

1. Definitions and classifications

Informal or non-state justice systems are umbrella terms often used to describe mechanisms of justice and conflict resolution that operate outside the bounds of a formal, state-based legal system. These may include, but are not limited to, indigenous, customary and religious legal orders, alternative dispute resolution mechanisms and popular justice forums.

This book is concerned primarily with customary justice systems, sometimes also referred to as 'traditional justice systems'. While the diversity of such systems makes generalization difficult, for the purposes of this book, 'customary justice' refers to a system of customs, norms and practices that are repeated by members of a particular group for such an extent of time that they consider them to be mandatory.¹ Customary systems tend to draw their authority from cultural, customary or religious beliefs and ideas, rather than the political or legal authority of the state. As such, provided that it has not been incorporated into state law, customary law is only law to the extent that the people who follow it, voluntarily or otherwise, consider it to have the status of law.²

Customary justice systems are as much social or political orders as they are legal orders: customary law generally comprises descriptions of what a community does as well as prescriptions as to what its members should do. These norms and rules are actively produced, enforced and recreated through processes of participation and contestation. Customary law can therefore be dynamic, adaptable and flexible, and any written version of it is likely to become quickly outdated. Factors as diverse as ecology, socio-economics, proximity to the state system, and religious beliefs all contribute to the development of customary law. These factors explain why the precepts of customary justice systems can differ greatly over small distances, and why there may be several versions of customary law co-existing in one place, in competition with each other as well as the state system.

Placing customary law under the banner of 'informal' or 'non-state' justice makes certain caveats necessary. First, distinguishing customary systems from the state's judicial apparatus does not mean that the relationship is necessarily one of exclusion. In many countries, customary systems are incorporated into and regulated by state law, regulations or jurisprudence. In Uganda, custom is a recognized source of law,³ while in Malawi, the customary system has been integrated into the hierarchy of the formal justice system.⁴

Second, to classify customary law as 'informal' should not imply that it is simplistic or lacking in authority. In Afghanistan, for example, the *Pashtunwali* customary system comprises highly developed rules and procedures, and outcomes reached are broadly considered more legitimate and carry greater authority than those handed down by the state courts.⁵

Third, while the terms customary law and traditional law may create the impression that such law is outdated or antiquated, this is not necessarily the case. While generally time-honored and long-

established, customary justice systems can be modern institutions and receptive to contemporary influences.⁶ In Somalia, for example, there is evidence that customary law is responding to forces of globalization, particularly in the urban economic sector where it has reinvented itself to accommodate modern crimes, business practices and trading patterns.⁷

Box 1

Distinguishing between different legal frameworks

Customary justice refers to a system of customs, norms and practices that are repeated by members of a particular group for such an extent of time that they consider them to be mandatory.

The **formal justice system** refers to controls organized by the state and enforced by specific institutions that follow procedures determined by law. These include courts, the police, prosecution offices and correctional facilities.

Indigenous law can form the basis of a customary justice system. It refers to a set of norms, principles, values, authorities, procedures and methods used by indigenous peoples to control criminal events, regulate social life, organize public order and resolve their problems and conflicts.⁸

2. Characteristics of customary justice systems

It is impossible to comprehensively define the nature of customary legal systems. First, the governing principles and rules are not static but are constantly evolving in response to cultural interactions, socio-economic and demographic shifts, political processes and environmental change. Second, customary systems are unique to the communities in which they operate. In southern Sudan alone, there are at least 50 tribes each with their own customary law,⁹ while in Indonesia, there may be as many as 300 distinct legal orders.¹⁰ However, while customary law can vary between and within countries, provinces and communities, a number of common characteristics can be identified.

2.1 A focus on the restoration of social harmony

Customary justice systems generally exist in small, rural communities dominated by multiplex relationships — that is, “relationships which are based on past and future economic and social dependence, and which intersect ties of kinship”.¹¹ Conflict threatens these relationships and therefore has the potential to disrupt social harmony. In this way, disputes are viewed not so much as matters between individuals, but as issues concerning entire communities.¹² Customary justice systems aim to restore intra-community harmony by repairing relationships between disputing parties and creating a framework for reintegration.¹³ In Guatemala, for example, the universe, nature and the human community are all part of the integrated order: “Law is an expression of this order. Its primary purpose is therefore to maintain communal harmony and equilibrium and not to guarantee the enjoyment of individual rights and entitlements.”¹⁴

A closely related feature is that, unlike in Western liberal democracies where the role of an independent judiciary is confined to the administration of justice, customary justice systems are often an integrated component of a broader governance mechanism.¹⁵ A corollary of this is that, in contrast to a separation of powers doctrine, the political, executive, administrative and judicial functions of customary leaders are usually inseparable and intertwined. For this reason, some argue that “to view customary practices as ‘law’ is essentially a Western-centric

Unlike Western legal cultures, where the aim of dispute resolution is generally compensation or retribution, the primary goal of customary dispute resolution mechanisms is often to achieve reconciliation between parties divided by conflict.

approach”, which does not facilitate a sound understanding of customary justice.¹⁶ A more constructive approach, put forward by Faundez, may be to view these systems instead as governance mechanisms that dabble in dispute resolution, unconstrained by the procedural rules and guidelines characteristic of liberal legal systems.¹⁷

2.2 A hierarchy of problem-solving fora

Customary justice systems generally comprise a hierarchy of problem-solving fora. Small disputes may be adjudicated by the extended family, while more complicated disputes are likely to be referred to a village-level forum. At lower levels, respected elders within the family may be responsible for resolving disputes, whereas at higher levels, adjudicators might include traditional leaders, religious leaders, persons with specific expertise in customary law, and other persons with skills in conflict resolution. Such actors may be appointed on the basis of heredity or social status, or election, depending on the community and its traditions. Leaders are generally male, and enjoy high social standing and moral authority within their communities, characteristics that are needed to ensure that disputants participate in the dispute resolution process and abide by the outcome reached.

