

Informal Justice Systems: Challenges and Perspectives

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Abstract

In large parts of the world, indigenous courts, councils of elders, and similar traditional authorities play a central role in the resolution of disputes. Despite all cultural differences, they share common features. Their relations with the state justice institutions are in many cases problematic, especially when they are not formally recognised. Nevertheless, they are perceived as legitimate institutions by local populations. Therefore, more recent strategies that aim at building the rule of law and improving access to justice include informal justice institutions as important stakeholders. In most cases, however, their positive potential can only be effectively used if they are reformed and linked to state institutions. This will be especially important in order to ensure that basic human rights standards are met. The inclusion of informal justice institutions will lead to a more comprehensive approach towards building the rule of law. Visible changes should however not be expected in the short term.

Keywords: informal justice systems – legal pluralism – human rights – access to justice – restorative justice

Informal justice systems from a rule of law perspective

Informal justice systems have lately received much attention among rule of law theorists and practitioners. The notion refers to a variety of institutions that serve to resolve disputes and relate to social practices distinct from official state policy. Informal justice systems may be run by traditional or religious authorities, elders or other respected community members.¹ They are “informal” in the sense that they apply non-state methods of conflict resolution. Nonetheless they may be obliged to adhere to state law, and they can even be formally incorporated into the state court system, such as the Ethiopian *Kebele Social Courts* that are formal state organs that provide court-like decisions applying *shimglina*, a traditional mechanism of arbitration. But even if the law formally recognises and incorporates them, these institutions stand out of the official state and are perceived as “informal” by the people. Informal justice systems have existed in almost all societies and in all times. This paper focuses on the phenomenon in the development context of today.²

Informal justice institutions may be regarded as part of the overall governance system. The phenomenon is discussed mainly with regard to cases in Africa, Latin America, and South Asia. Many observers point to the practical needs of rural populations when explaining the popularity and functionality of informal justice institutions. Rural populations often have better access to informal justice systems than to the state judiciary and they prefer them for a number of significant reasons: typically, the procedure takes place on site, it is more or less free of cost and less prone to corruption, it is exercised by trusted people in the language everybody speaks, and decisions are taken according to rules known to all community members. Informal procedures typically aim at restoring social peace instead of enforcing abstract legislation. They are consent and justice oriented. In this sense, informal justice systems allow for better “access to justice”.

Apart from these common features, informal justice institutions are, in large geographical areas, the only choice due to the absence of the state. This is often the case in regions where colonial powers did not attempt to establish formal court systems, such as North Yemen or Afghanistan. In the situation of armed conflict, informal justice institutions often gain more importance due to the breakdown of the formal court systems. In post-conflict societies they can play a crucial role in the stabilisation and reconciliation process.

Challenges for strengthening the rule of law

The growing attention given to informal justice systems is also due to the fact that the transfer of western-style judiciaries to post-conflict societies has more or less failed. After two decades of internationally funded institution building and rule of law promotion, and billions of dollars spent, the outcome still seems meagre. Recent studies have shown that newly established state courts and the laws they apply are not necessarily accepted by local populations. Especially in rural areas with more conservative, traditional communities, the gap between the formal and informal justice systems can be enormous. Even if state courts have been newly formed or re-established, disputes are still and foremost dealt with by the informal justice institutions.

Therefore, more recent efforts focus on *strengthening and reforming existing traditional institutions* and *linking them to state institutions* rather than trying to marginalise them. A purely state centred concept of the rule of law finds less and less support while informal justice institutions are more and more acknowledged as functional equivalents of state courts. In the latter sense Brian Tamanaha has stated that ‘although non-state justice systems do not meet the requirements of the rule of law, they can and do satisfy rule of law functions’, at least insofar as they can ‘play an important role in connection with establishing and maintaining rule governed behaviour between citizens’.³ They complement – and often even substitute – the state infrastructure for conflict resolution, may enable the restoration of the social peace, and even provide better legal certainty.

This new strategy does however go along with substantial concessions. Gaining the benefits of informal justice institutions may require accepting their disadvantages as well:

1. Informal justice institutions function well within homogenous communities, but can create conflict in heterogeneous societies. They are effective in resolving conflicts on the community level, but not between individuals or groups and state institutions or other external actors.⁴
2. Informal justice institutions are often male dominated and their decisions tend to be gender-biased.
3. The most frequently raised concern is related to human rights. One example is the tradition of *swara*, i.e. the marrying of a girl or woman into another family as a compensation for the killing of a family member and as a symbol of reconciliation, which is practiced by the tribal councils called *jirgas* in parts of Afghanistan and Pakistan. To ensure a decent standard of human rights protection and fair trial in informal conflict resolution, some kind of monitoring and potentially also interference may be required. Informal institutions shall increase “access to justice”, but not create “poor justice for the poor”.⁵
4. Finally, it would be unrealistic to believe that informal justice systems were immune against corruption, nepotism, and other factors influencing the procedural fairness.

In view of the enormous importance of informal justice systems at the grass root level and their potential as effective means of conflict resolution but also the challenges they create, they have rightly been identified as one of the core issues for rule of law promotion in developing countries in the years to come.

