Engaging Customary Justice Systems

White Paper

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Introduction

The rule of law is a universally held value – it is essential for the protection of human rights, ensuring security, and has increasingly gained recognition as indispensible for long-term economic development.[1] International institutions, development agencies and national governments have long strived to strengthen the rule of law, particularly in post-conflict environments, as a prerequisite for establishing stability and promoting growth. This goal has been elusive.

Engaging with customary and informal systems of justice has emerged as a critical consideration in rule of law sector support over the past five years and is focus of the work of Hakí in its programs and research around the world. The international community largely remains unsure of how to approach customary justice and tends to design interventions that alternately ignore or replace customary systems. The best approach, we have found, lies more in the middle. Customary justice systems should not be seen as separate or parallel, but an integral, if often deeply flawed element of the wider justice sector.

This paper analyzes various aspects of customary justice and proposes a comprehensive approach for engaging customary justice systems in a constructive manner that maximizes needed reform while strengthening positive attributes.

What is Customary Justice?

Customary justice takes many forms. Often referred to as informal, traditional, tribal or even religious justice, it represents a system of laws/customs and/or institutions that are integral to society, but often operate in parallel to centralized, state-subsidized and statute-based justice systems.[2] Customary systems derive their legitimacy from traditions, local power structures and community acceptance rather than constitutional or statutory authority.[3] Customary justice often refers to a system of laws and community institutions that reflect local cultural norms and have a long history of providing local dispute resolution. Indeed, most "customary courts" predate the advent of modern judiciaries and often operate as a byproduct of bifurcated colonial justice systems. Customary justice also refers to religious systems of law such as sharia law

[1] E.g., "The Legal Empowerment Approach to International Development" Haki White Papers, September 2010; Messick, Richard E. (1999) "Judicial Reform and Economic Development: A Survey of the Issues", *The World Bank Research Observer*, vol. 14, no. 1: pp. 117-36; Douglass North, *Institutions, Institutional Change, and Economic Performance,* 1990; Dani Rodrik, Arvind Subramanian, and Francesco Trebbi, 'Institutions Rule: The Primacy of Institutions Over Geography and Integration in Economic Development,' in 9 *Journal of Economic Growth*, no. 2, 2004.

[2] Many scholars object to a formal-informal divide, arguing that customary justice systems are often more "formal" and legitimate in the communities in which they operate.

[3] This paper also differentiates customary justice from mob or vigilante justice.

courts, but with the caveat that many Islamic legal systems already integrate religious tenets into national legal frameworks, and thus fall somewhat out of the scope of this paper.

Customary courts tend to operate in a transparent fashion in public places and with wide-ranging community participation. Disputes are resolved as a forum with large numbers of community members present to observe (and comment). Large trees and open buildings are the courtroom. Chiefs, clan leaders, or panels of village elders hear and resolve disputes. Lawyers are normally prohibited. Traditional leaders act as

Country Case Study: South Sudan

A brief example from a customary court in Juba, South Sudan illustrates the legal and procedural flexibility of customary justice systems:

> A man from the Lokoya tribe was taken to the Kator "B" customary court in Juba by a man from the Kakwa tribe on grounds of breach of oral contract. The Kakwa man claimed that the Lokoya man had not paid for a large supply of sugar he had taken. The Lokoya man claimed frustration of purpose of the contract because the sugar had been stored in a warehouse that had burned down. A panel of six chiefs adjudicated the case, one each from the Lokoya and Kakwa tribes – to weigh in on potential customary law interpretations. One of the prime witnesses, the warehouse owner, was a Muslim from the north. The chiefs examined the plaintiff and defendant in rotation. A Koran was produced for the Muslim warehouse owner when called to testify. Ultimately the chiefs decided that the sugar had fully transferred into the hands of the defendant and that the plaintiff was due payment. The chiefs next examined whether there was insurance on the warehouse and whether there was any negligence on the part of the warehouse owner. Having deduced that the only way to make the plaintiff whole was through payment by the defendant the chiefs ruled for full payment. A payment schedule was made through the court's cashier. Public opinion generally seemed to be in favor of the judgment.[1]

Customary courts play a basic, fundamental role in providing access to dispute resolution mechanisms. The courts are flexible in deciding cross-tribal disputes as well as dealing with subject matter that might lie outside of customary law. In this case, contract enforcement is a basic justice service required in market economies – one which many countries continue to struggle to provide. Citizen surveys in South Sudan have demonstrated greater trust, accessibility and a general preference for customary courts (Source: Tiernan Mennen, "Lessons from Yambio: Legal Pluralism and Customary Justice Reform in Southern Sudan", *Hague Journal on the Rule of Law,* 2, 218-25, 2010)

Table 1.

