairman is often simultaneously the court's registrar, secretary, documentalist and chairman. Further, few, if any, UP chairmen/members have to date received any form of training to assist them in carrying out their duties in either tribunal.

In this regard, there is a potential, but so far unexplored role for the MLGDRC and the MoLJPA (perhaps both ministries working together in co-operation with the District Courts) to provide training, support functions, monitoring and oversight of the operations of VC and ACs across the country. Civil society organizations could also contribute. Madaripur Legal Aid Agency, a legal services organisation that has for many years been operating a community-based dispute resolution model that draws on the strengths of the traditional *shalish* but that also emphasizes gender inclusion and respect for fundamental constitutional principles, has in recent years begun to provide training in mediation, basic legal skills and constitutional principles for VC members in Madaripur District.

According to the Director and Founder of MLAA, Mr Fazlul Huq, the decision to support the VCs is in part a means to ensure that the mediation model developed and championed by MLAA over the past 30 years continues to be used in Madaripur in the future, 'after the funding for MLAA has dried up'. The activities of MLAA and other NGOs are to a large extent dependent on ongoing support from international cooperation partners. The VC is an institution of the government, and the government has a responsibility to provide the means and resources for it to be able to function effectively, even if it does not do so at present.



In Mr Huq's assessment, the VC, despite its current limitations, can be an attractive alternative to village *shalish* for poor people, since there is no role for 'middle-men', people who try to earn money by 'arranging' the *shalish* on the part of the disputants. Villagers are already familiar with the UP and the UP members, and they have the possibility in a VC case to nominate representatives whom they trust to sit on the adjudication panel. Recognizing that much of the justice-related work being carried out by UP chairmen and members is informal mediation rather than VC arbitration, the focus of MLAA's support has been on teaching UP members the 'Madaripur Mediation Model' (described in detail in the following section). As Mr Huq says:

***“The VC and voluntary mediation can complement each other. The UP members can resolve some disputes by mediation, and some by adjudication. Maybe they don't have a very good understanding of the law, but we can teach them a sense of the justice of the case.”***

A four-year UNDP and EU delegation-supported project, 'Activating Village Courts in Bangladesh', launched in 2009 and worth almost \$15 million, is seeking to strengthen the village court system in 500 selected UPs across Bangladesh. The project also seeks to develop capacity of village court members, UP representatives and support staff. The project has four components: (i) a review of the existing legal framework, which will result in the submission to the GoB of a proposal for reform of the existing Village Courts Act; (ii) capacity development of UP chairmen, focusing on knowledge-sharing and best national and international practices, (iii) village police and staff of village courts; awareness-raising on the roles and functions of village courts amongst potential court users, community-based organisations, school teachers and religious leaders; and (iv) technical assistance to the Local Government Department and the MLGRDC to strengthen oversight, monitoring and evaluation of VC activities.

## COMMUNITY-BASED JUSTICE, MEDIATION AND PEACE-BUILDING INITIATIVES

The changing nature of traditional *shalish*, discussed above and commented upon by many researchers, is almost entirely due to the efforts of NGOs, since very few if any resources have been allocated by the government to justice service delivery below the District Court level. There are many NGOs involved in justice or legal services deliveries at the community level in Bangladesh. They are engaged in provision of legal services in relation to the formal justice system as well as the ADR-type approaches discussed here. Some NGOs provide generalized services for all types of personal and community disputes; others, such as Ain O *Shalish* Kendra (ASK) and Banchte Shekha (BS), focus on family and women's issues: dower, maintenance, guardianship, child custody and divorce. Some of them, like MLAA, have developed their own distinctive dispute resolution models, sometimes known as moderate or reformed *shalish*, which retain the informal and communitarian nature of traditional *shalish*, but which incorporate constitutional and human rights norms, in particular the principles of free and equal participation, non-discrimination and gender equity.

## STRUCTURE, ESTABLISHMENT AND COMPOSITION

The MLAA mediation model works in the following way:<sup>7</sup>

The NGO identifies local contact persons to disseminate information on mediation as an alternative to traditional mediation or to the formal court system. Community-based mediation organizations (CBMOs) are then established with the help of the NGO, which trains CBMO members in human rights, gender equity, law and mediation.

CBMO members are all volunteers and do not receive any remuneration. They could be retired teachers, nurses, public servants or others who have had some formal training or who enjoy respect in the community. The CBMOs are comprised of both men and women, and women are represented on all mediation panels.

<sup>7</sup> This description draws heavily on the summary description in Stapleton, 2010, pp. 63-64.

The NGO then appoints a paid mediation worker to provide administrative and logistical support to each CBMO. His or her tasks are to receive applications for mediation, arrange and supervise mediation sessions, and follow up and monitor compliance with the solution reached by the parties.

Mediation workers at the village level report to a supervisor who is responsible for supporting the work of all mediation workers in his or her area. An MLAA monitoring, evaluation and research cell maintains updated information on mediation procedures and data on all sessions conducted and outcomes. MLAA leaders maintain an ongoing dialogue with local religious and political leaders and police, so as to ensure ongoing support for the activities of the CBMOs.

## PROCEDURES EMPLOYED

One common feature of NGO-sponsored or supported IJS is that they are based on mediation rather than arbitration. In NGO-sponsored *shalish*, the panelists seek to engage both parties in settling the dispute, with a view to reaching a mutually acceptable solution. The process is much more participatory than a traditional *shalish* and there is a high level of compliance with decisions reached. This is because (a) they have been accepted by both sides and (b) the presence of family members and neighbours, together with the involvement of local mediators under the aegis of a locally based and respected NGO, creates social pressure on the parties to keep the promises they have made. Procedures for the recording of agreements differ from organization to organization, as do monitoring and follow-up measures. In many cases, the NGOs can also provide legal aid for parties wishing to apply to the District Court, if mediation is not successful or the agreement does not hold.

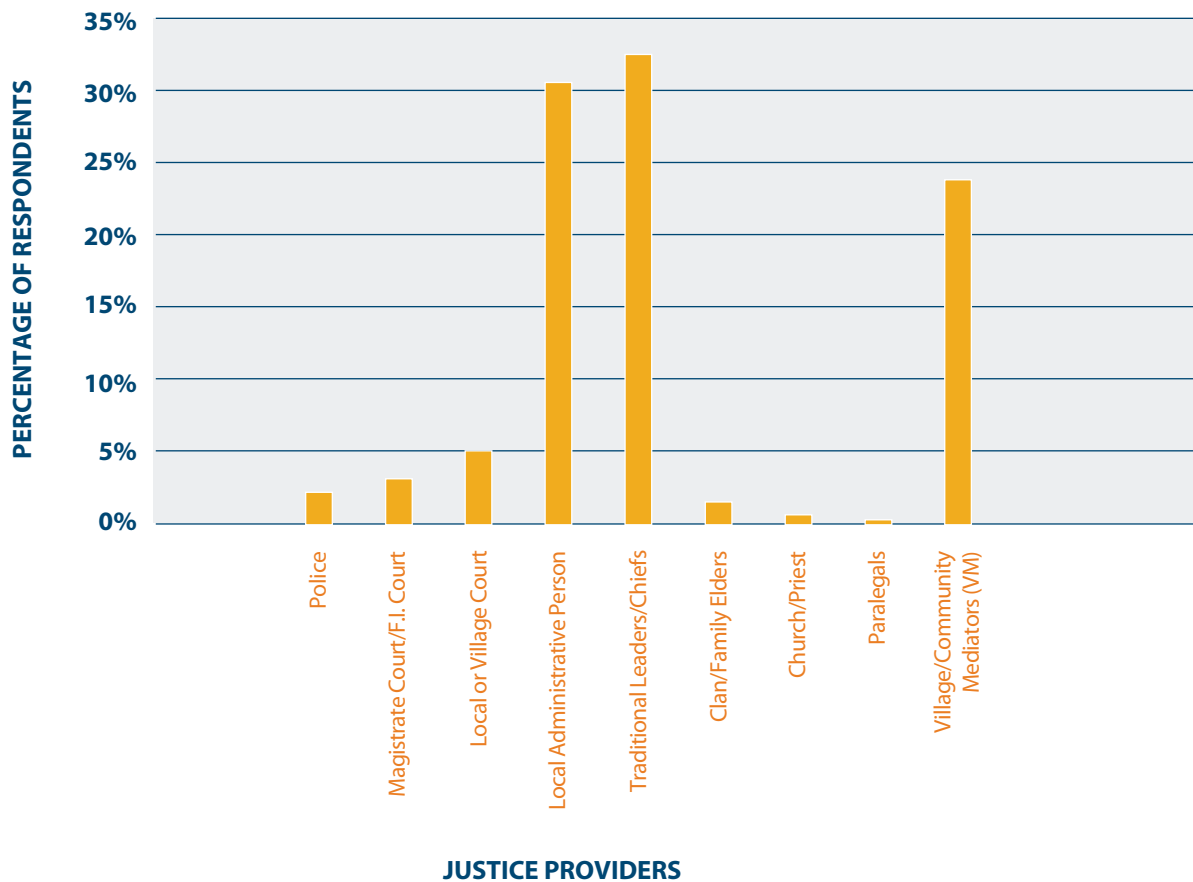
## ACCEPTANCE AND EFFECTS

In general, traditional authorities welcome the activities of the CBMOs, since it reduces their caseload and is seen as a positive contribution toward the maintenance of harmony in village life. It is also clear that, in those parts of the country where NGO-sponsored mediation programmes have been prominent, there has also been a flow-on effect to the village *shalish*. Focus groups of traditional *shalishkars* in Rangpur and in Rangamati both confirmed that the presence of Bangladesh Legal Aid and Services Trust (BLAST) and other NGOs offering mediation services had raised community expectations. People were less likely to submit to an arbitrated process at the village level when they could choose a more participatory process instead. Women who had participated in training provided by NGOs demanded that women be represented on the *shalish* panels. The involvement of female UP members in village mediations had become more common. There was now an expectation that, if one of the disputants was a woman, then there should be also at least one woman represented on the panel.

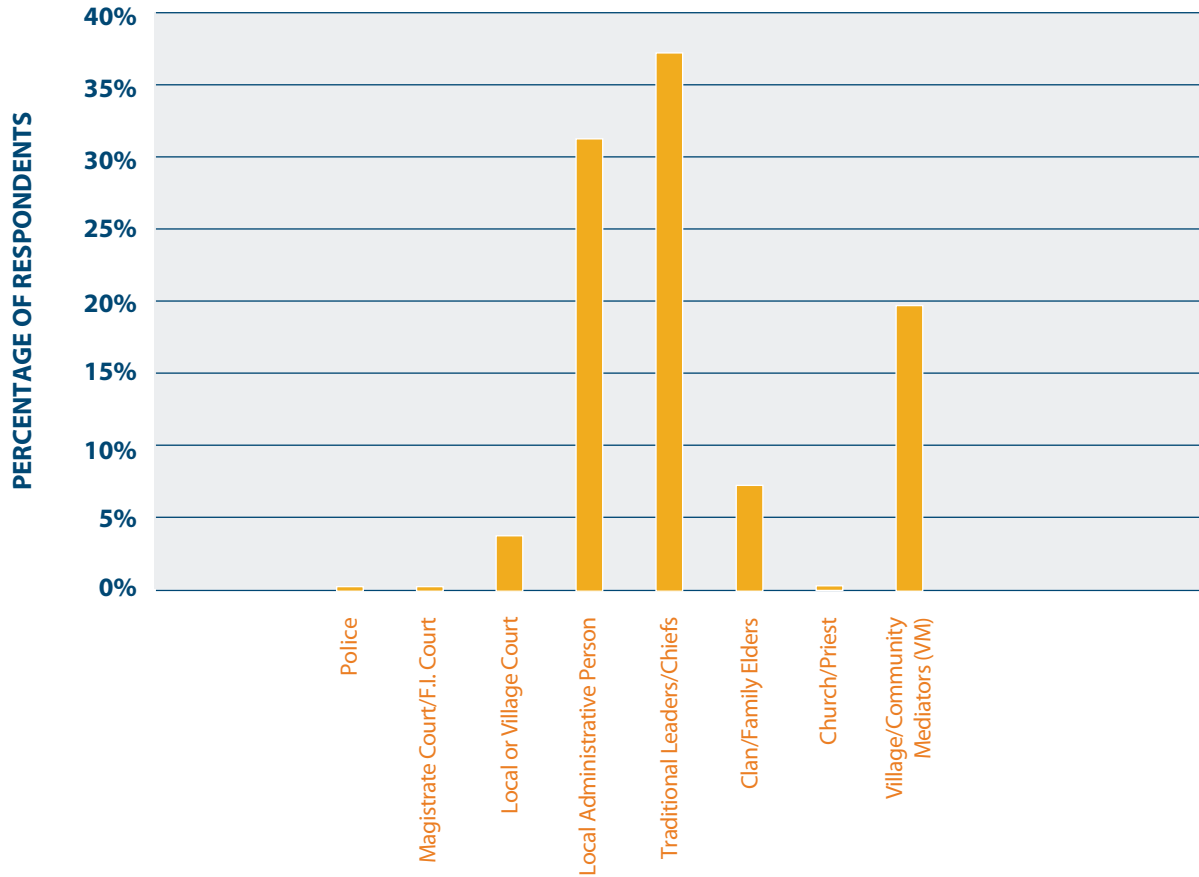
# PREFERENCES OF USERS AND PROFILES OF PROVIDERS

## USER PREFERENCES

WHICH ONE OF THE JUSTICE PROVIDERS IS IN YOUR OPINION THE BEST?



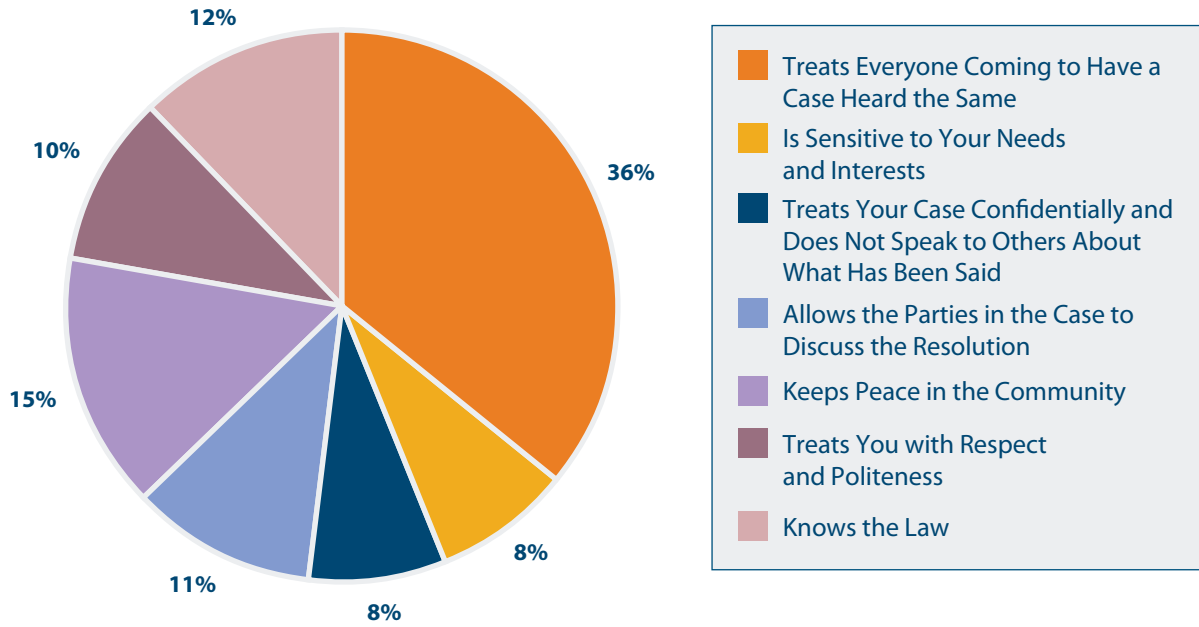
## WHEN YOU HAVE A PROBLEM OR CASE, WHICH JUSTICE PROVIDER DO YOU PREFER TO GO TO FIRST?



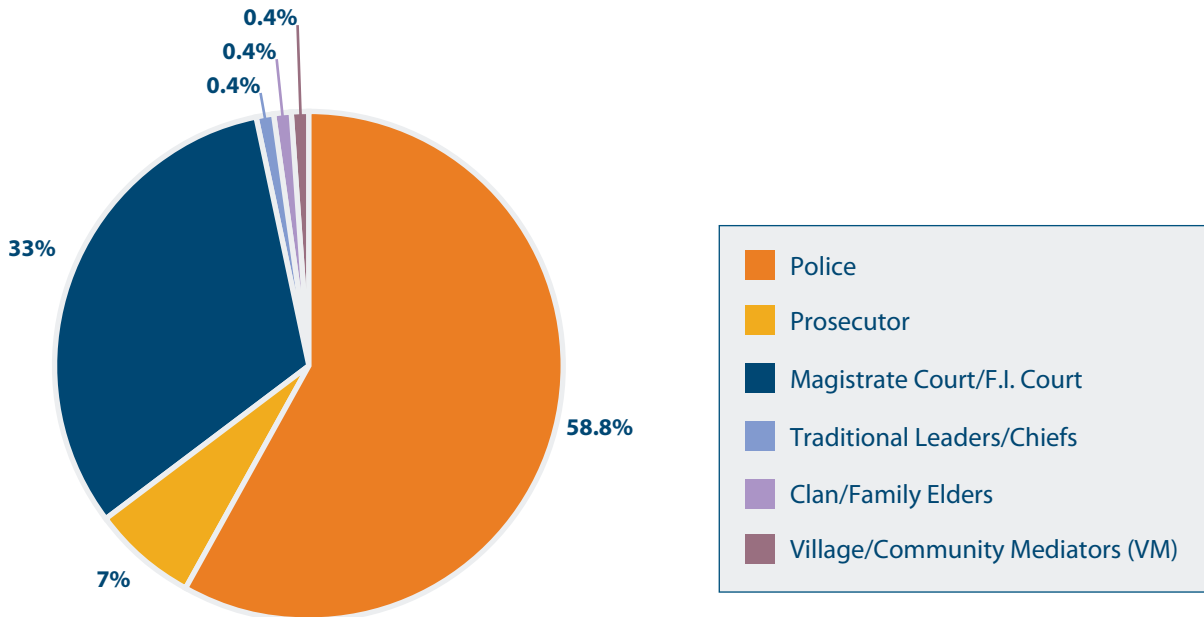
### JUSTICE PROVIDERS

The figures in these graphs show that the various forms of IJS – community mediators, traditional leaders and local administrators (UP members) – are all ranked highly among the list of preferred justice providers. Police and Village Courts do not currently rank highly among the respondents interviewed.

### WHAT CHARACTERIZES A GOOD JUSTICE PROVIDER?

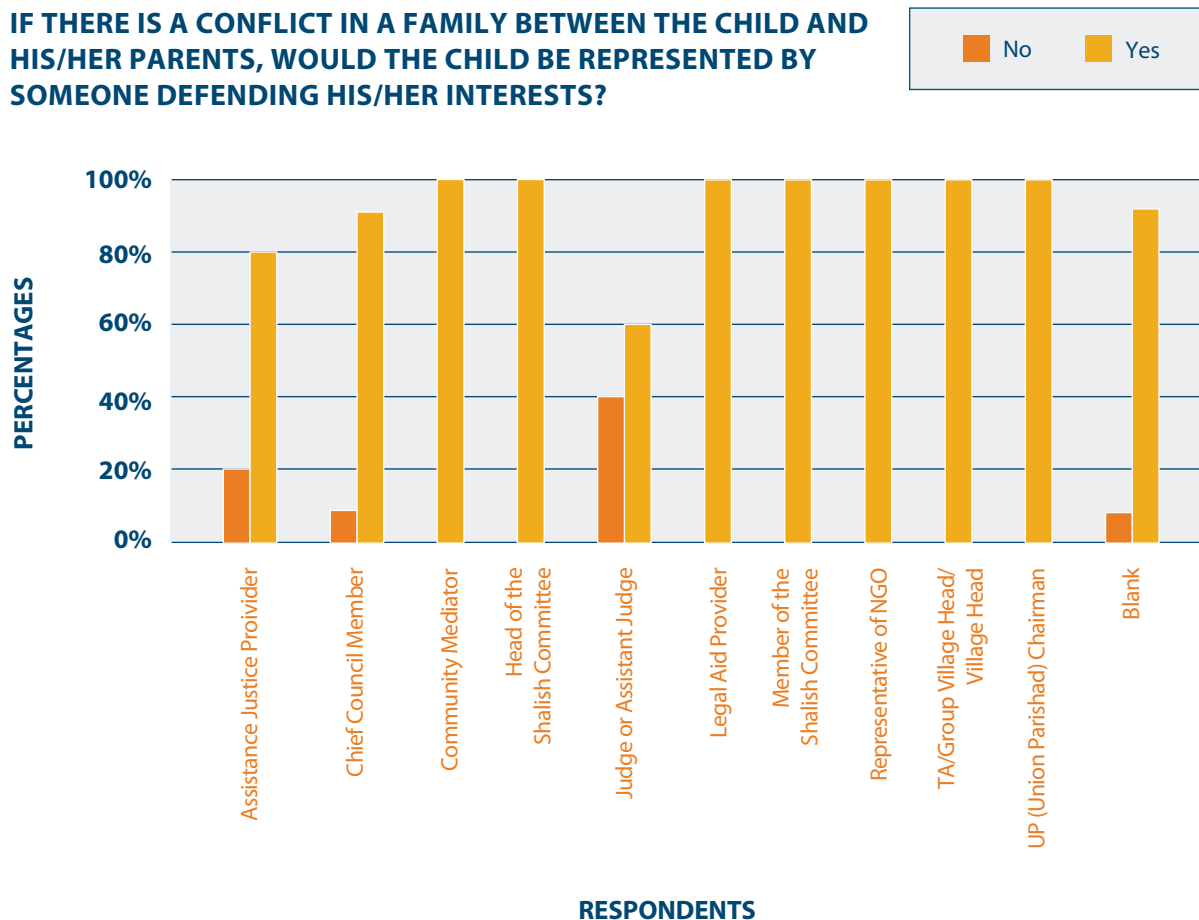


### WHICH JUSTICE PROVIDER WOULD YOU NOT APPROACH BECAUSE OF PRICE/COST?



## PROVIDER PROFILES

**IF THERE IS A CONFLICT IN A FAMILY BETWEEN THE CHILD AND HIS/HER PARENTS, WOULD THE CHILD BE REPRESENTED BY SOMEONE DEFENDING HIS/HER INTERESTS?**



## HUMAN RIGHTS ISSUES ARISING OUT OF THE INFORMAL JUSTICE SYSTEMS

### INTRODUCTION

The preamble to the Constitution of the People's Republic of Bangladesh proclaims that it "shall be a fundamental aim of the State to realise through the democratic process [...] a society in which the rule of law, fundamental human rights and freedom, equality and justice, political, economic and social, will be secured for all citizens."

Article 11 of the Constitution provides that "the Republic shall be a democracy in which fundamental human rights and freedoms and respect for the dignity and worth of the human person shall be guaranteed, and in which effective participation by the people through their elected representatives in administration at all levels shall be ensured."

Article 27 provides further that "all citizens are equal before the law and are entitled to equal protection of the law."

The guiding principles and rights guarantees contained in the Constitution provide a framework for measuring the effectiveness of governance and justice institutions in Bangladesh, first and foremost of official institutions, but also of informal bodies, since the state's human rights protection obligations extend beyond its own acts and omissions and require it to take positive measures to protect, promote and ensure respect for human rights principles in all areas of society, including in the domestic sphere.

75 percent of Bangladesh's population of 150 million people live in rural areas.<sup>8</sup> The majority of the rural population are poor and it is estimated that more than 50 percent of them earn less than TK 15 (1 US\$) per day. Very few of these people will ever have any contact with the formal justice system.

The government's principal response to the justice needs of local communities to date has been to establish ACs and VCs. To date, the potential of the VCs has been largely unrealized, but, with the new 'Activating Village Courts Programme', the government is taking a significant first step toward providing the necessary resources and know-how for VCs to be a viable justice provider – and a source of inspiration and of good practices for other informal justice providers – at the community level.

This is a welcome first step, but more needs to be done. In particular, the government should also take an active interest in the operations of village *shalish* and of the various NGO-supported mediation initiatives that are operating at the UP level and below, so as to realize the promises of the Constitution and to fulfil its human rights obligations.

## WOMEN AND INFORMAL JUSTICE SYSTEMS

The difficult situation faced by many Bangladeshi women in their daily lives has been well documented in numerous reports and is also acknowledged by the government and in a significant number of laws, ordinances, government programmes and advocacy campaigns.

Article 28 (2) of the Constitution provides that women shall have equal rights with men in all spheres of the state and of public life, but this is at best an aspiration rather than a right that can be claimed or enforced in practice in Bangladesh at present.

The national maternal mortality rate in Bangladesh is one of the worst in Asia; every year, about 11,000 women die giving birth, as most deliveries take place at home without a skilled professional. It has been calculated that one in every seven maternal deaths is due to domestic violence. Bangladesh is one of the few countries in the world where women have a lower life expectancy than men. Women, particularly poor women, have very restricted life choices. Most of the decisions regarding their lives are made by others: by their families, by their husbands, by male village leaders. Domestic violence is commonplace, both in rural and urban communities. As in many other societies where domestic violence is commonplace, women are often trapped in dysfunctional marital and family relationships, unable to seek redress or to break free from a violent relationship due to poverty, lack of education, fear of reprisals, or of bringing shame upon themselves or upon their children.

It is in this context that Bangladeshi women's participation and potential to obtain fair and equitable outcomes from IJS should be assessed. Promoting the participation of women as *shalish* panellists and encouraging the more active participation of female disputants – including ensuring the rights of women to freely present their point of view during the hearing – are important and worthwhile goals for reform of IJS in rural Bangladesh, but they are unlikely to be enough in themselves, since they do not address the underlying causes of women's disempowerment and vulnerability in Bangladeshi society.

In women's focus groups conducted for this study, there was general agreement that traditional *shalish* favours men's interests, and, furthermore, that unmarried women and widows are at a particular disadvantage. It was also clear that those women who have had contact with women's NGOs or participated in NGO-sponsored *shalish* were in a much better position to articulate the problems with the village *shalish* and had higher expectations of what types of IJS reforms should take place. In this regard, the quota of a minimum of three female UP members has created a group of female community leaders who have a level of authority by virtue of their office that women have not had previously. The practice of inviting UP members to participate in village *shalish* has meant that some village *shalish* have now for the first time started including female panellists, at least in family matters or

<sup>8</sup> Van Schendel, 2009, p. 232.

matters involving female disputants. As the practice spreads, so does the expectation amongst (female) members of the community that female participation should be the norm.

As mentioned above, the values of gender equity and of free and equal participation by the parties to the dispute championed by the NGO-coordinated mediation programmes have also had a positive influence on village *shalish* in those areas where NGOs have been active. Where the NGO-sponsored *shalish* is popular and well respected, this creates positive pressure on traditional village leaders to incorporate aspects of the NGO model into their own *shalish* forums. NGO activity has, without a doubt, been significant in positively challenging negative cultural norms at village level and in raising awareness of those categories of cases that by law cannot be dealt with by IJS and of the prohibition on physical punishments or imprisonment.

At the same time, however, it is also acknowledged by all stakeholders that, despite the legal prohibition on cultural practices which are damaging to women's interests and security, such as dowry demands, 'eve teasing' (described below), acid-throwing and other forms of harassment or violence against women, these practices continue to be widespread. Neither the informal nor the formal justice system seems able or willing to effectively address or combat these practices. Women's NGOs provide a valuable source of support or legal assistance for victims of these offences, but only a very small percentage of victims are able or willing to approach an NGO (or other possible provider of legal or social support) for assistance.

The practice of dowry-giving (by the wife's family) is said to be contrary to the principles of Islam and has also, since the adoption of the Dowry Prohibition Act in 1980, been prohibited in Bangladesh. Since that time, several other laws have been adopted seeking to address acts of violence against women, among them the Cruelty to Women Ordinance in 1983 and the Women and Children Repression Prevention Act in 2000, which provided for punishment of crimes against women and children including the death penalty, depending on the seriousness of the incident. By virtue of the Women and Children Repression Prevention Act, the taking or demanding of a dowry can result in imprisonment, a fine or both.

Despite the adoption of these laws and the Islamic prohibition on the receiving of dowry,<sup>9</sup> dowry demands continue to be commonplace and are perhaps even increasing in Bangladesh, amongst both rich and poor families. On the other hand, based upon the payment of dower, which is required by Islamic law and which is also formally recognized in the Bangladeshi legal and judicial system (disputes about the payment of dower are one of the matters that can be dealt with by the Arbitration Council under the Muslim Family Law Ordinance), a survey carried out in Dhaka<sup>10</sup> found that 88 percent of recently married Muslim wives did not receive dower, but were forced to give a dowry. Dowries are seen by many men as a get-rich-quick instrument, a perfect means by which to achieve upward material mobility.

Dowry demands are believed to be one of the major factors behind violence against women in Bangladesh today. The problem has been recognized by both the government and NGOs, but the scale of the problem and the fact that dowry negotiations (and the violence that is associated with late or no payment of the dowry) take place within families and are kept secret makes it difficult to tackle it effectively. The government has responded by passing the Women and Children's Act, which also creates a special Family Court to hear matters addressed in the Act. More recently (as described in section 1), victims' support units have been established as a pilot initiative at some police stations. But for the reasons described above, few women are willing to approach the justice system or the police for assistance. Fear of reprisals, financial insecurity, fear of consequences for children to the marriage, and the risk of ostracism from family and community all conspire to keep women silent about the abuse they face.

9 According to the Qur'an, receiving dowry from the bride's family is *haram*, forbidden by the Islamic law; it is the husband's family that should provide *mohorana* (otherwise known as *dower*), money for the bride's family.

10 Described in Monsoor, 2003.



Effectively combating dowry-related (and other) forms of violence against women requires concerted action by the government at all levels. The weaknesses of the police force at the local government level have already been described, and there is no doubt that, if progress is to be made, the police must be willing to act decisively, also in matters in the domestic sphere where they have been traditionally reluctant to interfere.

But other governance and justice-sector institutions at the local level, both formal and informal, can play decisive roles. If the government engages directly with traditional leaders and IJS mechanisms, encouraging them to provide effective and proactive justice for women, while at the same time raising public awareness, in collaboration with NGOs, more women will be willing to seek justice rather than to suffer in silence. As village and community leaders and mediators begin to act, as community awareness is raised, and where police demonstrate that they will actively enforce the law where violations are taking place or people are at risk, women will also receive more support from family members and from the community at large.

## CHILDREN AND INFORMAL JUSTICE SYSTEMS

Very little has been written about the situation of children in IJS in Bangladesh. Like other traditional societies, children in local communities in Bangladesh generally do not participate in IJS. If the matter is one where their interests are affected, someone (a relative – either a parent, or in the case of a custody matter, an uncle) will speak on their behalf.

This was confirmed by children's focus groups in the five districts in which the study was undertaken. Children interviewed were more or less unanimous in the view that children do not play any part in traditional *shalish*. They are unlikely to be present at all, since *shalish* is considered a matter for adults; yet, even if they are present, they will not have a right to speak.

There was also a consensus amongst the children interviewed that being a child (or a young adult) is a disadvantage in village life. Older people enjoy greater respect and an older person's opinion will invariably be accepted over the point of view of a child.

The focus of NGO work and of government awareness-raising programmes to date has been almost exclusively on improving the level and quality of participation of women in the justice system. Little, if any, attention has been given to the participation of children in IJS.

While children do not have a role in traditional village *shalish*, the *shalish* concept is widely used in Bangladeshi schools as a means of resolving conflicts that arise between students. An example given by children in Jessore was of a case of 'eve-teasing', or sexual harassment, of a girl student by a boy. According to the children, police in Jessore town were also aware of the eve-teasing phenomenon, and they had been responsive to it when complaints had been made. Children in Rangamati town told of a similar incident that had occurred in a residential area:

***'In the colony (residential area) in which they live, a boy had teased a girl. Afterwards, the girl told her parents about what had happened and they informed an elite person, who arranged a shalish on the family's behalf. In the shalish, the boy confessed his wrongdoing and asked the girl and her family to forgive him.'***

Cases of eve-teasing have gained increasing national prominence in recent years. According to figures released by the NGO, Ain O *Shalish* Kendra (ASK), in June 2010,<sup>11</sup> 14 girls had taken their own lives over the past few months in Bangladesh as a consequence of harassment they had faced. The problem is considered serious enough by the Ministry of Education that they have designated a special day, June 13, as 'Eve-Teasing Protection Day'. According to the Minister for Education, Nurul Islam Nahid, there were cases where female students had dropped out of school or had been encouraged by their parents to do so because they felt that their safety and honour were at

11 As reported by BBC News South Asia online on 11 June 2010, 'Bangladesh "Eve Teasing" craze takes a terrible toll.'

risk. In some places, schools had been shut down and exams delayed because of problems of stalkers harassing female students and teachers. The problem has also been acknowledged by the police at the highest levels: the Head of Police Nur Mohammed said that the harassment and the cases of suicide were ‘a cause for grave concern.’<sup>12</sup>

As with dowry-related violence, combating sexual harassment requires a concerted effort at all levels of government, by the police and by all justice providers, both formal and informal. There is potential here too for the government, with the support of or even active cooperation with NGOs, to work together with IJS providers to sensitize them, and through them local communities, to the prohibition on sexual harassment and to the need to take positive measures to bring the problem to light and to ensure that girls and young women do not keep silent due to a sense of shame, but be willing to speak up and to make complaints when harassment has occurred.

### **IMPROVING COMPLIANCE WITH FUNDAMENTAL LEGAL AND CONSTITUTIONAL STANDARDS IN TRADITIONAL (VILLAGE-BASED) *SHALISH***

The problems with traditional *shalish* from a constitutional, legal or human rights point of view are well known. One response to these problems has been to create alternate dispute resolution forums that offer a fairer justice process. The work of law and justice NGOs in rural Bangladesh has created healthy competition amongst justice providers and has had a positive impact on traditional *shalish* in those areas where NGOs have been most active.

The government’s response to local justice needs has been the creation of the Village Courts, although the initial motivation for their creation was probably to reduce pressure on the Districts Courts (and at the same time to bring the formal justice sector closer to ordinary people) than to provide an alternative to traditional *shalish*.

What has not been attempted to any significant degree, either by the government or by civil society, is to engage directly with village leaders and others providing IJS to try to incorporate fundamental legal and constitutional standards into *shalish* practices and procedures. It is quite common in pluralistic legal systems for IJS providers and representatives of the formal justice system to have little or no contact with each other. Distinctions in class, education and social outlook can lead to a tendency for representatives of the formal justice system to look down on IJS providers and to dismiss traditional IJS as primitive and unenlightened, a travesty of justice endured by the rural poor. The lack of organic links to the judiciary in the current setup of Village Courts does not contribute to breaking down these barriers.

A better approach would be if government at the central level were active in promoting positive engagement with IJS by all relevant ministries and agencies and those who work in them. The large majority of disputes are resolved through IJS and the government clearly does not have the resources to provide a viable alternative – or alternatives – to IJS that would ensure that key constitutional and legal principles were respected.

There is a tendency on the part of the government at all levels to ‘leave traditional IJS alone’ rather than to seek to positively influence existing practices through engagement with IJS providers, awareness-raising, training and so on. A passive approach to IJS is not sufficient if Bangladesh is to meet its international obligations. Positive measures are also required if ordinary people, not least women and vulnerable groups in local communities, are to have effective access to justice.

Positive measures to promote and to facilitate enjoyment of rights by participants in IJS are transformative and will take time to realize. But the government’s protection obligations, specifically to ensure that people involved in traditional IJS are not subjected to unlawful, cruel or degrading punishments, could be engaged immediately if there were sufficient will to do so. In the face of government inaction against the practice of issuing extra-judicial penalties in *shalish*, a number of Bangladeshi NGOs have taken legal action to seek to force local government and law enforcement agencies to protect people at risk and to punish those responsible.

<sup>12</sup> BBC News South Asia online, 11 June 2010.

For example, in a High Court judgment of 22 August 2009,<sup>13</sup> the court, responding to a public interest writ petition<sup>14</sup> filed by five human rights, women's rights and development organizations, issued a Rule Nisi on Government and the Inspector-General of Police as follows:

***“To show cause why their failure to act in a timely manner and to comply with their legal and constitutional duties to take effective measures to prevent the imposition and execution of extra-legal penalties, including by way of framing and adopting appropriate guidelines, directions or orders to all concerned authorities [...] should not be declared to be without lawful authority [...] and violative of fundamental rights as guaranteed in [...] the Constitution, and as to why [they] should not be directed to frame and adopt such guidelines, directions or orders as appropriate and to disseminate them through Bangladesh Television and Bangladesh Betar.”***

Further, the Court issued an interim order to government and law enforcement agencies and all UPs to “take immediate measures to investigate promptly any report received of the issuance and imposition of an extra-judicial penalty such as beating or lashing by any person or body [...] and to take appropriate measures against any found responsible, also to provide security and protection to any victim.”

In a subsequent High Court judgment,<sup>15</sup> handed down on 8 July 2010, the High Court went further and declared illegal all kinds of extrajudicial punishment including those made following the issuance of a *fatwa* by local religious leaders as part of a *shalish*. The court directed relevant authorities to take punitive action against people involved in enforcing *fatwa* against women.

Putting to one side the most heinous forms of extra-judicial punishment ordered by a minority of village *shalish*, there are also other forms of punishment regularly practiced that also contravene Bangladeshi law and rights standards: beating a guilty person with a stick or a shoe, various shaming rituals such as the necklace of shoes or blackening the guilty party's face, or temporary banishment of a person from the village. These practices are generally tolerated by local government and law enforcement officers. This may be because these practices also enjoy some support within local communities or because there is a general reluctance (or apathy) on the part of the government to interfere in village decision-making. Nevertheless, these forms of punishment are also unlawful and are an area where the government has an obligation to take positive measures to educate *shalishkars*, religious and community leaders on the requirements of national law. As has been seen in the case of other practices that have been legislated against, such as dowry and various forms of gender-related violence, it is not enough to legislate against practices that violate citizen's rights; there is also a need for concentrated awareness-raising and for prompt action by the police and local administration when norms are violated.

## **MOVING BEYOND PASSIVE COMPLIANCE WITH CONSTITUTIONAL AND HUMAN RIGHTS STANDARDS: TOWARD A NEEDS-DRIVEN LOCAL JUSTICE SYSTEM**

Despite the persistence of cruel practices in some traditional *shalish* and despite the ongoing exclusion of women – and children – from free, equal or meaningful participation, a large majority of people surveyed continue to prefer to have their disputes resolved within the local community. This can be explained in various ways, e.g., cost

13 Joint Press Release by Mohila Porishod, ASK, BRAC and Nijera Kori; ‘Extra-judicial penalties in shalish: High Court directs LGRD, Law-enforcing agencies and Union Parishads and Paurashavas to take immediate measures’, 22 August 2009.

14 The petition described an incident that had taken place in June 2009 where a women and man had been lashed 101 times on the order of village elders in Nobigonj, Habignaj, in a *shalish* held in the presence of a UP Chairman; a woman in Srimongol being lashed 101 times for speaking to a man from a different community; a woman in Sirajgonj being caned 100 times for daring to file a complaint of rape with the court; and a woman being whipped in public in August 2009 after refusing a relative's sexual advances.

15 ‘Fatwa illegal’, newspaper report in *The Daily Star*, 9 July 2010. The verdict was in response to three separate public interest writ petitions filed by BLAST, ASK, Bangladesh Mahila Parishad, BRAC Human Rights and Legal Services, and Nijera Kori.

and opportunity factors, fear of the police, lack of knowledge of the formal justice system, or a fear of the consequences that may arise if the *status quo* is challenged.

Given that traditional *shalish* is the forum in which the large majority of disputes arising in the country are resolved and that it will be likely to continue to be so for generations to come, it needs to be included in justice-sector policy development and service delivery programmes. This is not to say that IJS should be formally recognized in Bangladesh, but that the rights, interests and needs of those who, for the reasons described above, choose to seek resolution of disputes through IJS should be taken into account by the government in justice sector programming.

A first step is to identify and undertake measures that can improve the functioning of traditional IJS in their existing form. Where the operations of IJS, ingrained traditions and perceptions of justice are in conflict with fundamental legal and constitutional principles, the state should intervene in appropriate ways to protect people at risk and provide guidance and support to improve community awareness and the ability of *shalishkars* to resolve disputes in compliance with law.

A second step, however, is to go further than remedying obvious ‘malfunctions’ in the operation of traditional *shalish* and to promote and support efforts to reform community justice mechanisms so that they address the real justice needs of local people.

To take one example: the research undertaken on dowry-related domestic violence shows that very few women are willing to seek remedies; for the reasons discussed above, most choose to suffer in silence. For these women, neither the formal courts nor the police are realistic justice options. Domestic violence cases fall outside the jurisdiction of the village courts. If they live close to a district capital, they may be able to take their complaint to a women’s NGO, which can mediate on their behalf or assist them in obtaining formal legal redress. They could in theory seek justice through traditional *shalish*, which is also the most accessible forum and the one that is closest to their everyday life, but only if they can have confidence that their complaint will be taken seriously and they will not suffer reprisals. At present, however, no such confidence exists.

Since neither the NGOs nor the formal justice mechanisms have the capacity to absorb the need for justice of women at risk of violence, the traditional *shalish*, which exists in every village in Bangladesh, together with the village courts with an expanded jurisdiction, could, in time and with appropriate support, do something to fill the gap. This would require a major investment over a number of years by local government, justice sector and law enforcement agencies in partnership with legal services NGOs. It would draw attention to the plight of women at risk, emphasize that the law prohibiting violence against women must be enforced without exceptions and that village leaders have a responsibility, together with other justice sector actors at local level, to ensure that women and children at risk be protected, and that their right to obtain justice and a remedy be supported.

Put simply, dowry violence can never be solved by the formal justice sector alone. What is needed is to co-opt community leaders involved in IJS (and where necessary to first challenge discriminatory attitudes of these leaders towards women) so that they will adjudicate *shalish* cases in a different way, with a sense of justice for the position of women as well as for children and other vulnerable groups in the community. This process can be facilitated through the establishment of justice provider networks at the village and UP levels, bringing together traditional leaders, UP members, religious leaders, NGO representatives, the police and a representative from the District Court. These types of networks have been established with success in other countries where IJS are prominent. Despite the challenging structural dynamics, embedded power structures and political fault lines that exist in local communities, justice provider networks could be successfully established in Bangladesh as well.

## ASSESSMENT OF EXISTING PROGRAMMING AND GOVERNMENT INITIATIVES ON INFORMAL JUSTICE SYSTEMS

The 'Activating Village Courts' programme is the first major attempt by the government or by international cooperation partners to support state-side justice initiatives at the local level. The Village Courts have been in existence in their current form since 1976, but this is the first time that significant funds have been allocated by the government to equip VCs and those who work in them to carry out their function effectively. The programme will only reach 500 UPs, about 10 percent of the total number in the country, but, given that most VCs are currently not operating or operating only intermittently, the programme is a significant and important one.

If the programme is successful in activating village courts in the 500 UPs selected and in establishing effective and sustainable training, monitoring and evaluation mechanisms, then it can provide a catalyst for the activation of VCs across the whole country.

The research undertaken in this project demonstrates that, even where the VCs are functional, people prefer to have their disputes resolved through mediation rather than adjudication. There is a tendency to approach UP chairmen and members and to ask them to facilitate a *shalish* rather than to lodge an application with the VC. Given that this is the case, the programme should explore whether it would be desirable to amend the Act so as to formalize the ability of the VC to mediate cases as an alternative or as a precursor to adjudication.

If there is a shortcoming in the design of the programme, it is the lack of involvement of NGO informal justice expertise in the programme design and implementation. The experiences of MLAA in recent years in training and supporting VCs in Madaripur District illustrate the potential that exists for qualified NGOs and state justice institutions to enter into public-private partnerships.

As stated in The Asia Foundation's 2007 report on Community Legal Service Delivery in Bangladesh:<sup>16</sup>

***"The potential for interaction between informal and formal justice systems is not fully developed. While NGOs and public agencies enjoy collaborative working relations in education, public health and other development sectors, there are fewer examples in the justice sector. A number of innovations can strengthen public-private synergies. Examples include more efficient legal aid referral of cases for formal litigation that build on BLAST capacity and existing linkages, as well as community legal service technical support for enhanced village court capacity and community-oriented policing."***

NGOs such as MLAA, BLAST, ASK, SB and others have been providing or supporting justice solutions for people at local level for many years; they have considerable experience and enjoy both popular support and respect amongst local elites. They can provide training and other capacity-building services to VC members that could subsequently be incorporated into training curricula for VC magistrates to be developed by the MLGRDC, the judiciary and/or the MoLJPA. They also have the advantage that they are well established at the local level and can continue to provide training and support to the VC and to newly elected UP members, without any prior experience of mediation or adjudication of disputes, in the future.

<sup>16</sup> The Asia Foundation, 'Promoting Improved Access to Justice – Community Legal Service Delivery in Bangladesh', p. 47 ff.

## RECOMMENDATIONS FOR FUTURE PROGRAMMING FOR INFORMAL JUSTICE SYSTEMS

As part of the review of the existing Village Courts Act being carried out in connection with the 'Activating Village Courts' programme, consideration should be given to amending the act so that Village Court magistrates are required to comply with certain key constitutional and legal standards. A checklist of minimum legal norms to be observed should be distributed to all VCs, ideally in connection with basic training on law and human rights. The requirement for the court to comply with fundamental constitutional and human rights norms is necessary if the jurisdiction of the court is to be extended to include other civil and criminal matters, or if the existing financial limit of TK 25,000 is to be increased.

Consideration should also be given to extending the mandate of the VCs so that they can offer mediated dispute resolution as an alternative to or as a first step prior to adjudication. This would reflect what is already taking place on the ground.

Future government support for the operation of VCs must also include administrative and support functions within the UPs. Responsibility for providing training, logistical support and ongoing monitoring and oversight will require combined efforts from several agencies: the MLGRDC, the MoJLPA and the judiciary. If the VCs are to be activated and to operate effectively in all 5,000 UPs, this will also require a significant ongoing annual financial commitment from the government.

The current composition of the VC panels is not really satisfactory and it would be much better if the VC magistrates were not also currently serving politicians and local government officials. In the longer term, it would be better if independent magistrates were appointed to the VCs – retired school teachers, doctors or nurses, and other people in the community who are respected and who could take on the role of village court magistrate – with training and support from the government, for a renewable period of, for example, five years. The UP chairmen and members who sit as magistrates do so only for so long as they remain in the local government. By appointing judges from members of the local community, there is a better chance that capacity-building activities carried out by the government or by NGOs will remain within the institutional memory of the court; turnover of court personnel will be less frequent.

As regards the AC, consideration should be given to extending its jurisdiction so that it is also accessible to people from non-Muslim communities. Alternatively, a separate state-led rural justice body should be set up to provide remedies in family affairs for Hindus and other religious minorities.

Programmes of research into the normative, procedural and structural bases of traditional *Shalish* and the operation of primary justice more generally that take their outset in standards of constitutional and human rights (including the rights of children) and gender equality should be supported as part of a general engagement with justice for the poor.

At the central level, the police force has identified the need to be more actively engaged with local communities, through the introduction of community policing programmes, the creation of some pilot victim support units, and other initiatives. It will take some time before these new policies and programmes begin to have an impact on the ground. Law enforcement officers have a vital role to play in the oversight of traditional IJS and in providing effective protection and support for people at risk.

As discussed above, there are compelling arguments from rights, poverty reduction and access to justice perspectives for a more active and targeted government interest and involvement in IJS at the community level. Justice-sector policy and programming at all levels should take into account the existence of IJS and the government should engage with IJS providers and users to try to improve the quality of dispute resolution taking place at present and, in so doing, to provide better access to justice for the rural poor.

In this regard, the government together with cooperation partners should also consider how to actively harness the experience of legal services NGOs. Cooperation with NGOs would reduce the risk of duplication and of 're-inventing the wheel' in designing training and rights awareness programmes for village *shalish* providers.

Justice providers' cooperation forums, which have been established successfully in other countries, could be encouraged at the UP level and below, so as to improve linkages and flow of good practices between all of the justice and informal justice sector actors: village *shalishkars*, religious leaders, NGOs, UP members, judges, police and prosecutors.

One of the tasks of justice provider cooperation forums would be to educate, promote and maintain a collegial oversight over justice service provision by the various bodies represented in the forum. While there could be expected to be some initial resistance on the part of the judiciary or other formal agencies to sit in the forum, in the longer term it could be pivotal for transforming IJS procedures and practices at the village level for the benefit of all people living in rural communities.

# COUNTRY STUDY – ECUADOR

THE STUDY .....	223
BACKGROUND .....	223
METHODOLOGY .....	226
THE FORMAL JUSTICE SYSTEM AND ITS RELATION WITH INDIGENOUS INFORMAL JUSTICE SYSTEMS.....	228
TRADITIONAL LEADERS AND INDIGENOUS JUSTICE .....	235
USERS OF INDIGENOUS JUSTICE AND THEIR VIEWS .....	244
PROGRAMMING .....	249
FINDINGS AND RECOMMENDATIONS .....	251
ANNEX I – EXCERPT OF THE ORGANIC LAW ON THE JUDICIAL FUNCTION.....	253

## THE STUDY

This study mainly focuses on indigenous justice. As indigenous justice is becoming increasingly formalized through law in Ecuador, the working title of the present study was *Legal Pluralism and Intercultural Justice*, which would perhaps have been a more accurate title. Use of the phrase ‘informal justice’ in the final title was, however, finally maintained in order to give a certain uniformity among the six country studies. The continuum of formality to informality that is presented in the main report retains its analytical validity in relation to the systems studied in the present country study. No value judgment is intended by the use of the term ‘informal’.

## BACKGROUND

The relation between indigenous law and formal systems of law in Latin America has been debated for centuries. Central to this debate is the thinking of Bartolomé de las Casas (1484-1566), Bishop of Chiapas and Attorney General and Universal Protector of the Indians. Counter to the prevailing belief of the *Conquistadores*, he was of the opinion that Indians, as human beings capable of reason, had their own laws and government that should be respected by the Crown of Spain.<sup>1</sup> According to Yrigoyen Fajardo, the struggle for the recognition of indigenous law and legal systems has its roots both in the 16<sup>th</sup> century ideology of the natural inferiority of the indigenous

<sup>1</sup> In 1552, Las Casas published *A Short Account of the Destruction of the Indies* that was dedicated to then-prince Philip II of Spain and depicted the genocide committed against Native Americans.



people and the notion of the nation-state and state-law identity of the 19<sup>th</sup> century. In her view, recent constitutional reforms show a tendency toward the construction of multi-cultural states in the Andean countries.<sup>2</sup>

## THE ANDEAN REGION

The Republic of Ecuador is part of the Andean region, a region that is characterized by the presence of large indigenous populations that have generally been excluded from political life and public service.

Throughout the Andean region, new institutions of government – the Constitutional Assemblies – have been created. Bolivia and Ecuador have both witnessed large ethnic political mobilizations that have recently gained power and have helped define a new paradigm for state-society relations. Both countries have recently introduced new constitutions that reflect a human rights vision, inclusive perceptions of justice and the multifaceted composition of the countries. In Ecuador, constitutional reform goes beyond the concept of multiculturalism towards plurinationalism and intercultural approaches.

Moreover, there is a constitutional recognition of indigenous justice systems in Bolivia, Colombia, and Ecuador, among other countries in Latin America.

As concerns informal justice, the state's historical weakness in rural areas and the communal justice systems based in parallel community structures and indigenous cultures, some of which predate the national state, remain strong. Although some of the practices do not conform to human rights norms, they do form an accessible alternative to the formal justice sector, which is often complex and inaccessible in terms of hierarchy, formalities and indirect cultural discrimination.<sup>3</sup> According to Van Cott, "Large segments of Latin American society have existed outside the reach of the law for centuries, and there ha[ve] only been efforts to address this problem with adequate resources since the last decade. Informal systems are perhaps among the most necessary and constructive informal institutions in the region, given the extreme weakness of the formal institutions they replace or complement."<sup>4</sup>

In Bolivia and Ecuador, initiatives to reform the justice sector have recently been launched, one of the main issues being the constitutional recognition of indigenous justice and the moulding of institutions and administration of justice along the lines of both formal and informal justice. It should be added that reforms of the (formal) justice sector have been undertaken in the past 20 years. The 2009 Constitution of Bolivia, moreover, has specific provisions on indigenous native/aboriginal rural jurisdictions.<sup>5</sup> Other countries in the region, including Colombia and Peru, have developed models of constitutional and practical accommodation of local and indigenous justice provision that may exert some influence on developments in their neighbouring countries, despite political differences.<sup>6</sup>

## THE IMPLICATIONS OF RECENT REFORMS

The Republic of Ecuador has a population of approximately 12,150,000,<sup>7</sup> of whom approximately 830,000 have declared that they are indigenous and approximately 604,000 are Afro-Ecuadorian.<sup>8</sup> 12 percent of the population

2 Yrigoyen F., p. 32.

3 Defensoria del Pueblo de Perú, 2006.

4 Van Cott, 2003, p. 3.

5 The Political Constitution of Bolivia of 2009, Chapter 4 on indigenous native/aboriginal rural jurisdiction.

6 For a recent analysis of the relations between the justice systems in the Andean countries, see Córdor C., Eddie, ed. (2009), *Estado de la relación entre justicia indígena y justicia estatal en los países andinos: estudio de casos en Colombia, Perú, Ecuador y Bolivia*. Comisión Andina de Juristas.

7 A census was carried out in 2010, the final results of which are not available yet. Estimates are that the population numbers approximately 13,500,000 in 2011.

8 Plan Nacional para Eliminar la Discriminación racial y la exclusión étnica-cultural, p. 125. VI Censo de Población y Vivienda. Resultados Definitivos. Población que se declaró indígena, INEC, Noviembre 2001.

are indigenous according to the UN Special Rapporteur. 50.5 percent of the population are women and 3 of 10 Ecuadorians are youth, of whom 41.65 percent are between 19 and 24 years old.<sup>9</sup>

The estimated number of indigenous communities, peoples and nationalities varies considerably.<sup>10</sup> However, according to the Council of Nationalities and Peoples of Ecuador (*el Consejo de Nacionalidades y Pueblos del Ecuador*, CODENPE), there are 14 indigenous nationalities in Ecuador. Moreover, the *Kichwa* nationality consists of 18 peoples that maintain their identity in accordance with their customs, dialect, geographical placement and economic activities.<sup>11</sup> The *Kichwa de la Amazonia* live in the Amazon lowlands, whereas the other *Kichwa* nationalities mainly live in the provinces of the Highlands.

In the past 10 to 15 years, the questions of legal pluralism, ‘plurinationality’ or ‘democracy in diversity’<sup>12</sup> have emerged as central political issues. Moreover, the indigenous movement of Ecuador has gained more voice, not least because its organizations have brought indigenous peoples more firmly into politics and civil society<sup>13</sup> at a time when the consciousness of a specifically Latin American identity and set of aspirations has been high on the political agenda.<sup>14</sup> Iturralde claimed in 1995 that the management of social transformations cannot ignore, as it has in the past, the presence of actors who are organizing to recover and strengthen their ethnic and cultural identities, nor can it disclaim the legitimacy of their demands or disregard the dynamism of their organizational structures.<sup>15</sup> One of his points was the need for constructive inter-ethnic and intercultural dialogue in connection with judicial system reform, governance and representation, etc.

## THE LAW AND JUSTICE FRAMEWORK

As concerns justice, the Constitution of Ecuador of 1998 sought to ensure the basic guarantees of due process.<sup>16</sup> Moreover, Article 191 recognized that

***“The authorities of indigenous peoples exercise justice functions, applying their own norms and procedures for the solution of internal conflicts in conformity with their customs and customary law, in as much as they are not contrary to the Constitution or the laws.”<sup>17</sup>***

Although foreseen in the 1998 Constitution, legislation on the compatibility of the justice systems was not created,<sup>18</sup> despite ideas such as the proposed Bill on the Justice Functions of the Indigenous Authorities of Ecuador.<sup>19</sup> However, a Law on Arbitration and Mediation was passed on the establishment of mediation centres in indigenous and Afro-Ecuadorian communities and local associations.<sup>20</sup>

Reform processes in Ecuador led to changes to the Constitution, to the institutional framework of government, and the relationship between the indigenous movement and the Government of Ecuador. Thus, the National Congress (parliament) was suspended and a Constitutional Assembly was elected on 15 April 2007, with reform of

9 CEDAW

10 Garcíá, 2000, p. 94.

11 The National Plan for the Elimination of Racial Discrimination and the Ethno-Cultural Exclusion, p. 22.

12 Acosta and Martínez, 2009.

13 There is also the Organizational Act for Public Institutions of Indigenous Peoples defining themselves as Ancestral Nationalities, which entered into force in September 2007.

14 Maybury-Lewis, Macdonald and Maybury-Lewis, 2009, p. 17.

15 Iturralde, 1995, p. 12.

16 As recognized in international instruments, laws or jurisprudence. 1998 Constitution, Article 24.

17 Unofficial translation of Article 191, 4) of 1998 Constitution.

18 ECUARUNARI, 2008, p. 16.

19 Justicia Indígena – Aportes para un debate, Judith Salgado Compilador, p. 157.

20 Ley de Arbitraje y Mediación, Título III de la Mediación Comunitaria.

the Constitution as one of its main objectives. On 14 July 2009, an Organic Law was passed, thus formally creating a new law-making organ, the National Assembly.<sup>21</sup>

The fundamental change brought by the 2008 Constitution is the adoption of the neo-socialist doctrine ('21<sup>st</sup> century socialism') that will lead national norms, plans and policies. According to this doctrine, the role of the state has changed, as have the rights and obligations of citizens.<sup>22</sup> The recognition of international human rights instruments ratified by Ecuador has been maintained<sup>23</sup> and these can be directly applied in any national court. Moreover, Ecuador recognizes and obliges itself to protect and guarantee the full exercise of human rights to every person within its jurisdiction. In addition, Article 11. 2. of the Constitution of Ecuador establishes that "all persons are equal and enjoy the same rights, duties and opportunities"<sup>24</sup> and Article 275 outlines that "the state shall plan the development of the country in order to guarantee the exercise of rights, the attainment of the objectives of the development regime and the principles dedicated in the Constitution."<sup>25</sup>

The right of indigenous communities to exercise their own justice system and the outcome of justice provision, within their own territory, has been recognized by the Constitution of 2008. The implications of this provision are discussed in subsequent sections below.

In March 2009, a new Organic Law on the Judicial Function entered into effect. At the planning level, the National Plan for Development 2007-2010 and the National Plan on the Elimination of Racial Discrimination and Ethnic-Cultural Exclusion 2009-2012 are central to justice – both formal and informal – and to this study. All three are mentioned below in the section referencing the Justice System.

## METHODOLOGY

In Ecuador, formal justice is referred to as 'ordinary justice', whereas 'indigenous justice' is justice that covers a broad spectrum of ancestral justice, customs and other types of community-based justice among indigenous peoples. There are also other forms of 'informal justice' measures such as mediation and arbitration, which are not to be compared with indigenous or communal justice, etc. The Ecuador study mainly addressed indigenous justice and its relation with formal justice. It should be stressed that there is not one singular form of indigenous justice or indigenous justice provision. Each nationality, people and even community has its particular justice system, which makes it very difficult to look at them from a 'generalized perspective'. The present study thus looks at a few peoples and communities of *Kichwa* nationality and it therefore does not address all forms of IJS or indigenous justice systems in Ecuador.

In the communities visited, the religious leaders did not appear to be involved in the provision of justice. Nevertheless, community members are often very religious<sup>26</sup> and will go to the priest for assistance with issues. The political deputy (*el teniente politico*) used to have an adjudicative function as an investigating judge as well as being the government executive on the parish council. This function disappeared with the 1998 Constitution. The political deputy is a civil servant and as such represents government administration at the local level. It is in this capacity

21 Organic laws regulate the organization and activities of the main bodies of the government and the exercise of fundamental human rights and freedoms. All laws that are not covered by the above definition can be considered as ordinary. Organic law prevails over ordinary law and must be approved, reformed or abolished by absolute majority of the National Congress/Assembly.

22 Globalex, updated version of 'The Basic Structure of the Ecuadorian Legal System and Legal Research' by Maria Dolores Miño. The main principles are that Ecuador is a constitutional state that functions under the principles of the fundamental rights and social justice. Ecuador is self-defined as a sovereign, unitary, intercultural, plurinational state. Spanish is the official language. Kichwa and Shuar are official tongues to be used in intercultural exchange. The state's duties are to foster and protect human rights, strengthen national sovereignty and unity, eradicate poverty, foster development and a culture of peace.

23 This was also the case in the 1998 Constitution.

24 Unofficial translation.

25 Unofficial translation of Article 275 of the 2008 Constitution.

26 Catholicism and Protestantism are the most common religions.

that the deputy is recognized by the indigenous leadership. Presently, community members might seek to solve a problem with the help of the political deputy; however, during the mission it was not possible to determine the kind of problem or the way in which the deputy could be of help. Thus, the study concentrated on the indigenous justice system as such.

The study in Ecuador entailed a desk study, the collection of quantitative and qualitative data and information, the analysis of data and information accumulated and, finally, the drafting of the report.

The collection of data and information was carried out under the supervision of Fernando García-Serrano, Anthropologist, FLACSO – Quito, who has extensive research experience in the field of indigenous issues and legal pluralism in Latin America. The initial plan was to study two provinces of Ecuador, Pastaza in the Lowlands and Tungurahua in the Highlands. However, as the indigenous leaders in Pastaza required that any study carried out should be of direct use to them and that this might not be case with this study, it was decided to study the Highlands only. Approximately 96.4 percent of the indigenous people in Ecuador are Highland Kichwas.

The provinces of Chimborazo and Tungurahua were thus identified for the study. The Tungurahua province is divided into 9 *cantones* that are divided into parishes (urban, rural) and the parishes are divided into neighbourhoods, *ciudadelas*, etc. The 2001 census established that there are 441,389 inhabitants, of whom 40 percent are indigenous, 40 percent are white and 20 percent are mixed. 60 percent of the population live in rural areas.<sup>27</sup> The Chimborazo Province consists of 10 *cantones* and 61 parishes.<sup>28</sup> The 2001 census established that there are 427,517 inhabitants, of whom 58 percent are indigenous and approximately 60 percent of whom live in rural areas. Both provinces host development projects, mainly in the areas of infrastructure (water, schools, etc.), health and primary education. Governance and human rights projects are relatively few. Due to the concentration of indigenous people and culture, the populations in both provinces have been the subject of anthropological and sociological study and research.

The collection of data and information was carried out from June to September 2009 as follows:

- Interviews were conducted by Nuria Vehils and Annali Kristiansen (DIHR) with state institutions, ministries, UN agencies and civil society associations mainly in Quito in June 2009.
- Quantitative data was collected by Veronica Lligalo of Ambato, Province of Tungurahua and by Maria Béatriz Guzman of Riobamba, Province of Chimborazo in August 2009.
- Individual interviews and focus groups were conducted at the community level with leaders and the population and with authorities and institutions at the provincial level in Tungurahua and Chimborazo. The interviews were carried out by Annali Kristiansen (DIHR) with the assistance of Veronica Lligalo and Maria Béatriz Guaman.
- Written sources by and for the community (such as community rules) were not consulted in the present study.

This was followed by processing of the quantitative and qualitative data and subsequently the drafting of the report in 2010.

27 According to the Plan Nacional para Eliminar la Discriminación Racial y la Exclusión Étnica-cultural/ National Plan on the Elimination of Racial Discrimination and Ethnic-Cultural exclusion 2009-2010 64, 708 (14.08 per cent of the province) of the population declared themselves indigenous in the 2001 census, p. 125.

28 According to the Plan Nacional para Eliminar la Discriminación Racial y la Exclusión Étnica-cultural/ National Plan on the Elimination of Racial Discrimination and Ethnic-Cultural exclusion 2009-2010 153,365 people (38 percent of the province) declared themselves indigenous in the 2001 census, p. 125.

# THE FORMAL JUSTICE SYSTEM AND ITS RELATION WITH INDIGENOUS INFORMAL JUSTICE SYSTEMS

## THE JUSTICE SYSTEM, REFORM AND POLICY

The formal justice system of Ecuador has undergone various reforms in the past two decades. In order to meet international standards, the 1998 Constitution introduced two major reforms of the judiciary,<sup>29</sup> namely, that the criminal procedures were to follow the accusatory system rather than the inquisitorial system and that all national tribunals would be part of the judiciary. Therefore, the abolition of separate police and military tribunals, and the integration of these, as well as minors' tribunals, into the judicial branch had been foreseen at the adoption of the 1998 Constitution. By 2008, only the minors' tribunals had been integrated however. The 2008 Constitution abolished the military and police tribunals. Thus, these reforms established a unitary judicial system where only the bodies of the judicial branch can exercise jurisdiction.

A new Organic Code on Judicial Functions was published on 9 March 2009, the preamble of which underscores that, "The current Organic Law on the Judicial Function promulgated in the official registry 636 of 11 September 1974 is absolutely incompatible with the constitutional norms and international human rights standards and Administration of Justice, and does not meet the social reality of Ecuador in the 21<sup>st</sup> century."<sup>30</sup>

On 22 October 2009, an Organic Law on Jurisdictional Guarantees and Constitutional Control was published that develops the principles and procedures needed to make the constitutional actions to defend rights and also established the competencies of the Constitutional Court to guarantee constitutional supremacy. Since April 2010, a bill on guarantees in penal justice has been debated. The overall idea is to address penal norms in relation to the Constitution and international human rights law, to create coherence between penal norms and to make penal law and procedure more contemporary.

Ecuador has thus embarked on a thorough reform of the formal justice system. In addition to the formal recognition of the Rule of Law by the Constitution,<sup>31</sup> the purpose of the reform is to enhance the quality and reach of the justice system. Current endeavours entail a reorganization of the system that provide for change in the long term. One example is the creation of a 'judicial school' for the training of professionals of the judiciary, in order to enhance the quality of the justice system.<sup>32</sup> This is in line with policy 9.3. of the National Development Plan (please see the section on programming).

The National Development Plan (2007-2010) includes the Promotion of Access to Justice and objective 9 consists of five policies that address issues such as legal training for citizenship, legal pluralism that respects human rights, the judicial function and the national system of social rehabilitation, and gender violence and abuse of children. Several strategies have been developed to implement these policies. Of particular interest is policy 9.2, which provides that, "A multicultural state shall respect the values and principles of the different communities that live in

29 <http://www.nyulawglobal.org/globalex/ecuador.htm#V>, accessed April 2010.

30 Unofficial translation.

31 2008 Constitution, Article 1.

El Ecuador es un Estado constitucional de derechos y justicia, social, democrático, soberano, independiente, unitario, intercultural plurinacional y laico. Se organiza de forma de república y se gobierna de manera descentralizada.

La soberanía radica en el pueblo, cuya voluntad es el fundamento de la autoridad, y se ejerce a través de los órganos del poder público y de las formas de participación directa previstas en la Constitución.

Los recursos naturales no renovables del territorio del Estado pertenecen a su patrimonio inalienable, irrenunciable e imprescriptible.

32 The details are outlined in the 2009 Organic Law on the Judicial Function.

society, without altering the principles that protect and promote human rights. Dialogue shall be supported and conflicts shall be overcome through the free will of the parties.<sup>33</sup> The above could indicate that there is political will to reconcile the various forms of justice.<sup>34</sup>

It should be added that other policies are also important in creating access to justice in Ecuador, not least the national policies concerning gender equality, violence against women, abuse of children, etc. Most of these policies address the formal justice system.

Since the 1980s, women's rights have been on the agenda in Ecuador. The main efforts have addressed women in general and not indigenous women in particular. Examples of recent legislation that concern women are the Law on Elections, which, in Article 58, provides special measures to include women on the electoral list, and the Law on Violence against Women and the family.<sup>35</sup>

The rights of the child have in recent years been given more attention by Ecuadorian government and state bodies. The Childhood and Adolescence Code (2003) provides that a child, of either sex, is a person who has not yet achieved the age of 12. An adolescent, of either sex, is a person between the ages of 12 and 18. This legislation also means that any national endeavour in this regard addresses the age-groups (a) children under 6, (b) children between ages 6 and 11, and (c) adolescents between ages 12 and 17.<sup>36</sup> This definition is thus somewhat different from the definition in the Convention on the Rights of the Child (CRC), which defines a child as every human being below the age of 18 years unless majority is attained earlier according to applicable law.<sup>37</sup> Article 7 of the Code guarantees the rights of indigenous and Afro-Ecuadorian children and adolescents to develop in accordance with their culture and within a framework of inter-culturality, in conformity with the Constitution and as long as the cultural practices do not violate their rights. The principle of the best interest of the child is outlined in the Code along with an indication that this principle is superior to that of ethnic and cultural diversity (Article 11). Article 34 concerns the right to cultural identity.

As concerns the reach of the formal justice system, the National Plan on the Elimination of Racial Discrimination and Ethnic-Cultural Exclusion 2009-2012 observes that, although the law implies the principles of non-discrimination and equality in access to justice, experience shows that certain groups of persons, in particular victims of racial discrimination, do not have access to justice or do not have access on an equal footing with the rest of the population.<sup>38</sup> Moreover, the most probable hypothesis is that justice users are not counted among the population of little income, limited education, or who live in marginalized and remote areas of Ecuador. In other words, some social groups cannot access justice or make their human rights effective (both in the administration of and access to justice).

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33 They include:

- The promulgation of the law on the strengthening of the national system of the Public Defender
- The promulgation of a law on the articulation of the justices that, safeguarding the ancestral customs and the exercise of the jurisdiction on behalf of the authorities of the nationalities and peoples, permits the reconciliation of this justice with the common jurisdiction in fulfilling the international obligations of Ecuador in regard to the ILO Convention No. 169.
- The promotion of the use of alternative mechanisms of resolution
- The promotion, discussion and passing of the Law on Peace Jurisdiction.

34 Unofficial translation of the Plan Nacional de Desarrollo, pp. 229-236 and p. 338.

35 UNIFEM-UNICEF-OACNUDH, 2008, p. 55.

36 CRC/C/ECU/4 of 10 July 2009, Article 4 of the Code on Childhood and Adolescence.

37 CRC Article 1.

38 Unofficial translation, *Plan Nacional para Eliminar la Discriminación Racial y la Exclusión Étnica-cultural / National Plan on the Elimination of Racial Discrimination and Ethnic-Cultural Exclusion*, 2009-2010, p. 26.

## LEGISLATION AND STATE POLICIES DEFINING RELATIONS BETWEEN LEGAL ORDERS

Recent legislation seeks to define inter-linkages between the legal orders. The formal recognition of the Rule of Law(s) by the Constitution<sup>39</sup> means that several types of justice have come into play and with greater legitimacy than before. A study financed by OHCHR, UNICEF and UNIFEM indicates that, “According to the indigenous organizations, the national judicial system functions as an official state system, whereas indigenous law – understood as the ‘juridical protection’ by the indigenous peoples (pueblos originarios) and administration hereof – in general works in a clandestine way. Although there is a constitutional norm that declares rights, there is no regulation of their application, jurisdiction and competency to administrate justice.”<sup>40</sup>

The 2008 Constitution enshrines norms relating to indigenous peoples and Afro-Ecuadorian communities, in which self-determination, self-government, participation and indigenous justice are recognized and protected. With the fundamental rights come the correlative obligations that are also guaranteed to all citizens. One remarkable responsibility is the standard set by indigenous peoples: “ama killa, ama llulla, ama shwa” (one must not be lazy, one must not lie, and one must not steal).

Article 171 of the 2008 Constitution provides that indigenous justice is administered within the territory of indigenous communities, peoples and nationalities, and the state guarantees that indigenous justice decisions are respected by the public authorities and institutions as follows:

***“The authorities of the indigenous communities, peoples and nationalities will exercise jurisdictional functions, based upon their ancestral traditions and law, within their territorial area, with the guaranteed participation of and decision by women. The authorities will apply their own norms and procedures for the solution of their internal conflicts, and which are not contrary to the Constitution and the human rights recognized in international instruments.***

***The State guarantees that the decisions of indigenous jurisdiction will be respected by the public institutions and authorities. The said decisions will be subject to constitutional control. The Law will establish mechanisms of co-ordination and co-operation between the indigenous jurisdiction and the ordinary jurisdiction.”***<sup>41</sup>

Thus, decisions of these judicial organs are binding. They should respect the Constitution and international human rights standards.<sup>42</sup> Moreover, enforcement shall be respected by public and state institutions. In addition, decisions are subject to constitutional control.

Reportedly, this constitutional control will be carried out by an appeal tribunal composed of both indigenous authorities and state judges. At the time of the field study, it was not possible to ascertain whether the constitutional control mechanism was in fact in place and whether it had been used. The Organic Law on Judicial Guarantees and Constitutional Control introduces a slightly different mechanism of “Extraordinary Protective Action against Decisions of Indigenous Justice” regarding any decision that might violate rights that are constitutionally guaranteed or discriminatory against women (Articles 65-66, see below).

39 Art. 1 El Ecuador es un estado constitucional de derechos y justicia.

40 UNIFEM-UNICEF-OACNUDH, 2008, p. 77. It should be noted that the report is likely to have been written before the 2008 Constitution.

41 Unofficial translation.

42 This is repeated in the Article 343 of the Organic Code of the Judicial Function, which also states that it cannot be argued that customary law can justify the avoidance of any sanction of violation of women’s human rights.

In this regard, this provision of the Constitution does not appear to lay down any jurisdictional limits based on subject matter. At first sight, it would thus appear that the indigenous jurisdiction may include responsibility for serious criminal offences, as is the case in some other countries in the region. While other constitutional provisions might possibly have the effect of placing limitations in this regard, questions of this kind remain largely unanswered at the time the study visit and writing took place.

Interviews carried out with formal justice providers and representatives as well as the UN indicated that an issue to be clarified is whether the different forms of justice are on par/considered equal, form part of a continuum of justice or are separate and/or complementary.

The constitutional provision would appear to impose limits on the territorial jurisdiction of the indigenous IJS (“within their territorial area”). Issues of boundaries could arise in this regard. At the time of writing, it was unclear to what extent the personal jurisdiction of the IJS could extend to non-indigenous persons, whether state agents could be excluded from the scope of personal jurisdiction, etc. As discussed later in this study, there are indications that, in practice, non-indigenous persons do resort to the IJS for resolution of disputes. Whether they can be obliged to do so by indigenous IJS is as yet unclear.