Commonly, disputes that cannot be resolved at one level will be referred up the hierarchy until a decision can be reached. If customary dispute resolution options are exhausted, there may in some cases be a direct line of appeal linking customary and formal courts. In other situations, only those disputes that cannot be resolved customarily or offenses considered most serious by a community will be referred to the state.¹⁸

Box 2

Appointing customary law leaders, Burundi

In Burundi, the selection and training of customary law leaders (*bashingantahe*) is a long and complicated process. First, *bashingantahe* must be seen as possessing certain qualities that community members discern over a period of time. These include: “maturity, experience and wisdom, a sense of justice and equity, concern for a common good, a sense of responsibility ... truthfulness, discretion, intelligence, a sense of dignity and honor and courage”.¹⁹ There are, then, several stages to becoming a *bashingantahe*. After a youth is identified as a potential leader, he is observed by his community over a number of years, and his character is tested. He undergoes “a gradual integration into the judicial functions with the help of a sponsor”.²⁰ First, he would be an observer and take in the teachings of the *bashingantahe*; he then becomes an auxiliary in the resolution of conflicts before finally being allowed to attend deliberations. Following this initiation, the candidate is presented by his sponsor to the community. He takes an oath of commitment and fidelity, and must demonstrate material self-sufficiency. Once appointed, *bashingantahe* are held to strict standards of accountability. It is not uncommon for a leader to be relieved of his position for corruption, the violation of secrets or other forms of social misconduct.²¹

2.3 Dynamic and flexible operating modality

Customary justice systems generally apply flexible rules and procedures; norms are constantly being ‘reinvented’ in response to changing social circumstances, economic realities and intra-community politics. This dynamic structure allows leaders to craft pragmatic solutions that suit local conditions and respond to the issues at the crux of a dispute. On the other hand, such flexibility means that customary systems can lack coherency and predictability; where rules are applied differently to different groups in the same situation, resolutions reached may be viewed as arbitrary or discriminatory. The norms and rules of

Because one of the principle objectives of customary justice systems is governance rather than dispute resolution, they “do not administer justice through a specialized system of rules, but as part of a process where politics, law and other factors blend in ways that would be unthinkable in a state court”.²³

customary systems are often unwritten, passed down orally through the generations. Likewise, proceedings are usually oral, and there is rarely systematic or accurate record-keeping relating to the outcomes of cases.²²

2.4 Broad jurisdiction

Customary justice systems often do not distinguish between criminal and civil offenses in the same way as Western jurisprudence. Since wrongdoing is generally perceived principally in terms of its disruption to social cohesion rather than categorized as civil or criminal in nature, customary leaders often deal with both types of cases in the same manner.²⁴ Nevertheless, the bulk of cases adjudicated customarily involve personal matters such as marriage, divorce, adultery, child custody and succession, and matters deemed 'private' in nature or of small gravity according to customary norms, such as sexual assault or domestic violence. This can be explained at least to some extent by the number of jurisdictions that recognize the application of customary law to issues of personal status. But there can also be a connection between perceptions of customary jurisdiction and issues that have the potential to disrupt community stability, such as family disputes, theft, assault, rape and murder. In contrast, disputes concerning interactions with the central government, persons outside the community, and matters that cannot be dealt with customarily will often be referred to the state courts.

2.5 Participatory dispute resolution

In some customary justice systems, participation in dispute resolution is restricted based on gender, social status and/or ethnicity.²⁵ In other contexts, dispute resolution is public and participatory, with the disputants, witnesses and other persons seemingly removed from the conflict actively involved in providing evidence and offering their opinions as to possible outcomes. While this may appear laborious and inefficient to observers, this discourse (which may last for weeks or months) often forms an integral part of the dispute resolution process. It may satisfy the community's need to discuss the action, to show why it was unacceptable, and for the offending party to accept responsibility for his or her wrongdoing. Involving the community can also be important because conflict is understood as affecting the wider group; moreover, because compliance relies principally on social pressure, it is important that the outcome reached meets both the community's and the disputants' sense of justice.²⁶

2.6 Consensus-based decision-making

As discussed above, the overall goal of customary dispute resolution is often to restore social harmony; integral to this is a solution that is acceptable both to the parties and to the wider community.²⁷ Outcomes are hence usually compromises based on consensus, made through a process of 'light arbitration' as opposed to voting or centralized decision-making. Even where customary systems have rules and structured procedures, therefore, outcomes usually relate more to local perceptions of fairness, equity and subjective notions of a sound outcome given the specific circumstances.²⁸ Customary law thus usually provides a framework for deliberations as opposed to being determinative of an outcome.²⁹