Court Preference for Women Litigants		
Region	**Preference for Customary Court**	**Preference for Statutory Court**
Juba	95%	5%
Rumbek	99%	1%
Bentiu	93%	7%
Yambio	67%	33%

advocate and arbiter, the community as public opinion. Leaders are generally revered as the custodians of the complex oral legal history of tribes and clans. Yet those who continually advocate for unfair decisions lose credibility among their community and the constituents that pay their allowances.

Customary courts receive disputes in all areas of law. They tend to have wide-ranging flexibility on applicable law - statutory, tribal, comparative – and jurisdiction. And while most customary law cases center on family law in its many forms (including adultery, divorce, inheritance and child custody), customary courts also adjudicate criminal, contract, land and property and traditional disputes such as hexes. Even if a case is not directly covered under the tribe's customary law court leaders will often adapt customary norms of fairness to the dispute at hand. Customary courts are the primary entry point for a majority of citizens to access justice.

Customary and statutory courts and legal systems often exist in parallel. Most bifurcated systems of justice have colonial origins. Typically two co-existing systems of law were developed – one for colonial rule and access to land and natural resources and one for the colonized. Historically there has been only limited, prescribed interaction between the two. International justice sector support to date has largely maintained the status quo – customary systems have been ignored, presuming universal predominance of the formal system and channeling funding and technical assistance to formal courts. This approach has exacerbated the disconnect between the two systems and spurred neglect of justice issues in the courts of primary use by marginalized populations.

The customary-formal divide has also weakened justice systems as a whole. Parallel, unconnected systems generate confusing and often debilitating conflicts of laws and jurisdictional gaps and/or redundancies. Customary laws based on cultural norms and traditions are often, but not always, in conflict with statutory laws and international human rights standards. Jurisdictional lines between the two systems are rarely drawn. The result is an unstructured, *de facto* form of legal pluralism.

Legal pluralism and the study of plural legal orders has a long history in the legal anthropology field.[4] Modern approaches to legal pluralism treat it as "an empirical state of affairs in society" and that any socially pluralist society that enforces locally accepted social norms inevitably contains elements of legal pluralism.[5] In other words, legal pluralism is synonymous with cultural pluralism. In multi-cultural societies such as the U.S. the law, even in its strictest sense, is dynamic – "improvising, selecting, appropriating, denying, and contesting normative ideas from a host of sources."[6] The

[4] The term "legal pluralism" is itself an item for debate. Legal pluralism here refers to a legal system that recognizes different legal orders throughout society and with bases in ethnic and tribal traditions.
[5] Griffiths, John (1986) "What is Legal pluralism?" *Journal of Legal Pluralism and Unofficial Law,* 24: 1-55, 4.
[6] Greenhouse, Carol J., (1998) "Legal Pluralism and Cultural Difference: What is the Difference? A Response to Professor Woodman", *Journal of Legal Pluralism*, 61-72, 67.

persistence of common law jurisprudence in the U.S. reflects this. Decentralized adjudication in the common law history represents the need for a constant legal dynamic that adapts to localized norms and in the process debates, analyzes and shapes the law as needed. In the end, the process of creating law is as important as the law itself.

Legal pluralism has a mixed history in development policy. On one hand, customary justice systems are recognized as important to the cultural history of many countries. On the other, they are spurned by multilateral agencies and investment firms in favor of legal monism – single, unified systems that provide foreign investors with a more familiar legal platform.[7] However, single-minded reforms to create foreign monist legal systems have further disenfranchisement of the poor, rural and less educated in many culturally plural societies.[8] Additionally, in many countries customary law is critically linked and inseparable from cultural identity. The right to practice the cultural heritage enshrined in customary law has been the cause and fruits of countless struggles. It is often impossible to construct an inclusive and comprehensive legal system that does not include major contributions from customary law.