The requirement that the norms and procedures of indigenous jurisdiction conform to the Constitution and to international standards of human rights is noteworthy. In addition, the fact that the rights of women are specifically mentioned is remarkable. It is reported that the importance of considering the rights of the child is debated, although the absence of the rights of the child in the text may be noted. The Organic Law on Judicial Guarantees and Constitutional Control,<sup>43</sup> however, allows for any person who is not in agreement with the decision reached by the indigenous authority in the exercise of its judicial functions, to go to the Constitutional Court in order to contest any violation of the rights guaranteed constitutionally or the discrimination of a woman for being a woman.<sup>44</sup>

It remains to be seen, however, how the judiciary and legislature will interpret the relationship between individual and collective cultural rights. Chapter VI on human rights in the main report briefly discusses relevant jurisprudence in Colombia, where the Constitutional Court, in one case, found that only a limited number of the most serious human rights violations, as well as other compelling national interests, could override the collective cultural rights and constitutional autonomy regime. The view of the court in that country was that cultural rights and indeed cultural survival were a national interest that, perhaps in the light of the many threats that indigenous peoples and communities are facing, overrode some other human rights, especially those of a procedural character relating to fair trial. It remains to be seen whether developments in Ecuador will take the same direction.

The requirement of legislation to clarify relationships and coordination between the two systems is made clear by the constitutional article, but, as noted, the similar requirement in the 1998 Constitution went unfulfilled for almost a decade, as did a similar requirement in the 1991 Constitution of neighbouring Colombia, as discussed in the main report. If legislation is not forthcoming on the issue, it will be left to the higher judiciary to fill the gap based on particular cases rather than political decision-making. A bill on the relation between the ‘systems’ was foreseen for 2009. The bill on Coordination and Co-operation between Indigenous Justice and Ordinary Justice (formal justice) is being prepared as part of the policies of the Undersecretary of Regulatory Development and the Ministry of Justice, Human Rights and Worship to create intercultural dialogue. The preparations include prior consultation and debate with indigenous organizations as a means of reaching consensus on the bill.<sup>45</sup> This bill has been delayed and it has not been possible to ascertain whether the bill has been presented yet (June 2010).

43 2009 Organic Law on Jurisdictional Guarantees and Constitutional Control.

44 Chapter IX on Extraordinary Protective Action Against Decisions of Indigenous Justice, Articles 65 - 66.

45 Consolidated UN comments to final draft of report (UNIFEM Andean Office).



The Organic Law on the Judicial Function of 2009 does outline some aspects of the relations between the systems. The initial implementation of this law takes place in the period 2009-2011. It addresses the relations between the functions of indigenous and ordinary justice to a certain extent<sup>46</sup> as follows:

- The exercise of indigenous justice should guarantee the participation and decision of women. To solve internal conflicts, the (indigenous) authorities apply norms that are not contrary to the Constitution and human rights, and customary law may not be resorted to as a justification for violating the rights of women.<sup>47</sup>
- The principles of inter cultural justice are: diversity, equality, *non bis ne idem*, pro indigenous jurisdiction and intercultural interpretation.<sup>48</sup> They are defined as follows:
- The actions and decisions of judges, prosecutors, defenders and other agents of the judiciary, police and other public officials will observe the following principles in the processes of justice:
  - a. Diversity – The law, customs and traditional practices of indigenous communities and peoples must be taken into account, with the aim of guaranteeing the maximum recognition and the full realization of cultural diversity.
  - b. Equality – The authority concerned will take the necessary measures to guarantee the understanding of the norms, procedures and legal consequences of the decision in proceedings involving indigenous persons and collectivities. They will therefore make use of, among other means, the procedural intervention of interpreters, experienced anthropologists and specialists in indigenous law.
  - c. *Non bis in idem* – The acts of the authorities of indigenous justice may not be tried or reviewed by judges and judges of the judiciary or by any administrative authority at any stage of the proceedings brought to their knowledge, without prejudice to constitutional review.
  - d. Pro indigenous jurisdiction – In case of doubt between the jurisdiction of the ordinary courts and that of the indigenous instances, the latter is preferred in order to ensure the maximum autonomy and the least possible intervention.
  - e. Intercultural interpretation – Where persons or indigenous communities are present, the legal rights in dispute will, at the time of judicial action and decision, be interpreted cross-culturally. Consequently, efforts will be made to take cultural factors related to the customs, traditional practices, norms and procedures of peoples', nations', communities' and indigenous communities' own laws, in order to implement the rights enshrined in the Constitution and international instruments.<sup>49</sup>
- In addition, it is possible for judges to decline the exercise of jurisdiction whenever there is a petition from the indigenous authority regarding a case that has been submitted to the indigenous authority. Within three days, the indigenous authorities must prove the pertinence of such a petition. Should the statement be accepted by the judge, then the case should be referred to indigenous justice.<sup>50</sup>
- As concerns the promotion of intercultural justice, the Judicial Council will determine which resources are necessary for the coordination and co-operation between indigenous justice and formal justice. This includes training of civil servants who work in areas where indigenous persons predominate. The Judicial Council does not exercise authority, government or administration in respect to indigenous justice.

This actual application and effect of the law cannot be assessed at this early stage, as concrete application and thus jurisprudence can only be developed over time. The interviews carried out with formal justice providers and

46 Title VIII of the law, excerpt in Annex I

47 Article 343, Organic Law on the Judicial Function, excerpt in Annex I

48 Article 346, Organic Law on the Judicial Function, excerpt in Annex I

49 Unofficial translation of Article 344 may be found in the excerpt in Annex I.

50 Article 345 of Organic Law on the Judicial Function.

representatives as well as the UN indicated that an issue to be clarified is whether the different forms of justice are considered equal, form part of a continuum of justice or are separate and/or complementary.

As described later in this country study, practice would seem to indicate that it is rare for IJS to handle more serious criminal cases, though there are exceptions. Given this background, it is perhaps surprising that the constitutional provisions do not explicitly provide for this limitation, which would accord with the recommendations of the UN Human Rights Committee (see the main report).

## LINKAGES IN PRACTICE

The opinion often encountered among indigenous communities is that the formal system does not provide justice, is expensive, tedious and time-consuming, and does not serve the indigenous communities. In the case of the present study, there is a high level of co-existence of systems. Interviews revealed that community leadership is focused on keeping justice and justice-related issues within the community.

As seen in the analysis in subsequent sections of this study, informal practices exist whereby users, providers and leaders more generally recognize the occasional limitations of IJS in certain areas (serious criminal cases, recidivism, non-respect of IJS' decisions, inter-communal land disputes, fatal car accidents and, sometimes, marital break-up) and therefore resort to the formal system.<sup>51</sup> The communities are mainly in touch with the police that carry out investigations. Some interviewees mentioned contacting the police if relevant and particularly the traffic police were mentioned. The police related that they will act when they are contacted, although they are aware of a lack of confidence in the formal system, due to the bureaucracy and the language. The police work on the basis that one law applies to all. It appears that they have only general knowledge of indigenous justice and that the most usual contact is through exchange of information.

Present-day community leadership shows little evidence of functional linkages, which may be connected with historical facts, such as the introduction of the 1937 law and traditions. It may also be part of an effort of the indigenous communities and peoples to ensure that their culture and identity are maintained. One study shows a perception that indigenous justice functions clandestinely, which may also be an issue.<sup>52</sup>

It is as yet unclear whether the wording of the 2008 Constitution could be used as a basis for rules adopted in the framework of the indigenous legal order that would attempt to prevent and punish women or other members of the community for resorting to the formal justice system. The tenor of the constitutional provision and the principles cited earlier in the present study would not seem to preclude such attempts, though the provisions on women's rights – including the control mechanism of any decision that might violate rights that are constitutionally guaranteed or discriminatory against women (see above) – would seem to demand that there be no discrimination based on gender in relation to the rights and remedies available to persons. This, like many other issues related to IJS, remains uncertain.

## OUTREACH INITIATIVES OF THE FORMAL JUSTICE SYSTEM

### INDIGENOUS PROMOTERS OF THE OMBUDSMAN

The Ombudsman, or '*Defensoría del Pueblo*',<sup>53</sup> can receive complaints, which that office then refers to the competent bodies with a request for sanction.<sup>54</sup> It can express opinions regarding mainly administration and legislation; it can observe cases and ensure that they are correctly handled and that due process is respected, although it is

51 Donna Lee Van Cott, 2003, p. 7.

52 UNIFEM-UNICEF-OACNUDH, 2008, p. 77.

53 2008 Constitution, Articles 214-216

54 CRC/C/OPSC/ECU/Q/1/Addendum 1, paragraph 16.

not an alternative to the formal justice system and is not used as such. The Office of the Ombudsman has created an Indigenous Justice Unit and there are 40 promoters selected by their communities who have been trained and work voluntarily in the provinces. The promoters have credentials and work according to a set of rules.

There are also other promoters, such as the Afro-Ecuadorian promoters, who specifically work with their communities.

### Indigenous Public Prosecutors *Fiscales Indígenas*

Indigenous Public Prosecutors, or '*Fiscales Indígenas*', and similar justice operators have in recent years been introduced in some Central American countries. In Ecuador, Articles 194-197 of the 2008 Constitution establish the *Fiscalía General del Estado* (Public Prosecutor). Through an inter-institutional agreement, the Public Prosecutor's office with support from CODENPE (*Consejo de Desarrollo de las Nacionalidades y Pueblos del Ecuador*, established in 1998) has since 2007 established 11 Indigenous Prosecutor Units in some provinces of Ecuador. According to the office of the Public Prosecutor, one of the objectives is to integrate various forms of justice and to diminish the incidence of types of so-called indigenous justice that have appeared due to the limitations of the formal justice system.<sup>55</sup>

The offices of the *Fiscales Indígenas* (FIs) are supposed to form a nexus between the formal and the informal systems.<sup>56</sup> They act as a diversion office referring relevant cases to the formal system. Also, they verify whether decisions made by the Indigenous Justice Forums are in compliance with the national legislation and human rights standards. The FI were created in accordance with agreement No. 064-MFG-2007 and before the current reform of the justice sector.

This leads to the question of the role and responsibilities of the *Fiscal Indígena*. The FI is a graduate of law, who, due to his ethnicity, has an understanding of indigenous justice, speaks the local language, etc. The FI can provide a link between indigenous persons and communities and the formal system, but is apparently not employed on the same terms as other civil servants.<sup>57</sup> The result is a challenging professional position that requires knowledge of at least administrative, civil, criminal and tax law and covers an area (a province) where the majority of inhabitants are indigenous communities in rural areas.

Interviews with FIs showed that they are aware of human rights and they use community relations to solve problems that they might encounter. FIs are also called upon to help solve problems, acting to a higher degree as mediators and arbitrators than as public prosecutors. Interviews revealed that the role of the FI is unclear.

It is understood that the FI are a type of 'mediator' between formal and indigenous justice. FI are meeting the challenges of their position, although the role and responsibility of this unit – in particular in relation to the Organic Law on the Judicial Function – require further consideration. The question is also whether they are correctly placed to face the challenges that they in fact handle (mediation and arbitration, as opposed to prosecution only).

### Mediation and Justices of Peace

The other mechanisms of conflict resolution are justices of the peace<sup>58</sup> and mediation.<sup>59 60</sup>

Inspired by the Peruvian experience, justices of the peace are a recent innovation in Ecuador and, although they are mentioned in the Constitution, interviews confirmed that "there are no peace judges" or that "peace judges do not work".

55 See <http://www.fiscalia.gov.ec>

56 The function of *fiscales indígena* has also been created in Guatemala and Costa Rica in recent years.

57 Not a civil servant as such, but employed on a short-term contract.

58 2008 Constitution, Article 189.

59 2008 Constitution, Article 190.

60 Globalex, updated version of 'The Basic Structure of the Ecuadorian Legal System and Legal Research' by Maria Dolores Miño.

As concerns mediation, interviews with formal justice providers stressed that there are mediation centres and that they are used. Since 1998, the *Projusticia* Programme of the Ministry of Justice and Human Rights has supported the creation of Mediation Centres in some cities of Ecuador with support from multilateral and bilateral development partners. The centres function according to a set of rules and mediation guidelines and according to the *Projusticia* Programme and provide a useful alternative to formal justice. The Mediation Centres were not mentioned in the community interviews, although this may be due to the fact that the study was mainly conducted in rural areas, whereas the Mediation Centres are situated in towns.

## TRADITIONAL LEADERS AND INDIGENOUS JUSTICE

### BACKGROUND

In the communities surveyed (Kichwa), the population has inhabited the area since prior to Spanish colonial rule. In the communities, it is the *ayllus* (a network of families in a given area and a form of government), the *parentesco* (the kinship groups), and productive units that are the social nucleus of organization and reference.<sup>61</sup> Inspired by Laura Nader's analysis, Fernando García-Serrano underscores that the social system of the Kichwa not only serves to maintain social order and control, but also serves as a power system that resolves or exacerbates issues concerning interests, individual and social rights and obligations and produces conflicts.<sup>62</sup>

Colonial rule had an impact on indigenous justice. In some cases, indigenous law was destroyed and, in others, "Colonial administrators tolerated the normative, administrative and jurisdictional activities of indigenous authorities to manage minor, internal matters confined to spheres that did not impinge on 'divine and human law'. Indigenous authorities served as useful intermediaries between colonial authorities and the native population and an efficient means of social control."<sup>63</sup> In addition, the *cargo* system was introduced under colonial rule, whereby members, usually men, hold a series of *cargos* of increasing responsibility in the community.<sup>64</sup>

In the 19<sup>th</sup> century, there were a few 'free indigenous communities' and communities that were subjugated to the local landowner. In the second case, the local landowner (*el patron de la hacienda*) was the daily and permanent representative of power, who exercised power within the *hacienda*, regulated social relations and acted as an intermediary between state authorities and workers at the *hacienda*.<sup>65</sup> Moreover, the local landowners created a leadership system, the representatives of which were elected by government officials and business owners, as a means of ensuring an indigenous workforce for the use of the *haciendas*, for example. The system included a *varayuk* (*baston de mando* – the authority), a captain, a lieutenant, a henchman and a mayor (*un alcalde*, formerly both mayor and judge).

In 1937, the *Ley de Comunas Indígenas y Campesinas de 1937* replaced the above system and came to constitute one of the main sources behind the current leadership structure of the indigenous communities. It includes the chairman, the deputy chairman, the treasurer, the secretary and the member(s).<sup>66</sup> The highest authority is the General Assembly of the community that elects the leaders every year. The structure of the system may vary even from community to community and the description below should thus be seen as a very broad outline of some of the main characteristics of these systems. It is very likely that there are variations from one place to another.

61 Condor, 2009, p. 110.

62 Ibid., p. 128.

63 Van Cott, 2003, p. 3.

64 Ibid., p. 4.

65 Brandt and Valdivira, 2003, p. 21.

66 *Presidente, Vice Presidente, Tesorero, Secretario y Vocales.*

## INDIGENOUS JUSTICE PROVIDERS: COMPOSITION AND APPOINTMENT

According to literature<sup>67</sup> and to the information provided by the interviewees, the justice providers are the community leaders who are elected by the community through an annual 'popular vote' at the General Assembly. As mentioned above, the highest authority is the General Assembly of the Community, which elects the leaders every year.

This is in line with the Organic Code on the Judicial Function, whereby the authorities of the indigenous communities, peoples and nationalities authorities exercise the judicial functions as recognized by the Constitution and the law (Article 7).

The interviews conducted with Kichwa communities revealed some characteristics of the organization. Community leaders and traditional authorities together make up the leadership. It is noteworthy that, in the communities, there is community leadership as well as traditional authority/council of elders, who are either former community leaders or elders. According to Van Cott, juridical authorities are fused with religious and political authorities and are chosen through community customs. There is little or no differentiation of responsibilities, and decisions usually reflect the consensus of the elder authorities. Although there might be variations, and different views, some very general characteristics may be outlined:

- a. The number of persons that make up community leadership (in some cases named *el Cabildo* or *el Directorio*, with a *Directivo* that meets less frequently) may vary. The interviews revealed that there could be between 7 and 20 persons whose roles and responsibilities correspond to community needs and development.
- b. The leadership includes:
  - the chairman/the leader
  - the deputy-chairman/the substitute of the leader
  - the treasurer
  - the secretary, who takes notes and drafts documents
  - the trustee (*el sindico*)
  - the first member (*el vocal*), second member, etc.
- c. Leadership is related to the social and economic organization of the community. This includes authority in relation to issues of the use and community ownership of land, the production of agricultural produce and the use of the workforce, both for compulsory collective communal work (*mingas*) and work in nearby towns. Among the leadership, each person has a specific role, and interviews revealed that a member (*vocal*) could be responsible for the area of education, another for health, etc. Leaders are also responsible for community justice or indigenous justice as outlined below. Leaders are usually married persons; persons who are not married can generally thus not access leadership functions or informal justice provision.

In the administration of justice, all leaders are judges; however, each has a specific role to play. The chairman/leader runs the process and executes the sentence. The deputy-chairman has a mediator's role, and the secretary of discipline notes everything down in writing and carries out certain procedures. The traditional authority is responsible for providing legal advice to the leadership and the General Assembly as well as providing advice to the punished person.<sup>68</sup>

67 Brandt and Valdiviria, 2007, p. 29.

68 Condor, 2009, p. 140.

## PROFILES, INCLUDING GENDER AND AGE OF JUSTICE PROVIDERS

The community leaders must possess certain qualities and qualifications. Interviewees mentioned that younger men with secondary or tertiary education are perceived as possible future leaders. Due to their schooling, young men might be appointed as secretaries. However, this should be weighed against the tendency of younger men with higher levels of education to leave the community, making it less evident for them to take on the responsibility as community leaders in practice.

In the communities, the norm is that men, usually married, are elected as leaders. However, there are a few women community leaders, as some communities elect women directly. The qualitative study was able to ascertain that, in some communities, women have been elected as leaders; this was mentioned in users' and providers' interviews in Chibuleo San Francisco and Chibuleo San Pedro, Pilahuin and Quisapincha (Province of Tungurahua) and Bal-lagan (Province of Chimborazo). The relatively high proportion of women (in relation to men) who are included in leadership – and thus in justice provision – is also indicated in the quantitative survey (see main report, Chapter IV on user preferences, provider profiles and their implications for policy on authority with respect to gender and age of justice providers).

Interviews in other communities related that the leadership is composed only of men. Nevertheless, users and providers in some of these communities considered that the wife of a community leader is a kind of leader too. Some (male) interviewees considered that women are as qualified as men, but that they do not want to be leaders. According to some, women's participation in leadership will increase with the education of younger women.<sup>69</sup>

Research conducted in communities in Chimborazo Province indicates that, until three or four years ago, women were not allowed to attend any meeting and that women are far from decision-making powers.<sup>70</sup> Along the same lines (and as indicated in the main report in Chapter VI on women's rights in the administration of informal justice concerning the right to participation), there is a male bias (from men to men) whereby the administration of justice has a tendency to go against women.<sup>71</sup>

One of the communities visited consisted almost entirely of women and children, which, in the long run, could have an implication on the election of community leaders. At the time of the field study, interviewees related that the leaders 'were away' and effectively lived and worked in the cities of Ecuador. Thus, it should be added that migration has had an effect on the gender balance in communities at large and it is possible that this may have an impact on the composition of leadership and the administration of justice over time.

As bearers of culture and keepers of identity, women have a role in the application of physical punishments. Elderly female family members thus carry out '*ortigazo*' (whipping with nettles) and other purifying or cleansing rituals that are perceived as measures of correction and thus help to maintain community order.<sup>72</sup>

The qualitative and quantitative surveys indicate that informal justice providers are mainly younger to middle-aged males. In Ecuador, the quantitative survey indicates that more than 50 percent of providers are between 36 and 49 years old (see Chapter IV on user preferences, provider profiles and their implications for policy concerning authority with respect to gender and age of justice providers). Qualitative interviews revealed that justice providers aged 25 to 30 years are not uncommon. One informal justice provider declared that, in his community, 80 percent are young and 20 percent are old community members. Needless to say, this should be related to the average age of the population of Ecuador, which is young (see Section 1 on background in the present study).

69 Illiteracy is higher among women than men.

70 UNIFEM y la Universidad Andina Simon Bolivar, 2008, p. 74.

71 Ibid., p. 74.

72 Ibid., p. 74.

## TYPICAL NORMATIVE FRAMEWORKS EMPLOYED AND JURISDICTION

Customs and customary law provide the main normative framework for the administration of indigenous justice. However, one should keep in mind that customs change over time and the nature of culture is dynamic.

The *Ley de Comunas y Campesinas de 1937* recognized community justice and provided outlines for the organization of such justice. This was brought into the 1998 Constitution, which recognized the right of indigenous authorities to exercise justice functions for the solution of internal conflict. Chapter Four of the Constitution of 2008 elaborates on the rights of communities, peoples and nationalities, where it is stated that, “The indigenous communities, peoples and nationalities, the Afro-Ecuadorian people, the Montubio people and the communes form part of the Ecuadorian state, united and indivisible”. Collective rights<sup>73</sup> of the communes, the indigenous communities, peoples and nationalities are recognized and guaranteed, e.g., “to freely maintain, develop and strengthen their identity, sense of belonging, ancestral traditions and forms of social organization”.

As discussed above, the right of indigenous and peasant communities to exercise their own justice system and the outcome of justice provision, within their own territory, has been recognized by the Constitution of 2008. Decisions are binding and should respect the Constitution and international human rights standards; moreover, enforcement shall be respected by public and state institutions. In addition, decisions are subject to constitutional control; in concrete terms, this means an annual revision. At the time of the field study, it was not possible to ascertain whether the constitutional control mechanism was in fact in place and whether it had been used. This indicated a lack of familiarity with the functioning of any such mechanism by stakeholders.

## TYPICAL PROCESSES EMPLOYED AND FORCE OF OUTCOMES

### The Principles

The providers and users of indigenous justice interviewed perceive indigenous justice provision as:

- Accessible – it is oral and in the local language
- Swift – in some cases overnight
- Transparent – all community members know the rules, the procedure, the sanction
- Free or low cost, perhaps to pay for paper used (documents)
- Equitable – equality – all are equal
- Community-oriented – seeks to create ‘harmony’ in the community

### The Process

The interviews revealed that, once the existence of a problem has been recognized, the problem is usually brought to the attention of community leadership, which seeks to address it.

Depending on the severity of the problem, it may be decided that one leader settles the matter by mediation or talking with the parties or it may be decided that the case be brought before the General Assembly of the community.

The matter is usually addressed in public. However, in the case of problems, such as intra-familial problems, it is seen that the matter is settled in a smaller group. Interviews with leaders provided examples of couples ‘that do not live well’, where one leader seeks to advise the couple in order to solve the matter. Another example is intra-familial violence, where the accused husband is cautioned by the leader as a means of stopping the violence.

If the problem is severe, then the General Assembly can be convoked at short notice by the community leadership. In a public meeting of the entire community, the case is presented and each party is heard, as well as any witnesses.

<sup>73</sup> In accordance with the Constitution, and international pacts, covenants, declarations and human rights instruments.

For the settlement of a case, the parties are required to sign a document of resolution. There is a book where community decisions are noted, including cases and their resolution. A description of the case, including dates and relevant information, is noted down. The book – *el libro de actas* – serves to check whether there is recidivism and as a basis to inform the police or the formal justice system, should the case be referred there.

Reportedly, children can be heard as witnesses or give testimony, but they cannot be brought to trial if they are less than 18 years old. If a child is accused, the parent of the child is brought before the Assembly and can be accused of an act that the child has in fact committed. The parent is perceived as the person responsible for the act. In the communities visited, it seemed that there had not been any conflicts caused by a child in relation to its parents and, in cases of conflict between parents and the child, the child remains with his or her mother, father, grandparents or relatives.

In an interview with adults, the opinion was expressed that the young people do not want IJS, as they want to be free from punishment and the shame associated with it.

### **SUBSTANTIVE CASELOAD – ISSUES ADDRESSED AND REMEDIES AND SANCTIONS APPLIED**

Justice provision concerns mainly incidents that have happened in the community. There are community rules and, in many cases, the rules of justice provision are written down and these procedures are followed in practice (these procedures have possibly been introduced by the 1937 legislation). In some communities, the rules are updated regularly by the general assemblies in order to reflect changing relations with outside actors and within their communities, thus providing a dynamic and flexible system.<sup>74</sup> All work is noted, including cases and their resolution in the case-book (*el libro de actas*).<sup>75</sup>

The interviews revealed that the typical issues that are dealt with include:

- Person: Attacks, violence, or bodily harm inflicted against a person
- Family: Relationships, separation, divorce, paternity issues, infidelity, intra-familial violence
- Neighbour: Neighbour disputes and sometimes violence, violence and health, e.g., mental health problems and subsequent violence
- Community: Youth gangs or youth problems
- Natural resources: Water and land disputes, theft of livestock and foodstuff
- Goods and money: Theft of goods and money

It should be added that a general impression was given that there were few grave problems in the communities visited. The problems mainly concern water distribution, land boundaries, marital issues or problems, and thefts, the majority of which have been solved in the community. According to the interviews, very few persons resolve their problems outside the community, such as with the help of the formal justice system, the political deputy, the police commissioner or the chairman of the parish board. It seems that solutions outside the community are mostly sought by individuals in cases where the community cannot provide a solution, such as separation or divorce.

If a community member is a recidivist, the sentence or punishment gradually becomes more severe. Indigenous authorities may serve as first instance of adjudication for grave matters, which may subsequently be referred to

<sup>74</sup> One example is the validation by the leadership of formal documents such as contracts and land titles, although only in questions of mortgaging is it necessary for the state administration authorities to validate the documents. Condor, 2009, p. 139.

<sup>75</sup> Interviewees related that cases and their solutions are written down in order to be able check for recidivism in the future.



the state system.<sup>76</sup> Interviews revealed that, in serious cases, where a community decision is not respected several times, then some communities threaten to refer or actually refer the problem either to the formal justice system or even to the local political leader.

If a complaint is taken to the formal justice system, the indigenous authorities may show the case-book to the police or judge as the next step. The case-book provides the information necessary for the formal justice system to consider accepting a case, according to some interviewees.

The following table presents an overview of the issues raised and remedies and sanctions applied that were mentioned in the qualitative interviews. The examples provided are only examples of specific issues and their solution and it is likely that there are local variations, which cannot be reflected entirely in the present study.

ISSUE	REMEDIES, SANCTIONS OR SOLUTIONS
Attacks on the life of a person	Are almost always sent to the formal justice system, although exceptions are known
Problems between a young couple	Conciliation: addressing the issue and providing advice
Marital problems	Conciliation: addressing the issue and providing advice, formal justice
Intra-familial violence or violence against women	Conciliation, then a fine, then public punishment or confinement; final resort: formal justice
Paternity issues	Conciliation and recognition of responsibility
Infidelity	Public punishment
Neighbour disputes	Conciliation and recognition of responsibility
Neighbour or community violence	Conciliation and recognition of responsibility, in some cases public punishment
Youth problems – youth gangs	Relatively unknown phenomenon, but public punishment is seen as a means of preventing further developments
Water disputes	Water is distributed according to a schedule; if the schedule is not respected between communities, then the community leaders meet to settle the dispute.
Land disputes	Land is owned by the community and boundary disputes are thus between communities. The community leaders meet to settle the dispute and they make use of the registers of land titles (state) as a means to clarify and settle the dispute.
Theft of livestock and foodstuff	Agreement to return the stolen goods or to repay the equivalent
Issues related to traffic	Depends on the problem. It seems there is a distinction between the effect on the persons and the vehicles; some are taken care of by IJS and others are directly taken to formal justice systems.
Corruption	Corruption in leaders results in their being expelled or losing their position.

#### Typical Remedies, Sanctions and/or Solutions

- Conciliation: Conversation and joint reflection, dialogue and apologies
- Returning any stolen good or reimbursing the equivalent cost;
- Fines
- Public punishment
  - Whipping (*'latigez'*)<sup>77</sup>
  - Cold baths (*'baños'*)<sup>78</sup>
  - Whipping with stinging nettles<sup>79</sup>

76 Van Cott, 2003, p. 7.

77 In the case of physical attacks, stabbing, domestic violence.

78 Cold baths are prepared with cold mountain water and usually take place after midnight.

79 Interviews revealed that there are three types of nettles with varying degrees of effect.

- Placing in confinement<sup>80</sup> (in the community, in some cases subterranean)
- Exclusion from the community

As indicated above, the examples below are also of cases that were brought up in interviews and should therefore only be considered as illustrations of issues. As is apparent, retributive as well as more restorative measures are applied by the IJS.

## **VIOLENCE**

One example was provided by a group of women who explained that there had been a problem of a knife fight in their community that was solved by the community by punishing the guilty person with whipping and baths.

## **MARITAL PROBLEMS/SEPARATION/DIVORCE, AND WOMEN'S OPPORTUNITIES AND PREFERENCES**

Among the Kichwa, there are traditions or notions of what makes and unmakes a community. Separation or divorce among Kichwa is similar to the destruction of the social fabric of the community; therefore, divorce or separation is thus not necessarily an option in indigenous justice. Interviews with women users of justice revealed a variety of solutions to marital problems. Some of the interviewees explained that they had not been able to solve a problem adequately and, as result, were obliged to remain with their spouse.

In another community, there was 'a problem at home' due to a difference in ideas. In April 2009, the wife received the parents and the parents-in-law, followed by the leaders, as well as the pastor, who, through dialogue and advice, supported the resolution of the problem. In this way, the couple ended by apologizing to each other. In September 2009, the interviewees expressed that the solution was respected by the partners and it could be seen that they 'live well'. In the same interview, it was commented that the couple decides if it wants to live well or live badly and that, in some cases, even discussion at the level of the General Assembly can provide an opportunity to recognize errors.

## **DOMESTIC VIOLENCE AND RAPE**

By national law, domestic violence has been banned since 1995, when the Violence against Women and the Family Act (Law No. 103) was adopted. Domestic violence in indigenous communities has been addressed in research and, in the present study, it was mentioned in the interviews of women. Research shows that violence against women is hardly ever tackled in the General Assembly or by community leadership and, moreover, that violence against women has not been covered by the rules in all communities.<sup>81</sup>

In the present study, domestic violence and, in particular, violence against women were addressed in the interviews and the following provides some insight into the handling of these issues as perceived by women. A case of death threats and domestic violence was taken to the *Cabildo* three times in one community. Due to the fact that the decision was not respected several times and as it was considered very serious, the case was sent to the judge in Ambato.

In another case, it was decided that either a large fine should be paid or the couple should continue to live together. The couple continues to live together, but they reportedly 'do not live well'. Another example was of the confinement of the husband in the community cell/dungeon (*Calabazo*), after which he stopped being violent and 'they live well'.

80 Interviews revealed that, in the community, there is a room, a dungeon and in some cases a subterranean space.

81 UNIFEM y la Universidad Andina Simon Bolivar, 2008, p. 74. .

Rape is apparently a new issue. Some interviewees responded that rape had not taken place in their community; some replied that it should be addressed by the state as medical professionals are involved; and others indicated that the community does not know how to handle this type of case.

### **ILL-TREATMENT OF CHILDREN**

Ecuador's state report to the ICCPR submitted to the Human Rights Committee in December 2007<sup>82</sup> mentions a high incidence of ill-treatment within the family in Ecuador: 43.60 percent of children and young people have undergone some kind of ill-treatment.<sup>83</sup> According to a survey,<sup>84</sup> four of every 10 children said that their parents hit them when they were badly behaved or disobeyed. Others had been subject to psychological ill-treatment; 3 percent of children had been confined to a room or bathed in cold water by parents; 5 percent had suffered insults or jokes; and 2 percent had been expelled from their home or deprived of food. Blows were reportedly more frequently used by parents in rural areas than in cities, more in Amazonia than in other regions, and more in poor and indigenous homes.

As concerns IJS and ill-treatment of children, the question was briefly touched upon by one justice provider. He explained that children do leave home due to problems and that they either live in the community or go to the city to live. In addition, he mentioned that the problem is ill-treatment of children by parents.

None of the interviews with children provided any indication of the frequency or level of ill-treatment of children. With the high incidence of ill-treatment in the country, it is likely that it also takes place in the rural communities. The limited duration of visits to communities, which is only possible in a study such as the present one, places limits on possibilities to discuss sensitive issues such as this.

### **WOMEN'S RIGHTS CONCERNING REAL PROPERTY**

Communities own land mostly on a communal basis, though, in some cases, there is individual ownership of plots of land. One example of a case solved by an informal justice system related to land use, ownership, and inheritance was described to the team:

In the community concerned, it is possible to rent from other community members plots of land situated next to the land of the person renting (lessee). A person thus rented a plot of land located in front of/across from her own land. The rented plot of land was sold and the lessee contested the sale. The seller was a woman who had rightfully inherited the land according to a 'verbal inheritance'. The local informal justice system looked into the matter and decided that the sale was permitted and legal according to local norms.

The reasoning of the informal justice system's decision was that the plot of land had been sold to a neighbour who owned land – next to the plot of land. In the community, the first option to buy land is with the neighbour that is next to the plot of land. If that neighbour declines to buy the land, then it can be sold to anybody. As the person who rented the land lived in front of or across from the land, the first option was not available to her.

The interviewee conceded that the solution was good.

While several points could be raised in relation to the case, it is of interest that the plot of land had been inherited and sold by a woman, that the sale was also contested by a woman, and that this case was heard by the informal justice system.

82 CCPR/C/ECU/5 of 26 May 2008, English version.

83 Draft of the fourth report to the CMRW.

84 Ibid.

## RESOURCES: LAND AND WATER DISPUTES, THEFT OF LIVESTOCK, INTER-COMMUNITY DISPUTES

Problems between communities are solved between community leaders; a typical example is a water conflict or determination of land boundaries.

In Ballagán, a dispute between communities concerned land boundaries. These disputes occur due to the scarcity of arable land; people therefore ‘move’ the boundaries. In the particular case, it was not possible to solve the dispute at the leadership level of the communities and it was thus decided to solve the dispute in Riobamba (the main city of the Province of Chimborazo), resorting to an expert to look at the official documents and land titles (*escrituras públicas*) in order to verify who owned exactly which land.

In another cases, a dispute between the community of Atapo el Carmen and Atapo Quillotoro concerned the cutting of water from the hill (mountain). In order to solve the dispute, the leaders of the communities talked and went to Riobamba to verify ‘legal documents’ and to settle the matter. Consequently, the community of Atapo Quillotoro did not pursue the matter, as they did not have the right to do so. Thus, the availability of the formal justice system was important in these cases.

In a case concerning theft of two head of livestock, the victim informed the leadership, which called the alleged thief and community member in order to look at the issue. The leadership decided that the thief should cover the costs of the two animals, awarding \$800 in compensation, which was paid to the victim.

## TRAFFIC ISSUES AND CAR ACCIDENTS

Other types of incidents – car accidents – are likely to be taken to the indigenous IJS. The last possibility was mentioned a few times in the interview. The interviews revealed that many situations occur due to car accidents. If an accident takes place and the police are at the scene, then it is taken to formal justice immediately. If an accident results in the death of a person, then the formal justice system will be involved.

Generally, it seems that agreements are reached in the IJS whereby the accused reimburses the victim for any costs that might occur, such as for the repair of the car. Interviewees criticized the decision in one such case. The local leadership decided that \$100 should be paid to cover repairs of the car, but the actual cost of repair amounted to \$1,800, leaving the victim to pay the remaining cost. The actual cost was not acknowledged by the leadership, perhaps because the police had not been involved.

## SANCTIONS, INCLUDING PHYSICAL PUNISHMENT

In analysing indigenous justice in Ecuador, it is important first to establish the facts about the use of corporal punishment, including that which may amount to torture, inhuman or degrading treatment. Second, it is important to address these types of human rights violations in a manner that may prevent their use in the future.

As may be seen from the table above on remedies and sanctions, there are punishments used that could be deemed to fall within the framework of UNCAT. At the same time, it is important to recognize that physical punishment such as public whipping, whipping with stinging nettles and cold ‘baths’ may often be seen as cleansing rituals. Experts were of the view, however, that this is something that tends to be exaggerated in the media and may thus be less common than perceptions might sometimes indicate.<sup>85</sup>

Country study interviews confirmed the existence of these sanctions, although most interviewees added that these punishments are not applied very often and they have a preventive effect. Leaders interviewed said that

<sup>85</sup> Vintimilla J., 2008, p. 71.

they are careful in the application of severe physical punishment, that this form of punishment is not the norm.

Despite the fact that interviews confirm a sparing use of physical punishment, evidence of torture, inhuman or degrading treatment is available in the country. One example reported is of public hanging by arms and live burial where a *Fiscal indígena* (FI) intervened and managed to stop the punishment.

As concerns violence and the dynamics of culture, it should be noted that the Shuar Federation in 1996 replaced the death sentence with community expulsion combined with the community's confiscation of the accused's possessions. The work of the Shuar Federation shows how it is possible for indigenous law – and justice – to develop sanctions, that to a higher degree, respect human rights as well as create spaces of intercultural understanding in the practice of legal pluralism.<sup>86</sup>

At issue in Ecuador is also the question of lynching, to which the media have given a lot of attention. Lynching per definition is an extrajudicial punishment performed by a mob and, as such, it is not part of indigenous justice. Great care should be taken to address lynching correctly and based on facts, just as indigenous justice deserves correct attention. Interviews with formal justice providers and representatives revealed that lynching *per se* is not part of IJS. It is thus necessary to raise awareness about indigenous and informal justice. According to interviews in the communities, lynching is not part of indigenous justice and lynching in Ecuador has taken place in urban or peri-urban settings by persons who may or may not be of indigenous descent. Some interviewees stressed that, even though lynching may be carried out by indigenous persons, this does not mean that it is part of indigenous justice. In addition, the UN Special Rapporteur on extrajudicial executions noted during his mission to Ecuador in June 2010 that, "he had been presented with no evidence that indigenous justice had led to extrajudicial executions and stressed that it was entirely inappropriate to confuse mob lynching with indigenous justice."<sup>87</sup>

## USERS OF INDIGENOUS JUSTICE AND THEIR VIEWS

The users of indigenous justice are to be found among community members, although it is possible that non-indigenous persons who live in the area may seek indigenous justice as a means of solving an issue or an incident that has happened in the community. (See also above on the scope of personal jurisdiction of IJS.) One interviewee related that non-indigenous persons living in the area would rather address the parish or indigenous leadership than the formal justice system in order to solve specific problems.<sup>88</sup>

### WOMEN'S ACCESS TO JUSTICE

Women's access to justice is generally acknowledged to be an issue in Ecuador. Indigenous justice takes its point of vantage in collective interests, which, to a certain extent, may be achieved at the cost of individual rights. The law is clear that, "The exercise of indigenous justice should guarantee the participation and decision of women. To solve internal conflicts, the (indigenous) authorities apply norms that are not contrary to the Constitution and human rights, and the rights of women may not be violated by alleging that it is a question of customary law."<sup>89</sup> Nevertheless, the role of women and access to justice is complex and ensuring effective access requires more sustained effort.

In IJS, women reportedly do voice their opinions; however, as long as the leadership is mainly composed of men, it may not always produce results in favour of women. Although all interviews confirmed that women and men

86 Condor, 2009, p. 147.

87 Press release by OHCHR on 15 July 2010, full statement available at <http://www2.ohchr.org/english/issues/executions/index.htm> and full report to have been published in 2010.

88 San Pedro

89 Article 343, Organic Law on the Judicial Function.

have equal opportunities to voice their opinions and be heard, research nevertheless provides a different picture. The idea that “men think that women do not talk well [...] and therefore can neither help nor provide an opinion”<sup>90</sup> effectively limits the participation of women. As concerns intra-familial violence, this question hardly ever reaches the leadership or the General Assembly. (See page 15: Substantive Caseload above.)

In one community, women thought that ‘problems of the home’ should not be managed by IJS. Other interviews revealed that younger women prefer and also seek assistance from the state system rather than the indigenous justice system, despite the fact that this is ill-perceived in the community. In the case of separation or divorce, interviews with women revealed that indigenous justice is sometimes quietly ignored and that women go directly to the formal justice system or file cases of separation and divorce with the formal justice system as a last resort. This was also confirmed by formal justice system representatives.

As concerns justice use, it seems that the women, although very loyal to the system, do not in fact access justice at the level of the individual. In cases concerning marital breakdown, some of the interviewees explained that they had not been able to solve a problem adequately and, as a result, were obliged to remain with their spouse. The question, of course, is what the adequate resolution of a problem according to the women is and whether either the formal or informal justice system is capable of providing it. As mentioned elsewhere in this study, younger women do seek assistance from the state system, despite the fact that this is either ill-perceived or against community rules. Women are becoming aware that solutions may be found in places outside the community system, such as from the formal justice system, which, on the one hand, may provide justice to the individual and, on the other, may instigate changes in the communities where the rules are revised annually.

## CHILDREN’S VIEWS OF JUSTICE

In general, only limited information was available regarding indigenous justice and children. Children have some knowledge of the details of indigenous justice, although they are aware of the role of the community leadership in maintaining order. The interviews mentioned below revealed neither issues related to the rights of the child and ill-treatment of children, nor any information regarding the formal justice system or juvenile justice as such.

An interview with boys and girls (12 to 14 years old) revealed that their knowledge mainly concerned justice in the community, whereas their knowledge of formal justice institutions – or institutions outside the community – was more limited. In the case of a problem with neighbours, the interviewed children would prefer to talk with their parents first to solve the issue. In the case of a small problem, some would leave it at that and others would also inform the community leaders. In more serious cases, the problem should be resolved at that level. The group indicated that they knew of land and water disputes between communities, violence against women and abandoning of the home as well as questions of transport and repair of infrastructure. They did not report knowledge of cases such as rape or witchcraft.

Interviews with adolescents (17 to 18 years old) also showed that they had a good level of knowledge of IJS. They said that they would look at solving a problem so that it would not cause any disturbance. In addition, it was remarked that problems, including family issues, are solved by adults. Another interview (group of people aged 17 to 24 years) revealed that IJS can assist through conversation and guidance of young people. The example mentioned was problems of young couples.

## USERS VIEWS OF CHILDREN’S ISSUES

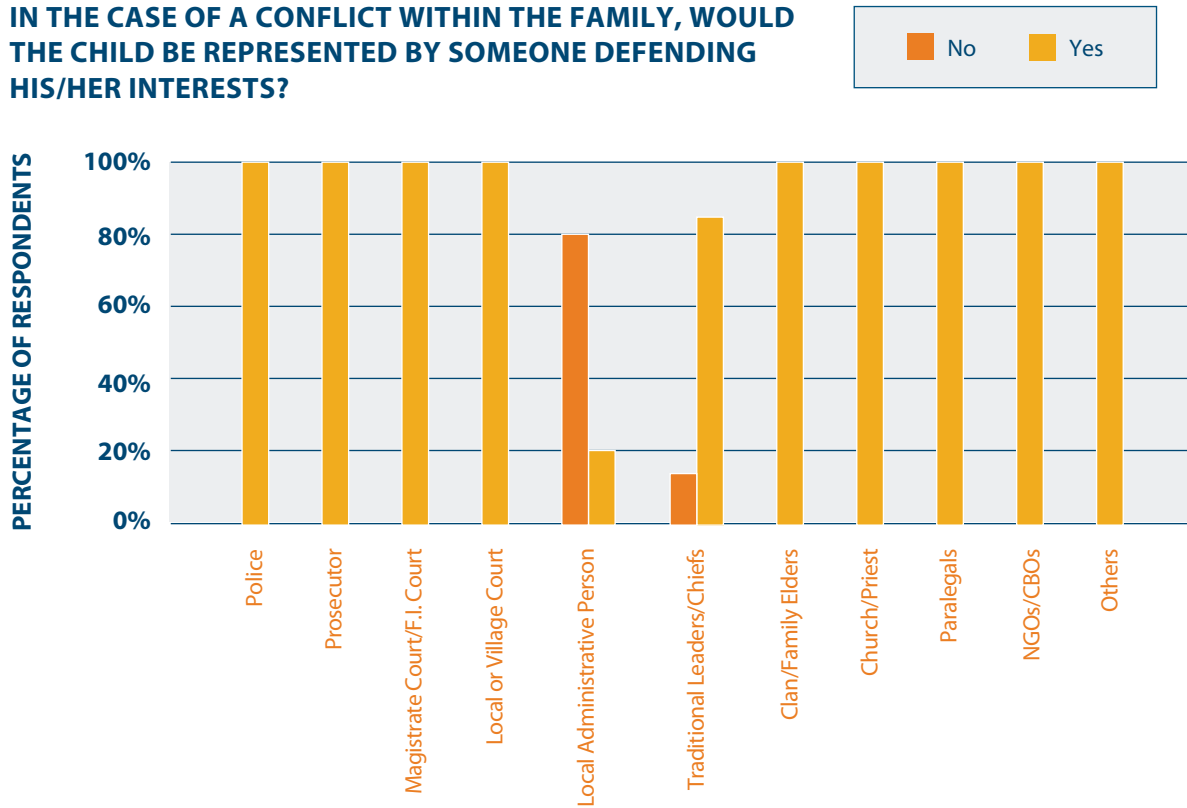
The quantitative survey showed that, in cases involving children, the qualitative restorative approaches are preferred, as the majority of the respondents think that beating or sending the child perpetrator to prison would be

90 UNIFEM y la Universidad Andina Simon Bolivar, 2008, p. 74.

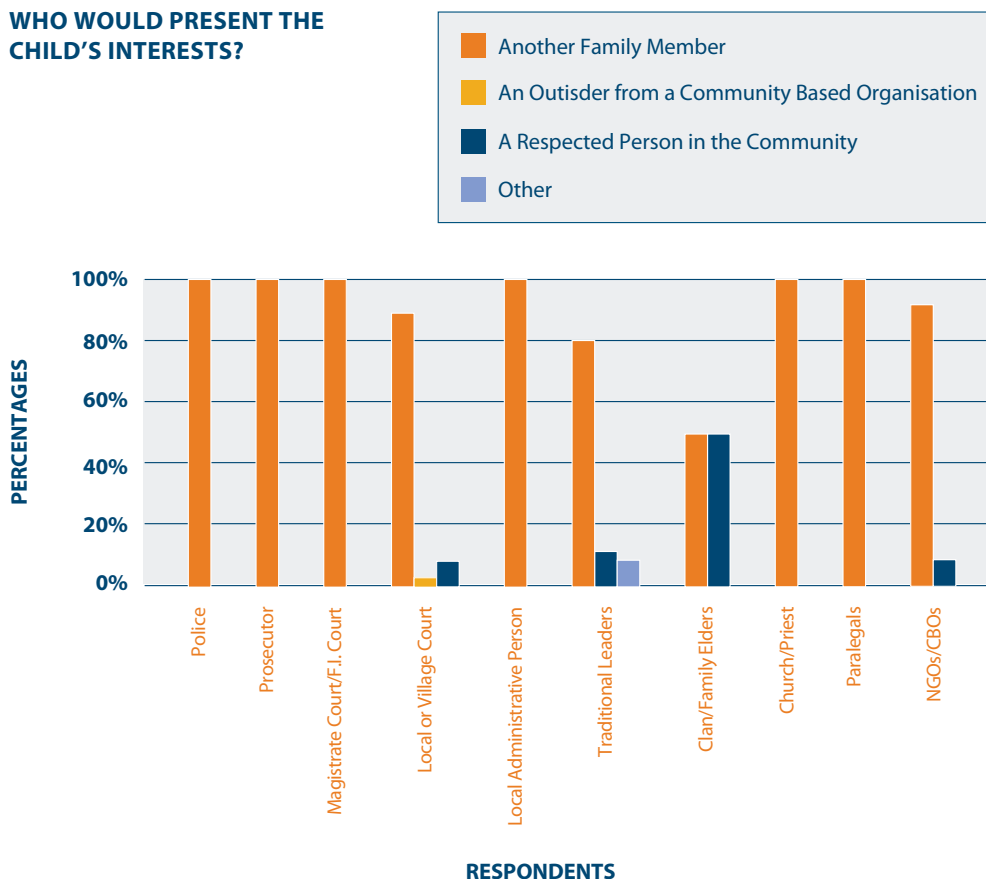
a poor solution. However, one third of the respondents would approve of more retributive measures. It is only the solution 'offender says "sorry" and you forgive' and the solution 'offender and you find a solution through mediation' that the majority of the respondents think would be appropriate. All other solutions are generally seen as poor.

In Ecuador, nearly all the respondents to the quantitative survey agreed that, if there is a case within the family between the child and his or her parents, the child would be represented by someone defending his or her interest. Moreover, the child would generally be represented by another family member.

### IN THE CASE OF A CONFLICT WITHIN THE FAMILY, WOULD THE CHILD BE REPRESENTED BY SOMEONE DEFENDING HIS/HER INTERESTS?



## WHO WOULD PRESENT THE CHILD'S INTERESTS?



## USERS PREFERENCES

### PERCEPTIONS OF INDIGENOUS JUSTICE AND FORMAL JUSTICE

Some qualitative interviews revealed that formal justice providers believe that indigenous justice works in an isolated manner and it was indicated that the indigenous communities are not necessarily interested in relating to the formal justice system. Moreover, there was limited knowledge of legislation or government policies in the field of indigenous justice, e.g., the Organic Law of March 2009 was hardly mentioned by formal justice providers in the provinces.

Some interviews confirmed that there is no relation between justice providers of the systems and there is no known policy to be followed. A few justice providers nevertheless seek to educate themselves on human rights, collective rights and indigenous justice; courses are provided by indigenous organizations.

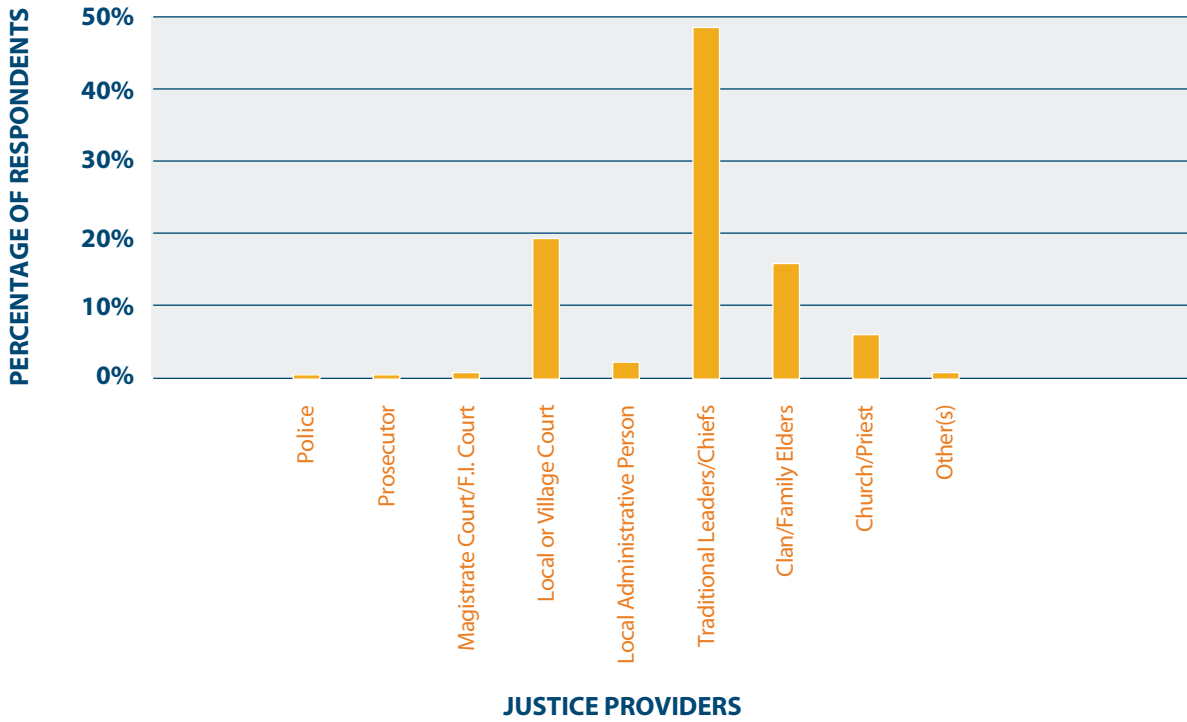
At the same time, it should be noted that indications are that women users of justice are aware that the formal justice system may be of better use to them in the case of divorce or domestic violence.

### PREFERRED JUSTICE PROVISION

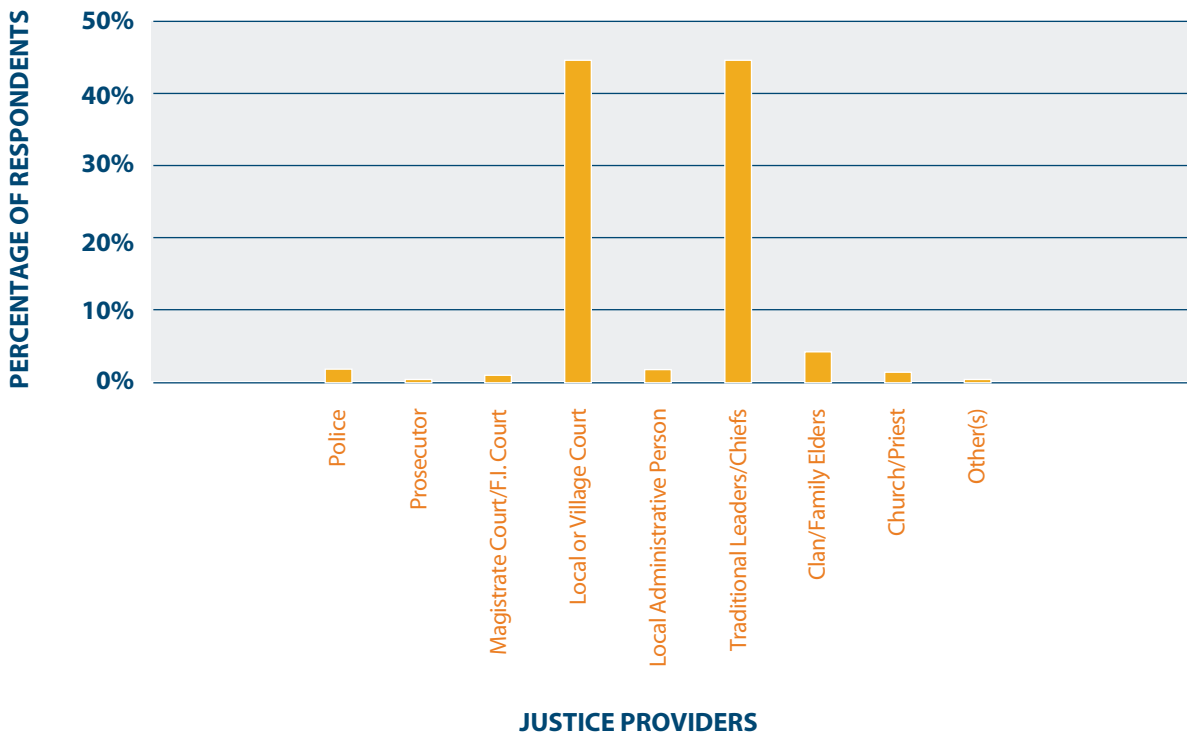
Taking point of vantage in the quantitative survey, it is interesting to note that an overwhelming majority of the justice users at the community level first go to a local/village court (112) or the traditional leader (elder, former leader, 40). Moreover, they are of the opinion that the best justice provider is either the local/village court (105), the traditional leaders (107) or the clan/family elders (11). It is also relevant to note that the church has a role to play, which is confirmed by the qualitative survey that revealed that the (Evangelical) church is present in some communities. (See graphics below.)



**WHEN YOU HAVE A PROBLEM OR CASE, WHICH JUSTICE PROVIDER DO YOU PREFER TO GO TO FIRST?**



**WHICH JUSTICE PROVIDER IS IN YOUR OPINION THE BEST?**



# PROGRAMMING

## GOVERNMENT PROGRAMMES

### Plans and Policies

**In 1998, Ecuador adopted as a state policy Ecuador's National Human Rights Plan, which has been implemented since 2003 through Operational Action Plans under the leadership of the Standing Committee on the Monitoring of Ecuador's Human Rights Plan, a joint body composed of representatives of the State and civil society, set up in November 1999.**

The National Development Plan (2007-2010) concerns the Promotion of Access to Justice and objective 9 consists of five policies as follows:

- (9.1.) Advance processes of legal training for citizenship
- (9.2.) Advance legal pluralism (alternative justice) that respects human rights
- (9.3.) Support institutional strengthening of the judicial function
- (9.4.) Restructure the national system of social rehabilitation and
- (9.5.) Diminish gender violence and abuse of children. Several strategies have been developed to implement these policies.

Policy 9.2 outlines that, "A multicultural state shall respect the values and principles of the different communities that live in society, without altering the principles that protect and promote human rights. Dialogue shall be supported and conflicts shall be overcome through the free will of the parties."

Other plans and policies are also important in creating access to justice in Ecuador, least the national policies concerning gender equality, violence against women, abuse of children, etc. Most of these policies address the formal justice system. The National Plan of Action of Good Living (2009-2013) refers directly to the ancestral Andean (Kichwa) concept of good living known as *sumak kawsay*, which is maintained in many indigenous communities. *Sumak kawsay* may be understood as the fullness of life.

As concerns the reach of the formal justice system, the National Plan on the Elimination of Racial Discrimination and Ethnic-Cultural Exclusion 2009-2012 relates that, although the law implies the principles of non-discrimination and equality in access to justice, experience shows that certain groups of persons, in particular victims of racial discrimination, do not have access to justice or do not have access on an equal footing with the rest of the population.<sup>91</sup>

As concerns planning and programming for children, Ecuador has created organs under the Constitution and the Childhood and Adolescence Code that will become the Decentralized System of Comprehensive Protection of Children and Adolescents (CRC, paragraph 17). The Childhood and Adolescence Code (2003) and the National Plan for the Comprehensive Protection of Children and Adolescents (2004-2013) are key elements in this regard. Law reforms have also been carried out, such as the reform of the Criminal Code (23 June 2005, Official Gazette No. 45), which concerns sexual exploitation of children. In addition to law reform and plans, several Executive Decrees have been issued, including Executive Decree No. 179 on the comprehensive protection of the rights of children and adolescents and Executive Decree No. 620 on the eradication of gender violence against children, adolescents and women. It should also be mentioned that measures have been taken to address poverty, the socio-economic situation, education, etc. In relation to children, the abolition of the \$25 contribution per child towards education

<sup>91</sup> Unofficial translation, *Plan Nacional para Eliminar la Discriminación Racial y la Exclusión Étnica-cultural /The National Plan for the Elimination of Racial Discrimination and Ethnic-Cultural Exclusion 2009-2010*, p. 26.

and the introduction of the Human Development Bono are relevant. The State-Indigenous Peoples and Nationalities Agreement for Children and Adolescents entitled Building Sumak Kawsay (Good Living) from the Beginning of Life, provides a minimum agenda for indigenous children in Ecuador.

### THE MINISTRY OF JUSTICE, HUMAN RIGHTS AND WORSHIP

The creation of the then Ministry of Justice, and Human Rights (2008) has also been a relevant step, which has recently become the Ministry of Justice, Human Rights and Worship (*'cultos'* was added to the Mandate in June 2010). The Ministry has been particularly active, including with:

1. Surveys and legal analysis. In co-operation with UNDP and UNHCR, the Ministry is collecting information about justice systems and, in particular, indigenous justice systems as a means of contributing towards the development of legislation. Initiated in 2009, this three-year project is carried out in the provinces of Sucumbíos, Chimborazo and Las Esmeraldas.
2. Conferences and publications. The book *La transformación de la justicia* is an example of co-operation with the Universidad Andina Simon Bolivar that provides an analysis of justice and the Organic Law on the Judicial Function that came into effect in March 2009.
3. Mediation Centres. The PROJUSTICIA Programme established mediation centres in various provinces and, more specifically, mediation centres for indigenous communities; the two most important are in Cotacaxi and in Otavalo. These centres have inverted the principles of confidentiality, whereby processes are closed to the community and the accused is subject to a verbal moral agreement. One such project is The Opening of Mediation Centres in Areas of Difficult Access to Justice (2004-2005, funded by The World Bank with Japanese funds).
4. The bill on Coordination and Co-operation between Indigenous Justice and Ordinary Justice (formal justice) is being prepared as part of the policies of the Undersecretary of Regulatory Development and the Ministry of Justice, Human Rights and Worship to create intercultural dialogue. The preparations include prior consultation and debate with indigenous organizations as a means of reaching consensus on the bill.<sup>92</sup> The bill has been delayed.

### UNITED NATIONS CO-OPERATION

The United Nations agencies are working together strategically with the Government of Ecuador. Moreover, there is geographical focus on the provinces of Chimborazo, Las Esmeraldas and Sucumbíos.

The present UNDAF 2010-2014 mentions access to justice as an issue.

The United Nations Office of the High Commissioner for Human Rights (OHCHR) and the United Nations Development Programme (UNDP) work with the Ministry of Justice and Human Rights in collecting information about justice systems and, in particular, indigenous justice systems as a means of contributing towards the development of legislation. Initiated in 2009, this co-operation is carried out in the provinces of Sucumbíos, Chimborazo and Las Esmeraldas. The OHCHR and UNDP are very aware of the challenges that the Constitution of 2008 poses and that it is necessary to look into the lack of information about indigenous justice, not least about the fact that there are several forms of indigenous justice, because there are many indigenous peoples, communities and nations. The issues to be addressed are very real, e.g., the coordination between indigenous justice and formal justice.

UNICEF addresses juvenile justice in the formal justice system and in co-operation with the Ministry of Justice and Human Rights. When the field and desk research was done, UNICEF did not work directly with indigenous justice and the rights of the child.

<sup>92</sup> Consolidated UN comments to final draft of report (UNIFEM Andean Office).

UNIFEM works on Women's Access to Justice and has published studies specifically on access to justice by indigenous women in the Andean Region. These studies provide a good panorama of the questions at issue in regard to the CEDAW and include good practices.

## FOUNDATIONS, NGOS AND BILATERAL CO-OPERATION DEVELOPMENT AGENCIES

As concerns foundations and NGOs:

1. CIDES – *Centro sobre Derecho y Sociedad* focuses on legal training and documentation, funded by the Deutscher Entwicklungsdienst/German Development Service
2. The Confederation of the Indigenous Peoples of Kichwa Nationality (ECUARUNARI) organizes workshops on indigenous justice and as a result published 'The legal structure and judicial systems of the Indigenous peoples of Kichwa nationality of Ecuador' (2009)
3. GTZ has supported a series of seminars, where experts and academics from Bolivia, Brazil, Colombia, Ecuador, Peru and Guatemala look into questions that relate to legal pluralism and the rule of law; one such seminar took place in Lima, Peru, on 29-31 October 2009
4. IBIS has principally worked on the rights of indigenous peoples
5. The Konrad Adenauer Foundation provides training of indigenous leaders in human rights and justice
6. The NGO-operated programme Indigenous Women Organised in Ecuador to Improve Access to Justice mentioned in the country-specific desk study could not be located, nor could the women's coordinator of ECUARUNARI be contacted during the missions.

Very little mention was made of the UN and of NGOs that work on issues of justice in the communities. Plan International and the Evangelical Church were mentioned in the communities.

## FINDINGS AND RECOMMENDATIONS

As the purpose of the country study is to inform a larger, global study on IJS rather than to make programming recommendations specifically in relation to Ecuador, the following findings and recommendations are tentative and generic.

The many changes introduced recently require concerted effort by development partners to work with government in a way that builds upon a human rights approach and that seeks to develop an understanding of the systems in order to reach a useful and relevant placement of the systems in relation to each other. It is clear that much work lies ahead to reach an acceptable model of mutual accommodation or harmonization of the two systems. The relations between them are likely to change over time, especially if the formal justice system becomes more accessible to indigenous communities (in all parameters: cultural, financial, geographical, etc.).

Although the National Plan for Development 2007-2010 addresses justice, including forms other than formal justice, the perception frequently encountered in the provinces visited was that the government and state do not have any initiatives regarding IJS. It was confirmed in interviews during the mission that there are no resources to address IJS and that neither training nor information on IJS has been carried out among state institutions. Understanding of the links and interest in IJS was sometimes encountered among respondents in the justice system, but this seemed to remain at a personal level.

Should the legislation on indigenous courts and tribunals still be in the making when future programming cycles commence, it would be useful to focus strategically on this endeavour and to ensure, for example, that human rights principles become part of the legislative text and that the text itself be clear and useful to users, providers

and practitioners of formal and informal justice systems. It is essential to clearly define the limits of subject matter and of personal and territorial jurisdiction and to emphasize human rights principles in this regard. In particular, if the constitutional provision results in the successful assertion of IJS' jurisdiction over serious criminal offences, the operation of this jurisdiction warrants serious study of issues including legal certainty, due process and fair trial guarantees. Developments in neighbouring countries are highly relevant to this, and cross-border exchange and consultation could be improved, especially in regard to evaluation of the functioning and consequences of the constitutional and legislative changes of recent years.

Studies of the implementation of the law could focus on various issues, including the implementation of the provisions concerning women's decision-making and participation, the use of corporal punishment by IJS and the situation of children in indigenous justice. The latter requires an initial identification of key issues.

The interviews revealed a lack of knowledge of indigenous justice and formal justice on the part of users and providers of justice, possibly because there have recently been so many legislative and institutional changes. This lack of knowledge can be remedied through study, surveys, good information and education. Study should include aspects of structure, process and substance, as set out in the main report.

UN agencies could focus on supporting the building of knowledge of the IJS within the formal justice system, on consultations between justice system stakeholders, and on IJS' leadership and exchange of experience. The reach of the formal justice system and the ways in which it approaches indigenous communities are essential here. Likewise, the present and future application of the principle of inter-culturality, as laid down in the 2009 legislation, is an area for study of best practices in relation to civil and criminal law.

Indigenous organizations have debated and raised awareness about indigenous justice, mainly with civil society and CODENPE. Nevertheless, given the widespread perception in Ecuador of indigenous justice as a static system that has never been subject to changes, it might be relevant to enter into intercultural dialogue about justice systems as a means of providing input to the bill on jurisdictions and of creating ownership.

# ANNEX I – EXCERPT OF THE ORGANIC LAW ON THE JUDICIAL FUNCTION

REGISTRO OFICIAL N° 544 – LUNES 9 DE MARZO DEL 2009

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## CAPÍTULO II

### PRINCIPIOS RECTORES Y DISPOSICIONES FUNDAMENTALES

Art. 4. – PRINCIPIO DE SUPREMACÍA CONSTITUCIONAL.- Las juezas y jueces, las autoridades administrativas y servidoras y servidores de la Función Judicial aplicarán las disposiciones constitucionales, sin necesidad que se encuentren desarrolladas en otras normas de menor jerarquía. En las decisiones no se podrá restringir, menoscabar o inobservar su contenido.

En consecuencia, cualquier jueza o juez, de oficio o a petición de parte, sólo si tiene duda razonable y motivada de que una norma jurídica es contraria a la Constitución o a los instrumentos internacionales de derechos humanos que establezcan derechos más favorables que los reconocidos en la Constitución, suspenderá la tramitación de la causa y remitirá en consulta el expediente a la Corte Constitucional, la que en un plazo no mayor a cuarenta y cinco días resolverá sobre la constitucionalidad de la norma.

Si transcurrido el plazo previsto la Corte no se pronuncia, el proceso seguirá sustanciándose. Si la Corte resolviera luego de dicho plazo, la resolución no tendrá efecto retroactivo, pero quedará a salvo la acción extraordinaria de protección por parte de quien hubiere sido perjudicado por recibir un fallo o resolución contraria a la resolución de la Corte Constitucional. No se suspenderá la tramitación de la causa, si la norma jurídica impugnada por la jueza o juez es resuelta en sentencia.

El tiempo de suspensión de la causa no se computará para efectos de la prescripción de la acción o del proceso.

Art. 5. – PRINCIPIO DE APLICABILIDAD DIRECTA E INMEDIATA DE LA NORMA CONSTITUCIONAL.- Las juezas y jueces, las autoridades administrativas y las servidoras y servidores de la Función Judicial, aplicarán directamente las normas constitucionales y las previstas en los instrumentos internacionales de derechos humanos cuando estas últimas sean más favorables a las establecidas en la Constitución, aunque las partes no las invoquen expresamente.

Los derechos consagrados en la Constitución y los instrumentos internacionales de derechos humanos serán de inmediato cumplimiento y aplicación. No podrá alegarse falta de ley o desconocimiento de las normas para justificar la vulneración de los derechos y garantías establecidos en la Constitución, para desechar la acción interpuesta en su defensa, o para negar el reconocimiento de tales derechos.

Art. 6. – INTERPRETACIÓN INTEGRAL DE LA NORMA CONSTITUCIONAL. - Las juezas y jueces aplicarán la norma constitucional por el tenor que más se ajuste a la Constitución en su integridad. En caso de duda, se interpretarán en el sentido que más favorezca a la plena vigencia de los derechos garantizados por la norma, de acuerdo con los principios generales de la interpretación constitucional.

Art. 7. – PRINCIPIOS DE LEGALIDAD, JURIS-DICCION Y COMPETENCIA. - La jurisdicción y la competencia nacen de la Constitución y la ley. Solo podrán ejercer la potestad jurisdiccional las juezas y jueces nombrados de conformidad con sus preceptos, con la intervención directa de fiscales y defensores públicos en el ámbito de sus funciones. Las autoridades de las comunidades, pueblos y nacionalidades indígenas ejercerán las funciones jurisdiccionales que les están reconocidas por la Constitución y la ley.

Las juezas y jueces de paz resolverán en equidad y tendrán competencia exclusiva y obligatoria para conocer aquellos conflictos individuales, comunitarios, vecinales y contravencionales, que sean sometidos a su jurisdicción, de conformidad con la ley.

Los árbitros ejercerán funciones jurisdiccionales, de conformidad con la Constitución y la ley. No ejercerán la potestad jurisdiccional las juezas, jueces o tribunales de excepción ni las comisiones especiales creadas para el efecto.

Art. 8. – PRINCIPIO DE INDEPENDENCIA.- Las juezas y jueces solo están sometidos en el ejercicio de la potestad jurisdiccional a la Constitución, a los instrumentos internacionales de derechos humanos y a la ley. Al ejercerla, son independientes incluso frente a los demás órganos de la Función Judicial. Ninguna Función, órgano o autoridad del Estado podrá interferir en el ejercicio de los deberes y atribuciones de la Función Judicial. Toda violación a este principio conllevará responsabilidad administrativa, civil y/o penal, de acuerdo con la ley.

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## TÍTULO VIII

### RELACIONES DE LA JURISDICCIÓN INDÍGENA CON LA JURISDICCIÓN ORDINARIA

#### Art. 343. – ÁMBITO DE LA JURISDICCIÓN INDÍGENA

Las autoridades de las comunidades, pueblos y nacionalidades indígenas ejercerán funciones jurisdiccionales, con base en sus tradiciones ancestrales y su derecho propio o consuetudinario, dentro de su ámbito territorial, con garantía de participación y decisión de las mujeres. Las autoridades aplicarán normas y procedimientos propios para la solución de sus conflictos internos, y que no sean contrarios a la Constitución y a los derechos humanos reconocidos en instrumentos internacionales. No se podrá alegar derecho propio o consuetudinario para justificar o dejar de sancionar la violación de derechos de las mujeres.

#### Art. 344. – PRINCIPIOS DE LA JUSTICIA INTERCULTURAL

La actuación y decisiones de los jueces y juezas, fiscales, defensores y otros servidores judiciales, policías y demás funcionarias y funcionarios públicos, observarán en los procesos los siguientes principios:

- a.** Diversidad.- Han de tener en cuenta el derecho propio, costumbres y prácticas ancestrales de las personas y pueblos indígenas, con el fin de garantizar el óptimo reconocimiento y realización plena de la diversidad cultural;
- b.** Igualdad.- La autoridad tomará las medidas necesarias para garantizar la comprensión de las normas, procedimientos, y consecuencias jurídicas de lo decidido en el proceso en el que intervengan personas y colectividades indígenas. Por lo tanto, dispondrán, entre otras medidas, la intervención procesal de traductores, peritos antropólogos y especialistas en derecho indígena.
- c.** Non bis in idem.- Lo actuado por las autoridades de la justicia indígena no podrá ser juzgado ni revisado por los jueces y juezas de la Función Judicial ni por autoridad administrativa alguna, en ningún estado de las causas puestas a su conocimiento, sin perjuicio del control constitucional;
- d.** Pro jurisdicción indígena.- En caso de duda entre la jurisdicción ordinaria y la jurisdicción indígena, se preferirá esta última, de tal manera que se asegure su mayor autonomía y la menor intervención posible; y,
- e.** Interpretación intercultural.- En el caso de la comparecencia de personas o colectividades indígenas, al momento de su actuación y decisión judiciales, interpretarán interculturalmente los derechos controvertidos en el litigio. En consecuencia, se procurará tomar elementos culturales relacionados con las costumbres, prácticas ancestrales, normas, procedimientos del derecho propio de los pueblos, nacionalidades, comunas y comunidades indígenas, con el fin de aplicar los derechos establecidos en la Constitución y los instrumentos internacionales.

#### Art. 345. – DECLINACIÓN DE COMPETENCIA

Los jueces y juezas que conozcan de la existencia de un proceso sometido al conocimiento de las autoridades indígenas, declinarán su competencia, siempre que exista petición de la autoridad indígena en tal sentido. A tal efecto se abrirá un término probatorio de tres días en el que se demostrará sumariamente la pertinencia de tal invocación, bajo juramento de la autoridad indígena de ser tal. Aceptada la alegación la jueza o el juez ordenará el archivo de la causa y remitirá el proceso a la jurisdicción indígena.

#### Art. 346. – PROMOCIÓN DE LA JUSTICIA INTERCULTURAL.

El Consejo de la Judicatura determinará los recursos humanos, económicos y de cualquier naturaleza que sean necesarios para establecer mecanismos eficientes de coordinación y cooperación entre la jurisdicción indígena y la jurisdicción ordinaria.

Especialmente, capacitará a las servidoras y servidores de la Función Judicial que deban realizar actuaciones en el ámbito de su competencia en territorios donde existe predominio de personas indígenas, con la finalidad de que conozcan la cultura, el idioma y las costumbres, prácticas ancestrales, normas y procedimientos del derecho propio o consuetudinario de los pueblos indígenas.

El Consejo de la Judicatura no ejercerá ningún tipo de atribución, gobierno o administración respecto de la jurisdicción indígena.