A holistic approach is taken to dispute resolution, which focuses on resolving the causal issue and preventing recurrence. The centrality of the underlying problem means that the offending act may be regarded as inconsequential or even forgotten. Further, in finding a solution, a wide range of factors may be taken into consideration, such as interpersonal relations, previous transgressions, and the power, status and wealth of the disputants.³¹

The combination of these factors means that Western jurisprudential precepts, such as treating like cases alike or having pre-determined sanctions for wrongdoing, rarely feature in customary justice processes.³² Disputes are resolved on a case-by-case basis and to the

“[I]n most circumstances, non-state justice is actually a de-legalized environment. This can facilitate flexible mediated solutions, but in the absence of a mandated structure or agreed norms, much discretion lies in the hands of non-state justice actors.”³⁰

satisfaction, at least ostensibly, of all parties concerned, even if this entails a solution that is materially different to another factually identical case. Further, because the customary system is structured more around compromise and consensus than the strict application of rules, disputants are rarely represented by lawyers or advocates.³³

2.7 Restorative solutions

Customary justice systems generally use restorative penalties as opposed to retributive punishments.³⁴ Such solutions can take the form of restitution (for example, the return of stolen goods, apologies or community service) or compensation (for example, fines or monetized damages). Retributive punishments do, however, occur and might include social sanctions (for example, banishment) or physical sanctions (for example, flogging or detention). The preference for restorative solutions often has a social or economic rationale. In developing country contexts, where insurance, unemployment benefits and/or state services may be unavailable, compensation provides a social and financial safety net for a victim or a victim's family. Compensation, for example, may replace the income-earning potential of a deceased or injured family member or, in cases of rape, provide for the fact that the victim may be unable to marry and may have to provide for her own upkeep (and that of any children resulting from the rape) for the rest of her life.³⁵

2.8 Compliance and enforcement of decisions

Compliance with solutions resolved at the customary level usually relies on social pressure as opposed to formal coercion.³⁶ Most often, such pressure is linked to normative commitment to customary rules, the authority of the customary leader, and/or the shame associated with rejecting a fair decision or jeopardizing group harmony.³⁷ It should be noted that such reliance means that powerful community members, either economically or politically, who may not be responsive to such pressures, may ignore customary decisions with impunity.

Pressure may also manifest in anticipated social sanctions. For example, if a party to a dispute will not accept an agreement that is broadly considered to be fair, he or she may not be assisted by the customary leader in the event of a future dispute,³⁸ or community members may refuse to participate with him or her in economic and social transactions.³⁹ In some communities, particularly those that follow animist traditions such as in some parts of Timor-Leste and Indonesia, compliance may be encouraged by beliefs that disregarding a solution will result in disapproval by the community's ancestors, and hence bad luck for the entire community.⁴⁰ Finally, in plural situations, the threat of referring the matter to the formal justice system may encourage compliance.⁴¹

In other contexts, there will be specific penalties for non-enforcement. In Somalia, an individual who rejects a judgment might receive any of the following sanctions: the forced seizure of livestock; a doubling of the original punishment; denial of access to the clan's safety net and benefits; or being tied to a tree full of ants. Alternatively, the transgressor may be "stigmatized and given the nickname *Gardiid* — the one who rejected judgment".⁴²

2.9 Reconciliation

Customary dispute resolution often incorporates rituals of reconciliation or reintegration.⁴³ The importance attached to reconciliation can be linked to the manner in which wrongs are conceptualized. In many traditional societies, wrongs are not only seen in terms of the actual injury or loss sustained, but also in terms of the offender's lack of respect for the social norms that ensure group harmony. Simply compensating a victim for his or her loss, or 'righting the wrong' may therefore be insufficient to resolve a conflict; the societal balance must also be restored.⁴⁴ Although reconciliation practices vary between societies, a typical arrangement is where the complainant, the respondent, their families, those responsible for adjudicating the dispute, others privy to the dispute and sometimes even the wider community come together and share food as a symbol of the restored relationship.⁴⁵ In many situations, perpetrators will host the reconciliation ceremony or provide an animal for consumption, a role that elevates them from dishonorable to honorable status. This ceremony represents a public apology by the perpetrator to both the victim and the community

as a whole for having disrupted community unity. Reconciliation ceremonies can also play important educative roles. By observing and being involved in the dispute resolution procedure, young people come to understand conflict resolution and acceptable and unacceptable behavior. Moreover, everyone in the community receives a message that certain types of behavior will not be tolerated, creating a deterrent to future offenders.

Box 3

Connecting with the ancestors through reconciliation ceremonies, Timor-Leste

In Timor-Leste, the reconciliation ceremony has immense religious significance. “It [is] believed that the ceremony [breaks] down the barriers separating the present life and the afterlife, providing the living with a unique opportunity to connect with their ancestors. The ceremony [is] thus a collective act of contrition, symbolizing the community’s regret for displeasing the ancestors, a request for forgiveness and a rekindling of clan-ancestral unity.”⁴⁶ It is also believed that the ancestors’ spiritual presence endows the dispute resolution process and the outcome with legitimacy, providing certainty that the agreement will be abided by and that the dispute will not resurface.