The challenge for states with plural legal orders is to develop a framework that both placates the fears of investors while embracing the cultural values of the trusted customary system.

Customary Courts: A Need for Reform

In fractured, pluralist states it is important to harness diverse social fields to create laws that reflect a broad and common cross-section of societal norms. Anthropological research on plural legal orders has long existed but has rarely been used to analyze and create reforms to enhance access to justice, let alone in conflict-plagued states. Only recently have the two disciplines of rule of law and legal pluralism come together. Yet development actors remain unsure how to integrate customary systems into established Western approaches and institutions.

Research has increasingly highlighted the importance of customary courts for access to justice and indicated an overwhelming preference and trust of customary systems of justice. [9] In many developing countries the formal justice system is an institution little

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[7] Patrick McAustan,*"Legal Pluralism as a Policy Option: Is it Desirable? Is it Doable?" from* Land Rights for African Development: From Knowledge to Action*, ed. Esther Mwangi, CAPRi Policy Briefs, available at:* http://www.capri.cgiar.org/pdf/brief_land-04.pdf, 9.

[8] E.g., Lauren Benton, "Beyond Legal Pluralism: Towards a New Approach to Law in the Informal Sector", 1994.

[9] E.g., Tiernan Mennen, "Lessons from Yambio: Legal Pluralism and Customary Justice Reform in Southern Sudan", *Hague Journal on the Rule of Law,* 2, 218-25, 2010; Deborah Isser, Stephen Lubkermann, Saah N'Tow, *Looking for Justice: Liberian Experiences with and Perceptions of Local Justice Options,* United

understood by the majority of citizens and whose powers of judgment are seen as biased and/or capricious.[10] Customary courts are cited as more transparent, less expensive, more in touch with community values, easier to access, more conveniently located, and easier to understand than their formal system counterparts. Customary courts and the chiefs that administer them are largely trusted over formally trained judges. One of the major struggles of developing countries is to create judiciaries that are accountable, transparent and trusted by a majority of its citizens. Many customary justice systems have already achieved this goal on their own.

Despite these positive attributes there are extensive needs for reform across most customary justice systems and at the statutory-customary interface. Customary law is often in violation of human rights principles, while the administration of justice in customary courts is often inconsistent, procedurally flawed and susceptible to elite-capture.

Women's Rights. The impetus for reform of customary justice systems has particular traction in gender-related issues. Customary practices are largely harmful to women and often condone gender-based violence (GBV). Customary courts handle a large percentage of GBV cases in pluralist societies, as they are generally more accessible and preferred to statutory courts, especially by the poor and undereducated. GBV also falls at the nexus of criminal and family law, inextricably intertwined with customs and traditions and the exclusive purview of the customary courts. Jurisdiction over criminal law in pluralist systems is often uncertain. As a result, most GBV cases are tried according to customary law. Even serious cases such as rape are brought with greater frequency to customary courts.

Customary courts are often male-dominated and a hostile location for women participants - potentially discouraging women from bringing cases and/or affecting the impartiality of proceedings. While courts are more accessible and the judgment of traditional authorities generally respected, customary law often violates women's substantive and procedural rights, in some cases to grossly inhumane proportions.

States Institute for Peace, 2009; International Rescue Committee/UNDP *First Field Report on Customary Court Observations*,15 November 2006.

[10] E.g., William Prillaman (2000) *The Judiciary and Democratic Decay in Latin America: Declining Confidence in the Rule of Law*

Country Case Study: Women's Land Rights in Kenya*

Policy debates in Africa aimed at tackling women's difficulties in accessing land usually focus on whether to strengthen the formal justice system or integrate customary land tenure and inheritance systems. However, research with Kenyan agricultural communities indicates that women have difficulties accessing land under either system. Technically, they can seek redress through multiple avenues, including formal and informal institutions and those that integrate elements of both, but in practice all avenues are easily undermined by more powerful in-laws, brothers and other actors that deny women access to land instead of upholding their rights.