# COUNTRY STUDY – NIGER

METHODOLOGY .....	256
BACKGROUND .....	257
THE APPLICATION OF CUSTOMARY LAW BY THE COURTS .....	258
REGULATION OF DISPUTES BY TRADITIONAL OR CUSTOMARY AUTHORITIES.....	262
REGULATION OF DISPUTES BY RELIGIOUS ORGANIZATIONS AND AUTHORITIES .....	266
PREFERENCES OF USERS AND PROFILES OF PROVIDERS.....	268
IMPORTANT HUMAN RIGHTS ISSUES ARISING FROM INFORMAL JUSTICE SYSTEMS.....	270
PROGRAMMING FOR INFORMAL JUSTICE SYSTEMS IN NIGER.....	276

## METHODOLOGY

This study is based on three main elements. The first is a desk study of available materials concerning non-state or informal justice and customary law in Niger.<sup>1</sup>

The second element is a field study conducted during a two-week mission to Niger in January 2010. The mission included visits to the town of Gaya and the village of Niakoye-Tounga in the Dosso region (about 20 kilometres from the town of Dosso, on the main road)<sup>2</sup> and to two settlements and hamlets in the area of Makolandi in the Tillaberi region, where providers and actual or potential users were met. Constraints posed by budgetary, logistical and security considerations did not make it possible to visit the east of the country. This choice of districts reflects a preference for rural areas over urban ones.

It is important to note that Gaya, in particular, is an area where there has been a lot of intervention by aid organizations and NGOs. In the field of justice, governance and human rights, these have included radio broadcasts and public discussions where justice sector actors have participated, and NGO outreach programmes have provided legal education (including through drama) and other legal services, as well as training for chiefs on mediation. It is also a border town on the main route from Niamey to important ports in the region. These factors mean that it probably represents a more open, progressive society compared to some parts of the country. The district (comprising 6 *cantons* and over 200 villages, as well as a number of urban *quartiers*) may thus give a good (though impressionistic, given the short duration) picture of an area where governance interventions of various kinds can be expected to have had an effect.

<sup>1</sup> As is mentioned in the main study, the term *justice informelle* had negative, pejorative connotations for jurists in Niger.

<sup>2</sup> The nearest police (*gendarmerie*) post was 5 kilometres away, while the *brigade* was 20 kilometres away in Gaya. The village, with an estimated area of 1 kilometre by 2 kilometres, has an estimated population of about 4,000, including 1,037 taxpayers.

The mission also included meetings and discussions with a number of representatives of the justice system and legal experts having specific knowledge of customary law and informal justice mechanisms, as well as representatives of UN and other cooperation partners and NGOs.

The third element is a quantitative study during which a population survey of potential and actual users or beneficiaries and providers of IJS were asked questions about their preferences and practices. The quantitative survey was conducted in the same districts and villages in the Dosso and Tillabéri regions of Southern and Western Niger in February 2010.

## BACKGROUND

Like many post-colonial states, the Republic of Niger recognizes customary law that regulates many areas of life and social interaction, as well as the customary institutions that apply these rules. Article 81 of the Constitution provides that the law will set out a procedure whereby customs will be harmonized with the fundamental principles of the Constitution. The same article provides that the law will set out rules concerning the status of traditional chiefs.

Legally, the situation in relation to the intersections between state and non-state provision of justice, and between statutory and customary law in Niger, is thus characterized by formal recognition of traditional or customary law and justice. This is seen in measures that include the widespread application of customary law in civil matters in the ordinary courts of the state justice system, as well as formal recognition of the role of chiefs in resolving disputes.

On the other hand, there are significant elements of law and justice that are *de facto*, an accepted part of the system while remaining unregulated by state law. These elements are seen primarily in the role of Islamic law as a part of customary law and of Islamic religious officials and organizations in the settlement of disputes. In comparison with other countries, there is a high degree of linkage between these informal settlements and the courts, based on the high level of social support for Islamic law and the informal instances that apply it.

Niger is a party *inter alia* to the human rights covenants as well as to the Convention on the Rights of the Child and the CEDAW, as well as to the Convention against Torture and the ICERD. The Constitution contains guarantees of basic human rights, including equality,<sup>3</sup> but does not contain a clear prohibition of discrimination based on sex.

Through assistance to the justice sector in the country and increased government focus, there are now courts in each department of the country, though for some people the nearest statutory court may still be at a distance of up to 150 kilometres. In this context, police and *gendarmerie* may function *de facto* as justices of the peace. Future justice programming is expected to place greater emphasis on primary justice and non-state actors, including paralegals, with which UNDP has worked to support paralegalism and primary justice in recent years. For its future programme, it aims to include cooperation with women's organizations in its primary justice programming.

## TYOLOGY

As is stressed in the main study, any typology of IJS is inevitably rough and ready, as national legislation, history and practice make for many variations. This Annex examines three main forms of informal justice in Niger: (1) the application of customary law by formal state courts, (2) the role of the chiefs in settling disputes, and (3) the settlement of disputes by Islamic religious authorities. Of these, only the third can really be said to be a non-state system.

Strictly speaking, the application of customary law by the formal courts may be said not to be an expression of informal justice at all. Nevertheless, an interpretation such as this would exclude such a vitally important part of the

<sup>3</sup> See Article 8.

picture in Niger. The application of customary law by special chambers of the formal courts bears a close resemblance in fact to the customary or local courts found in some Anglophone and Lusophone countries in Africa. In this way, it fits more or less into the customary or local courts in the typology in Chapter 3 of the main study.

As is discussed below, the institution of chiefs and headmen or traditional leaders also has its particularities in Niger, particularly in relation to the unusually high level of integration of chiefs into the administrative and political structure of the country. Despite this, chiefs are treated here as traditional leaders rather than as administrative structures with a dispute resolution function according to the working typology in the main study.

The religious authorities, including individual *marabouts*, *imams* and *cadis*, as well as associations such as the Islamic Association of Niger (AIN), can, in the context of Niger, be considered on paper as purely non-state actors. The limitations of a simple dichotomy between formal and informal or state and non-state systems are nevertheless quickly seen when one considers the many ways in which dispute resolution by these actors is given an imprimatur by state agencies.

As in most contexts, analysis of reality reveals a complex picture of interactions in which the different systems intersect with one another. Lower level chiefs may double as customary law assessors in formal courts, and assessors may advise and assist chiefs or may be recognized as *marabouts* in their communities. The precepts and doctrines of Islamic law, as well as its actors, enter into the system in different ways at all levels.

## THE APPLICATION OF CUSTOMARY LAW BY THE COURTS

Pursuant to Article 81 of the Constitution, Article 63 of the Law on Judicial Organization and Powers<sup>4</sup> lays down the basic framework for the application of customary law by the courts in the country. The article provides that, subject to conformity with provisions of duly ratified international conventions, legislative provisions or fundamental rules relating to public order (i.e., the civil law concept of *ordre publique*), the courts should apply the custom of the parties in matters concerning:

1. the capacity of persons to enter into contracts and to take legal action, the status of persons, the family, marriage, divorce, paternity, inheritance, gifts and wills;
2. ownership or occupancy of real property and the rights arising therefrom, except where the legal action concerns a plot of land that is registered or concerning which documentation of the transfer is evidenced according to law.<sup>5</sup>

The courts routinely deal with cases in all of these areas. Importantly, Article 63 clearly gives primacy to international conventions over conflicting customary rules. As we shall see below, this position creates some tension with some aspects of customary or Islamic family law, including repudiation and the inheritance rights of children born outside of marriage.

4 Loi organique n° 2004-50 du 22 juillet 2004 fixant l'organisation et la compétence des juridictions en République du Niger.

5 Unofficial translation by DIHR. Article 63 : Sous réserve du respect des conventions internationales régulièrement ratifiées, des dispositions législatives ou des règles fondamentales concernant l'ordre public ou la liberté des personnes, les juridictions appliquent la coutume des parties :

1) dans les affaires concernant leur capacité à contracter et agir en justice, l'état des personnes, la famille, le mariage, le divorce, la filiation, les successions, donations et testaments;

2) dans celles concernant la propriété ou la possession immobilière et les droits qui en découlent, sauf lorsque le litige portera sur un terrain immatriculé ou dont l'acquisition ou le transfert aura été constaté par un mode de preuve établi par la loi.

## THE ROLE AND FUNCTIONS OF CUSTOMARY ASSESSORS

Article 43 of the same law provides that, in such matters, the judge must associate two customary assessors (*assesseurs coutumiers*) who represent the customs of the parties. Assessors are chosen from a list of nominees proposed by the chiefs of the different ethnicities and areas to the court of first instance. The candidates have often functioned as advisers to the chiefs before being nominated for this position. The court can enter into a dialogue with the chiefs concerning the names put forward, based on the court's knowledge of the qualities of the persons concerned. The court can reject certain candidacies as part of this process. The President of the Court sends the agreed list of candidates to the Ministry for Justice, which makes the final selection. The list of candidates is not made public until after the approval. According to a judge interviewed, the assessors should be literate, often in Arabic. Asked whether it would be possible to make the candidacies public at an earlier stage, the Justice of the Court of Gaya said that there would in principle be no difficulty with this. The problem is rather that there are not so many willing candidates, as the pay available to the assessors is so little that it is more or less a voluntary function, not attracting many candidates. The law does not appear to contain provisions relating to the deontology of assessors or for their disqualification for reasons of conflict of interest or partiality.

It is important that assessors have a solid knowledge of custom in fields such as inheritance, land and real property, marriage and paternity. Although Islamic law exerts a strong influence on the custom applied, there are important differences from place to place and from one ethnic group to another. Thus, any attempt to develop a guide for courts on custom would either have to content itself with being generic and not completely accurate or have to be very detailed.

While some judges insist that the *assesseurs* are mere advisers on custom, their role in practice may be rather different. Judges rotate from one court to another in different parts of the country, whereas the same assessors may be in place even for decades.

In practice, the assessors may be relied upon not simply for their knowledge of custom, but for proving evidence of the factual circumstances and context of the dispute, particularly in cases concerning land or the ethnicity and origin of a person. They may be closely associated with the chiefs and other elders who are familiar with the history of land allocations in a particular area, and would often conduct on-site visits together with the judge and COFO.<sup>6</sup> Their involvement with the court gives the judgements increased legitimacy among local communities. What is more, they are likely to speak the language of the locality and people involved, which the judge perhaps cannot. Moreover, they may in fact play a role in assisting the judge to clarify the facts of the case and the nature of the claims involved, in advising the judge on the credibility of witnesses or otherwise on the merits of the case, and even in explaining and thereby indirectly enforcing the court's decision. They may play a role in bringing the parties to a dispute to a friendly settlement.<sup>7</sup> If and when the assessors play this expanded role, there may be a danger that they will take the side of the chief and those close to him. To a large extent, it is up to the judge responsible for customary and civil matters whether the assessors will be confined to the strictly advisory role foreseen for them in the law or whether they will cover a range of rather diffuse and ill-defined functions.

In understanding the role played by the assessors, it may thus be more helpful to see the assessors as the vital link between the formal and informal systems that allows communication and understanding between the two and thus for them to work together. It should be remembered that the courts rarely have the resources to conduct on-site visits, meaning that they must rely on other means to obtain information. They may contribute to the chances of an actual enforcement of decisions of the court by providing a channel of communication whereby chiefs,

6 *Commission Foncière*, or local land commission. One member of the judiciary doubted whether the assessors possess an in-depth knowledge of land allocations, as they live mostly in town rather than in the rural areas.

7 Interview with assessors, Gaya, 18 January 2010. The most senior assessor in Gaya had assisted in the process of filling the vacancy that arose when an assessor of another ethnicity retired. The assessors came from Gaya town, rather than the surrounding areas, which is important for their availability.

without whom a decision might have little chance of being enforced, can understand and accept the decisions of the courts. Without the benefit of further research, however, this remains a rather impressionistic view. Given this variety of roles, any idea of gradually replacing the assessors with training and written guides on custom for judges seems less feasible.

## LINKAGES BETWEEN THE COURTS AND THE TRADITIONAL CHIEFS

Unofficial links exist between dispute resolution by the chiefs and litigation at the courts, and the assessors may play important roles in managing these. The assessors are often close to the chiefs, being nominated by them; they may live in the community where the dispute originates; and they will often take part in on-site visits and measure land, ascertaining the facts on behalf of the court. The assessors interviewed during the mission confirmed that they sometimes engage in advising chiefs on how to handle cases brought to them. In some cases, the assessors may themselves hold positions as traditional chiefs. Among three assessors interviewed in Gaya, one was a *chef de quartier* and an assessor. It was beyond the scope of the field study to attempt to assess whether judges attempted to secure against conflicts of interest and roles where functions overlapped in this way. An assessor may also be a *marabout* or expert in Islam.

An interview with the President of the Court of Gaya confirmed that the court normally insists that people have attempted to seek a resolution of the dispute from the chief in their village or *quartier* and *canton* before bringing a case to the court. It is not usually necessary to insist on this, as people would usually do so themselves. The judiciary has interpreted this to be obligatory in cases concerning land,<sup>8</sup> but courts extend it in practice into marriage dissolution and all areas as necessary to manage their case-load and because, among communities in Niger, it is considered a violation of local peace to bring a person before a court. Thus, preservation of peace and harmony demand that local avenues be utilized first, according to one judge. The conciliation avenue is seen as essential by the judiciary.

## REPRESENTATION OF WOMEN AS ASSESSORS

The position (from the point of view of religious doctrine) of women in Islam may be important when it comes to positions as assessors, to the extent that they are expected to have an understanding of Islamic law. Recognition for learning in Islamic law (as well as approval by the chiefs in the area) may be considered important for nomination as a customary assessor at the courts. Thus, religious doctrine and sentiment may influence the choice of customary assessors in some areas also. Nevertheless, there was one woman among the eight assessors at the court in Gaya, and there are reportedly two at the High Court (*Tribunal de Grande Instance*) in Dosso.

A representative of the judiciary thought that the best way of promoting representation of women in positions of authority was by making positive examples known among the population, thereby promoting a change in views, rather than through top-down intervention.<sup>9</sup> The Ministry for Justice acknowledged the poor representation of women in the justice system in general.

The AFJN felt that there should be a concerted effort to promote women as customary assessors, saying that this would be a visible and important signal that would affect women's participation and access to justice. They expected that it would bear fruit in terms of case outcomes, as assessors promote their personal views, as well as custom, when intervening in cases. Women focal points said that customary assessors often fail to explain issues of women's rights under customary law to the judge. They were in no doubt that gender biases are present.

<sup>8</sup> Interview with the President of the Court of First Instance of Gaya. 16 January 2010.

<sup>9</sup> Interview with adviser to the Supreme Court, M. Mounkaila. Niamey, 15 January 2010.

## CUSTOMARY OR ISLAMIC LAW?

In practice, there is a widespread and accepted conflation of customary law, which, as described above, is recognized as a source of law in and by the legal system, with Islamic law, which is not in itself recognized as a source of law by legislation or the constitution. At times and to varying degrees, the conflation amounts to a substitution of precepts of Islamic law for custom. The general result is nevertheless that Islamic law is widely applied by the courts, the chiefs and, of course, the Islamic authorities. In the courts, the degree to which Islam replaces custom will typically depend on a number of factors, including the views and preferences of the parties, the legal domain in question,<sup>10</sup> the part of the country concerned and the knowledge and attitudes of the judges and *assesseurs coutumiers* who are working at a particular court.

In the areas of family law and succession, for which Islam lays down very clear rules, Islamic authorities will see any divergence from these rules as wrong. Most observers agreed that Islamic law has gradually taken over from divergent custom in many parts of the country as the accepted custom, so that one today finds that the courts are by and large applying Islamic law in family matters where the parties have not chosen statutory law.

In questions of real property law, where Islam does not lay down substantive rules, non-religious custom will typically play a greater part. In practice, the customary law applied in particular areas and among particular groups will usually represent a mixture of ethno-linguistic or tribal custom and Islamic law precepts.

Thus, the phrases '*droit coutumier Haussa Islamisé*' and '*droit coutumier Djerma Islamisé*', meaning the Islamified customary law that is peculiar to Haussa or Djerma groupings, are frequently heard and used among scholars, judges and the *assesseurs coutumiers*.

There are differences of opinion among legal scholars and practitioners (the latter broadly including judges as well as lawyers) as to whether this conflation – and indeed Islamic law as such – should be given legal recognition as a part of the customary law of the country. Scholars and practitioners agree that this has in reality been done by the courts, including at the highest levels. Unsurprisingly, the representatives of religious organizations interviewed considered Islamic law to be part of the law of the land, partly because of what they saw as its moral authority, partly because its *de facto* acceptance.<sup>11</sup>

The differences of opinion on this subject are largely, but not completely, aligned with views on the role of religion in public life (i.e., between holders of secularist and more religiously oriented points of view). Legally recognizing the precepts of Islamic law as a source of law would compromise the nominally secular and republican nature of the state. Links between the political power of the state and mainstream Islam in the country are well entrenched, though less explicit than the recognition given to the role of chiefs in settling disputes. In terms of legal domains, the issue of family law and the position of women herein has been an important unresolved issue in the country for close to 20 years. Islamic religious authorities opposed the attempt to introduce a code of family law in the early 1990s. According to one representative of an Islamic organization, the opposition was based on the content of what was being proposed rather than on the idea of a codified law as such.<sup>12</sup>

Much scholarly attention in Niger has been paid to the issue of family law and the difficulties surrounding the introduction of legislation in the area. While some constitutional provisions, including those on gender equality, for instance, would seem to mandate decisive judicial intervention (see below on the question of equality as it relates to repudiation in Islamic marriage, for example), far-reaching judicial interpretations of these constitutional provisions would run the risk of exposing the institution of the courts to political attack.

10 I.e., one could expect a very high degree of penetration of Islamic law in matters of marriage, divorce and succession.

11 Interview with AIN, Niamey, 21 January 2010.

12 Interview with ANASI, Niamey, 20 January 2010.

# REGULATION OF DISPUTES BY TRADITIONAL OR CUSTOMARY AUTHORITIES

## STATUS OF CUSTOMARY AUTHORITIES

A 1993 Regulation (*Ordonnance*)<sup>13</sup> sets out the legal framework concerning the customary or traditional chiefs in the country. It provides that chiefs are organized according to the administrative structure of the country and are subject to the supervision of these bodies. This means that there are likely to be up to 15,000 chiefs in the country that are covered by the *Ordonnance*. While the chiefs and headmen are considered to be, and indeed act as, representatives of the people, it is also true that the institution of chiefs and headmen in Niger is an administrative institution, built up according to the administrative structure of the country (quarter/villages, tribe, canton, grouping and sultanate/province).<sup>14</sup> These divisions may or may not correspond to ethnic and linguistic divisions. Although the right to be a candidate for the office of headmen or chief is dependent on heredity, a great many headmen and chiefs are former civil servants<sup>15</sup> and they are dependent for their office and income on the Ministry of the Interior. Government authorities can modify or abolish the units and their structure. Conviction of certain criminal offences results in ineligibility as a candidate for office as a traditional chief. The regulation provides for an election process among eligible persons and for ultimate approval by the minister responsible for local government or by a lower body in the governmental hierarchy, depending on the level of the chief concerned.<sup>16</sup> Once appointed, chiefs remain in office for life, barring removal for disciplinary reasons. The interviews conducted made it clear that village chiefs are very aware of the hierarchy within their own system and seem to respect the superior authority of the *chef de canton*. Likewise, the *chef de canton* will generally not hear a case that has not been before the *chef de village* or *quartier*.

Chiefs or headmen fulfil a number of governmental and administrative functions and are members of the local council. They assist in the collection of taxes and the conducting of censuses, maintain social harmony and cohesion, ensure the respect of administrative and legal rules and defend the interests of citizens and communities *vis-à-vis* the authorities and third parties. They are associated with all development initiatives in the area they are responsible for and are considered administrative law magistrates, having the duty to maintain public order, and report on any circumstances likely to threaten it. They combine these functions with that of representing the people.

In addition to these functions, Article 15 of the *Ordonnance* bestows on chiefs the function of resolution of disputes. The article provides that traditional chiefs have the power to conciliate disputes in customary, civil and commercial matters. The chief uses custom to resolve issues concerning the use of land for cultivation or pasture on which the community possesses customary rights.

Very prominent in the case-load of the chiefs are land and real property matters, as well as a number of disputes related to this, including disputes between cultivators and pastoralists concerning water, damage to crops, etc.

13 Ordonnance n° 93-028 du 30 mars 1993 portant statut de la chefferie traditionnelle du Niger.

14 « La chefferie au Niger est donc une "chefferie administrative", d'origine coloniale, qui perdure depuis l'indépendance, et qu'il ne faut pas confondre avec ce qu'étaient les chefferies pré-coloniales. »

Jean-Pierre Olivier de Sardan, « Chefs et Projets au Village (Niger) », *Le bulletin de l'APAD*, n° 15, *Les dimensions sociales et économiques du développement local et la décentralisation en Afrique au Sud du Sahara*, [En ligne], mis en ligne le : 20 décembre 2006. URL : <http://apad.revues.org/document563.html>. Consulté le 14 avril 2010.

15 This would seem to be the case especially in urban areas and among the higher ranks of the system. The *chef du quartier* met in Gaya town was a former *garde*.

16 Chapter 1 of the *ordonnance*.

## PARTICIPATION AND GENDER

The above-mentioned *Ordonnance* provides that any citizen of Niger can participate in the process for nomination of chiefs, provided that the customary rules permit them to do so. On paper, there is nothing in the law to prevent women from participating in the process of selecting chiefs or, one would suppose, even in being nominated as a chief or as a customary assessor. There are reportedly areas of Niger where there is representation of women in the chief's council.<sup>17</sup> Nevertheless, there are several factors militating against such participation. Social and customary norms weigh heavily against women playing such a role in most of the ethnic groups represented in the country. Even in the state institutions, there are few women in positions of authority.

Second, the view of women in Islam as interpreted in Niger also plays a role. Islamic officials questioned about this during the mission were sceptical about women occupying positions of authority.<sup>18</sup> It seems fair to say that this view represents a particularly conservative view of Islam, which, however, is dominant in Niger today.

## PROCEDURAL ISSUES

According to many authors, the traditional chiefs very frequently exceed their powers by going beyond mediation or conciliation and actually imposing a decision.<sup>19</sup> This view was frequently echoed by persons met during the mission, including by some chiefs themselves. It was nevertheless the view of many interviewees that the many efforts at training and sensitization of chiefs and populations, as well as the active NGO work conducted, had had a significant impact in lessening this tendency in the Gaya district. Nevertheless, there does not appear to be a clear or uniform understanding of what is meant by conciliation. NGO representatives interviewed explained that 'negotiation' is perhaps a more accurate description of what takes place, where many influences and factors are present.

On the positive side, hearings (when they are heard, which would usually only be the case for disputes being resolved at the level of the *chef de canton*) are held in public and everyone can attend them. Interviews with village and ward (*quartier*) chiefs tended to confirm that formal hearings are held only in more serious cases and at the *canton* level. Based on the interviews and focus group discussions held, the resolution of disputes is frequently a function that the chief would share with the *sages* and *notables* of the area, often in a very informal way, where networks and relationships play an important role. Minor disputes are usually handled by the chief consulting with the two families involved. (This would usually be the first step, even in marital disputes, rather than talking first to the parties themselves.) This would often be followed by consultations with the area *notables* (*sages*), and then, if necessary, by talking to the two spouses. Generally, once a matter has been brought to the chief, it is already a public matter, so that confidentiality is less of an issue. Nevertheless, matters can be handled with discretion where necessary. Sometimes, disputants would arrive for a hearing, each accompanied by 'their' *sages* to assist and represent them.

Problems involving two different *quartiers* would usually be dealt with by the two *chefs de quartier* meeting and consulting. If necessary, the *chef de canton* can get involved.

The absence of deontological rules concerning equality of the parties, independence and impartiality, as well as the impermissibility of coercion, coupled with other factors including the dependence of chiefs on the executive

17 Interview with Mr. Nouhou Hamani Mounkaila, Counsellor at the Supreme Court of Niger, 15 January 2010.

18 Asked whether a woman could be a chief, the representative of an Islamic organization interviewed referred to a *Hadith* as authority for the view of Islam that women were unsuited to positions of authority. While the authors of the present report do not make claims to expertise in the field of Islamic law, some brief reading on this *Hadith* shows that there is disagreement among Islamic scholars both as to its authenticity and as to its correct interpretation. In some other predominantly Muslim countries, no difficulty is seen with women occupying positions of authority.

19 See Bachir Talfi, Research Paper 'Quel Droit Applicable à la Famille au Niger ? Le Pluralisme Juridique en Question', Danish Institute for Human Rights, Research Partnership 4/2008. In footnote 95, the author cites a number of sources for this assertion. Interviews conducted with some chiefs tended to confirm this. Local populations expect to see matters decided and closed, they said.



power, point to a weakness here. A *chef de canton* is a senior and powerful person whom ordinary people will be very reluctant to challenge. There are few or almost no safeguards against abuse in the procedure, and the nature of tightly knit communities means that it is unlikely that parties will not use connections and a variety of means to influence chiefs in their favour. NGO interviewees said that the important process regarding a dispute is what goes on before, rather than during, a hearing. Power relations very easily enter into the equation.

## THE LINK TO THE COURTS

Article 15 provides further that the chief should draw up a *procès verbale* regarding the conciliated settlement. This should be kept in a register and copies provided to the competent administrative and judicial authorities. Such a written record, duly signed by the parties, should, according to the article, in no case be contested again before the administrative or judicial authority. The same law does not require that parties attempt to resolve their disputes before the customary authorities before bringing them to court. It appears, however, that many judges and courts require this in practice.<sup>20</sup> Where written settlements are drawn up, a difficulty that arises is that the law governing the judiciary<sup>21</sup> does not make any reference to approval of the *proces verbaux*.<sup>22</sup> In practice, the courts would reportedly hold that a settlement only becomes executory after approval by a court, although it becomes binding between the parties at the moment of signature.

Here, the courts must carry out a sensitive balancing act. It must do what it can to ensure due process at the level of the chiefs, including by refusing to approve documents that do not live up to basic requirements of procedural fairness and substantive guarantees. On the other hand, they must respect the requirements of the *Ordonnance* and the need to limit their case-load. The practice of the court of first instance in Gaya is that the written record and the circumstances of its conclusion are examined to see if it really has the character of a conciliated settlement, before the court approves it. The court should not simply approve a written document on its own. Sometimes, it is observable that one party has not even been present and that the document is the result of an *ex parte* application to the chief by one of the parties. The court's practice is that claims of pressure from family members to accept a settlement will be insufficient to refuse approval, whereas coercion or threats from a chief will be sufficient. At a minimum, rules of justice would require that parties be informed of the principle of voluntariness and of this consequence of signing a *procès verbale*.

Another difficulty encountered is that written records are rarely kept in most areas of Niger. Even in Gaya, which as noted has seen many interventions, it is reportedly only done regularly by one or two out of a number of *chefs de canton*. Many chiefs are illiterate and thus incapable of complying with the requirement to keep written records. A result of this is that parties sometimes reopen disputes when a chief dies and a new one is appointed (or even when a new judge is appointed to the court).

## ACCESS ISSUES

There is no formal barrier to women bringing cases to the chiefs, although traditional mores may make this difficult. Women focal points said that women often feel frustrated by proceedings before the chiefs, as they are ordered by his counsellors to stay quiet when they try to speak and generally feel intimidated when surrounded by an all-male group of counsellors. The protocol required to access a chief's court varies significantly from region to region. Interviewees from NGOs that provide legal services did not as a matter of common practice accompany 'clients' during hearings. Accompaniment of this kind would in practice require the consent of the chief.

20 Interviews with judge in Gaya, January 2010. See above on application of custom by the courts.

21 See footnote 1 above.

22 Here, as elsewhere in this study, the authors are indebted to Mr. Talfi's paper. See below.

While some interviewees did mention that contributions (cash or in-kind) are made to chiefs for the adjudication services that they render, some thought that this was usually less an issue of corruption and bias than one of necessity. One interviewee thought that the amounts expected<sup>23</sup> were generally small and known to the parties. However, in claims of a certain value, this might no longer hold true. Other interviewees representing users said that corruption was a major problem both in the informal and formal justice systems. A more thorough study would be necessary on this issue before drawing conclusions.

## SUPERVISION AND MONITORING MECHANISMS IN RELATION TO THE CHIEFS

There is no code of professional conduct in relation to resolution of disputes by chiefs. Any attempt to develop one would have to take account of the different levels at which chiefs exercise their competence and of differing levels of formality (in terms of holding hearings) as well as levels of literacy, both of the chiefs themselves and of their communities.

Chapter V of the regulation/*ordonnance* concerning the chiefs sets out a disciplinary procedure in relation to the chiefs that provides for supervision by the appointing authority (the ministry responsible for local government). It provides for the establishment of disciplinary commissions and gives the ministry the power to determine their composition, functioning and operation. It appears, however, that this procedure has not always been used.<sup>24</sup> There is no systematic monitoring in the absence of a complaint. While interviewees in the judiciary and among NGOs considered that more systematic monitoring of the chiefs would be desirable, it would be an expensive and demanding undertaking that could rouse the antipathy of chiefs. The very presence of NGOs and the work that they have done in sensitizing populations have created an environment where there are more checks on the power of chiefs. Where NGOs can work among communities with the consent of chiefs, a cooperative relationship that promotes openness can arise gradually, in contrast to a top-down approach.

Written records of case settlements should, as noted, be provided to the administrative and judicial authorities. This is reportedly rarely complied with in practice. Doing so would give both of these authorities the possibility to conduct a better informal dialogue with chiefs and contribute to supervision and monitoring, even in the absence of a systematized review by the courts, which exists in some other contexts.

One interviewee observed that it is possible to gauge the success of chiefs in resolving disputes amicably by examining the extent to which they are resorted to by the local population and comparing this to the numbers of cases brought to the courts in the area and the numbers of settlements contested and overturned. Monitoring or analysis of this kind would provide indicators of acceptability and legitimacy.<sup>25</sup> Gender-disaggregated figures on litigants' profiles would provide indications of levels of satisfaction with outcomes and processes at the level of conciliation by the chiefs.<sup>26</sup>

Reflecting on the dispute resolution tasks of a traditional chief, most found it difficult to give a precise estimate of how much time this task demanded on a monthly basis, but all agreed that availability was a key factor in accomplishing the task, as well as such qualities as being a good listener and communicator, being honest, fair-minded and of good reputation, but also being decisive and solution-oriented. A bad decision could pursue a chief for a long time, and people stop going to one who does not enjoy a good reputation.

<sup>23</sup> Often colloquially referred to as 'Kola'.

<sup>24</sup> Some interviewees referred to the removal of a Sultan in Zinder that occurred without invoking this procedure.

<sup>25</sup> Maître Chaibou, interview in Niamey, 22 January 2010.

## PENAL CASES, PUBLIC ORDER, AND THE LINK TO THE SECURITY FORCES

It is important for the *gendarmerie* to maintain good relationships with the chiefs, so that they call or contact the *brigade* when there is an incident. The *gendarmerie* has the authority to impose fines for minor assault and battery cases, and good links to the chiefs in the use of powers such as these can limit illegal action by chiefs. Local chiefs interviewed seemed in general willing to contact the *gendarmerie* in cases of serious violence. The security forces might reportedly refer domestic dispute cases back to the traditional authorities, although increasing awareness of domestic and gender-based violence as something unacceptable means that the victim needs to be shown that this is taken seriously. Usually, it would only be in extremely serious cases that a complaint would even be made to the security forces and then it would need to be pursued as a criminal matter.<sup>27</sup> Social pressure, and the impossibility of returning to her husband afterwards, would cause most women victims not to report the matter to the *gendarmerie* or police.

The chiefs' knowledge of national legislation and human rights standards was generally estimated to be very limited, particularly at the lower levels of the hierarchical system. While *chefs de quartier* and *chefs de village* would often consult with a more senior chief (*chef de canton*, who is frequently a former state official with knowledge of the law and contacts in the administration) in serious cases and before arriving at a settlement, this mechanism was unlikely to be one that involved legal analysis.

## LINKS BETWEEN THE CHIEFS AND RELIGIOUS OFFICIALS

In practice, a local scholar of Islamic law, or *cadi*, or a local *imam* may be consulted by the chief when he is asked to resolve a dispute. Chiefs may also refer certain types of disputes to the *cadi* or *imam*, who will generally be one of the notables of the village or quarter and thus be likely to be close to the chief. As Islam is the religion of the overwhelming majority of the people and lays down clear rules on a number of contentious issues, it very often cannot but be taken account of. Thus, Islam may play a significant role in the application of customary law by chiefs, though this will probably vary with local circumstances.

## REGULATION OF DISPUTES BY RELIGIOUS ORGANIZATIONS AND AUTHORITIES

In practice, people often turn to religious authorities for settlement of their disputes, particularly those concerned with family, matrimonial and succession matters. In rural areas or simply outside Niamey and other main towns, this means simply turning to the local *imam*, or a *marabout* or learned *cadi*.<sup>28</sup> In contrast to customary or traditional chiefs, who seemingly have a large measure of pragmatism in how they approach and settle conflicts, religious officials are often likely to be guided by what they see as binding religious law. Thus, these officials will judge, rather than conciliate, based on the Qur'an and *Hadith*. Religious officials interviewed nevertheless emphasized that Islam favours conciliation. Cases that are clearly not regulated by Islamic law might, though, be referred to the *chef de canton*.

The Islamic Association of Niger (*Association Islamique du Niger*, AIN) occupies a particular position among these religious entities. This organization was allowed to be established during the period of military rule in the 1970s at a time when a state of exception was declared and freedom of association was not respected, meaning that it enjoyed a monopoly for a long period until the restoration of civil liberties in the early 1990s. While never having an official status, the position of the AIN, as the *de facto* representative of the religion of the overwhelming

27 Interview with the Commandant de Brigade of Gaya Gendarmerie, 18 January 2010

28 Religious authorities mentioned that it is not unknown for two non-Muslims to approach an *imam* or other religious official with a dispute.

majority of the people, and the clear signal given by the military government in permitting this organization to exist and develop while others were forbidden, gave it a status that resembled one of an official body in the eyes of many people.

The law does not provide for legal recognition of the dispute resolution function of these authorities. Nevertheless, according to some authors and observers, they frequently hand down decisions that, for the parties involved, have a character that is considered binding.<sup>29</sup>

## SEMI-OFFICIAL LINKAGES BETWEEN THE COURTS AND THE RELIGIOUS AUTHORITIES

When the institutional authority of an organization such as the AIN is combined with the *de facto* assimilation of customary law to Islamic law and the lack of guidance for judges on matters of Islamic law, it is clear that it is the religious authorities that are recognized as having the greatest knowledge of religious law. Particularly in the capital, Niamey,<sup>30</sup> where there is a mixing of different ethnic groups and thus little trace of customary law that is distinct from Islamic law, the latter holds sway. The decisions reached by religious authorities belonging to the AIN enjoy great authority among the people and, very often, the judicial and administrative organs of the state. This is seen particularly in cases of dissolution of marriage. In practice, judges reportedly often defer to decisions such as divorces pronounced by the AIN or by *imams*, and approve them as though they were taken by customary authorities. This is reportedly done even by the Supreme Court.

An interview with an *imam* in Gaya confirmed that *procès verbaux* drawn up before the *imam*<sup>31</sup> are sometimes approved by the court. At least in towns, *imams* may well be more highly educated than lower-level traditional chiefs. On other occasions, the judge might choose to modify the *procès verbaux*. From the interviews conducted (admittedly a small sample that is unrepresentative of the country as such), some judges tend to treat such written records from religious officials on more or less the same basis as those emanating from the chiefs.

The courts will very often refer the parties to a dispute to the AIN to swear a religious oath.<sup>32</sup> More occasionally, a *chef de canton* might also request the swearing of such an oath. Because of the strong religious beliefs of people in Niger, such an oath carries great weight.

An illustration of how far this *de facto* recognition reaches in the eyes of the state authorities is the practice whereby the police even executed summonses (*convocations*) issued by the AIN at the Grand Mosquée of Niamey. According to information given during an interview at AIN, this practice has now stopped following a process of self-evaluation at the AIN, which considered that its authority should be based on voluntary submission to Islamic law rather than to force. It nevertheless illustrates that the police of Niamey clearly viewed the AIN and the Grande Mosquée as having the authority of a state organ. It is also noteworthy that the critical evaluation of this practice came seemingly not from the state authorities, but from the religious ones.

29 Gayakoye Sabi A. Quelles autorités compétentes pour la mise en oeuvre du droit de la famille? Quelles compétences? Quelle hiérarchie ?, communication au Colloque 'Quel droit de la famille pour le Niger?', Niamey du 21 au 23 novembre 2005, in Actes du Colloque, FSEJ/IDDH, p. 356. Reference provided by Bachir Talfi, footnote below.

30 The AIN reportedly now has offices in the main provincial towns as well as in Niamey.

31 Usually in both French and Arabic, in the case of this *imam*.

32 Decisions of the Supreme Court of Niger make frequent reference to such oaths sworn before religious officials of the AIN.

## PREFERENCES OF USERS AND PROFILES OF PROVIDERS

In common with other places examined, people often find state providers too expensive, both because of fees actually demanded and because of transactional costs, including transport. The AIN said that they would typically ask or encourage parties to a dispute to make a contribution toward the costs of the association. They would ask for contributions based on the size of the estate in a succession matter. Some interviewees said that they were familiar with particular cases where *imams* had demanded exceedingly large amounts as fees or contributions for their work in solving succession disputes.<sup>33</sup> Women focal points said that lower level chiefs would not usually demand a fee to hear a case.

Most of the users interviewed in Niger were illiterate or semi-literate, so the preference for someone who is familiar and able to explain things carefully is understandable. Unsurprisingly, impartiality and effectiveness also rank highly.

Several interlocutors reminded the team that it would be erroneous to see usage patterns as expressions of 'enlightened' preference on the part of users. Most observers repeated that people are unaware of their rights and are often or usually afraid to assert claims in relation to any form of authority, whether it is a local headman or chief, a religious learned person, a *gendarme* or other state official, or a judge.

### WOMEN'S PREFERENCES

Interviews with the women focal points (*femmes relais*) in Gaya tended to show a preference among women for the customary institutions because of the possibility of greater respect for privacy and confidentiality in sensitive marital matters. Even if the process at the village level is not completely confidential, it remains within the village, where people know each other well. Bringing it to a formal court would involve exposure to strangers. The time factor, especially the delays that are present in the formal courts, coupled with the transport costs, are likewise an important reason why people avoid them. According to the President of the Gaya Court of First Instance, up to 90 percent of all matrimonial cases brought to the court are brought by women. This strikingly high figure would seem to indicate that women do not have full confidence in the conciliation mechanism by chiefs or are unhappy with outcomes from it. It is likely that many of them result from repudiation. Interestingly, the Islamic Association of Niger confirmed the same tendency in that most of the marital cases reaching them were brought by women.

Many cases are brought when a marriage has broken down and a woman is seeking one of a number of things from her husband or former husband. Thus, in general, it is women who seek outside intervention to achieve justice and remedies in respect of marital breakdown. They will seek remedies according to the providers that are available and who they think is likely to be of the greatest assistance to them.

The African Faith and Justice Network (AFJN) provided (impressionistic) confirmation of this, saying that, once women learned to know and not fear the court system, they were more inclined to use it rather than the traditional resort to the *cadi* or local chief. They emphasized again that the presence of courts, even at the departmental level, is new in Niger. As women discover this avenue, they make use of it. As a result, the AFJN expressed a clear preference for providing resources to the courts and making them more accessible, rather than to the customary structures. They emphasized that the judiciary, and particularly its accessibility in the provinces, is still a very new phenomenon. The presence of courts in all department capitals is a huge improvement that has been realized, they said.

In contrast, only 10 percent of land cases were (roughly and impressionistically) estimated to have been brought by women and only 5 percent of criminal complainants and defendants are estimated to be female. A small number

<sup>33</sup> Author's interview in Niamey, 22 January 2010

of women bring GBV or VAW cases to court. The President of the Tribunal estimated that this was about one case per month at most. (It was not possible to obtain more systematically compiled data.)

Persons disagreeing with the decisions of *imams* or other religious officials may in some cases choose to bring them to a *chef de canton* rather than to a court, recognizing that the former is not a legal authority. A detailed survey would be necessary to draw conclusions on patterns in this regard.

## THE POLITICS OF THE POWER OF CHIEFS AND THE AUTHORITY OF THE JUDICIARY

An issue of major importance for the policy (and political) debate on the position of informal justice and customary law in the legal system of Niger concerns the intrusion of national as well as local politics into the nomination and appointment of chiefs.<sup>34</sup> In this regard, it should first be remembered that the nomination of chiefs, as well as responsibility for disciplinary matters concerning them, is with the executive rather than the judiciary. To the extent that chiefs are executing an adjudicative function, the scheme does not respect the separation of powers.

Some commentators point out that the power of chiefs was constrained and made subservient to the executive branch during the period of military government in Niger. Chiefs were removed if they displeased the government, and it became normal for the executive branch to intervene actively in the nomination and appointment of chiefs. Particularly at higher levels of the *chefferie*, the traditional constraints on the power of chiefs have been weakened. Traditionally, a chief would have been surrounded by counsellors, whose assent would be necessary for decisions of importance. This constraint was weakened when chiefs were made more dependant on national politics. While the 1993 legislation on the status of chiefs, adopted after the return to multiparty politics, appeared to regularize matters, it did not change the political and sometimes dependent nature of the institution. The importance of patronage networks and the ability of headmen and chiefs to deliver political support of their communities, while perhaps weakened in recent years, cannot be underestimated in electoral politics.<sup>35</sup> Many interlocutors during the field visit confirmed the importance of this factor, with reports of senior national political actors intervening in the choice of chiefs even at the village level.<sup>36</sup>

The privileges and allowances of the chiefs were augmented somewhat in new legislation supported by now ousted President Tandja in June 2008. Some commentators in Niger make a connection between this move and the active support of chiefs when constitutional changes were made in an attempt to permit the president to remain in office. At a meeting of chiefs in the town of Dosso during the mission, the privileges accorded to chiefs were observable in the form of armed bodyguards and vehicles with state licence plates. Representatives of the judiciary may look at examples like this and be reminded of their own lack of resources and vehicles and the non-enforcement of their judgements. The importance of politics of this kind for issues of justice policy can be seen when it is remembered that the judiciary at the highest levels opposed the president's attempt to seek a third term in office. In May 2009, the Constitutional Court twice found that a third term or any attempt to change the Constitution to permit one would violate the Constitution. The president ultimately responded by announcing the dissolution of the Constitutional Court.

Thus, the case of Niger illustrates that, in certain contexts, any measures or programmes that tend to strengthen the adjudicative role of chiefs – especially if this is to the disadvantage of the authority of the courts – may not only be highly politicized, but also potentially detrimental to higher level goals of supporting the rule of law and democracy. Attempts to work with informal justice through the system of chiefs will not remain modest efforts to improve access to justice, but will be seen through the lens of national politics.

34 For an accessible article on this question, see Abdoul Azizou Garza, 'Le "Tazarcé" et la chefferie traditionnelle : la complicité invisible' <http://www.cetri.be/spip.php?article1460>

35 Ibid.

36 Interview, Niamey, January 2010.

## IMPORTANT HUMAN RIGHTS ISSUES ARISING FROM INFORMAL JUSTICE SYSTEMS

In the following, the issues that particularly affect women and children are mainstreamed, so that they are dealt with under family law, criminal law and property law.

### CONFLICTS BETWEEN CUSTOM AND LEGISLATION

As Article 63 of the Organic Law on Judicial Organization makes clear,<sup>37</sup> the constitution, duly ratified international conventions, national legislation and *ordre publique* have primacy over custom. Thus, the courts and traditional chiefs should refrain from giving effect to custom that is in violation of norms deriving from any of these sources. Members of the judiciary were generally clear in responding that customs and religious precepts that contravened these guarantees would have to give way to the primacy of hierarchically superior standards. Linked to this is the question of whether custom is perceived as being dynamic and susceptible to change, including in the light of constitutional standards. The assessors interviewed were of the opinion that custom could not change,<sup>38</sup> although they observed that people were becoming more ignorant of their customs and less likely to follow them. They acknowledged that there were changes taking place in regard to the role of women. Programmatic measures, including those that would further a more informed discussion of the nature of custom and its relationship to national law, could help in increasing understanding and moving debate forward.

### FAMILY LAW MATTERS, WITH A PARTICULAR FOCUS ON THE RIGHTS OF WOMEN

Similarly to elsewhere in Africa, marriage is customarily seen as the union of two families, rather than of two individuals. It is generally conducted by a religious official. It is preceded by payment of bride price agreed between representatives of the families. The amount of bride price varies from one ethnic group to another, and wealth and social status also play a role. Marriage is thus not primarily based upon the independent choice of the individuals involved, though there are regional and ethnic variations in this regard.

### 'REPUDIATION' OF FEMALE SPOUSES

The primacy of higher legal standards does not seem to be rigorously applied in all cases. Particularly difficult issues arise in relation to issues such as marital relations, including the question of repudiation of a female spouse by a male. Asked whether the courts might ever find that the constitutional provision regarding equality (Article 8, including equality of the sexes) could mean that availing this legal avenue to men and not to women was unconstitutional, members of the judiciary were hesitant, referring to considerations of *ordre publique*. (Interviewees were not aware of any cases where the question had been brought up.) Similar issues might arise in relation to different succession rights based on gender, where Islamic rules are very widely accepted in society. While Islam decrees that a smaller portion of a deceased's estate goes to a wife, this is seen as being justified by the difference in obligations that men and women have, whereby males in a family are obliged to provide for unmarried female relatives. Married women's rights to retain their own property are also stressed. An issue also arises in relation to children born outside of marriage and their (lack of) succession rights in Islamic law. As noted above, parliament in Niger has failed to resolve the contentious issues of family law through legislation for almost 20 years. Any attempt by the judiciary to step into the breach left by legislative inaction, on the basis of wide and general-sounding

37 Loi organique n° 2004-50 du 22 juillet 2004 fixant l'organisation et la compétence des juridictions en République du Niger. See above.

38 It is to be emphasized that the tiny sample of assessors interviewed can in no way be considered to be representative of the opinions of assessors in the country in general.

constitutional provisions, could prove very controversial and be a threat to the fragile position and legitimacy of the courts.

The various actors expressed a number of different viewpoints on problems and solutions in this area. According to representatives of the Islamic associations AIN and the Association Nigérienne pour l'Appel et la Solidarité Islamiques (ANASI), one problem is a lack of understanding of the rules of Islamic law. These prescribe a lengthy process for repudiation that includes a considerable 'cooling off' period during which the repudiation (*talaq*) may be revoked and during which the spouses should seek mediation of their dispute. Repudiation is abused in practice, according to many interviewees, including those from the religious associations. Many men think that all they have to do to repudiate their wives according to Islamic law is to say so three times in succession. A better understanding of Islamic law among the public, as well as among chiefs, customary assessors and the judiciary, would lead to improvements and less hardship. ANASI tries to encourage men to provide a document to repudiated wives to provide more certainty as to their status.

Some members of the judiciary interviewed were well aware of these rules and agreed that wives whose husbands had expressed a wish to repudiate them should remain at home pending the whole (approximately 90-day) period<sup>39</sup> foreseen by Islamic law, during which a husband is obliged to continue to support his wife.

The AFJN representative agreed that erroneous interpretation of Islamic law was a major barrier to access to justice for women, but also pointed to the lack of gender equality in some aspects of Islamic law. The *femmes relais*/women focal points interviewed in Gaya pointed out that the very possibility of repudiation acts as a barrier to women bringing issues up in various justice forums. Any complaint on their part could lead to repudiation, so they prefer to remain silent about all but the most grievous matters.

## DISSOLUTION OF MARRIAGE

While repudiation is only open to males, men and women alike may seek dissolution of a marriage for a number of reasons. There seems to be a lack of clarity about who has the authority to dissolve a customary marriage. A *chef de quartier* said that the *chef de canton* or a judge had the authority to do this.<sup>40</sup> The authority of religious officials to do this seems also to be accepted by the courts. Nothing seems to be provided for in the law as to this authority and it seems that many dissolutions of marriage take place by agreement between families, with varying degrees of involvement by religious officials. As noted above, the courts, right up to the Supreme Court, reportedly accept divorces granted by religious officials as legal and binding.

Most interviewees said that repayment of bride price was necessary in order to obtain a divorce, especially if it is sought by the woman,<sup>41</sup> though flexibility could be shown in relation to when repayment took place. Some said that bride price would not have to be repaid if she had borne a child (especially a male one) to her husband. A new suitor or husband could assist the woman in repaying the former husband. In some cases (reportedly amongst the Toubou), a husband can demand an additional sum from a suitor proposing marriage to his former wife. In one area, it was said that a woman would have to find a new spouse for her husband before she could be separated from him.

The AFJN pointed out that women could be vulnerable to legal actions for bigamy where a couple separate and remarry, whereas men, because of the legality of polygamy, would not face any such threat.

39 According to the explanations received, the woman should complete three menstrual cycles before the repudiation enters into force. During this period, the husband must continue to provide for his wife.

40 In many countries in Africa, this can be done by agreement between the families and spouses.

41 Interview with assessors in Gaya. The interview with a village chief and his counselors in Niakoye-Tounga revealed the local practice that reimbursement would be necessary if the marriage was a voluntary one.



## CHILD MARRIAGES

Information from UNICEF indicates that Niger has the dubious distinction of having the highest percentage of child marriages of any country in the world. One study conducted by UNICEF showed that 44 percent of women between the age of 20 and 24 had been married before they reached the age of 15, which is the minimum age for girls established by statute for civil marriages. The study indicated that decisions concerning marriage are most often taken by men and that the reasons given for the consent to child marriages were the concern to prevent pregnancy outside of marriage, to follow tradition and to cement links and relations within the community.<sup>42</sup> UNICEF has conducted campaigns against child marriages in which traditional chiefs have been targeted. One NGO representative in Gaya thought that the campaigns by UNICEF and other actors in this issue had had an impact in Gaya and that this message had been understood. However, the interviews did not reveal evidence that arrangement of marriage of underage girls would be considered a matter for the police.

Interviews with the religious authorities (and some chiefs) did not reveal evidence of a clear standard based on age followed by them, but rather an assessment based on the maturity of the person in question on a case-by-case basis. Islamic law does not set a minimum age. The religious authorities and groupings met and interviewed did not express any opposition to the minimum age of 15 in the law. Women focal points said that the age of 15 tended to be accepted as the age at which a girl could marry in urban areas, but, in rural areas, marriage at an earlier age was very frequent. Parents would often arrange marriage for girls who could no longer attend school, as they would be afraid of pregnancy.

An NGO representative said that the time factor was important in relation to child marriages and that such a marriage could be annulled within the first year, but not afterwards.

## FORCED MARRIAGES

Very often, forced marriages are also child marriages. In Gaya, participants in an (urban) focus group discussion said that these were becoming rarer as young people expected greater freedom of choice. The question provoked a very lively discussion, with disagreement about whether it was women or men who were primarily instrumental in arranging marriages. In rural areas, answers indicate that the response of the chief might rather be to persuade a woman to accept the marriage.<sup>43</sup> Village chiefs considered these cases difficult to deal with and cited cases where girls had to leave the village as a result of their refusal to enter into a marriage agreed to by their father.

## CRIMINAL LAW MATTERS AND THE PROBLEM OF ILLEGAL EXERCISE OF AUTHORITY, ILLEGAL DETENTION, ETC.

As already mentioned, the material competence of the chiefs is limited to civil, commercial and customary matters. Chiefs will often pragmatically resolve the civil aspect of petty criminal matters through imposing the payment of compensation to the victim, after which the matter will go no further.

In former times, chiefs formally had the power to detain people. They had – and in many cases still have – handcuffs and cells. In practice, however, many chiefs continue to exercise power in relation to violations of the penal law and other matters of social order where local norms are seen to have been violated.<sup>44</sup> The judiciary is aware of many cases where chiefs impose ‘fines’ (the proceeds of which are often kept by the chiefs themselves) and may

42 [http://www.unicef.org/french/infobycountry/niger\\_39831.html](http://www.unicef.org/french/infobycountry/niger_39831.html)

43 Interview in Niakoye Tounga, 18 January 2010

44 An interview in the village of Niakoye-Tounga confirmed that cases of witchcraft are occasionally dealt with by compelling the witch to release the soul of the victim. It was not possible to go into depth on the question.

detain people. It is known for chiefs to detain persons to compel the appearance of a family member.<sup>45</sup> Even in civil cases, chiefs might detain people. Where crops are damaged by cattle, for example, people expect the chief to detain the ‘offender’ until payment is made. As pastoralists are still often nomadic or semi-nomadic and the amount may be disputed, detention will be seen as necessary until the matter is resolved.

Local communities applying custom will often hold families or groups responsible for the acts of a member, several interviewees pointed out. Communities will often not seek imprisonment to end a matter. If compensation is not paid, vengeance may still be sought. If the formal justice system does not take account of this aspect, there will often be a need for the informal system to deal with it.

Occasionally, there are reports of chiefs imposing punishments that are cruel and may amount to torture, as well as being illegal.<sup>46</sup> While such cases represent an extreme of unacceptable conduct by chiefs, the greater difficulty is that the state justice organs lack outreach to be able to deal with crime, meaning that it is, in practice, unavoidable that chiefs exercise some authority in regard to maintaining law and order in their communities, even without any formal authority to do so. A local chief might detain a person accused of wrongdoing and not be able to find a way of transporting the suspect to the *gendarmerie* until the next market day, for example. Witnesses might find it difficult and expensive to come to town, especially if they are not heard the first time, and then give up. As a result, the state justice organs are, however reluctantly, sometimes compelled to accept, in practice, that exercise of authority by the chief takes place. The result is that a gap opens up between what is legal and what is accepted practice. At other times, the police or *gendarmerie* might detain someone for a few days as punishment for a relatively minor offence, then release the person rather than take him or her to court.

An even more extreme situation is where the police are afraid to challenge the authority of the chief at a local level. Chiefs and their *Dogari* (guards, often armed) may intimidate the *gendarmes* and prevent their intervention.<sup>47</sup> Often, according to one member of the judiciary, they simply do not find out about it at the time that it happens. Accusations of witchcraft will often be dealt with entirely at the local level, and cases of infanticide, for example, may not be reported to the state authorities. It does well to remember that the balance of power (and numbers) in remote areas does not always favour the state organs.

Formalizing some level of penal competence on the part of the chiefs has not been discussed in recent debates on justice. The representative of the Supreme Court of Niger emphasized training and simultaneous capacity-building of chiefs and the judiciary as the best way to address the problems that arise. This could go a long way toward eliminating some of the worst human rights violations that arise through exceeding jurisdiction and imposing abusive and illegal punishments. Nevertheless, unless the police and *gendarmerie* are given sufficient resources to successfully provide security in local communities, it would seem inevitable that local structures will fill the gap, with or without the legal authority to do so.

## CRIMINAL LAW ISSUES AFFECTING CHILDREN, INCLUDING PETTY JUVENILE CRIME

In the town *quartier* of Gaya, the practice described would attempt to find an informal, restorative solution for a first petty offence, whereby parents or guardians would be asked to exert discipline over a wayward child. For a more serious first offence, the *chef de quartier* would probably consult the *chef de canton*, who might decide that the matter should go to court. In rural areas, responses on this question indicated that any elder in the village might talk to an unruly child, though they felt that their words would often fall on deaf ears.

45 Interview with Mr. Nouhou Hamani Mounkaila, adviser to the Supreme Court. A similar familiarity with such cases was mentioned by the President of the Court of First Instance of Gaya.

46 For example, by keeping cells infested with ants or scorpions.

47 An instance of this was described in a meeting with NGOs in Gaya, where the *Dogari* prevented the *gendarme* from carrying out an arrest by threatening violence. The case involved a man who had killed a suspected adulterer. There was a lot of sympathy for the action in the village.

## VIOLENCE AGAINST WOMEN AND HARMFUL PRACTICES

Levels of FGM/C are very low in Niger, relative to some other countries in the region, and the practice is illegal.<sup>48</sup> The Islamic authorities interviewed generally expressed strong disapproval of violence against women, saying that Islamic law permitted only extremely mild forms of physical chastisement for disobedience to a husband. A representative of the *gendarmerie* interviewed noted the increased awareness of this issue in society, but said that traditional attitudes and the lack of real options for women outside the family are still a major barrier. Most cases would simply not be reported to state authorities. His view was that women would go to a senior family member or, in some cases, to a local headman (*chef du village* or *chef du quartier*) if they thought there were some chance of a sympathetic reception and successful intervention. This view was echoed by representatives of the judiciary and would thus seem to speak in favour of trying to improve awareness and protection mechanisms at the most local level. The women focal points interviewed said that, even if GBV were raised, either with the formal or informal institutions, it was more likely that the complaint would come from a family member rather than the woman herself.

## LAND AND REAL PROPERTY LAW

It was generally agreed that property matters are among the most frequent conflicts and those most difficult for the courts, chiefs and religious officials to handle, as well as the most likely to cause conflict.<sup>49</sup> NGO representatives found that property matters were not handled well either at the community level or by the courts. There was very little protection against abuse of power by the wealthy and powerful. NGOs and members of the judiciary agreed that chiefs would often find it difficult not to take the side of those they were closest to in land disputes. As a result, people may be losing confidence in the customary systems. Legislation was supposed to have created a special court or division of the court concerned with rural land questions, but it has not really operated in practice.

Some interviewees noted that women are beginning to make claims in relation to land and real property, which was not seen before, but, generally, the customs of those interviewed did not permit this. Women who came into possession of property due to the deaths of husbands would be vulnerable to having it taken from them.

## LAW OF SUCCESSION

It was generally acknowledged that customary law does not permit women to own, or thus to inherit, land in their own right. Islamic law demands that a fixed share of the estate go to the spouse of the deceased, including any portion of the estate that is real property. In this sense, the rules on succession in Islamic law will usually be more favourable than those in customary law, and Islamic religious authorities interviewed (who all had a high level of education) said that they would apply Islamic rules rather than customary ones, whereas chiefs and assessors tended to answer more conservatively, sticking to customs that prevented women from inheriting real property. The association of women lawyers said that most *cadis* and *ulemas* would lack this level of knowledge and education and would tend to find that women were not entitled to inherit land, saying that this represented Islamic law. They cited several cases to demonstrate this point.

The AIN said that it assisted in many succession disputes, but would usually only do so where all parties to the dispute sought its intervention and agreed to abide by the outcome.

48 UNICEF, 2005, see [http://www.unicef.org/publications/files/FGM-C\\_final\\_10\\_October.pdf](http://www.unicef.org/publications/files/FGM-C_final_10_October.pdf). Reports from Niger indicate that the practice was most prevalent in western parts of the country where numbers of animists were relatively high, but that campaigns and programmatic initiatives have succeeded in reducing the numbers from close to 6 percent in 1998 to a little over 2 percent in 2006.

49 For example, the President of the Tribunal de Grande Instance observed that there are deaths every year in Boboye because of land disputes.

## SUCCESSION MATTERS INVOLVING CHILDREN

Islamic law does not recognize succession rights for children born outside of marriage ('illegitimate children') from a father's estate. Children born outside of marriage can inherit from their mothers. Fathers, on the other hand, can make gifts to such children or endow them with rights by 'legitimizing' them through marriage to the children's mother.

As things stand, the principle of the best interests of the child does not prevail over this long-standing custom or legal rule in the courts and IJS of Niger. While religious officials may exhort parents to marry or to provide for a child born in this way, the rules on succession are quite clear in saying that such children have no rights to inherit. This is accepted as a fact of life, according to the (provider) interviewees, and such cases do not normally even come to court. (In a similar way, unmarried 'partners' have no succession rights.) While numerical data on the practice of the different legal instances was not available on this question, this would seem to be true for chiefs' courts, religious authorities and for the application of custom by the courts.

One interviewee pointed out that there is the possibility of intervention by a prosecutor if lack of provision for a child born outside of marriage amounts to abandonment according to the penal code.<sup>50</sup> In cases where paternity is proven or not contested, the threat of a penal case according to this article could be of some use to women seeking child support, or even succession benefits, if a litigant were able to get access to a prosecutor. Reportedly, these provisions authorize a prosecutor to intervene in a civil case in favour of the succession rights of a child.

## MATTERS RELATED TO THE CUSTODY OF CHILDREN

One court visited<sup>51</sup> said that there was little difficulty seen in relation to hearing children in custody cases, though it depended on age and maturity. Several interviewees mentioned an Islamic practice where an age limit of seven years is determinant. Women retained custody of children under the age of seven and men were entitled to custody after this age (thus, children who reach the age of seven after a dissolution would leave the mother and join the father). This assumes that the father is willing to take them into his care. If not, the mother would attempt to get assistance from her family to support the children. Rural women interviewed said that, in practice, it is entirely up to the man to decide whether he will take custody of his children and the village chief would usually not interfere in the matter. More research would be necessary to determine whether this is a general practice across the country and whether male and female children are treated differently, which was permitted in some places.

Other respondents indicated that, if the man wanted to take custody of the children, he could do so. If not, they remained with the mother. Girls might be given the option of remaining with their mother, even if the father disagreed. (See also text on child marriages.) Research could also usefully distinguish between issues of custody and guardianship, where the latter refers more to the right to exert parental authority and hence to decide on many issues relating to the upbringing of a child. (This could be an important factor when it comes to decisions relating to arranged marriages, particularly when girls reach the age of puberty.) The rule is known in other predominantly Muslim countries,<sup>52</sup> although experience from many countries shows that there is considerable scope for the best interests of the child principle to gain more prominence in custody decisions, either through the adoption of legislation or sensitization of adjudicators. This practice was the subject of criticism and a recommendation for change in the concluding observations on Niger of the Committee on the Rights of the Child.<sup>53</sup>

50 The Penal Code contains a number of relevant articles, including Article 253 on abandonment, or denial of care to a child under Article 227.

51 Court of First Instance of Gaya

52 See 'Knowing Our Rights: Women, family, laws and customs in the Muslim world' in *Women Living Under Muslim Laws*, ISBN 0-9544943-4-2, 2006. See especially p. 337 et seq.

53 Niger, CRC, CRC/C/118, 2002, 37, paragraph 163.

## PROCEDURAL MATTERS RELATING TO CHILDREN

In relation to whether children could be parties to cases, while none of those interviewed responded negatively, chiefs tended to respond in an abstract manner, indicating that this situation did not often arise in practice, but that it would depend on the maturity of the child. They said that minors bringing complaints would be listened to. One chief said that children would not be heard, responding that, 'with the Peuls, everyone knows his place' and that a person would have to be 30 to 40 years of age in order to be heard. A senior chief<sup>54</sup> agreed that the family of the child should nominate a representative to assist the child in a dispute where the child has an interest in being heard. Rural women interviewed said that children below the age of 10 would not be heard by the traditional chiefs and would be represented by their father. (Nevertheless, the impression of the team was that it could not be expected that traditional adjudicators would actively intervene to ensure that this question was explored and steps taken. It was rather a question of not opposing the idea when it was suggested to them.)

## PROGRAMMING FOR INFORMAL JUSTICE SYSTEMS IN NIGER

### FINDINGS

From a policy or political viewpoint and related to the legal position, some structural issues are of great importance. First, there is the role of the chiefs and the link to politics. It cannot be doubted that the institution of the chiefs, while enjoying varying degrees of legitimacy in the country, is highly politicized. The *chefferie* is a vital tool of mobilization for political parties and leaders. This is related to the question of the role of the judiciary in a fragile political environment. The relative power of the judiciary and the traditional chiefs is an important indicator of the separation of powers and of accountability of powerful actors in society.

Second, the tension between the secular state<sup>55</sup> and the role of Islam continues to dominate the debate on customary law and informal justice in Niger. Islamic norms have, as noted, gradually replaced older custom. While this has not been the result of any design on the part of state actors, it is now a reality accepted by the courts and represents a challenge to the secular norms of the constitution. While greater compliance with Islamic norms would improve the protection of the weak in a number of areas, the structural inequality of men and women poses challenges to international and constitutional standards.

Third, linked to this is the question of the role of constitutional standards and the willingness of the judiciary to step in and fill the gap left by legislative inaction in controversial areas. Thus, a gap seems apparent between what is legally correct and what may be deemed politically prudent. It may be a tall order to expect the judiciary, the least powerful branch of government, to tackle thorny issues that parliament has failed to grasp, particularly in such a fragile political context.

Finally, several interviewees pointed to the shortness of the period in which the justice system of Niger has received concerted international assistance. They pointed out the significance of there now being a court in each *department* in the country, saying that these improvements need to be built upon and continued.

In general, informal justice has not been the object of a great deal of programming focus for justice in Niger. The programming that has taken place has been in the area of training for some chiefs on mediation and record-keeping. Beyond this, there is primary justice programming through NGOs, which has partly targeted chiefs as such through training and sensitization and partly aimed at providing legal services at the village and grassroots levels.

54 Chef de Canton de Gaya

55 Article 4 of the 1999 National Constitution establishes the separation between the state and religion.

## LEGISLATION

As mentioned above, attempts to introduce a family code foundered in the early 1990s and most interlocutors were pessimistic at the prospects of success of new initiatives in this direction. Some thought that it would be possible to introduce legislative changes in the area of family law bit by bit, rather than comprehensively. The Ministry for Promotion of Women and Protection of Children is working with a cabinet of jurists on draft legislative proposals. (Many in Niger are looking at the situation in neighbouring Mali, where a new family code adopted by parliament was not signed into law by the president following opposition from religious groups). Some NGO representatives pointed out that much of the content of CEDAW, the Maputo Protocol and associated policy recommendations could be legislated in Niger without popular opposition. According to this view, the hardest sticking points (especially in relation to Islamic law) are questions of succession portions, the age for legal marriage (if it were to be set at 18), and questions related to family planning and limiting family size.

In the area of land law, there is a *Code Rural* dating from the early to mid-1990s. Some interviewees thought that it would be good to go a step further and have a codified law on land ownership (*Code Foncier*). This would obviously have to take custom into account.

## TRAINING AND EDUCATION

The chiefs interviewed, especially at village level, expressed a keen interest in attending training activities, especially in the areas of land and real property law and family law.

## PROJECT ON TRAINING OF CHIEFS IN RECORD-KEEPING

Written records of case settlements are often not provided to the administrative and judicial authorities as they should be. Doing so would give both of these authorities the possibility to conduct a better informal dialogue with chiefs. This could be supplemented by training and dialogue sessions where both sides discuss issues and exchange views on practice and challenges. There would be a possibility to enhance this with the participation of other parties, including occasionally the police and NGOs. Dialogue could take place at the time when allowances are paid to chiefs.

At the time of the visit, there was an ongoing project involving training in record-keeping for chiefs and standard forms had been produced and agreed upon. The initiative enjoyed the support of chiefs interviewed, one of whom held a senior position in the national association of chiefs. An obstacle to progress in this area is the estimated large number of chiefs who are not literate. According to one estimate, out of some 10,000 chiefs and headmen in the country, perhaps 125 have received some form of tertiary education, and no more than a few hundred would be able to write and understand a written *procès verbale*. Where NGOs are present in communities through village-based paralegals, focal points *femmes relais*, etc., it could be possible to envisage cooperation between headmen and these other primary justice actors for the purpose of such record keeping. It could likewise be the basis on which cooperation in other matters – including training and sensitization on children's and women's rights – could be built up.

## TRAINING IN MEDIATION

Some training in mediation has been carried out for chiefs in Gaya under a Swiss-funded programme for justice and governance in the area. The training was provided through a local NGO. Unlike the question of record-keeping, training in mediation would not necessarily require literacy, although training materials and approaches would have to be tailored to the educational level of the target group.

## SURVEY ON SUBSTANTIVE NORMS

The EU-financed PAJED programme financed a survey (*recensement*) of customs that was conducted in the first months of 2010. The aims of the survey are to gather knowledge and provide a basis for discussion and debate among practitioners, academics and legal sector actors. There is no immediate (or even medium-term) aim to legislate on customary matters. A '*coutumie*' or (reportedly) rather comprehensive study was carried out in the colonial period for the whole region (in 1939). According to some reports, this remains accurate in many respects. A more (geographically) limited study was made for some departments of Niger in 2001 and a number of anthropological studies of various ethnic groups also exist.

The study looks at most of the issues with which customary law is typically concerned, especially personal status and family law (including marriage, its obligations and dissolution, and custody of children) and succession and real property law. Less attention is paid to issues of conduct and public order, including the exercise of 'criminal' jurisdiction. Children's custody, maintenance and succession issues are dealt with substantively. The draft report obtained does not explore issues of children's (or women's) participation, as it is concerned with substantive rather than procedural and structural issues.

UNICEF financed an analysis of the situation of women and children in Niger in 2008 and 2009<sup>56</sup> that was published under the auspices of the Ministry for the Promotion of Women and the Protection of the Child. The study recommends legislating a children's code to combat violence and abuse against children and to regulate the age of marriage. While most of the recommendations in the area of legal protection are focused on state-centred measures, mention is made of developing partnerships with parents and communities. It also speaks of giving advice and material assistance to families who are attempting to reintegrate children who have been in difficulty with the law.

Interlocutors in the judiciary thought that a written guide to customary law would be helpful. Most thought that any such guide should be based on ethnicity rather than on the region concerned, though account would have to be taken of regional differences. Some recognized the risks inherent in reducing custom to a written guide, removing the flexibility that is present in traditional methods. Some observed that it is a question of how such an instrument is used. It should not be seen as an authoritative source where definitive answers can be found, but rather as a guide to understanding for members of the judiciary who are trained in a different way of thinking. The customary assessors interviewed in Gaya were of the opinion that a written guide on custom could never replace the function of the assessors.

## MONITORING

According to Maitre Chaibou, the trust in which a particular traditional chief is held can be quite directly seen in the number of cases reaching the lowest formal court in an area, either at first instance or after having been heard by that traditional chief. Such an analysis can thus be a valuable monitoring instrument. It could especially be used in connection with an initial identification assessment of what is happening in an area, prior to commencement of programming initiatives.

The presence of paralegals, *femmes relais* (women focal points) and legal aid providers providing legal assistance will likely have an impact on the action of chiefs. All observers in Gaya tended to agree that these measures meant that there was greater respect in Gaya for the law requiring chiefs to stick to conciliation. While not conceived of as an instrument of monitoring *per se*, such measures created openness and transparency.

The disciplinary rules and systems for chiefs are not much used in practice. Any large-scale programming efforts in relation to chiefs should include attention to accountability mechanisms.

<sup>56</sup> Found at [http://www.unicef.org/wcaro/wcaro\\_ANSITEF\\_Niger\\_2009.pdf](http://www.unicef.org/wcaro/wcaro_ANSITEF_Niger_2009.pdf)

## OUTREACH INSTRUMENTS

Unsurprisingly, NGO representatives felt that they were capable of having the most successful outreach to the level of chiefs' courts and dispute resolution mechanisms. Their commitment, willingness to work long hours and networks of contacts at the village level (through previous training exercises and membership) gave them advantages in this regard. NGOs generally agreed that activities that enabled them to develop such networks were extremely valuable. NGO presence, and contacts to a network or larger organization, could help in ensuring that decisions were actually implemented. However, there may be a possibility that even the NGO representative in a village will be someone who is close to the local power structure. It is difficult to avoid this concentration of power, as NGOs, like others, usually require the goodwill of the local chief to be able to work effectively in a village or community. This is especially the case if they conduct mediation or otherwise assist in solving individual cases.

NGOs such as Association Nigérienne pour la Defense des Droits de l'Homme (ANDDH) assisted judges to visit local communities. They found this helpful in improving relationships between the formal and informal systems and in improving understanding of each other's roles and functions.

NGOs felt that the greatest impact on the quality of justice available from traditional chiefs could be had through capacity-building among chiefs and sensitization of the public. Education through drama (including by showing films and discussing them afterwards) and radio broadcasts were felt to be effective. It was necessary to break the 'culture of fear' that existed in relations between people and the traditional authorities, they said.<sup>57</sup> Mention is made above of UNICEF's work to sensitize chiefs against child marriage.

Addressing an issue such as providing for the succession rights of children born outside of marriage through working with religious officials to systematically exhort fathers to acknowledge and provide for them might be moderately effective if it is not possible to pass legislation on intestate succession that provides for such provision.

## PROGRAMMING AIMING AT IMPROVING WOMEN'S ACCESS TO JUSTICE AND PROTECTION OF WOMEN'S RIGHTS

### ADDRESSING STRUCTURAL IMBALANCES

Most interviewees agreed that people were not yet ready to accept women as chiefs. The AFJN felt that there should be a concerted effort to promote women as customary assessors, saying that this would be a visible and important signal that would have an effect on women's participation and access to justice. They expected that it would bear fruit in terms of case outcomes. Reportedly, RDFN<sup>58</sup> in Gaya requested the mayor of Gaya to propose women as candidates and assessors, who did so, but his letter went unanswered.

### VIOLENCE AGAINST WOMEN

The UNICEF/Ministry for the Promotion of Women and Protection of Children study mentioned above recommends sensitization measures against VAW, directed at men and women, coupled with strengthening women's access to the courts and to counselling services. The lack of realistic prospects for sustainable protection measures (including trained, sympathetic and understanding reception of victims in law enforcement and justice, enforceable restraining orders, shelters and effective sanctions) in relation to violence against women would seem to demand that most attention be paid to prevention and awareness-raising initiatives at the local level in all but the most serious cases. The highly family-oriented structure of local communities will often mean that women close to the *chef du village* or *chef du quartier* are persons of influence in their own right who may assist in resolving cases that particularly involve women. Prevention through promotion of a culture at the local level where violence

<sup>57</sup> The *Commandant de Brigade* of Gaya also acknowledged this factor.

<sup>58</sup> Rassemblement des Femmes Démocratiques du Niger



against women is deemed unacceptable and is tackled at an early stage through, for example, warnings and family counselling, may be among the most effective measures. The positive experiences of NGOs with women focal points (*femmes relais*) in communities could be worth building on in this respect.

### **Women's Rights in Marital and Family Matters in General**

Any couple marrying can choose to conduct a civil marriage, which would give some legal protection to women in terms of dissolution, custody and succession. In order to be accepted in society, a civil marriage would have to be accompanied or followed by a religious one. While more could be done to promote use of the civil code when marriages are conducted, there are not many indications that this could change much in the short to medium term. There are many reasons for this. One is that the Civil Code is outdated, being based on the law as it stood in France in the late-1950s (so that a husband's permission is required for a woman to get a job, open a bank account, etc.). Another obstacle is seen in the distance for people to a *mairie*, where a marriage could be conducted, and the legal formalities required (e.g., birth certificates and prior announcement).