3. Constraints of customary justice systems

Critics of customary justice systems posit that, broadly speaking, justice is rarely dispensed to a very high standard.⁴⁷ They argue that such processes lack safeguards, leaving society vulnerable to solutions that may be unjust, discriminatory and exclusionary, as well as punishments that are violent or barbaric.⁴⁸ While the core areas of criticism overlap to some extent, they converge around the rights and treatment of vulnerable groups, as discussed below.

3.1 Lack of predictability and coherency in decision-making

As noted above, customary justice systems generally employ flexible rules and procedures, with outcomes based on consensus rather than the strict application of rules. While this facilitates the crafting of pragmatic solutions, critics argue that such flexibility encourages outcomes that can be arbitrary and lack predictability and coherency.⁴⁹ Moreover, these factors, combined with the absence of procedural safeguards and the primacy of community harmony in decision-making, can lead to decisions that reinforce power hierarchies and discriminate against marginalized populations at the expense of justice and human rights.⁵⁰

A critical point is that, although decisions are said to be consensual, disputants are often under significant pressure to agree to what is broadly understood to be fair and equitable. What is considered fair and equitable can be influenced by power, status and wealth differentials between disputants, discriminatory social norms, and perceptions of group cohesion. In particular, the notion of ‘harmony’ may be “abused and manipulated to suppress legitimate complaints of the weak”, leaving them “prone to being ‘consensused’ into accepting decisions that they find unsatisfactory.”⁵¹ A good illustration of this is where crimes of rape are resolved by having the perpetrator marry the victim. As Wojkowska explains, while this may ostensibly be to protect the victim’s honor and ensure the payment of a dowry, the solution may also be desirable to the community at large for at least two reasons. First, marriage will

“[W]hile there are many ‘paths to justice’, informal dispute resolution is on the whole not a comprehensive and coherent system, but a set of processes run by a range of influential individuals. ... Whether norms are written, oral or based purely on common sense, in reality it is social norms and power which usually determine the outcome of dispute resolution at the local level. ... Neutrality is hard to find in the village and, as a result, the paths to justice are not equal for all. The powerful travel a smooth road; the weak face a bumpy ride.”⁵³

provide the victim with a measure of social and economic security (a burden that may otherwise have fallen to the community) and second, it creates bonds between families and communities, thereby reducing the risk of subsequent violence.⁵²

3.2 Discrimination and exclusion of marginalized groups

A closely related criticism of customary justice systems is that they often discriminate against vulnerable groups such as women, minorities, children and the poor. In some contexts, participation in dispute resolution is restricted based on gender, social status and/or ethnicity.⁵⁴ In Somalia, for example, women can only be represented by male relatives.⁵⁵ In northern Kenya, some tribes allow women to present evidence, but only “while seated on the ground and while holding a grass reed above their heads”; men by contrast, present evidence “while standing and holding a long rod understood to be a symbol of respect”.⁵⁶

In many customary justice systems, women are routinely discriminated against with respect to their roles as guardians, their inheritance rights, and their right to freedom from sexual and domestic violence.⁵⁷ Further, sanctions may be exploitative and/or abrogate women’s basic human rights; such sanctions include the practices of wife inheritance (where a widow is forced to marry a male relative of her deceased husband), ritual cleansing (where a widow is forced to have sexual intercourse with a male in-law or stranger),⁵⁸ forced marriage,⁵⁹ and the exchange of women or young girls as a resolution for a crime or as compensation.⁶⁰

Box 4

Customary law and its compatibility with human rights and gender standards, Somalia

In Somalia, a number of *xeer* (customary) practices contravene women’s basic human rights and standards of gender equality. Such practices include *dumaal* (where a widow is forced to marry a male relative of her deceased husband), *higsiiian* (where a widower is given the right to marry his deceased wife’s sister) and *godobtir* (the forced marriage of a girl into another clan as part of a compensation payment or inter-clan peace settlement). Crimes of rape are commonly resolved through the marriage of the victim and the perpetrator. Although the *xeer* of many groups protects the right of a victim to refuse a marriage in cases of rape, victims face enormous societal pressure to acquiesce; marriage is widely believed to be the best option in such situations to ‘preserve’ the victim from a life of shame and as a means of stemming future retaliatory violence.⁶¹

3.3 Weak procedural safeguards, accountability and enforcement capacity

Customary justice systems, particularly when not recognized by the state, operate with little regulation and sometimes outside of any legal framework. They can lack procedural safeguards that protect the rights of disputants, such as the presumption of innocence or the rights to a defense and due process. Further, the methodology for ascertaining facts or assessing evidence may be arbitrary or violate human rights, such as the use of torture to obtain a confession.⁶² In particular, where customary systems recognize practices such as witchcraft or black magic as crimes, unsound evidentiary practices not based on modern scientific rationalism often lead to equally unsound resolutions.⁶³ Customary proceedings also have few safeguards to protect the privacy of disputants and witnesses, particularly vulnerable groups such as women and children. In cases such as rape, this can have important social and economic consequences for victims.

