

Customary Justice: Challenges, Innovations and the Role of the UN International Development Law Organization (IDLO)

Abstract

Interest in informal legal systems has grown in recent years with greater emphasis being placed on local ownership as an effective means of development. Non-state justice systems, including indigenous, customary, and religious legal orders; alternative dispute resolution mechanisms; and popular justice fora are often the only avenues through which the masses can access justice. Customary justice systems (CJS) provide access to justice for marginalised or impoverished communities that may otherwise have no other options for redress. The essential nature of CJS systems to many communities emphasises the need for their recognition for successful rule of law promotion. However, customary and religious systems are not without deep flaws. They often discriminate against women and minorities, and are inconsistent with established criminal justice standards and human rights norms. Furthermore, informal dispute resolution mechanisms are often captured by local elites or religious leaders, and women, the poor, and ethnic minorities are unlikely to get equal access or fair treatment. At the UN level, a great deal of attention has been given to the empowerment of people to use the law and legal processes, as well as to interventions aimed to strengthen the capacity of local communities, to guarantee access to justice on a fair and non-discriminatory basis. However, the current debate provides little practical guidance on how to strengthen customary legal systems without consolidating inequitable or rights-abrogating practices inherent in some of those systems, and what role the international community could play without undermining local ownership.

Keywords: non-state justice – informal legal systems – customary justice systems – traditional justice – access to justice – local ownership – dispute resolution – human rights

Introduction

Interest in informal legal systems has grown in recent years, with greater emphasis being placed on local ownership as an effective means of development. Non-state justice systems, including indigenous, customary, and religious legal orders; alternative dispute resolution mechanisms; and popular justice fora are often the only avenues through which the masses can access justice. Customary justice systems (CJS) provide access to justice for marginalised or impoverished communities that may otherwise have no other options for redress. The essential nature of CJS, to many communities, emphasises the need to engage with such systems to ensure successful rule of law strategies. Engagement however, as discussed below, is not without challenges. Customary and religious systems are frequently characterised by deep flaws. They often discriminate against women and minorities, and are inconsistent with established criminal justice standards and human rights norms. Furthermore, informal dispute resolution mechanisms can be captured by local elites or religious leaders, and women, the poor and ethnic minorities are unlikely to get equal access or fair treatment.

However, criticism of traditional systems needs to be put into context. Neither gender discrimination nor lack of due process is peculiar to customary justice. In many of the countries where customary systems violate international human rights standards and principles, the state system itself is often no better.

For instance both customary and state systems in Somalia's Somaliland and Puntland consider as legitimate the reduction of penalties for homicide considered to be an "honour killing". In South Sudan the right of the family of a homicide victim to choose between execution of the perpetrator or the payment of blood money, is enshrined in law as well as customary norms.

Key challenges surrounding the use of CJS

Interest in informal systems of justice as development tools has grown in recent years. However, a number of challenges remain unaddressed, including the following:

1. **Customary norms and justice processes often lead to discriminatory outcomes and tend to reinforce the power structure that controls and administers them.** The United Nations Development Programme (UNDP) finds that traditional and indigenous justice systems are susceptible to elite capture and may 'serve to reinforce existing hierarchies and social structures at the expense of disadvantaged groups'.¹ This includes traditional leaders who often rule arbitrarily, with few checks and balances on their administration, giving power considerations precedence over equity, fairness and overall justice. Flexible and uncertain rules and the lack of procedural safeguards pose particular risks for vulnerable groups, including women, the youth, people living with HIV/AIDS, and ethnic minorities.²
2. **Local judges and community members involved in alternative dispute resolution are often not aware of basic human rights standards.** As a result, customary law and customary dispute settlement and administration may violate human rights standards and constitutional provisions, such as the right to equality and non-discrimination and the right to fair trial, including the right to legal representation, the right to due process of law, the right to protection against self-incrimination or coerced confession, the right to a jury trial, the right to an appeal, and the right to protection against cruel and unusual punishment.

Promoting Innovation in CJS

Both the international community and local actors have developed several approaches to tackle the challenges related to access to justice in customary settings, including the following:

1. **Community-based strategies, legal empowerment approaches and legal awareness programmes.** Such strategies seek to raise local awareness of state justice norms, for example by building the capacity of customary authorities to apply basic human rights standards, by empowering individuals and groups at the local level to realise their rights and access justice, or by providing legal and paralegal aid to pursue litigation of customary abuses in state courts. In this context, the use of community-based paralegals and "mobilisers" proved to be an especially effective way of bridging CJS with formal justice. Specially trained paralegals and community "mobilisers" can sit between the customary and formal systems, using the advantages of both and adapting to the situation. They can integrate reconciliation practices into dispute resolution and evoke the centrality of community harmony. Because they are community-based, paralegals are familiar with community power-holdings and dynamics, and may be more accessible and approachable, leading to a better understanding of the backgrounds of disputes. Working at the intersection between litigation and high-level advocacy, they may be able to overcome problems of elite capture common to many customary justice systems.
2. **The empowerment of women as equal partners,** through interventions aimed at equipping women with the information and skills necessary to assert themselves and speak up among men and chiefs, while promoting a community-wide appreciation of women's rights and contributions.³ Gender-based programmatic interventions have proved effective in facilitating greater participation in decision-making, so that outcomes would represent the perspectives, needs, and expectations of the wider community, as opposed to only those of the chiefs and their followers.

Engaging with CJS: The role of the international community

While the rule of law and justice administration traditionally lies at the core of state functions and responsibilities, the role of non-state actors in promoting and strengthening the rule of law and access to justice at both national and international levels should not be underestimated. At the UN level, a great deal of attention has been given to the empowerment of people to use law and legal processes, and to interventions aimed to strengthen the capacity of local communities to guarantee access to justice on a fair and non-discriminatory basis.

The Commission on Legal Empowerment of the Poor advocated a de-regulation of legal services including through customary justice systems, and the 2009 Report of the UN Secretary General called for 'low-cost justice delivery models, taking into account ... the efficacy of informal and alternative dispute resolution mechanisms'.⁴ In March 2012, the Secretary-General⁵ called on governments to clarify the relationship between traditional and formal legal systems, to bring them in line with international human rights standards and ensure access to justice of women and marginalised or vulnerable groups. However, the ensuing debate provided little practical guidance on how to strengthen customary legal systems without consolidating inequitable or rights-abrogating practices inherent in some of those systems, and what role the international community could play without undermining local ownership.

Engagement with customary legal systems to bring them into closer line with international norms and standards seems essential to strengthen the rule of law in development contexts. However, there are few comprehensive or empirically driven efforts to evaluate impact. Existing knowledge shows that interventions have tended to follow orthodox theories of reform, focusing on improving procedural or substantive aspects of customary laws, or modifying the state-customary interface to better harmonise or regulate the two frameworks, rather than empowerment-based approaches. Ultimately, understanding the political and social context as well as the relationship between formal and informal systems will be crucial to any reform effort, as is the importance of engaging with those most affected and implicated in these systems.

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Endnotes

¹ UNDP, *Access for All: A practitioner's guide to a human rights-based approach to access to justice* (2005).

² E. Harper, *Working with Customary Justice System: Post Conflict and Fragile States*, IDLO (2011).

³ *Ibid* p. 20.

⁴ UN General Assembly, *Report of the Secretary General on Legal Empowerment of the Poor and Eradication of Poverty*, 13 July 2009, A/64/133.

⁵ UN General Assembly, *Report of the Secretary General on Delivering Justice: A Programme of Action to Strengthen the Rule of Law at the National and International Levels*, 16 March 2012, A/66/749.