### **PROGRAMMING AIMED AT IMPROVING CHILDREN'S PARTICIPATION**

Mention was made of UNICEF's work with traditional chiefs to address the problem of child marriages. The 2008-2009 study on the rights of women and children recommends addressing the chiefs to sensitize them on the benefits of encouraging the participation of women and children as well as of promoting education.

# COUNTRY STUDY – PAPUA NEW GUINEA

<b>METHODOLOGY .....</b>	<b>281</b>
<b>BACKGROUND .....</b>	<b>282</b>
<b>PREFERENCES OF USERS AND PROFILES OF PROVIDERS.....</b>	<b>289</b>
<b>HUMAN RIGHTS ISSUES ARISING FROM INFORMAL JUSTICE SYSTEMS .....</b>	<b>292</b>
<b>ASSESSMENT OF EXISTING PROGRAMMING AND GOVERNMENT INITIATIVES ON INFORMAL JUSTICE SYSTEMS .....</b>	<b>299</b>
<b>RECOMMENDATIONS FOR FUTURE PROGRAMMING FOR INFORMAL JUSTICE SYSTEMS.....</b>	<b>310</b>

## METHODOLOGY

This report is based on desk research, as well as both qualitative and quantitative interviews and surveys, conducted with users and providers of informal justice systems (IJS), government officials, NGOs and development partners.

The study was divided into two stages. In August 2009, the study team carried out a series of qualitative interviews and information-gathering in four locations: Port Moresby/National Capital District, Eastern Highlands Province, Simbu Province, and in the Autonomous Region of Bougainville.

During October 2009, a quantitative study was carried out in selected districts of Eastern Highlands province, as well as in the remote Karimui-Nomani District in Simbu Province. Eastern Highlands Province was selected because it is one of six provinces in which the UNICEF-sponsored Women’s and Children’s Access to Community Justice (Child Protection) Programme is being implemented. This programme is the first of its kind in Papua New Guinea (PNG) and, while this report is in no way a review or evaluation of the Programme, the study team wanted to make an assessment of the extent to which the programme has changed perceptions of practices of IJS in those districts of Simbu Province in which it is operational.

Karimui-Nomani District in Simbu Province was selected to provide a point of comparison with the districts chosen in Eastern Highlands. Karimui-Nomani is a very isolated district with very weak links to the central administration. There are no formal justice sector institutions (police, magistrates court or village court) operational in the district. The only justice services available are provided by informal service providers.

## BACKGROUND

### TYOLOGY: THE OPERATION OF INFORMAL JUSTICE SYSTEMS IN PNG

For hundreds and perhaps thousands of years in Melanesia, disputes have been resolved through community-based mediation. Throughout PNG and in the Autonomous Region of Bougainville, community-based mediation in one form or another continues to be the means by which the large majority of disputes are addressed and resolved. Mediation happens everywhere and every day, in all facets and at all levels of PNG society.

In local communities, disputes are mediated by application of traditional customary norms to the facts of the case. Custom is not fixed, but changes over time. Custom is rarely if ever written down, but is passed on in the community from one generation to the next.

PNG is a remarkably diverse country with over 600 distinct cultural and language groups. Any report that purports to explain the operation of traditional justice systems in such a country, or to make recommendations for programming on IJS, must therefore be read with a grain of salt. While the nature and functionality of community justice mechanisms will inevitably vary from one province or district to the next, the following mechanisms are common to many local communities in PNG.

#### LEADER COURT (*HAUSLINE*)

The leader court, used in this study to refer to tribal chiefs dispensing traditional justice in villages, is the most traditional justice mechanism of all in PNG. The members of the leader court are the traditional leaders of the community, men who inherit their position of leadership by descent. Members of the leader court decide cases by applying traditional customary law. Traditional leaders continue to enjoy great respect in the majority of communities across the country.

The central concept in traditional justice in PNG is *wanbel*, the process by which people or clans in dispute, through mediated discussion, reach agreement and agree to resolve a conflict. The resolution of the dispute is publicly demonstrated through the payment of compensation (*bel koal*) to stop the tension in the community from rising further.

In traditional mediation, compensation is almost always paid by both parties to the dispute. What is central to the process is the restoration of harmony in the community. If *wanbel* has not been achieved, there is a risk that the dispute will arise again in the future, perhaps perpetuated by relatives or descendants to the original parties to the conflict, with violent consequences for the families involved and for the community as a whole.

Compensation was traditionally non-financial: a pig, a cassowary or some shells were paid by one side to the other or a feast was arranged to mark the reestablishment of harmony in the community. Today, compensation will usually be monetary, sometimes accompanied by a pig or other item.

In urban areas, the traditional clan system has broken down or become unmanageable due to the intermixing of people from many different tribes from different parts of the country. Here, the village courts, supplemented by community-based mediation services at settlement level, can bridge the gap that would otherwise exist.

The traditional system is also under pressure in other parts of the country, e.g., in districts where there are large mining operations that have brought with them new people, new cultural practices and value systems, and social ills in the form of alcohol and drug abuse. In parts of Eastern Highlands and Simbu Provinces, where the study took place, respect for traditional leaders is breaking down and groups of young men without livelihood or prospects are challenging the power of the traditional leaders.

## PEACE OFFICERS/NGO OR CHURCH-SPONSORED MEDIATION AND DISPUTE RESOLUTION

In addition to the leader courts, various other forms of IJS, some of them people-driven initiatives, others NGO or government-sponsored, are present in many local communities. These different justice mechanisms tend to complement rather than compete with other IJS in the community. It is not uncommon for a village leader to also perform a role in relation to a community-based mediation programme and at the same time to be a village court magistrate.

Many of the 'non-traditional' or 'non-formal' dispute resolution mechanisms have developed in response to identified gaps in the justice system in the community. In some isolated districts where government presence is poor or even non-existent and where village courts are not operating, church leaders take on roles as peace-brokers in cases of inter-tribal conflict.

In many highlands districts, peace officers, or peace and good order committees, established in an honorary capacity by provincial authorities, work side-by-side with village leaders and village court magistrates to mediate, resolve and prevent violent conflict from arising within the community.

Also, in highlands districts '*hevi komitis*', comprised of informal justice providers selected by the village or clan itself, perform the same function as Peace and Good Order Committees under the Tribal Rights Act. Their role is to mediate between warring groups or clans when there is inter-tribal conflict.

Women's groups, church groups and others (some of them empowered by contact with women's and children's rights NGOs or by organizations like Peace Foundation Melanesia), have established mediation services that supplement the leader court and often bridge traditional custom and practice with an understanding of constitutional and human rights norms and of the importance of the victim's right to redress. These groups also seek to find a middle ground, respecting both the traditional *wanbel* conflict resolution model and PNG's new constitutional and legal order.

## INTRODUCTION TO THE VILLAGE COURTS

The village court is established by statute, with the intention of resolving disputes and maintaining peace and harmony in local communities, by the application of customary law. Village court magistrates are appointed by the provincial administration. They receive a modest salary, guidance on relevant law and procedures, together with some administrative support by the provincial and national government. Magistrates may attempt first to resolve a dispute through mediation, with the goal of obtaining a mutually agreeable settlement. If a negotiated settlement cannot be reached, the village court has the power to determine a dispute of its own accord through the issuing of a declaratory order.

As with the leader court, the resolution of a matter, whether mutually agreed or not, will invariably involve the payment of some form of compensation by both parties to the dispute.

Due to the existing cap of K 1000 on compensation payments in village courts, certain types of disputes, among them matters involving bride price, polygamy, or some serious criminal offences (which should by law be dealt with by the formal justice system), are resolved instead by informal justice mechanisms within the local community. In isolated districts, it is simply unrealistic for disputants to bring the case to the formal law and justice agencies; they are too far away and can, in any event, not be relied upon to provide support in the case of an emergency. Local people in these districts must resolve disputes and seek to restore and maintain communal peace as best as they can with the means available to them.

Even in districts that are comparatively close to provincial centres, there is still a reluctance to approach the police for assistance in family marital disputes or in cases involving crimes of violence or sexual abuse. The fact is that the

formal justice system, which will decide a civil matter in favour of one party at the expense of the other or will prosecute a violent offender and perhaps also provide some form of redress for the victim, cannot in isolation heal the rupture that has been caused in the community by the dispute or offence. Without a parallel process of mediation and reconciliation between the parties and their families or clans taking place at the village level, there will be no lasting resolution of the dispute and violence will be likely to erupt again in the future.

As knowledge of constitutional and human rights norms grows in some local communities and amongst village court magistrates and other officials, there is also increasing recognition of the needs and rights of victims, who may wish to see the perpetrator of a violent act prosecuted and punished. In such communities, there may be an understanding that the victim's wishes should be respected if he or she wishes that the perpetrator of the act be handed over to the police.

### **JOINT SITTINGS OF TWO OR MORE VILLAGE COURTS**

If a dispute involves individuals or groups from different villages, communities, or tribes, a joint sitting of members or two or more village courts may be convened.

### **DISTRICT COURT**

If one of the parties to a matter in the village court was dissatisfied with the outcome of the case, he or she could seek to have the matter heard *de novo* in the district court. The district court applies the formal rather than the customary law. In practice, 'appeals' from the village court occur extremely rarely.

It is more likely that a village court may refer a matter up to the district court if the matter falls outside the jurisdiction of the village court. Examples of such cases are serious criminal offences, motor traffic accidents, or matters where the compensation sought is above the K 1000 limit payable in the village court.

As mentioned above, many cases that fall outside the jurisdiction of the village court are nevertheless resolved in the local community through the leader court or another informal justice mechanism rather than by referral to the district court.

### **OPERATIONS OF THE VILLAGE COURTS**

The Village Courts Act, which establishes the village courts, the lowest rung in the PNG judicial system, provides a procedural and regulatory framework in which the courts operate. Village court magistrates decide cases through the application of traditional custom, which may vary from district to district or from province to province and has not been codified. The primary function of the village court is to ensure peace and harmony in the area for which it is established by mediating in and endeavouring to obtain a just and amicable settlement of disputes.<sup>1</sup> If mediation fails, the court also has a compulsory jurisdiction.<sup>2</sup>

The village court has jurisdiction over all people normally resident within its area of operation. The courts exercise jurisdiction in both civil and criminal matters, although the distinction is often blurred in the court's daily work. Specific offences within the court's jurisdiction are prescribed in the regulation. These include striking a person, using insulting and threatening words, damage to property, drunkenness in the village court area, failure to perform customary duties or obligations, and accusations of sorcery.

A village court may order compensation of up to K 1000 and issue a fine or penalty of up to K 200 either in cash or goods. The court may also issue work orders not exceeding eight hours in one day, six days in any one week, or a total period of 12 weeks. Where a fine or work order is not complied with, the village court can issue a notice of

<sup>1</sup> Section 52, Village Courts Act 1989

<sup>2</sup> Section 53, Village Courts Act 1989

reminder. If the subject of the notice still fails to comply with the order, an order for imprisonment can be issued, but such an order must be endorsed by the district court magistrate before it is acted upon.

Village courts can apply any law or custom<sup>3</sup> as they find appropriate in the circumstances of the case. The court decides matters in accordance with 'substantial justice' and is free to determine its own procedures.

A number of local residents are appointed as village court magistrates, peace officers and clerks. There are normally nine village court officials in each court. The officials are entitled to receive an allowance of K 25 per month for their services. The amount of remuneration is set by the national government but paid for by the provincial government from its own annual operating budget.

The Village Courts Act was proclaimed in 1973 and commenced operation in 1975, authorized by Section 172 of the PNG Constitution to provide for a system of village courts and peace officers, including their jurisdiction, powers, duties and procedures. Today, there are over 1,400 village courts, staffed by some 14,000 village court officials, and dealing with over 600,000 cases and disputes each year.

The national government is responsible for the jurisdiction of the village courts as well as for policy, monitoring, training and setting of performance standards. The national government is also responsible for appointment of village court magistrates and proclamation of village court areas. The Village Courts and Land Mediation Secretariat, established under the Department of Justice and Attorney General (DJAG), provide periodic training and capacity-building for village court magistrates and officials and undertake research on various legal and thematic issues.

All village court administrative and financial functions were decentralized to provincial and local-level governments in 1996 after the passage of the Organic Law on Provincial Government and Local-Level Governments. Provincial governments recommend names for appointment of village court magistrates, chairmen and deputy chairmen to the Minister of Justice. Provincial governments are also responsible for providing stationery to the village courts to record decisions made and to ensure that each village court has at least one copy of the village court legislation, regulations and procedures manual.

Local-level government (LLG) has no power to make laws on village courts, but may make laws on maintaining peace and good order in the community and may facilitate dispute settlement through consultation, mediation, arbitration and community forums. Where LLG has adopted its own laws, alleged breaches of the laws may be heard by the village court.

The large majority of village court magistrates are men, but there is a concerted effort from the central level on down to ensure that each village court has a minimum of one female magistrate. In August 2009, it was estimated that there were about 300 female magistrates country-wide. This number can be expected to increase in the years to come.

Almost without exception, village court officials interviewed by the study team said that their work was very demanding and often required their attention every day of the week, much more than the two days of hearings that they are officially required to conduct. In view of the amount of work involved, the compensation being provided (K 25 per month) is woefully inadequate. Many magistrates interviewed said that they would continue to do the work regardless of the money they were paid, since they could see how important it was for the well-being of the community. However, they were adamant that they and their colleagues deserved greater recognition from provincial and national government for the work they were doing, with very little assistance, training or support.

Village court magistrates have been described as 'the slaves of the justice system'. In many districts, they are the only government body present on the ground and accessible to people seeking justice. In those districts where

<sup>3</sup> Sections 57, 58, Village Courts Act 1989

the village courts support programme is operating, it seems that they are quite dynamic and are making a valuable contribution to maintaining and strengthening community harmony.

It is difficult to assess the extent to which village courts are functional across PNG. The quantitative study undertaken in Eastern Highlands Province, in which most, but not all districts, were covered, indicates that there is considerable variation from district to district, and that, in some of the most isolated districts, where there is communal fighting or where law and order has broken down, village courts are weak or non-functional. In some of these districts, as described above, community members have taken it upon themselves to develop their own justice and peace-building mechanisms, sometimes inspired by similar initiatives taken by local people in other districts or by mediation training provided by national NGOs.

### **GOVERNMENT POLICY ON INFORMAL JUSTICE SYSTEMS AND PLANNED REFORM OF VILLAGE COURTS ACT<sup>4</sup>**

PNG government policy is that as many disputes as possible should be resolved through the village courts and other community justice mechanisms, which reflect the values and traditions of Melanesia.

The current Law and Justice Sector Programme, which the government is implementing with financial support from AusAID, is seeking to prioritize restorative justice, which reflects Melanesian history, culture and values and is considered to be the best justice model for PNG. At the same time, attempts are being made to provide improved protection and better justice services for women, children and vulnerable groups, and, in so doing, to improve implementation of the CEDAW and the CRC and related instruments in PNG. The passage of the Lukatim Pikinini (Look Out for the Children) Act through Parliament, together with the establishment and implementation of new guidelines on juvenile justice and on violence against women, as well as efforts to ensure that women are represented on all village courts across the country, are some of the measures that have been undertaken in recent years.

As a pilot activity under the Law and Justice Sector Programme, a number of community justice centres (CJCs) have already been established. The intention of the centres is to increase exchanges and linkages between different justice stakeholders in local communities and, in so doing, to increase the quantity and quality of traditional justice being dispensed in those communities. The establishment of pilot CJCs is recognition by the government of the invaluable role that is being played by NGOs, church groups and other community-based organizations.

There is an acknowledgement by the government of the current reality that village courts often overreach their jurisdiction, hearing serious criminal matters that should be referred to the police and to the higher courts. Unfortunately, due to the limited reach of government services in isolated communities, there is no practical alternative at present. This is all the more reason for the government to give its backing to the work being done by NGOs and by local community groups to fill the gaps where government services are lacking.

DJAG acknowledges that the current salary of K 25 per month for village court magistrates is not adequate in view of their large workloads, which are often equal to or greater than ward councillors, who receive K 300 per month. DJAG has been lobbying within the government for increased funding for village courts, to enable salaries to be increased and to provide a uniform for village court staff (which many village court officers have been calling for), since this can help to increase the respect with which court officers and decisions of the court are held by the community. Village court magistrates are part of the PNG judiciary and they should be recognized as such.

In the 2007 White Paper on Law and Justice in PNG, the government committed itself to supporting the rejuvenation of the village courts, and, in this regard, it is envisaged that the national government should take back responsibility for appointment of village court officials, their tenure of appointment, and remuneration. Furthermore, the

<sup>4</sup> Information gathered from interviews with Deputy Secretary of Justice, Mr. Benny Metio, and Mr. Peni Keris, National Co-ordinator, Village Courts and Land Mediation Secretariat.

White Paper proposes a review of the existing jurisdictional limits for imposition of penalties or compensation payments. Since there is no limit to compensation in customary cases of bride price, child custody following marital breakdown, and death, these cases are rarely settled by village courts. Perhaps the law should intervene to set upper limits for compensation in such cases, so as to allow them also to be resolved at village court level in the future.

It is proposed to revise the Village Courts Act and to rename it 'The Community Courts Act', which would reflect the fact that village courts also operate in urban areas, and, furthermore, that purely non-state informal justice mechanisms (leaders courts, NGOs and others) are also providing justice services at the community level. As with the existing Village Courts Act, the revised law will not attempt to codify custom, but rather to provide a renewed jurisdictional and procedural framework within which the existing village courts can operate, one that gives greater recognition to the plurality of justice service providers that exist in many communities.

### **COMMUNITY-BASED JUSTICE, MEDIATION AND PEACE-BUILDING INITIATIVES**

In response to supply-side justice shortages at the local level, there have been numerous initiatives, some introduced into the community and some home-grown, to provide alternative community-based justice and mediation mechanisms.

The quantitative data gathered in connection with this study (some of which is illustrated in the diagrams in Section 3 below) shows that people are just as likely to seek resolution of their disputes through community mediation forums as they are to approach the village court, and, furthermore, that both these forms of IJS are considerably more popular amongst users than the leader's court.

One of the best known NGOs in PNG, Peace Foundation Melanesia (PFM), has for almost 20 years been providing conflict and community justice training to people in communities across the country. The organization has been recognized internationally for its work in facilitating peace and reconciliation in the Autonomous Region of Bougainville after the cessation of hostilities in 1993/94.

One of the legacies of PFM's work in Bougainville are the Peace and Good Order Committees that exist today in each village to administer community justice through the use of win-win mediation and restorative justice through cooperation between chiefs, village police and village courts.

Today, PFM is working in a range of provinces, undertaking baseline data collection on law and order problems, carrying out community justice courses where invited village leaders assist local people to establish their own community justice committees, and provide ongoing monitoring and mentoring.

Very few local communities have regular police presence; it is a common complaint amongst village people that the police do not come to assist when they are needed, even if someone from the community travels many hours by foot to reach the nearest police station and request help. Lack of consistent formal sector agency involvement has resulted in chronic law and order problems in many communities. Ongoing conflicts and violence inhibit development and prevent people, not least women and children, from realizing their potential to contribute positively to the well-being of the community.

In Eastern Highlands and Simbu provinces, there are a number of examples of communities that have successfully resolved communal conflict through the establishment of their own peace-restoring and dispute resolution forums. People have taken the attitude that, if the government cannot guarantee law and order or provide basic justice services, then they must find solutions themselves. In Kup District of Simbu Province, the organization Kup Women for Peace (KWP) was founded by a group of women in the village who wanted to fight back against the communal violence that was killing their husbands and sons and causing women and girls to live in fear of physical or sexual assault.



The mandate of KWP is to prevent and ameliorate outbreaks of violence in the community. After receiving initial training in community dispute resolution, they facilitated the establishment of community justice centres in the district. They have promoted the incorporation of rights principles into the work of the community justice centres, recognizing the necessity of the traditional restoration of peace through the exchange of compensation between the parties to the dispute, but at the same time insisting on the importance of handing offenders in serious criminal matters over to the authorities for prosecution.

KWP have also provided training on victim's rights, on the CRC and CEDAW to village leaders and to village court officials. In response to the lack of police presence in the district, KWP together with village leaders decided to appoint 'community police officers' who could be a link between the community and the nearest police station in Kundiawa.

In focus groups discussion held in Kup, village men said that they recognized the contribution that the village women had made to restoring peace in the community. As one man related that, "We realize that we are born of women. We know that the women have been feeling pain for a long time. In our traditional culture boy children are born to be warriors, but it is the women who suffer."

Another example of a home-grown community justice and peace-making initiative is in Fomu district in Eastern Highlands Province, where the village leaders decided about five years ago to give up their claim on a piece of land which had been the subject of continual inter-tribal fighting. The village leaders told the research team, "We realized that only in peace-building, and living in harmony with neighbours can there be freedom of movement and access to social services."

Since the fighting has ceased, the community has been able to build a community school for the first time, for which they are now seeking government recognition and support.

Community justice programmes have also been successfully established in urban areas as a supplement or, sometimes, an alternative to the formal justice system. The Saraga Peace Good Order and Community Development Association, at Six Mile Settlement in Port Moresby, offers conflict mediation services in a community comprised of people from 34 different ethnic groups. At the time the association was established, there was little cooperation between the different groups: "Everyone had their own way of dealing with things and people did not dare to go into the other groups' territory."

After receiving initial training from PFM, it was decided to establish a conflict resolution committee based on win-win mediation and restorative justice principles. There are currently 34 members on the committee, one representative for each ethnic group. Five of the 34 members are women. When a dispute comes to the attention of the committee, a mediation panel is formed, comprised of those members of the committee who are best able to deal with the matter. When mediation has been successfully completed, it is marked by the exchange of money, a pig and/or the holding of a '*mumu*' (feast) for the disputants and their families or clans. In some cases, the committee may request the participation of a village court magistrate or a police officer in the mediation. The committee takes up a wide variety of cases, but not matters involving car theft, car accidents, killings, matters of serious sexual abuse, child welfare, or custody cases.

# PREFERENCES OF USERS AND PROFILES OF PROVIDERS

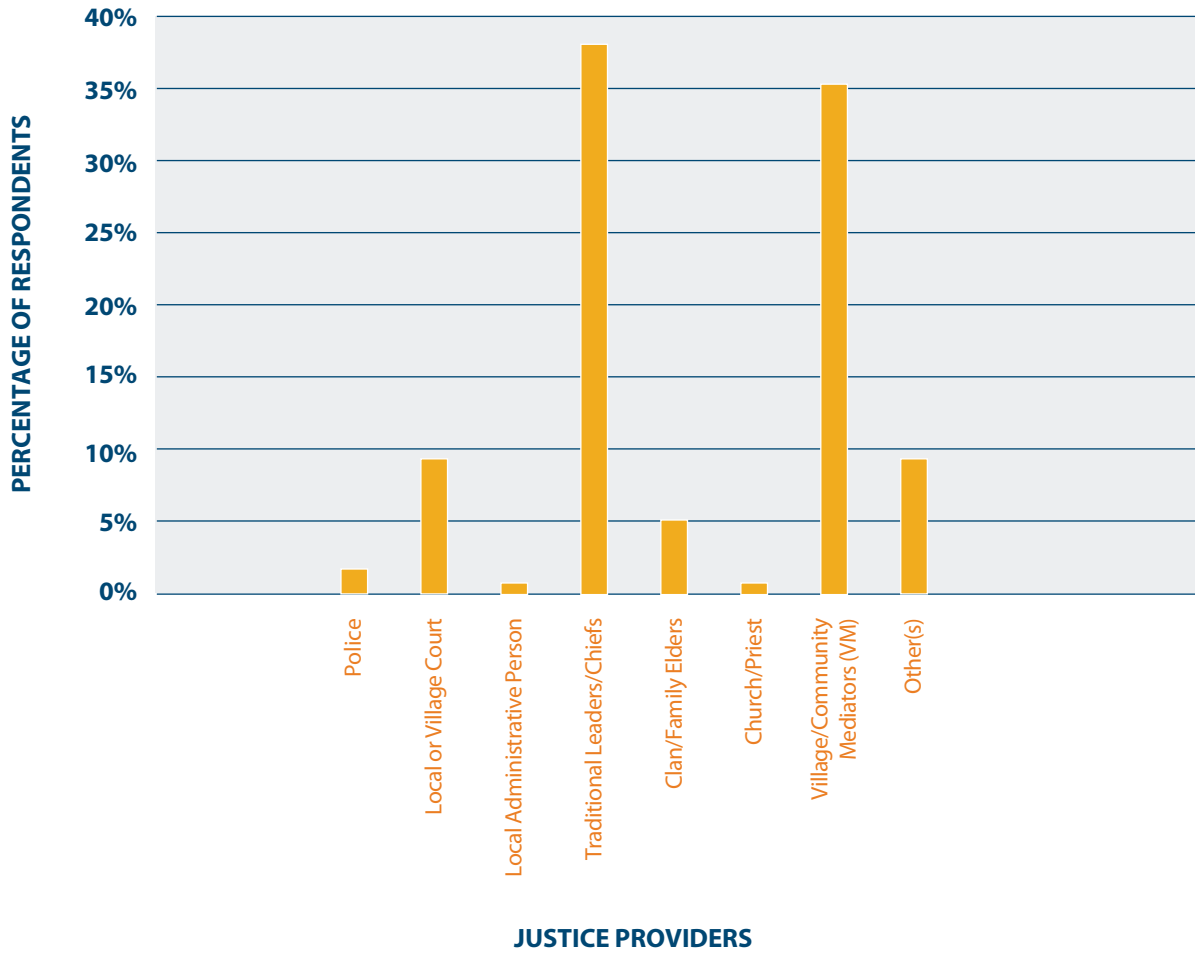
## USER PREFERENCES

As part of this study, quantitative survey instruments were administered to 124 informal justice ‘users’ and 42 ‘providers’ (i.e., traditional leaders, village court magistrates or community mediators) in selected districts of Eastern Highlands Province as well as in Karimui-Nomani District in Simbu Province. The results of the users’ survey reveal that an overwhelming number are of the opinion that informal justice providers are best (Figure 3.1.a). Given a range of possible justice providers, a very large majority of respondents said that they would first approach traditional village leaders, elders or community mediators (i.e., justice providers that had no connection with the state) if they had a problem or case where they needed assistance. A small fraction of respondents nominated the village court as the justice provider they would approach in the first instance. Only a fraction of respondents said that they would approach a formal sector agency or authority first (Figure 3.1.b).

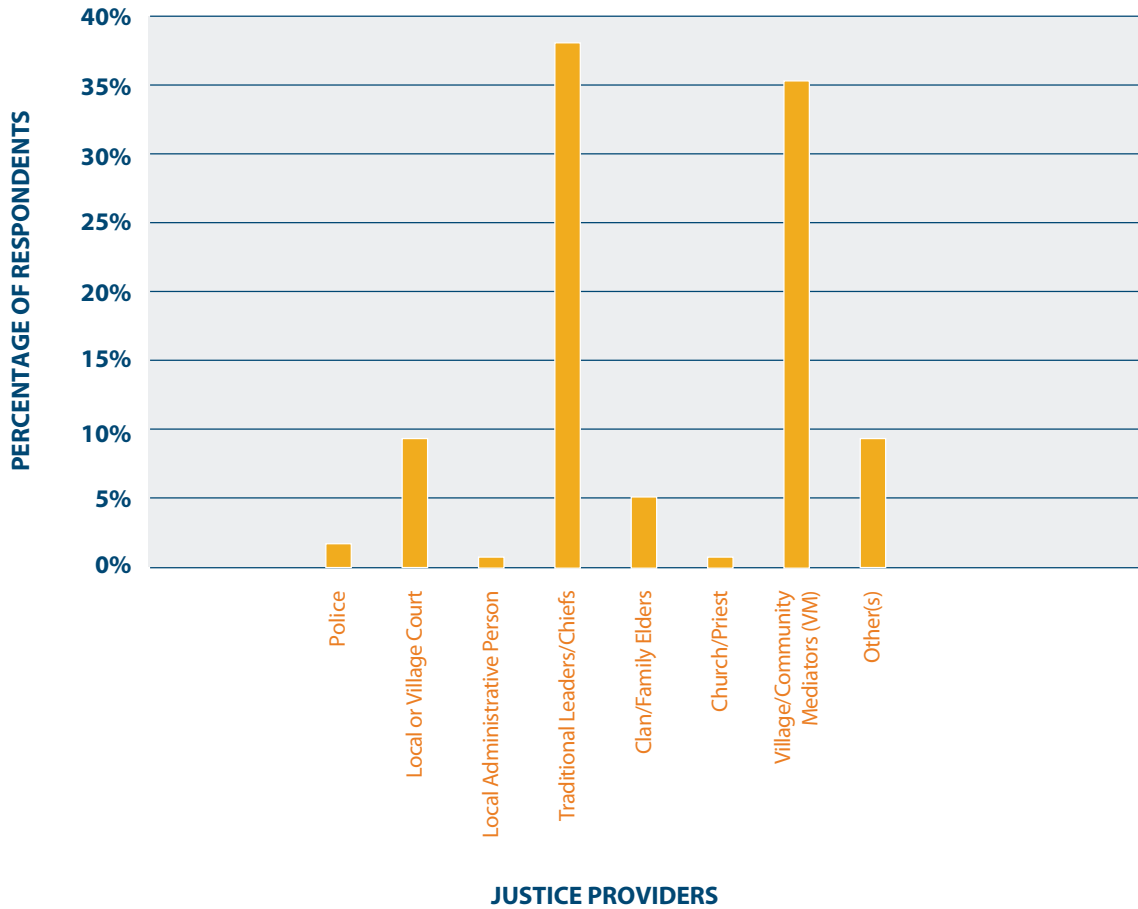
User preferences for different justice forums may be at least partly related to cost or perceived cost. For example, 31 percent of respondents said that they would not be able to approach the village court because of the costs involved. Similarly, 26 percent and 22 percent of respondents said that they would not be able to afford to approach the magistrates’ court or the police for assistance in resolving a dispute. On the other hand, very few respondents felt that cost would be a prohibitive factor in approaching traditional leaders, family elders, community mediators or paralegals, if those were present (Figure 3.1.d). This seems to be a confirmation of information gathered during qualitative interviews that these ‘purely informal’ justice providers rarely if ever require any form of payment for their services.

When asked ‘what characterizes a good justice provider’, respondents were twice as likely to concur with the statement ‘keeps peace in the community’ as any of the other options provided (see Figure 3.1.c). This arguably reflects the cultural context of justice processes in Melanesian societies as being primarily about the restoration and maintenance of peace and community harmony. Many respondents also agreed with the statements ‘treats everyone coming to have a case heard the same’ and ‘knows the law’. Even though the sample size is small, it is interesting to note that these two statements, which emphasize the quality of consistency and fairness in decision-making, rated highly. At the other end of the scale, two characteristics of justice providers that are often prioritized in formal justice systems, confidentiality and the opportunity for the parties to the case to discuss the resolution, were only considered important by a few respondents.

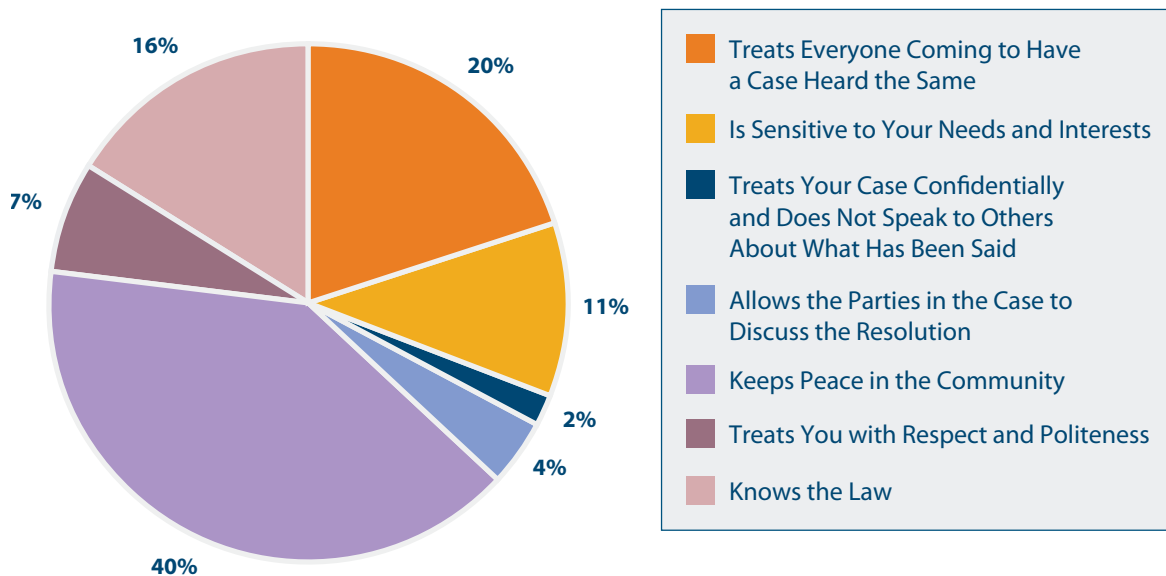
## WHEN YOU HAVE A PROBLEM OR CASE, WHICH JUSTICE PROVIDER DO YOU PREFER TO GO TO FIRST?



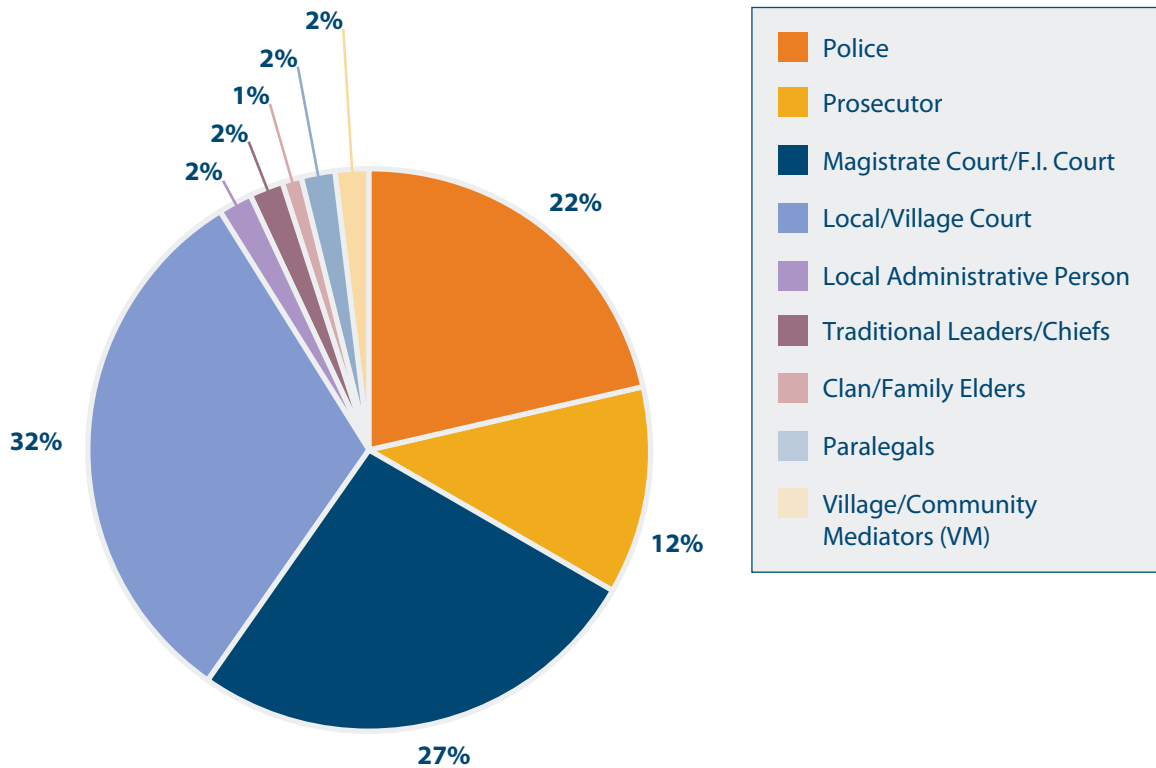
**WHEN YOU HAVE A PROBLEM OR CASE, WHICH JUSTICE PROVIDER DO YOU PREFER TO GO TO FIRST?**



**WHAT CHARACTERIZES A GOOD JUSTICE PROVIDER?**



## WHICH JUSTICE PROVIDER WOULD YOU NOT BE ABLE TO APPROACH BECAUSE OF THE PRICE/COST?



### PROVIDER PROFILES

A characteristic of informal justice providers is that they respond to matters as they arise, rather than working according to a fixed schedule. Village court magistrates who participated in qualitative interviews conducted in the first part of the study regularly made the observation that, although they formally meet to hear disputes one day a week, in reality they are working every day, responding to requests for assistance that are made in accordance with the Village Courts Act or which they received 'informally' by virtue of their status within the community.

## HUMAN RIGHTS ISSUES ARISING FROM INFORMAL JUSTICE SYSTEMS

### INTRODUCTION

PNG has ratified many international human rights treaties, including the ICCPR, the ICESCR, CEDAW and the CRC. The PNG Constitution contains an extensive Bill of Rights, and a guarantee, in Article 57, that a person whose guaranteed rights or freedoms have been or are at risk of being infringed may seek legal redress. The Government of PNG has also taken measures to reform its national legislation and practice with a view to improving compliance with its human rights obligations. The passage through Parliament of the 2007 Lukatim Pikinini Act, which replaces the Child Welfare Act, is an example of a law adopted so as to incorporate in greater measure the principles of the CRC into PNG law and practice.

Against these developments in the legal framework for facilitating enjoyment of rights by the people of PNG is the fact that people in many parts of the country today are living in communities that are characterized by widespread violence and insecurity and where traditional values and governance structures have become weakened, but where the national government has been unable to provide sufficient services or support to guarantee personal safety.

As mentioned earlier in this study, PNG is a remarkably diverse country and any attempt to make comments about human rights issues arising out of IJS will inevitably be general in nature, drawing on comments and statistics gathered from the comparatively few districts in which the study was conducted. In the following subsections, special attention has been given to rights issues particularly affecting women and children, reflecting the fact that women and children have traditionally been and continue to be disadvantaged as regards access to and influence over decision-making in IJS.

IJS of various kinds are regularly used by people in all parts of PNG, be they rural villagers, islanders, residents of squatter settlements, or town residents. Though conflict resolution and peace mediators play an important role in IJS, there is comparatively little government attention to ensuring that due process is followed in terms of the execution of law and respect for human rights principles.

Although there increasingly is recognition within local communities of the rights of victims and of the moral and legal imperatives that demand that a serious criminal offender should be punished for his or her actions, the process of trying to find *wanbel* in community-level IJS is focused first and foremost on trying to maintain peace and good order in the community. Even if one party to the dispute is not really in agreement about the means by which the case has been resolved, feeling that there should be an acknowledgment of individual responsibility (on the part of the offender) or of individual suffering and loss (on the part of the victim), there is strong communal pressure to agree to mutual compensation payments, since this is seen as the only means by which harmony in the community can be achieved. The reality is that the interests of the community trump individual rights. Human rights principles and ‘justice’ – or at least justice from the perspective of the victim – are at best secondary and at worst insignificant in nearly all conflict cases handled by traditional leaders.

The only long-term and meaningful way to apply a human rights-based approach to dealing with law and justice, and in particular the promotion of the rights of women and children, is for government and cooperation partners to prioritise working through the village courts and through other IJS at the village and community levels. Promoting the observance of core human rights principles in all aspects of the functioning of community-based justice forums would help to decrease violence against women and children in local communities and would provide the safe space that is necessary for women to participate more meaningfully in community decision-making processes.

## WOMEN AND INFORMAL JUSTICE SYSTEMS

### WOMEN’S PARTICIPATION IN INFORMAL JUSTICE SYSTEMS

Despite efforts to date by the government and by support programmes to increase awareness of IJS of the right of women to equal access to village courts, the large majority of village courts and other types of IJS remain dominated by men. This was certainly the view of the women interviewed in focus group interviews in most of the communities visited during the study. By way of example, women in one of the focus groups in Eastern Highland Provinces related the following:

***“It seems that the men are in collaboration with each other. We can stand in Court and say that we were beaten up or our husbands are committing adultery or taking new wives. The magistrates handle our cases as if it is no big problem. Sometimes our husbands tell the Court that if we wish to go, we are free to do so and they can then live with their new wives in peace. The Court may award***

***us compensation; the highest amount would be around K 300 and a pig, and tell us to leave the house. But how can we go back to our own people? We become a burden to our families when we return to our village. It seems we are the great losers whenever our husband takes a new wife."***

Nevertheless, research findings in this and other recent reports demonstrate that women continue to use village courts because they are affordable and more easily accessible than other formal or informal justice mechanisms. This provides a strategic opportunity for the government, for cooperation partners and for agencies such as the National Family and Sexual Violence Action Committee (FSVAC) to work to improve women's and girl's rights enjoyment and human security through capacity-building initiatives focusing on gender equality, women's and children's rights, and peace-building initiatives.

## **JUSTICE AND PROTECTION MECHANISMS FOR WOMEN AND CHILDREN ACCUSED OF SORCERY**

Many studies and reports undertaken on gender-based violence identify negative customs and traditions as the main problematic areas in dealing with crimes of violence against women and girl children. Women are particularly vulnerable because they may, without reason, be accused of sorcery practices and their children may be subsequently ostracized from the community as children of sorcerers, considered to be 'devilish'. There have been many instances in highlands provinces and elsewhere where women accused of witchcraft have been murdered or have fled their home district for fear of being attacked.

At present, there are no effective protection services at the provincial or national levels to protect women and children caught up in the sorcery-violence epidemic. Village courts have jurisdiction to hear cases of 'false accusation of sorcery', but, in practice, it is not possible for the court to resolve such a case since there it is impossible to prove or disprove the allegations. Traditional leaders, village court magistrates and community police are afraid to intervene for fear of themselves facing reprisals. Husbands of women accused of sorcery may be unable to protect their wives from gangs of young men who have taken it upon themselves to 'protect' the village from sorcerers and who do not respect the authority of the traditional village leaders.

In Ungai-Bena District, close to Goroka and Eastern Highlands Province headquarters, women stated in the focus group meeting:

***"We are just there. We can't do or say much. When it comes to someone dying or being ill and the cause is decided [by family members of the sick person] as related to sorcery then we automatically live in fear. We just know one of us will be attacked, tortured, or even killed. We just do not know which one of us will be the victim. When it happens, it is so sudden, and takes everyone by surprise. Our husbands cannot stand up for us, unless we have many sons. Then, he can take a stand against the accusation ... We simply have no rights."***

Concerns about the persecution of women accused of sorcery have been reported in the newspapers for many years. An editorial in *The National* strongly argued that education and the knowledge of the true causes of illness and death that it will bring are the best means to respond to sorcery and witchcraft-related issues.<sup>5</sup> More recently, the PNG parliament proposed a review of the Sorcery Act so that the state is in a better position to respond to the many complex challenges that it poses for security and safety in local communities.

In the short term, however, the onus must be on the PNG police to instil in their officers a commitment to act decisively to protect women at risk of attack and to apprehend those responsible for persecution or threats of violence, irrespective of the personal risks to which they may expose themselves in so doing. If the problem is a lack of police capacity, then the onus should be on the national government to prioritize increased resources for policing in local

5 The National, 23 March 2006, p. 18

communities. The capacity constraints facing the police service have been well documented and they cannot by themselves change complex and long-standing community belief systems. But the police are the only institution with a mandate to ensure human security; no one else can perform this function, which is a precondition for the restoration of law and order. By acting decisively and in unison, the police can begin to fight back against the sorcery epidemic and, in so doing, create safe space in local communities where community leaders and informal justice providers can again exercise their authority to address and resolve sorcery allegations without members of the community taking the law into their own hands.

The study team heard of one very positive example of action to protect women at risk by the Catholic Church in Kerowagi District. The Catholic Church has been active in educating parishioners about the medical causes of illness and death, rather than emphasizing, as some other denominations do, the conflict in the spiritual world between the forces of good and evil, in which acts of sorcery are said to play a part. The Catholic Bishops' Conference has issued a direction that any parishioner found to be accusing another of sorcery will be disbarred from the Church community. Furthermore, Church group leaders have been providing safe haven for women and families at risk of attack, sheltering them in their own homes or arranging temporary refuge for them in other towns or villages. There have been several instances of Church members being accused as co-sorcerers and threatened or assaulted.

### **RIGHTS OF WOMEN VIS-À-VIS POLYGAMY**

A village court magistrate in Goroka district, where human rights training has been received from the village court liaison officer in the provincial administration, mentioned that conflict arising from the practice of polygamy is a serious and growing problem. In the past, it was only chiefs who took more than one wife, and this was considered justified since the workload involved with being the chief's wife, growing vegetables and tending livestock, preparing for functions and entertaining, was more than one woman could handle alone. In recent years, however, polygamy has also begun to be practiced by rich men in the village, who see it as their right as wealthy men to take a younger wife, or two, as a sign of their status in the community. In the magistrate's point of view:

***“When a man brings another woman into his house and village, the first wife is expected to live in harmony with the other woman. Sometimes, the first wife may take the matter to court as an adultery case, but if the husband insists that he has decided that both women should be his wives, then the court cannot decide the case against him since he is the boss or head of the family. His point of view as to whether it is a case of adultery or of having taken a second or third wife must be followed by the court since we follow customary law in our decision-making.”***

There is a pressing need for the government to legislate on polygamy, so that village courts can be guided on how to resolve such cases in an equitable manner.

### **RESPONSES TO DOMESTIC AND SEXUAL VIOLENCE TARGETING WOMEN AND GIRLS**

The extremely high rates of violence against women in Melanesia, especially in PNG, have been explained by researchers in terms of the negative consequences of traditional authority structures in the country. Customs that effectively render women legal minors, that refuse them property rights independent of their husbands or male relatives, and that require females to defer to adult men, are common in many regions.

A village court magistrate interviewed in Simbu province emphasized the need for the government to address violence against women and children by providing the necessary resources to enforce existing laws and guidelines. Violence against women, as an endemic problem across the whole country, was illustrated by comments by a women's focus group in Ieta village, close to the administrative capital of Bougainville on the island of Buka: “Those women who know their rights go to the women's NGO (in the administrative capital) for assistance. Those who do not, just wait for the next Boxing Day.”



The women in leta village said they were frustrated that the resolution of domestic violence, rape or child sexual abuse cases was often decided within the village, without the village elders alerting the community police. The women would prefer to see the perpetrator in such cases handed over to the authorities to face criminal justice, but dare not take action of their own accord since they are afraid of their husbands.

It was encouraging during the study to hear of initiatives to encourage men in their capacity as fathers, husbands and brothers to take responsibility on family and sexual violence issues. For example, the Catholic Church in Eastern Highlands Province has been, through men's fellowship groups, encouraging men to stand up as advocates against all forms of violence and lawlessness, particularly those affecting women. Some respondents reported incidents where men had publicly denounced other men known to be perpetrators of violence against women or had even beaten such men in public.

While acts of 'citizen's justice' such as these must never be condoned, they illustrate that attitudes toward this subject can and are changing in those communities where there has been awareness-raising on women's rights and on domestic violence. Where awareness-raising and training have taken place, there must be a commitment by the government to provide necessary policing resources to ensure that cases that are reported are followed up and that women at risk have viable options to report violence safely without fear of reprisal.

## **WOMEN'S INHERITANCE AND PROPERTY RIGHTS**

In traditional times, if a woman's husband died, the woman would normally have to marry one of her husband's brothers, who would then be responsible for caring for her and for her children. This practice continues today, but a woman who does not wish to remarry one of her brothers-in-law is not under any obligation to do so. If a woman chooses not to remarry, she may still continue to live in the family home; however, if she wishes to do so, she can also return to their home village.

The custom that land and property are inherited through the male line continues to be practiced today in the highlands provinces. A distinction can be made between rights of ownership over real and personal property. Women cannot inherit or own land, but they may have ownership over certain items of personal property (clothing, household items, etc.).

On Bougainville, land and property rights are (except for the southern tip of the island) matrilineal and so the problem of a woman being displaced from her home if the marriage breaks down does not arise in practice.

The issue of women's right to property in the event of breakdown of the marriage is one of the subjects addressed by the UNICEF-sponsored human rights training delivered to village courts in some districts of Eastern Highlands Province. Village court magistrates reported to the study team that, since they have received the training, they now take greater account of the woman's economic position and of her contribution to the marriage, rather than deciding cases merely by reference to bride price. If one or both parties to the marriage come to the village court seeking a dissolution, that person or couple will start by granting a one-month separation order and encourage the couple to try to resolve their differences with the help of family and friends. If, after one month, the marriage dispute still cannot be settled, a dissolution order is granted. When deciding what compensation the wife is entitled to, the court will take into account the number of years the marriage has lasted, how many children there are, and the amount of bride price that was paid by the husband's family. Sometimes, women are afraid to speak in the courtroom, but the recent appointment of a female magistrate to the village court has helped in this regard.

While this example is not representative of village courts in PNG in general, it illustrates the great potential that human rights and access to justice training targeting village courts have to promote change in village court practices that can, in a comparatively short period of time, positively influence attitudes and decision-making in other justice forums at the village level.

## CHILDREN AND INFORMAL JUSTICE SYSTEMS

### CHILDREN'S PARTICIPATION IN INFORMAL JUSTICE SYSTEMS

In village courts and IJS across PNG, the rights or wishes of children are generally not taken into consideration and it would be rare for any child under the age of 16 to appear in person in a village court hearing. Where matters arise affecting their interest, an adult relative (sometimes the child's uncle if the child's parents are the disputants in the case) will speak on behalf of the child.

It is very unusual for an informal justice provider to be under 30 years old; in traditional society, decision makers and mediators were and continue to be almost exclusively drawn amongst the older men in the village. The concept of 'youth' is different in Melanesian culture to that in some other societies. On the one hand, men and women take on adult responsibilities from the onset of puberty: work, marriage, child-bearing, and even fighting in those communities where inter-clan violence continues unabated. On the other hand, men are not considered old enough to make decisions or to resolve disputes on behalf of their community until they have reached middle age or older.

In those communities that have had more contact with women's and children's rights NGOs or that have been reached by, for example, the child protection programme that has been piloted in Eastern Highlands Province with support from UNICEF, attitudes towards the participation of children and their right to be heard in disputes affecting their interests can be expected to be gradually changing. But the geographic scope of these programmes is currently very limited.

### JUVENILE JUSTICE AND CHILD PROTECTION PROGRAMMES

Eastern Highlands and Simbu Provinces have initiated a juvenile justice and child protection programme with support from UNICEF. Juvenile justice working groups have been established in each province, and liaison officers have been appointed to educate law enforcement agencies, village courts and village leaders about juvenile justice principles and the requirement that cases of children in conflict with the law should not be dealt with by the village courts but referred to the specialized juvenile justice authorities.

Village court magistrates interviewed in Goroka district confirmed that, since they have received training on the new juvenile justice arrangements, they no longer hear criminal matters involving juveniles. Instead, the matter is referred back to the community for mediation and/or is passed on to the juvenile welfare officer for further action.

In Eastern Highlands Province, the juvenile justice committee has been with the PNG police highway patrol, which has assisted the committee in disseminating information about juvenile justice along the highway to nearby villages and public places.

The perceived value of the programme was emphasized to the study team by provincial administrators, by district and village court magistrates, by the police, and by local community organizations.

What is needed is to extend the programme so that it can reach all parts of Eastern Highlands and Simbu Provinces and, in time, the whole of the country. It is noticeable that there is still very little knowledge of the contents of the new national juvenile justice policy or of the Luaktim Pikinini Act away from the district capitals.

Another UNICEF-support initiative that was praised by local community and government representatives is the Caritas PNG child protection programme in Simbu Province. In Kerowagi Province, 16 care centres addressing issues of custody, adoption, inheritance, stigma and support for children suffering from HIV/AIDSs have been established. This programme is filling a gap in government services and at the same time making a valuable contribution towards securing the rights of children at risk while sensitizing the local community about issues of child rights and equal treatment.

There is a pressing need for advocacy programmes by the government, churches and NGOs in all parts of the country for the protection of children in conflict with the law through the application of juvenile justice principles, since the physical punishment of child offenders is a very common practice and is widely perceived as a suitable punishment and form of instruction for the child, rather than as a crime being committed against them. While those village court magistrates who have received human rights training understand that such forms of punishment are unlawful, they continue to take place in the community. In many cases, disputes involving juvenile criminality are resolved privately as a matter between the two families; they are not brought to the attention of the village court at all.

### **CUSTODY DISPUTES AND PAYMENT OF MAINTENANCE**

Where a marriage has broken down in the highlands provinces and a child is seven years or younger, the child will normally remain in the custody of his or her mother. Male children over the age of seven years would as a general rule stay with their father's family, since the right to inherit property follows the father's line. Girl children may go with the mother if she chooses to go back to her village, but this may give rise to conflict when the time comes for the girl to marry and for bride price to be determined.

Village court magistrates in one ward of Goroka District told the study team that, following the training they had recently received on children's welfare, any custody disputes coming before them are now passed on to child welfare authorities for decision. Previously, custody disputes would have been decided with respect to the bride price, which meant that the child would go with the father.

The new approach is in line with the provisions of the Lukatim Pikinini Act, which incorporates the principles of the CRC into PNG law.

Women in focus groups reported to the study team that it can be quite a challenge to get an ex-husband to meet his responsibilities to pay maintenance for his children if he has abandoned the family. A woman from Lufa district in Eastern Highlands Province described in a focus group discussion how she had successfully gone to court to obtain maintenance for her children from her ex-husband:

***"I was determined that my husband would not run off with another woman without any responsibility for the children's upbringing. But it's a very long process. You have to be very determined and keep looking for people who can help you. Not many of my sisters were able to do what I did. Many of them have 'fatherless' children."***

Another case example was provided by women from Goroka district. A woman whose husband decided to marry another woman brought a case against her husband in the district court. The district court advised her to bring the matter to the leader and village court first, which she proceeded to do. Eventually, she obtained a decision in her favour in the village court that both the husband and his new wife should pay her K 350 each, in addition to which the husband should pay regular maintenance for his two children. The new wife was not very happy with the decision, but she had to pay. The women in the focus group thought that this was a very just decision, showing understanding for the difficult position in which the abandoned wife had been placed. But they said that such an outcome was rare; in most cases, village courts did not take maintenance cases seriously.

### **INHERITANCE RIGHTS**

In PNG, rights to property and inheritance follow the father's line of descent. On the island of Bougainville (with the exception of the extreme south of the island), property inheritance is matrilineal.

The study team did not hear any examples of cases in which child rights principles had been considered or applied by village courts or other IJS in relation to inheritance rights.

The link between child rights and rights of inheritance is being made, however, by the Caritas-supported care centres for AIDS orphans in Kerowagi District. In addition to those orphans living in communal care, a further 65 orphans in the district, living with other family members, have been registered by the programme and are visited by the centre staff from time to time to ensure that their needs are being met. Several cases have come to attention where the extended family members have tried to take the land that an orphan has inherited. There is a need for legal assistance to defend children's property rights in such cases.

### **CHILD SEXUAL ABUSE**

Village court magistrates interviewed by the study team said that it would be very rare for a case of child sexual abuse to be the subject of a mediation or court hearing. It would be more likely that such a matter, if it comes to light, would be dealt with within the family so as to avoid shame. In the Highlands, the child's uncle has a special duty of care in relation to his cousins and he could decide to take over custody of a child in such a case if he did not believe the child's parents were capable of carrying out their duties. In the case of a girl child, this would mean that the uncle's family, not the parents, would receive bride price when she marries.

Informants spoke of cases of sexual abuse of older girls less than 18 years old by men who prefer younger girls for sexual gratification rather than for a genuine relationship. Such cases, where the girl or the girl's family complain, are treated as adultery, rape and/or carnal knowledge. In practice, they are almost always handled at the community level through leader court, peace mediations or the village courts rather than by the law enforcement agencies.

### **CHILDREN'S RIGHTS AND MARRIAGE**

In traditional society in many parts of PNG, children, especially girl children, were promised in marriage to another family or clan by their parents at an early age. This practice has now died out in urban areas and in many rural communities as well. Informants in most of the locations visited said that girls and boys now choose whom they wish to marry themselves; they are no longer expected to follow their parents' wishes.

Nevertheless, interviews carried out in some more remote areas, such as Karimui in Simbu Province and Obura Wonenara in Eastern Highlands Province, revealed that the practice is continuing, even though it does not have the level of acceptance that it had previously. In Karimui District, as in many other remote communities in PNG, there is little or no central or provincial government presence, and it is only the Church or missionary groups that can seek to intervene or mediate if such a case arises.

## **ASSESSMENT OF EXISTING PROGRAMMING AND GOVERNMENT INITIATIVES ON INFORMAL JUSTICE SYSTEMS**

The study revealed that some very good pilot initiatives are taking place in Eastern Highlands and Simbu Provinces and on Bougainville to link formal sector justice and law enforcement systems to village courts and other community-based justice processes.

The UNICEF-supported village courts programme in Eastern Highlands and Simbu Provinces was praised by village court magistrates who have participated in training sessions and there was a request for further and ongoing training and support from the provincial and national government. Even with limited financial and personnel resources, it was apparent that the programme is having a significant impact in those districts in which it is taking place.

The establishment by the government of pilot community justice centres (*hausbang*), and, with it, the explicit recognition that is being given to the work of NGO and local-level justice initiatives, is a very positive development

and could prove to be a valuable forum for coordination and maximization of efforts between those institution and groups that make contributions to community justice and peace.

Community justice centres, which bring together representatives of all IJS at the local level, can be used strategically in training programmes. By bringing together all informal justice providers, it could be possible to achieve significant impact in local communities *vis-à-vis* implementation of women's and children's rights, respect for the rights and wishes of victims, and in the identification and promotion of 'good cultural practices' that are supportive of or reinforce constitutional and human rights principles.

The study revealed that the functionality of village courts varies considerably from district to district. Many village court officers said that they had never received any formal training for their work. Some were not even aware of the existence of the village court manual. It is probably fair to assume that the situation in Eastern Highlands Province would be better than some of the more isolated parts of the country.

Village court magistrates are requesting more information about the formal law, including knowledge of the Constitution, so that they will be better equipped to carry out their work.

Village courts, especially in urban or semi-urban areas, are very overworked. The allowances paid do not reflect the work being done or the contribution village court officers are making to the maintenance of peace and order in the community via the justice system.

Although women reported that village courts often do not take their concerns seriously, they are nevertheless active participants in village courts, and especially so in those districts where female village court magistrates have been appointed. Anecdotal evidence from some informants suggests that women also use justice mechanisms strategically and may not bring a case to the village court if they are not confident of having community support on the matter.

The Village Courts Secretariat is carrying out a very promising research project on women, custom and IJS in cooperation with the Manus provincial government. The research seeks to identify examples of customs that support and promote gender equality and women's participation in justice processes.

In those courts where women magistrates have been appointed, the response of the existing magistrates and of the local community seems to have been very positive. Respondents from different groups (women, men and informal justice providers) all pointed to the benefits that the appointment of a female magistrate had brought to the court. The relative ease with which this change has been accepted by local communities is positive and it demonstrates that culture is living and can change rapidly.

## RECOMMENDATIONS FOR FUTURE PROGRAMMING FOR INFORMAL JUSTICE SYSTEMS

The quantitative data on IJS in PNG gathered in this study may well be the first data of its kind about in PNG. This study was necessarily limited in scope, it being just one of six country studies carried out as part of a global report. It would be well worthwhile to continue to do research and baseline data collection in other provinces of PNG, starting with Simbu Province, National Capital District and Autonomous Region of Bougainville, where qualitative interviews were carried out, but where there were not sufficient funds to follow up with quantitative research.

As mentioned in the previous sections above, there are a number of very good initiatives underway by government and cooperation partners to promote children's and women's access to justice and to support community-based justice initiatives. The establishment of pilot community justice centres by the government, in recognition of the plurality of community-based justice initiative and of the desirability of promoting cooperation and coordination between informal justice mechanisms, is an excellent initiative that can become an important means to build the capacity of IJS and to increase awareness of and compliance with human rights norms.

The programmes that have been established are for the most part in or close to provincial capitals. There are good reasons for why such programmes should begin close to political and institutional hubs: it is best to start a new programme in a location where there is a reasonable likelihood that it will meet its goals and objectives. There are also economies of scale: it is easier to connect to and service programmes that take place close to communication, infrastructure and transport links.

But the programmes that are working well must over time be extended so that they are also available to more people in outlying communities. Development partners like AusAID, UNICEF and others should be willing to take risks to introduce community justice programmes into some districts where government services are failing or have failed and also where communal violence continues to be an ongoing problem. The success of the pilot UNICEF children's and women's protection programmes in the Highlands Provinces and on Bougainville shows that they are beneficial and worthy of replication. This can provide the impetus for extending them into more difficult operating environments, where there is an understanding at the outset of the programme that results will be more difficult to achieve and that negative customary practices or bad practices and lawlessness that have 'been imported' into the local community due to the breakdown of traditional cultural norms will take longer to change.

Both development partners and the government should be more willing to accept risks if the promise that access to justice, equality and human security are rights for all is to be realized.

Village courts and other community justice mechanisms – including the police – are at present unable to provide adequate support and protection to victims and witnesses at risk. This should be a priority for future village court and community justice programming. Unless there are effective protection mechanisms in place, people will be unwilling to risk their safety or that of their family members by approaching justice institutions.

The sorcery epidemic is one of the major law and order problems affecting women and children in the Highlands, and the government must take concerted and long-term action to restore law and order and guarantee personal security. There is clearly a role for the village courts and for other community justice mechanisms to play in combating the epidemic, but they can only act if law enforcement agencies are able (i.e., have the necessary resources) and willing to take effective and timely action when people are accused of sorcery or where attacks occur. The experiences of Kup Women for Peace and other community-driven justice and peace-building initiatives have demonstrated that there is a lot of capacity within local communities that can be co-opted in a public-private partnership to fight back against the accusers and the attackers and at the same time to provide safe havens and protection for women and their families when they are threatened.

Dispute resolution based on the principle of *wanbel*, or the restoration of communal harmony, reflects the ancient culture and traditions of the people on the PNG mainland and on Bougainville. These traditions have been recognized in the constitutions of PNG and of Bougainville and restorative justice principles are central to government thinking and policy in the justice sectors. But disputes should not be resolved by village courts or by other justice mechanisms at the village level in such a way that victims of serious crime, or people whose constitutionally protected rights have been violated, are unable to access effective remedies.

Programming for village courts should continue to prioritize awareness-raising and training for court officials on gender equality, women's and children's participation, the right of the child to be heard in matters affecting his or her interests, and so forth.

Monitoring and accountability mechanisms for village courts and other community justice mechanisms are lacking at present. The state's protection obligation – that is, the obligation of the state to take positive measures to ensure that citizen's rights are not being violated in IJS – needs to be engaged. There are potential roles for district court magistrates, for the police, for DJAG and the Village Courts Secretariat and for provincial administration to play in monitoring efforts. The Village Courts Secretariat has identified the need to develop a monitoring system, which will also help to inform the needs and priorities for future capacity-building and training initiatives. Any such system should recognize the mutuality of support requirements and obligations that exists between the IJS mechanisms and state structures. A monitoring system that is only 'top-down' is unlikely to gain the trust of providers who are frequently underpaid and lack the support they require.

# COUNTRY STUDY – MALAWI

METHODOLOGY .....	303
BACKGROUND .....	304
THE SYSTEM OF TRADITIONAL AUTHORITIES .....	307
LOCAL (CUSTOMARY) COURTS .....	315
USER PREFERENCES .....	321
KEY HUMAN RIGHTS ISSUES .....	324
PROGRAMMING .....	330
RECOMMENDATIONS AND FINDINGS .....	337

## METHODOLOGY

The case study draws on three main sources of information: (i) a one-week visit in February 2009, (ii) a large quantitative survey carried out subsequent to this, and (iii) a desk study of available literature and some follow-up contacts. During the field visit, interviews and focus group discussions were conducted at village and district levels in three districts of the Central Region of Malawi. The team managed to reach a large number of representatives of justice sector institutions at the national and district levels, Police Headquarters staff and Community Police Unit staff, traditional authorities (TAs), group village headmen, village headmen, NGO representatives, village mediators, community educators, donor representatives as well as a district official. The field mission was preceded by a number of Danish Institute for Human Rights (DIHR) visits in connection with the Village Mediation Project (VMP) funded by Irish Aid and conducted by The Paralegal Advisory Services Institute (PASI).

The Malawi quantitative survey was the largest of the country case studies conducted. The following user and provider surveys were collected in the four police regions of Malawi:<sup>1</sup>

REGION	PROVIDERS	USERS
Northern	82	218
Central	64	236
Southern	16	66
Eastern	45	211
<b>Total</b>	<b>207</b>	<b>731</b>

<sup>1</sup> Malawi has three administrative regions for most governance purposes, but, for policing, four regions are used. The study uses the four policing regions.



As is described in the main report, the quantitative data was collected through interviewers going out into the villages to ask the questions in the questionnaires and take down the responses on paper. In Malawi, it was the regional PASI paralegals who collected the quantitative data.

## LIMITATIONS

Only a limited number of districts and TAs were visited during the field mission, and only in the Central Region. The Malawi study was the first field study to be carried out, and some aspects which came to light later in the drafting of the overall study were thus not fully addressed during the field work. As a result, the knowledge and data gained during the field work has been largely supplemented by a desk study drawing on the work of other researchers.

The large scale of the Catholic Commission for Justice and Peace/Department of International Development (CCJP/DFID) Primary Justice Programme (involving cooperation with UNICEF) made it difficult to draw generally valid conclusions on this programme based on the relatively small number of districts visited and interviews carried out.

## BACKGROUND

The Republic of Malawi, located in Southern Africa and bordered by Tanzania, Mozambique and Zambia, is a country of 118,484 square kilometres. The most recent census, conducted in 2008, provided a total population figure of 13,066,320 people<sup>2</sup> and a (high) population density of 139 per square kilometre.<sup>3</sup> Approximately 19 percent of the population is urbanized.<sup>4</sup> The remainder continues to be largely dependent on subsistence agriculture. The country is divided into three administrative regions: Northern, Central and Southern, and further into 28 districts.<sup>5</sup> According to UNICEF, children comprise 52 percent of the population.<sup>6</sup>

The population is composed of a number of major ethnic groups, including, in the Northern region, Ngoni and Tumbuka. In the South and Central regions, Yao, Mang'anja, and Chewa are the largest groups. Interestingly, much of Malawi, including the largest (Chewa) linguistic group, traditionally follows a predominantly matrilineal customary marriage system. Some 20 of the 28 districts, especially in the Southern and Central regions, are considered to be traditionally matrilineal, meaning that this system predominates in the country's culture and customs.<sup>7</sup>

The country was a British colony and inherited legal and administrative systems based on the common law that were and are broadly similar to those of many other former British colonies in Africa. The system of autocratic one-party rule that was introduced after independence (in 1964) persisted until the overthrow of President Banda in 1994 and the drafting of a new constitution. The constitution guarantees the principles of democracy and the rule of law, including the independence of the judiciary, and a modern and progressive bill of rights that guarantees non-discrimination and the equality of the sexes. The new constitution allowed both the creation of a number of new independent institutions and civil society organizations that took advantage of the newly guaranteed freedom of association. Most independent civic organizations are thus relatively young. The country's legal and judicial institutions remain under-resourced, but have benefited from government and development partner attention in the years since the country became a democracy. In some respects, the pace of legal reform has been slow.

2 2008 Population Census, Preliminary Report, National Statistical Office, September 2008. There are varying estimates of the 2010 population. UNICEF provided a figure of 13.2 million, while the CIA World Factbook in July 2010 provided a higher estimate of 15,447,500.

3 Government of Malawi, 2008 Population And Housing Census, Preliminary Report, September 2008.

4 CIA World Factbook, <https://www.cia.gov/library/publications/the-world-factbook/geos/mi.html>

5 Ibid.

6 Information received from UNICEF for the purposes of the present report.

7 Mwambene, *Divorce in Matrilineal Customary Law Marriage in Malawi: A Comparative Analysis with the Patrilineal Customary Law Marriage in South Africa*, University of the Western Cape, 2005.

Political deadlock prevented the adoption of reform-oriented legislation and policy in recent years, including on issues such as public service reform, access to information and decentralization, but also on important issues related to the rights of women and children.<sup>8</sup>

## CONSTITUTIONAL PROVISIONS AND THE RECOGNITION OF CUSTOMARY LAW

The Constitution of Malawi is in general a very modern, progressive and ambitious document that lays out a comprehensive set of human rights, as well as a number of independent institutions to assist in securing and promoting them. It reflects the wish of the Malawian people to achieve a radical departure from the one-party state that dominated the Republic of Malawi for the first thirty years of independence. It is noteworthy that the guarantee of equality does not contain the limitations or ‘clawback’ clauses in relation to customary law that are seen in some other countries (see the main report). The Constitution mentions customary law in several provisions, providing that customary law in force at the time of entry into force of the Constitution will continue to have the force of law (Article 200) subject to any legislation adopted to the contrary or to a finding of unconstitutionality by a competent court.

Article 13 of the Constitution obliges the state to legislate and make policy for the full participation of women in all spheres of society on the basis of equality with men. Article 24 provides that legislation shall be passed to eliminate discrimination against women, and particularly against customary practices of (a) sexual abuse, harassment and violence, (b) discrimination in work, business and public affairs, and (c) deprivation of property, including property obtained by inheritance. Article 22 provides for the right to marry and, specifically, that no person shall be forced to marry and that this principle applies also to customary marriages.

Article 23 is concerned with the rights of children, who are defined in the article as persons under 16. The Article provides that children are entitled to equality before the law and, *inter alia*, to protection from economic exploitation or from work, treatment or punishment that is hazardous, that interferes with their education or that is harmful to their health or to their physical, mental or spiritual or social development. The Constitution does not explicitly mention the principle of the best interests of the child, though a review of the Constitution by the Law Commission has recommended a change in this regard. A legal age for marriage is not set by the Constitution.

The Constitution likewise protects the right to equality before the law, to access to a court, and to an effective remedy for violations. All of the complex of rights concerning liberty and security of the person and to a fair trial are well protected in the Constitution. Article 43 guarantees the right to lawful and procedurally fair administrative action where rights, freedoms, legitimate expectations or interests are at stake. The constitutional provisions apply to traditional leaders and even to all persons.<sup>9</sup>

The far-reaching constitutional guarantees have exerted a considerable influence on legal thinking in Malawi, though at present this is reflected only in a series of progressive legislative proposals that have as yet not become law. It remains to be seen how the public and politicians will view the proposals once they are debated in Parliament and whether there will be difficulties in applying and enforcing progressive laws.

The adherence of the Parliament of Malawi to the dualist doctrine concerning the relationship between national and international law means that the provisions of international human rights instruments ratified by Malawi cannot be directly applied by the courts of Malawi.<sup>10</sup>

8 As noted by the Committee on the Rights of the Child: see CRC/C/MWI/CO/2, 27 March 2009, paragraph 8. The committee lists numerous pieces of proposed legislation: Child (Care, Protection and Justice) Bill, the National Registration Bill, the Deceased Estates (Wills, Inheritance and Protection) Bill, the Marriage, Divorce and Family Relations Bill, the Revised Penal Code Bill, the Criminal Procedure and Evidence Bill and Education Act Review.

9 Kanyongolo, 2006.

10 Article 211 of the Constitution provided for both dualism and monism, but this was removed by Parliament. See CEDAW, concluding observations on the combined 2nd – 5th reports, 2006, paragraph 9.

## JUSTICE SECTOR REFORM

The structure of the court system in Malawi is designed as a four-tier system, but, in reality, only the level of third-grade magistrate courts and the level of the high court exist.<sup>11</sup> Although a District Civil Appeal Court is outlined in the legal framework as the second tier, it does not exist in practice (Schärf, 2002).

There are approximately 300 persons qualified as lawyers in Malawi, of whom only a fraction are practicing law. In 1999, only nine of the 217 magistrates were professionally qualified lawyers, increasing to twenty-one in 2006. The rest have undergone shorter training. Similarly with the police, most prosecution is undertaken by non-legally qualified police prosecutors. Most magistrate courts are located in urban or semi-urban areas, and there can be up to 50 kilometres from a village to the closest magistrate court. Courthouses are sometimes left empty because there is no accommodation for magistrates in remote areas. Roads are generally bad in remote areas and means of transportation not readily available and expensive. The police reach out into the villages through Community Police Units composed of civilian volunteers. The structure of community policing is built up according to the administrative structure surrounding traditional leaders and authorities. There are thus Community Police Forums at the highest level of local chiefs/traditional leaders (in Malawi termed TAs – see below), Crime Prevention Panels at group village headmen level, and Crime Prevention Committees at village headman level. The police, however, generally lack transport to respond to calls from the Community Police Units. Both police and magistrate courts face a significant backlog of cases.

Development partners, especially the European Union and DFID, but also UNDP, USAID and UNICEF, have lent their support to programmes to enhance justice in the country. The UNICEF programme, which is primarily supported through DFID, is the only programme designed to improve women's and children's access to justice at the informal and formal levels. While there has been support to the police and judiciary from these programmes, efforts to introduce a sector-wide approach to justice have (at time of writing) thus far not borne fruit, though they are currently being renewed. Some innovative programmes have focused especially on the level of primary justice. At the formal justice level, UNICEF has worked on justice for children over the past decade, building the capacity of the police service to ensure children and women have their rights to protection, upheld by the justice sector. The establishment of supported Victim Service Units in each police station linked to community policing structures is one element of this work. The PASI NGO, with the support of senior members of the judiciary and senior members of the Prisons Service, has successfully promoted a model of paralegalism that is based on close cooperation with and among the main criminal justice institutions. Significant reductions in the numbers of people on remand detention have resulted. A DFID-financed primary justice programme, implemented by CCJP, provides training to traditional leaders.

## TYOLOGY OF INFORMAL JUSTICE SYSTEMS

Malawi currently has two types of informal justice systems (IJS) of relevance to the present study: the first is that of '*Pabwalo*' or '*mphala*' (in the north of the country) or dispute resolution by customary leaders known as traditional authorities and their subordinate headmen. Traditional leaders have continued to resolve disputes at the local level, using custom as their main normative basis. Some NGOs, with the support of development partners, have engaged with the traditional leaders in recent years, providing training and support.

The second broad category is composed of mediation schemes that have been introduced at the village level whereby trained mediators assist people to solve their own disputes, primarily those of a civil character. As the scheme under which the mediators work is a pilot project, and no detailed research or documentation of the work

11 There is not agreement on whether both third and fourth-tier subordinate courts operate within the justice system today. While the Malawi Law Commission refers to their existence in their *Report on the Law Commission on the Review of the Traditional Courts Act*, Wilfried Schärf (2002) argued that he has been unable to find documentation of the fourth tier in the seven districts that he studied as part of his research. He holds that when 4th grade magistrates left their position, they were not replaced.

carried out by the mediators is available, this informal justice system is discussed in the programming section of the study rather than in a separate chapter of its own.

