

## REPORTS — RAPPORTS

# Advancing human rights in legally plural Africa: the role of development actors in the justice sector<sup>1</sup>

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This dissertation examines the role of justice sector aid in sub-Saharan Africa regarding the relationship between human rights and local legal orders from a normative and empirical point of view. At the normative level, it explores how socio-legal theory on legal pluralism and human rights' cross-contextual implementation may inform the practice of development actors in the justice sector. Based on case studies in Sierra Leone and Mozambique, the research applies this body of knowledge to the analysis of empirical data on development actors' policies and interventions. The conclusion argues that the following issues deserve particular attention: the adoption of a users' perspective regarding which local justice providers are targeted by policies and interventions, consideration of how different modes of dispute processing relate to the implementation of human rights, engagement with local knowledge and a critical approach to human rights cross-contextual application.

*Key words:* Justice sector aid, human rights, access to justice, legal pluralism, customary legal orders, Sierra Leone, Mozambique

Enjoying and being able to claim human rights entails the existence of normative frameworks and dispute processing mechanisms that acknowledge and apply these standards. In principle, these institutions amount to the legal order of the state. However, in many regions of the developing world, the state lacks the capacity and/or the legitimacy to provide justice services to large segments of its population (Wojkowska 2006). This situation is particularly acute in sub-Saharan Africa, where more than 80% of disputes are processed by customary law institutions.<sup>2</sup> Though widely accessible, these

<sup>1</sup> This is the report of PhD research carried out at Ghent University, under the supervision of Eva Brems.

<sup>2</sup> For example, in Sierra Leone about 85% of the population falls under the jurisdiction of customary law, in Malawi between 80% and 90% of all disputes are processed through customary justice forums, and in Mozambique 90% of land transactions is conducted according to customary tenure (Wojkowska 2006:12).

institutions present a number of pitfalls in terms of human rights. For example, they tend to discriminate on the basis of gender and apply corporal punishments (Wojkowska 2006). At the same time, these legal orders may also contain norms that protect human rights or that may allow their protection, such as in the area of access to livelihood resources (Gomez Isa 2011; Hellum 2007). However, the legitimacy of some human rights is often contested in this region as these norms contradict certain aspects of African cultural and religious traditions (An Na'Im 2003). In other words, advancing human rights within local justice processes in sub-Saharan Africa goes hand in hand with two significant challenges. On the one hand, local populations have to see human rights as relevant to their immediate realities, and on the other, justice institutions should be built that protect them in a legally plural context where state justice is not dominant.

At the crossroads of theory and practice, this dissertation explores the connection between the policies and interventions of development actors seeking to advance human rights within local legal orders in sub-Saharan Africa and important insights generated by socio-legal scholars on how to go about these challenges.<sup>3</sup> At the empirical level, it investigates how international development actors address the relationship between local legal orders and human rights in the context of justice sector aid in sub-Saharan Africa. What kind of policies and interventions do they support for advancing human rights within local justice processes? At the normative level, it examines how socio-legal theory relates to human rights aid in this area. What theoretical insights are of relevance to the practice of development actors in the justice sector? Why are they relevant and how can they be applied?

The study focuses on human rights assistance within aid to the justice sector or justice sector reform, excluding transitional justice, which forms a separate area of study.<sup>4</sup> Though aid to other sectors, such as health and education, can contribute to the realization of human rights more generally, this dissertation concentrates on the role of international aid in advancing human rights within local legal orders and justice processes. This may be pursued at different levels, such as by strengthening the capacity of the state to deal with human rights and local legal orders, that of local justice providers to respect

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3 The term 'local' is used for emphasizing a users' perspective, i.e. the locally available justice options. In many cases this excludes formal justice institutions sponsored by the state due to their lack of accessibility. However, throughout this dissertation local legal orders are also identified in terms of 'customary', 'informal' and 'non-state', depending on the country and the context. Actually, there is no single word that captures all the dimensions implicated in the justice options that are locally available. For example, a legal NGO may not be a 'customary' legal actor but may nevertheless base much of its work on local custom. In other words, local legal orders often cross the boundaries of 'modern' vs. 'customary', 'formal' vs. 'informal' or 'state' vs. 'non-state' dichotomies. Bearing this in mind, these labels have been nevertheless employed since they are a useful way of distinguishing human rights assistance that is targeted towards these as compared to state sponsored formal justice institutions. The term 'legal orders' covers the norms, the actors and the mechanisms involved in local justice processes.