Box 5

Unsound evidentiary practices, Indonesia and Timor-Leste

In Maluku, Indonesia, researchers from UNDP recounted a case where a dispute concerning the ownership of a fruit tree was resolved through a contest whereby the petitioners competed to determine who was able to hold their breath underwater for the longest period.⁶⁴ In Timor-Leste, where a woman becomes pregnant outside of marriage (including in cases of rape) and the alleged father denies responsibility, a common practice for determining paternity is to wait until the baby is born and then assess its physical features. "If the baby does not resemble the father in any way, then he will be absolved from any responsibility."⁶⁵

In the context of a weak regulatory environment, customary justice systems vest significant responsibility in leaders who are rarely accountable either to their communities or a higher authority. Ineffective safeguards render such leaders more prone to corruption, politicization and nepotism. This is heightened in situations where decision-makers receive little or no remuneration and where customary dispute resolution has been proscribed and driven underground.

Finally, as noted previously, the enforcement of solutions resolved at the customary level usually relies on social pressure as opposed to formal coercion.⁶⁶ Weak enforcement capacity has been correlated to poor compliance, particularly when there are power differentials between the parties.⁶⁷ This diminishes the certainty of outcomes, encourages forum shopping, and weakens the integrity and authority of the customary system as well as its role in deterrence and safeguarding society.

3.4 Abrogation of human rights and criminal justice standards

Possibly the most salient criticism leveled at customary legal processes is that they fail to uphold international human rights and criminal justice standards. The sanctions imposed can include corporal punishment,⁶⁸ humiliation, banishment,⁶⁹ retaliatory murder,⁷⁰ the betrothal of children and forced marriage.⁷¹ Such punishments violate, *inter alia*, the rights to life;⁷² protection against cruel, inhumane or degrading treatment;⁷³ and protection from discriminatory treatment,⁷⁴ as enshrined in international law.

24 Customary norms can also promote violence and tolerate impunity for serious crimes. In Afghanistan, the right and expectation of revenge (*badal*) in response to wrongs perpetrated against an individual or group lie at the heart of the *Pashtunwali* legal tradition. This is manifested in tolerance of honor and revenge killings, both of which are considered legitimate and are not subject to sanction. In fact, not seeking revenge or referring such acts to the state system is a sign of moral weakness or cowardice.⁷⁵ Likewise, in Somalia, families of homicide victims may be permitted to choose between compensation and the execution of the perpetrator.⁷⁶

Customary systems that are based on a doctrine of collective responsibility, such as those in parts of Somalia and Kenya,⁷⁷ do not make provision for the punishment of individual perpetrators of wrongdoing. This allows serious offenders to escape accountability and promotes a culture of impunity.

Finally, the compensatory nature of many customary systems can deny the rights to a remedy and equality before the law where outcomes are determined, not based on the nature of the crime, but on the gender and social status of the victim.⁷⁸ In Somalia, for example, for identical crimes, the level of compensation payable is highest where the victim is a married woman, followed by single woman, and then a widow. Similarly, the compensation payable when the victim is a man will always be higher than that for a woman.⁷⁹ In systems where customary systems are simultaneously collective and compensatory, the victims of crime may receive little or no compensation, for example, in cases such as honor killings and intra-family crimes, because the compensation-paying group and the

compensation-receiving group are one and the same.⁸⁰ Where compensation is payable in, for example, girls or young women, a range of fundamental rights are violated.⁸¹

3.5 Comparing the state and customary justice systems: clearing up ambiguities and misconceptions

As the above discussion sets out, critics of customary justice systems present many salient arguments. Inherent flexibility, a focus on consensus-based decision-making and the application of norms that may not reflect international standards mean that rules may be applied inconsistently and that outcomes may be unpredictable, arbitrary and/or discriminatory. Such characteristics place customary justice in sharp opposition to most state (and particularly Western) jurisprudence, which is structured around the even application of pre-determined rules and a separation of rule-setting, executive and judicial powers.

It is important to highlight, however, that customary systems vary enormously, and generalizations can sometimes be misleading. For example, in Liberia, some research has reported a general perception that customary justice is 'not for sale', that parties enjoy equality, and that cases are decided on their merits.⁸² Similarly, in Afghanistan, despite clear problems of gender discrimination and with respect to collective responsibility, customary judges are perceived as neutral arbiters, and participants enjoy nominal equality. *Pashtun jirgas* usually require participants to sit in a circle — a symbolic gesture signifying that no single person should dominate proceedings, and that all enjoy the right to be heard.⁸³ Customary fora may even be more effective than state justice mechanisms in certain respects. In Liberia, a key criticism of the courts is that they fail to enforce judgments; customary enforcement, on the other hand, relies on moral authority and is widely regarded as more effective.⁸⁴ Likewise in Indonesia, many users of customary justice perceive this system to be less arbitrary, more predictable and less corrupt than the formal system.⁸⁵

It is also important to understand that customary justice systems have culturally and context-specific aims and precepts; practices that may appear unjust from a Western perspective may be viewed as neutral or even imperative by users of customary justice. For example, as discussed above, the flexibility and negotiability inherent in many customary systems and its vesting of rule-setting and dispute resolution responsibilities in the same actors are widely cited as inhibiting access to justice. Proponents of customary justice systems would argue, however, that these factors are a necessary facet of processes that are designed to restore social harmony and that cannot be isolated from their social context. Impartiality may in fact be regarded as integral to the functioning of a customary system; it is the customary arbiter's intimate knowledge of the parties, the background to the dispute and local power-sharing arrangements that facilitates the crafting of a decision that will meet popular notions of equity and ensure compliance.⁸⁶