Recent analysis suggests that the policy debate must shift away from pitting formal legislative approaches against support for customary systems (Chopra and Harrington). Instead the problem needs to address sociocultural value systems that legitimize discriminatory behavior. The justice system, both formal and informal, have a role to play only in so much as they can create the social and political contexts that pressure communities to reject abusive and self-serving behavior.

In Northern Kenya, neither institution was up to the task. Instead the Kenya National Commission on Human Rights provided the framework for widows to challenge elders by telling their story of being chased from their lands. The elders, caught between securing patrilineal land rights and protecting women, had to develop innovative means to resolve their dilemma. In many cases, they defended the widows and ensured that they received a life interest in the land for their own protection and to ensure that their sons would receive a portion as dictated by patrilineal practice.

In situations such as Northern Kenya civil society and community-based projects represent the best option for supporting disadvantaged women to advocate and "forum shop" for the institution best suited to reject discriminatory practices. Projects that develop partnerships with courts and/or other institution that expand protective practices need to be carefully evaluated and expanded. Ultimately, the aim must be to empower women to navigate whichever forum they find most available, convenient, effective, and cost-efficient in promoting women's access to land rights.

* *For due credit and a more detailed analysis see: Tanja Chopra and Andrew Harrington, Arguing Traditions: Denying Kenya's Women Access to Land Rights, Justice for the Poor, World Bank, Research Report, No. 2, 2010*

Land Tenure. Land tenure is a foundation of customary law in many societies, particularly in Africa. Customary land tenure systems have evolved into a complex hybrid of traditional practices, local power dynamics, and statutory law reflecting a diverse range of cultural, ecological, social, economic and political factors. For decades, many African governments have sought to replace customary land tenure systems with a "modern" system of property rights, based on state legislation, European concepts of ownership and on land titling and registration. This is partly because, since colonial times, customary land tenure was held not to provide adequate tenure security, thereby discouraging investment and negatively affecting agricultural productivity.[11]

[11] For more discussion see, *Changes in "customary" land tenure systems in Africa*, Edt. Lorenzo Cotula, International Institute for Environment and Development (IIED), Food and Agriculture Organization of the United Nations (FAO), March 2007

Land legislation, however, has a poor track record of implementation and most resource users gain access to land through local land tenure systems. Where formal land registration has been pursued, this has proved slow, expensive, difficult to keep up-to-date and hard for poor people to access. As a result, very little rural land has been registered and customary land tenure systems continue to be applied in much of the rural developing world. In Africa, formal tenure covers only between 2 and 10 percent of the land.

It is now generally recognized that land policies and laws must build on local concepts and practice, rather than importing one- size-fits-all models. For instance, in its latest Policy Research Report on land tenure the World Bank argued that "in customary systems, legal recognition of existing rights and institutions, subject to minimum conditions, is generally more effective than premature attempts at establishing formalized structures".[12] Yet customary systems are not a panacea for insecure land tenure and face their own challenges of elite-capture, inconsistent application, and harmonization with formal institutions.

Procedural. Customary law and the role of customary courts has evolved in many post-conflict environments to fill a dispute resolution vacuum, combining customary and statutory elements and often operating without guidance or even full knowledge of past customs. Within this context the courts have developed and expanded their jurisdiction in a haphazard manner. Expansion of the courts and changes to the controlling law has resulted in an inconsistent application of legal standards and punishments between and even within the same customary courts. Judgments and punishments are often dictated by preferences of individual authorities. Most customary courts operate without institutional supervision, recourse for appeal, and no review and remand procedure linking customary and statutory courts.

Lessons for Development: Customary Justice Reform, Top-Down to Bottom-Up

National governments and international donors struggle to identify how to strengthen the rule of law in diverse, pluralist states. A common strategy is legislation and institutional reform at the highest levels with directive reforms of customary courts by judiciaries and Ministries – codifying and re-writing customary laws, stripping customary courts of jurisdiction, appointing new court chiefs, etc. However, "top-down" reforms such as these have little positive track record of actual implementation and effectiveness. Meanwhile, feedback from communities stress the importance of the

[12] *Land policies for growth and poverty reduction*, Klaus Deininger, World Bank 2003

customary system, but express a need for more resources and more efficient and consistent administration, especially on women's rights. Government officials emphasize the need for a hierarchical justice system, with customary courts working under established jurisdictional guidelines and recognizing and utilizing the technical supervision of the formal system. The best approach, it would seem, combines a bit of both.