Most important trends in the past years

As the potential of informal justice systems to strengthen the rule of law finds more and more recognition, many states as well as non-state actors with the support of the international community are trying to strengthen them to the benefit of the concerned populations while diminishing their possible negative effects. It would be premature to report success stories as the change of legal cultures takes time and can only be assessed in the long-term perspective. The following examples are chosen in order to introduce the range of different approaches:

In accordance with Article 247 of the Constitution of Pakistan and the Frontier Crimes Regulation of 1901, an oppressive remainder from colonial times, Pukhtun *jirgas* in the Federally Administered Tribal Areas (FATA) may punish crimes on the basis of their own traditions and beliefs while the state assumes only a limited role. In response to calls for fairness in criminal procedures and equality before the law, tribesmen under trial were given a right to appeal and women and children under the age of 16 were excluded from a clause allowing for group punishment in 2011. These changes are certainly positive steps in the right direction but they are not going far enough, as basic human rights standards are still not fully guaranteed to the citizens of FATA.

The South Sudanese Local Government Act of 2009 goes further, being an elaborate regulation that provides a detailed prescription on customary court organisation and – like in South Africa – obliges the traditional authorities (*chiefs*) to give their rulings in accordance with the constitution. However, it still needs to be effectively implemented.

Meanwhile, the Constitution of Bolivia of 2009 established the “plurinational legal state” and gives official recognition to a variety of traditional non-state conflict resolution institutions like customary courts. Peasant communities like the Ayllus in the high plateau region who have always maintained their own customary law and courts may now officially exercise jurisdiction over their members in specific social affairs. Criminal cases are excluded but the competent state courts are often difficult to reach. The procedure applied by the customary courts is highly formal and every case is recorded. The aim is to reestablish harmony and reintegrate the accused into the community. The courts are bound to the constitution and shall consider human rights. It is especially noteworthy that they take final decisions. The only linkage with the state justice system leads to the Constitutional Tribunal. Bolivia’s decision to abolish the hierarchy of the formal over the informal justice system is part of the response of a new generation of political leaders to call for the recognition of indigenous forms of self-governance. Similar developments can be observed in other countries, both in the Latin American region and other regions. If Bolivia’s informal justice system can be formalised and access to justice improved without sacrificing internationally recognised human rights standards, its approach may be a model for other legal pluralist societies.

Possibilities for the international policy community to strengthen the rule of law through informal justice systems

As mentioned before, the change of legal cultures needs time. Therefore, most of all, patience is needed. Sustainable improvements of the rule of law through the inclusion of informal justice systems into the respective strategies should not be expected within a span of a few years.

Approaches to reform informal justice institutions must be based on careful analysis of their functioning, as they may differ from village to village. In the search for ways to improve access to justice and the rule of law, experiences of other countries can be highly inspiring. There will be, however, no one-size-fits-all model, as the traditions and values on which informal justice systems are based are highly diverse.

Countries such as Pakistan, South Sudan, and Bolivia that take concrete steps towards legislative and even necessary constitutional reform should be actively supported. However, while it may be advisable to improve access to justice through informal institutions, formal justice sectors should not be neglected. For an effective protection of vulnerable individuals, especially children and women, it is necessary that state institutions remain competent to resolve certain cases. In many countries of the world, the judiciaries will need further assistance to fulfil this mandate. State capacity can be raised through the introduction of new forms of justice delivery such as mobile courts.

It is important to take into consideration that resolving disputes is an inherently political issue and that actors, formal as well as informal, will always have certain political motives. Efforts to reform and strengthen informal justice institutions are often faced with open or hidden opposition by high-ranking state officials who are concerned that they will lose political power. On the grass root level, in contrast, state officials are frequently willing to engage the informal system as they already live in communities and are in cases even involved in informal dispute resolution mechanisms.

In conflict and post-conflict situations, informal justice institutions may be perceived as competitors by stakeholders who are more interested in their own advantage than in effective conflict resolution and social peace, such as illegal armed groups, warlords and radical ideological or religious movements. If they are meant to play a vital and positive role in building the rule of law, informal justice institutions need to be protected from the influence of such actors.

Last but not least, the question of legitimacy must be taken very seriously. While state institutions mainly derive their legitimacy from national legislation - and to some extent – from international law, informal justice institutions are oftentimes met with much more acceptance from and within the local communities.

The reform and strengthening of informal justice institutions and the creation of effective linkages with the state will fail if this has not been prepared together with the members of the respective communities in an inclusive process. Principles of traditional justice such as the seeking of consent may be useful in this way.

Related UN Documents

The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies – Report of the Secretary-General, UN Doc S/2011/634.

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Endnotes

¹ The wider notion of *legal pluralism* is avoided in this paper as it includes phenomena ranging from the self-governance of the Christian Churches to the *lex mercatoria* and hybrid forms of internet governance.

² One example of informal justice systems in Western countries are the councils of Native American tribes in Canada and the USA. See, Jacob T. Levy, *Three Modes of Incorporating Indigenous Law*, in Kymlicka and Norman: Citizenship in Diverse Societies (2000), 297-325.

³ Brian Z. Tamanaha, *The Rule of Law and Legal Pluralism in Development*, 3 The Hague Journal on the Rule of Law 1-17 (2011).

⁴ Matthias, Kötter, *Non-State Justice Institutions: A Matter of Fact and a Matter of Legislation* 6 WZB (Working Paper no. 34, 2012).

⁵ Matt Stephens, Typologies, Risks and Benefits of Interaction between State and Informal Justice Systems, Presentation at conference on Customary Justice and Legal Pluralism in Post Conflict and Fragile Societies (November 2009) 151.