Further, features of customary justice that are said to violate human rights and criminal justice standards may be grounded in context-specific rationales. Two practices illustrate this argument — customary solutions that violate the rights of women and collective responsibility. In relation to the rights of women, in many developing country contexts, rape and widowhood have specific social and economic implications for the women involved. Entrenched discriminatory attitudes may dictate that rape victims are unable to marry, forcing them to rely on their families or the wider community for social, livelihoods and financial protection. Such women, and any children involved, are more vulnerable to poverty and homelessness, and often suffer lifelong discrimination. In this context, a common solution to crimes of rape is for the victim to marry the perpetrator. Although this clearly abrogates the victim's right to a remedy and freedom to choose a marriage partner (and arguably to protection from treatment that is cruel, inhumane or degrading), marriage may provide her with a degree of social and economic security that she would not otherwise enjoy.⁸⁷ Similarly, in legal cultures where women are not entitled to inherit property, 'wife inheritance' may be viewed as a mechanism for providing widows with access to land and financial and social protection.⁸⁸ In situations of generalized discrimination, poverty and limited (or non-existent) social security, the importance of these basic safeguards cannot be understated.

Similar issues arise in the case of collective responsibility for wrongdoing, a practice that is often grounded in economic and security rationales. For example, political fragility and weak governance in Somalia means that the clan unit is the fundamental provider of security and protection. Since a clan's perceived strength and wealth are dependent on its size, the number of men in the clan must be protected. As Gundel explains, individuals may have too few resources to make a full compensation payment themselves, which can then set in place a cycle of revenge killing with the result that the clan loses an economically and militarily important member. It is thus deemed more beneficial for the group to collectively assume responsibility for compensation payments and protect its membership.⁸⁹

Finally, it is important to view the criticisms of customary justice in context. While customary norms and practices may violate established human rights and criminal justice standards, they may not be so different from the norms and practices enforced by the state. In Somalia, reduced penalties when a homicide is an honor killing, and in southern Sudan, the customary right for the family of a victim to elect between execution of the perpetrator or the payment of blood money are not only customary norms, but also provided for in legislation.⁹⁰ Moreover, while customary processes may, for example, be gender discriminatory, this may reflect broadly embedded social attitudes as opposed to something unique to customary justice.

In sum, the evaluation of whether or not customary justice is broadly disadvantageous is not a black and white issue, but is context-specific and relative, and requires a nuanced and case-by-case analysis. Criticisms need to be understood as rooted to some extent in individual perceptions of justice, and inseparable from the broader social and economic context. Such disadvantages also need to be weighed against the advantages and benefits associated with customary justice systems discussed in the following section.

4. Reasons that customary justice systems might be preferred

One of the strongest arguments presented in support of customary justice systems as dispute resolution mechanisms is simply that they are the preferred means of resolving disputes for the majority of users. While there is a growing body of quantitative analysis in support of this contention, albeit country-specific, asserted preference is not a clear-cut indicator in itself, but one that is colored by factors such as limited alternatives and a restricted perspective outside of a respondent's social context. Perhaps most significantly, preference for customary justice can sometimes be more closely related to dissatisfaction with formal state-based justice than to actual satisfaction with customary norms. These factors are interconnected and mutually reinforcing, as shown below.

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Box 6

Patterns of use and preference for customary justice systems

In a 2007 survey of 1,441 households in 63 sites in Somaliland and Puntland, respondents were asked to rate various justice 'options' on a scale where 1 corresponded to 'not very successful' and 5 corresponded to 'very successful'. On average, respondents rated the customary system at 4.156, the Islamic legal system at 4.186, and the state legal system at 3.086.⁹¹

A 1,114-person survey conducted by the Asia Foundation in Timor-Leste in 2004 found that 94 percent of respondents were confident in the customary system, and 63 percent were very confident; 77 percent stated that the customary system reflected their values; and 80 percent recognized their community leaders, as opposed to the police, as being responsible for maintaining law and order.⁹²

Between 2008 and 2009, the Centre for the Study of African Economies (Oxford University) and the Carter Center conducted a baseline survey of approximately 2,300 households in 175 communities

in Liberia. Of 3,181 civil cases, 3 percent were referred to a formal court, while 38 percent were referred to a customary forum (59 percent were not referred to any forum). Of 1,877 criminal cases, 2 percent were referred to a formal court, while 45 percent were referred to a customary forum (53 percent were not referred to any forum).⁹³

A 4,524-respondent survey conducted by UNDP in 2005 across five provinces in Indonesia found that while respondents overwhelmingly stated a preference for the customary justice system, actual patterns of use between the customary system and state courts did not vary considerably. Ten percent of respondents claimed to have used the formal system, while 12 percent claimed to have used the customary system. However, 28 percent were satisfied with the performance of the formal justice system (37 percent being dissatisfied), whereas 53 percent were satisfied with the performance of the customary system (17 percent were dissatisfied). Likewise, only 28 percent of respondents felt that the formal system treated all persons fairly, and 50 percent felt that it favored the rich and powerful, whereas with respect to the customary system, 69 percent of respondents felt that all persons were treated equally, and 15 percent felt that this system favored the rich and powerful.⁹⁴