From our analysis and past experiences we advocate for a dual approach to reforming customary justice systems – top-down and bottom-up. In this approach reforms target improving professionalism and consistency of judgments through citizen and civil society monitoring and advocacy and through direct support to individual customary courts to strengthen processes. At the framework level reforms target constitutional and jurisdictional guidelines and institutional policies to clearly delineate jurisdiction and resolve conflicts of laws. This more balanced approach reinforces positive aspects of customary systems, such as access and affordability, while establishing frameworks, oversight and internal dynamics for realistic, iterative reforms that address human rights violations and increase consistency.

Our recommendations also reflect growing rule of law policy priorities to integrate customary justice into overall judicial reform efforts, while acknowledging the pitfalls of overly centralized approaches that do not change the reality for marginalized populations.[13] The dual approach here presents, 1) a broad procedural and normative framework that sets a foundation from which, 2) incremental, community-driven reforms can take place.

1. Top-Down – a Pluralist Framework

The formal judiciary has a role to play in providing technical supervision to the customary courts. Education and reform of the customary courts best occurs if reinforced by judicial technical oversight and review, correction and remand, or collateral review of misjudged cases.[14] Developing proactive case review policies can help foster a healthy review system between the customary courts and the judiciary that improves consistency of judgments and helps documentation and harmonization

[13] See generally. Penal Reform International, *Access to Justice in Sub-Saharan Africa: The Role of Traditional and Informal Justice Systems* (2000), http://www.gsdrc.org/docs/open/SSAJ4.pdf [7/18/2010]; Leila Chirayath, Caroline Sage, Michael Woolcock, *Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems* (July 2005), available at: http://siteresources.worldbank.org/INTWDR2006/Resources/477383-1118673432908/Customary_Law_and_Policy_Reform.pdf [7/18/2010]; The Role of Non-State Justice Systems in Fostering the Rule of Law in Post-Conflict Societies; http://www.usip.org/programs/initiatives/role-non-state-justice-systems-fostering-rule-law-post-conflict-societies [7/18/2010]

[14] David Pimentel, *Rule of Law Reform Without Cultural Imperialism? Reinforcing Customary Justice through Collateral Review in South Sudan,* 2 HAGUE J. ON RULE L. 1 (2010) (Proposes a system of collateral review of customary court decisions for South Sudan)

efforts (discussed more below). The recommendations in this section are not sufficient in and of themselves, but should form the normative/institutional component of deeper reforms.

Central level reforms should focus on two primary categories of activities to incorporate, strengthen and reform customary justice systems vis-à-vis the formal, statutory process. First, is to develop a legal framework that delineates broader guidelines for subject matter, territorial, and personal jurisdiction. Second, a cross-jurisdictional, multi-tribal process needs to be set up to adjudicate disputes that involve a conflict of customary laws due to a diversity in parties – i.e., where parties are members of different ethnic groups or tribes and there is a conflict of jurisdiction or which customary law should be applied.

The approach to plural legal orders observed in customary courts in multi-ethnic areas across Africa provides important lessons on the vetting and collaboration required for legal pluralism. For pluralism to take root in the legal order of multi-ethnic countries there has to be a built-in flexibility that allows discussion and compromise between customary law traditions. There also has to be significant space for oral jurisprudence and less emphasis on rigid statutory procedures.

Personal Jurisdiction. Personal jurisdiction refers to which court or administrative body has jurisdiction over an individual person bringing a claim. Typically this is determined by residence in a territorial jurisdiction such as a county or state, but in customary law it pertains more to an individual's tribal membership. Personal jurisdiction in many legal systems, including the US, is determined by "minimum contacts" with an administrative area, ensuring that a court has the requisite authority over a person. Personal jurisdiction in the customary court system only exists for internal disputes between members of the same tribe. Cross-tribal disputes would have no clear jurisdiction and be removed for diversity. Methods for determining tribal membership (and thus customary "minimum contacts") are set by customary law.