Unlike neighbouring Mozambique and Zambia, Malawi does not currently have a system of parajudicial<sup>12</sup> state customary courts. Nevertheless, as such a system has previously existed and may be reintroduced in Malawi, issues related to such courts in Malawi are also discussed.

## THE SYSTEM OF TRADITIONAL AUTHORITIES

As can be seen from the table below, the structure of traditional leaders starts at the lowest level with village headmen at village level and has two main superior levels: group village headmen and traditional authorities. Legislation also recognizes senior TAs and some TAs reportedly also employ other categories, including 'senior village headman', that are not recognized in legislation. There are an estimated 24,000 villages in Malawi, each of which has its traditional justice forum, presided over by a village headman (VH), though not all of them have been recognized by the Ministry of Local Government.<sup>13</sup> He or she is chosen according to customary rules and the position remains in the family entitled to the office by custom. A group of elders within the family typically decides who among the relevant family members (most often the children of the VH or the children of his/her sister) are most suited to become the next village headman when one dies or withdraws.

<b>PRINCIPAL CHIEFS (7 IN MALAWI)<sup>14</sup></b>							
<b>SENIOR TA 28</b>							
<b>TRADITIONAL AUTHORITY (TA) (APPROXIMATELY 500)</b>							
<b>SUB-TA 61</b>							
<b>GROUP VILLAGE HEADMAN (GVH) (APPROXIMATELY 2,400)</b>							
<b>GVH</b>	<b>GVH</b>	<b>GVH</b>	<b>GVH</b>	<b>GVH</b>	<b>GVH</b>	<b>GVH</b>	<b>GVH</b>
<b>VILLAGE HEADMAN (VH) (APPROXIMATELY 18,000)</b>							
<b>VH</b>	<b>VH</b>	<b>VH</b>	<b>VH</b>	<b>VH</b>	<b>VH</b>	<b>VH</b>	<b>VH</b>

The village headmen select among them the group village headman who presides over the area equivalent to a group of villages, and the group village headmen select in turn among them the TA or chief who is the highest authority within a given geographical and administrative entity. The exact s/election procedures and customary organization vary in the different districts of Malawi. The term 'traditional authority' is also used in Malawi to describe the geographical area over which a 'chief' holds sway.<sup>15</sup> The team was not able to obtain an exact figure for the number of traditional authorities in the country, but consultation of maps suggests that the number is in the range of 400 to 500. A group village headman might typically be responsible for five to ten villages.

<sup>12</sup> See main report for an explanation of this term.

<sup>13</sup> "Town Chiefs" in Malawi, Diana Cammack, Edge Kanyongolo and Tam O'Neil, 'Africa Power and Politics Working Paper No. 3', June 2009. This accounts for the discrepancy between the number of village headmen and villages.

<sup>14</sup> One principal chief having authority over some of the Chewa people is based in Zambia.

<sup>15</sup> In order to maintain clarity, this report reserves the terms 'traditional authority' and its abbreviation 'TA' for those layers of the traditional leadership system and the geographical areas where they have authority. The term 'traditional leaders' is used more generally to include all layers of the system.

All layers of the TA structure were paid a monthly stipend by the Office of the President and Cabinet (OPC). These amounts are currently set at 18,000 Kw for TAs, 5,000 Kw for group village headmen, and 2,500 Kw for village headmen.<sup>16</sup> The powers and independence of chiefs and TAs under Banda were simultaneously entrenched and closely circumscribed, so that the president could and did nominate and remove chiefs as well as create new chieftaincies, while at the same time the chiefs were given power over local development (through heading development committees that bypassed district councils). As the traditional authorities at the various levels receive payment from the Office of the President and Cabinet, some point to the problematic situation of the TA structure being tied to the political party structure and to the fact that the TAs have been used to deliver votes and support to the ruling party.<sup>17</sup> This phenomenon is well known in other countries.

In the rural areas where the quantitative study was conducted, most of the providers interviewed from among chiefs and the TA system described themselves as farmers. Of approximately 120 respondents, some 60 had completed only primary school education, whereas about 35 had also completed secondary school. The remainder had either had no schooling or had some form of post-secondary education, usually of a vocational nature.

As in other countries in Africa, a noteworthy development is that of 'town chiefs', where it can be seen that, despite urbanization trends, some traditional patterns of authority as well as respect for customs and traditions are reproduced to maintain order locally. Although chiefs have no authority in respect of land allocation within towns, they may occasionally exercise it in practice with a high degree of acceptance from the local population, if not from the authorities. Some such chiefs may exercise authority because of hereditary claims to do so in the area in question, although the area has changed character and become urban and ethnically mixed. In such cases, they may be entitled to stipends as described above and have an office recognized under legislation. Others may have gained authority in other ways because of local prominence. The institution of town chiefs is a true instance of hybridization, in that some such chiefs are elected locally, including through election processes that have the support both of the District Commissioner and Paramount Chief. Some studies have shown that these authorities (even those with no claim to hereditary title as TAs or headmen) enjoy forms of recognition from the authorities, including payment of stipends, and function as a channel for funding local projects, thus filling a gap that has partly developed out of practice over the past 30 years of urbanization and has partly been strengthened because of the stalled decentralization process.<sup>18</sup>

## FUNCTIONS OF TAs AND CHIEFS

After the establishment of democracy in 1994, the role of elected district councils was intended to be enhanced (at the expense of the power of the chiefs), though decentralization has stalled for other reasons.<sup>19</sup> TAs remained the administrative heads in the local communities as provided for in the Chiefs Act of 1967. This legislation gives them the following functions:

- to preserve the public peace
- to carry out the traditional functions of his office under customary law in so far as the discharge of such functions is not contrary to the Constitution or any written law and is not repugnant to natural justice or morality
- to assist in the collection of tax
- to assist in the general administration of the district in which their area of jurisdiction is situated and for the purpose of carrying out such functions as the district commissioner may require
- to carry out and enforce any lawful directions of the district commissioner

16 An estimated US\$ 135.00, US\$ 37.50 and US\$ 18.75, respectively, in February 2009.

17 Law Commission, 2007, and Schärf et al., 2002. See also Cammack et al., 2009.

18 The source for the information on town chiefs generally is Cammack, Kanyongolo and O'Neil, 2009.

19 Ibid.

As Cammack, Kanyongolo and O'Neil point out,<sup>20</sup> the cultural and ritual functions, especially those related to community organization around events such as funerals, should not be underestimated as a key element of the importance of chiefs locally, including in towns. Retention of 'good standing' membership in the local community is an issue almost of survival and the authority that controls the 'gates' in this respect is highly important. The Malawi Human Rights Commission, in its 2006 report on cultural practices and their impact on human rights, documents the various roles played by chiefs in relation to a number of cultural practices that have harmful aspects. Some of these are discussed in the sections on women's and children's rights.

Preservation of public peace will usually involve close liaison with the police, as well as keeping a close eye on, for example, who is living in which house, who moves in and out of the area, and direct (verbal) intervention in relation to any issues of 'misconduct'. During the Banda era, order was often maintained by officials of the ruling party and the Malawi Young Pioneers, an organ of the youth wing of the party (MCP). Thus, chiefs were not the main enforcers of order at the local level.

By virtue of the Land Act, chiefs do not own customary land. Title is vested in the state, represented by the president. Chiefs retained their role in relation to allocation of customary land<sup>21</sup> in the Banda period. The Malawi Land Policy, approved by the cabinet in 2002, and a proposed new Land Bill would deprive the chiefs of sole power to allocate customary land, aiming to democratize this control through local representative structures (Customary Land Committees).<sup>22</sup> The limited amount of new land to be allocated also limits the power of the chiefs in this regard, and some authors note that chiefs in Malawi do not appear to have enriched themselves by selling off customary land to the degree seen in some other countries.<sup>23</sup> The land policy makes it very clear that the authority of chiefs over land does not represent ownership, but a trust. Officially, chiefs have no power to allocate land in towns, though some reportedly continue to do so, occasionally leading to conflicts with town authorities.

## GENDER REPRESENTATION AMONG TAs AND CHIEFS

While the TA is male in most areas and the predominance of males in the system is universal,<sup>24</sup> female village heads are found in the central and southern (matrilineal) areas, and they are even beginning to be encountered even in the north.<sup>25</sup> Female TAs were encountered in Kuulunda and Maganga (Salima) during the mission, though there are generally fewer women at the higher levels of the system. The TA is generally assisted by an advisory council (the members are known as *indunas*). Women may also be found as *indunas* in some areas. In Njewa, visited during the mission, four of eleven counsellors were said by the chief to be female. Of approximately 120 providers encountered in the Malawi quantitative survey, about 20 were women. Some TAs have a specific women's council designated to deal with what they consider delicate cases that require female intimacy (such as rape and domestic violence). The Malawi Human Rights Commission, in their 2006 study on cultural practices and human rights, found that:

***"[S]uccession to chieftaincy was in principle open to both males and females in all but a few ethnic groupings. This in principle opens the door for women to participate in decision-making positions at community level. The study found that in certain areas there had been remarkable progress in terms of women's participation in decision-making positions. A case in point was the situation in Mulanje where there were three women chiefs out of a total of six chiefs at traditional authority level."***

20 Ibid.

21 Cammack, Kanyongolo and O'Neil, 2009.

22 Malawi National Land Policy, Government of the Republic Of Malawi, Ministry of Lands, Physical Planning & Surveys, January 2002.

23 Cammack et al., 2009, cite Peters and Kambewa for this observation.

24 Kanyongolo, 2006.

25 See Munthali, Alister, 'The Emergence of Female Village Headwomen in Rumphi and Implications for Land Use and Management', conference paper, 2008, accessed at [http://iasc2008.glos.ac.uk/conference\\_papers/papers/M/Munthali\\_111001.pdf](http://iasc2008.glos.ac.uk/conference_papers/papers/M/Munthali_111001.pdf)

The Commission's study is also interesting for its finding that "the responsibility of choosing chiefs was mostly given to women, particularly in matrilineal societies." Nevertheless, "the results often produced men as chiefs. This could be attributed to some of the contents of initiation ceremonies and general pieces of advice given to girls and women, which recognize men as more capable leaders than women."

The MHRC found that having several wives is extremely widespread in society generally, and widely considered to add to the prestige of a chief. It can thus be fairly assumed that many chiefs are likely to be upholding polygyny.

## THE ADJUDICATION FUNCTION OF THE TAs

While the Chiefs Act does not explicitly mention an adjudicative function, in practice, this is considered to be included under 'traditional functions of [his] office under customary law'. In practice, it is recognized by community members, magistrates, police and local authorities, all of whom either refer cases to TAs or accept referrals from them, use TAs as a point of liaison for service of court documents or as expert witnesses on customary law, etc.

The 1965 Land Act does not give recognition to the dispute resolution function of chiefs in land issues. Nevertheless, magistrate courts do not have jurisdiction in matters pertaining to title of customary land<sup>26</sup> and these cases remain among those most frequently dealt with by the chiefs. The land policy recognizes that "no formal arrangement exists to ensure these functions are performed in a judicious and transparent manner." It acknowledges new land management structures, which would continue to involve chiefs, but be supplemented by other respected persons elected from the community. This will require new legislation on the accountability of traditional leaders.<sup>27</sup> Under the new arrangements proposed in the policy, the TAs would continue to be involved in adjudication and dispute settlement by presiding over a Traditional Land Tribunal.<sup>28</sup> The district authorities would support this tribunal, including through use of GPS technology. As mentioned, the policy had not yet been transformed into law at time of writing. Thus, while chiefs continue to exercise jurisdiction in the area of land disputes, and that jurisdiction is acknowledged by state organs, this occurs on the basis of a vague and general legal framework.

In 2002, Schärf and his colleagues<sup>29</sup> found that chiefs were still (though without legal authority) dealing with cases of a criminal character and wanted to have their former powers to order detention and impose community service returned to them, feeling that their authority had been diminished. The 2009 report by Kanyongolo et al. reports that minor disturbances of the peace are dealt with by town chiefs, but that cases involving criminal behaviour are sent to the police.

In practice, chiefs also settle disputes in marital and family law matters and a variety of civil disputes. A 2009 study<sup>30</sup> found that town chiefs were dealing with cases of the following kinds: (a) boundary disputes and minor damage to property, (b) inheritance cases, (c) attempting to reconcile partners in domestic violence cases, (d) disputes between domestic servants, and (e) quarrelling neighbours and ex-lovers.

They were also found to be dealing with some kinds of family problems, including disputes arising out of teenage pregnancy by a neighbouring boy or a boy trying to get a girl to marry him without her family's permission. According to the same report, they were not dealing with cases involving dissolution of marriage, sending these back to family elders (*nkhoswe*) or, failing this, to the courts. Witchcraft cases were among those dealt with by town chiefs. Englund and WLSA Malawi<sup>31</sup> describe the phenomenon arising in impoverished urban areas with ethnically mixed populations of suspicions by parents that their children are being led into witchcraft by neighbours.

26 Section 39 of the Act.

27 Land Policy, 5.10.2 (b)

28 Ibid, 5.14.3

29 Schärf et al., 2002.

30 Cammack, Kanyongolo and O'Neil, 2009.

31 Englund, 'Witchcraft and the Limits of Mass Mediation in Malawi', *Journal of the Royal Anthropological Institute*, 2007, WLSA, Malawi, 2009.

## NORMATIVE BASIS

The Constitution recognizes customary law, and this is generally what is applied by the TAs and chiefs, though there is likely to be considerable variation, based on knowledge of and attitudes toward particular provisions of statutory law and the Constitution. In towns, town chiefs may apply a mixture of common sense, elements of statutory law and the customs of different ethnic groups.

## PROCEDURES EMPLOYED

In their 2002 study, Schärf and his colleagues provide a description of the adjudicative process before chiefs and their counsellors. Some extracts from this are provided below.

*“Depending on the nature and seriousness of the problem any person may participate in the dispute resolution process: chiefs, elders/ndunas, victims, offenders, State officials, party officials and neighbouring chiefs. The system is characterized by its relaxed yet respectful atmosphere, an outdoor rural setting (often under a tree), informality of dress, common-sense language and a natural flow of story-telling and questioning.”*

*“The dispute is dealt with in a holistic manner, taking into account interpersonal relationships, community status, local values and community perceptions. The entire context of the event which gave rise to the dispute is sketched and probed, rather than only looking at the precipitating act which brought the parties to the customary justice forum.”*

*“The aim is first to ascertain the facts, and to do this the forum may have to hear a large amount of testimony, some of which may be quite irrelevant to the case. Standards of proof may thus be rudimentary. The maxim ‘no smoke without fire’ is adopted as opposed to proof beyond reasonable doubt and proof on the balance of probabilities.”*

Respondents said that, in practice, it is often the counsellors who hear cases at the higher level of the system. They refer their decision to the chief for confirmation or approval.

## IMPARTIALITY AND INDEPENDENCE?

Some doubt as to the impartiality of the chief and the process is expressed:

*“A participatory or consensual approach to decision-making is adopted. What remains debatable, however, is to what extent other factors such as the need to protect his own authority and prestige finally influence the decision of the chief. Nonetheless, parties agree to the process as well as to all the other inter-personal dynamics at play. Chiefs seldom sit alone. They are accompanied by indunas.”<sup>32</sup>*

These observations tended to be confirmed by statements heard in the qualitative study. It was noted that TAs, GVH and VH often have family ties to one of the parties (or some times both) in a case brought before them. Although some TAs emphasize the importance of impartiality and advise their GVH on this when they are appointed, it is very difficult to retain impartiality in all cases. Many villagers report having encountered partiality, both in terms of whether a TA, GVH or VH is willing to deal with their case and in the way the case is handled.

It must likewise be remembered that chiefs continue to have executive governmental responsibilities. They also play a role in local and occasionally even (at the higher levels of the chieftaincy system) national politics.<sup>33</sup> For this

<sup>32</sup> Schärf et al., 2002.

<sup>33</sup> Schärf et al., 2002, Cammack, Kanyongolo & O’Neil, 2009.



reason, there remains doubt about their independence from the executive arm and the political system; this is among the reasons why the Law Commission decided against having chiefs sitting on the proposed local courts (see below).

Moreover, the presence of pressure to reach a solution is acknowledged:

***“Victim, offender and family members or relatives are called to appear before the chief or elders. Pressure is used to reach an agreement that satisfies the parties, social hierarchy, community expectations and the chief. Thereafter, the forum will reach a decision that satisfies the victim, and is considered reasonable by the chief and the wider community.”***

The process thus has elements of facilitated negotiation, and cannot be neatly categorized as arbitration or mediation.

The chief and counsellors may not necessarily be neutral or impartial:

***“Factors at play include the interests of the chief to promote his authority and prestige, political influences and pressure, and the current human rights and democratic changes that have influenced some members of certain communities. More factors are the respective status of the disputants, and the likelihood of the case being taken to the formal state courts.”***

Although counselling and advice may sometimes be given to the parties, the penalty is often in the form of payment of livestock. The nature of the offence, the age of the offender, the degree of outrage by the community, as well as other extra-judicial factors that may influence the chief and *indunas*, determine the penalty or order.

In interviews with users and other providers, chiefs were sometimes accused of corruption in relation to dispute resolution.<sup>34</sup> In addition, the traditional practice of paying tribute to chiefs (typically a chicken for the chief and his *indunas* to eat) is hard to distinguish from the taking of bribes.<sup>35</sup> The party who provides a greater gift or tribute may have expectations of being favourably treated. The system has no obvious safeguards against dangers such as these.

## FORCE OF OUTCOMES

It is difficult for a community member not to abide by the judgement or case outcome. While people do have the possibility of seeking a review of the decision of a village headman at higher levels of the customary system, the non-formalized nature of this system makes it subject to a host of uncertainties. Chiefs faced with defiance of their decisions may have a number of means at their disposal, including mobilizing a community to ostracize a person, creating difficulties in accessing any public funds or services that would otherwise be available, denying access to graveyards upon the death of relatives or family members, and, because of their authority over land, even banishment from the village in cases of suspicion of witchcraft. Town chiefs claimed in some cases be able to secure the assistance of public authorities in having a person evicted from his or her home. Families ‘harbouring thugs’ may be ‘shunned’.<sup>36</sup>

## ACCOUNTABILITY MEASURES IN RELATION TO ADJUDICATION BY CHIEFS AND TAS

Accountability measures in relation to the TAs are primarily within the IJS themselves. Chiefs adjudicate in a collegial framework with the participation of *indunas*. Depending on the relationship between the chief and the *indunas*, this may be a strong or a weak measure of accountability. The hierarchical nature of the chieftaincy system is likewise an accountability measure, both through the possibility of appeal or referral to a senior chief and by

<sup>34</sup> Ibid, p. 42.

<sup>35</sup> Ibid.

<sup>36</sup> Ibid.

means of expectations of proper conduct. As regards appeal, it appeared that only a small number of cases reaching the VHs and GVHs go on to the TA, ranging between 2 and 6 per month in the areas visited. It also appears that wayward chiefs may be 'reined in' by their families.<sup>37</sup>

TAs are to some degree accountable to governmental organs, from the district commissioner's office up to the OPC, as they receive their allowances from these executive organs. There is no inspection or monitoring mechanism of the adjudicative functions of TAs. There is no set of procedural rules that TAs are supposed to apply. Reference is made to the provisions of the Land Policy dealing with the need for an improved accountability framework.

Schärf and his colleagues in their 2002 study<sup>38</sup> found that significant efforts were made to keep records at the higher levels of the system (paramount chiefs). At lower levels, some village heads said that an effort was made to keep notes, but the quality of these is dubitable. As mentioned later in the report, capacity-building in record-keeping is an element of the CCJP/DFID primary justice project.

It can be concluded that, although there are some measures of accountability present in relation to some issues of conduct and discipline, few are available in terms of the protection of legal rights of individual litigants, and, as Schärf and colleagues observe, "It would be a brave villager to report his/her chief to the chief's superiors."<sup>39</sup>

The available studies say that it is customary to try to resolve a dispute at the level of the family elders and village headman before going to the courts or formal justice organs. If a solution cannot be found at this level, the VH or other chief 'authorizes' a person to resolve the dispute at a higher level of the traditional system or at a formal court. While there is no basis in law for the need for an 'authorization' of this kind, it may carry weight in practice. There is no official appeal mechanism from the TAs to the magistrate courts and a case has to restart if referred from one system to the other. In land disputes, a case that has been heard in the TA system can be appealed to High Court. There are, however, only four High Courts in Malawi and, in most cases, referral to High Court is not in reality an option for the vast majority of people.

## ACCESS ISSUES IN RELATION TO ADJUDICATION BY TAS

Schärf and his colleagues also commented on issues of accessibility:

***"It is thus important to recognise that the system is undoubtedly more accessible in terms of distance, cost, language, values and outcomes. It also appears better able to respond to the needs of the poor as it is simpler, less time consuming, more accessible and better understood than the formal system."***

The report goes on to say that cases are usually resolved on the day of the hearing.

CCJP reported figures indicating that 44 percent of cases before TAs are brought by women.<sup>40</sup> Although the project has worked to improve reporting and documentation, detailed figures are not available in these reports on the kinds of cases involved. However, it may be assumed with some confidence that family, property (personal and real) are prominently represented as well as a variety of civil and minor criminal matters.<sup>41</sup> These figures do, however, indicate that, in respect of the traditional leaders, the primary problem for women may not be one of access to these institutions as such, but rather the structural, procedural and substantive fairness encountered. These may hinder access to justice more broadly.<sup>42</sup>

37 Kanyongolo, Cammack and O'Neil, 2009.

38 Schärf et al., 2002.

39 Ibid.

40 CCJP, 2008, 7.2.2.

41 Ibid. The more serious cases referred to the formal institutions reportedly include murder, grievous bodily harm, rape, incest, burglary and defilement.

42 See the main report for a working definition and discussion of access to justice.

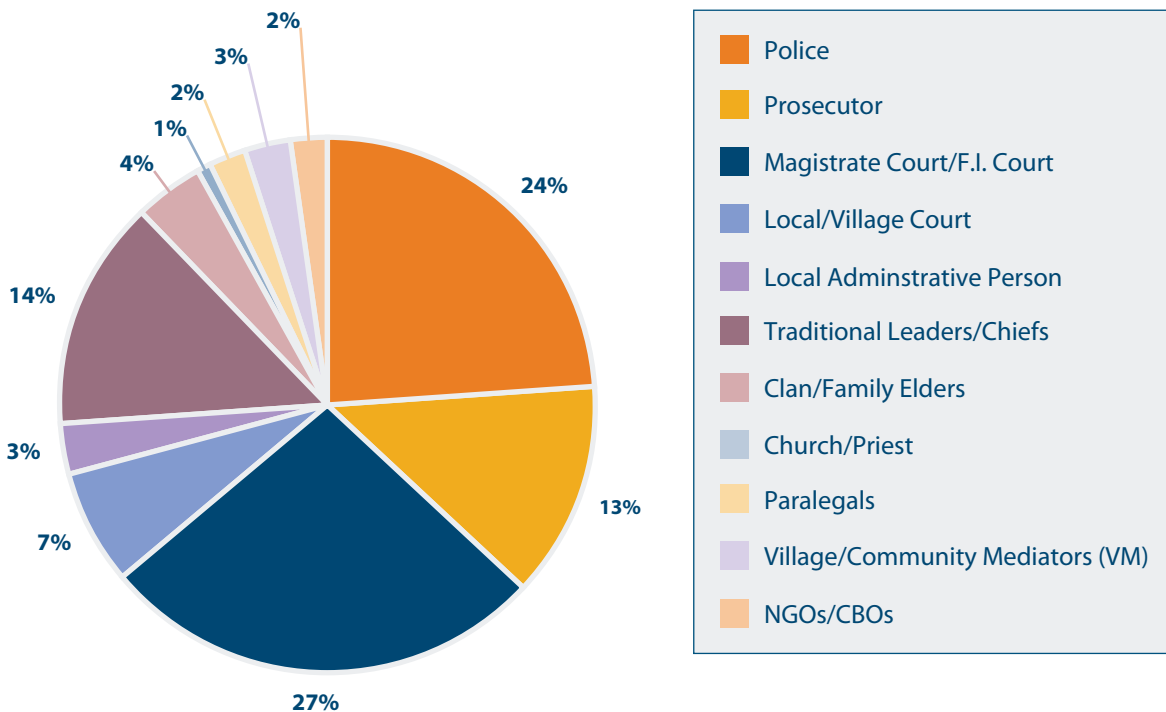
## FEES AND COSTS

Chiefs reportedly levy fines and court fees on parties to a case.<sup>43</sup> More research would be necessary to gain detailed knowledge on payments.

The Chiefs Act is seen as permitting traditional leaders to charge a fee or in-kind contribution for hearing a case, and they generally do. In the quantitative study, approximately two thirds of the 120 traditional providers interviewed said that some kind of payment was charged, though for some it depended on the kind of case in question. Approximately equal numbers said that it was or was not a fixed amount. In the qualitative interviews, some chiefs mentioned a value of 100 to 500 Malawi *kwacha*.<sup>44</sup> Other respondents confirmed this and also mentioned fines levied by chiefs for civil misconduct (such as divorcing a wife) that would be payable to the chief rather than the victim of the misconduct.<sup>45</sup>

Interestingly, the study reveals that cost is seen by users as a barrier to access to justice in respect of all providers: magistrate courts, police and the traditional leaders, as the chart and table below illustrate. Responses indicate that cost holds people back from using all of the main justice providers,<sup>46</sup> though it would not seem to be a significant barrier in relation to family structures.

### WHICH JUSTICE PROVIDER WOULD YOU NOT BE ABLE TO APPROACH BECAUSE OF THE PRICE/COST?



Most Malawian NGO representatives and justice sector representatives considered it legitimate for traditional providers to charge a fee for these services. It may nevertheless act as a barrier to access to justice for some of the most vulnerable people in villages, particularly for women. CCJP informed the team in 2010 that they now counsel

<sup>43</sup> Ibid. See also Kanyongolo, et al., 2009.

<sup>44</sup> About US\$ 0.75 to US\$ 3.50 at the time the interviews were conducted in February 2009.

<sup>45</sup> From meeting with a party to a case in Salima, February 2009. Officials at the district commission office in another district confirmed the same information.

<sup>46</sup> Evidently, this issue could be explored in much greater detail in a more profound study. It was not possible to differentiate in this question between the different kinds of costs involved, such as fees for a summons and/or hearing, transport costs, etc.

chiefs against charging fees. A further aspect of the practice of paying fees to traditional authorities or headmen is the danger that a non-standardized system of donations or fees may present a risk that a party may gain an advantage by paying or giving more than the opposing party. This is discussed in the above section on Impartiality and Independence.

## CONCLUSIONS ON THE ACCESSIBILITY OF THE TA SYSTEM

It seems clear that, for most Malawians, the traditional system and modernized versions of it (the town chiefs) remain the most accessible of institutions outside family structures. However, access to institutions or mechanisms cannot itself be equated with access to justice. Although many respondents point to attributes of traditional leaders in terms of justice provision including appropriateness of procedures and proximity, many also raise issues that point to a lack of human rights compliance on several counts.

Schärf and the other authors of the 2002 report are likewise candid about the lack of choice available to these and other vulnerable and marginalized groups. Substantive human rights issues that arise out of the handling of cases are discussed later in this study.

## LOCAL (CUSTOMARY) COURTS

Until 1994, there was a system of state-controlled customary law courts (known as traditional courts) in operation in Malawi, pursuant to legislation.<sup>47</sup> These courts were under the authority and control of the executive rather than the judiciary. Some chiefs sat in these courts while simultaneously adjudicating disputes in their own informal chief's courts. Under the Banda regime, the state traditional courts had competence even in capital cases. Because of its misuse against political opponents by the president under the one-party state, this system became highly discredited and was effectively discarded when the attorney general suspended their operation in 1994. As a result of this administrative action, most of the functions and officers of these courts were integrated into the lower tiers of the judiciary. Nevertheless, the legislation on these courts remains on the statute book and the 1994 Constitution, in Article 110 (3), provides that "the jurisdiction of such courts shall be limited exclusively to civil cases at customary law and such minor common law and statutory offences as prescribed by an Act of Parliament."

A 2007 report by Malawi's Law Commission recommended re-establishing a system of local courts that apply customary law.

## BACKGROUND

What eventually became the traditional courts had their origin in the so-called 'Native Courts' that were established under the colonial government by the Native Courts Ordinance of 1933. The scheme set up by this legislation was similar to those established in some other British colonies in Africa. Custom – or what became customary law – was administered through provincial commissioners and chiefs, the latter acting as advisers and assessors to the Commissioners.<sup>48</sup> By this measure, customary law was brought under the control of the colonial state. The government's control was extended by virtue of a new Ordinance in 1947 that brought the establishment or constitution of such courts under state control.

The Local Courts Ordinance of 1962 superseded these pieces of legislation, which were again amended and renamed as the Local Courts Act in 1964, upon independence. In 1969, the Traditional Courts Act renamed these courts, henceforth calling them 'traditional courts'. At that time, the jurisdiction of the traditional courts (at a regional level) was extended to include capital offences (Law Commission, 1997). In 1970, the appeal procedures

47 The Traditional Courts Act

48 Report of the Law Commission on the Review of the Traditional Courts Act, Malawi Law Commission, Law Commission Report No. 17, September 2007. ISBN: 978-99908-85-01-09.

for the traditional courts were changed, removing the jurisdiction of the High Court to function as an instance of appeal in relation to these courts, so that the highest court of appeal was now the National Traditional Appeal Court. This meant the establishment of a parallel court system, one referring to the judicial branch of government, the other referring to the executive.<sup>49</sup> Chairpersons of these courts were appointed by the Minister for Justice, and could likewise be removed by the minister for a variety of reasons.

Until 1993-1994, the traditional courts were recognized as first instance courts. Their adjudicative functions were transferred to the magistrate courts after the introduction of democracy and the process of making and introducing the new constitution began. The traditional courts had been established by ministerial warrant. As such, they were legally suspended by means of an order of the Attorney General. Thus, while the legislation establishing these courts remained in place after 1994, in practice, the law fell into abeyance.<sup>50</sup> The presiding officers of these courts were integrated into the lower tiers of the magistrate courts as magistrates. The influx of these new magistrates decreased the general level of qualifications within the overall cadre of lay magistrates. Magistrate courts are thus now applying customary law in relation to some areas of family law and other areas of civil jurisdiction.

While it may be that few Malawians bemoaned the passing of the regional traditional courts, which had been used as an instrument of political repression by former president-for-life Banda, the disappearance of the traditional courts at the local level meant a loss in access to justice for many Malawians. These courts operated in the vernacular and applied customary law that was familiar to ordinary people. Since 2000, magistrate courts have had jurisdiction over disputes arising out of customary marriages. When, after 2000, they started to handle such matters, there has, according to the report of the Law Commission (2007), been dissatisfaction with the process due to a lack of expertise in customary law among magistrate courts. The magistrates are not given any information about customary law except in relation to family law,<sup>51</sup> and it is up to the individual magistrate to what degree and in what way he combines notions of customary law and common law.<sup>52</sup>

A particular problem arose initially out of the haste with which traditional courts were effectively abolished, when no legislative provision was made to modify the jurisdiction of the magistrates so as to provide a forum for areas in which the traditional courts had previously enjoyed exclusive jurisdiction. This was the case with cases concerning guardianship or custody of children, dissolution of marriages and declarations concerning paternity.<sup>53</sup> The result was that people had nowhere to go with cases of these kinds. Parliament subsequently amended Section 39 of the Courts Act to confer jurisdiction on magistrate courts over these matters.

Traditional courts formally retained some areas of jurisdiction on land and customary marriage (through the Land Act and the Law on Inheritance), although they had in practice ceased to exist. Disputes arising out of any such settlements cannot be brought before the magistrate courts, but can be appealed to the High Court.

## PERSPECTIVES FOR LOCAL COURTS

Reinstating local courts is a topic that is frequently discussed in justice circles in Malawi, and a great deal of serious work has been done on the subject. For this reason, as well as for comparative purposes, it is interesting to examine and discuss the proposals in some detail although the possibility remains hypothetical. The Malawi Law Commission has, over the past decade, worked on various research projects and legislative proposals on the structure of the courts and the role of customary law and traditional justice providers. A bill for the establishment of local courts was drafted in 2007 and was adopted by Parliament in early 2011. The Act establishes local courts as

49 Ibid.

50 See AFRIMAP, 'Malawi, Justice Sector and the Rule of Law', 2006, p. 45.

51 Paper delivered by Justice of the High Court, Kenan Tilombe Manda, conference in Cape Town on Traditional Justice, March 2010.

52 Justice Manda, 2010.

53 See Schärf et al., 2002.

a parallel structure to magistrate courts with an appeal function at district level (to a district appeals local court) and up to the High Court and Supreme Court. The Law Commission reasons that, even if there were magistrate courts available to people in the remote, rural areas of Malawi, their access to justice would still be impeded by the lack of “access to familiar courts and to familiar court procedures” (Law Commission, 2007). The introduction of local courts would be coupled with a phasing out of third and fourth-grade magistrate courts, currently staffed by non-jurist magistrates. The Law Commission observes that the judiciary has been blamed for general inefficiency because magistrates lack knowledge of customary law and traditional authorities lack knowledge of criminal law. Previous studies have documented a serious problem of a lack of familiarity with legislation among adjudicators and other court personnel at the magistrate courts,<sup>54</sup> though the situation may have improved somewhat since the study was conducted in 2002. While unfamiliarity of magistrates with customary law is a problem, there is an equal risk that justices of the proposed local courts will be unfamiliar with provisions of statutory law and the guarantees of the Constitution and thus perhaps unable to ensure conformity with the latter.

The Malawian proposals are interesting because they represent an attempt at reconciling a perceived need for proximate courts based on customary norms and procedures with concerns about gender equality, the protection of children and constitutional human rights guarantees. Here, we confine ourselves to outlining a few elements of the Draft Bill.

## COMPOSITION

The Law Commission recommends that the presiding officers (chairpersons) in local courts be “lay persons” rather than chiefs, considering that having chiefs sitting as presiding officers would offend against the principle of the independence of the judiciary. The Commission recommends imposing an educational qualification of the level of secondary education,<sup>55</sup> a level of proficiency in English, adequate knowledge of the customary law and language of the area. A minimum age of 35 years would be required, as well as fitness and character requirements. Local courts would have assessors sitting with the chairperson in civil matters, appointed by the registrar to advise on customary law.

## JURISDICTION

The Law Commission states that the jurisdiction of proposed courts “is confined to the administration of customary law in civil matters and exercising limited jurisdiction in criminal matters. [...] [T]he Commission recognizes that there are certain civil matters at customary law which are handled to the detriment of women and children due to established customs and other matters which result in persecution of suspects.”

Thus, a number of matters often dealt with by customary law would, according to the Law Commission, be excluded from the subject matter jurisdiction of the local courts:

***“The Commission thus proposes to exclude such matters from the jurisdiction of Local Courts. Such matters include: inheritance issues, matters involving custody of children, cases of witchcraft, land disputes and matters involving distribution of matrimonial property.”***

The proposal to vest jurisdiction for these matters in magistrate courts rather than in local courts should be seen in the light of the legislative bills that are pending on issues of marriage and property succession, as discussed in the section of this study dealing with human rights issues. The far-reaching changes that are mandated by the Constitution and proposed in the legislative bills would abolish polygamy and customary rules on inheritance, making

54 ‘Access to Justice for the Poor of Malawi? An Appraisal of Access to Justice Provided to the Poor of Malawi by the Lower Subordinate Courts and the Customary Justice Forums’, Wilfried Schärf, Chikosa Banda, Ricky Röntsch, Desmond Kaunda, and Rosemary Shapiro, DFID, Malawi, 2002, accessed at <http://www.gsdc.org/docs/open/SSAJ99.pdf>

55 The Malawi Certificate of Education

these matters the subject of statutory rather than customary law. Thus, a move toward dealing with these issues through statute as opposed to custom would be accompanied by a move toward statute-based courts.

In some sections of the Draft Bill, for example Section 136 on abduction of girls under sixteen, the Law Commission does not conclude on the jurisdiction of the local court, but raises the possibility that local courts should be allowed to try such offences both in order to ensure a fast process and in order to create awareness within the community that such practice is criminal and not condoned by law. This perspective may, of course, be challenged in terms of whether it is in line with the above-quoted statement about areas that should be excluded from the jurisdiction of the local courts.

## REMEDIES AND SANCTIONS

In civil cases, local courts would award compensation and costs of the legal action, the restitution of property, specific performance of any contract entered into under customary law, or any other order required by the case. In criminal cases, local courts would be able to impose community service, fines not exceeding 5,000 Mw. *Kwacha*, the payment of compensation, obtaining sureties of good behaviour, forfeiture (if authorized by legislation), or for aggravated offences or repeat offenders, imprisonment for periods up to 12 months (in a prison authorized under the Prisons Act). The local court would be able to order a person to enter into a bond to keep the peace and be of good behaviour. It would also be empowered to dismiss a case with a caution, without proceeding to judgment. For common assault or an offence of 'a private nature', a court would be entitled to stay proceedings and encourage reconciliation.

## PROCEDURAL RULES AND PROCEDURAL RIGHTS

Proceedings in local courts could, in the Commission's proposals, be conducted in the vernacular language (with the approval of the chief justice), but records would be required to be kept in English in order to facilitate appeals.

The Commission proposes two sets of procedural rules for civil and criminal cases, respectively, with the specific purpose of conforming to constitutional guarantees. Some legal guides on terminology and procedure already exist in some national languages.

The draft legislation and report also deal with the question of legal representation of parties, referring to paralegals in this regard. It is proposed that legal representation (by legal professionals) would only be permitted in criminal cases.<sup>56</sup> The Commission also considered representation by other persons. Concerned about the abuses that could arise from unregulated paralegals offering legal services of dubious quality for remuneration, it was considered that, if paralegals appear in these courts, it should be as a 'next friend' and the service of the paralegal should be free of charge. It did not address the issue of whether this rule should be amended if legislation were to be adopted providing for a regulatory scheme for paralegals. In addition, it was recommended that, although the customary practice of being represented by certain family members should be retained, adult women should have discretion as to whether to be represented. This was in order to 'uphold the principle of gender equality before the law'.

## NORMATIVE BASIS

In addition to customary law, the new local courts would be able to apply other legislation adopted giving them jurisdiction, and rules, regulations, by-laws, etc. as adopted by local government in the area. As regards criminal law, no criminal penalties would be able to be ordered except on the basis of state legislation.

<sup>56</sup> Malawi Law Commission, September 2007, p. 31.

## REVIEW AND SUPERVISION

The Commission recognized the need for an effective supervisory mechanism because of the effective unavailability of appeal mechanisms to poor litigants. Functions in this regard – both appellate and supervisory – would fall to a district appeals local court and would apply both in civil and criminal matters. The supervisory powers would include the power to issue instructions on the further conduct of a case.

## OUTREACH AND ADR BY FORMAL JUSTICE INSTITUTIONS

### COMMUNITY POLICING AND VICTIM SUPPORT UNITS

The Victim Support Unit (VSU) is a programme of the Malawi Police Service supported by UNICEF, with funds from DFID. Part of its function is to strengthen the ability of the informal justice providers to provide justice relevant to the needs of woman and children. The VSUs are in all police stations and are attached to the system of community policing that operates in Malawi and are guided by standard terms of reference and operational guidelines. They include police child protection officers and a range of personnel trained in responding to women and children. Community Victim Support Units are established at the TA level and are headed by the traditional authority. They provide emergency accommodation and a safe house for woman and children fleeing violence and access to community leaders for immediate protection. They also include community leaders and representatives of the police, schools and health services, and a child protection officer and other members of the community concerned with ensuring that the rights of women and children are protected, particularly in relation to justice issues. They strive to have a gender balance. Among their aims are the promotion of restorative justice through mediation and diversion and the prevention of violence, abuse and exploitation by engaging community leaders in understanding the specific needs of women and children in terms of informal justice and through outreach and prevention activities.

Insufficient data was collected to make conclusions about this programme. However, some observations can be made based on communication with UNICEF, NGO representatives and villagers as well as visits to one Victim Support Unit and some police stations in the Central Region.

Among the most significant categories of cases being brought to the Kanengo VSU, cases generally related to family disputes are featured prominently. Thus, 'failing to maintain the family' accounted for 14 percent of cases, and insufficient support a further 7 percent, while wife desertion accounted for 13 percent and a more general category of 'family disputes' comprised 10 percent. Common assault accounted for 9 percent of cases and 5 percent were wife battering.<sup>57</sup>

The community policing structure consists of community policing forums at the TA (geographical entity) level, where the TA (chief) is a patron of the scheme. At lower levels of the system, there are crime prevention panels (at the GVH level) and crime prevention committees (at the VH level) where problems of safety and security affecting the community are discussed. Uniformed community policing volunteers assist the police and receive some training. The level of functionality of the committees varies from district to district. Community Victim Support Units and child protection committees are linked to the community policing structures.

These structures are the means by which the police interact with the communities in their areas of operation, and headmen and chiefs play an important role in them. The visit to the Kanengo (model) police station revealed that the DFID-sponsored Primary Justice Programme and the training of village headmen by CCJP (in which the police have participated) has resulted in cooperation of various kinds. CCJP (in common with other Malawian NGOs) uses community-based educators (CBEs) in a number of its programmes, including the primary justice programming that targets chiefs and headmen. The educators are chosen from a variety of local structures, including community police and local government.

<sup>57</sup> Statistics obtained during the field visit to Kanengo VSU. Copy with DIHR. The figures received do not make it clear whether some cases classified as 'common assault' are cases of gender-based violence.



## REFERRALS

A number of minor dispute cases are being referred back to the community level by the Kanengo police station. In interviews, these were said to include cases of 'misunderstandings in the family' and non-payment of debt cases, as well as land disputes. However, statistics on referrals obtained during the mission revealed that a large number of cases relating to chieftaincy disputes and witchcraft were being referred back to the headmen, as well as land disputes. Disputes concerning marital infidelity were often referred to family elders.

## FINDINGS

Most of those who knew of and had benefited from the VSU programme praised it for filling an important function of giving the victims an accessible place to go for support and for being a way of giving village members an entry point to the formal police institutions in more serious criminal cases. The structural linking between state institutions and informal community-based structures, which is recommended in the overall study, gives the possibility of referrals both ways and the potential of communicating government justice policy – including on gender and family issues – to adjudicators, beneficiaries and potential perpetrators. The integration of this programme into the existing justice sector institutions may render it more sustainable.

The staff of the community police units were not trained to the same extent as ordinary police. A visit to one VSU and a community police officer in charge revealed dedicated staff and good facilities that met the needs of victims for immediate protection from violent husbands (including a place to stay for the night within the facility). Nevertheless, the visit suggested a need for more human rights training for VSU staff.<sup>58</sup>

It appears that the police are not able to meet the TAs and discuss things with them as often as initially intended (once a month) because of a lack of transport facilities. The same problem impairs interaction between the police and the community policing structures. While it appeared<sup>59</sup> that the trained police officers met were generally capable of assisting and advising the community police officers on issues of legislation and human rights, the support functions are impaired by lack of transportation at police stations. Another issue concerns impartiality and accessibility. The community policing structures fundraise locally in order to sustain their activities. This could risk affecting policing priorities in the communities and districts. If the referral of witchcraft cases back to the headmen indicates a general practice and view among the police that such cases should be handled locally and by traditional institutions, this could be problematic for the legal protection of women and children in particular.

## ADR AND THE COURTS

The Court (Mandatory Mediation) Rules were adopted by the judiciary (High Court) and came into operation in August 2004.<sup>60</sup> The rules require (with some exceptions) that in all civil actions pending before the High Court and subordinate courts, the parties attempt mediation. The parties should choose a mediator from a list maintained by the court registrar or one whom they have chosen of their own accord.

One opportunity is to make use of the framework that has been set down by the courts for mediation. Community-based mediators or traditional chiefs could work together with this system to a greater degree, though this would demand some form of quality control and certification system.

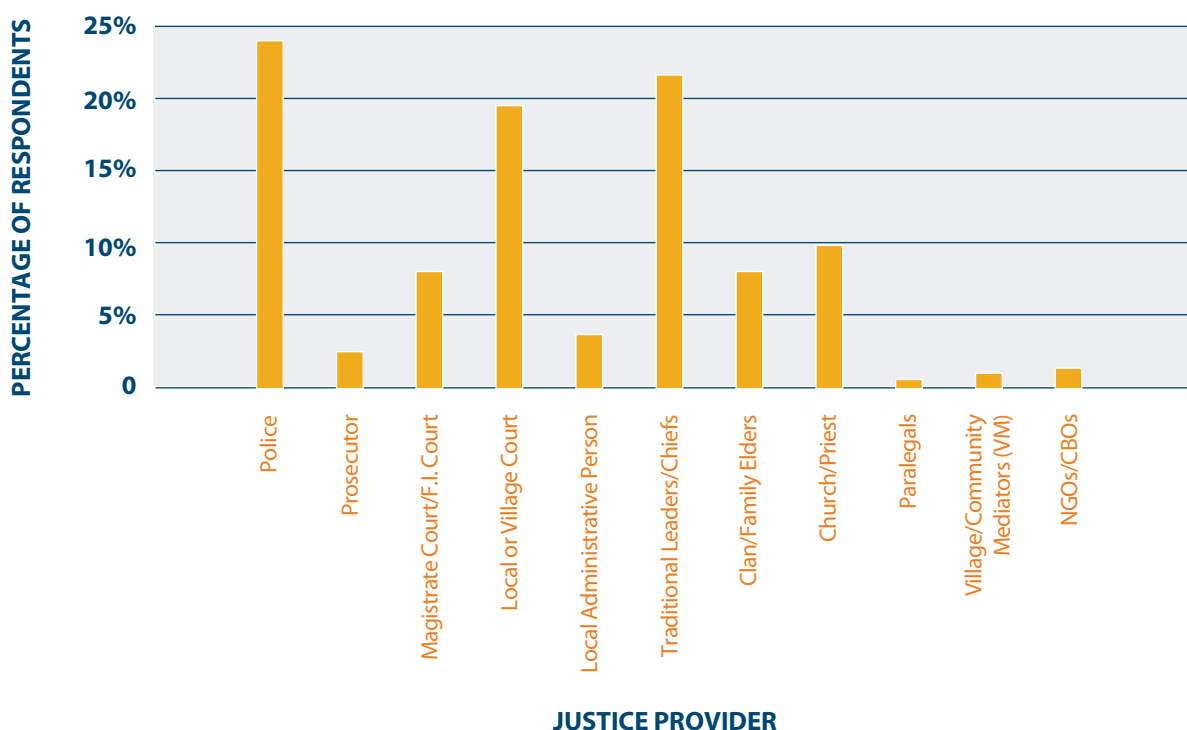
58 Pictures on the wall depicted complainants and perpetrators in different cases, one with a child posing next to her rapist and surrounded by the family. The perpetrator was imprisoned according to the officer, but the rights and needs of the child were obviously not being met in the process.

59 Albeit impressionistically.

60 'Courts, (Mandatory Mediation) Rules 2004' leaflet, published by the High Court of Malawi.

## USER PREFERENCES

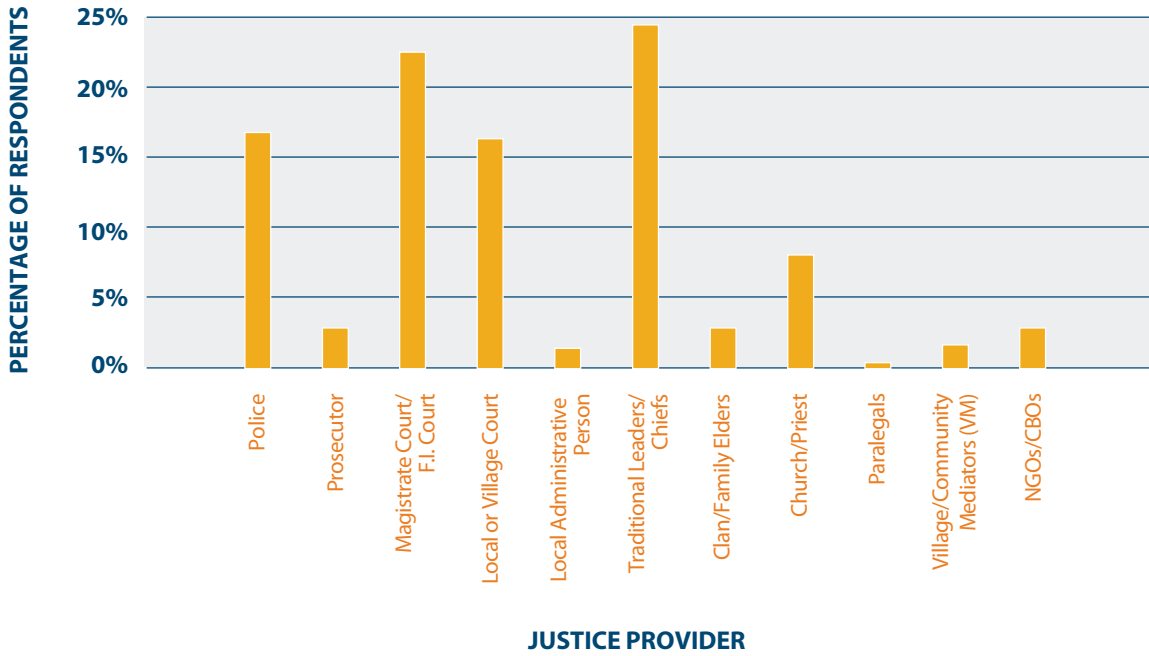
WHEN YOU HAVE A PROBLEM OR CASE, WHICH JUSTICE PROVIDER DO YOU PREFER TO GO TO FIRST?



The data collected confirmed previous conclusions that a major proportion of the population primarily use IJS. In the qualitative data collected, approximately one third of the respondents said they preferred to take a case to the traditional leaders first (see below), while another third would first go to church leaders. While the nature of the services provided by church leaders tends to differ from IJS, and a religious official or paralegal might provide advice rather than dispute resolution as such, it can be said that the main sources of help for people facing disputes are the family counsellors, religious leaders, NGOs/CBOs, and traditional authorities (TAs). In regions where the Village Mediation Programme has been carried out, the village mediators are another important informal justice provider. The quantitative data indicates that people in the rural villages visited prefer to take cases to traditional leaders or sometimes to church leaders. There were too few respondents living in proximity to the magistrate courts<sup>61</sup> to enable findings on whether people would have this preference if distance to the court were short. Women raised issues of distance to the police or courts as important in choosing not to approach these institutions. During interviews, some women pointed to the danger of assault or rape when they travel far, especially by night. On the other hand, some respondents showed a willingness to travel considerable distances to have their cases resolved by the instance of their preference (including the village mediators). This was explained by the respondents in terms of the perceived partiality of the traditional leader closest to them.

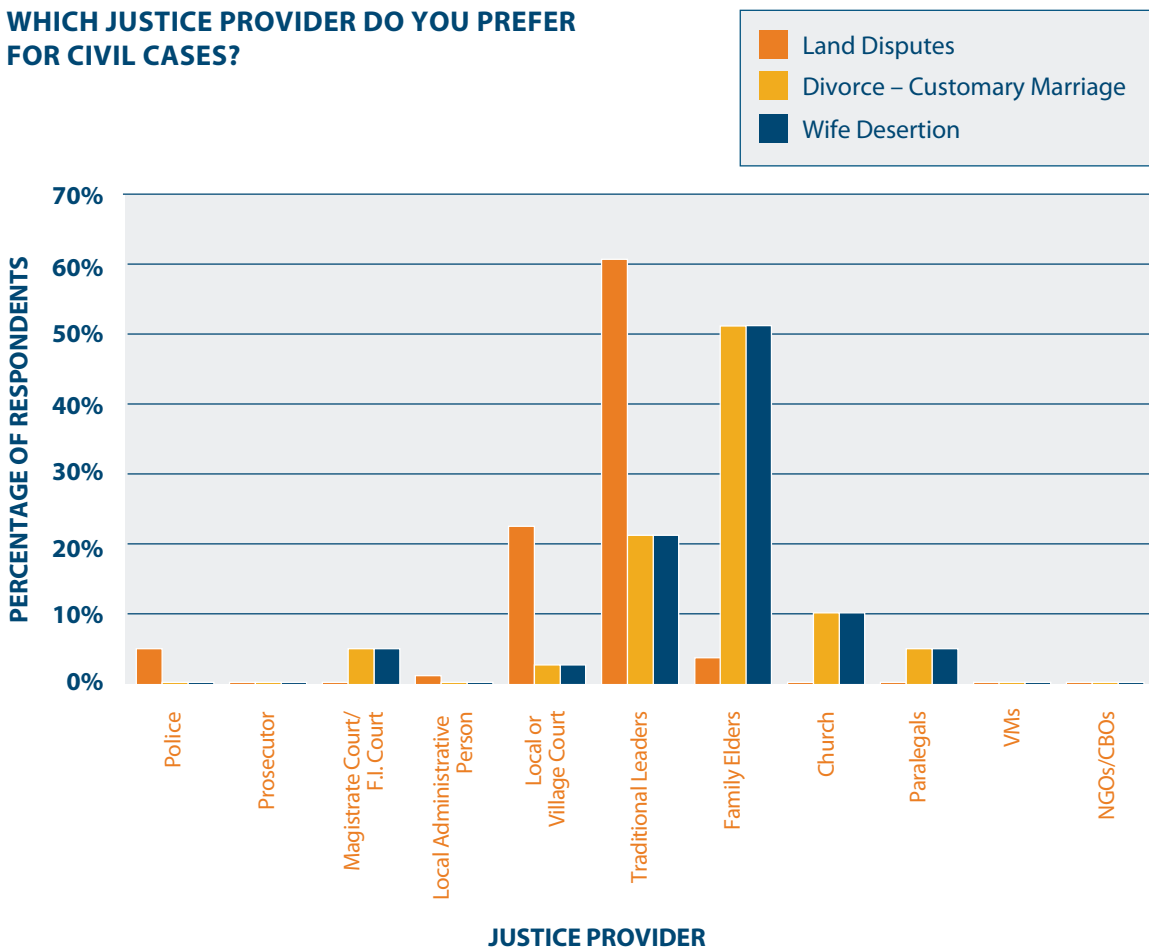
61 80 percent of IJS users interviewed during the quantitative part of this study live more than 16 kilometres away from the closest formal court.

**WHICH JUSTICE PROVIDER IS IN YOUR OPINION THE BEST?**

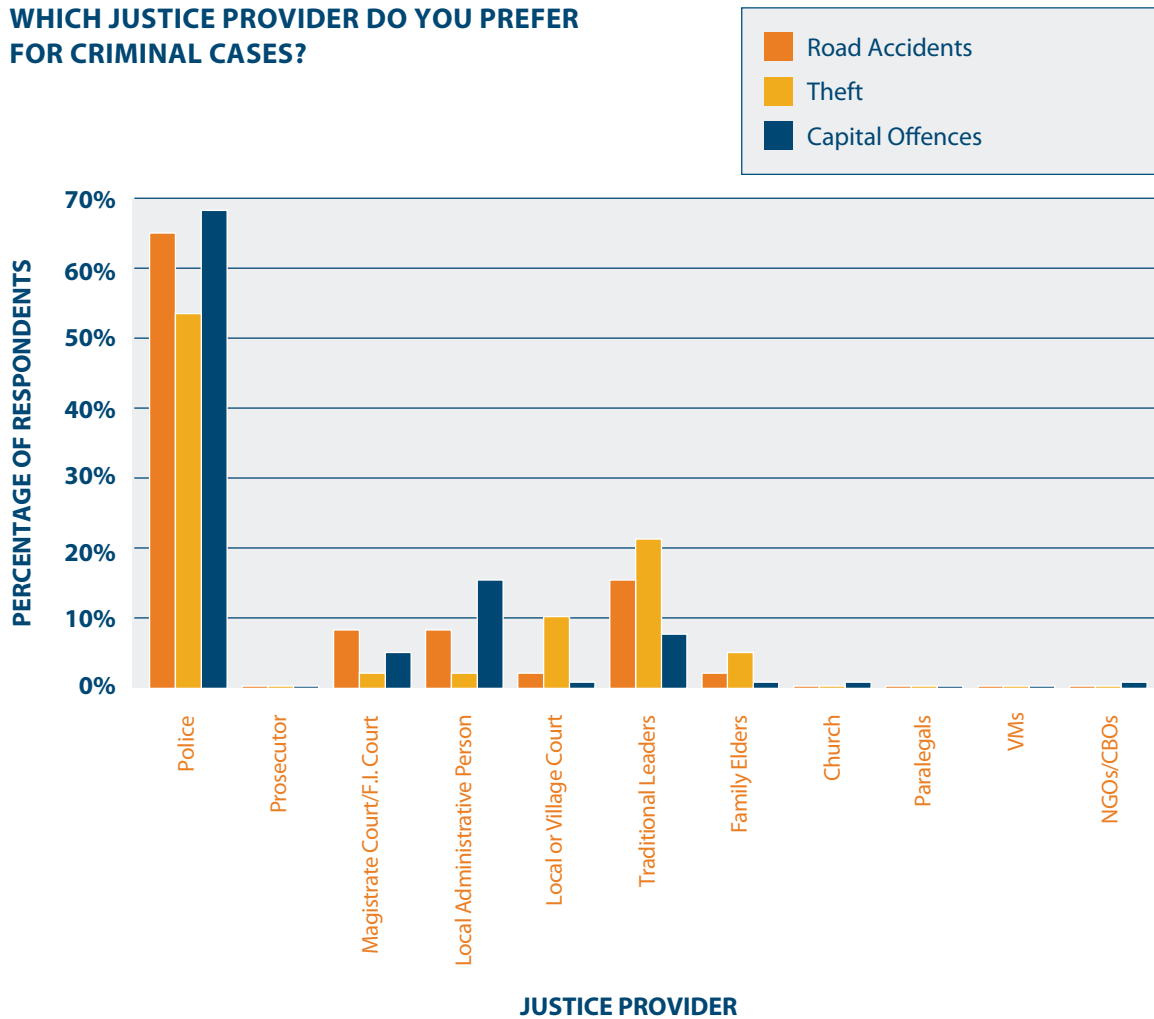


**USER CHOICES IN RELATION TO PARTICULAR LEGAL DOMAINS<sup>62</sup>**

**WHICH JUSTICE PROVIDER DO YOU PREFER FOR CIVIL CASES?**



## WHICH JUSTICE PROVIDER DO YOU PREFER FOR CRIMINAL CASES?



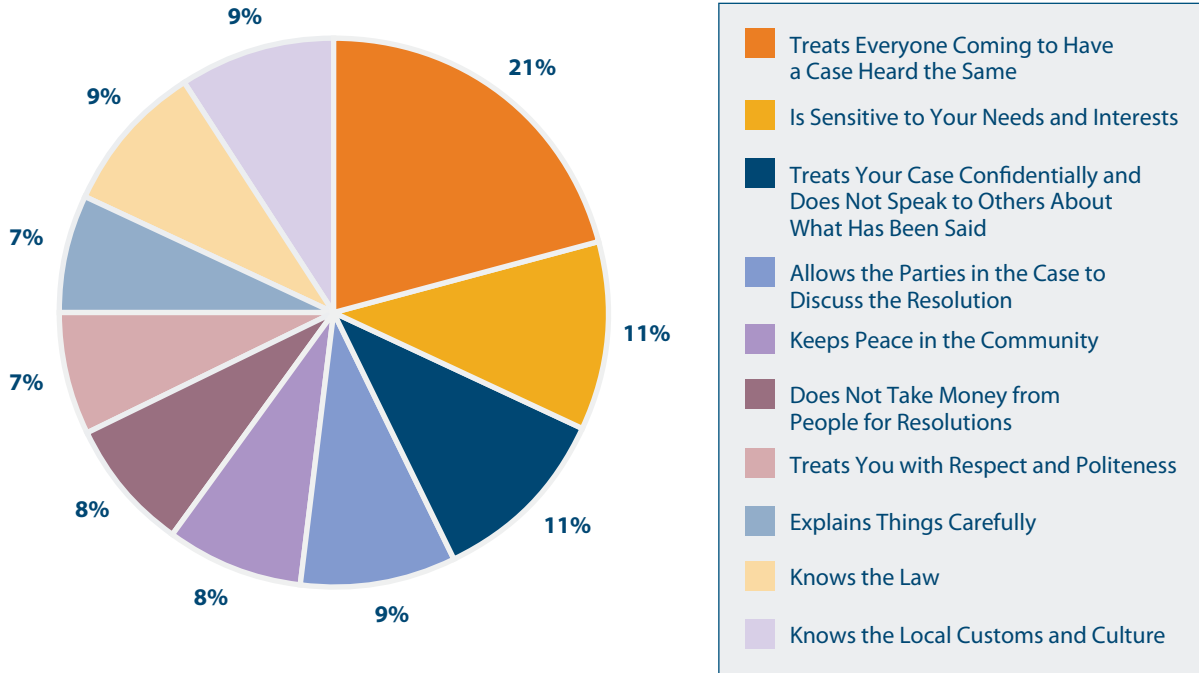
As is evident from these graphs, the respondents use the broad spectrum of justice providers according to the type of case in question, and people will in many cases approach the police if it concerns a criminal case. Earlier studies<sup>63</sup> tend to confirm this, especially if more serious violence is involved. When the data shows that respondents generally prefer to go to traditional leaders and church leaders as their first choice, it probably signals that most cases are civil in nature. Both the preferences of users and the attitudes of providers vary from case to case. A 2010 follow-up interview with those responsible for the village mediation programme revealed data showing that traditional leaders in the rural areas where the programme operated tended to resolve land disputes themselves, but preferred to refer family disputes to the village mediators.

User choices also related to characteristics of processes and providers. The publicity or confidentiality surrounding the process was important to several women interviewed. Some in areas where there is a Village Mediation Programme said that they chose the village mediator because the case is handled with confidentiality and in privacy, rather than being a public matter for the whole community. This is discussed below in relation to domestic violence cases. Some point to the importance of the justice provider treating everybody the same. This is supported by the quantitative data presented below. Women raising the importance of being treated the same, since it is generally recognized<sup>64</sup> that, especially in particular types of cases such as inheritance and land conflicts, women are not treated equally and in accordance with human rights.

63 Such as those by Schärff et al., 2002 and Cammack et al., 2009.

64 See the Law Commission report of 2007.

## WHAT CHARACTERIZES A GOOD JUSTICE PROVIDER?



## KEY HUMAN RIGHTS ISSUES

### CRIMINAL JUSTICE ISSUES

The reports seen and persons interviewed do not indicate that chiefs and TAs are handling cases involving serious crime on a large scale. There appears to be a fairly widespread understanding on the part of chiefs that criminal matters are to be handed over to the police. Nevertheless, this does occur in a number of areas and in relation to a number of issues,<sup>65</sup> particularly those involving minor assaults, theft and domestic violence.

The strong link between justice and security at the local level is important. The previous studies cited discuss links between chiefs and police. Community police officers are trained in legislation, but the training only reaches the level of community police forums and not further to the community police panels and committees. Schärf et al. (2002) report the worries expressed by NICE that chiefs in some cases overtly or covertly sanctioned 'mob justice' due to limited understanding of the right to bail and other human rights and democratic principles. Reference is made earlier in this study to the means at the chiefs' disposal to enforce norms of conduct.

### WOMEN'S RIGHTS AND JUSTICE ISSUES

The Government of Malawi's sixth report to the UN CEDAW committee mentions a programme of law reform supported by the government that has produced several pieces of draft legislation that still await political debate and legislation. The legislation would strongly impact customary law as currently practiced in the area of marriage and the family.

<sup>65</sup> Schärf et al., 2002, at 39 and 41, Cammack et al., 2009, at 48, as well as citing other authors (Ndelemani, 2008).

## ISSUES RELATED TO MARRIAGE

The MHRC reported that, “According to interviewees, culturally, women do not marry but get married.”<sup>66</sup>

Malawian Law currently recognizes three kinds of marriage: civil marriages, customary marriages and marriage by cohabitation or reputation. One important area of concern is the consolidation of various laws on marriage into a Bill on Marriage, Divorce and Family Relations. The Law Commission recommended the repeal of all the statutes<sup>67</sup> and instead the enactment of the proposed new bill. After some years of political deadlock, there are signs that progress may be forthcoming.<sup>68</sup> Steps like this, if adopted by legislation, represent a rather radical departure from Malawian custom. The legislation is pending introduction in Parliament and political debate.

### MARRIAGE BY REPUTE OR COHABITATION

Customary law in Malawi traditionally did not permit a marriage to be entered into in the absence of consent by marriage guardians (*ankhoswe*) in matrilineal cultures. In patrilineal cultures, the payment of *lobola* would be required by custom. Article 22.5 of the Constitution, however, explicitly recognizes marriage by repute or cohabitation. The courts have ruled that this provision can require that a marriage be recognized despite non-compliance with tradition.<sup>69</sup> This would effectively allow people to dispense with traditional requirements. The 2002 report by Schärf and his colleagues observed strong opposition among some communities to the recognition of marriages based on cohabitation.

In consultations by the Law Commission on the Constitution, representatives of Christian and Islamic religious communities recommended removing the constitutional recognition of marriages based on cohabitation and repute, but the Law Commission decided against doing so. The Law Commission notes that:

***“This conclusion came under heavy criticism at the Second National Constitution Conference as it was viewed as tantamount to sanctioning adulterous unions. The Commission however maintained its position principally on the understanding that marriages by repute or permanent cohabitation are a necessary evil to protect the weaker party in such relationships who, in most cases, happens to be a woman. The Commission also considered that from a religious perspective such relationships are not condemned outright but rather that couples are invited to formalize the unions. Thus, the law should be seen to do the same in a different way.”***

The Law Commission’s proposed Bill on Marriage, Divorce and Family Relations elaborates on the constitutional provision, giving legislative recognition to such marriages.

### POLYGAMY/POLYGyny

The MHRC report found polygyny to be a familiar practice in 98 percent of the areas visited for their 2006 study.<sup>70</sup> Figures were not available to the team on the numbers of polygamous unions in the country. The Bill on Marriage, Divorce and Family Relations would contain a prohibition of polygamy, on account of its discriminatory effect and the negative impact it has on women. The prohibition would be in part motivated by what the Commission describes as “sometimes wilful neglect of women and children during marriage and not just after divorce or during separation”.

66 MHRC report on cultural practices, 2006, p. 21.

67 The existing legislation in question includes the Marriage Act, the African Marriage (Christian Rites) Registration Act, the Asiatics (Marriage, Divorce and Succession) Act, the Divorce Act, the Married Women Maintenance Act, and the Maintenance Orders (Enforcement) Act as well as customary laws relating to marriage and divorce.

68 *Nyasa Times* of 27 April 2010 quotes Patricia Kaliati, the Minister of Gender, Women and Children, as saying that the bill will be laid before Parliament in September 2010.

69 See Mwambene, 2005, citing Civil Cause No. 70 of 2004.

70 Page 19.

## DISSOLUTION OF MARRIAGE

Some authors suggest that it is easier for women to initiate divorce in a matrilineal (and *uxorilocal*) marriage culture, where the husband moves to live with his wife's family. In this case, there is no *lobola* that must be returned, and it may be easier for a woman to secure the understanding of marriage counsellors (*ankhoswe*) on her side.<sup>71</sup> 'No-fault' divorce may be allowed simply on the basis of incompatibility and can be initiated by the wife on various grounds, including failure by the husband to provide for her. Nevertheless, there is not full equality of treatment in this regard.<sup>72</sup> According to Mwambene, the practice is that customary divorce can currently be granted by local chiefs or marriage guardians (*ankhoswe*). In patrilineal cultures, return of *lobola* is required, something that is usually out of the control of the wife.

In matrilineal cultures, the custom was said to be that there is no obligation on the part of a divorcing husband to maintain the wife he is divorcing, though the courts may now tend to decide otherwise, imposing such an obligation based on Article 24 of the Constitution.<sup>73</sup> The government reported to CEDAW that specific provisions have been recommended in the new bill relating to the welfare of women and children both in terms of maintenance and in terms of giving the knowledgeable child an opportunity to state his views on issues relating to custody.

The question of matrilineal/matrilocal culture as opposed to patrilineal/patrilocal culture also has consequences for the custody of children upon dissolution of marriage. Children of matrilineal marriages usually belong to the family or clan of the wife. According to Mwambene, the former traditional courts generally upheld this custom. She also writes how magistrate courts may be moving away from this position toward one based on the welfare of the child. Nevertheless, it should be remembered that only a tiny fraction of marriage dissolution and custody cases would actually come before a magistrate court. It should also be noted that such matters will not be within the competence of the local courts if the bill on local courts as currently drafted passes into law.

## FORCED MARRIAGE

According to the MHRC study on cultural practices, various forms of forced marriage exist in Malawi. They include wife inheritance, which seemed to be on the decline, and 'wife replacement', where a wife who dies is replaced by a younger sister of the wife. MHRC found familiarity with this among 40 percent of respondents. It seemed to be especially common in the northern region, where patrilineal marriage systems are the norm. In the northern part of Chitipa, 'bonus wife', or *kupawila*, is the practice whereby the girl's parents get into debt and, as payment for the debt, they offer the daughter in marriage to the creditor.

The report does not discuss the extent to which women in general exercise freedom in the choice of a spouse. Mwambene (2005) is of the view that the matrilineal system affords greater freedom of choice to women than the patrilineal.

## ISSUES ESPECIALLY AFFECTING CHILDREN<sup>74</sup>

The Law Commission's report on the Constitution<sup>75</sup> recommends changing the constitutional definition of a child to include persons up to 18 years of age. A bill is pending before Parliament to give constitutional recognition to the principle of the best interests of the child.<sup>76</sup>

71 See Mwambene, 2005, citing other sources.

72 Ibid.

73 Ibid, citing Civil Cause No. 28 of 2004, Zomba district magistrate court.

74 Several of these issues are of particular relevance to girl children as well as to women.

75 Op cit.

76 Ibid.

## AGE OF MARRIAGE, CHILD MARRIAGES AND DEFILEMENT

The customs of the main ethnic groups in Malawi do not set down an age for marriage. Instead, puberty, estimates of maturity and completion of an initiation ceremony are the main basis.<sup>77</sup> The MHRC report on cultural practices found child marriage to be common in all of the areas covered by the study, often of girls down to the age of puberty – about 12 years of age. The consequences of such child marriages, including fistula, abandonment of education and entering into a position of subservience as the junior wife in a polygamous household, are some of the negative consequences mentioned by the Human Rights Commission. Child marriages were found to be often of a forced character.

The issue of the age of marriage has been taken up in UN treaty body reporting processes.<sup>78</sup> Section 22.8 of the Constitution says that the state will “discourage” marriages where one party is below the age of 15. It requires parental consent to be obtained in marriages in which one party is or both parties are below the age of 18. The lack of clarity as to whether marriages of persons below 15 are legally permissible<sup>79</sup> has led the Law Commission to recommend “that the age of marriage with parental or guardian’s consent should be sixteen years for both sexes and that persons who are eighteen years old may marry without consent.”

The crime of defilement (statutory rape) as currently defined means having sexual relations with a child under the age of 13. The Law Commission’s Report on the Review of the Penal Code recommends raising the age limit for the offence of defilement to sixteen. While data collection in Malawi did not reveal a great deal of material on which to base specific findings on this issue, the age limit seems a reasonable one. Nevertheless, the law needs to distinguish consenting relationships from abusive ones, also for 16 to 19-year-olds. Legislation in this regard needs to tread a careful balance between protecting children against predatory conduct and harmful social practices on the one hand and draconian punishment of consenting teenage sexual relationships on the other. Research and analysis in other countries, including in the context of the present study, reveal that families are often reluctant to bring cases arising out of relationships between consenting teenagers to the criminal justice system, often preferring to settle such cases through marriage agreements or payment of compensation.<sup>80</sup> Such practices raise difficult issues of the relationship between social norms, children’s and parents’ rights and the law. It is very important to work for solutions where the views and maturity of the minors involved are taken into account, in accordance with the Convention on the Rights of the Child.

Harsh criminal penalties for this kind of case (as opposed to those where there is a significant age gap) are a far from ideal solution. Thus, any change to penal legislation and prosecutorial and court practice should in our view permit a clear distinction between the two case types. The overall study contains a discussion of policy and programmatic questions linked to this issue.<sup>81</sup>

## PROPERTY RIGHTS AND INHERITANCE

While matrilineality is relatively widespread in Malawi, this does not generally mean that real power over land in traditional communities is exercised by women.<sup>82</sup> Nevertheless, some security for women is present in that, in matrilineal cultures in Malawi, women may also be considered the owners of the matrimonial dwelling, which the husband is obliged to build for her.<sup>83</sup> Indeed, the custom in matrilineal communities is described in the saying that

<sup>77</sup> Mwambene, 2005.

<sup>78</sup> See the 2006 CEDAW concluding observations and those of the CRC in 2008.

<sup>79</sup> Malawi’s sixth state report under the CEDAW, 2008, discusses the issue and acknowledges the lack of clarity, but does not provide an answer.

<sup>80</sup> Occasionally, the same tendency will be seen even in regard to more clearly abusive relationships.

<sup>81</sup> The Uganda case study also deals with the issue in some detail.

<sup>82</sup> See WLSA Malawi, 2009.

<sup>83</sup> Op cit., Mwambene, 2005.



a divorcing husband 'leaves with his blanket.'<sup>84</sup> In practice, he may have been allowed to take the harvest<sup>85</sup> and fixtures that he can show that he brought to the marital home, but the home itself and the land that the couple possessed belongs to the wife. If cases are brought to a magistrate court, the latter may order an equal distribution of property. The situation may be very different for more urbanized couples. Article 24 of the Constitution provides protection of women's rights in Malawi. There is a right to equal disposition of marital property that is 'jointly held'. WLSA Malawi points to a generally conservative interpretation<sup>86</sup> of this provision by the courts that does not recognize women's contribution as homemakers and caretakers or even women's financial contribution as providers of daily necessities. WLSA lobbied for change to the constitutional provision that would recognize their contributions.

In 2002, the NGO PAC/NICE expressed concerns about the tendency of customary justice to discriminate against women and children, especially in inheritance and domestic disputes.<sup>87</sup> WLSA reports that property-grabbing is widespread.