4.1 Financial accessibility

Resolving disputes at the customary level is generally affordable in terms of transaction costs; customary norms rarely impose dispute resolution fees, and the system is structured in such a way as to limit the costs that disputants would otherwise need to absorb. For example, customary fora are usually within walking distance of users' homes, and flexible operating procedures mean that dispute resolution can occur at times that do not interrupt income-earning activities. The financial accessibility of customary justice can in part be linked to its *raison d'être*; because customary resolution aims to restore social harmony, it would be somewhat self-defeating if it were to impose significant barriers to accessing the processes that re-establish intra-community social and economic ties. The cost-effectiveness of the customary system is often contrasted to the cost of accessing the state justice system. In weighing up the added value of referring a dispute to the courts, parties have to consider both direct costs, such as case filing fees and the costs of representation, and indirect costs, such as those associated with bribery, travel and the opportunity cost of being absent from employment.⁹⁵

4.2 Geographic and linguistic accessibility

Customary justice systems are usually considered more accessible because they are situated in or close to the communities in which disputants live, and because adjudication takes place in local languages. Courts, by contrast, are usually located in district and state capitals, may operate only in national languages, and can impose administrative requirements that exclude those with little education or who are illiterate.

4.3 Familiarity

Customary adjudication processes are usually led by persons familiar to the disputants and who enjoy moral and social authority. These adjudicators generally know not only the disputants, but also the history to the dispute and other matters that may be regarded as important to its resolution, such as a transgressor's capacity to pay damages. In contrast, judges at state courts may be vested with ostensible authority but tend to be regarded as detached and foreign to disputants. Further, lack of familiarity with court proceedings, complex administrative requirements and the formal atmosphere of the courts can intimidate users and present disincentives to accessing the courts.

In India, Kenya and the Solomon Islands, state courts conduct proceedings in English, even though most of the population speak only local dialects. A similar situation exists in the Indonesian province of Aceh (where courts operate in Indonesian), in Timor-Leste and Mozambique (where courts operate in Portuguese) and in Niger (where the courts operate in French).⁹⁶

In line with the above, preference for customary justice can be more of a reflection of a user's inability to see beyond their specific social and economic context — the absence of a valid reference point. As Boege explains, in situations where customary systems operate, people define themselves as “members of particular sub- or transnational social entities (kin group, tribe, village)” before citizens or nationals of the state. “The state” is perceived as an alien external force, far away not only physically, ... but also psychologically.”⁹⁷

4.4 Expedience

Customary justice processes are usually considered faster than those of formal courts. While this can be due to inefficient bureaucratic processes at the state level, as noted above, customary justice can be similarly time-consuming. This anomaly in user perception may be explained by the fact that the time taken to resolve a matter through the court may have more harmful implications than an equally long process at the customary level. Disputants may need to travel several times to the place where the court is sitting, each appearance generating travel, time and opportunity costs. Customary and court-room justice may consume similar amounts of time, therefore, but in a customary setting, the cost implications of this are less severe.

4.5 Cultural imperatives

In certain contexts, cultural imperatives influence users' preference for customary resolution. In some provinces of Indonesia, for example, the formal justice system is regarded as a place reserved for those who have committed wrongdoing.⁹⁸ Alternatively, referring a matter to the state system may be considered disrespectful to the notion of social cohesion and community harmony, or an affront to the decision-making abilities of the customary leader. In such situations, disputants may need to weigh the net benefit of referring a matter to court against the possibility of social sanctions or that the leader may not assist them when faced with a future problem, or even discriminate against them in subsequent decisions.⁹⁹

4.6 Avoiding the state system

As alluded to above, preference for the customary system can say more about a user's dissatisfaction with the state alternative than their satisfaction with customary norms. First, the state system may be avoided because of real or perceived threats of mistreatment by justice sector actors, including intimidation, physical abuse or bribery. In particular, in pluralistic situations or where corruption is rife, the courts may be regarded as a mechanism through which the powerful exploit or perpetrate injustice against the weak, the poor or their enemies.

Second, there may be paradigmatic differences between the formal and customary justice systems in terms of core legal values, such as what constitutes misconduct, how crime is conceptualized and notions of responsibility. In Kenya, for example, gambling and brewing alcohol are criminalized through legislation, but are accepted practices by many pastoralist communities regulated by customary law.¹⁰⁰ When people are charged under such laws, the state system appears unjust, illogical and arbitrary. Similarly, in customary systems where conflict is regarded as involving groups as opposed to individuals, the notion of individual responsibility and punishment entrenched in many formal justice systems can be a source of confusion and angst that manifests itself in avoidance.¹⁰¹

The modalities of state justice may also contradict local perceptions of justice and fairness. Differences in the burden of proof in criminal and civil cases may appear illogical, and the dismissal of a case on the grounds of a technicality may be considered arbitrary.¹⁰³ Likewise, in legal cultures where justice is associated with speedy resolutions, the practice of granting bail is often viewed as equating to impunity.¹⁰⁴

“People don't see two legal codes at all. The 'customary' legal framework is not seen as law at all, but as a way of life, how people live — State Law on the other hand is something imposed and foreign. ... It is remote, in a foreign language and has little to do with most people's lives ... Legal pluralism isn't about different laws — it's about a different world view.”¹⁰²

Third, the solutions offered by the state justice system may not be sufficient to resolve a dispute, particularly where the common sanctions do not adequately respond to the important social and practical issues that the wrongdoing creates at the community level. For example, crimes of rape, homicide or physical assault that have a temporary or permanent impact on income-earning capacity can have important economic implications for those involved and their dependants.¹⁰⁵ The customary system generally accounts for the economic consequences of crime through compensation-based solutions. Compensation provides a social and financial safety net for the victim or the victim's family, hence safeguarding them from poverty, homelessness and exploitation. The formal justice system, however, rarely orders the payment of compensation in criminal cases, and as explained above, developing countries rarely provide social security benefits or other services for victims of crime.