4 Transitional justice refers to processes and mechanisms deployed in societies in transition from authoritarian rule to democracy or from armed conflict to peace in order to come to terms with a legacy of large scale abuses of human rights. These may include individual prosecutions, reparations, truth seeking, institutional reform, vetting and dismissals, or a combination of these (UN Secretary General 2004; UNDP 2006).

and protect human rights, and that of justice users to claim their human rights. In other words, this may include interventions at the national and local levels and may target state and local actors.

In order to analyse these interventions, four general types of interventions in the justice sector were identified.<sup>5</sup> First, interventions may deal with law drafting and law reform at national and local level. Examples of this type of intervention include drafting legislation embodying human rights, the removal of clauses that exempt customary laws from complying with the national constitution and the ascertainment or self-statement of customary laws that protect human rights, amongst others. Second, interventions may aim at supporting or reforming institutional arrangements at national and local levels. For instance, reforming the normative framework for legal pluralism, (re)defining jurisdictional boundaries and referral procedures between state and local legal orders, and reforming appointment procedures within local justice forums to incorporate gender quotas. Third, interventions may attempt to build capacity amongst state and local justice providers by means of training state court judges on how legal pluralism and customary law relate to human rights, sensitization of state court judges for applying human rights in a contextualized way, training local justice providers on national legislation embodying human rights and human rights dialogue with local justice providers, amongst others. Finally, interventions may focus on empowering justice users, such as initiatives for the dissemination of national legislation embodying human rights, human rights dialogue and awareness raising and the provision of mobile courts, legal aid and paralegal schemes.

The research focuses on ‘international development actors’, i.e. multilateral and bilateral assistance agencies, development banks, United Nations agencies, international nongovernmental organizations, international consultancy firms and international foundations in their roles as donors, implementers, technical advisors and stakeholders in policy dialogue. The focus on international actors is justified by the fact that in recent years these actors seem to have shifted their position towards local legal orders, i.e. from ignoring and condemning them as part of the problem of underdevelopment in the justice sector to embracing them as part of the solution for improving access to justice for the poor (Corradi and Schotsmans 2012). But human rights assistance, and aid to the justice sector in general, entail a chain involving multiple links between international and domestic development actors (ICHRP 2000). Therefore, the role of international development actors is necessarily examined in relation to that of domestic development actors, such as the government and local civil society organizations.

Due to the nature of the research questions this dissertation relies heavily on the case study method. This entails an empirical enquiry that investigates a contemporary

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5 Different international actors have produced various classifications of interventions in the justice sector. Although the terminology differs, there is a lot of overlap between the various typologies. For extensive lists of possible interventions, see Skaar *et al.* (2004) and Samuels (2006). The typology of interventions proposed by this dissertation results from the analysis of data collected during field visits and an extensive review of grey literature.

phenomenon in depth and within its real-life context, especially when the boundaries between phenomenon and context are not clearly evident (Yin 2009). The case study is the preferred method when ‘how’ or ‘why’ are the core questions of the research, the investigator has little control over events and the focus is on a contemporary phenomenon (*ibid.*). It relies on multiple sources of evidence and the triangulation of data while benefiting from the prior development of theoretical propositions to guide data collection and analysis (*ibid.*).

The process of data collection and analysis for this research took place in different phases. A first exploratory phase consisted of a systematic review of grey literature produced by international development actors, which was available online. During this phase, the focus lay on identifying those actors who had produced documents discussing their views on local legal orders, legal pluralism and human rights, either specifically or in the context of broader policy fields, and analysing how they positioned themselves in theory with regard to this topic. Subsequently, a revision of program documents for the African region allowed the ‘mapping’ of countries in which these actors were supporting interventions in this area. On the basis of this mapping, two case studies were selected for fieldwork: Sierra Leone and Mozambique. This choice was based on the fact that different international agencies were active in each of these countries thereby allowing the collection of data from a broader spectrum of practices.<sup>6</sup> Prior to the field research, a broad range of information was gathered on the history of these countries, in particular how the colonial and post-colonial history affected the legal landscape, the characteristics of local legal orders and legal pluralism, and the areas in which local justice processes seem to be at odds with human rights. The purpose of the fieldwork was to gather detailed information about the types of strategy that development actors support in relation to these issues.