The Law Commission reviewed the Wills and Inheritance Act and recommended the adoption of a proposed Deceased Estates (Wills, Inheritance and Protection) Bill. This bill would specifically abolish all customary laws involving succession. Of particular relevance to women under this programme is the abolition of discriminatory inheritance practices between the girl and boy child.<sup>88</sup> The latter would be matters excluded from the jurisdiction of the proposed new local courts, according to the Bill on inheritance practices, though the proposal is of course subject to political debate and the legislative process.

## DOMESTIC VIOLENCE AND GENDER-BASED VIOLENCE

The Malawian government reported to the CEDAW Committee that gender-based violence is a persistent problem for women and girls in Malawi.<sup>89</sup> The state report says that, in 2004, 28 percent of women had experienced physical violence by the age of 15 years, as had 13 percent of married women. Intimate partners, such as husbands, are often key perpetrators and the most common forms include slapping and arm-twisting (16 percent) and forced intercourse or marital rape (13 percent).

Many cases of domestic violence never reach the police. In discussions between the Malawi delegation and the CEDAW Committee, it was acknowledged that perpetrators of domestic violence are rarely reported to the authorities since families perceive that the penalization of the breadwinner would impoverish the whole family.<sup>90</sup> Some villagers also say that one reason is that they know of no cases that have gone to the police where the perpetrator is prosecuted. Among the domestic violence cases that are in fact taken to the police, almost none of the cases end with a conviction because the woman withdraws the charge or because there is lack of evidence and the police do not have the resources to investigate and seek evidence. Thus, the preference of many women would ultimately seem to be for remedial, preventive and restorative solutions to domestic violence, except perhaps in the most serious cases (unless society or the justice system shows itself capable of addressing the survival issues that arise).

Many women raised the issue of confidentiality and noted that privacy is important for them, especially in cases of rape or domestic violence. If the case were to be taken up before the TA, the case might be heard in an open

84 Ibid.

85 WLSA Malawi, 2009.

86 Though with inconsistencies among the different high courts and some notable exceptions. See p. 17, discussing the case of *Kayira v. Kayira*, Civil Cause No. 44 of 2008.

87 Schärf et al., 2002.

88 Sixth periodic report to the CEDAW Committee, 2008, paragraph 48.

89 Sixth periodic report, 2008.

90 International Service for Human Rights: <http://www.ishr.ch/treaty-body-monitor/cedaw/658-ishr-report-on-cedaws-examination-of-malawi-22-january-2010>

forum in the community and the woman would have to stand in front of the whole community. According to the women interviewed, this practice of communal dispute resolution results in many women not speaking up, and those who do speak up feel even more victimized by the process and often do not experience justice as having been done. According to some TAs, this difficulty is tackled by allowing the women's council of the TA to play a role in talking to the woman separately (or examining for evidence) and then relaying the knowledge back to the chief. It was not possible to examine the question of whether examinations of this kind could be unduly intrusive or whether consent to them is voluntary.

Concerning rape cases, headmen interviewed said that they would generally refer these cases to the police, though they would first try to ascertain whether the case concerned allegations of rape that are raised because a man had 'failed to fulfil what the parties had agreed' before having sexual relations. If they found that the situation was of this kind, the headmen interviewed said that they could deal with the case.

## PROGRAMMING ON DOMESTIC VIOLENCE

Support to the VSUs is one important initiative in this regard. Police, NGO representatives and village members interviewed for the study, told of their impression of a decrease in domestic violence cases in places where NGOs or police (supported by CIDA) have been raising awareness on gender-based violence. However, specific documentation of this has not been available to the study team.

The Government of Malawi reported to the CEDAW Committee that it had inherited a process spearheaded by the civil society that led to the enactment of the Prevention of Domestic Violence Act in April, 2006. WLSA observed in an alternative report to CEDAW in 2009 that the Prevention of Domestic Violence Act of 2006 is not being effectively implemented because of a lack of resources.<sup>91</sup> The government had reported that, although the law is effectively in force, there are a number of areas that need further development before the law is made fully operational. The Ministry of Women and Child Development is aware of the existing gaps in the law and is making an effort to review the law.

## OTHER HARMFUL PRACTICES

FGM is not widespread in Malawi,<sup>92</sup> though the MHRC reports on a variety of other harmful practices. With particular regard to the traditional IJS, some of these included practices associated with chieftaincy, such as *shazi*, whereby women and girls are chosen to provide sex to prominent guests at the installation ceremony of the chief. CCJP refers to similar practices in their reporting on the primary justice programme.<sup>93</sup> Also reported by the MHRC are rituals associated with death and funerals that are often discriminatory against women and degrading to them. Some practices may particularly involve children. The ISHR reports on the proceedings of the CEDAW Committee in January of 2010, where it is mentioned that traditional healers prescribe sexual intercourse with young girls to heal those within the community who have contracted sexually transmitted diseases. While many of these practices are unlikely to be the outcome of IJS decisions, they illustrate the challenge inherent in the chief's role as custodian of culture, putting the chiefs in an ambiguous position in relation to efforts to eradicate harmful practices.

## WITCHCRAFT AND BANISHMENT

WLSA reports encountering an average of four women in each of the eleven prisons visited on charges related to witchcraft. Witchcraft itself is not an offence in Malawi,<sup>94</sup> but the justice system can penalize suspects on charges of 'breach of the peace' that have their origin in accusations of practicing witchcraft. WLSA reports that the profile

91 WLSA Malawi, 2009.

92 The MHRC report on cultural practices found that it was reported as known by only 5 percent of respondents. It seemed to be concentrated in one area and, even there, there seemed to be strong opposition to it. See page 40 of the study.

93 Malawi Primary Justice Programme, Annual Report 2008.

94 The Witchcraft Act penalizes accusing a person of witchcraft.

of the suspects or 'offenders' conforms to the unfortunate pattern observed in other countries: they are likely to be elderly women whose relative wealth provokes the envy of neighbours or who are otherwise unpopular. While these are cases from the formal justice system, and thus outside the scope of the present study, it is probably fair to say that they represent two things: (1) the tip of an iceberg that extends down into informal justice as meted out by chiefs and (2) magistrates and police may themselves believe that witchcraft was being practiced or that they feel a need to conform to the expectations of the public. Some women were even given sentences exceeding the maximum permitted for the offence of causing a breach of the peace.

Children may be affected at the level of IJS. Belief in witchcraft is widespread, and extreme measures against children can receive the support of even well-educated NGO and state representatives. Cases of children being expelled from villages by the chiefs are widely known in Malawi, but the extent of the problem does not appear to have been documented. The study is not aware of any studies carried out on the extent of this sensitive problem. The children are expelled, most often, as a result of accusations of witchcraft and particularly of accusations of being bewitched to kill their own parents by 'giving' them HIV/AIDS. This, of course, represents a serious issue of human rights abuse for the children of Malawi.

### **PROGRAMMING RELATED TO WITCHCRAFT**

The proposed Bill on Local Courts would exclude witchcraft cases from the jurisdiction of the local courts. While this is no doubt intended as a safeguard, it may in some cases also have the effect of pushing cases downward to even less formal mechanisms rather than upward toward the courts.

As with other practices rooted in culture and belief, the criminal justice system may, in many cases, not necessarily be the best instrument to combat harm done to women and children in this way. A later section discusses the recommendations regarding programming to deal with cultural practices that are made by the MHRC.

The scope of the study did not permit an examination of how informal justice mechanisms deal with petty offences of theft and misconduct by minors systematically. Practice in Malawi and other countries indicates that it is probable that a great many such matters are dealt with at the family level and thereafter at the community level, where village headmen would become involved. Traditional leaders at the various levels, both in Malawi and in other countries who responded to questions of this kind, often stated that it is only in the case of repeated offences of this kind that they would refer a matter to the police or encourage a community member to do so. Most often, such offences would be resolved between families through payment of compensation. Any actual punishment imposed is more likely to be imposed by members of the alleged perpetrator's own family.

## **PROGRAMMING**

Programming impacting IJS in Malawi consists both of those initiatives institutionally located in the formal justice system that affect IJS and those that directly target IJS. The former include law reform programmes that would, by legislative intervention, attempt to change custom in a number of areas, including land ownership, inheritance, personal status and family law. Outreach initiatives of the formal justice system, such as community policing and the involvement of the VSUs on this level (supported by UNICEF), can also impact IJS and present opportunities for greater engagement with them. As shown below, even those initiatives that directly target IJS tend to be delivered through formal state institutions or NGOs.

### **LAW REFORM**

One lesson learned in this regard related to the importance of proper planning when carrying out a judicial reform with far-reaching consequences for access to justice. The gaps that were left by the effective abolition of traditional

courts illustrate the necessity to take consequences like this into account when planning such moves (including by means of legislation) and also to provide education, training and legal materials to prepare courts for their new functions and areas of jurisdiction.

Also in relation to law reform, much of the work of the Law Commission mentioned in this study was donor-funded through DFID programmes in the area of justice in Malawi. It is difficult to draw ultimate conclusions on this work. On one hand, the Law Commission has carried out excellent work, both in consulting stakeholders and groups in society and in producing legal (and sometimes also social and policy) analysis and a set of legislative bills that would go very far in relation to legal gender equality, inheritance, and judicial organization. The political deadlock of the past years in Malawi has unfortunately meant that the far-reaching legislative recommendations remain on the shelf. For the purposes of this study, it has not been possible to gauge the political support for or opposition to many of the proposals. It is probable that they would give rise to lively political debate.

## COMMUNITY AWARENESS-RAISING PROGRAMMES

Several organizations carry out awareness-raising programmes on issues related to primary justice and human rights. One of them is NICE, an EU-funded, project-based organization that works in partnership with the Malawi Human Rights Commission, GTZ, the Forum for Dialogue and Peace, PASI, traditional authorities and justice sector institutions. While most analyses<sup>95</sup> support the need for awareness-raising, a weakness is that programmes are too often carried out as one-off trainings. Also, many programmes are carried out in the most accessible districts and not where it may be needed the most. On the positive side, the programmes are generally carried out by (or in collaboration with) CBOs or police who are located within the communities and are able to follow-up informally. The support to the work of the VSUs in this regard has been discussed above.

## TRAINING OF CHIEFS

The 2002 study by Schärf and his colleagues found that chiefs would welcome training on a number of subjects, including human rights, the Constitution, gender issues, court management, dispute resolution skills and sentencing principles.<sup>96</sup> Nevertheless, this should not be taken to mean that traditional authorities at all levels would easily embrace all of the values inherent in human rights treaties and the Constitution. The same study noted opposition to the recognition of marriage based on cohabitation. Other studies note popular opposition to the release of suspected thieves. The issue of chiefs and headmen being associated with a number of cultural practices that can be harmful is discussed in other sections of this report.

The District Commissioners Office provides TAs with knowledge about the Constitution of Malawi, basic legislation, and TAs' obligation to be impartial in case handling when they are appointed. It is up to the individual TAs whether they transfer this knowledge to their group village headmen and their village headmen. Headmen interviewed during the field mission also mentioned initial briefings by the TA after appointment, where rules of conduct are laid down. The study found a great variation in the transfer of knowledge beyond the chiefs on justice issues. The study was not able to obtain a review or evaluation of the CCJP programme on training of TAs and cannot express an opinion on its impact. In other areas, notably on HIV/AIDS, studies have shown that training programmes can influence chiefs' knowledge and practices, but that training alone may not be enough to change well-entrenched attitudes among the chiefs.<sup>97</sup>

The largest programme for training of headmen and chiefs has been the Malawi Primary Justice Programme of the CCJP, sponsored by DFID. The programme (July 2007 to June 2010<sup>98</sup>) was based on the lessons learned in the

95 Schärf et al., 2002; Cammack et al., 2009; MHRC 2006.

96 Schärf et al., p. 43.

97 Botha, 2007.

98 The programme will reportedly be extended for a period pending the finalization of a new programming cycle.

prior MASSAJ Primary Justice Pilot Project from 2004 to 2006. A number of implementing agencies in all districts of Malawi, mostly from local government, but also from faith-based organizations or other NGOs, were responsible for activities under the programme at the district level, with overall national coordination by CCJP. Traditional leaders were identified as the major providers of primary justice. The Programme developed a manual for the purposes of the training (in English and Chichewa) and a case record-book for use by traditional adjudicators. A revised version of the training manual had reportedly been developed in 2009/10, though (as of April 2010) this was only available in Chichewa. Comments made herein are thus based on the 2007 version.

The manual is for the use of trainers drawn from local government, traditional leaders, community members, NGOs, CBOs, and religious leaders. It includes modules on teaching skills and organizational and communication issues related to the preparation and conduct of training. Substantive modules covered include the Constitution, the meaning of primary justice, and the process of case handling. There is also a module on conflict transformation that addresses basic concepts in relation to conflicts and (relatively briefly) describes the elements of a mediation process. There are also modules on data collection and record-keeping and on advocacy, project monitoring and evaluation, as well as an appendix on community policing. Forms for referrals and recording of outcomes are provided in the manual.

In addition to targeting traditional leaders, the programme also seeks to increase knowledge of legal rights among individual men, women and children in the targeted communities by means of semi-monthly meetings. Community-based educators facilitate these meetings. The primary justice programme, likewise, facilitates opportunities for cooperation and coordination between chiefs and other primary justice actors, including through interaction with court users' committees.

From the (albeit limited) opportunity that was available to learn about this programme, it appears to have several important strengths, including the attempt to link to other initiatives, such as the community policing structure and district stakeholders. The combined targeting of adjudicators and community members and the open forums in which primary justice is discussed at the village level would also seem to be very worthwhile. CCJP reports that these forums have been used by women to raise discussion of harmful practices (see discussion on *shazi*, or "the chief's blanket", above). Similarly, other changes have been agreed upon at the village level, including increasing the representation of women on village courts.<sup>99</sup>

The choice of modules in the training module seems to reflect the wish for trainers to reach a variety of target groups, including community members, headmen and chiefs and other local stakeholders, and for the manual to serve a number of purposes, including in relation to the implementing agencies under the project. This applies especially to the module on monitoring and evaluation. The advocacy module is likewise directed more at the implementing agencies and their staff. While a holistic approach to programming and targeting is useful in relation to IJS, it may lead to a dilution in relation to the manual itself, as it does not appear to be a tool relating to the specifics of the adjudication function of chiefs.

The training manual module on procedure discusses use of the courts as compared to alternative (non-legal) avenues. It lists necessary skills for persons providing legal assistance, appearing to be directed toward this function rather than at persons (such as traditional leaders) who are involved in deciding cases. While mediation is dealt with (though rather briefly), it appears that traditional leaders do not generally use mediation as a procedural method. By all accounts, most cases are decided by a form of facilitated negotiation or arbitration. The training manual does not appear to include issues such as the requirements of procedural fairness in proceedings of this kind. As issues relating to fairness and accessibility are likely to come up in the primary justice forum discussions under the project, it could be useful to include discussion guidelines on issues of this kind (including the obstacles that typically arise).

<sup>99</sup> CCJP 2008 at 4.4.1.3.

A manual that was more specifically directed toward traditional adjudicators might also include some guidance on a number of the typical substantive issues dealt with by traditional leaders. (The manual provides a list of these.) Nevertheless, there are two difficulties in this regard. One is that, as discussed in previous sections, chiefs do not have legal competence to deal with many of the questions that they are in fact adjudicating. While there may be no legal obstacle to their 'proposing' non-binding 'solutions' in this regard, the lack of a legal basis makes this difficult to do in practice. Second, training on substantive law might demand knowledge and skills in excess of what is available from the pool of trainers. The 2008 report acknowledged that some CBEs are not fully capable of dealing with all of the issues, and recommended more training.

The Primary Justice Programme is ambitious in size, attempting to reach all of Malawi. As mentioned, a variety of delivery agencies are used to carry out activities under the project. While pragmatism was undoubtedly necessary in taking account of local capacities to implement activities, this diversity of partners could also have certain costs in terms of structure and uniformity of philosophy and approach. There would be advantages in using the same delivery structure nationally in terms of gathering experience and harmonizing policy. The limited scope of the mission did not provide an opportunity to explore this issue in detail, however.

A final issue concerns the use to which the recorded decisions are put. The Primary Justice Programme has done a lot to distribute forms for recording decisions and registering cases. Keeping case records can potentially serve several purposes, including enhancing enforcement, promoting legal certainty (if the written records are capable of being consulted by other potential litigants), and enhancing accountability to the public, to more senior chiefs and to stakeholders in the formal justice system (if available for consultation by these). They can also be a source of knowledge and guidance for the providers, both within the same court and among a wider circle of adjudicators. This last purpose was emphasized by those responsible for the project. It appears as though more thought and resources could be given to these purposes and functions. The monitoring that is contemplated in the manual is concerned with achievement of project goals, and there does not seem to be a system in place for monitoring of case outcomes. While there is no doubt that this would be an ambitious and expensive undertaking for a programme that is targeting the whole country, monitoring and use of outcome results could be explored on a pilot basis.

## VILLAGE MEDIATION PROGRAMME – PASI/DIHR

The Village Mediation Programme (February 2008 – September 2009) is a pilot programme with the objective of promoting access to justice at the village level by building the capacities of village mediators in each village cluster to mediate in minor cases in a way that complies with human rights standards and gives the parties the space to come up with the best solutions for them. It also aims at supporting a diversion process and ensuring that serious criminal cases go to the police and the courts. The programme draws on experiences of community mediation from other parts of the world.

PASI carried out the programme with the support of DIHR. Mediation trainers were trained in three districts. The trainers went on to train three village mediators in each village or village cluster (a total of 75 village mediators in each of the six involved TAs). Trainers and mediators are thoroughly trained on the basis of a curriculum and set of materials tailor-made for the project by a specialist in mediation education, and the trainers underwent intensive training for 15 days spread over three modules. The training focuses on mediation skills and methodology, human rights and justice concepts. Both among trainers and mediators, there is more or less even gender representation.

Since the trainers are generally located within the respective TAs, they are able to supervise and co-mediate in order to continuously support the village mediators. Village mediators are trained to mediate in teams of three in order to secure impartiality and the non-adjudicative nature of the mediation process.

Although there was initially some opposition from TAs to the programme, this has generally changed when seeing the impact and mode of cooperation of the village mediators. Once properly briefed and consulted, traditional leaders interviewed were generally happy about the village mediation programme. The need to gain the traditional leaders' acceptance of the mediators and their activities was underlined by the mediators themselves and during interviews. It was necessary to observe the traditional hierarchy to gain this acceptance. In some areas, the traditional leaders began by insisting that they be allowed to sit in on mediation sessions between parties to a dispute, and it was necessary to explain to them that the confidential and consensus-oriented nature of the mediation process would not permit this.

Similarly, the necessity to brief the community on the nature of mediation was important. Some community members had expectations that cases would be adjudicated and 'decisions' enforced. Leaflets were produced explaining the process and the role of the mediators.

The village mediators in the three districts had, as of the beginning of 2010, facilitated the resolution of over 800 disputes in the six TAs. In some places, the case-load of GVH has gone down from six cases to one case per month. According to the GVH, VH and TAs interviewed, this allows them to spend more time on development issues. A 2010 examination of some of the cases referred to mediators by traditional leaders indicated that minor family disputes and issues of conduct tend to be referred, whereas headmen and chiefs retain the cases that relate to inheritance, property and land.

Although the pilot programme formally ended in 2009 and is still seeking funding to continue, PASI has maintained contacts with the trainers and mediators. They carry out monthly visits to the TAs, where they supervise the trainers and mediators and collect the case records.

In the pilot areas, the village members reported major improvements in their access to justice, especially among the most vulnerable groups. Women pointed to the importance of privacy and confidentiality in cases of domestic violence as important for the protection of their integrity and equal treatment. Many also pointed to the lack of a fee when approaching the village mediator as being important for their ability to get any help at all. Some come to the mediators when others have given up or refuse to deal with their case. The structure of the mediation team and the process of mediation, both designed to ensure impartiality, are evidently important to parties as is the focus on bringing in both (or all) parties' perspectives on an equal footing and giving the parties the ownership of the solution to the dispute. According to parties who have gone through mediation, this makes the dispute resolution process more fair and equal and provides a better foundation for the parties to actually implement the solution.

A success of the VMP programme is its thorough approach to development of an educational curriculum that is precisely targeted to the profiles and functions of its users, using simple language and concepts and a training methodology that was tested and refined. These features have already led the curriculum and materials to be adopted and applied in other countries.<sup>100</sup> While the VMP was able to improve access in the areas of its operation, the familiar challenges of distance and accessibility do also arise in relation to the work of mediators. The three mediators chosen in a case may live at some distance from one another and from the parties. The mediators themselves were keen on having three mediators in each case, though logistical challenges can make this difficult to comply with. Likewise, communication with trainers and PASI paralegals would require resources and paid work time.

The Village Mediation Programme is not embedded in an existing structure. Although the programme was intended to be embedded in a broader national paralegal programme, this proved not to be possible. The larger paralegal programme is implemented by an NGO that is dependent on donor funding and is itself one that could

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<sup>100</sup> PASI and the training expert (Ms. Brenda Brainch) were invited to Sierra Leone to introduce the programme there.

most usefully be integrated into state structures. The lack of linkages to formal institutions gives the programme little chance of sustainability on its own and of long-term provision of access to justice for the most vulnerable groups. This would also make it difficult to expand to the national level.

Another challenge is that the village mediators do not have easy access to advice or support from people with legal or human rights expertise in the current structure, and referrals to formal justice sector institutions or others are difficult to follow up on.

Although case records have been collected on the cases mediated so far, a system remains to be developed that will generate a good foundation for monitoring and for providing the necessary supervision and linkages to the village mediators.

A continuation of the programme would be necessary to evaluate practice and success in relation to tackling sensitive human rights questions. The nature of mediation does not permit the mediator to dictate the terms of the solutions chosen by the parties, so the project used other means – mostly structural and procedural – to try to address human rights concerns. By building human rights norms into the education of the mediators, an effort is made to bring ideas based on human rights into the dialogue between the mediator and the disputing parties. Second, the mediation process secures a high degree of real procedural equality between the parties. Third, the more or less equal gender representation among mediators attempts to ensure a forum accessible to both genders. The lack of fees and voluntariness of the service is also a measure of accessibility.

## RESEARCH AND STUDIES

Kanyongolo cites studies of customary law in Malawi carried out in the 1970s,<sup>101</sup> saying that these were the last studies of their kind to be carried out. Meanwhile, scholars refer also to the jurisprudence of the National Traditional Appeals Court (NTAC) during its period of operation until 1994. A number of articles and research papers are available on land issues, and reference has been made to the 1999 government study on this. Less research and data seem to be available in the area of women's rights, as pointed out by the CEDAW committee in its examination of country reports. Apart from this, there are a number of shorter studies and research papers, including Prof. Kanyongolo's own work, as cited herein.

## PROGRAMMING RELATING TO CHILDREN

Reference is made to the section on outreach dealing with the work of the VSUs earlier in this case study. Particularly at the CVSU level, programming related to children is possible. In addition, there are some other efforts worthy of note in relation to children.

The government made a National Plan of Action for Orphans and Other Vulnerable Children (OVC) 2005-2009. While the plan's six strategic areas do not include justice provision, there is mention of a plan to provide the legal framework and coordination to protect the most vulnerable children.

In relation to customary IJS, programming on justice can often usefully be linked to programming on health. Many of the issues related to women's and children's rights, especially those related to domestic violence, child marriages and the property and well-being of children, are issues of women's and children's health, as well as coming to the fore in connection with justice. Likewise, programming in the domain of education can tackle difficult cultural issues.

101 J. O. Ibik, 'The Law of Land, Succession, Movable Property, Agreements and Civil Wrongs' in series *Restatement of African Law*, Vol. 4. Sweet & Maxwell, 1971.



## PROGRAMMING RELATED TO CULTURAL PRACTICES

Malawi Human Rights Commission's (MHRC) 2006 report on cultural practices,<sup>102</sup> makes a number of useful recommendations on programming that addresses such practices. The MHRC's recommendations on addressing harmful cultural practices are paraphrased in the following paragraphs. While they extend far beyond the field of justice, they may also be relevant to it.

The MHRC recommends attempting to introduce alternative practices rather than trying to ban harmful practices outright. This approach has been taken in relation to FGM in other parts of Africa (Tanzania). An attempt to modify cultural practices that are deeply culturally embedded may have educational and health aspects as well as justice ones. In some instances, they may be better tackled through interventions that adopt a multifaceted approach. Relationships with local communities or traditional leaders that are working in the field of health or education may present the best opportunity for addressing harmful practices that can yield benefits in the field of informal justice.

Changing harmful traditional practices is a complex process that must involve all stakeholders, including traditional leaders, community members, religious groups that may be reluctant to speak out about the practice, and the government. Awareness of rights must be promoted, and harnessing traditional and religious leaders is necessary in the effort to spread knowledge of rights. In interacting with traditional or religious leaders, there is a need to respect positive or 'neutral' traditional practices in order to demonstrate good faith in relation to the aim of encouraging and endorsing culture and diversity.

The power balance must be understood. Women and children are especially vulnerable because of their lower social and economic status. Outreach programmes on gender equality targeting all sectors of society need to create public awareness through information. Children and young women need to be empowered. Practices that directly or indirectly confer higher status on boys and men than on women and girls should be modified so that males and females enjoy equal status. Women, as one category of the main victims, must be given the opportunity to participate in the process of modifying the 'negative' practices.

It is important to gain an understanding of the details of the practice from its cultural underpinnings. The latter may make people hesitant to sacrifice what is perceived as important, although they understand it to be harmful. Offering substitute activities or a modified version of the practice is constructive, so the abolition or modification of the practice does not leave a vacuum.

People who perform harmful practices often do what they think is best for the children. Engaging them regularly on the significant role they play in the upbringing of children by emphasizing the positive information they pass on to children and at the same time making them see elements in the practices that are negative, would be worth pursuing. The 'unwritten curricula' (used by Malawian *anankungwi*) during initiation should be reviewed by regularly engaging them in dialogue or interactive discussions. Information that is passed on to the initiates must be appropriate for the initiates and must not centre on how to perform sex, but on good behaviour. It is therefore recommended that the *anankungwi* should undergo training on sex and sexuality and how best information about this subject matter can be passed on to the initiates. Interactive discussion with them on a regular basis by all those interested in promoting the rights of children could be helpful.

The Ministry of Health should take a leading role in promoting healthy cultural practices by giving advice to all participants in cultural practices such as circumcision and discouraging unhygienic practices.

Education for women is vital to the realization of their rights. Unless girls' education is promoted so that girls realize their full potential, the status of women in Malawi will remain low and women's rights are likely to continue to be violated.

<sup>102</sup> *Cultural Practices and their Impact on the Enjoyment of Human Rights, Particularly the Rights of Women and Children in Malawi*, 2006.

Many of the harmful practices have legal and/or administrative implications. The MHRC recommends that the Law Commission should thoroughly study the practices discussed in the study with a view to initiating a process of law reform pertaining to culture.

The MHRC report refers also to a study sponsored by UNICEF in 2001 in one area of Malawi.

## RECOMMENDATIONS AND FINDINGS

Most findings are presented in the thematic sections and chapters above and will not be repeated here. Some tentative suggestions are also made in relation to some aspects of the training of chiefs, though it is possible that these have been overtaken by reality in the implementation of the programme.

Malawi presents an example of a comparatively large programmatic focus on traditional chiefs as IJS providers as well as of significant work in law reform in areas of relevance to IJS and the majority of Malawians.

The legislative reforms proposed by the Law Commission and in the Land Policy would be extremely far-reaching if implemented. While it may have been beyond the scope of the mandate of the Law Commission to assess programmatic (and budgetary) implications of the (re)establishment of local courts and the division of jurisdiction among them and the magistrate courts, this would appear advisable before any such legislation could enter into force. The demands that new legislation on marriage, inheritance and land would pose on the magistrate courts and other actors in terms of knowledge and enforcement powers could be very significant, requiring retraining, provision of materials and interaction among various justice agencies.

A key element in plotting the way ahead consists in enhancing the interaction between various providers at the local level. An interesting aspect of the programming work hitherto done in Malawi is the focus on interaction among various primary justice stakeholders. The results reported in relation to the CCJP Primary Justice Programme, the VMP and the VSUs would all seem to indicate that this has been very productive in terms of improvement and change. All of these bodies (as well as the local courts, if re-established) would face the same difficulties and challenges in terms of support, monitoring and referral systems. There are thus good reasons to attempt to maximize the extent to which some mechanisms of support could be shared among the different primary justice institutions. The various programmes analysed herein each have their strengths, weaknesses and particular contributions. There is ample opportunity for the sharing of methodologies and resources.

More detailed study of the programmatic work could yield valuable knowledge on the interaction between police, community policing structures and traditional chiefs. Nevertheless, resource constraints (most often for transport and communication) continue to pose difficulties and mean that targets are sometimes overly ambitious.

# COUNTRY STUDY – UGANDA

INTRODUCTION.....	338
METHODOLOGY .....	339
BACKGROUND .....	339
FORMAL JUSTICE IN UGANDA .....	341
DISPUTE RESOLUTION THROUGH THE LOCAL COUNCIL COURT SYSTEM .....	348
DISPUTE RESOLUTION IN NORTHERN UGANDA – ACHOLILAND.....	360
DISPUTE RESOLUTION IN NORTHEAST UGANDA – KARAMOJA .....	367
WOMEN AND CHILDREN .....	372
THE STATUS OF CHILDREN IN UGANDA.....	383
LAND ISSUES AND INFORMAL JUSTICE SYSTEMS IN UGANDA .....	387
CONCLUSION.....	396

## INTRODUCTION

The different regions in Uganda focused on in this study – the Central, North, and North-eastern areas of the country – illustrate a nuanced relationship between formal justice systems and IJS. They underscore various approaches to concepts of justice that have emerged as a result of customary tradition, prolonged states of conflict, and government priorities. Uganda is a useful case study within this IJS study precisely because it depicts the complexity of how a plurality of systems, informal and formal, interacts within a single country. In the North, for instance, the longstanding conflict between the Lord’s Resistance Army (LRA) and Uganda government forces (UPDF) rendered justice systems dysfunctional for over two decades. Meanwhile, central Uganda and urban areas such as Kampala have maintained peace and relative prosperity for the last twenty years and today has a system based in a formal justice model conducive to supporting an integrated Justice, Law and Order Sector (JLOS) approach. This contrasts starkly with Uganda’s economically and politically marginalized Karamoja region, which has long had to rely on its own traditional system of government and administration of law and order, evolving into a dominant informal justice system.

Therefore, a case study of Uganda provides insight into a system marked by strong and disparate customary practices across ethnic communities at the local level that nationally maintains and promotes the Western model of

justice, as reflected primarily in the retributive penal justice system. Notions of justice – retributive and restorative – especially in communities transitioning from war, are recurrent themes in Uganda’s recent history and are relevant and included in this discussion.

## METHODOLOGY

This report is based on an extensive desk study of existing research that has been conducted on formal and informal justice in Uganda. The desk study was supplemented by a two-week qualitative field mission to the country in October 2009 by two researchers. Research on the ground comprised key informant interviews with representatives of formal justice sector institutions at the national and local levels, donor representatives, NGOs, informal justice providers and focus group discussions with users in Central, North and North-eastern Uganda in the Mukono, Kitgum, and Moroto districts, respectively. Guidance for the appropriate contacts to aid in the research was provided by UN agencies in Kampala as well as a local NGO partner, Foundation for Human Rights Initiative (FHRI) and other Danish Institute for Human Rights (DIHR) contacts.

Due to the disparity of social contexts within Uganda, requiring multiple and large sample sizes to provide significant results, as well as time constraints, it was decided this case study would not include quantitative research, opting instead to focus on a more comprehensive qualitative analysis. Uganda has already had a vast amount of research conducted on it with respect to the different regions and justice issues. Thus, the case study presents an opportunity to present greater background on the justice system in general than is the case with the other country studies. Limitations acknowledged with regard to the fieldwork include the short time period for the on-ground research and logistical and security challenges, both of which restricted the scope of the geographic areas that could be included for qualitative study.

Programming implications will be addressed in each of the regional sections. Given that this case study reflects purely qualitative data, it does not follow the exact same format of the other case studies contained in the overall IJS study. The Uganda study aims to provide a comprehensive contextual overview and analysis of how formal and informal systems function in different areas of the country itself.

## BACKGROUND

Uganda, which gained independence from British rule in 1962, experienced a series of coups and civil conflicts up until the current president seized power in 1986. This period was marked by widespread political violence and repression, which culminated with a great concentration of power in the hands of the head of state.<sup>1</sup> Milton Obote, Uganda’s first president, was overthrown by Idi Amin in 1971. With a suspension of the Constitution, Amin ruled under a provisional government until 1979 and conducted what many call a reign of terror, systematically killing presumed Obote supporters and opponents in general. In 1979, Amin’s forces were defeated and Obote ‘won’ the subsequent election in 1980. A new series of grave human rights violations commenced that was not much different from Amin’s regime. Obote was overthrown in 1985 by a faction of the military and, in 1986, the current president, Yoweri Museveni, and his National Resistance Movement (NRM) seized power.

An estimated 800,000 people were killed during the political violence between Amin’s coup in 1971 and the end of civil war in 1985.<sup>2</sup> Between 1986 and 2006, President Museveni’s government has faced more than 20 armed insurgencies, with the conflict between the Lord’s Resistance Army (LRA) and the Government of Uganda (GoU) in the North being by far the longest lasting and most devastating. Peace talks between July 2006 and March 2008 resulted in a final peace agreement and annexure (the Juba Peace Agreements).

1 Joanna R. Quinn, *Social Reconstruction in Uganda: The Role of Customary Mechanisms in Transitional Justice*, June 2005.

2 Aili Mari Tripp, ‘The Changing Face of Authoritarianism in Africa: The Case of Uganda’, *Africa Today*, Vol. 50, No. 3, Spring 2004, p. 4.

Political parties were until recently banned from operating in Uganda on the grounds of threatening unity and the risk of promoting divisions along ethnic and regional lines. However, following the national referendum in July 2005, multiple parties have been allowed to organize and operate. Following an amendment to the Constitution, Museveni ran for and won a third term in the subsequent presidential and parliamentary elections in February 2006.

International donors have sometimes been accused of holding Uganda to a different standard than many other African countries. They have sometimes overlooked Uganda's political record because of its strong economic growth and its eagerness to adopt structural adjustment programs promoted by the West.<sup>3</sup> The approach of Museveni's government to tackling the AIDS epidemic in the country, as well as the relative advances in human rights compared to Uganda's previous regimes, have elevated its status among donors as a system that could be emulated in other parts of Africa. Under Museveni, Uganda has seen reductions in poverty and improvements in health and education. This has led to Uganda being widely characterized as a country that went from 'basket case' to 'success story', according to The World Bank.<sup>4</sup>

Gender inequality is prominent in private and public sectors both in relation to the law and in terms of access to justice. Net enrolment of children in schools, however, has more than tripled in the previous eight years, and gender parity in education has also nearly been achieved.<sup>5</sup> Of course, given that there are significant regional and rural-urban variations, it is important for the purposes of this study to look specifically at the situation of women and children in relation to different IJS contexts, such as within Karamojong society and post-conflict Northern Uganda, which will be discussed in depth.

## TYPOLGY

As discussed in the typology chapter in the main IJS study, a number of mechanisms of IJS are considered in this case study. These include those anchored in customary and traditional leaders, local administrators, customary courts, NGOs and CBOs, and paralegals. Many of these systems are actively in use in Uganda. In this report, three main forms of informal justice in Uganda are examined: (1) the Local Council Court system for settling disputes; (2) settling of disputes in post-conflict Northern Uganda by traditional authorities; and (3) the Karamojong traditional system for governing and settling disputes in the North-eastern region. Whereas the latter two can be said to be pure non-state systems, the first is established and regulated by law and forms part of the local government system.

The Local Council system with the Local Council courts (LC courts) is an example of a model bridging the many grey areas between formal and informal justice providers through the decentralized government structure. The LC system is an example of locally elected officials with an adjudicative function, established nationwide with the aim of providing grassroots justice and reconnecting the people with their customary traditions. Following legislative reforms in 2006, the higher levels of the system are now more akin to a 'parajudicial' (hybrid) customary court system. The LC courts apply customary law and the by-laws passed by Local Executive Councils. Today, LC officials are salaried or at least supported by the state (depending on the level). However, they report diminished scope of powers and therefore face challenges to effective functioning in their roles. Ongoing challenges to the effectiveness of the LC court system, including the danger of political interference in case decisions due to close links with the executive branch of government, will be discussed in further detail.

In Uganda, traditional leaders are particularly influential in administering justice in the rural areas of some parts of the country, as will be examined in the sections on Karamoja and the Northern region of this case study. The use of customary law is often distinct and particular to each tribe. In the North-eastern region, traditional courts comprising a council of elders deal with virtually all disputes and form part of a separate traditional governance

3 Ibid., pp. 9-20.

4 Monica Duffy Toft, *Securing the Peace*, Princeton University Press, 2010, p. 105.

5 Ibid.

system that has developed due to long periods of instability and little presence of the formal state governance and justice system. Similarly in the North, the dominant tribes have a long history of particular traditional practices and justice with traditional leaders based on a heredity system. However, long periods of conflict and displacement in the area have changed the dynamics of the communities, and its impact on the traditional systems and notions of justice will be discussed further.

As in many countries, the decision to use informal systems over formal ones appears to result from a combination of tradition and inaccessibility and/or weakness of the formal system. While Uganda has a relatively strong formal justice sector by African standards, enjoying consistent development partner support to a sector programme over a decade, it remains largely inaccessible to the majority of the population, who rely on a variety of informal justice providers in their efforts to access justice.

## FORMAL JUSTICE IN UGANDA

### CONSTITUTIONAL RECOGNITION OF TRADITIONAL LEADERS AND LIMITS ON THEIR POWERS

This section provides an overview of the formal judicial system and the linkages that currently exist to the informal system. It also addresses the subject of policing and prison systems in Uganda. These issues are relevant to the discussion of IJS, as a majority of respondents in this study cited mistrust and inefficiency of the police, as well as an unjust prison system, as reasons why they utilize informal systems.

To begin, the formal justice system in Uganda legally recognizes traditional institutions and customary law. By virtue of Chapter 16 of the Constitution of Uganda (1995), the 'Institution of Traditional or Cultural Leaders' is given legal status. Paragraph 246 (1) determines that the existence of such leaders shall be in accordance with the culture, customs, tradition and aspirations of the people to whom such an institution applies. Paragraph 6 defines a traditional leader as follows: "a king or similar traditional leader or cultural leader by whatever name called, who derives allegiance from the fact of birth or descent in accordance with the customs, traditions, usage or consent of the people led by the traditional or cultural leader"<sup>6</sup>

Paragraph 2 establishes that the community concerned shall resolve the issue of traditional institutions where it has not been solved, as prescribed by the parliament. Paragraph 3 determines that the institution of the traditional leader is a legal person – and so has legal capacity, which can be conferred by the GoU or by virtue of culture, custom or tradition. People do not have to pay in order to maintain such institutions. Moreover, under Paragraph 3, Section (f), it is forbidden that such leaders exercise administrative, legislative or executive powers, and they are not afforded any judicial powers or right to hold customary courts – powers that were removed from them and transferred to the local government system through the LC courts after 1986.

The role of traditional leaders is recognized, but with limited powers, and there is a clear hierarchical preference for the formal systems over the informal within the Constitution, with the lowest formal level being the LC courts system. Although customary law and practices are recognized in the Constitution, it prohibits 'laws, cultures customs or traditions which are against the dignity, welfare or interest of women or which undermine their status.'<sup>7</sup> Furthermore, women have the right to affirmative action to redress any imbalances due to history, traditions or custom.<sup>8</sup> The Ugandan Constitution is, with these and similar provisions, regarded as one of the most progressive constitutions in Africa from a gender perspective.

6 Constitution of the Republic of Uganda 1995, Chapter 16.

7 Ibid. Article 33 (6).

8 Ibid. Article 33 (5).

According to the Judicature Act, the High Court can observe and enforce customary law as long as it is 'not repugnant to natural justice, equity and good conscience and not incompatible either directly or by necessary implication with any written law.'<sup>9</sup> Magistrate courts also exercise their general jurisdiction in accordance with the High Court and the Judicature Act and likewise can observe, apply, and enforce any civil customary law as long as it is not 'repugnant to justice'. In civil cases or matters where no expressed rule is applicable, the magistrate courts 'shall be guided by the principles of justice equity and good conscience'.<sup>10</sup>

## THE UGANDAN COURT SYSTEM

The chart below provides an overview of the Ugandan civilian court system hierarchy. Magistrate Courts handle the majority of civil and criminal cases in the country and are divided into three layers: Chief, Magistrates Grade I, and Magistrates Grade II courts. Magistrates are appointed by the Judicial Service Commission and hear cases individually. Their jurisdiction is limited both geographically as well as substantively in civil and criminal matters. Magistrates Grade II can hear any criminal offences that are not of an aggravated or serious nature (in accordance with Section 161 (1) of the Magistrates Court Act).<sup>11</sup> They do not have jurisdiction over capital offences, but can hear cases related to criminal offences committed by children, as well as civil matters where the value of the subject matter does not exceed 500,000<sup>12</sup> Ugandan shillings. Magistrates Grade I can hear claims whose value does not exceed 2,000,000 Ugandan shillings and have unlimited jurisdiction over civil matters governed solely by customary law. They can also hear any criminal cases, provided they do not involve life imprisonment sentences or the death penalty.<sup>13</sup>

The Chief Magistrate supervises both the LC and magistrate courts. Their jurisdiction over civil claims includes those where monetary values do not exceed 5,000,000 Ugandan shillings; they are competent to hear criminal cases involving life imprisonment, but cannot try capital offences.<sup>14</sup>

The Superior Courts include the High Court, Court of Appeal, and Supreme Court. The High Court is headed by a principal judge and exercises unlimited jurisdiction in both criminal and civil cases. It is the first court of appeal for the Chief Magistrates and Magistrates Grade I Courts. The High Court is divided into Commercial, Civil, Criminal, Family and Circuit Divisions. Appeals against judgements made by the High Court are made to the Court of Appeals.<sup>15</sup>

The Court of Appeal is headed by the Deputy Chief Justice with the assistance of seven judges. The president appoints all justices who sit on the court. The court serves as the instance of appeal for High Court judgements. The Supreme Court comprises the Chief Justice and six judges and is the final civilian instance of appeal in Uganda.<sup>16</sup> All courts administer justice according to the same law: written law, common law and doctrines of equity, and any established or current custom or usage of customary law.<sup>17</sup>

A subsequent section will provide an in-depth explanation and discussion of the LC court system, the courts closest to the people, including the debate about whether the LC courts actually fall under the formal justice system or instead straddle the formal and informal systems.

9 Chapter 13 the Judicature Act, Section 15, Article 1.

10 Article 10, Magistrate's Court Act: [http://www.ulii.org/ug/legis/consol\\_act/mca232/](http://www.ulii.org/ug/legis/consol_act/mca232/)

11 *Access to Justice in Northern Uganda*, Office of the United Nations High Commissioner for Human Rights (OHCHR) Report, 2008, 51.

12 At the time of writing, UGX 500,000 is approx. equivalent to US\$ 215 (Oanda.com June 2010).

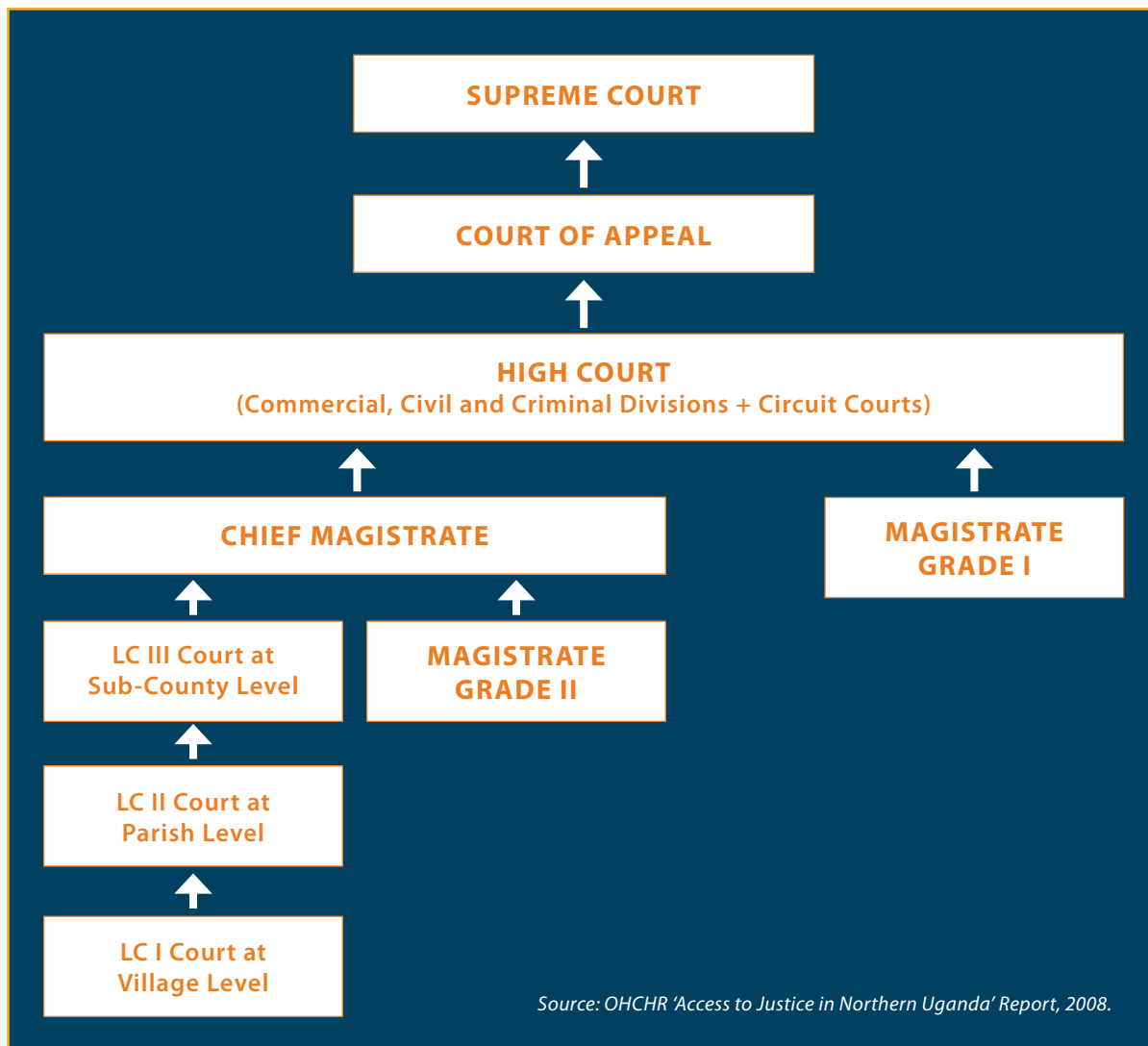
13 Ibid.

14 Under Ugandan law, sentences of life imprisonment can be given for: incest (Section 149, Penal Code), attempted rape (Section 125, PC), aiding committing suicide (Section 209, PC), killing an unborn child (Section 327, PC), or arson (Section 327, PC).

15 Ibid.

16 Ibid., p. 53.

17 Odoki, 1994.



## THE JUSTICE LAW AND ORDER SECTOR

The Justice Law and Order Sector (JLOS) is a justice sector reform programme through a sector-wide approach.<sup>18</sup> JLOS is supported by nine bilateral donors, the EU and the World Bank. This sector-wide approach to the justice sector was the first of its kind in Africa and has been in existence since 2001.

JLOS is pursuing the overall vision of 'justice for all' through six main intervention areas: (1) promotion of the rule of law and due process; (2) fostering a human rights culture across JLOS institutions; (3) enhancing access to justice for all, especially the poor and marginalized groups; (4) reducing the incidence of crime, and promoting safety of persons and security of property; (5) enhancing the JLOS contribution to economic development; and (6) building institutional capacity to enhance service delivery. Four substantive focus areas have been selected for the programme: criminal, commercial, family, and land justice. Support to the LC court system is included under enhancing access to justice and is primarily focused on capacity building, which will be discussed below.

<sup>18</sup> JLOS comprises the following core government institutions: Ministry of Justice & Constitutional Affairs; Ministry of Internal Affairs; the Judiciary; the Police Force; the Prisons Service; Judicial Service Commission; Directorate of Public Prosecutions; the Law Reform Commission; the Human Rights Commission; Ministry of Local Government (Local Council Courts); and Ministry of Gender, Labour and Social Development (Probation Services & Juvenile Justice).



Although general progress has been made in relation to programme indicators, reform of the justice sector is slow and the backlog in the system remains substantial.<sup>19</sup> Moreover, despite efforts to increase the outreach of the system, the majority of Ugandans still have little access. This is especially the case in the conflict-affected areas in the north, north-eastern, and western parts of the country. A stronger focus on IJS is therefore seen as critical; there appears to be an increased openness and focus on the LC court system, as well as traditional mechanisms. The ongoing discussions on the role of traditional justice systems in the transitional justice process in the north are important steps toward increased openness of IJS. Research on transitional and traditional justice is being undertaken as well as some studies on customary processes and practices. It is, though, only at the stage of formative studies and preliminary discussions on how the informal systems can feed into the formal system.<sup>20</sup>

A National Development Plan (NDP) for the period 2010/11 to 2014/15 was under development during the time of this field research study in 2009. The NDP has since been finalized and launched and it is noteworthy that the following two strategies have been included under the objective of 'enhanced access to justice': (1) promotion of use of ADR and innovative approaches to enhance justice within all four focus areas (criminal, commercial, land and family justice), with emphasis on conflict-affected areas in Northern Uganda and the strengthening of judicial oversight of ADR and improved record-keeping; and (2) strengthening the capacity of Local Council courts through capacity-building, streamlining of funding, and the implementation and enforcement of the Local Council Court Amendment Act of 2006.<sup>21</sup>

The formulated 'access to justice' objective from the draft NDP reads: "to strengthen [the] capacity and role of Local Council Courts and develop a national framework for the practice of informal, customary system[s] of justice to ensure conformity with human rights standards including gender equality, uphold[ing] the rule of law and complement[ing] the formal justice sector."<sup>22</sup> This highlights the increasing recognition of IJS by the JLOS and its stakeholders.

A recent initiative under the JLOS is the goal to professionalize the bench. The formal court system will phase out the Grade II Magistrates, which will have implications for the accessibility of justice in the short term. It is envisaged that the LC court III will fill this gap and, in the longer term, there will be more Grade I Magistrates. However, in the short term, all criminal matters above the LC court III level will be assigned to the Chief Magistrates. In the short term, this gap will also be evident in relation to the Family/Child Protection Courts on the ground. Strengthening of the LC courts I-III and establishing more Grade I Magistrates will be the longer-term solution. This initiative does, however, pose a challenge to the accessibility of the courts for the short to medium period to come; one of the major challenges to the LC system according to the Ministry of Local Government (MoLG) is the numbers of those employed in the justice section. Currently, LCs do not cover the whole country at all levels. In reality, there are many Ugandans who do not have real access to the LC system and therefore make use of other informal mechanisms.<sup>23</sup>

## POLICING IN UGANDA

Research from this study and elsewhere suggests the challenges associated with policing in Uganda are a significant reason that people continue to rely on IJS. Uganda's history of conflict has meant that the strength of policing has varied throughout its history, with periods of a complete absence of policing, or the use of non-state policing, particularly in the north and northeast of the country. In recent years, the Ugandan government, acknowledging that police play a key role in contributing to justice and law and order, has made efforts to improve the Uganda

19 NDP 2010/11-2014/15 and JLOS 2008-09 Work Plan.

20 Interviews with the Law Development Centre, Danida and the Legal Aid Basket Fund, and the Irish Embassy (JLOS Lead Donor) in Kampala, October 2009.

21 National Development Plan (2010/11-2014/15), April 2010, Objective 3, Strategies 3 & 5, pp. 301-302.

22 Objective 3 (enhancing access to justice for all especially the poor and marginalized groups in the draft National Development Plan), quoted to the team during the field visit in October 2009.

23 Interview with Ministry of Local Government, Kampala, October 2009

Police Force, such as by initiating community policing initiatives and deploying special police forces to remote regions of the country.

The Ugandan Police Force (UPF) structure is such that, at the district level, the force is under the command of the District Police Commander (DPC), who reports directly to the Regional Police Commander (RPC). All police stations in urban areas and rural outposts are under an officer-in-charge (OIC) who generally deals with minor crimes. All criminal investigations fall within the purview of the District Criminal Investigation Department (CID) with a direct line of reporting to the DPC. In addition to the regular police forces, the police structure also includes Special Police Constables (SPCs), Anti-Stock Theft Units (ASTUs),<sup>24</sup> Local Administration Police (LAP), and a Child and Family Protection Unit (CFPU) comprised of officers responsible for handling family-related complaints.<sup>25</sup>

A general underreporting of crime by the public and a lack of manpower, transportation vehicles, police equipment, and systems to record crimes, are just a few of the challenges that the police face in Uganda. Corruption and poor public image are also a problem for the UPF, as is the recruitment of police officers. In rural areas, there still is generally not enough police presence on the ground. In 2005, there were 13,000 police in Uganda. 40,000 police were needed for the national goal of 1:600 population ratio, while the international police ratio stands at 1:250.<sup>26</sup> Police numbers today have not increased significantly and salaries remain low; a police constable earns an average of 67,000 Ugandan shillings a month.<sup>27</sup>

Police remain reluctant to be posted to extremely remote regions of Uganda such as Karamoja. In September 2009, 120 of 200 police officers transferred to Karamoja under the Restoration of Law and Order in Karamoja (RELOKA program) failed to report to duty to the posts to which they were transferred.<sup>28</sup> Nevertheless, as of late 2009, police reported that increased community policing in Karamoja has led to the registration of an estimated 400 criminal cases per month, citing an improving law and order situation in Karamoja, which has restored public confidence in the police.<sup>29</sup> In the north, where people retain a 'militarized' security mind-set due to the years of conflict between the UPDF and LRA (during which the police were sidelined and rendered obsolete in the eyes of many), there is little confidence in the UPF to be able to address the scope of post-conflict security problems.

Across a number of regions featured in this case study, mistrust by the general population of the police was high due to corruption levels and a lack of response to cases. Moreover, police do not have sophisticated and accurate record systems in place to compile crime statistics that could convince a sceptical public of their impact in the community. Nevertheless, some communities report that their image of the police is improving, due to the friendlier attitude of police towards civilians and the noticeable reduction of crime in urban areas.<sup>30</sup>

When police posts are geographically distant from the villages, communities tend to use LC I courts or traditional leaders as their first instance of referral for crimes. According to Bruce Baker, evidence suggests that LC I courts have had a 'remarkable ordering effect on social life and have acted as the first line of protection against serious disorder and crime'.<sup>31</sup> Although LCs cannot effectively replace the role of police, there is potential for them to work together in various areas relating to local justice and order. Uganda's LC court system is discussed in detail later in this study.

24 Primarily established for the Karamoja region.

25 *Access to Justice in Northern Uganda*, OHCHR Report 2008, p. 54.

26 Baker, p. 10.

27 *Northern Uganda – Justice in Conflict*, Africa Rights Report, January 2000, p. 29. (67,000 shillings is approximately US\$ 30 - Oanda.com on 5 August 2010).

28 'Uganda: Police Officers Decline to Serve in Karamoja' – [www.allAfrica.com](http://www.allAfrica.com) 23 September 2009.

29 'Uganda: Karamoja Police Register 400 Cases Monthly' – [www.allAfrica.com](http://www.allAfrica.com), 26 October 2009.

30 *Ibid.*, p. 6.

31 Bruce Baker, *Popular Justice and Policing from Bush War to Democracy: Uganda 1981-2004*, *International Journal of the Sociology of Law*, 32, 2004, p. 10.

The UPF also faces constraints from widespread political interference serving to undermine prospects for effective law enforcement. Police officers report that they cannot exercise their powers of arrest in communities where prominent politicians have interests.<sup>32</sup> Furthermore, at the community level, police are often constrained by the power and influence of the community elders. For instance, elders will often not allow the arrest of boys in their community or in cases where the individual is a member of their clan. Additional challenges for the police include language barriers with communities that do not speak English (where police officers come from a region other than that to which they are posted), logistics (with a lack of resources and manpower), and the geographic vastness of the terrain they are often mandated to cover in rural areas.<sup>33</sup>

Despite the aforementioned weaknesses of the UPF, Baker portrays a largely positive view of police interventions in Uganda particularly in their efforts in 'community policing' initiatives. In an interview with the Deputy of Police in Karamoja conducted for the present study, it became clear that the UPF have put an emphasis on community policing in recent years; he explained that the first week of every month was earmarked for community policing initiatives such as going from homestead to homestead sensitizing communities on the role of the police.<sup>34</sup> While it is true that the UPF are embracing the idea of community-oriented policing and have deployed community liaison officers in most regions, the current number of such officers is only 300 and they appear to so far have had limited impact nationwide.<sup>35</sup>

## GENDER ISSUES AND THE POLICE

Criticism has been levelled against the UPF for inadequately handling gender-sensitive cases and children's issues. With a predominance of male police officers in the UPF, women often feel that cases they bring to the police are either not taken seriously or not handled in a gender-sensitive manner. Women report situations where police try to convince them to drop their complaint and reconcile with the perpetrator in cases of domestic violence.<sup>36</sup> Some survivors report that most police officers regard domestic violence, including marital rape, as 'a domestic matter' not necessitating police intervention. Costs incurred in filing a case with the police also serve as a deterrent for women pursuing justice. Many women are simply not able to afford to pay for medical expenses or for providing transport for the police during their investigation.

In cases of sexual and gender-based violence (SGBV), survivors are required to fill in a Police Form 3 (PF3), which is used to document physical and other injuries and requires a physical examination by a doctor or by government-approved medical personnel. Without such a form, a victim of SGBV has no chance of successful prosecution against the perpetrator.<sup>37</sup> Moreover, if a doctor determines that a woman has not been raped, the case is regarded as weak and will likely be dropped; this is a determination that disregards the role of a court in determining whether sexual assault has occurred.<sup>38</sup> Women are reportedly also required to pay for the medical examination required for the PF3 form, a cost that is arbitrarily set and varies from district to district.<sup>39</sup> Finally, although forensic evidence is key to successful convictions of SGBV offences, the reality is that there are few forensic experts in Uganda. This means there are delays for medical examinations and test results, or in some cases examinations cannot be carried out at all.

32 *Social Justice Amidst Complex Realities: Protecting the Rights of Children and Women in a Traditional Pastoral Community – The Case of the Pokot in Northeastern Uganda*, Transcultural Psychological Organization Report for Dan Church Aid, 2008, p. 51.

33 Interview with Deputy Cox, Police Administration – UPF Karamoja. (October 20, 2009).

34 Ibid.

35 *Community Policing Assessment in Northern Uganda*, USAID Report, March 2005, p. 6.

36 *'I can't afford justice': Violence Against Women in Uganda Continues Unchecked and Unpunished*, Amnesty International Report, April 2010. 39.

37 Ibid., p. 44.

38 Ibid., p. 40.

39 *Access to Justice in Northern Uganda*, OHCHR Report, 2008, p. 33.

## THE UGANDAN PRISON SYSTEM

As in many African countries, the Ugandan prison system is characterized by overcrowding, poor prison conditions, and backlogged cases, with a predominant number of prisoners on remand awaiting trial. Prisoner statistics from October 2009 indicate Uganda has a total prison population of 30,957, with an overall occupancy rate for prisons estimated at 227 percent.<sup>40</sup> Such congestion can be attributed to the inefficient processing of cases through the formal legal system, leaving 56 percent of prisoners waiting for their day in court, sometimes for years.<sup>41</sup> In 2008, overcrowding, malnutrition, poor sanitation, disease, overwork, and lack of medical care resulted in 149 prisoner deaths nationwide.<sup>42</sup>

The Ugandan Prisons Service derives its mandate from the national constitution and the 2006 Prisons Act. Section 5 of the Prisons Act provides the functions of the prison service: (1) to ensure that every person detained legally in a prison is kept in a humane, safe custody and produced in court when required until lawfully discharged or removed from prison; (2) to facilitate the social rehabilitation and reformation of prisoners through specific training and educational programmes; (3) to facilitate the re-integration of prisoners into their communities; (4) to ensure performance by prisoners of work reasonably necessary for the effective management of prisons; and (5) to perform such other functions as the Minister, after consultation with the Prisons Authority, may from time to time assign to the service.<sup>43</sup> Prisons across Africa, including Uganda, have tended to focus on the custody role (safety and security) of prisons rather than the rehabilitation (corrections) aspect and therefore are often viewed with suspicion by local communities, who are inclined to focus on the latter in their IJS.

The research team visited two Ugandan prisons during this study: Kitgum Prison in the north and Moroto Prison in the northeast. At the time of the visits, Kitgum prison had a population of 163, with 121 of the detainees being held on remand, while Moroto prison was holding 103 prisoners, 76 of whom were on remand. Both were the only prisons in the district, and Kitgum prison was over capacity in its number of detainees. At the time of this visit, Moroto prison was under renovation, sponsored by JLOS and the Netherlands government, to physically strengthen and increase its holding capacity. The prison superintendent explained that, in December 2008, 23 prisoners had managed to escape, six of whom are still at large.<sup>44</sup> Given the relatively small size of the Moroto prison, prisoners serving long-term sentences are typically sent to 'prison farms' where they serve out their sentence while receiving training in carpentry, tailoring, adult literacy, and religious instruction.

The majority of prisoners in both prisons were being held on remand for a variety of charges including robbery, rape, defilement, illegal possession of firearms and murder. According to Article 23 (6)(b) of the Ugandan Constitution, the maximum holding periods of detainees is 60 days for petty offences and 180 days for capital offences.<sup>45</sup> In Moroto Prison, the superintendent reported that 23 of the 163 prisoners had been held over their legal limit for remand, a reportedly chronic problem. The reasons for this include case backlog and the fact that court is not often in session. In fact, there is no chief magistrate in Moroto; the closest is located in Soroti, a district located in a completely different region to Moroto, and only holds session once every three or four months.<sup>46</sup> The infrequency of court sessions in different regions across the country, particularly in the north and east, poses a major stumbling block to accessing formal justice.

40 'Summary of UPS Prisoners Statistical Returns October 2009'. Accessed at <http://www.prisons.go.ug/reports/1009.pdf>

41 Ibid.

42 2008 Country Report on Human Rights Practices – Uganda, US Department of State, 25 February 2009.

43 *Options for Enhancing Access to Justice and Improving Administration of Law and Order in Karamoja*, HUGGO and LABF Report, 22 December 2008, p. 103.

44 Interview with Mr. Joseph Outeke, Superintendent of Prisons, Moroto.

45 *Access to Justice in Northern Uganda*, OHCHR Report 2008, p. 20.

46 Ibid.

As mentioned, the congested justice process has contributed to a lack of confidence in the system and is a key factor in the continuing popularity of IJS in many areas of the country. In Karamoja, for example, frustration with the police and prison system has led some communities to disregard their role and services all together. This is particularly in response to the police's mixed record of being able to handle the serious problem of cattle raiding that has threatened livelihoods and the security of the region for many decades.

Across ethnic groups in Uganda, concepts of 'justice' vary, as do perceptions of whether justice is adequately administered through the formal justice mechanisms. Reasons that point to the preference for informal systems by some populations within Uganda are the inefficacy of the formal system as well as the idea that 'justice' is not necessarily served by giving people prison sentences. Communities may feel there are better, more expeditious ways to administer justice. Indeed, the Moroto prison superintendent explained that mob justice was a big challenge in the region. He added that traditional courts needed 'boundaries' and that the jurisdiction of formal justice systems and IJS need to be clarified and subsequently enforced.

The Paralegal Advisory Service (PAS), a pilot scheme that was introduced to Uganda in 2005 with inspiration from its Malawian parent, is aimed at providing legal advice and assistance to remand prisoners and those in conflict with the law. The presence of PAS paralegals working in Kitgum prison appeared to be making a positive contribution in helping to address the many bottlenecks in the formal system. Nevertheless, paralegals report the challenges of resistance to them from the police and some prison officials, as well as high corruption levels. All of these factors hinder access to justice. Based on modest yet largely positive results thus far, using paralegals to provide linkages between formal and informal systems may be a constructive focus area for programme initiatives in the future.

## WOMEN AND JUVENILES IN PRISON

Overall statistics for Uganda indicate 96 percent of prisoners are male and 4 percent female. Women prison cells are kept separate from the men, although there is no separation of detainees incarcerated for capital offences as opposed to minor ones, of juveniles and adults, nor between those in remand and those serving sentences. According to Ugandan law, execution of persons under 18 is prohibited. However, a recent case was brought to light of 17 juveniles who have been sentenced to death in Uganda's Luzira prison, but cannot be executed because the offenses were committed when they were below 18.<sup>47</sup>

# DISPUTE RESOLUTION THROUGH THE LOCAL COUNCIL COURT SYSTEM

## CENTRAL REGION & MUKONO DISTRICT

In the Central and Southern regions of Uganda, the LC court system is the main conflict resolution mechanism for solving community disputes. Mukono District in Central Uganda, an area representative of the region, was selected for the study of the local dispute resolution mechanism provided by the LC courts.<sup>48</sup> It is a district where the LC court system appears to be widespread and functioning comparatively well. The Central and Southern regions have remained relatively peaceful for the past 20 years, and the formal state justice system here has been able to develop without disruption, unlike in other regions of Uganda such as the North and the Northeast. This allows for an assessment of the linkages between the LC courts, formal state courts, and other state actors under 'normal' circumstances.

47 '17 children on death row', The New Vision, 15 September 2009: <http://www.newvision.co.ug/D/8/13/694877>

48 The selection of Mukono District was mainly based on input provided by the local partner organisation FHRI and the UNDP, UNICEF and UNIFEM country offices.

Unlike other regions of Uganda, the LC court system in the South and Central regions appears to have taken over the traditional mechanisms and is the only functioning local dispute resolution mechanism, besides more informal family dispute resolution.<sup>49</sup> None of the respondents in the selected case study area ascribed any role to other traditional or customary dispute resolution mechanisms; this is partly due to the predominantly urban setting as well as the relative success in the establishment of the LC courts across Mukono District.

Mukono District has an estimated population of 1,114,300<sup>50</sup> and 56 percent of the population is under 18 years of age (26 percent below the age of five). The District is made up of four counties and has four urban areas recognized as municipalities. District headquarters are located in Mukono Town. The district has 28 sub-counties, 144 parishes and 1,119 villages, which in principle means the same number of Local Councils and courts. Mukono Town is one of Uganda's fastest-growing urban areas. The political head of the town is the mayor, elected for a five-year term. The supreme policy-making organ in the town is the Town Council, composed of 28 elected councillors who serve four-year terms.

## THE LOCAL COUNCIL COURT SYSTEM

The Local Councils, established within the local government system, have 'quasi' legislative and judicial functions. They have concurrent jurisdiction with the lower magistrate courts in civil matters and petty criminal offences. They are by some seen as fundamental to the nature of justice in Uganda and as the most instrumental institutions for law and order.<sup>51</sup>

As mentioned, the LC court system was established as a system falling within the category of elected/appointed local government officials with adjudicative functions, though legislation in recent years has modified this picture somewhat. The lowest level (LC I at the village level) is the court of first instance, and the LC courts formally form part of the judiciary. The statutory framework for the LC courts comprises the Constitution, the Local Government Act and the Local Council Courts Act. Whereas their procedural and structural foundation is based on statutory law, their substantive foundation is customary law and by-laws passed by the Local Councils. Many describe the norms applied by the LC courts as a mix of common sense and customs of the area.<sup>52</sup>

Civil society, in general, perceives the LC court system to be part of the formal state system and not as an informal justice system. However, JLOS representatives in general view the LC court system as more of an informal system along the lines of other informal systems led by civil society and more traditional systems as seen in the north and northeast of Uganda.<sup>53</sup>

The LC system (originally known as Resistance Committees) was established during the NRM guerrilla war (1981-1986) to provide 'government services' to areas that were not reachable at the time. The Local Councils were thought to bring needed discipline and were perceived as more accessible and effective than the formal system in relation to geographical distances, costs, and the passing regulations adapted to local conditions. Following the end of the conflict, they were formalized and spread out across most parts of the country. In the process of introducing the Local Councils nationwide, the old order of appointed local chiefs was dismantled. In 1988, formal regulation was put in place and the previous powers of the chiefs were transferred to the Local Councils.<sup>54</sup> The LC courts were included in the local government structure in the 'Resistance Councils and Committee (judicial)

49 Interview with Irish Embassy, October 2009.

50 Figures according to 2002 national census.

51 See, for example, Bruce Baker, 'Multi-choice policing in Uganda', *Policing & Society*, Vol. 15, No. 1, March 2005, pp. 19-41.

52 Interviews with LC I, LC II and LC III representatives in Mukono District, October 2009.

53 Comments during interview with Irish Embassy (JLOS donor lead), Law Development Centre and JLOS institution representatives in Kampala, October 2009.

54 Oloka-Onyango, 1989, Odoki, 1994 and Baker 2005.

Powers Statute,<sup>55</sup> which tied the courts to the local government administrative system. Thus, the courts became part of the structure of the Executive Committees. The Statute was changed to the Executive Committees (Judicial) Powers Act in 2000, which was replaced in 2006 by the Local Council Courts Act 13.<sup>56</sup> This act separated the Local Council executive committees and the judicial powers for the LC III Courts.

Besides its court function, the duties of the LCs at the LC I-LC III levels include passing by-laws based on the community's needs, mobilization of the community in law and order matters (including, for example, the establishment of night patrolling units), law enforcement through local administrative police, and other related functions.<sup>56</sup> Some of the LC court informants interviewed mentioned patrolling at night as one of the positive ways the LCs contributed to establishing law and order in the community.

The Local Councils operate at the local government levels from village (LC I) through parish (LC II) to sub-county (LC III) levels and LC IV and LC V for division and town level. The LC V is responsible for the entire district. The LC courts III, IV and V are at the same level, and from the LC court III level appeals go directly to the Chief Magistrate.

A number of acts give powers and responsibilities to the LCs and LC courts within different areas and include: the Children Act, the Land Act, the Community Service Act, the Public Health Act, and the National Environment Act. A weakness is that the texts of these acts, however, are not always available to the LC courts, but can only be accessed at the district level. The laws applied in decisions by the courts are primarily the by-laws passed by the relevant Local Council, which have to be in accordance with the Constitution.<sup>57</sup> The LC courts can apply customary law as long as it is not in violation of statutory law, but notably do not specify which customary law and how it is to be applied. The Act and the Regulations are primarily concerned with the procedural aspects; it is not outlined which customary law should apply, for example, in disputes between individuals belonging to different communities and customs.

Most stakeholders generally assess the LC court system as a potentially effective structure for ensuring access to justice due to its accessibility, simplicity of procedures and requirements, cost, speed and emphasis on reconciliation and compensation.<sup>58</sup> The most recent evaluation of the system carried out in 2006 provided an overall positive assessment of the system despite the identified weaknesses and challenges.<sup>59</sup>

According to users and other stakeholders interviewed, people prefer to go to the LCs because of the reconciliatory approaches typically used and because they trust the LCs more than other institutions. The police acknowledge that, in minor criminal offence cases, people will approach the LCs first and tend to turn to the police only if the LCs fail to solve the matter. However, family matters are sometimes brought to the police by women rather than to the LCs in instances where the woman might fear that her case will not be treated impartially.

## JURISDICTION OF THE LOCAL COUNCIL COURTS

The subject matter jurisdiction (referred to as legal jurisdiction in the Act) of the LC courts includes civil matters and civil disputes governed by customary law (customary tenure land, marriage and divorce, identity of customary heir), violations of the by-laws passed by the LCs, and matters specified under the Children Act. The LC courts can order various types of relief in deciding these cases, including reconciliation, declarations, compensation, restitution, costs, apology, attachment and sale, and, in the case of breach of by-laws, impose fines, community service<sup>60</sup> or other penalties authorized in the by-laws.

55 Given the change to multiparty system in 2005.

56 Interviews with LC I, LC II and LC III representatives in Mukono District, October 2009.

57 Interviews with LC I, LC II and LC III representatives in Mukono District, October 2009.

58 Interviews with donor representatives and justice sector representatives, Kampala, October 2009.

59 Joint Survey on Local Council Courts and Legal Aid Services in Uganda Report, UNDP & Legal Aid Basket Fund, July 2006.

60 An order of community services for both adult and children has to be endorsed by the chief magistrate.

Jurisdiction in criminal cases involving children<sup>61</sup> includes affray, common assault, bodily harm, theft, criminal trespass, and malicious damage to property. In addition to placing the child under guidance and supervision by a person appointed by the court, the court can order reconciliation, compensation, restitution, community services, apologies, and cautions. The LCs have to follow special procedures when handling matters involving children, which will be discussed in further detail below. Legal representation is only allowed in the LC courts in matters concerning the violation of by-laws and cases involving children. In matters involving children as victims, cases are meant to be referred to the Family and Children Court through the LC III courts.

The LC courts' jurisdiction in civil matters is restricted by a monetary value of 1 million shillings; it has no restrictions in matters governed by customary law. However, where compensation is awarded exceeding 500,000 shillings, the case must be referred to the magistrate courts that are authorized to reduce the amount.<sup>62</sup> To the extent these procedures are followed, the informal and formal systems as such are highly interdependent.

The majority of cases handled by the LC I-III courts relate to land, theft, assault (often alcohol-related), and family-related matters such as domestic violence and child/wife maintenance. The LC Is do not have a formal legal mandate to handle land disputes, but typically attempt to solve matters amicably before referring them to LC II-III courts or the District Commissioner. According to LC officials interviewed, it is typically matters outside their monetary jurisdiction, or serious criminal cases, that are referred to higher levels of the LC system or the police, respectively.