Territorial Jurisdiction*.* Territorial jurisdiction has less significance at the customary court level because territory or administrative boundaries do not normally coincide with the location of different ethnic groups. In the proposed cross-tribal courts traditional authorities from the accused tribe are present at the proceedings regardless of location. The courts handle all cross-tribal disputes that occur within a determined administrative boundary, such as a state or county, but apply various customary law as dictated by determination of personal, or tribal jurisdiction. In other words, personal jurisdiction is determined first, territorial second.

Conflict of Laws. Determination of which law to apply is the most contentious jurisdictional issue in pluralist states and between customary and statutory systems. In many countries, the statutory system does not have authority or even presence at the local level. Harmonizing systems that have long operated apart is a difficult and slow

task that requires ongoing democratic discourse and legislative processes guided by a flexible, pluralist legal and Constitutional framework.

Statutory limits vis-à-vis customary law should be established through a constitutional process that ideally outlines where statutory law begins and customary law ends, preferably through language that allows for an evolving constitutional interpretation (see South Africa case study). In this manner, statutory law would establish itself through an evolutionary process that publicly deliberates over the best legal system for individual issues. This also allows for statutory law to slowly alter its national mandate as multilateral customary law approaches become less (or more) efficient. Family law, for example, normally falls under customary law but contains many legal issues that have more criminal or statutory elements.

Lines of territorial or personal jurisdiction also need to be established at the customary court level. In some instances customary courts use the traditions of the region exclusively and in other instances chiefs from the traditions of the litigants are brought to help adjudicate. A uniform standard and practice needs to be established across all tribes for such cross-tribal jurisdictional issues and reinforced through regular appellate review (see *part d* below). Beyond this, the territorial breadth of courts need to be firmly linked to administrative boundaries such as counties and a decision made on the existence of courts for other tribes that exist in large numbers within these boundaries.

Harmonization is best implemented through an iterative institutional referral system between customary and statutory courts that exists mostly *ad hoc*, if at all. Customary courts cases that violate rights enshrined in formal law should immediately be removed to a constitutional or statutory court. The constitutional court will then rule on the constitutional issue alone and remand the case back to the customary court with guidance on how the judgment needs to change to comply with constitutional provisions. The customary court will issue another ruling in compliance that then becomes incorporated into the jurisprudence of that customary law. Appeals from this court would extend up to the Supreme Court, the ultimate arbiter on the line between customary and statutory law. This process could also occur through a collateral review system where a separate body, such as a national human rights commission, has the mandate to review customary court decisions and challenge them in the statutory or constitutional court, with remand back to the customary level.

Multi-ethnic, cross-jurisdictional courts. Once jurisdictional lines are delineated a flexible, cross-jurisdictional authority needs to be established to navigate areas of conflict between tribes. Customary courts and their statutory counterparts are often ill-equipped to deal with disputes between parties from different ethnic groups. Traditional authorities and statutory judges are largely unaware of oral, customary traditions, other than their own. Determining the controlling customary law or finding fault or shared liability based on some combination of laws is a delicate process unique to each case.

The concept of a separate court for cross-tribal disputes is inspired by the practices and success of customary courts in multi-ethnic countries and is based on the concept of diversity of jurisdiction used to remove cases from state to federal level in the US.[15] Customary courts observed in diverse areas of South Sudan with high Internally Displaced Peoples demonstrated a unique flexibility born out of necessity. They incorporate cross-tribal jurisdictional issues seamlessly by utilizing a panel six to eight chiefs from various local tribes. Where there is diversity of parties they ensure participation of a chief from each tribe and adjudicate through consultation and compromise. Each chief for the concerned party/tribe advises on the appropriate tribal law. A paramount chief serves as chief justice for the panel and facilitates the reaching of a compromise by the parties and tribal chiefs. Where there is no chief present for a party to the dispute, the case is postponed and a chief from the tribe called to adjudicate.

A cross-tribal court would be established to take cases removed for diversity involving litigants from different tribes. The court structure could be as simple as that in the South Sudan example, where each court adjudicates through a representative panel of traditional authorities that handles both intra and inter-tribal disputes. Procedures of open, collaborative deliberation are recommended, particularly in post-conflict societies where wounds from inter-tribal conflicts are often still being mended. This type of system has other related benefits: 1) in keeping with historical dispute resolution techniques, compromise is reached through consultation, 2) rifts between tribes are repaired through public airing of grievances in a process similar to truth and reconciliation commissions, 3) tribes that exist as a minority in pre-determined administrative boundaries are not subjected to biased judicial processes.[16]

[15] In the US where there are parties to a State case from different States - diversity of jurisdiction - either can remove the case to a Federal court.