During the fieldwork in Mozambique and in Sierra Leone semi-structured interviews were conducted with a wide range of stakeholders.<sup>7</sup> An interview guide was developed in advance on the basis of a review of socio-legal and grey literature and the semi-structured interview method allowed enough flexibility to incorporate new topics that emerged in the course of the field research. Interviews with representatives from multilateral and bilateral development organizations, government officers, international nongovernmental organizations, and domestic nongovernmental and civil society organizations led to a good overview of the different initiatives supported by development actors at different levels and their discourses on the reasons why they considered these approaches appro-

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6 At the time the empirical research was conducted, the main development actors providing support to local legal orders in Sierra Leone were the British bilateral cooperation (DfID), the United Nations Development Program (UNDP) and the World Bank, whereas in Mozambique it was the Danish bilateral cooperation (DANIDA), the European Union (EU) and UNDP.

7 The fieldwork in Sierra Leone took place from 5 to 17 April 2009 in the capital city, Freetown, as well as in Makeni and Bo towns and in Moyama district. The fieldwork in Mozambique took place in three phases. First from 11 August 2009 to 25 September 2009 in the capital city, Maputo, as well as in Pemba city and Massinga and Morrumbene districts. Second from 13 September 2010 to 10 October 2010 in Pemba city. And third from 12 February 2012 to 04 March 2012 in Maputo city.

priate. Local justice providers that had been involved in interventions, such as traditional leaders and paralegals, were also interviewed on their perspectives on these initiatives and representatives from civil society organizations and local experts were consulted in respect of their ideas about the research topic.

Both in Sierra Leone and in Mozambique the researcher collaborated with representatives from local civil society or nongovernmental organizations in order to gain access to certain interviewees at grassroots level, such as community leaders and traditional healers. In turn, contacts with these local organizations was facilitated by donors that provided funding for their activities. These entry points might have influenced the interviewees' perceptions of the researchers' expectations and consequently their answers. In order to mitigate this, the researcher explained each time what the purposes of her research and the interview were and that she was not associated with the organization that had introduced her to the interviewee. In addition, whenever possible interviews were conducted by the researcher alone, except for some cases in which the presence of an interpreter was required. For their part, international development agencies' representatives were directly contacted by the researcher by e-mail or telephone.

During the phase of analysis, all recordings were carefully listened to and interview notes taken on the field were expanded. Subsequently, a number of interviews were fully or partially transcribed by the researcher. Not all interviews were transcribed due to the fact that in many cases interviews yielded mainly factual information about the kinds of activities supported by development actors, which did not require a word by word analysis. Those interviews or parts of interviews where more complex issues were discussed, such as development actors' discourses on their rationale's for engaging or not with local legal orders, the limitations of interventions and their perceived effects, were transcribed. Both the transcribed interviews, the expanded interview notes and the field notes taken on the basis of observations were coded inductively. The categories emerging from this process were analysed in the light of insights generated by the review of socio-legal literature and discussions held with peer researchers and colleagues. Finally, a preliminary version of the findings was discussed with justice sector stakeholders from these countries in an international forum organized in Cape Town in March 2010 and in an international seminary organized in Brussels, in February 2011.

The dissertation is divided into two parts. Part one develops a normative analysis of the relationship between local legal orders, legal pluralism, human rights and justice sector aid in sub-Saharan Africa in general. Chapter one introduces the research topic and the state of the art, the research questions and the methodology. Chapter two discusses some of the common threads running across the justice landscapes of sub-Saharan Africa, such as the co-existence of state justice institutions imported by the former colonial powers alongside various local legal orders that may or may not be officially recognized in state law. Next to the fact that the legal orders sponsored by the state are often perceived as alien or illegitimate, the chapter points out that a major weakness of these institutions is that they tend to be understaffed, under-resourced and inaccessible to the majority of the population due to distance and costs, making it problematic to assume that they

constitute the best or only channel for advancing human rights within local justice processes. The chapter also shows that these institutions have nevertheless tended to benefit from a privileged epistemological position, which often translates into justice sector and human rights aid operating at this level exclusively.

The chapter remarks that current concerns regarding poverty reduction within development aid offer an opportunity for justice sector aid to engage with human rights and local legal orders. In this context, the chapter outlines some of the characteristics of local legal orders that are of relevance to the practice of development actors. For example, that customary law institutions, which are prominent in the region, were influenced by colonial and post-colonial dynamics, which led to the erosion of downward accountability mechanisms and gaps between official and living customary law. The chapter also reflects on the implications of local legal orders being multi-layered and polycentric, including a wide array of actors and modes of dispute processing. At the same time, the chapter provides an overview of the areas in which local legal orders tend to be at odds with human rights and mentions some domains where human rights may find protection in local legal orders.