## PARTICIPATION & GENDER

The LC I and LC II courts comprise all members of the Executive Committees at the village and parish levels, respectively, directly elected in local government elections. For LC III, IV and V courts, the five members are appointed by the sub-county Local Council, on recommendation by the Executive Committee. For the LC III, IV and V courts, the Act and Regulations determine that at least two of the five members shall be women, and if the chairperson is a man, the vice-chairperson shall be a woman, and vice versa.<sup>63</sup>

Addressing gender representation in the Local Councils and courts has for the first time made the system more accessible for women. However, it is not yet considered to have had a significant tangible impact. There is some discussion as to whether these types of 'affirmative measures' make a difference within the local context, where the social status of women in the family and community continues to limit their independence and decision-making power. Moreover, if the 'electorate' is male-dominated and predominantly subscribes to traditional norms, this can also influence how progressive the women elected will be. Some have pointed out that the mandatory participation of women (and disadvantaged groups in general) has helped shift the monopoly of the adjudication process away from the typically elder men as traditional dominant actors. Although there is little documentation on the impact of this so far, it is clear that it does not guarantee an impact on, for example, the bias against women litigants in decision-making processes. This would require a broader shift in the power structure within the society.<sup>64</sup>

Amongst the women interviewed in this study, there was a general preference for using the LC system over the police. Respondents indicated that the formal justice system was not seen as an option at all. In a focus group discussion in Mukono, respondents indicated that it did matter to them that there were women in the LC, as they understood the needs of women better. Unlike the police, the LCs were said to appreciate the general preference to solve matters through reconciliation and/or compensation for the woman and her children, rather than punishment of, for example, an abusive or neglectful husband.<sup>65</sup>

61 Over the criminally responsibly age of 12 years.

62 Section 10 (2) and (3), Local Council Courts Act 2006

63 The Local Council Courts Act, 2006 and The Local Council Courts Regulations, 2007.

64 See, for example, Kane, Oloka-Onyango and Cole, 2005.

65 Focus Group Discussion with group of eight women in Mukono, October 2009.



## ACCOUNTABILITY ISSUES AND POLITICS IN THE LOCAL COUNCIL COURT SYSTEM

Although established by law, many Ugandans show acute awareness of how the LC system was set up during the period of 'Movement' government by the ruling party at a time when other parties could not operate. As such, it is also a political system with inherent party political elements. The elections for the Local Councils involve the popularity and standing of individuals in the community, rather than knowledge of the law and justice, and it is these representatives who appoint members of LC courts III and IV. The separation of the executive and legislative powers from the judicial powers is seen as a positive development, but it nevertheless remains evident how closely related the LC system is to the political system and party politics.

These issues have an impact on the decisions and orders made by the LC courts. A concern iterated by users, representatives of police, and formal justice sector institutions, is that LC officials are often 'more concerned about their votes than justice', leading to bias and a lack of impartiality in their judgements. This is especially an issue that affects women and the poorest in the community. It also has potentially serious implications for politically sensitive issues like land, where the LC system plays a big role in the administration and settling of disputes.<sup>66</sup> The land issue has also led some donors to exercise caution with regard to full engagement with the LC system. Weaknesses of the LC system in respect of land that result from the combination of judicial and executive functions are also discussed in the section on land later in this country study.

Most respondents, including representatives of government and the formal justice sector institutions, commented that the composition of the LC courts leaves them open to abuse of power, especially given the lack of alternatives and/or review of their operations and decisions. Some government officials interviewed even went as far as to say that trust in the system and its long-term survival is dependent on a further separation of executive and judicial powers. The potential for abuse of the system as it exists now can, over time, serve to undermine it. This could lead to a decrease in access to any dispute mechanism for many communities using the LC system especially in the southern and central regions where it has replaced the traditional systems.

The LC courts are increasingly accused of partisanship and partiality, decreasing their popularity. Although the LC system is the only available option to most in central Uganda, one user explained, "It comes down to a choice between the LCs, which might be biased and partial, or to give up on the matter as the LCs are the only option we have." For the majority of people interviewed, the two main options for seeking justice are the LCs and the police. The police are generally seen as far away from the community (both geographically and substantively, in terms of understanding of issues relevant to the community), corrupt, and therefore biased towards those who can pay.

The main form of accountability of the LC courts to the community is political accountability through the election of councillors. However, political accountability through elections does not address accountability in the daily operations of the LC courts and the exercise of the judicial function. As mentioned, LC courts are run by locally (s) elected (depending on the level) administrators with an adjudicative function, rendering the question of qualifications less relevant. According to the Act and Regulations, there are no specific qualifications required for the two lower levels. For LC IIIs, the main qualifications relate to residency, moral standing, knowledge of the local language and English, and the prohibition on simultaneous membership in an executive body (since the amendments made in the new Act in 2006). Informants interviewed for this study point out that the lack of formal training or qualifications of the officials has an impact on the understanding and ability of the officials to follow regulations.<sup>67</sup> Thus, while the judicial function is exercised in relation to individuals, political accountability is to the community as a whole. Accountability to individual litigants or defendants can only be through requirements of compliance with substantive and procedural rules, and whatever appellatory and disciplinary rules exist in respect of these courts.

<sup>66</sup> Interviews conducted with users, police and formal justice sector institution representatives, Mukono & Kitgum, October 2009.

<sup>67</sup> E.g., interview Uganda Law Reform Commission, Kampala, October 2009.

One major weakness of the system is the lack of consistency and record-keeping applied by the LC courts, which in practice means that there is limited opportunity for a real appeal. Recent surveys<sup>68</sup> show that a large majority of LC courts only keep limited and partial records and do not understand the recording requirements nor appreciate the need for accountability. This issue was mentioned by the formal justice sector institutions as a serious weakness in the LC system when discussing the appeal and monitoring structure.<sup>69</sup>

While monitoring by the chief magistrate is foreseen in the Act as a measure of accountability, challenges in relation to its practical functioning mean that it is rarely effective in practice. Other aspects of monitoring are the responsibility of the MoLG. This aspect is discussed further below in the section on linkages. The lack of substantive monitoring and regular review of LCs by the magistrate courts contributes to limiting the protection of human rights, especially of vulnerable groups including women and children. Despite an elaborate appeal system, individuals in vulnerable circumstances are unlikely to appeal decisions made by the LC courts and the powers of the LCs in the process can be an obstacle.

## PROCEDURES OF THE LOCAL COUNCIL COURTS

Both the Local Council Courts Act and Regulations<sup>70</sup> include detailed directions on operational matters, the institution of civil matters and cases of breach of by-laws, as well as the procedures and the remedies applicable in the LC courts. In cases where the Regulations are silent on procedures for civil and criminal matters, the Civil Procedure Rules and the Criminal Procedure Code Act can apply, respectively. Also included in the Act and Regulations are standard forms and formats to be applied by the courts. The instruments have been supplemented by a set of guides on Local Council administration of justice developed by the MoLG (specifically for the conflict areas in the north) with support from UNDP.<sup>71</sup> The guidelines, however, are sufficiently generic to be useful in all parts of the country and have been included in the training of LCs by the MoLG.

According to the Regulations and the Guides, the LC courts should apply principles of natural justice, due process and fair trial, and should not pay 'undue regard to technical rules of evidence and procedure', but rather have the matters solved expeditiously. They should adhere to principles of human rights, ethical conduct, natural justice and gender sensitivity.<sup>72</sup> Representation by a lawyer is not permitted before the LC courts except in cases of violation of by-laws. The LC courts are obliged to take into consideration the principles and guidelines developed in the National Gender Policy to combat discrimination of women and girl children, as well as the provision of the National Council for Children Act on coordination of all policies relating to children.

The language of the LC court is the main (vernacular) language of the area, but the records are meant to be translated into English as well. Claims to the courts can be made orally or in writing to the chairperson.

The court of first instance is the LC I (village level) for the area in which the case originates. People typically bring their cases to the chairperson of the LC court, who will then summon the other members of the court to establish a quorum. According to the respondents, the requirement of a quorum is sometimes disregarded in urgent cases 'to restore law and order immediately'.<sup>73</sup> Parties to the dispute are invited (or summoned) to present their case and witnesses from the community are also called when needed. The LC court officials also conduct site visits when required, for example, if the case involves land boundary disputes. The proceedings have to take place in daylight

68 See, for example, Joint Survey on Local Council Courts and Legal Aid Services in Uganda Report, UNDP & Legal Aid Basket Fund, July 2006.

69 Interviews with formal justice sector institution representatives in Mukono and Kitgum, October 2009.

70 Local Council Courts Act 2006 and Local Council Courts Regulations 2007.

71 Local Councils Administration of Justice – Revised Guides for Local Council Courts, Ministry of Local Government, March 2007.

72 Local Council Court Regulations 2007 and Revised Guides for Local Council Courts 2007.

73 Focus group discussion with LC I and LC II officials in Mukono District, October 2009.

(between 6 a.m. and 6 p.m.) according to the Act and Regulations, but, again, it was mentioned that this rule is sometimes disregarded when LCs are involved in an urgent matter, such as a serious fight.

The 2006 Act permits LC courts to make a variety of orders that are binding on the parties in civil suits, including for attachment and sale of property, for example. In cases concerning breach of by-laws, they can impose fines and other penalties, including community service. The LC courts also possess coercive powers to compel appearance of witnesses and to punish perjury. Nevertheless, the LC court officials see their role as facilitating an amicable solution that is in all parties' interest, and emphasize that the process is voluntary. According to respondents, whether the final decision is seen as binding (this varied from LCs I and II to LC III level) is not important because the LC courts' solutions are found through a voluntary process in agreement with all parties.

If the decisions are not respected, the LC courts can call on the police to institute arrests and executions of summons. According to all LC officials met, this is rarely done. For LC I and II levels, they would refer a case up in the LC system if an amicable solution were not found. The LC III level, in general, seems to encourage the parties to remain at the level of dispute resolution as the LC V (town/district) has an overburdened case-load and generally the LCs discourage parties to go the magistrate courts. The LC I through III levels reported case-loads of up to 20 cases per month, while the LC V receives up to 120 cases per month. Although there are elaborate procedures for appeal through the LC system to the chief magistrate, it is clear that parties are discouraged from bringing cases to the formal state courts; issues of costs, distances, time, as well as lack of knowledge and understanding of the community or parties are emphasized.

The guides produced by the MoLG are elaborate and provide the reader with information on all relevant procedures for various types of cases and stages. It provides relevant and contextual examples of steps to be taken and how to fill out records based on scenarios of civil customary matters. In this sense, the guides appear very useful and have been developed with participation of LC court officials. However, both the guides themselves, as well as the required formats, require a certain level of English language skills in reading and writing, as well as an understanding of the laws concerning responsibilities of the LCs. Few LC courts in general appear to have been provided with any documents, copies of laws, and the necessary registry books and stationery – a problem for both the local courts' officials themselves as well as other stakeholders and users.

## **COST AND ACCESS ISSUES IN THE LOCAL COUNCIL COURT SYSTEM**

In the LC courts' Regulations, a fee structure has been determined covering allowances to court members (LC III level) for stationery, on-site visits, and serving of summons. According to the MoLG, the LC system is built on voluntarism and service of the community. Therefore, the lowest levels receive no remuneration except for the necessary equipment provided by the payment of fees by the parties. LC III level courts receive a sitting allowance through the fees (and the local governments), while LC V levels are salaried. According to the 2006 survey of the Local Courts,<sup>74</sup> users and civil society organizations, the fees charged by the LC courts are often higher than the prescribed fees, especially at the lower levels. Stakeholders and users report that the LC officials, especially at the LC I and II levels, charge higher fees than what is stipulated in the Regulations. LC V levels (urban areas) normally provide their services for free, but these LCs are provided with salary and office structures.

For many community members, the fees charged by the lower level LC courts can be prohibitive for access to justice. This extends to services such as the provision of unofficial, but necessary referral letters (discussed further in the following section) for individuals to approach other institutions such as the police or the Administrator General's office. Equally problematic is that the fees demanded can also create a bias in the LC courts towards the party with the most resources. Such factors can affect the decision-making process, as well as the prioritization

<sup>74</sup> Joint Survey, 2006.

of cases. Typically, women have less access to resources than men and several respondents mentioned that this was a contributing factor to lack of access by women despite the enabling formal framework for gender equality.

In the communities, there is a level of understanding of why the LCs charge higher fees. The situation is blamed on lack of financial and material support (locally referred to as ‘facilitation’) of the LC courts by the government. The MoLG encourages the local governments to include LC court running costs as a part of already limited district budgets. However, the lack of support and adequate resources is mentioned by all stakeholders as one of the issues that lead to corruption and poorer functioning of the LC courts. The MoLG has delegated administration of the LC courts to the district level where the lack of financial and material support of the services is seen as a lack of support for the system by the central government. Although trust in the system is undermined and accessibility limited for some groups, it is reported to still be the ‘cheapest’ for users, also when compared to the police. (Although the functions of the police and the LC, including its judicial functions are different in law, many ordinary people see the two as alternatives for the solution of their problems in many instances.)

## LINKAGES BETWEEN LOCAL COUNCIL COURTS AND OTHER INSTITUTIONS

The LC system is a gateway to and from the communities. No initiatives in the community take place that have not gone through the LC system<sup>75</sup> and community members in practice need letters of reference from the LCs to go to other state institutions. In many instances, people will be referred to the LCs from the police or magistrate court if they have not notified the LC of the matter first (if the matter falls within the jurisdiction of the LC). This is not a formally prescribed procedure, but has emerged as an unofficial functional linkage to ensure that matters are dealt with as close to the communities as possible. As it serves to relieve pressure from other institutions, it has slowly become a rule enforced by the formal state courts and the police.

During a focus group discussion with a group of women in Mukono, all agreed that if a matter needed to be taken to the police, they would first approach the LCs, who would then refer them to the police. One respondent expressed the following at a focus group discussion with a mixed group of community members: “Even if you do not trust the LCs and would have preferred to take a matter directly somewhere else, you would still approach them first. Who knows what letter of reference you might need from them another time – would they be willing to provide that if you’ve passed them this time?”<sup>76</sup>

The official functional linkages between the LC courts and the magistrates’ courts are written into the Act and the Regulations, with legally established procedures for appeals from the LCs to the chief magistrate. The type of cases the LC system is allowed to handle and the threshold for referral to the magistrate courts is clearly defined. Moreover, the supervision of substance through monitoring of case records is clearly placed with the chief magistrate, presenting an example of substantial integration between the LC courts and the magistrate courts.

## MONITORING OF LC COURTS

However, the functional linkages with the formal justice system and the placement of the LC system as an integrated part of the local government structure present certain challenges when it comes to monitoring, supervision and the upward accountability of the LCs. While the LCs are integrated in the local government structure and thereby fall under the MoLG, their court function falls under the judiciary. According to stakeholders, this gives rise to coordination problems in relation to the monitoring of their work and mandate. It also means that the responsibility for the monitoring and supervision of the LC court function is not clear and not exercised. According to the Act, the legal mandate to supervise the LC courts lies with the chief magistrate who holds the supervisory appeal mandate and is responsible for paying visits to check records and orders issued by the LC courts. LC court orders

<sup>75</sup> Interview with Law Development Centre, Kampala, October 2009.

<sup>76</sup> Focus group discussions held in Mukono in October 2009.

are admitted to the chief magistrate for execution and sentencing. However, such supervision, in practice, is limited and mostly takes place in the form of review of decisions on appeal. Chief magistrates have heavy case-loads and limited resources and the sheer number of LC courts in itself presents a challenge. Moreover, as the method of appointment is entirely different to and separate from the judiciary, there is little sense on either side of belonging to the same overall structure. In many instances, the LC courts refrain from referring cases to the chief magistrates. This can be ascribed to the LC courts' role as a gatekeeper in determining which cases should 'burden' the formal court system, as well as to being a way of keeping control over community matters.

The local government structure also has a monitoring responsibility for the LCs, but, given the number of LCs (at all levels) and the limited resources available within local government budgets, the monitoring of the LCs is not considered a priority. The LC IIs report to the District Commissioner, but it is not clear whether these reports are followed up on; none of the LC officials interviewed had received any monitoring visits.

Anecdotal evidence through interviews with representatives of the judiciary as well as other JLOS institutions and civil society representatives<sup>77</sup> suggests that record-keeping is a general problem. Consequently, for the cases that are actually appealed, the records sent to the chief magistrate are often insufficient, which leads to tensions between the LC system and the magistrates. The judiciary generally views the LCs more as an informal mechanism than as a part of the judiciary and is critical towards LC officials when it comes to following procedures and respecting their jurisdiction.

Under the JLOS programme, joint monitoring visits are conducted with the MoLG. However, the purpose of these visits is to monitor implementation according to JLOS programme indicators, rather than general monitoring and supervision of the operations of the LC court system. One discussion was held with civil society organizations that provide training to LCs on children and juvenile detention. In discussing monitoring of LC courts, it appeared that all actors involved in strengthening LC operations were monitoring according to their own (programme) indicators. No efforts had been made to coordinate and consider a joint indicator and monitoring framework. Ultimately, this means that the LC court system is operating independently and without measures for quality assurance of the justice that is delivered through this system. This is recognized by all stakeholders as a major weakness of a system that, in principle, is the preferred (and for some the only) dispute resolution alternative to the majority of Ugandans. In some areas, the LC system is operating in the absence of strong links to other institutions that could strengthen its operations, such as the police, probation officers, and the judiciary.

The official functional linkage with the police relates to summons and arrests, and referrals of criminal cases that are beyond the jurisdiction of the LCs. From other studies and reports as well as interviews in this study, there is indication that the police enlist the assistance of LCs for summonses and arrests. Although the police are typically contacted in serious criminal offences, it is usually the LCs that bring 'suspects' to the police. The police representatives interviewed see the LCs as a useful 'gatekeeper' to the community and an important component in providing communal peace and security, especially through initiatives such as community watch. The type of assistance LCs can provide the police with in terms of knowledge of community relationships, individuals, and other information relevant to criminal investigations is seen as extremely valuable.

A main concern of the police with regard to the LC system relates to LCs exceeding their jurisdiction. Defilement cases are the most frequently mentioned problem in this regard. Rather than referring defilement cases directly to the police, LC officials will frequently deal with the cases themselves, thereby overstepping their jurisdiction. Another example, mentioned by many, is the confiscation of property and other valuables until debt is paid off,

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<sup>77</sup> Interviews held in Kampala, Mukono and Kitgum on October 2009.

or in some cases ‘remanding’ the defendant until the family has paid the debt.<sup>78</sup> The police representatives interviewed mentioned that arresting and charging LC officials would be the correct measure to combat the problem of LCs overstepping their jurisdiction. However, no recent examples were given and these types of arrests do not appear to be made often, if at all. In interviews with stakeholders, areas of tension in the working relationship between the police and the LCs were mentioned. As members of the community, LC officials see the police as removed from the community context and potentially corrupt and biased towards the rich and powerful. Moreover, amongst the lower levels of the LC courts, there is limited understanding of the principles relating to evidence in criminal matters, as well as to the police bond system; LCs often see the release of an accused person as an expression of corruption in the police rather than due process.

Another concern relates to the fair trial principles stipulated in the framework for the LCs; in practice, LCs’ handling of cases does not live up to these standards. Impartiality, as discussed above, is a major issue in relation to the LC system and is mentioned by users and other stakeholders. Although all LC officials interviewed mentioned impartiality as important, frequent reports of abuse of power are registered both through surveys and by the MoLG and the judiciary.<sup>79</sup>

## HUMAN RIGHTS ISSUES RELATING TO WOMEN

Many cases that proceed through the LC system are issues that specifically affect women and have a direct impact on their social, economic and physical security in Ugandan society. These issues include land and inheritance rights, domestic violence, and sexual and gender-based violence, which will be addressed in detail in a later section in this report.

The Constitution of Uganda prohibits discrimination of women in laws and customs, and customary law can only be applied if it does not violate constitutional guarantees and statutory law.<sup>80</sup> The LC courts are to apply customary law as well as statutory law when resolving matters. This places the LC courts in a difficult position between applying customary law and following statutory law. This is often done with limited knowledge of laws and in cases where potential conflict is greatest – namely, in issues that relate to the status of women.<sup>81</sup>

Domestic violence is viewed as a family matter by both LCs and many of the women interviewed, rather than a criminal matter to be brought before the police. In bringing cases forward, the main aim for the women is to stop the violence. Only if the intervention by the LC courts is seen as ineffective will they go to the police. Some women in focus group discussions nevertheless emphasized that LC officials are from the same community, and biases against women can occur given traditional structures and the social standing of men in the community. With the requirement to obtain a letter from the LCs before going to the police, women often find themselves in difficult situations with limited possibilities for action. The ‘victim support units’ visited reported heavy case-loads, but still underscored the problem of real access by women in need.

On the other hand, when the LCs do take cases of abuse and violence brought by women and a solution is found, implementation is strengthened by the fact of the solution having been achieved within the community.

78 Anecdotal evidence from other studies suggests that LC courts are also handing out sentences beyond their powers relating to corporal punishment, expulsion from the community and (short-term) imprisonment and detention. None of the informants interviewed in this study mentioned that the LCs in their area had handed out such sentences, but they had all heard of LCs that were still handing out sentences, especially corporal punishment, as part of their sentencing. All informants, however, were also aware that this was not according to the rules governing the LCs.

79 Ibid. Interviews conducted with the MoLG and representatives of the Judiciary in Kampala October 2009.

80 Constitution of Uganda 1995 (Article 33(6)).

81 See, for example, Kane, Oloka-Onyango & Tejan-Cole, 2005, and Celestine Nyamu-Musembi, 2008.

## ISSUES RELATING TO CHILDREN IN THE LOCAL COUNCIL COURTS

Any case brought to the LC courts by a child or 'person of unsound mind' has to be instituted by the 'next of kin or next friend' in the name of the child or individual. It is not clarified in the Act, Regulations or Guides whether account shall be taken of the age of the child in this regard, and it appears from interviews conducted that children will always be represented by an adult family member. Although the Children Act clearly defines a child as any person below 18 years, in practice, the age of a child is less clear within the community context. Civil matters involving children are mostly taken up as a family matter and for the family interest.

The LCs have an obligation to ensure the welfare of the children in their area, with special emphasis on the protection of their rights to property of their parents. It is also the duty of the LCs to ensure that children are protected from discrimination, violence, abuse and neglect. Emphasis is put on reconciliation and mediation efforts between children and their guardians.

For matters involving children accused of a crime, a child is defined as above 12 and below 18. There should be no cross-examination and the process should be as informal as possible. All decisions should take into account the guiding principles of the Children Act (including the welfare principle and rights of the child). In addition to reconciliation, compensation, restitution, community service, apology or caution, a guidance order can be issued. The LC courts cannot order remand of children accused of breaking the law.

The Children Act provides for 'fit persons' to be appointed; probation officers and civil society organizations see a potential for the LC system to play this role. This would help to avoid having to send children to district remand homes far from their communities. Civil society organizations have provided training to LC officials as 'fit persons'; nevertheless, LC officials, in general, remain hesitant to get involved in juvenile cases and diversion.<sup>82</sup>

Cases relating to children are conducted in camera, with only the LC court officials and the parents or guardian present. The probation and welfare officer should be present as well, but, in practice, this is not always the case.<sup>83</sup> In fact, it is their belief that, in many instances, LCs do not follow proper procedures and thereby violate the procedural guarantees and rights of the child. A frequently mentioned example of the overstepping of mandates by the LC system relates to defilement cases. Such cases are often treated as civil customary matters and the procedures for referral to the formal system, police, and welfare officers are not followed. With regard to offences relating to children as victims (or if they are charged together with adult), the matter should be forwarded to the Family and Children's Court through LC II or III.

There is further discussion of issues regarding children in the LC courts in the general section on children (Section 9.3) below.

## PROGRAMMING FOR LOCAL COUNCIL COURTS

At the time of the study visit in October 2009, LC local elections had still not been held. This meant that, in some areas, the LC court system at the village and parish levels was not operational and, in others, that they were functioning without any legal mandate. This situation obviously had some impact on the implementation of programmatic interventions towards the LC court system.

There is an interest amongst the JLOS and the donor group to support the LCs, which the NDP also focuses on, but increased monitoring and follow-up will be necessary for further engagement. The inclusion of the LC system in the JLOS and the judicial reform programme is an indication of the potential importance attached to the system. Nevertheless, it is important to note that community-based informal or traditional systems and sector-specific

<sup>82</sup> Interview with Law Development Centre, Kampala and Welfare and Probation Officer in Mukono, October 2009.

<sup>83</sup> Interview with Welfare and Probation Officer, Mukono, October 2009.

adjudication bodies such as the institutional framework set up under the Land Act have not been mentioned in the programmes.<sup>84</sup> With the new NDP, more focus has been put on the latter, which is important for the scope for linkages and complementarities. For the effective functioning of the system in other regions, such as the north and northeast, how this interlinks with traditional and other community-based mechanisms remains to be assessed, as does the scope for complementarity between the systems.

## EDUCATION AND TRAINING

With UNDP support, the MoLG has carried out training for LC courts across Uganda; however, this training was not given to all levels of the system. The training sessions were given by MoLG and mainly focused on legislation and procedures. The sessions did not address adjudication in substance matters, such as land disputes – a major area of concern to the communities and the LC system. As there is little monitoring of the LC system and no follow-up and reporting on the training, the process for further support to the LC court system has been delayed. In addition to the MoLG and UNDP initiatives, some *ad hoc* training sessions have been implemented in the Central and North Regions by local and international NGOs. Such efforts, however, are not necessarily coordinated with the MoLG and other initiatives. In addition, the Human Rights Commission has provided training to the LC courts on human rights, judicial powers, administration of justice and vulnerable groups, but no follow-up or monitoring activities have been included. The training is ongoing due to the relatively short tenure of the LC officials.

It should be pointed out that few LC court informants were knowledgeable about the substance of the amendments to the 2006 Act and the subsequently revised Regulations. Some of the LC court informants reported that some training was provided by the Ministry of Local Government, but far from all of those interviewed had participated. Moreover, they were provided with copies of some laws by the Ministry, but had never received any training in the interpretation and application of these laws. Continued training of LC officials is a clearly identified need. However, it is necessary to incorporate such activities into a more coherent framework where follow-up activities are linked with the feasibility to provide necessary support to the LCs through supervision, guidance and monitoring.

Informants in the communities generally pointed to their lack of adequate awareness of the powers and mandate of the LCs. This hinders the communities' ability to demand and secure accountability of the LCs. Most know little, if anything, of the legal framework on powers and regulations of the LC court system, including the latest revisions from 2006.

## OVERALL FINDINGS ON THE LC COURT SYSTEM

The LC structure at the local government level is largely successful in providing law and order and access to a local dispute resolution mechanism. Besides the potential partisanship and politicization of the judicial function, the main issue surrounding the LC system is operational (including training, human and financial resources, and monitoring). The system has the potential to provide official functional linkages to the formal system. The legal framework, regulations and the guidelines for how to operate in accordance with constitutional guarantees and statutory laws are in place and should be implemented. However, as discussed, there are numerous challenges to ensuring the implementation and control of this dispute resolution mechanism at the community level. A more thorough mapping than currently exists on the type of justice provided by LC courts and their use by communities is needed, as well as consideration of the potential of providing justice through a mechanism that, at this level, is so closely linked to the executive branch.

The formal recognition and elaborate legal framework for the operations of the current system are seen as strengths and an unexploited resource for providing tangible access to justice to the communities. LCs are largely operating

<sup>84</sup> See Dr. Celestine Nyamu-Musembi's, *Review of Experience in Engaging with 'Non-state' Justice Systems in East Africa*, Institute of Development Studies, Sussex University, 2003.



according to the same values as the formal system with its legal framework, normative basis, and regulations, and are therefore open to change. Such a mindset provides a potential platform for strengthening the system. Many stakeholders also point to the potential of the LCs' role in the administration of juvenile justice and diversion mechanisms.

While some of the major issues relating to the LCs concern the effects of poor administration and operational problems, there are also issues relating to substantive deficiencies. An in-depth mapping of the system and its potential as well as the development of programming initiatives will have to distinguish between the two.

It is evident that the LCs have a large number of current as well as potential responsibilities. In areas where the system functions well, it plays a key role in providing law and order to communities and is able to deal with the spectrum of issues that affect them. The 'success' of the system is built on its outreach and the fact that it derives from the community. It is a reward in itself to be elected by the community to help address local issues of concern and disputes.

These positive aspects should, however, be balanced with an acknowledgement of the weaknesses of a system that is built on voluntarism and relatively short terms of office. When respondents mention lack of resources ('facilitation') of the LCs as a factor that contributes to undermining the system, it is unsurprising that LC officials are hesitant in taking on additional responsibilities. The scope for making use of this outreach and trust within the LC system for a larger number of areas in Uganda, while enforcing stricter standards for record-keeping, administration and reporting, has to be balanced with commensurate resources available.

## DISPUTE RESOLUTION IN NORTHERN UGANDA – ACHOLILAND

### THE POST-CONFLICT NORTH

Northern Uganda comprises, in part, the sub-regions of Acholi, Lango, and Teso. For the purposes of this study, focus will be on the Acholi sub-region that includes Gulu and Kitgum districts, known collectively as Acholiland (due to the dominance of the Acholi ethnic group numbering over 700,000). This region of Uganda has experienced the longest insurgency on the African continent, one that has devastated the region and spilled over into southern Sudan, eastern Congo, and the Central African Republic.<sup>85</sup> The conflict between Joseph Kony's LRA and the GoU began in 1986 and led to displacement of over 80 percent of the population in the region. An untold death toll, an estimated 30,000 children abducted by rebels to act as soldiers, sex slaves, and carriers, and 1.8 million people living in IDP camps were some of the consequences.<sup>86</sup> The roots of this conflict are manifold and beyond the scope of this research, as are the legacies of related conflicts in the North that extend across the sub-regions and ethnic groups. Nevertheless, it is clear that political mishandling of power, periods of protracted conflict, and the marginalization of ethnic groups, from colonial times to the present, play a significant role determining how dispute resolution is addressed.

After the 23 years of internal conflict between LRA and the UPDF government forces, the justice system in this region faces serious challenges. The Juba Peace talks between the Ugandan government and the LRA began in 2006 and, by the end of 2008, had resulted in the signing of a number of agreements entitled 'Agenda Item 2 on Comprehensive Solutions to the Conflict' and 'Agenda Item 3 on Accountability and Reconciliation', which set a framework for a justice policy in the north. The government has since charged the JLOS with the responsibility of designing a national transitional justice policy. In mid-2008, the third national JLOS forum on transitional justice

85 Tradition in Transition, Beyond Juba Working Paper No. 1, July 2009.

86 Quinn, Joanna R., 'Social Reconstruction in Uganda: The Role of Customary Mechanisms in Transitional Justice', *Human Rights Review*, July 2007.

raised questions on the relationship between the formal and informal accountability mechanisms and how the two systems should and could be integrated to secure lasting peace as is mentioned in the Juba Peace Agreement as well.<sup>87</sup> Although transitional justice is not a focus of this study, it is an integral part of the discussion of justice and the relation between formal justice systems and IJS in this region. How these issues will be handled in a strategy for the north will have an impact on the relation between formal and informal justice in the country as a whole and on national legislation and programmatic initiatives. Some of the issues raised at the national level relating to transitional justice will therefore be included in more detail below.

## JUSTICE SYSTEMS IN THE NORTH

After a longer period of no LRA activity, a tangible peace has descended upon the region and the question of which justice mechanisms – formal, informal, transitional, restorative – should be used to address past and current challenges to justice is a salient one to ensure a durable peace. During the two decades of conflict, atrocities were committed both by the LRA, known for its killings, mutilations, abductions, forced recruitment of children, and sexual violence, and the UPDF, including extrajudicial executions, torture, rape and forcible relocation. More than three quarters of the population in northern Uganda were displaced; many were living in IDP camps for protracted periods. Moreover, a new Acholi generation was born in the camps. This population has known no life outside the camps and many members of it distance themselves from traditional Acholi culture and norms. In 2008 and 2009, as the people in northern Uganda began to return to their homes, the issue of land began to pose a major challenge to peaceful integration back in the Acholi villages. Customary land boundaries (that had never been documented) have become disputed and seen as ‘unresolvable’, as many of the elders who knew the boundary lines were killed during the war. The issue of land will be discussed in-depth in a later section in this study. Northern Uganda is now more stable than neighbouring Karamoja; however, its societal and judicial fabric remains fragile and complex.

The formal justice system had always been inefficient and inaccessible to most of the rural population in this region. However, during the two-decade long conflict with the LRA, the formal system in the north ceased to function all together. Courts closed, as did police posts, and police deployment was limited as a result of an inability of police officers to assure their collective safety. Subsequently, many of the law and order functions became militarized as they were taken up by the UPDF. LC courts also filled the vacuum that was left, and the reliance of the population on LC courts for resolving issues outside their jurisdiction remains apparent today. Even in the IDP camps, it was not uncommon for LC chairpersons to be elected as camp leaders. At the same time, it was not uncommon that elders ‘doubled’ as LC officials.

The resilience of local justice mechanisms to continue functioning during the protracted conflict should not be overlooked. Over the years of chaos, atrocities and lawlessness, LCs remained the one link. It is even argued by some that LC courts remain the ‘backbone of access to justice in war affected areas’. For instance, in Pader District during the war, LC courts were handling 100 percent of disputes. In other areas, the figure was 90 percent.<sup>88</sup> In the transitional process following the war, LCs were accorded ‘more powers’ to help restore order; communities had faith in them and had no formal institutions, including the police, which left them inadequately represented. With relative peace and stability since 2007, the additional powers granted to the LCs are being rolled back.<sup>89</sup> However, the complaints levied against the LCs in today’s post-conflict period, including LCs exceeding their jurisdiction and not following correct procedures, illustrate that the system remains a flawed one. Training has remained the key intervention for improving the quality of LC adjudication and dispute resolution and the MoLG and UNDP have therefore emphasized training programmes for LCs on this region.

87 JLOS, Report on the Third National JLOS Forum – 30 July 30 – 1 August 2008, p. 4.

88 Justice Resources, *Law and Disorder: The Impact of Conflict on Access to Justice in Northern Uganda*, November 2004, p. 31.

89 Interview with OHCHR, Kitgum, October 2009.

The World Bank study on land administration and disputes in the north<sup>90</sup> found a gradual decline in the number of disputes being solved by the clan and family institutions during the period of displacement. This was largely due to the geographical scattering of clan and family head of households and a weakening of the community structure. At the same time, the number of land disputes dealt with by the two lowest levels of LCs increased. The reduction in clan and family cases of land dispute cases declined even further upon IDP returns. LCs, however, continued to receive the same number of cases. At the LC III level, case numbers increased as the system began to function according to its statutory mandate in land disputes. However, the percentage of land disputes being solved through the traditional system remains substantial and the LC system relies on assistance from the traditional system for advice (especially on land boundaries) and as witnesses. The World Bank study therefore recommends that the role of the traditional system as well as the LCs (at all levels) be clarified and properly integrated into the statutory system. Land disputes are one of the areas where the formal justice system often refers cases back to the traditional system and is therefore seen by some as an example that could assist in other areas, especially with regard to the relation between formal and informal justice in transitional justice.<sup>91</sup>

### DISPUTE RESOLUTION BY ACHOLI TRADITIONAL AUTHORITIES

Prior to colonial rule of Uganda, traditional leadership tended to be grouped by family, clan or chiefdom. Such groupings continue to be the organizing social structure today. Identification to one's clan (*kaka*), family (*dogola*) or household (*ot*) is said to remain central to Acholi individual and collective identity.<sup>92</sup> In Acholi, the traditional leadership is organized within an institution called *Ker Kwaro Acholi*, headed by the Acholi paramount chief. A council of traditional leaders is made up of '*Rwodi*' (currently 53 individuals who hold hereditary posts) who elect among them the '*LawiiRwodi*'. The '*LawiiRwodi*', in turn serves as head of traditional authority for his lifetime.<sup>93</sup> By contrast in the Lango community, the traditional authority is organized under the Lango Cultural Foundation and headed by the paramount chief, the '*Won Nyaci*'. In keeping with the norm across Uganda, the paramount chief is a non-hereditary elected post.

While both the Acholi and Langi have elaborate traditional dispute resolution systems, the Acholi system is reportedly the most developed. The systems are both based on the structure and organization of the clans and function alongside the formal justice system. How they are used to settle serious conflict depends on the severity of the violence involved in a specific case. The traditional system, in addition to hearing cases and deciding on verdicts (as in the formal system), will also focus on cleansing and reconciliation. Even in matters involving death, where the perpetrator has been sentenced by the formal system, she or he will still go through a process of cleansing, reconciliation, and payment of fines in the traditional system.<sup>94</sup> During an interview, the Grade I Magistrate in Kitgum explained that the fine imposed for intentional murder is twelve head of cattle, while the fine for unintentional murder is six head of cattle. Most fines for offences according to the traditional system are paid in cattle rather than money. However, with cattle harder to come by in the region, there has been a gradual move towards monetization of the fines.

An Acholi belief in the 'living dead' and divine spirits influences the notions of justice and reconciliation. These spirits ('*jok*') play an important role in the world of the living. They guide the Acholi moral order and, when a wrong is committed, they can bestow misfortune and illness ('*cen*') on the community until the elders take action against

90 World Bank, *Post-conflict Land Policy and Administration Options – The Case of Northern Uganda*, 2009.

91 Interview with Michal Otim, Acholi Elder and Minister in the Cultural Center of Acholi, October 2009.

92 Justice Resources, *Law and Disorder: The Impact of Conflict on Access to Justice in Northern Uganda*, November 2004, p. 31.

93 International Alert, p. 44.

94 World Bank, *Post-conflict Land Policy and Administration Options – The Case of Northern Uganda*, 2009.

the offender.<sup>95</sup> As a consequence, the Acholi discourage troublemaking due to the fact that consequences of misguided actions affect the broader clan or community. There is a strong emphasis on the need to live in harmony with others and maintain good social relations.

As is often cited and analysed by researchers and academics the world over, the Acholi people have a long and vibrant history of traditional customary practices and notions of community justice. Acholi culture promotes traditional conflict resolution through reconciliation ceremonies that involve the acceptance and reintegration of those considered guilty of crimes back to the community. '*Mato oput*' (drinking the bitter herb) is an Acholi mechanism of reconciliation aimed at restoring the relationship between clans that have been affected by either an intentional murder or accidental killing. Typically, this takes place with the slaughtering of a sheep (provided by the offender) and a goat (provided by the victim's relatives); the animals are cut in halves and exchanged by the two clans to share together along with drinking the bitter herb, *oput*. A payment of compensation usually follows, in the form of cows or cash. Many Acholi believe that the *mato oput* process can bring true healing in a way that formal justice cannot, particularly as it does not aim to establish an individual's level of guilt, but rather seeks to restore the social harmony that has been disrupted within the community.<sup>96</sup> The process also involves active participation and deliberation by the entire conflict-affected community and acknowledgement by and forgiveness of the perpetrator of the crime.

Another common ritual is '*Nyono Tong Gueno*' ('stepping on the egg'), a 'cleansing ceremony' traditionally intended to welcome home family members who have been away for an extended period of time. In the current context in northern Uganda, it is performed on those returning from the bush either as ex-combatants or from LRA captivity. An estimated 20 percent of those returning in this way have participated in such traditional practices of their own volition.<sup>97</sup> Other similar ceremonies included '*Monya Kum*' (the cleansing of a body) for persons returning from captivity and '*Mono Piny*' (cleansing of an area), which involves goat sacrifice to appease ancestors and cleansing an area of evil spirits where war-related massacres occurred.<sup>98</sup>

The systems, however, also include a punitive/retributive element with punishments, such as caning, meted out for certain offences. In cases of murder, however, the practices aim at preventing further violence such as revenge killings or mob justice. Again, the focus is therefore on reconciliation (e.g., *mato oput*) and can include the exchange of a girl-child to the victimized clan, where her first-born will be a 'substitute' for the murder victim.<sup>99</sup>

While these practices have come to symbolize the broader system of traditional justice in northern Uganda, it should be underscored that today (given that so many were killed, including elders, in the past 20 years of conflict) traditional linkages have become weaker as the younger generations are not as adherent to tradition and customary laws. Moreover, the fragmentation of communities due to decades of displacement and war has left behind an extremely fragile and eroded social fabric that cannot possibly function or be regulated in the same way it did prior to war.

## MAIN ISSUES RELATING TO THE TRADITIONAL ACHOLI JUSTICE SYSTEM

Despite the prevalent use of *mato oput*, research conducted by Tim Allen found little widespread enthusiasm for it or other similar ceremonies, citing some Acholi people who believed that such public rituals were useless and were only concentrated in urban centres. His research also revealed that other ethnic communities, such as the

95 Patrick Tom, 'The Acholi Traditional Approach to Justice and the War in Northern Uganda', August 2006,

96 Tom, 2006.

97 Erin K. Baines, 'The Haunting of Alice: Local Approaches to Justice and Reconciliation in Northern Uganda', *The International Journal of Transitional Justice*, Vol.1, 2007, p. 113.

98 Ibid.

99 Interview with OHCHR, Kitgum, October 2009.

Langi, Madi, and Itesots, were also dismissive of these rituals in today's context. Allen further asserts that there are inherent problems associated with equating social healing rituals with 'justice' and questions of who has the right and authority to speak for the Acholi people on issues such as rejecting the ICC and the national justice system for *mato oput*.<sup>100</sup>

Concurring, Nakayi argues that a majority of LRA fighters were abducted minors, who neither knew much about Acholi rituals nor experienced them during the two decades of war. In addition, she notes that many non-Acholis live in northern Uganda and have also been greatly affected by the LRA conflict, but have little knowledge of Acholi traditional practice and its relevance to them. She adds that traditional mechanisms are sanctioned by the community and therefore tend to be focused more on the community than on the individual.<sup>101</sup> Acholi notions of forgiveness and reconciliation are indeed central to their culture. Nevertheless, given the types of crimes that a community is faced with after decades of brutal war, this notion of forgiveness and reconciliation is assumed to apply to all individuals in the community. Allen argues that the Acholi's capacity to forgive may be overestimated by researchers, journalists, humanitarian aid agencies, Acholi elders and religious leaders. Moreover, this approach to forgiveness overlooks the nature of personal choice in forgiveness and disregards the idea that some victims may want retributive justice over traditional forgiveness.<sup>102</sup>

This highlights the issue that the scope of informal justice mechanisms may be limited and highly context-specific to each community in Uganda. Informal mechanisms that apply to the Acholi in Kitgum may hold little or no resonance for the Karamojong in Karamoja, nor the Baganda in the Central Region. Even within one community, the Acholis' *mato oput* may be relevant to addressing traditional serious crimes within their society, but perhaps not suitable to apply to 'untraditional' crimes such as the mass atrocities committed by the LRA (not least, it can be argued, because *mato oput* requires acquaintance with perpetrators and their participation in the ceremony, which is often not possible when crimes were committed by LRA members in villages other than their own). On the other hand, national mechanisms and those within the formal justice sector may be more broadly applicable and legally legitimate to post-conflict settings, but can lack *de facto* legitimacy or on-the-ground support. Added to this, the blurred line between perpetrator and victim in wars such as with the LRA, particularly when children are involved, means that criminal trials and a retributive justice mechanism may be inappropriate when taking into account the specifics of this particular conflict. Nevertheless, some argue on the basis of recent studies that, although traditional justice is practiced with variable frequency, it is respected in principle and, given the shortcomings of the formal justice system, is valued in its ability to deliver and its accessibility to the community.<sup>103</sup>

## TRANSITIONAL JUSTICE IN NORTHERN UGANDA AND THE RELATION BETWEEN JUSTICE SYSTEMS

Based on literature reviewed for this study and interviews conducted in Kitgum, a clear divide exists between advocates of traditional mechanisms such as *mato oput* and those who feel it has lost its relevance, especially in northern Uganda's post-conflict context. On the one hand, there are those who believe, given the absence of a strong formal system in Uganda as well as the limited scope of prosecutions such as those under the ICC and the national justice system, that *mato oput* has value in being promoted both as an informal justice and transitional justice mechanism. Others, though, argue that the Acholi traditional approach is inadequate for dealing with cases that involve grave human rights violations and violations of international law. Those who support traditional mechanisms argue that international courts, such as the ICC, do not help in restoring relationships, while

100 Tim Allen, *Trial Justice: The International Criminal Court and the Lord's Resistance Army* (London, New York: Zed Books, 2006) As referenced in Nakayi, 2008, Note 7, p. 167.

101 Rose Nakayi, 'Reaching Out for Justice and Reconciliation in Northern Uganda: The Proposed War Crimes Court and Traditional Justice', University of Notre Dame, Center for Civil and Human Rights, Working Paper No. 5, Winter 2008, p. 23

102 Allen, pp. 129-133.

103 'Tradition in Transition', Beyond Juba Working Paper No. 1, July 2009, p. 5.

traditional justice approaches have played a significant role in reintegration of returnees and former combatants into the community. However, oversimplification of this dichotomous debate with the ICC and international law, on one side, and *mato oput* and traditional systems, on the other, is unhelpful, as it does not provide room for layered responses or the acknowledgement that the various systems of justice are not mutually exclusive. The role of the ordinary national justice system is sometimes forgotten in this discussion. The discussion recently taken up under the JLOS transitional justice sub-committee and the national forum is more nuanced and focuses on how the traditional practices and mechanisms, as they are written into the peace agreement, can complement the national justice system and its structure.

For this to happen on a large scale and to reconcile thousands of perpetrators and victims, modifications would have to be made to the traditional mechanisms. It could be argued that communities lack the capacity to implement such a complex task. However, the government is greatly mistrusted by a majority of the population in northern Uganda and too much government interference in a traditional system runs the risk of threatening local trust and consensus that the informal reconciliation processes rely on to be effective.<sup>104</sup> An integrated approach using a combination of justice mechanisms over a period of time may be one way forward. However, adequate funding, prioritizing and sequencing of this combination would be key to its effectiveness.

Transitional justice does warrant a brief discussion, given that traditional and informal justice mechanisms play a significant role in the peace-building process. The purpose of transitional justice in restoring post-conflict justice, legitimacy and legality, is to allow for processes of acknowledgement, forgiveness and reconciliation to encourage trust and rebuilding of society. Transitional justice mechanisms encompass notions of retribution and punishment such as the use of trials, criminal tribunals, or the ICC, as well as restorative efforts such as truth commissions, use of amnesty, reparations or an apology. Uganda has used a number of transitional justice mechanisms since the NRM, led by President Museveni, came to power. Truth commissions, an amnesty act, the establishment of a specialized war crimes part of the High Court and referral to the ICC – this is a combination that has arguably served to complicate and hinder the peacemaking process and transition within the country.<sup>105</sup> One challenge to the efficacy of using such varied mechanisms in the Ugandan context is that there is a lack of emphasis on the linkages across these justice mechanisms. Rather, each initiative has been seen as having a specific purpose. There is also the question of how much broad local-level involvement has been integrated into these initiatives.

In the case of northern Uganda, transitional justice processes illustrate the challenges to implementing both formal and informal aspects of justice. The unusual use of amnesty in Uganda for LRA members as an incentive to end the war with government forces, coupled with the 2003 ICC referral of the LRA by Museveni, appears to show a contradiction: amnesty was seen as an alternative to retributive methods, while referral to the ICC foresaw criminal investigation and subsequent punishment.<sup>106</sup> As discussed in this section, traditional approaches to dealing with perpetrators of crime focus on the wrongdoing of the individual and the party harmed. They engage in a process of restorative measures and compensation. This clearly is more complicated when multiple individuals are the perpetrators and there are countless victims and affected families.

In the context of northern Uganda, the discussion on how to deal with fragmented and traumatized communities in addressing past atrocities, while ensuring the current safety and security of a population, is an important one. The type of justice that should be applied to perpetrators of crimes during war that allow for a society to move on and heal in a post-conflict context is different than the everyday justice needed for a functioning law and order system within a community. In northern Uganda today, the need for both exists simultaneously. However,

104 Scott Worden, 'The Justice Dilemma in Uganda', USIP Briefing, United States Institute of Peace, February 2008, p. 10.

105 'Peace First, Justice Later: Traditional Justice in Northern Uganda', Refugee Law Project, July 2005, p. 17.

106 Ibid., p. 4

addressing both types of justice needs is complex and requires careful sequencing.<sup>107</sup> During the short stay in Kitgum, it became apparent that the focus of both donors and implementers so far has been on everyday justice and the restoration of law and order. Little headway has been made thus far on how to approach justice for crimes committed during the LRA conflict and donors appear to support differing priorities of what issues need to be prioritized in the region. Long-term stability and societal rebuilding will depend on adequately addressing the latter based on the needs of the communities.

There has been a strong push from the government to develop a national transitional justice strategy, which is currently being drafted under JLOS and is supported by many communities themselves, stemming from commitments delineated in the Juba peace agreement. This process would translate to an eventual national law on IJS, traditional mechanisms and transitional justice processes.

## PROGRAMMING IN NORTHERN UGANDA

In the few years following the end of the LRA conflict, northern Uganda became the recipient of numerous donor and NGO initiatives aimed at addressing the gamut of post-conflict justice issues that remain in the region.

Key initiatives relevant to justice and human rights being undertaken by the UN agencies and programmes include the mass sensitizations on human rights conducted by OHCHR in Kitgum and Gulu regions. The OHCHR is also focused on capacity-building of key stakeholders who play a role in human rights, community policing, human rights investigations, and in the coordination of human rights protection agencies. The OHCHR also conducts human rights investigations in the area through individual cases, community monitoring and detention monitoring. UNICEF and UNFPA are currently working on gender-based violence programming in the region, with a specific focus on post-rape care. UNICEF's program approach for 2010 onwards will focus on access to justice for children as well as transitional justice and reconciliation. In April 2010, UNDP, WFP and WHO launched a Joint Recovery Project in the post-conflict north, with a focus on improved livelihoods, enhanced capacity of local government, and peace-building and conflict prevention.

Other NGO initiatives include that of LAP and FIDA, which provide legal services, primarily in Kitgum and through outreach visits. War Child Canada has a limited legal aid programme. NRC provides legal aid and counselling, especially in relation to land matters. Advocates International gave training to senior Lango cultural leaders on out of court dispute resolution.

Programming implications:

- An immediate need to address land issues in northern Uganda – a key element to a durable peace in the north
- A two-pronged approach should be considered and financially supported that addresses transitional justice and law and order initiatives simultaneously (not prioritizing one at the expense of the other)
- Technical expertise needs to be strengthened in the process of creating a TJ strategy and national law that ensures an adherence to the principles of natural justice, due process and non-discrimination.
- Fact-finding and analysis of the traditional value systems and how they square with human rights principles is essential (OHCHR has already started discussions on this initiative).
- Effective programming initiatives are needed to address the police challenges to fulfilling their mandate for cases outside LC jurisdiction.
- Direct monitoring and evaluation and impact analysis of programming are essential.

<sup>107</sup> See Refugee Law Project Working Paper, No 17., 2005, which argues that peace needs to come before justice, examining traditional justice mechanisms in northern Uganda.

## DISPUTE RESOLUTION IN NORTHEAST UGANDA – KARAMOJA

Karamoja, situated in the northeast of Uganda bordering Sudan and Kenya, is an arid, sparsely populated region. Karamoja comprises five districts: Kaabong, Abim, Kotido, Moroto, and Nakapiripirit, spread over a 27,900-square-kilometre territory with a population of just over one million.<sup>108</sup> Economically and politically marginalized throughout its history, Karamoja is widely perceived by the rest of Uganda as a place of perpetual insecurity, lawlessness, marauding warriors, weapons, and cattle raiding. Much of these perceptions stem from a lack of understanding of the Karamojong context and the history of this extremely isolated part of the country. The Karamojong ethnic group dominates Karamoja's population. Unique to this area are the predominance of pastoralism and agro-pastoralism as livelihood methods and the characteristic movement of its population. Until recently, Karamoja has been sidelined by the government, thus remaining underfunded and underdeveloped relative to the rest of the country. An estimated 82 percent of the population of Karamoja live in poverty; the 'global acute malnutrition' (GAM) rate is 15.9 percent, well above the international emergency threshold of 10 percent.<sup>109</sup> Since 2008, President Museveni's government has devoted more attention to Karamoja. This section of the study on Karamoja is one that represents a region with a prevailing dominance of informal justice and thus provides a rich contribution to the complex discussion of bridging the formal and informal mechanisms of justice.

### THE JUSTICE CONTEXT IN KARAMOJA

The historical and socio-political context of the people of Karamoja informs the reasons why and how informal justice plays such a dominant role in the region. Throughout its history, Karamoja has never fit into the Ugandan political structure or national identity. The Karamojong see outsiders as responsible for the conflict and insecurity that has plagued the region since Uganda's colonial period. On the other hand, given the prevalence of cattle raiding among pastoral groups that has existed for generations,<sup>110</sup> underpinning the regional insecurity, there are those within Karamoja who also bear primary responsibility for contributing to the volatility of security and livelihoods of the Karamojong.<sup>111</sup>

In 1911, Karamoja was declared a closed region by British colonial administrators who found it difficult to maintain law and order; thereafter, the administrators were "able to plunder and repress the local residents at will."<sup>112</sup> Karamoja was once again declared a closed district between 1930 and 1960<sup>113</sup> by the government and has consistently been regarded as separate and lagging behind the rest of the Uganda. Under Idi Amin's reign in the 1970s, the Karamojong were forced to wear Western dress and to disarm, leaving them socially vulnerable and unable to protect their cattle.<sup>114</sup> The flow of weapons from Sudan and the fall of the Amin regime led to the region becoming awash in small arms and light weapons, with the Karamojong substituting guns for their traditional weapons, and an escalation of cattle raiding. Since the Museveni-led NRM came to power in 1986, attempts have been made to

108 OCHA- Office of the Prime Minister, 'Joint Fact Sheet on Karamoja: Humanitarian and Development Realities in the Region', April 2008.  
109 Ibid.

110 Traditionally, raided cattle were used to redistribute wealth and food, acquire bridewealth, and form alliances across families and communities. See Knighton op. cit.: Kennedy Agade Mkutu, 'Small Arms and Light Weapons among Pastoral Groups in the Kenya-Uganda Area', *African Affairs* 106 – No. 102, 2006, pp. 47-70.

111 Elizabeth Stites and Darlington Akabwai. *Changing Roles, Shifting Risks: Livelihood Impacts of Disarmament in Karamoja, Uganda*, Feinstein International Center, July 2009, p. 9.

112 Charles Emunyu Ocan, 'Pastoral Crisis in Northeastern Uganda: The Changing Significance of Cattle Raids', CBR Working Paper No. 21, June 1992, p. 10.

113 For example, under the 1958 'Special Regions (Karamoja) Ordinance Act', the provincial commission had the power to declare any section of the region a 'prohibited area' closing movement of cattle and humans, subject to collective fines if violated. (This act was repealed in 1961).

114 Frank Emmanuel Muhereza, Deborah Ossiya and Irene Ovonji-Odida. *Options for Enhancing Access to Justice, and Improving Administration of Law and Order in Karamoja*. HUGGO and LABF Report, 2008, p. 12.



'restore law and order' in the region. Instead, such attempts were met with resistance from the Karamojong, which only served to increase lawlessness.<sup>115</sup> The creation of a Ministry of Karamoja Affairs with the president's wife, Janet Museveni, being appointed as minister, has meant that more attention is being given to Karamoja and the overall security of the region is currently more stable relative to previous years.

During its periods of confinement as a closed region, the Karamojong evolved their own traditional system of governance and administration that was intended to "ensure social harmony and collective survival in extremely hostile economic, political and ecological conditions."<sup>116</sup> IJS continue to be preferred by the Karamojong, who generally view the Ugandan government as both ruthless and unresponsive to their needs. As mentioned, this structure emerged largely from the fact that a complete lack of a formal justice infrastructure existed for many decades, during which informal mechanisms were predominantly used to solve problems.

## TRADITIONAL AUTHORITIES

Within the Karamojong, the main responsibility for maintaining justice falls upon the traditional council of elders, known as the 'akiriket'. There are four kinds of *akiriket*, each serving a different purpose: a spiritual/ceremonial *akiriket*, and three 'sub-*akirikets*' (a fortune-telling *akiriket*, one for punishment, and one for offerings/appeasement). The frequency with which the respective *akirikets* convene varies from every few years (ceremonial *akirikets*) to as frequently as needed (punishment *akirikets*). There is a generational hierarchy within the Karamojong that divides the community among the senior elders (the 'mountains'), the elders (the 'gazelles') and the younger generation (the 'rats'). *Akirikets* are composed of 'mountains' and 'gazelles' only. The convening of the *akiriket* is typically done under a tree specifically designated for this purpose.

In addition, the '*ekokwa*', a more formal community court, meets on an *ad hoc* basis when needed to determine matters of justice. The traditional system in Karamoja is such that the equivalent of all the various levels of the formal courts system of magistrates' courts and the High Court are fused into one, the *ekokwa*, and convene at the same time and place.<sup>117</sup> The *ekokwa* provides a medium through which punishment by senior elders is decided and meted out for errant behaviour committed by a member of the community. The traditional court also enforces decisions it has sanctioned for implementation. When the *ekokwa* is convened, it acts as a tribunal and trial court, handling cases on such matters as murder, defilement, theft, and adultery. This traditional court also has the power to carry out investigations and to enforce decisions it has sanctioned for implementation.

## THE APPLICATION OF INFORMAL JUSTICE IN KARAMOJA

The need for justice is encapsulated in the traditional community beliefs in vicarious liability and collective punishment, which exist across traditional justice mechanisms in most Karamojong ethnic groups. Punishment of a crime rather than an individual who commits a crime is practiced among Karamojong communities. This means collective punishment may be meted out to an entire village (after a cattle raid, for example), serving the purpose of collective atonement for wrongs committed. An individual who has committed a crime is considered unclean. Until that person is cleansed, typically through a traditional ceremony and/or animal sacrifice, the community will avoid association with the person and the 'conflict' will remain unsolved. In such instances, retributive methods such as imprisonment would not be appropriate from the community's point of view.

Interviews and focus group discussions conducted for this study provided insight into how informal justice is applied in Karamoja. As mentioned, it is typically the council of elders (*akiriket*) or the community court (*ekokwa*) that metes out justice in the community on an *ad hoc* basis for cases that range from verbal abuse against parents by their children, to rape, defilement, or murder cases.

<sup>115</sup> HUGGO and LABF Report, pp. 12-13.

<sup>116</sup> Ibid.

<sup>117</sup> Options for Enhancing Access to Justice, and Improving Administration of Law and Order in Karamoja.

Minor offences are usually dealt with using public corporal punishment. In one example, two boys in the village who had engaged in a physical fight were brought to the elders for traditional disciplining. The elders made them collect reeds from the river with which they were subsequently whipped as punishment.<sup>118</sup> Stealing is usually punished by being beaten, caned, or whipped by the elders or youth of the community in public. The perpetrator may also be required to kill a bull that is then shared with the community. Often the perpetrator is also smeared in chyme from the animal as a way to ward off bad omens, or is required to eat certain organs of the animal, lest the community become cursed.

The typical punishment for committing adultery, either by a man or women, is a fine of 60 cows. However, given the severe drought and famine conditions in recent times, most people do not have this many, if any, cows and therefore a new system of compensation has recently been decided by the elders. A debt system instituted meant that the cows owed can now be paid back in the future during more prosperous times.

According to elder *akiriket* members, rape cases brought to traditional authorities are typically dealt with in one of two ways: in cases of 'courtship/engagement rape', there is no punishment for the perpetrator with the agreement that he is required to marry the girl he raped. For cases of 'rape by a non-acquaintance', if the accused admits guilt for the rape, he is fined and caned by the elders. He is then required to collect alcohol for the elders and kill a bull. In addition, the perpetrator's family would be required to give 10 to 15 cows to the victim's family. If the accused claims innocence, the traditional authorities may consider taking the case to the LC I, LC III or even the police; the elders explained they want to abide by the law and occasionally try to use the formal system.<sup>119</sup> In another case, involving the rape of a married woman, youth from the village were sent to track down the perpetrator, who was brought back to the village and severely beaten. He was then required to kill a bull as punishment and to take a large ram and a bag of 'snuff' (tobacco) to the parents of the victim to ask for forgiveness, after which the case was considered solved.<sup>120</sup>

Traditional punishment for murder is a sentence of death for the perpetrator. The death sentence can be carried out in three ways: (1) during the rainy season, the perpetrator is taken to a river and drowned; (2) hanging by rope from a tree, or (3) beating to death of the perpetrator by his/her family. The latter is reserved for repeat offenders and is seen as punishment given to benefit the clan as a whole by ridding the community of a troublemaker.<sup>121</sup> This 'eye-for-an-eye' philosophy for murder is considered 'just' both as a retributive punishment for a crime committed and as a way to protect the community from future crimes that would have been committed by that same perpetrator. It is also seen as an effective deterrent mechanism for others who may potentially commit offences.

Despite the traditionally powerful position *akiriket* elders have held in administering IJS, elders reported problems with youth in their communities who increasingly do not respect or abide by the justice administered by the elders. This may be one reason why not all cases are reported to the traditional authorities. One participant of a youth focus group in this study provided an example of settling a murder case without involving the traditional authorities. In this case, an intoxicated man shot at three youths from the village, killing one of them. The two who survived reported the incident to the family of the deceased youth, who in turn went to the family of the perpetrator and confiscated 150 cows; the family kept 60 of the cows, which they considered just compensation for the life of their son, and returned the remaining cows to the perpetrator's family. This case was then considered settled.<sup>122</sup>

In a case that illustrates the conflict between traditional and formal justice, a youth was given the death penalty by the traditional authorities for committing a rape in the community. Upon his death, his family reported the case

118 Female focus group discussion, Lpoutiput Village, Badunget sub-county, Moroto (24 October 2009).

119 Elders focus group discussion, Lokilala Village, Nadunget sub-county, Moroto (24 October 2009).

120 Ibid.

121 Ibid.

122 Youth focus group discussion, Lokilala Village, Nadunget sub-county, Moroto (24 October 2009).

to the police, who then arrested elders of the *akiriket*, intending to take them to court. However, the elders were subsequently freed, as they reportedly paid the family of perpetrator who had been killed.<sup>123</sup>

At the time of this research, ‘peace talks’ were taking place between three tribes, the Bokora, Jie, and Mathenik, which have had a long-standing adversarial relationship largely due to cattle raiding. The talks were sponsored by two local NGOs, and women, youth, and elders from all three ethnic groups participated. The talks resulted in a ‘resolution’ passed that allowed for joint grazing of cattle in the carrels, exchange visits among the three communities to strengthen relations (in particular for events such as weddings) and, finally, a resolution for punishment for anyone caught cattle raiding. It was decided that the punishment for getting caught in the act would be death. This severe punishment was agreed to largely because cattle raids continue to be a major livelihood and security issue in Karamoja and this was considered to be useful as a deterrent mechanism.<sup>124</sup>

In the communities interviewed, the perception toward police and the formal justice system was extremely negative. The focus group held with the elders, all of whom were part of the *akiriket*, included one respondent who said that ‘human rights protects thieves’ because the use of formal justice failed to address their security needs and those who were put in jail on remand rarely saw their day in court.<sup>125</sup> Their frustration with the corruption inherent in the system, coupled with the lack of effective policing and protection against cattle raiders and warriors with guns, had led them to reject the formal justice system altogether. Women respondents said they knew that murder or cases involving severe injuries should be reported to the police, but maintained they did not do this because the process involved took too long and they preferred to settle these issues among themselves.

## FORMAL JUSTICE IN KARAMOJA

A high percentage of the population in Karamoja has little understanding or access to the formal justice system and is generally poorly informed of its rights. The High Court is located in Moroto, which is geographically inaccessible to most Karamojong. There is also no magistrate judge based in Moroto; therefore, few cases are taken up and then only infrequently. The general perception is that, if the Karamojong opt to use the formal justice system, they tend to do so for its retributive aspects. They therefore become frustrated with the system when there is no outcome or if a perpetrator is set free. Within the formal justice structure, a number of Karamojong interviewed prefer the military court, which, although it lacks transparency, has a higher incidence of sentencing those who come before it and is therefore perceived as more efficient. The LC court system exists in Karamoja. However, it does not play as important a role in justice provision in the region, relative to more urban areas. The elders remain the dominant hand in administering justice. In Karamoja, for example, the LC I most often sits in consultation with the elders when cases are brought to him.

Given the ongoing tenuous security situation in the region until 2009, most aid agencies, NGOs, and programme initiatives had avoided operations in Karamoja. However, with phase III of a mandatory disarmament process in place since 2006, and increased government engagement in policing and security in the region, more donors have been shifting their work to this part of the country. This has meant that, in the past year, donor attention and resources previously diverted to conflict-ridden Kitgum and Gulu in the north are now beginning to flow to Karamoja.

## PROGRAMMING IN NORTHEAST UGANDA

The needs of the region are manifold and many of them are acute. Key among them is the basic need for survival in a climate that is harsh, a geography that is remote, and an ongoing period of drought and hunger that exacerbates cattle raiding and road ambushes. UNDP has initiated five broad projects in the region aimed at promoting

123 Interview with Patrick Osekeny, UNFPA Office, Karamoja.

124 Elders focus group discussion, Lokilala Village, Nadunget sub-county, Moroto (24 October 2009).

125 Ibid.

livelihoods, income generation for women and youth, capacity building of local government, infrastructure development, peace-building, and cross-border Sudanese and Kenyan dialogue. UN agencies such as UNFPA and UNICEF are addressing the challenges that women and children face in Karamoja associated with polygamy, bride price, domestic violence and lack of access to education. There are also NGOs working in the areas of water and sanitation and veterinary medicine.

As mentioned, President Museveni's wife has also been appointed a special minister to Karamoja, drawing increased attention to the previously politically ignored region. On the government side, initiatives for the region include the Karamoja Integrated Disarmament and Development Program (KIDDP), operating out of the Office of the Prime Minister and the Minister of Karamoja Affairs. This is supported by Danida's Human Rights and Good Governance Program. Among its objectives are the strengthening of traditional cultural institutions and the implementation of the legislative and judicial powers of local Karamoja governance.

With a recent increase in military and police presence (including a Special Police Constabulary) in the region, the Government of Uganda has signalled an interest in treating Karamoja as part of Uganda after many years of disengagement.

Programming implications:

- There is a need to adopt programming approaches specific to Karamoja – the region should be considered not just as a part of Uganda (in that it deserves government attention and resources), but also as a special case, given its history, remoteness and specific ethnic and cultural demography. Ideally, programming should be based on initiatives that come from the Karamojong themselves, rather than decided at the national level or determined by donors.
- The sequencing of program initiatives is essential to this region of Uganda; focusing on IJS programming in itself without regard to the context of what may be most needed – such as immediate access to food and livelihoods – would be short-sighted and would undermine the effectiveness of any engagement with IJS. As a result, programming recommendations here include non-IJS and non-justice elements.
- Integrating a focus on livelihoods into programming is key for the immediate term in Karamoja, considering that basic human needs for survival are barely being met among the population. This, of course, links to peace, security and justice issues. A focus on livelihoods can lead to a discussion of justice provision in relation to these livelihood issues.
- There is a need to thoroughly document existing IJS in Karamoja in order to inform justice-related programmes in the future.
- Peace-building opportunities and intervention need to be seized upon now, given the relative, though extremely tenuous, stability that has prevailed since 2009.
- The issue of education, especially of girls (who are often stigmatized if they go to school), needs to be addressed. Human resources (and thereby capacity-building in general) are a problem in the region due to extremely low literacy and education.
- Building of needed infrastructure should also be linked with capacity-building of human resources.
- Disarmament alone is not the key to improved security; there is a need for programs to address the underlying causes of what purposes weapons serve in Karamojong society.
- Improving the effectiveness of policing and building community trust in Karamoja is also key.
- Although programming should emphasize a holistic approach, replication among donors and agencies should be avoided and therefore it is perhaps best that each agency focus on one specific area of intervention in coordination with other actors.

- Local solutions and gradual change. How to improve and change the life of the Karamojong without endangering their cultural and societal integrity should be a central consideration.
- Sexual and gender-based violence is a serious problem in Karamoja, and since programming interventions are just starting there, such initiatives including sensitizations should be prioritized.

## WOMEN AND CHILDREN

Uganda is signatory to all relevant international conventions on women and children. Article 31 of Uganda's Constitution delineates women's rights at the national level. Children's rights and freedoms are also recognized in the Constitution and specifically in the Children Act. Normatively, women and children have recognized rights in Uganda drawn from various legal instruments and its Constitution is credited for being one of the most gender-sensitive on the African continent.<sup>126</sup> However, in practice these rights continue to be undermined by factors such as harmful cultural practices, internal conflicts, poverty, and patriarchal power structures.<sup>127</sup> As with many pastoral communities, insecurity plays a major role in undermining women and children's rights, freedoms and prospects. In Uganda, the threats to women and children arguably are most acute in the north and north-eastern regions, due to the history of conflict as well as threatened livelihoods. These contexts continue to directly affect vulnerable groups.

A discussion on women and children in IJS is useful in illustrating the complexity of implementing policy and developing effective programming within such differing cultural and societal contexts. As mentioned, gender inequality is prominent in Uganda, despite its progressive constitution and legal framework for protection for women and children. Lack of implementation of laws relating to women's and children's rights means that assurance of these rights remains elusive for the majority in Uganda.

### LEGISLATION RELATING TO WOMEN AND INFORMAL JUSTICE

Uganda's Domestic Relations Bill is aimed at consolidating all national laws relating to marriage, separation and divorce, as well as marital rights and duties. The bill addresses issues such as the age of marriage and the right to negotiate sex, adultery, and marital rape. The Domestic Relations Bill would set the minimum age of marriage at 18, prohibit female genital mutilation (FGM), and criminalize marital rape and widow inheritance.<sup>128</sup> It remains a controversial piece of (proposed) legislation due to its challenging of traditional and cultural norms, in particular those relating to marriage and domestic violence. Officially drafted in 1987, a revised version that included provisions on polygamy was put before Parliament in 2003. The bill was rejected by Parliament that year and again in 2008. The bill remains in draft form largely due to strong opposition from religious and traditional leaders, as well as some government officials; President Museveni, for example, stated in 2006 that the bill "was not urgently needed".<sup>129</sup> Renewed efforts by civil society advocating for speedy adoption of the bill were made in 2009, but have so far been unsuccessful.

Although this controversial amalgamation of laws, essential to ensuring the full realization of rights for women in Uganda remains in draft form, several individual pieces of legislation pertaining to women's rights particularly in the context of traditional customs and practice exist. Uganda is a majority Christian country, yet has a significant Muslim population. The issue of application of Islamic *Shari'ah* law, alongside customary law, is much debated in the country, particularly concerning proposals that legislation governing Christian, Hindu, and traditional marriages should not apply to Muslim marriages.

126 Birabwa-Nsubuga, Christine, *Women Under Customary Marriage in Uganda: A Critical Look at Their Property Rights at Dissolution*, Danish Institute for Human Rights, 2006, p. 14.

127 'Social Justice Amidst Complex Realities: Protecting the Rights of Children and Women in a Traditional Pastoral Community – The Case of the Pokot in Northeastern Uganda', Transcultural Psychological Organization Report for Dan Church Aid, 2008, p. 15.

128 The practice of a woman being inherited by a member of her husband's family, should he die.

129 'Uganda: Domestic Relations Bill Would Save Lives', Human Rights Watch May 31, 2005. Online: <http://www.hrw.org/en/news/2005/05/30/uganda-domestic-relations-bill-would-save-live>

## CUSTOMARY MARRIAGE

The Customary Marriage (Registration) Act from 1973 defines customary marriage as “a marriage celebrated according to the rites of an African community and one of the parties to which is a member of that community”.<sup>130</sup> Section 2(4) of the Act states that customary marriages may be polygamous. Under Section 11 of the same Act, the age for customary marriage is 16 years for a female and 18 years for a male. Marriages of children under these ages are void. Section 32 states that, if either party is under the age of 21, “the written consent of the father, or if he is dead or of unsound mind, of the mother, or if both are dead or of unsound mind, of the guardian of the party, must be produced [and] annexed to the affidavit as aforesaid before a licence can be granted or a certificate issued”. In practice, there may sometimes be a misunderstanding on the part of some families and officials that Section 32 allows fathers to override the minimum age for marriage as set out in Section 11. Parties to a customary marriage are required to register their marriage within six months of having their marriage ceremony or they are considered to commit an offence and are liable for a fine up to 500 Ugandan shillings.<sup>131</sup>

## BRIDE PRICE

A 2007 court case to abolish bride price, a standard component of customary marriage in Uganda, was rejected in 2010 by a four-to-one ruling by Uganda’s Constitutional Court.<sup>132</sup> By ruling in favour of bride price, the practice in which the groom and his family pay an amount in property (typically cattle), wealth, or money to the bride’s family in exchange for her hand in marriage, remains legally protected in Uganda. This includes the requirement of the return of a bride price to the husband in cases of divorce or dissolution of the marriage. The women’s rights NGO, Mifumi, that had submitted the case before the court argues that the practice violates the Ugandan Constitution guaranteeing the equal status of women in society and is degrading to women and that the demand for return of bride price as a condition for divorce causes domestic violence.<sup>133</sup> The Ugandan government and the international community have recognized that bride price, in the absence of the right to refuse on the part of the wife, is a form of slavery that should be abolished.<sup>134</sup> The draft Domestic Relations Bill does not prohibit the payment of a bride price, but such payments would no longer be essential for formalization of customary marriages and demands for return of ‘marriage gifts’ would be considered an offence.<sup>135</sup> The Domestic Relations Bill also attempts to address the issue of full consent by the bride for marriage, thereby helping reduce the cases of women and girls sold for bride price by their parents.

During this research, a rare customary marriage ceremony was observed<sup>136</sup> in Karamoja between a Karamojong warrior and his bride, who was to become his fourth wife. A significant part of the ceremony involved continued negotiation about cattle for the bride’s family, which had previously been established at a bride price of 86 head of cattle. The bride did not participate in the negotiation and was not seen during the ceremony. Her family carried out the negotiations of bride price; only when this was agreed to did the marriage officially proceed.

130 Part 1(1) Customary Marriage (Registration) Act, 1973, Chapter 248. Ugandan Legal Information Institute

131 Ibid.

132 ‘Uganda: Constitutional Court Rules in Favour of Bride Price’, 27 March 2010: <http://www.allAfrica.com>

133 Research findings show that 60 percent of those interviewed wanted reform of the bride price custom, while 28 percent wanted to abolish the practice altogether. The vast majority of respondents believed there was a connection between bride price and domestic violence. (Bride Price Roundtable on Constitutional Petition, Uganda, May 2009.)

134 See Supplementary Convention on the Abolition of Slavery, the Slave Trade, and Institutions and Practices Similar to Slavery, acceded to by Uganda in 1964. Cited from Von Struensee, p. 20.

135 Vanessa Von Struensee, ‘The Domestic Relations Bill in Uganda: Potential For Addressing Polygamy, Bride Price, Cohabitation, Marital Rape, Widow Inheritance, and Female Genital Mutilation’, 2008.

136 Customary wedding ceremonies are reportedly seldom held today in Karamoja because most Karamojong men cannot afford the bride price required; there are few cattle to give due to the continued severe drought and the cattle-raiding problem.