[16] See. Schmid, Ulrike, "Legal Pluralism as a Source of Conflict in Multi-Ethnic Societies: The Case of Ghana", *Journal of Legal Pluralism,* 2001 (the Ghanaian example where conflicts between the Gonja and Nawuri tribes escalated to a civil war in 1994 in part due to the power relationships established by an ill-constructed legal pluralist system. Traditional authorities that had been delineated in terms of tribal membership were altered and assigned to a specific territory. The restructuring created an additional legal hierarchy that gave "majority tribes" legal dominance over "minority tribes". Historical conflicts over land were now placed in a legal framework that subordinated minority tribes' customary law to that of the majority tribes.)

Country Case Study: Constitutional Pluralism in South Africa

South Africa provides another case study on legal pluralism supported by a multi-cultural Constitutional process. South Africa is one of the most prominent examples of social pluralism providing recognition of traditional leadership and customary law. The South African Constitution creates a comprehensive system of rights to cultural, linguistic, religious and traditional communities. Specifically recognized within this is the role of customary law and traditional leadership. As stated under s. 221:

> (1) The institution, status and role of traditional leadership, according to customary law, are recognised, subject to the Constitution.
> (2) A traditional authority that observes a system of customary law may function subject to any applicable legislation and customs, which includes amendments to, or repeal of, that legislation or those customs.
> (3) The courts must apply customary law where that law is applicable, subject to the Constitution and any legislation that deals specifically with customary law.

Under this section customary law is clearly subsumed within the rights and structures of the Constitution, but is also given its own place as the chosen law where applicable. Additional sections of the Constitution established guidelines for national legislation to provide for a national council of traditional leaders and to define roles for traditional leadership at the local level. The role of customary law was recognized by the Constitution but intentionally left vague and to interpretation by, in the words of the Constitutional Court, "future social evolution, legislative deliberation and constitutional interpretation."[1]

The role of customary laws was interpreted in such a way by the Communal Property Association Act (1996) that provided for allocation of communal land by a democratically elected board. This act reflected the opinion that the authority of chiefs to allocate communal land was too easily corrupted. The Act did not, however, attempt to substitute individual title for communal tenure – often the more sensitive and contentious issue. Chiefs are recognized as responsible for settling disputes in the customary courts under territorial and subject matter jurisdiction per the apartheid-era Black Administration Act. New acts are continually passed to abolish outdated provisions. The Customary Marriages Act (1998) is one example, where customary marriages were given legal recognition, overturning provisions of the Black Administration Act. (Barbara Oomen, *Chiefs in South Africa: law, power and culture in the post-apartheid era*, 1999)

South Africa's commitment to legal pluralism and traditional structures is an important development because it reflects not only a Constitutional dedication to multiculturalism but also the political and functional need for incorporating traditional legal systems.

2. Bottom-up – Working in Customary Courts

Reform at the framework and central institution level has limited potential for reform on its own. Most local customary courts operate in isolation and outside of central government control. Their proximity to communities makes them more responsive to evolving local norms and culture, including demands for human rights.

The first step in working in any pluralistic or customary law environment is to conduct a thorough needs assessments that includes monitoring of customary court cases for procedural and human rights violations, and interviews with community users and traditional authorities. Buy-in from the community and its leaders is essential. The following recommendations and activities should be carried out depending on traditional authority responsiveness and professionalism, but ideally each recommendation is implemented so as to reinforce the gains in others. For example, training of traditional authorities should always coincide with civil society monitoring and demands for reforms of customary courts.

***Documentation*.** One of the key steps to developing an integrated pluralist system is recording, analyzing and making public the results of customary court cases. Documentation of customary court decisions and application of laws would build up the jurisprudence within each community and create a structure for continued recording of judgments that can lead to creation of a legal clearinghouse for all customary law decisions by tribe/community, at the appellate level. This process can expose bad practices but also increase consistency and predictability of rulings. The system also allows traditional authorities and communities themselves to better track compliance with rights and evolving changes in norms.