Chapter three identifies a number of socio-legal theories that provide guidance for development practitioners on how to address the relationship between human rights and local justice processes. First, the chapter explains why it is necessary for development practitioners to look beyond state justice and address local legal orders. Given that legal pluralism affects the opportunities individual and collective actors have to claim their human rights, the chapter argues that interventions have the potential to alter these structures in ways that are conducive to the better protection of international standards. This requires a sound comprehension of local actors' strategies of action and how legal orders, as resources, may be mobilised. In addition, human rights aid addresses social fields that are semi-autonomous so that understanding how these social fields interact and building upon that knowledge may improve the effectiveness of interventions. At the level of the promotion of human rights cross-contextually, the chapter shows why it is necessary that interventions are grounded on critical approaches to human rights as well as culture and local custom. As both are flexible and dynamic, the chapter argues that interventions may contribute to more inclusive definitions and interpretations of both.

Overall, this chapter shows why and how socio-legal theory on legal pluralism and human rights can provide valuable entry points for devising interventions in the justice sector. The chapter argues that development practice constitutes a significant channel through which these theories can be applied in the real world and that it is necessary to continue exploring how development practitioners can capitalize on this knowledge. Indirectly, this chapter also demonstrates that as long as interventions pay thorough attention to the *how* question, promoting human rights within local legal orders does not need to present in itself as an exercise in cultural imperialism. On the contrary, this kind of undertakings could represent an excellent opportunity for understanding international standards in a critical way and contribute to more inclusive definitions of human rights. As mentioned above, human rights as well as culture and local customs are flexible and

dynamic so that they may be reconciled. The chapter illustrates several ways in which legal development actors may contribute to this goal. This requires looking beyond state justice institutions, understanding the interaction amongst local legal actors and normative repertoires, looking at how behaviour is regulated from an empirical point of view, being sensitive to different paradigms of reality, conceptualising human rights, culture and custom in a critical way and supporting ongoing dynamics of change ‘from within’.

Looking at the practice of legal development actors from an empirical point of view, part two builds on the normative insights developed in part one for the analysis of the data collected in the case studies. The findings on Sierra Leone presented in chapter four show that there is a tendency to focus on the most visible local justice providers and the identification of official customary rules, while ignoring or at best indirectly targeting non-official actors and practices. The chapter suggests that a number of interventions in Sierra Leone reflect the assumption that local legal orders are basically the same as state legal orders, but with a different normative content and authority figures. This seems to lead to a focus on explicit rules and the most visible legal actors for the promotion of human rights within local legal orders. Considering that the latter are multi-layered, polycentric and resort to different modes of dispute processing, the chapter questions this approach and concludes that interventions need to pay more attention to plurality in customary justice, both in terms of the multiplicity of actors that play a role at grassroots level, the different approaches they follow for processing disputes, and the particular challenges and opportunities they present for the promotion of human rights locally.

Based on the findings from the case study on Mozambique, chapter five describes a similar tendency in this country and puts forward the hypothesis that some development actors, such as international donors and governmental actors, seem to be inclined to look at legal pluralism from a normative rather than from an empirical point of view. The chapter shows the drawbacks of policies and interventions that adopt such a state defined conception of legal pluralism and a one-off, unidirectional approach to the promotion of human rights. This is mainly the case of policies and interventions endorsed at national level and supported by a few donors, while the majority of donors in the justice sector ignore the subject altogether. These initiatives focus on the community courts, while they exclude other local justice providers, such as traditional authorities and healers, who are oftentimes more relevant at local level. At the same time, the methodologies employed for the promotion of human rights often involve the dissemination of national laws in a top down fashion. These strategies are contrasted with a number of initiatives that embrace an empirical understanding of legal pluralism and dialogical methodologies in relation to human rights. These interventions are deployed by a number of international nongovernmental and local civil society organizations, who appear to be closer to grassroots realities and hence more inclined to address justice related issues from the perspective of justice users.