## POLYGAMY

Polygamy is a common and legally recognized practice in Uganda and permitted for customary and Muslim marriages. Under Islamic law, a man is entitled to marry up to four wives. With the commercialization of marriage and the required practice of bride price, having multiple wives is often considered a sign of wealth for a man. For a woman, the practice of polygamy is often accompanied by the absence of equitable means for justly allocating the respective interests among a polygamous man's wives, often leading to violations of such rights as the right to inheritance and property rights. The Domestic Relations Bill proposes that polygamy would remain legal in Uganda, but would be strictly regulated by guidelines set out in the bill restricting a man to two wives and requiring the economic support for all wives, as well as providing for equal sexual rights and more equitable grounds for divorce.<sup>137</sup>

## CHILD MARRIAGE

Under customary law in Uganda, the age for marriage is 16 for a female and 18 for a male. In Islamic marriages, girls can marry upon reaching puberty, at around 13 years of age.<sup>138</sup> The Domestic Relations Bill would ban child marriages and require that parties for marriage be a minimum of 18 years of age; this would apply to males and females and to civil, customary and Islamic unions.<sup>139</sup> Parents are known in some cases to force their daughters out of school into child marriage to raise income from the bride price. Economic circumstances reportedly force girls to marry at a significantly younger age than was traditionally the norm.<sup>140</sup> The risk of teenage pregnancy outside of marriage is of course also a factor. The issues of marriage age and of child marriage in this regard are linked to the law surrounding defilement.

## INHERITANCE

The Succession Act dictates the legal mechanisms for inheritance in Uganda. Under this Act, women's rights to inherit from their husbands and fathers are recognized. However, these inheritance rights are not equal to those of men.<sup>141</sup> The legally married wife and children of a deceased person can continue to occupy the house and farm the land, although they do not have the right to control or sell the property and, if a widow were to remarry, her occupancy rights would cease. According to Section 28(1) of the current inheritance law, 75 percent of a deceased's estate goes to the children and 15 percent goes to the wife.<sup>142</sup> In cases when a woman is part of a polygamous marriage, she will inherit even less because all the wives are required to share the inheritance. Inheritance matters are typically decided on an *ad hoc* basis or according to customary law. Forceful evictions of women (and their children) from their homes after their husbands' deaths is reportedly common in Uganda. Typically, these decisions are made by tribal or religious leaders who are not aware of the formal legal system. This provides one reason why statutory laws such as the Succession Act are often not implemented in practice.<sup>143</sup>

Uganda has a Muslim population of 12 percent and Islamic law plays a substantial role in the lives of many Ugandan women. Islamic law, as interpreted in Uganda, affords women fewer inheritance rights than men; a widow with children is only entitled to one eighth of her deceased husband's property.<sup>144</sup> In addition, while both male and

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137 Ibid.

138 Von Sruensee, p. 5.

139 Ibid.

140 'Giving Out Their Daughters for their Survival', Refugee Law Project Working Paper No. 20. April 2007, p. 44.

141 'Inheritance Legal Mechanisms' FAO Uganda Country report, Gender and Land Rights Database: <http://www.fao.org/gender/landrights/report>

142 Ibid.

143 Rachel C. Loftspring, 'Inheritance Rights in Uganda: How Equal Inheritance Rights Would Reduce Poverty and Decrease the Spread of HIV/AIDS in Uganda', 2007, p. 262.

144 Ibid., p. 266.

female children can inherit property, boys are entitled to receive twice as much as girls. The difference in treatment is justified by its upholders as reflecting the different responsibilities of men and women towards their families. The question of inheritance rights in Islamic law is discussed in other case studies, including on Niger.

## PROPERTY-GRABBING

As in many other African countries, property-grabbing in Uganda is a widespread problem. Property-grabbing is a customary practice whereby, upon a man's death (typically during the mourning period when the family comes together), his relatives literally grab his property for their own. This includes property that the husband had before marriage and the property acquired by the husband and wife together. Under customary law, property and labour belong to the entire family and 'women, as property, cannot own property'.<sup>145</sup> The practice of property-grabbing often leaves a widow evicted from her home, with no means to provide for herself or her children. This is especially a problem for women and children who are affected by the stigma surrounding HIV/AIDS; families affected by AIDS-related deaths and especially AIDS orphans are vulnerable to property-grabbing.<sup>146</sup> Orphans often have no one to defend their inheritance rights and dispossession of widows and their children is widespread, due to patrilineal inheritance customs in much of sub-Saharan Africa.<sup>147</sup> The pluralistic legal systems that exist in Uganda have tolerated customary norms that limit or simply deny property and inheritance rights of women and their children. The problem is exacerbated where the sense of obligation towards the widow's upkeep on the part of the deceased husband's family, which was traditionally recognized in custom, has broken down. This problem of property-grabbing has been documented in both poor and wealthy families in Uganda.<sup>148</sup>

## ACCESS TO PROPERTY AND LAND FOR WOMEN AND CHILDREN

Ensuring the protection of women's and children's rights in practice is a challenge in Uganda. Traditional systems that provided some (though generally unequal compared to that of men) protection of women's claims to property and welfare in family structures have been weakened by social change and greater individualism, while 'modern' state-based systems have not been able to take over. The inaccessibility (in geographical, cost and culture terms), bias, and corruption in the state courts make it difficult to claim rights to property that are protected by statutory law. Other agencies of the legal system, such as the police, are also failing to protect these rights. Once again, this demonstrates that traditional authorities and dispute resolution mechanisms are important to work with to protect women's and children's rights. However, given the existing bias against women and children in the traditional system and the weakening role of traditional authorities and customs that would have given some protection to women's interests today, it is clear that state courts and statutory bodies have an important role to play as well.

Research shows that the measures of protection in the statutory laws of property and land upon succession for vulnerable groups, including widows and orphans are largely undermined by exemptions for property and land held under customary tenure.<sup>149</sup> State courts in Uganda often apply a conservative understanding of customary law as a natural and fixed social order rather than take a progressive and dynamic approach. The courts are quick

<sup>145</sup> Ibid., p. 257.

<sup>146</sup> Duncan McPherson, 'Property-grabbing and Africa's Orphaned Generation: A Legal Analysis of the HIV/AIDS Pandemic for Inheritance by Orphaned Children in Uganda, Kenya, Zambia and Malawi'. Online at [www.law.utoronto.ca/documents/ihrp/HIV\\_mcperson.doc](http://www.law.utoronto.ca/documents/ihrp/HIV_mcperson.doc)

<sup>147</sup> Birte Scholz and Mayra Gomez, *Bringing Equality Home—Promoting and Protecting the Inheritance Rights of Women: A Survey of Law and Practice in Sub-Saharan Africa*, Geneva: Centre on Housing Rights and Evictions, 2004.

<sup>148</sup> Ibid.

<sup>149</sup> See, for example, Duncan McPherson, 'Property-grabbing and Africa's Orphaned Generation: A Legal Analysis of the HIV/AIDS Pandemic for Inheritance by Orphaned Children in Uganda, Kenya, Zambia and Malawi', online at [http://www.law.utoronto.ca/documents/ihrp/HIV\\_mcperson.doc](http://www.law.utoronto.ca/documents/ihrp/HIV_mcperson.doc) and Christine Birabwa-Nsubuga, *Women under Customary Marriage in Uganda: A Critical Look at Their Property Rights at Dissolution*, Danish Institute for Human Rights, Research Partnership 2/2006.



to cite custom to promote male authority over land. Birabwa-Nsubuga cites a High Court judgement overruling four lower courts in which it was argued that the children could not inherit land given to their deceased mother by their father as it could never have been owned by her – only entrusted in her to use for the family’s benefit. It would therefore have to revert to the father.<sup>150</sup> This view is supported by a view of women as ‘property’ through the payment of bride price. Birabwa-Nsubuga cites both respondents from her case studies as well as a judgement from a chief magistrate stating that a man can sell off land as he sees fit according to customary law, as both the land and the wife are the property of the man.<sup>151</sup>

However, as many point out, changing laws to ensure the rights of women and children in relation to inheritance and succession regardless of custom can cause potential tension and conflict because it potentially undermines the power and influence of traditional and local leaders. Alienating traditional authorities can have the opposite effect, as they often offer the only viable avenue for relief and protection available to the majority of vulnerable groups who are threatened by land-grabbing or have their access to land and property limited. World Bank research carried out in the Teso, Lango, and Acholi regions of northern Uganda concludes that the best way to encourage property rights reform in sub-Saharan Africa, including tenure security for women, is to build on customary property systems, not to try to overrule them with statutory regimes.<sup>152</sup> Others doubt that changes to customary local norms rooted in patriarchy can be achieved without pressure from a statutory regime: “Given that African legislators tend to be sympathetic to the patriarchal values that infuse their societies, and customary leaders are a powerful lobby, it has proven very difficult to pass statutory reforms to protect the property of widows and (especially girl) children.” In 1998, for example, women’s groups in Uganda engaged in intense lobbying to have a clause requiring spousal co-ownership of land included in proposed land legislation. These activists succeeded in eliciting a promise from the government to include the clause, only to see it removed in a last-minute parliamentary debate.<sup>153</sup>

The move towards privatization and the implementation of a national land titling system has been accompanied by a sense of increased individualization of ownership. Arguably, the protection of women’s use of land under the customary tenure has not been replaced by other protection systems; titles are typically held by men through the patrilineal line of inheritance, simply maintaining unequal gender power relations that already exist. Recommendations emerging from research into land and property-grabbing issues in Uganda (and other sub-Saharan African countries) indicate a need to both emphasize and maintain a role for traditional and local leaders. This applies to both the administration of land as well as dispute resolution. Legislation should also insist on minimum protections for children and spouses to all types of property. Sensitization and information of statutory laws can also assist in slowly changing the customs and practices by traditional and local leaders, given the relatively dynamic character of the unwritten norms and approaches to decision-making.

A general lack of knowledge of land and property rights and how to claim them amongst people is mentioned as a factor contributing to and exacerbating issues relating to access to land and property for vulnerable populations. The studies referenced in this section all indicate that few, including LC I courts, have any knowledge either of the law or about such built-in protection mechanisms as the consent clause. Even misconceptions such as regarding registration and titling as potential means of land-grabbing are very common.<sup>154</sup> A later section of this study will further address the complex and problematic issue of land in Uganda as it relates to IJS.

150 Christine Birabwa-Nsubuga, *Women under Customary Marriage in Uganda: A Critical Look at Their Property Rights at Dissolution*, Danish Institute for Human Rights, Research Partnership 2/2006, pp. 30-31.

151 *Ibid.*, p. 34.

152 *Post-conflict Land Policy and Administration Options*, World Bank Report No. 46110-UG, May 2009.

153 Ann Whitehead and Dzodzi Tsikata, ‘Policy Discourses on Women’s Land Rights in Sub-Saharan Africa: The Implications of the Return to the Customary’, 3 *Journal of Agrarian Change* 67, 2004, pp. 89, 101, & 104.

154 *Post-conflict Land Policy and Administration Options*, World Bank Report No. 46110-UG, May 2009.

## VIOLENCE AGAINST WOMEN

The widespread violence against women in Uganda takes various forms, including domestic violence (DV), sexual and gender-based violence (SGBV), and female genital mutilation (FGM). Legal redress for female survivors of such crimes is limited; the slow process of law reform, delays in the formal justice system, limited gender capacity across criminal justice institutions, logistical constraints, and inadequate legal aid are just a few of the challenges women seeking justice in such cases face.

### DOMESTIC VIOLENCE

The Domestic Violence Act, which was adopted in November 2009 and became domestic law in March 2010,<sup>155</sup> criminalizes marital rape and other forms of domestic violence and puts forth provisions for penalties and civil remedies for such crimes. In the Act, LC courts are given a mandate to try domestic violence cases. Courts are required to hear DV cases within 48 hours of an application being filed and the Act also provides for the issuing of protection orders by the magistrate courts. First offences for domestic violence are punishable by up to two years of imprisonment. The inherent challenges to enforcement of this law are evident in the fact that societal acknowledgement that rape can occur within marriage is culturally not accepted. This is particularly problematic considering that women are often considered 'property' of their husbands after they are married.

Domestic violence has been described as rampant in Uganda, affecting some 40 percent of women.<sup>156</sup> Although reliable statistics are difficult to attain, largely due to underreporting of cases, national data has shown that approximately 60 percent of Ugandan women have experienced physical violence since age 15.<sup>157</sup> Focus group discussions held with women for this study support the findings of widespread domestic violence. In one focus group in Karamoja, all respondents reported domestic violence in their homes; the women added that this happened almost on a daily basis and was something they considered normal.<sup>158</sup>

The cultural normalcy of domestic violence between husband and wife indicates that changes in attitude and behaviour are needed in addition to strong enforcement of formal legislation such as the DV bill to protect women from this type of violence. Typically, cases of domestic violence are usually 'settled' informally within the family or with the assistance of a traditional leader. The emphasis tends to be on keeping the family together and solving problems to maintain the larger communal harmony. Moreover, in cases where domestic violence is reported to the police, officers often encourage victims to reconcile with their partners 'for the sake of keeping the family together'.<sup>159</sup> The Child Family Protection Units within the UPF that handle domestic violence cases are small and have few staff. In some cases, local leaders and the immediate and extended families of both parties are invited to the police station to mediate the couple's reconciliation.<sup>160</sup>

Most cases of domestic violence continue to go unreported. Many women say they are afraid to report cases of violence, including rape, because they fear hostility from the community. They also fear they will be treated dismissively by the police and no action will be taken to help them. In a report to the CEDAW Committee, the

155 Upon presidential assent from Yoweri Museveni, who had previously stated that such types of legislation were not an urgent priority. 'I can't afford justice' Violence Against Women in Uganda Unchecked and Unpunished', Amnesty International Report, April 2010, p. 17.

156 'Uganda: Domestic Relations Bill Would Save Lives', Human Rights Watch, 31 May 2005. Online: <http://www.hrw.org/en/news/2005/05/30/uganda-domestic-relations-bill-would-save-live>

157 "I can't afford justice": Violence Against Women in Uganda Unchecked and Unpunished', Amnesty International Report, April 2010, p. 27.

158 Female focus group discussion, Lpoutiput Village, Badunget sub-county, Moroto (24 October 2009)

159 "I can't afford justice": Violence Against Women in Uganda Continues Unchecked and Unpunished', Amnesty International Report, April 2010, p. 40.

160 Ibid.

government admitted that attitude of police officers towards violence against women remains a challenge.<sup>161</sup> In cases that are reported, police maintain that it is not uncommon for a woman who reports her partner for assault, to subsequently request his release from police custody, saying, 'What good does it do if he is in jail? The children are hungry and not going to school.'<sup>162</sup> For these reasons, domestic violence remains a problem largely dealt with within the community through informal mechanisms such as negotiation and mediation. Respondents in this research overwhelmingly said that they would not report domestic violence to the formal authorities, deciding to either remain silent or to take the problem to an elder in the community. This underscores the point that domestic violence remains seen as a social issue that should be dealt with outside the formal justice system.

## SEXUAL AND GENDER-BASED VIOLENCE

The problem of SGBV is a serious one for women and girls throughout Uganda. The Uganda Demographic and Health Survey found that 39 percent (over one in three) of women and girls aged 15 to 49 years had experienced sexual violence during their lifetime.<sup>163</sup> Most SGBV cases go unreported. As mentioned in a previous section, in general, police response to acts of SGBV remains poor, as such cases often are not taken seriously. Typically, the issues such as SGBV are dealt with traditionally according to local custom and rarely enter the formal justice system. Women who have been raped say they often face rejection by their families and others in the community, especially if she contracts HIV as a result of the violation. Women who do chose to bring formal proceedings after sexual assault often bear a heavy burden of proof. Forensic evidence and proof of assault are difficult to attain due to the lack of knowledge, medical resources and personnel.

### RAPE

Rape is a criminal offence defined under Section 123 of the Ugandan Penal Code as "any person who has unlawful carnal knowledge of a woman or girl without her consent or with her consent, if the consent is obtained by force or by means of threats or intimidation of any kind or by fear of bodily harm, or by means of false representations as to the nature of the act, or in the case of a married woman, by personating her husband, commits the felony termed rape."<sup>164</sup> Punishment for a rape conviction is death. Attempted rape is considered a felony and is punishable with life in prison. Although rape is punishable by death, few cases ever go through the formal legal system. A report by the Bureau of Democracy, Human Rights and Labour from 2008 noted that, of the 477 rape cases recorded by police, only 115 were taken to court, and there had been no convictions.<sup>165</sup> However, a Police Crime Report from that same year reports 1,536 reports of rape, of which 241 cases proceeded to court and 52 convictions resulted.<sup>166</sup> Even given these conflicting figures, the number of cases being reported and taken to court is considered low relative to incidences of such crimes. If the victim is under 18, the offence is considered a defilement rather than a rape. In Karamoja, if a boy rapes a girl, it is termed colloquially as 'putting her down'. The practice of 'courtship rape'<sup>167</sup> is reportedly common in the region.

### DEFILEMENT

In Uganda, statutory rape is referred to as 'defilement'. Defilement is defined under the Penal Code Act as 'sexual intercourse with a girl under the age of eighteen'. The maximum penalty for such an offence is death. Attempted

<sup>161</sup> Ibid., p. 35.

<sup>162</sup> Ibid., p. 27.

<sup>163</sup> Ibid.

<sup>164</sup> Penal Code Act – Chapter XIV, Section 123.

<sup>165</sup> 2008 Country Report on Human Rights Practices, Bureau of Democracy, Human Rights and Labour, February 2009. Online at <http://www.state.gov/g/drl/rls/hrrpt/2008/af/119030.htm>

<sup>166</sup> ANPPCAN website: [http://www.anppcanug.org/?page=ugandans\\_raped](http://www.anppcanug.org/?page=ugandans_raped)

<sup>167</sup> This is a practice whereby a boy or man, upon seeing a girl or woman he desires, will rape her with the intention that she will subsequently become his wife, often with the help of friends who hold the victim down.

defilement ‘with or without corporal punishment’ is punishable with up to 18 years in prison.<sup>168</sup> An amendment to the Penal Code Act in 2007 states in Section 129(1) that “any person who performs a sexual act with another person who is below the age of 18 years, commits a felony known as defilement and is on conviction liable to life in imprisonment”, newly defining the crime in gender-neutral terms.<sup>169</sup> The amendment of the Penal Code Act also provides a distinction between ‘simple’ and ‘aggravated defilement’. The latter applies if the victim is below the age of 14, the offender is knowingly infected with HIV/AIDS, the offender is a parent or guardian or a person in authority over the victim, or the perpetrator is a serial offender.<sup>170</sup> ‘Aggravated defilement’ is punishable by death, while ‘simple defilement’ (i.e., defilement of a person below the age of 18) is liable to life imprisonment upon conviction.

However, despite such legislation and harsh punishment for the crimes of rape and defilement, sexual crimes against children continue to be a major problem in Uganda, with a reported average of 10,000 children defiled each year. In 2008, 8,635 defilement cases were reported to the police. Of this figure, 4,124 cases were taken to court and 333 convictions were recorded.<sup>171</sup> Many cases go unreported to the formal legal system, in many cases due to the shame and perceived ‘spoiling’ of prospects for a woman in marriage. Cases of alleged defilement are only brought to the formal justice system when the ‘perpetrator’ has not given payment or dowry to the family. Justice is perceived to be better served by negotiating and receiving compensation than through retributive justice in the formal legal system.<sup>172</sup> Nevertheless, the tendency of ordinary people to negotiate such cases may be founded upon a mismatch between the law and prevailing social norms on the age at which children attain sexual maturity. Proper consideration of the issue of defilement requires a distinction in respect of the age of the offender. While Ugandans favour harsh punishment of adults ‘preying on’ teenage girls, one study found that 95 percent of Ugandans interviewed disagreed with treating sex among children as defilement, yet this is the effect of existing law.<sup>173</sup> The law on defilement, especially when it penalises consenting relationships between teenagers of a similar age, has been criticized for criminalizing teenagers, burdening the justice and penal systems, and serving more to protect the economic interests of parents than the well-being of girls. The Uganda Child Rights NGO network, in its 2005 report on Uganda’s compliance with the Convention on the Rights of the Child, states that:

***“The law on sexual abuse of children in its present form (amendments have been proposed under the sexual offences/[/]miscellaneous amendments bill 2004) has also been noted to be biased against the boy child. For example a 15 year old boy who gets into a sexual relationship with a 17 year old girl is imprisoned while the latter is considered a victim and left free. It should be noted that the majority of people on remand for defilement are minors who had been engaged in teenage love/sexual relationships. Defilement constitutes over 90% of all capital offences in the Chief Magistrates Courts.”<sup>174</sup>***

## FEMALE GENITAL MUTILATION

Article 32(b) of the Ugandan Constitution prohibits “laws, cultures, customs, or traditions which are against the dignity, welfare, or interest of women or which undermines their status”. The Female Genital Mutilation Act, adopted in December 2009, criminalizes FGM, a practice that is common among a number of tribes, particularly in the

168 ‘Partial Justice: Formal and Informal Justice Mechanisms in Post Conflict West Nile’, Refugee Law Project Working Paper No. 21, May 2007, p. 9.

169 ‘Where Justice is a Dream: A Report of a Study of Formal and Informal Justice Mechanisms in Adjumani’, Refugee Law Project, 2009, p. 30.

170 Section 129 (4) of the Penal Code (Amendment) Act, 2006 – excerpts taken from Annex 2: Refugee Law Project Working Paper No. 20, p. 62.

171 African Network for the Prevention and Protection against Child Abuse and Neglect (ANPPCAN) statistics. Online at [http://www.anppcanug.org/?page=ugandans\\_raped](http://www.anppcanug.org/?page=ugandans_raped)

172 Ibid.

173 See Uganda Child Rights Education Network, Child Sexual Abuse and Exploitation Study Report, 2004. Online at [http://www.commonwealtheducationfund.org/downloads/documents/Uganda\\_Child\\_sexual\\_abuse\\_&\\_exploitation\\_study\\_report.pdf](http://www.commonwealtheducationfund.org/downloads/documents/Uganda_Child_sexual_abuse_&_exploitation_study_report.pdf)

174 Accessed at [http://www.crin.org/docs/resources/treaties/crc.40/Uganda\\_UCRNN\\_update.pdf](http://www.crin.org/docs/resources/treaties/crc.40/Uganda_UCRNN_update.pdf)

southeast and northeast of Uganda. The Act, which at the time of writing has yet to become national law, provides for a maximum prison term of ten years for those who perform FGM and up to five years for those who participate in the process.

## THE STATUS OF WOMEN IN KARAMOJA AND ACHOLILAND: HUMAN RIGHTS WITHIN INFORMAL JUSTICE SYSTEMS' CONTEXTS

Understanding the role of informal justice and traditional cultural practices becomes clear when looking at the context of women in north and northeast Uganda. As discussed in the previous section, legislation does exist on protection of women, but a key problem is enforcement of existing laws as a result of dysfunctional mechanisms to maintaining law and order. Law and policy occasionally promise more than state justice agencies can deliver. Given this justice vacuum caused by inaccessibility of the formal justice system in much of Uganda, it is important to acknowledge that informal justice mechanisms have filled a large space in this vacuum.<sup>175</sup> In the regions discussed in this section, the cultural institutions of elders and traditional leaders, which often mediate conflicts between families and communities, and the LC system have played predominant roles in providing alternatives to formal justice.

The following section describes some of the challenges women and children face in north and northeast Uganda and the typical way these issues are addressed through the informal system. Human rights issues emerge from a prevailing inequality of the status of men and women across different ethnic group contexts and from cases in which traditional solutions are applied to what are considered criminal offences. It should be noted that the IJS in both regions have emerged during protracted periods of armed conflict and insecurity during which there was a complete absence of state law and order and a non-functioning formal justice system. Although the situation has improved in Karamoja and Acholiland in recent years, the restoration of justice has been slow to follow.

### WOMEN IN KARAMOJA

Gender roles among the Karamojong are steeped in tradition and inculcated from a young age. Women are primarily responsible for cooking, cutting firewood, building houses, cultivation, fetching water, and cleaning and taking care of the children. Men have the general responsibility for keeping the cattle and building the fence around the village.<sup>176</sup> The separation of male and female roles is defined even down to the specifics of food: there are parts of a bull that only women or men are permitted to eat. Many community meetings are divided into men or women-only gatherings. As mentioned previously, informal justice mechanisms in Karamoja are overseen by an elders' group composed of men.

Despite the many societal challenges expressed by female informants of this study, women were considered powerful by a number of male informants in this research. They view the Karamojong social system as separate but not unequal for the sexes. "Women are the dictionary of our culture", affirmed one elder, and "senior mothers especially are consulted on most everything", he added.<sup>177</sup> The fact that, in their traditional justice system, the murder of a woman is punishable by 100 cows, compared to only 60 required by the perpetrator if a man is killed, also testifies to the respect and value of a woman over a man according to the Karamojong.<sup>178</sup> In recent years, where the situation of drought and starvation has increased, both men and women informants reported more equal male and female roles; with no cattle to tend to, men now help women build huts and also play a larger role in childcare.

175 'Partial Justice: Formal and Informal Justice Mechanisms in Post Conflict West Nile', Refugee Law Project Working Paper No. 21, May 2007, p. 22.

176 Consensus response from female focus group discussion in Loputiput Village, Nadunget sub-county, Moroto (24 October 2009).

The response from the male focus group was similar, but the men felt that they had additional responsibilities to the women, such as surveying land, training oxen, officiating ceremonies and solving problems of the community.

177 Key informant interview with Philip Eumar, Karamojong elder (23 October 2009).

178 Ibid.

However, much of a woman's status among the Karamojong community remains determined by whom she is married to; the wife of a 'mountain', for instance, has the most power within the community. Her value is derived from her status as a wife and mother. The intrinsic value of females is specifically determined within the culture by the amount of cattle she is able to bring her family in bride price. Once she is married, a woman is considered the property of her husband. Under Uganda's Customary Marriage Act, there is an implicit assumption that the marrying parties would have equal status. However, this assumption does not take into account that the status of most women under customary marriage is typically subordinate to that of the man.<sup>179</sup>

Within the traditional justice system, the right of women to own property such as land or livestock is not recognized. A woman may be given a milking cow by her husband, but she is not able to sell or transfer any interests to another party.<sup>180</sup> She is considered to have 'user rights' of assets as opposed to the 'owner rights' that her husband possesses, reflecting the patriarchal organization of society. Anecdotal justification for this is that, in most cases, because women are 'acquired' for a bride price during marriage, she is considered property and, once again, 'property cannot own property'.<sup>181</sup> As in other patriarchal societies, in distributing property, a boy is always given more, as he cannot acquire inheritance in the same way that a girl might expect to 'inherit' from her husband's home upon marriage.<sup>182</sup>

Domestic violence poses a constant threat to Karamojong women. In a female focus group, the women participants were asked whether they had experienced violence against them from their husbands, how often, and for what reasons. A majority of women raised their hands, responding that they are physically abused on a daily basis. The women explained that, in most cases, the abuse is attributed to their husband being drunk, that he was upset they did not have food prepared for their husbands' guests or that there was not enough food for the children. According to the women, the solution, if 'the beatings become too much', is to take her case to an elder mother of the village who will then summon the man responsible and order him to 'change his ways'.<sup>183</sup> All the women expressed a desire not to be beaten, although they acknowledge that the stress of living in famine and poverty meant that such violence against them was inevitable and expected. Notably, the highest rates of gender-based violence in Uganda are found in Karamoja, along with high rates of FGM and forced child marriage.<sup>184</sup> Traditional courts deal with all cases from family disputes, civil cases and criminal cases, but, as these are councils of elderly men, they are not gender-sensitive to matters that come before them. Furthermore, domestic violence was generally not considered a priority issue relative to the myriad problems of survival for many women and their families in Karamoja.<sup>185</sup>

Rape is a serious problem in Karamoja and, in many cases, is not treated as a crime, but is considered part of a courtship process or a marriage proposal, known as 'courtship rape' or 'engagement rape'.<sup>186</sup> Under Ugandan law, rape only applies to women over the age of 18<sup>187</sup> and such cases would be classified as a crime of assault. This is because the Domestic Relations Bill, which would address crimes such as rape, has been under discussion in various forms since 1965 but has yet to be passed.<sup>188</sup> According to one informant working on gender-based violence in the region, in Karamoja, there is nowhere for women to report rape, and cases almost never go to court because

179 Birabwa-Nsubuga, pp. 18-19.

180 , Frank Emmanuel Muhereza, Deborah Ossiya and Irene Ovonji-Odida, *Options for Enhancing Access to Justice, and Improving Administration of Law and Order in Karamoja*. HUGGO and LABF Report 2008, p. 79.

181 Key informant interview with Patrick Osekeny, GBV District Coordinator, UNFPA (22 October 2009).

182 *Social Justice Amidst Complex Realities*, TPO/DanChurchAid, p. 49.

183 Female focus group discussion, Lpoutiput Village, Badunget sub-county, Moroto (22 October 2009).

184 Interview with Patrick Osekeny, UNFPA.

185 Ibid.

186 Elders focus group discussion, Matheniko, Lokilala Village, Nadunget sub-county, Moroto (24 October 2009)

187 Rape of a female under 18 years of age is considered 'defilement' that ostensibly carries a death penalty.

188 Birabwa-Nsubuga, p. 16.

the formal system does not function.<sup>189</sup> If a rape case is settled by compensation, it will not be given to the woman directly, but rather to her family. In addition, health facilities to provide needed medical evidence of rape are not available, and at the time of this research only six health units in the whole of Karamoja had a stock of post-exposure prophylaxis (PEP) kits to protect from HIV, most of which were about to expire.<sup>190</sup>

The challenges inherent in taking cases to the formal justice system are again manifold: police investigations are often inadequately carried out; a lack of any witness protection program means that few if no witnesses typically come forward to testify in court; the lack of forensic equipment and staff means that the medical proof required to prove cases of rape, torture, and murder, is difficult if not impossible to establish; and, finally, courts are backlogged and the processing of cases is slow and can take years.<sup>191</sup>

## WOMEN IN ACHOLILAND

During the protracted war with the LRA in the north, civilians were primary targets, especially women and children. As mentioned in the introduction, during this period rape was used as a tactic of warfare, women and girls were forced into marriage and sexual slavery, and child abductions into the LRA army were common. Women's participation in warfare under the LRA was at an equivalent level to that of male combatants.

As a result of decades of protracted conflict, much of the social fabric of the north was destroyed. The legacy of this violence has included the perceived normalization of violence among communities, particularly SGBV, weakened communal ties especially in relation to traditional authorities, as well as the loss of land and sense of home identity.<sup>192</sup>

Domestic violence rates are high in the north, as are cases of SGBV such as defilement. As in Karamoja, most cases of DV and SGBV go unreported. Although referral of cases to the LC system in the north is higher than in the Karamoja region, the preference to settle gender-related cases informally remains prevalent. Research has found that, in the areas of education and literacy, exposure to domestic violence and family community conflict, young females in particular demonstrate more difficulties.<sup>193</sup>

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189 Interview with Patrick Osekeny, UNFPA.

190 Ibid.

191 Interview with Anthony Androa, Ugandan Human Rights Commission, Karamoja.

192 During the war, a majority of the population in the north was forced to flee and lived in IDP camps. Many of these IDP camps have since officially closed, although many continue to live in the camps, afraid to go home or hesitant to get involved in a land dispute.

193 *The State of Female Youth in Northern Uganda: Findings from the Survey of War-Affected Youth*, SWAY, April 2008, p. 2.

# THE STATUS OF CHILDREN IN UGANDA

## LEGISLATION ON CHILDREN – THE CHILDREN ACT

The role of IJS – principally the LC courts – in dealing with issues of child justice in Uganda is described in the following against the more general background of child justice and protection. Reference is also made to the text on the LC courts earlier in this report.

The Children Act, Chapter 59 of the Laws of Uganda, was adopted on 1 August 1997. The Act provides among its 113 provisions the right of children to have legal representation in all matters before a family and children's court. Such specialized courts should exist in every district of Uganda. Lauded as “one of the most elaborate pieces of law on children on the continent of Africa”,<sup>194</sup> the Act provides detailed provisions of the treatment and rights of children in conflict with the law. This includes provisions from raising the age of criminal responsibility in Uganda from 7 to 12 years of age, to arrest and detention limitations. The Act seeks to ensure access to justice by children by consolidating and promoting all laws relating to childcare, protection and child and juvenile justice.

## CHALLENGES TO IMPLEMENTATION OF THE CHILDREN ACT

The challenges in the Act's implementation underscore some of the salient issues arising from the roles IJS and formal justice play in Uganda. Customary law continues to be ‘a powerful force’ in Uganda and falls at times into conflict with certain provisions of the Act as well as the international CRC.<sup>195</sup> In addition, Uganda does not have the institutions or financial resources to fully implement the provisions of the Act. This fact, coupled with the role of customary law, means that many of the safeguards provided in the Children Act are, in practice, not realized.

Ensuring comprehensive justice protection for children requires the active and effective role of justice providers. For instance, the UPF is mandated (among other stakeholders) by the act to defend, protect and enforce the right of the child stated in many of the provisions. Yet, in many cases, they do not live up to their role in protecting children and fail to exercise their powers when dealing with such cases. For instance, broad discretionary powers are given to the police in the use of diversion from courts; however, such powers are often not exercised due to political interference, or fear of retribution from individuals or communities.<sup>196</sup>

Child and Family Protection Units (CFPUs), established in 1998, are mandated by police guidelines to handle all cases involving children in conflict with the law. This includes conducting investigations of cases where children have been charged with a crime. However, assessments of the efficacy of such units have been mixed. CFPUs have been criticized for being a dysfunctional extension of the police, lacking in staff capacity and the professional training needed for such specialized work. A study of one CFPU in Pokot in north-eastern Uganda revealed that the unit did not have a single female police officer to handle sensitive gender-specific cases such as defilement and sexual abuse of girls.<sup>197</sup>

Uganda's Family and Children Court is the court of first instance for cases that cannot be tried by LC courts. These courts have the power to preside over all criminal cases against children, except cases that are punishable by death and offences for which a child is jointly charged with a person over 18 years of age.<sup>198</sup> In practice, they are presided over by magistrates who have to deal with both child and adult cases. Although designated as juvenile

194 Lillian Tibatemwa-Ekirikubinza, *Juvenile Justice in Uganda: Operationalisation of the Children Statute*, 2003, p. 175.

195 Uganda Summary and Analysis ‘Representing Children Worldwide’ website: <http://www.law.yale.edu/RCW/rcw/jurisdictions/afe/uganda/frontpage.htm>

196 Asan Kasingye, ‘Role of the Police Under Diversion: An Assessment, Success and Failures’. Available at <http://www.unicef.org/tdad/ugandapoliceroleindiversion.pdf>

197 *Social Justice Amidst Complex Realities: Protecting the Rights of Children and Women in a Traditional Pastoral Community – The Case of the Pokot in Northeastern Uganda*, DanChurchAid, January 2008, p. 51.

198 Article 94 of the Children Act



courts, magistrates only constitute themselves into this court for the purpose of hearing cases in which children are involved.<sup>199</sup> This may ultimately defeat the purpose of having such permanent specialized courts.

Article 100 of the Children Act provides that every case should be handled expeditiously and without unnecessary delay. However, the large backlog of cases, the infrequency of court sessions held in some regions, and the lack of financing mean that cases often are not processed in a timely manner. The previously mentioned case of 17 juveniles who have been sentenced to death in Uganda's Luzira prison but cannot be executed because the offences were committed when they were below 18, and have subsequently remained in jail for years, is an example of this.<sup>200</sup>

## DIVERSION

Although the team did not come across any examples of diversion used in practice during their (admittedly very limited) time in the field, diversion is accepted and promoted both in the Ugandan Constitution (Article 34) and the Children Act Section 91(9). Section 89 (2) specifically empowers the police to dispose of cases at their discretion with recourse to formal court hearings.<sup>201</sup> The Act places emphasis on the need to divert children from the formal justice system and includes practices such as referring their cases to LCs or probation officers or holding child offenders in special reception centres for children to avoid detention with adults. Opportunities for diverting child offenders often may be missed in practice. As mentioned, police officers often fail to exercise the discretionary powers to divert cases, children are in reality detained with adults due to limited detention facilities, and investigations are not carried out expeditiously or before custodial options for children are enforced.<sup>202</sup>

## ROLE OF LCs IN DEALING WITH CHILDREN

Part III of the Children Act details support for children by LCs. It specifies the role of LCs in safeguarding and promoting the welfare of children, among which is the responsibility for child protection (Article 10 (6)).<sup>203</sup> Allocating this responsibility to the LC court level can significantly decrease the number of children's cases in the formal legal system, particularly with regard to petty crime cases.

Section 92 of the Act provides for the jurisdiction of the LC courts in relation to children. Village-level LC courts<sup>204</sup> have jurisdiction in all matters of a civil nature concerning children. This includes all of the major issues dealt with in the main report, including paternity, custody, property and inheritance and issues related to marriage. Unfortunately, little research is available on the operation of the LC courts in dealing with these issues, as the available research has tended to focus more on criminal issues and juvenile justice. There is reason to suppose that the resource and knowledge constraints that have sometimes prevented LC courts from fully playing their intended role in criminal matters are no less pressing in relation to civil causes.

## CRIMINAL JURISDICTION OF LC COURTS AND POWERS IN CHILDREN'S CASES

The same section provides that village-level LC courts are the court of first instance for a range of minor criminal offences alleged to have been perpetrated by a child. The list of offences is set out in the third schedule to the

199 Tibatemwa-Ekirikubinza, p. 205.

200 '17 children on death row', *The New Vision*, 15 September 2009. At <http://www.newvision.co.ug/D/8/13/694877>

201 Kasingye, p. 4.

202 Ibid., p. 5.

203 'Article 10 (6) 'Each local government council shall provide assistance and accommodation for any child in need within its area of jurisdiction who appears to the committee to require assistance and accommodation as a result of his or her having been lost or abandoned or seeking refuge.'

204 Formerly called "Executive Committee Courts".

Act.<sup>205</sup> Many of the offences that child offenders might commonly commit, including those typically committed against other minors, are included, though accusations of defilement by teenagers are absent.

It is specifically provided in Section 92 (7) that LC courts do not have the power to commit children to remand detention.

While having the power to impose the penalties provided for in the Penal Code Act for these offences, the LC courts also have the power to make certain other orders having more of a restorative character. These include (a) reconciliation, (b) compensation, (c) restitution, (d) apology, or (e) caution. The LC court can also make guidance orders, requiring offenders to submit themselves to the supervision and guidance of a suitable person designated by the court. These provisions are in line with the idea that whole communities are responsible for children. As Tibatemwa observes, however, LC courts are not always familiar with the provisions of the Act.<sup>206</sup>

## PROCEDURAL ISSUES AND RIGHTS OF CHILDREN BEFORE THE LC COURTS

While the procedural rights of children before the LC courts are in general the same as those of adult litigants before those courts, Section 92 (8) of the Act provides that the LC court shall have “due regard” to certain procedural rights set out in Section 16 (b) (c) (d) and (f) of the Act, that apply in the Family and Children’s Courts set up under the Act. These sections respectively provide for: (b) proceedings to be held in camera; (c) proceedings to be as informal as possible and by inquiry rather than by exposing the child to adversarial procedures; (d) for parents or guardians of the child to be present whenever possible; and (f) the obligation to explain the right to appeal to the child.

While the obligation of ‘due regard’ appears to be somewhat less than full respect of these provisions, it would seem to impose on the LC court a duty to respect these obligations to the highest possible degree practicable. It should be noted that the right to legal representation is not included among these procedural rights. As discussed earlier, this right generally does not apply in LC courts in Uganda except where violation of by-laws is concerned. Even in these cases, legal assistance is highly unlikely to be readily available outside of urban areas.

The second schedule to the Act specifically provides that children have all the rights set out in the CRC and the AU Charter on the Rights and Welfare of the African Child, with ‘appropriate modifications’ to respect the circumstances prevailing in Uganda.

## PREFERENCES IN CHILDREN’S CASES

One 2003 study that surveyed children and parents indicated strong support for LCs as the main point of contact for children who commit crimes. The study examined to what extent the law on juvenile justice was consistent with societal perceptions in Uganda. Child offenders interviewed felt that the LC system was better suited to deal with child matters than the police due to the fact that LCs were part of the community and knew the individuals involved and were therefore more likely to deal appropriately with the offences within their context.<sup>207</sup> Discussions held with parents of children who had committed offences also provided the general view that child offenders should be dealt with outside the formal criminal justice system as much as possible. Indeed, support for this view was so strong that some believed that, if possible, cases should be resolved between the victim and parents of the child offender before considering taking a case to the LC.<sup>208</sup> In general, respondents viewed the police very

205 The third schedule to the Act was not available. The information here is taken from Tibatemwa-Ekirikubinza, footnote 41. The offences are: affray (fighting in public), common assault, occasioning actual bodily harm, theft, criminal trespass, malicious damage to property, and “soliciting or loitering for immoral purposes”.

206 *Id.*

207 Tibatemwa-Ekirikubinza, p. 187.

208 *Ibid.*, p. 187.

negatively, citing that they were too harsh in dealing with children and were also corrupt.<sup>209</sup> Reference is made in an earlier section to the views of a sample of the population on the issue of minors involved in (often consensual) sex with another minor.

The field research conducted for this study found that using formal justice mechanisms such as the police and court system would come only after exhausting options within the community itself. During focus group discussions held both in Kitgum and Moroto, participants indicated an overwhelming preference for bringing all cases, including those involving children, to the traditional leaders first before LCs or the police. While LC I courts appeared to play a prominent role in northern Uganda, they played a much less significant role in Karamoja in dealing with family issues or crimes relating to children. Solutions in such cases were more likely to be 'solved' within or among families themselves or within the village context.

## CHILD RIGHTS ISSUES IN KARAMOJA AND ACHOLILAND

In a country where 50 percent of the population of 33 million is under the age of 14 years,<sup>210</sup> the welfare of children and their ability to access justice is a measure of the larger picture in Uganda. Many of the issues addressed in detail in the previous section concerning women apply to children as well, including land, property and inheritance rights, child marriage, and SGBV. According to ANPPCAN Uganda Chapter, a regional NGO working to protect children from abuse and neglect, child sexual abuse is the most rampant form of crime against children in Uganda. Defilement, mentioned in a previous section, is tied in with the issue of child marriage of girls and the social status of girls in general, but also in the criminalization of consensual relations among teenagers.

In Acholiland and Karamoja, two regions with protracted conflicts, most children have not been able to go to school. Many were abandoned, orphaned or abducted and exposed to extreme cruelty. During the war in northern Uganda, children experienced some of the worst human rights abuses ever reported against children at the hands of the LRA. Thousands were abducted, enslaved, tortured, mutilated, forced to commit atrocities against their own families, raped and infected with sexually transmitted diseases including HIV, became orphaned and were forced to live on the street, and suffered from severe malnutrition and disease. Girls endured forced marriage and forced pregnancy, the repercussions of which have left them with their own children who have become highly stigmatized among their communities.

With a tangible peace since 2007, addressing the psychosocial repercussions and justice for children in this region remains a huge challenge. Children who were traumatized by their direct experience with the LRA, or who grew up in camps, have difficulty adjusting to post-conflict life as young adults. Child offenders are common, as is the practice of locking up children. According to JLOS prison statistics, children make up approximately one fifth of prison population (an estimated 2,000 of the 10,000 prisoners in Uganda).

In Karamoja, the status of children poses many human rights concerns. Children often have difficulty accessing their right to education, health care, food and shelter. Child labour is the norm and widely believed to be a necessary form of training for them to become responsible adults.<sup>211</sup> Karamoja society is based around labour, especially in the caretaking of cattle. At a young age, children, especially boys, are grazing cattle and assisting the family in the manual tasks involving the animals. They are accorded more freedoms than girls. Girls are treated with a privileged status growing up, sheltered and provided for more than boys, due to the value attached to them as future sources of wealth. However, if a girl were to become pregnant before marriage, she would forfeit this privileged status and be discounted as a loss to her family.<sup>212</sup>

209 Ibid., p. 191.

210 CIA Factbook: Uganda. Online: <https://www.cia.gov/library/publications/the-world-factbook/geos/ug.html>

211 Muhereza, Ossiya and Ovonji-Odida. HUGGO and LABF Report, 2008, p. 83.

212 *Social Justice Amidst Complex Realities: Protecting the Rights of Children and Women in a Traditional Pastoral Community – The Case of the Pokot in Northeastern Uganda*, TPO/DanChurchAid, p. 49.

An educated girl in Karamojong society 'cannot fetch a lot of cow'. By virtue of being educated, she may even be considered to be a prostitute and is subsequently given a lower dowry price than an uneducated one.<sup>213</sup> This is because education is considered to undermine her role as a homemaker, mother, and wife. This stigmatizing of educated girls is a great social deterrent for those who might want to attend school. Amongst both sexes, illiteracy rates are high in Karamoja. Among a focus group of a dozen Karamojong male youths during the field research, only one had received even basic schooling. Those who had not received any schooling indicated a great interest in doing so. However, they would only do so if adult classes were offered and also acknowledged the difficulty in being able to attend given their need to work to bring food to their families.<sup>214</sup>

Street children in Kampala are becoming an increasing problem. Many of them are from Karamoja where, due to famine and insecurity, they left for the capital in search of better livelihoods. In Kampala, the children survive on begging and scavenging and living in the streets. If caught by the police, they are typically taken into custody and eventually deported back to Karamoja.

## PROGRAMMING

UNICEF Uganda has begun a new country program for the period 2010-2014 focused on Access to Justice for children, particularly with regard to child-friendly procedures in the formal justice system, gender sensitivity, and procedure guideline training. On the policy level, there is engagement with JLOS that advocates for diversion. This follows their previous programming cycle (2006-2009), which had focused on children and armed conflict.

## LAND ISSUES AND INFORMAL JUSTICE SYSTEMS IN UGANDA

As in most sub-Saharan African countries dependant on agriculture, land and property in Uganda are among the most important factors in the livelihoods of Ugandans. The Constitution provides that everyone has a right to own property, and the High Court of Uganda has long maintained that women, whether married or unmarried, have a right to own property in their own right.<sup>215</sup> The statutory legal framework for the administration and management of land is generally seen as relatively progressive with regard to protection mechanisms for women. However, under customary law in Uganda, women cannot freely own property and, in most instances, have little recourse to protect their property and land rights. Most land is under customary tenure and the decision-making power in relation to administration and dispute resolution rests with the male-dominated traditional systems. Land disputes are among the most predominant type of cases brought to the IJS in Uganda. This section takes up some of the general issues relating to property and land within the plurality of legal orders in Uganda. This discussion will also address vulnerable groups and their access to land, as well as the post-conflict situation in northern Uganda. Due to the key role land plays in Uganda, this issue should be acknowledged and integrated into future programmatic efforts towards both informal and formal justice systems.

### LAND TENURE IN UGANDA

During colonial rule, the British introduced a system of freehold title. Under this system, chiefs and kingdoms were granted formal land rights rather than the customary tenure system(s) and all untitled land was considered 'crown land'. Following independence in 1962, crown land became public land and a period of nationalization of land

213 Patrick Osekeny, UNFPA

214 Focus group discussion with Matheniko youth, Lokilala village, Nadunget sub-county, Moroto (24 October 2009).

215 Christine Birabwa-Nsubuga, *Women under Customary Marriage in Uganda: A Critical Look at Their Property Rights at Dissolution*, Danish Institute for Human Rights, Research Partnership 2/2006, p. 26.

began. Nevertheless, the customary tenure systems continued to operate, albeit without legal status. Under the current government, land reform was made a priority. This resulted in Chapter 15 of the 1995 Constitution and the 1998 Land Act.

According to the Constitution, land in Uganda can be owned in accordance with customary, leasehold, *mailo* and freehold tenure systems. With the Constitution and the Land Act, private individual freehold was introduced and customary ownership was given full legal recognition as private property with the possibility of all citizens owning land under customary tenure to acquire a certificate of ownership and the possibility of converting land under customary tenure to freehold land ownership by registration and titling.<sup>216</sup>

## CUSTOMARY AND COMMUNAL OWNERSHIP

Communities can own land communally on their own terms, and individuals, families, and clans can obtain a certificate of customary ownership. However, the issue of whether customary tenure means communal ownership is another issue. How communal ownership is defined (and regulated) clearly has an impact on the individual security of tenure, as does the size of communal land (for example, communal grazing and hunting grounds), which, in northern Uganda, has declined dramatically. Despite the increasingly private nature of ownership with exclusive user rights, including in respect of land held under customary tenure, it is still the general view of communities and clan leaders that their land belongs to the clan. This creates a tension between customary and statutory law.

Groups (communities, clans, or families) can also own land together by forming Communal Land Associations (CLA), with a constitution providing rules for the management of land. At least one third of the membership of a CLA must be women. The Land and Equity Movement in Uganda (LEMU) sees these institutions as having a great potential for protection of women's rights, as their rights under the customary law of the area can be written into the CLA constitution. The protection and enforcement of these rights can thereby be provided under both customary and state judicial systems.<sup>217</sup> There are, however, some issues currently preventing this system from being implemented. These relate to both the functioning of the institutional framework as well as the plurality of systems and the traditional patrilineal system.

## THE 'CONSENT CLAUSE'

Another protection mechanism for vulnerable groups that was introduced in the Land Act is the so-called 'consent clause'. According to this, land upon which the owner of the land resides with his or her family and children cannot be sold, transferred or given away without the written consent of the spouse and dependent children. For children below the age of majority, the consent must be given by the Land Area Committee.<sup>218</sup> The Act also provides for every spouse to have security of occupancy of family land and a right to use family land, and can give or withhold consent to any transactions of family land that affect his or her rights.<sup>219</sup> It is not clear how the consent clause is administered with regard to polygamous marriages, as it is only "the" spouse, dependent children of majority age, and children below the age of majority that are mentioned in the article. The consent clause does, however, apply to customary marriages. These are formally recognized in line with civil marriages irrespective of whether a certificate has been obtained from the district authorities.<sup>220</sup>

Customary ownership of land as private property is recognized together with the customary tenure system, which is given full legal status with all its institutions and rules for all land held under customary tenure. Those who wish

216 Constitution of Uganda 1995, Article 237 (3, 4) and The Land Act 1998, Chapter 227, Sections 2-9.

217 Judy Adoko & Simon Levine, 'Falling Between Two Stools' in Birgit Englert & Elizabeth Daley (eds.), *Women's Land Rights & Privatisation in Eastern Africa*, 2008 and the 1995 Constitution of Uganda and the 1998 Land Act.

218 The Land Act 1998, Chapter 227, Section 39 (1).

219 Ibid, Section 38A (1).

220 Christine Birabwa-Nsubuga, *Women under Customary Marriage in Uganda: A Critical Look at Their Property Rights at Dissolution*, Danish Institute for Human Rights, Research Partnership 2/2006, p. 19.

their land to remain under customary tenure can do so and their rights must be upheld by the courts (irrespective of formal titling). According to Adoki and Levine from LEMU, this means that “the existing protection of women in customary law thus remains, but with two additional advantages: first, those customary rules of protection now have full judicial force in state law; and secondly, protection has been added by bringing customary land into the framework of national law, because women now enjoy additional safeguards (notably from the Constitution and the consent clause).” However, it is the view of Adoko and Levine that, in practice, the government has primarily directed its energies and resources into converting customarily held land to freehold tenure rather than to efforts in respect of customary tenure or non-individuated rights. They argue that, with support only to customary owners and not customary ownership, the protection of women’s rights, in particular, is failing because protection through privatization ‘falls between two stools’: customary and state law. From the outset, the government’s aim has been to incorporate customary ownership into a privatised freehold ownership by giving titles to any customary owner who wants it – thus freeing them from the ‘constraints’ of customary law, but thereby also its associated obligations.

Most of the land in the Northern Region (approximately 80 percent) is held under customary tenure, most of it without official documentation of title. Land boundary disputes are considered amongst the most common types of disputes,<sup>221</sup> especially given the return of large numbers of IDPs to their homes. A recent World Bank study indicates that 85 percent of respondents have experienced threats to their security of tenure following the return and resettlement of IDPs, as well as a subsequent rise in land ownership and boundary disputes.<sup>222</sup> The majority of disputes reported concerned land abandoned upon displacement (with a prevalence rate of 65 percent) and relate mainly to inherited land.<sup>223</sup> Given the centrality of customary tenure in northern Uganda, the World Bank study recommends that it should be the traditional structure that is the first point of jurisdiction for dispute resolution and land administration and that these institutions are integrated into the statutory system.

## INSTITUTIONAL FRAMEWORK FOR LAND ADMINISTRATION AND DISPUTE RESOLUTION

### STATUTORY BODIES

The Ugandan Constitution establishes the basic land institutions: the Uganda Land Commission (ULC), the District Land Boards (DLB) and the District Land Tribunals (DLT). The latter have the jurisdiction to determine land disputes by individuals, the ULC or other authorities, with responsibilities relating to land. The decentralized structures for administration and management of land are the District Land Boards, District Land Officers, Area Land Committees and Recorders. It should be pointed out that, as part of efforts to secure better protection of women’s land and property rights, a third of the members of the DLB must be women. The LC IIs are the formally recognized court of first instance for land disputes with appeal to the Land Tribunals at the district level,<sup>224</sup> but, in practice, LC I courts are actively engaging in land dispute resolution as well.<sup>225</sup> Land boundary disputes were reported in the case study as well as in other research as some of the most frequently heard cases at the LC courts.

In general, the institutional framework set out in the Constitution and Land Act is not in place on the ground, especially in the north of the country. The function of the District Land Boards is meant to be the surveying of land, but this has not taken place, and the Area Land Committees (ALC) responsible for processing the Certificate

221 Based on interviews with OHCHR, Resident State Advocate, Magistrate, DCP, LC II Chair. See also International Alert, *Contributing to a Peace Economy in Northern Uganda: A Guide for Investors*, 2009, and Judy Adoko & Simon Levine, ‘Falling Between Two Stools’ in Birgit Englert & Elizabeth Daley (eds.), *Women’s Land Rights & Privatisation in Eastern Africa*, 2008.

222 World Bank: *Post-conflict Land Policy and Administration Options*, 2009.

223 Ibid.

224 The functions of the DLT has since 2006 been transferred to the District Magistrates’ Court.

225 Interviews conducted with LC I representatives in October 2009 and World Bank, *Post-Conflict Land Policy and Administration Options – The Case of Northern Uganda*, 2009 and World Bank, *Analysis of Post-conflict Land Policy and Land Administration: A Survey of IDP Return and Resettlement Issues and Lessons: Acholi and Lango Regions*, 2008.

of Customary Ownership are not in place in many areas. In Kitgum, for example, the ALC was established only recently (in July 2009) and was only starting to consider cases at the time of the research. In addition, the possibility of owning land as a community through a Communal Land Association faces challenges, as the District Land Registrars that would set up the CLAs are not in place. The statutory dispute resolution structure is weak, with the LCs II and III not able to perform their assigned role in many places.<sup>226</sup> One magistrate interviewed believed the LC courts were mishandling land disputes by not remaining impartial by being susceptible to political influence as well as by showing corrupt tendencies.

## THE LCs

There is no doubt that the mix of governance and judicial powers at the lower levels of the LC system contributes to the lack of clarity and impacts on the efficiency with which the system can help resolve conflict and tension. The District Magistrates' Courts have a severe backlog of land dispute cases because the LC system is unable to handle them and other parts of the institutional structure are not in place. It seems that many LC courts do not know the scope of their jurisdiction, including in land matters, as evidenced by the cases they choose to handle. Even at the LC III court level, many are reportedly unaware that the LC court can only hear land matters on appeal, with LC II being the court of first instance.<sup>227</sup>

Other issues relate to insufficient knowledge and understanding of the procedures prescribed for LC courts and other bodies. It was, for example, mentioned by several respondents that an additional 10,000 shilling fee for land inspections is often charged and set-fee rates not always followed.<sup>228</sup> The Norwegian Refugee Council currently supports activities in the north aimed at informing the communities of their possibilities for documentation of ownership. Few Ugandans are aware of the possibility and process of obtaining a Certificate of Customary Ownership and most have been interested in obtaining a freehold title to their land because of the land market. However, the process of titling for landowners (which is strongly encouraged by the Government of Uganda) can take years to complete and, as applications are processed centrally, requires travelling to Kampala.

## TRADITIONAL LEADERS

Traditional mediation and arbitration systems also exist, typically starting with the lowest level chiefs and traditional land committees. According to custom and practice, these can forward disputes on to senior chiefs if unsuccessful in solving a matter. There is, however, a gap or disconnect between the recognition of customary title without any corresponding recognition or role for the customary institutions that deal with customary land issues. The current (formal) institutional framework, as described above, does not include the roles and functions of customary land administration and dispute resolution. Nevertheless, certain overlaps between the traditional and the statutory system exist. The LCs, though considered to be part of the statutory system, often have elders as members, and the LC (and magistrate) courts often invite the elders to advise and guide the court on land matters. This is especially the case in the north, where the traditional systems are stronger than in other parts of the country and with the specific issues surrounding the resettlement of IDPs.

The World Bank study of the Teso, Lango and Acholi<sup>229</sup> areas found that both strengthening of the customary land administration systems and dispute resolution mechanisms as well as further clarification of the LC courts' role in dispute resolution and land administration would be beneficial. With respect to the management of land conflict and dispute management, the study found a complete lack of institutional capacity to manage land disputes and that targeted efforts to strengthen both formal and informal/customary conflict resolution would be necessary.

<sup>226</sup> International Alert, *Contributing to a Peace Economy in Northern Uganda*, 2009 and World Bank, *Post-conflict Land Policy and Administration Options – The Case of Northern Uganda*, 2009.

<sup>227</sup> Interview with Magistrate, Kitgum, October 2009.

<sup>228</sup> According to interviews with Norwegian Refugee Council, District Land Officers, LC officials, October 2009. The Area Land Committee in Kitgum charged 50,000 Ugandan shillings for the verification process, which it believes is affordable for town people.

<sup>229</sup> World Bank: *Post-conflict Land Policy and Administration Options*, 2009, pp. iv-v.

Clarification of the LC system's role would also need to take the current practice into consideration and thus perhaps consider amending the law to allow LC I courts to handle simple land disputes. It is emphasized that this is not in itself a recommendation to take this step, but merely to study whether this step should be taken, including its positive and negative consequences. It is also emphasized that the issue of the influence that the exercise of executive powers could have on the use of the judicial mandate of LC I courts would have to be solved for the LC system to be able to effectively play a part in resolution of land disputes. Some donors pointed out that, despite great interest in supporting the LC system, it was exactly the politically sensitive issue of land that led to some hesitation among donors. The role of the LC system should be combined with identification of legitimate traditional/informal institutions such as clan councils to assist in managing land disputes. The alternative dispute resolution methods used by customary and community based mechanisms, such as mediation, conciliation and arbitration, are seen as beneficial in this regard. The lack of capacity to perform very basic functions such as record-keeping on the part of both the LCs and the clans is, of course, an issue to address, but actual institutionalization of traditional institutions similar to the statutory ones are mentioned by many as a prerequisite to progress in arriving at an integrated system that provides legal protection. Although some traditional leaders feel sidelined by the local government structures, it is also recognized that many traditional leaders have immense powers over land and natural resources, which, of course, has implications for conflicts.<sup>230</sup>

The push for individual land ownership in the particular context of northern Uganda is seen by many as a factor involving potential risk of spurring further conflict. Discussions of what communal land and state land can be sold to potential investors have given rise to some tension over land in the region and raised questions of vested interests.<sup>231</sup> It is a generally promoted view in the studies referred to in this section as well as the respondents interviewed that titling should be pursued in a manner that complements customary tenure rather than replaces it, as it is better at protecting and managing communal and collective rights. Similarly, it is important to establish an institutional framework that includes both the customary/traditional and the statutory institutions and that the institutional framework reflects the reality and practice on the ground, including the human and financial resources made available through the local government system.

## USE OF FORMAL AND INFORMAL JUSTICE SYSTEMS IN LAND MATTERS

The extent to which customary law and the customary tenure system protect women and vulnerable groups' rights is an issue of debate. According to one interpretation of customary law, a woman (in a patrilineal culture) enters the clan of her husband when married and gain the rights to benefit from the land of the family and clan, with the protection of her rights by the family of her husband. This means that, even where there is more than one wife, she is entitled to enough land to provide for herself and her children. Unmarried or divorced women have rights to be allocated land by their own parents' clan. A widowed woman still has rights under her late husband's clan, perhaps by being married to her late husband's brother, but, even if choosing not to re-marry, she would maintain full rights over the land that her husband has allocated to her.<sup>232</sup> In practice, most research has found that a woman loses her right to any property and land upon dissolution of marriage (for reasons other than death) and will have to return to her family, who will have the responsibility to provide for her. Under customary tenure, neither the husband (as the steward), nor the wife in principle, has the right to sell the land.

Family land is usually vested in the head of the family, who acts as the steward of the land with the responsibility of looking after it on behalf of all family members' interests. When land is sold, it becomes individually owned and is no longer under clan control. Previously, selling of land was forbidden according to customary law, but has been

<sup>230</sup> Ibid., pp. 33-36.

<sup>231</sup> International Alert, *Contributing to a Peace Economy in Northern Uganda*, 2009, and World Bank, *Post-Conflict Land Policy and Administration Options – The Case of Northern Uganda*, 2009.

<sup>232</sup> This particular principle has however been contested. The interpretation outlined here is mentioned in LEMU's work.



taking place for many years (in Uganda as in other African countries), with acceptance of the clans. The clan control over land varies from district to district, in general, across the country, but also within the Northern Region.

Sales of small portions of land owned under customary tenure (without written documentation) are becoming more frequent to meet short-term consumption needs due to socio-economic reasons. These types of land sales have a potentially negative long-term impact on the economy of the family. According to LEMU, taking into account the duty to protect women and children, customary law and the customary tenure institutions should in principle have prohibited these sales. An eroding respect for clan elders and customary institutions, due largely to the long-term displacement and life in IDP camps, is cited as one explanation for the lack of protection exercised. Additionally, an increasing tendency to charge for services and 'corruption' of the clan structure can also be identified as relevant factors.<sup>233</sup>

Moreover, with the use of the statutory system, especially the LC system, and the overlap or even confusion between the two, the statutory system is sometimes used to 'trump' the traditional system, which undermines the traditional system's potential role in land administration and dispute resolution management. LEMU studies in the region<sup>234</sup> show that men tend to go to the state administration, in the form of the LC I, to appeal over the head of the clan, claiming the right under the statutory law to sell land. This takes place even though the LC I has no authority in land matters under the Land Act; indeed, Parliament granted this authority to customary authorities without specifying who or what those customary authorities are. In practice, this enables approval of a sale of customary land because legal recourse is unavailable or because clan leaders or those who disagree with the sale may be reluctant to oppose the LC. Adoko and Levine argue that giving decisions of clan judges the full backing of police and courts in practice could support the customary system's ability to protect women and children's rights, as provisions of legislation enacted by Parliament and the Constitution are superior.<sup>235</sup>

The studies carried out by LEMU showed that none of the sales approved by the LC I contained consent of the spouse, despite the 'consent clause' in the Land Act. This is mostly attributed to a lack of knowledge of the law and of the clause, but also to the fact that many of the LC I representatives interviewed maintained that women have no right to oppose a sale, as 'women do not own land under customary law'. The current mix of practices and use of systems and institutions indicate how the plurality of systems can lead to overlaps and abuse of the situation and not only to alternatives and choice. The research that the study team is familiar with all points to a strong need for better complementarity and integration between the existing systems to achieve protection, especially of vulnerable groups and women, as the current situation seems to render them less protected.

It has been argued by many (including in interviews with respondents in Kitgum) that one of the main challenges is the population's lack of memory and knowledge about the traditional ownership and boundaries of land. This is attributed to the many years of displacement and the breakdown of customary structures. Others argue that it is rather an interest in being able to push or trace land to the clan jurisdiction that is at stake. In some areas, traditional leaders still wield immense power over the administration and management of customary land. In such contexts, self-interest and an increasing politicization of the system play a role. Although it is predominantly the customary systems that are currently addressing land issues, it was the view of some respondents in this study that an increasing number of people prefer the LC system because of the possibility to influence the outcome.

233 Judy Adoko & Simon Levine, 'Falling Between Two Stools' in Birgit Englert & Elizabeth Daley (eds.), *Women's Land Rights & Privatisation in Eastern Africa*, 2008, p. 110.

234 LEMU, *Land Matters in Displacement – The Importance of Land Rights in Acholi land and What Threatens Them*, 2004; LEMU, *Land transactions in land under customary tenure in Teso*, 2005; LEMU, *A Land Market for Poverty Eradication*, 2005.

235 Judy Adoko & Simon Levine, 'Falling Between Two Stools' in Birgit Englert & Elizabeth Daley (eds.), *Women's Land Rights & Privatisation in Eastern Africa*, 2008, pp. 111-112.

There has been a tendency towards a weakening of the customary institutions. No measures have been taken to help reinforce them in areas where they could help implement state law and government policy, for example, through a system for registering spouse consent and thus enforcing the consent clause.

Several respondents interviewed and other studies indicate that a politicization of land administration and management structures potentially has significant ramifications for land issues and conflicts. It is exacerbated by lack of knowledge of rights, making it easy to exploit and convince people that they do not have any rights. Given the lack of trust in the state system in the north, coupled with a lack of resources and institutional corruption, decisions are ignored and rarely enforced even where matters are pursued in the courts. The police typically do not get involved in land disputes, unless they escalate to a point where criminal offences are committed. It is still the traditional system, combined with the lowest layers of the statutory system (the LCs) that handle most disputes and it was generally the view of respondents for this study that the formal institutions are the very last resort. If a matter reaches the District Magistrate, it is likely that it has not been solved through the layers of resolution provided by the traditional systems and the LCs. However, this has to be seen in the light of a continued breakdown of the traditional family and clan structures that give security of access to land at the household, family and community levels. When this takes place, the traditional conflict resolution mechanisms become unavailable, weakened as a forum for dispute resolution in Uganda in general.<sup>236</sup>

## PROGRAMMING

As issues relating to land are most pertinent in the Northern Region of Uganda with the resettlement of a large number of IDPs, there is an increased focus on programmatic interventions to secure especially land rights, particularly those of vulnerable groups, as well as security of tenure in general, in order to avoid tension and a potential scale-up of conflict again in the region.

Attempts have been made in Acholiland and Lango to document customary tenure principles. In Acholiland, the Ker Kwaro Acholi has produced the publication *Principles and Practice of Customary Tenure in Acholiland* in Acholi and English with support from the Norwegian Refugee Council and the EU. This document outlines the interpretation of key terms related to land tenure and the rights and responsibilities of all actors in relation to ownership, acquisition, transfers, and conflict resolution. Similarly in Lango, the Lango Cultural Foundation has produced *Rules and Regulations on Land Use and Management of Land in Lango* in Luo and English with support from LEMU. Both publications have been developed through broad consultative processes.<sup>237</sup> However, through the interviews in Kitgum, it became clear that the Ker Kwaro Acholi's version of the principles had been contested by other Acholis despite a relatively broad consultation process. The main elements of contestation relate to the 'prohibition' against the selling of customary land and the land rights of widows (in the husband's clan), unmarried girls and children born outside marriage. Moreover, the Resident District Commissioner wanted it to go through the LC system while the council lobbied for it to be passed as a by-law. These discussions have led to a stall in its dissemination and related sensitization activities. In Apac, the initiative supported by LEMU has had more success and the district government is passing by-laws to ensure customary rules are followed, forming a partnership between the traditional and state system.

<sup>236</sup> Christine Birabwa-Nsubuga, *Women under Customary Marriage in Uganda: A Critical Look at Their Property Rights at Dissolution*, Danish Institute for Human Rights, Research Partnership 2/2006, p. 25.

<sup>237</sup> Ker Kwaro Acholi, *Principles and Practice of Customary Tenure in Acholiland*, 2008, and Lango Cultural Foundation, *Principles, Practices, Rights and Responsibilities (PPRR) of Customary Land Tenure in Lango Region*, 2009.

LEMU suggests that the customary land judges in the villages in northern Uganda, who know the boundaries and ownership of land, could be used in a local public process to record the boundaries and potentially could be mandated to record all land sales (including customary land). Local land judges and/or the state administrator registering the sales could be responsible for ensuring spouse (wife) consent.

Attempts to document the principles of customary tenure in various areas and clans could be undertaken to facilitate complementarity between the customary and statutory systems. The process of documenting principles should, however, include the process for changes to allow continuous dynamics to customary law. To the greatest extent possible, it should be a participatory process involving the community in order to avoid later contestation. Such documentation could include the principles for customary land judges to adjudicate matters. This would allow for a partnership between the traditional system (the clans) and the state, which would also mean the customary authorities could rely on the state to enforce decisions. However, as described above, the attempts so far illustrate the difficulties involved when competing interests are at stake, including those who favour a lack of 'codification' of the traditional principles and practices.

Land is one of the key areas within the northern Ugandan context that is being addressed by current donor programming. The process is complex because it involves a struggle for land and natural resources that inherently involves local and national politics. The Norwegian Refugee Council (NRC) is providing training to LC I, II and III courts, but especially targeting the LC II at the sub-county level because of their jurisdiction in land matters. The training is based on the Local Council Courts Manual by the Ministry of Local Government and with a special focus on land rights. NRC is also focussing on elders, clan leaders and family heads and has, as a part of this focus, assisted with the development of the publication on principles and practices of customary land tenure to promote peaceful dispute resolution in land matters, but also other dispute areas, such as family-related matters. Through its work with dissemination of information on land rights, and hereunder information on documentation of land ownership, NRC also assists with payment of fees for obtaining Certificates of Customary Ownership. NRC also runs a legal aid programme, which includes research, capacity-building of legal aid providers and advocacy. Legal counselling advice and representation by lawyers is provided through the programme, and advice centres have been established in eight sub-counties.

The Association of Women Lawyers in Uganda (under the International Federation of Women Lawyers: FIDA) has a strong presence in the north. FIDA activities include the provision of information and sensitization campaigns in the region as well as of legal advice and litigation in land matters for women. The organization is mentioned by many as having an impact in the areas they reach, but, as with civil society efforts in general, outreach is a challenge.

Related to the discussion of increased individualization and privatization of land in general and the potential impact it has on the vulnerable situation in the north, International Alert has developed a guide for investors in the post-conflict context in northern Uganda.<sup>238</sup> The guide was developed by a group of local business leaders in Acholi and Lango regions and with input from other stakeholders. The guide explains the statutory legal framework, central issues arising from the pluralistic legal orders and how the institutional set-up is envisaged in the legal framework and the actual mix of an institutional framework in practice, and the overlaps with the traditional systems. It provides suggestions about what to be aware of and how to try to cooperate with both systems.<sup>239</sup>

A National Land Policy to address the implementation of the protection of rights under the different tenure systems and the institutional framework is being drafted. The policy has been underway for a while, with the fourth draft having been presented in September 2009 (the third draft is from 2007). The non-functional statutory system for land administration and management should be addressed in the policy, and the re-institutionalization of the land tribunals together with the establishment of special land divisions under the magistrate and High Courts are mentioned. Moreover, the draft policy addresses dual operations of the customary and statutory systems by legally empowering the customary authorities to perform functions relating to land rights administration, land dispute resolution and land management.<sup>240</sup>

For future programming, the normative basis for land policies on land administration and management has to be taken into consideration, including views on customary law and institutions, privatization and land market creation, and ownership of land in different regions of the country. Programming initiatives will inevitably support different aspects of these areas, incorporating the interests of stakeholders locally and centrally. With regard to parajudicial types of IJS, such as the LCs, consideration should be given to the complementarity between customary and statutory systems and whether checks and balances can be instituted.

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238 International Alert, *Contributing to a Peace Economy in Northern Uganda: A Guide for Investors*, 2009.

239 The guide is relatively new (2009). Unfortunately, it has not been possible to obtain any information of the use and impact of the manual in practice.

240 <http://allafrica.com/stories/200912160781.html>

## CONCLUSION

This study has aimed at providing a comprehensive overview and analysis of IJS context in Uganda and the varied landscape of justice mechanisms – both formal and informal – currently in practice. The usefulness of this study stems from examining how a plurality of justice mechanisms function and address starkly different contexts within a single country; from the strength of the LC court system in the Central Region and urban areas of the country, to the predominance of informal traditional and transitional justice mechanisms used in the North-eastern and Northern Regions. Although the varying contexts illustrated in this study may not exist to the same degree in other developing countries, the challenges revealed and lessons learned contribute to informing a more holistic approach to justice programming. Moreover, the ways and degrees to which these systems are employed reveal a necessary departure from the traditional dichotomous discourse between formal and informal systems of justice.

The programming chapter of the main IJS study emphasizes the importance of harmonizing interventions with one another to acknowledge and include other development and justice initiatives. This is particularly relevant in the Ugandan context, where holistic approaches to address the manifold and complex regional challenges to primary justice are needed in order to bridge the various formal and informal justice mechanisms. Despite the funding pressures and time-bound nature of most donor programs, a thorough assessment of the IJS context on the ground is essential before any programming takes place. Efforts should be made to improve coordination with other programming initiatives to avoid duplication and to promote complementarity and effective sequencing. Addressing the broader justice dilemmas in countries with a history of conflict – particularly issues relating to retributive justice, transition justice, and peace and reconciliation – should also be part of this discussion.

In addition to examining the IJS in Uganda, this study included sections on the formal justice structure not covered in the other country studies, which focused primarily on the valuable quantitative data collected. Although unsurprising, it is important to underscore that a major reason that IJS continue to be used is the inaccessibility, mistrust, and weakness of the various branches of the formal justice system. Therefore, in order to holistically address justice solutions, an examination of the challenges to the existing formal system and underlying weaknesses is important when exploring potential programming channels that can serve to connect the informal and formal justice systems. As mentioned in the main study, formal justice actors often have little understanding of IJS or customary law in their countries, despite their acknowledgement of the widespread use of these systems among the population.

The programming implications and recommendations from this Uganda study have already been addressed in the previous geographic and thematic sections and thus do not need to be repeated. Drawing on the experience of Uganda's long-standing JLOS and its NDP provides useful examples of how inclusion of IJS and justice programming at a sector level can take place. However imperfect, the evolution of the parajudicial LC court system – from its foundations as an executive organ towards a decentralized system that is more inclined to be respectful of judicial independence and connection to the ordinary judiciary – illustrates the growing potential for alternative solutions to the traditional 'formal versus informal' models of justice. Expanding programming focused on the LC system is recommended. However, simultaneous programmes aimed at increasing knowledge and documentation of IJS' practices are also necessary. Generally speaking, 'users' will pick their engagement with the formal justice systems and IJS based on their assessment of which is best perceived to provide them access to 'justice'. Thus, imperfect systems can be used together if overlaps are properly addressed and areas of complementarity adequately explored; examining one system in isolation from another will only undermine the effect of programming initiatives. Meanwhile, active engagement and consultation with IJS' providers and users (especially women and children) to form these linkages remain imperative.





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