Documentation efforts should not be seen as an attempt to codify or formalize customary law, but instead stimulate self-reform through local ownership by traditional authorities. Creating a database of judgments of customary justice practices would complement oral traditions. Documentation research through participatory action methodologies can help give greater ownership, capture changing oral jurisprudence and increase consistency of judgments.

One key to documentation is creating a court clerk position for each customary court that transcribes court proceedings and oral decisions of the chiefs and keeps track of administration and enforcement. Many customary courts already employ clerks. Development projects and national governments should create programs to develop the profession further.

Training of Traditional Authorities. Documentation efforts should feed into larger efforts to train and increase the professionalism of chiefs and customary court personnel, including clerks, police and other administrators. Traditional authorities are an extremely important and accessible part of the justice sector and have shown responsiveness to incorporating growing demands for human rights. For example, past customary court studies have documented independent reforms by chiefs in response to human rights trainings to increase punishments for violence or approving divorces for abusive relationships.

Traditional authorities should be trained on human rights and improving court administration, however, all trainings should be designed to avoid perceptions of

cultural imperialism and introduction of foreign values. Training should also be linked to larger incentive structures surrounding the customary courts, including citizen monitoring and feedback, especially from women. Greater access to funds and formal system review of cases can also help keep create incentives for chiefs to reform practices and incorporate human rights and respond to changing cultural norms.

Education and reform of the customary courts through the chiefs can only occur if reinforced by technical oversight and review, correction and remand of cases misjudged by the customary courts (as detailed above).

Increase professionalism. Professionalism in customary courts needs to be strengthened and institutionalized. Low levels of corruption in customary courts are common, but not universal and constantly threatened by outside actors. Customary court transparency can only be maintained through introduction of systems for reinforcing professional conduct and giving voice to citizen complaints. Chiefs should be incorporated into the broader judicial oversight and discipline framework. A code of conduct for all customary court personnel should be developed and enforced through internal ethics review committees. An anonymous complaint office can also be established with local government boards to allow reporting of ethics abuse and impropriety such as bribery.

Developing professional associations and/or local forums for traditional leaders can increase momentum for reform. Associations or forums can create internal leadership that energizes reforms. Forums can also strengthen documentation efforts, ethics reviews, and reinforce trainings and review of judgments.

Empowerment and awareness raising. The importance of working with customary court personnel is only half the equation, as citizens themselves are often unaware of their rights and the level of justice they should expect from the courts. Customary courts are generally responsive to the values of their constituents. Like any system of laws, the courts receive their mandate from the people and must evolve as the expectations of their constituents change, particularly when there is an alternative forum such as statutory courts. Increasing awareness of rights and the protection that should be accorded across society has the potential to stimulate reform within the customary courts by threatening their standing in the community as the primary venue for dispute resolution.

Civil society monitoring and advocacy. Empowering local civil society organizations and other community groups to demand reforms from the customary courts (and statutory courts) creates a sustaining incentive for long, difficult reforms. Civil society groups have a strong role to play in monitoring customary court human rights and ethical violations and reporting these abuses to an established review body. Civil society legal service providers, such as community paralegals, can also play a key role in navigating the space between customary and statutory systems, and identifying cases that should be

removed to cross-tribal or appeal courts. An active civil society is essential for challenging local power dynamics that co-opt both formal and customary justice systems. Civil society can expose these abuses, raise awareness of human rights and other legal entitlements, and build dialogue and demand for justice at the community level.

Conclusion

The accessibility and preference for customary justice systems by local, largely marginalized populations across the developing world necessitates their inclusion in development strategies. Yet, most customary courts, like their formal counterparts are in need of reform and strengthening. Rule of law projects should conduct careful analysis and consideration of balanced approaches that integrate both systems, while understanding the overarching effect of local power dynamics and the need for a comprehensive, unified plural legal framework with clear jurisdictional guidelines.

Hakí and partners have developed the integrated approach presented here over years of engagement with both formal and informal justice systems. We hope this paper can serve as the basis for developing improved strategies for engaging customary justice systems to provide greater access to justice for marginalized populations.