Chapter six investigates the hypothesis that the implementation of human rights may require different strategies within local forums that resort to mediation as compared to those that resort to adjudication. This topic is explored in this chapter with a focus on

gender and by looking at the links between women's lived realities with plural law and development interventions that aim at improving women's access to justice. Based on fieldwork conducted in Pemba city, northern Mozambique, this chapter reveals that the enforcement of a justice forum's decisions is a crucial area for women's access to justice that tends to be overlooked. This finding is linked to the discussion brought up in chapter two on how different modes of dispute processing rely on different avenues for enforcement, with mediating forums depending on social pressure or the parties' willingness to comply. The conclusion argues that understanding women's lived realities with the law is essential in two ways. On the one hand, it is necessary for assessing the kinds of process that interventions set in motion and the extent to which the latter contribute to the realisation of women's rights. On the other hand, it uncovers areas of intervention that remain unaddressed despite their potential to generate positive changes. In this sense, chapter six underscores one of the points raised in chapter three, i.e. the relevance of incorporating 'actor oriented' perspectives on gender and legal change within justice sector aid. Towards the conclusion, this chapter suggests that improving the collaboration between mediating and adjudicating forums could provide an entry point for ensuring the enforcement of human rights within local justice processes.

This topic is picked up in chapter seven, which discusses the role of international development actors in relation to reforms to the normative framework for legal pluralism. Building further on the case of Mozambique, this chapter discusses why reforms to the normative framework for legal pluralism should be grounded on empirical realities of legal pluralism and their human rights implications. The chapter suggests that local participation in the definition of national policies is necessary and that international development actors can contribute to this end by financing empirical studies on legal pluralism and human rights, and by facilitating informed and participatory policy dialogues. As such, this chapter elaborates further on several issues raised in chapters three and five, such as the relationship between empirical and normative legal pluralism vis-à-vis human rights and the intrinsic connection between law and power.

The general conclusion remarks that the fact that justice sector aid in sub-Saharan Africa starts to address the relationship between local legal orders and human rights constitutes a window of opportunity to engage with important realities that have often been neglected. However, the empirical findings of this dissertation support the critique previously articulated by other authors working on this topic: several interventions tend to deal with the issues in a superficial way.

Four areas were identified where this is the case. First, the kind of actors targeted by interventions. Chapters four, five and seven show that interventions tend to deal with 'official' legal actors mainly, which only constitute the tip of the iceberg as compared to the multiplicity of actors that are actually involved in local justice processes. While a number of nongovernmental organizations go beyond this top-down approach to legal pluralism and identify and collaborate with 'less visible' local actors, such as traditional healers and spirit mediums, these organizations tend to work around specific human rights topics, such as domestic violence and widow's inheritance rights, meaning that they are not always in a position to articulate an integrated human rights strategy.



A second area in which some development actors have tended to understand local legal orders superficially in the reviewed case studies involves the implications of different modes of dispute processing for the implementation of human rights. On the one hand, norms play a relative role in defining the outcome of disputes that are processed within forums that rely on mediation, which is often the case of local justice forums in sub-Saharan Africa. On the other hand, enforcement of decisions made by these forums depends heavily on social pressure, meaning that a widespread consensus on the appropriateness of the outcome is needed. Nevertheless, interventions often focus on adopting legislation and disseminating it instead of addressing power differentials in society that may lie at the root of unfair dispute outcomes and lack of enforcement of human rights compliant decisions by local forums.

Third, most of the studied interventions seem to address the relationship between local legal orders and human rights superficially by ignoring local knowledge. It seems that research on how local normative orders relate to the problems at hand and may contribute to providing local answers, not only to local but also to national and international problems, constitutes a strategy that only a few organizations follow.

Fourth, there is a tendency to take issue with the problem of lack of knowledge about human rights at local level, without looking at human rights in a critical way and acknowledging the challenge of their cross-cultural and cross-contextual implementation. Interventions rarely focus on building the capacity of state justice providers to apply human rights cross-culturally and in relation to local legal orders, or on how national policies and legislation may need to be adapted in order to respect human rights embodied in local norms.

These general findings clearly show that socio-legal theory may feed into the practices of development actors and improve them. However, one might question whether the issue is confined to improving the strategies that underpin the practice of development actors? According to Stephens (2009), the issue that bedevils development practice in all fields of endeavour is how to bring about policy and institutional change in an environment that is hostile to reform. According to him, there are three pre-conditions for advancing a policy agenda: political support, resources and a coherent strategy. The main contribution of this dissertation lies with the third element. In other words, this analysis may hopefully contribute to overcoming relatively 'benign' though not to be underestimated constraints, such as the lack of coherent theories of social change or epistemological bias in justice sector aid and human rights assistance. However, how to generate political support and a genuine commitment to the implementation of coherent strategies, while making enough resources available to achieve this end, are amongst the topics that researchers in this field may want to continue to investigate.

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