When understood in this light, the state justice alternative — imprisonment of the perpetrator — is unattractive on many levels. First, it overlooks the needs of the victim who is “relegated to the status of witness”.¹⁰⁶ Second, in many cultures, detention is not regarded as an appropriate punishment, or perhaps as punishment at all. In contexts of generalized poverty, the fact that the perpetrator is provided with cost-free accommodation, food and protection may be regarded as illogical, unjust and akin to impunity.¹⁰⁷ Third, the focus on the individual overlooks the reality that conflict usually impacts and hence involves whole families and sometimes entire communities. Finally, as the perpetrator is not regarded as having paid their debt to society through serving time in prison, the conflict often remains unresolved.¹⁰⁸

A final reason for avoiding the state justice system is that the adversarial nature of court proceedings is said to pit neighbor against neighbor in a zero-sum contest where the ‘winner takes all’. This creates tension and estrangement, and breeds revenge, threatening group harmony and cohesion. Proponents of customary justice might argue that the formal system’s focus on individual responsibility and pre-determined rules fails to appreciate that disputes are often multi-faceted and have complex histories. Such prescription prevents adjudicators from isolating and responding to the underlying cause of the dispute, and limits the scope for finding a solution that fits popular perceptions of justice and equity. Customary justice, by contrast, is often viewed as a more effective approach for resolving disputes that take place in multiplex societies where members share mutually dependent social and economic links and need to continue living together.¹⁰⁹ The customary system’s restorative and conciliatory approach facilitates this by focusing on the future relationship between the parties and situating dispute resolution in the broader social context of wrongdoing. Dispute resolution thus aims not only to punish and compensate, but also to reconcile the parties and reintegrate the perpetrator into society.¹¹⁰

Box 7

Examining preference for customary resolution, Afghanistan

The following recounts the story of customary leaders in Afghanistan who adjudicated the resolution of a physical assault case through restitution; the leaders argued that this means of resolution was a fairer approach than referring the problem to the state justice system. If the case went to the court, they explained:

“[T]he offender would have been put in the custody of the police until his case went to trial. If the court convicted him, he would have [had] to pay for transportation to carry him and his guard from police custody to the main jail in the city. The defendant is the main income earner in his family, and therefore, putting him away would devastate his family and the consequences would be unpredictable. Moreover, no one could guarantee that he would not have been the target of revenge once he was out of jail, even if he had ‘paid his debt to society’. A revenge attack could be fatal. ... [A]nd the bloodshed would not stop for generations to come. By the current arrangement, the injured victim, who was another economically disadvantaged farmer, was compensated fully for the assault ... ”¹¹¹

4.7 Conclusion

As the above discussion sets out, the premise that customary justice systems are the preferred choice of users is grounded in salient practical and social rationale. Their speed, accessibility and cost-effectiveness make them a natural partner for disputants based in rural settings and isolated from the state system. Moreover, their focus on consensus-based decisions and the restoration of community harmony seems to respond to the needs of tightly knit communities whose members share close bonds of social and economic dependency. As Isser and Lubkemann note, the preference for restorative justice is not necessarily based on an abstract notion of tradition; "[q]uite the contrary, it represents a very rational calculation based on the socio-economic and cultural context".¹¹²

However, as demonstrated in previous sections, generalizations can rarely be made. The preference and demand for customary justice by user groups is by no means universal. The International Council on Human Rights Policy cites the example of Fiji where the judiciary's wavering application of criminal penalties for rape has given rise to a strong women's movement working to ensure that customary justice norms (specifically that of *bulubulu*, or ritual apology that absolves the perpetrator of any further legal responsibility) do not undermine the legal process.¹¹³ Neither is customary justice always fast,¹¹⁴ nor are speedy outcomes always just. Similarly, the customary system is not always cheaper¹¹⁵ and may be equally affected by corruption.

In other cases, user preference for the customary system has more to do with the availability (or lack thereof) of viable alternatives. Customary justice may not be users' first choice, but rather the only option for resolving a dispute. State justice may be geographically inaccessible or too costly, or there may be cultural disincentives that dissuade users from approaching the courts. State courts may refuse to resolve matters of great significance to communities, either on the grounds of triviality (for example, cases involving disrespect) or because they do not recognize the nature of the wrongdoing (such as in cases of witchcraft or black magic). Alternatively, courts may be weak and unable to offer quality justice in a timely manner, or not be functioning at all, particularly in post-conflict situations or in the aftermath of natural disaster.

Finally, preference for the customary justice system may reveal more about a user's disapproval of the state system than his or her approval of customary norms. On the one hand, this can be mainly attributed to fundamental differences in the *raison d'être* between customary and state justice systems. The aim of customary justice is the restoration of intra-community harmony by repairing relationships and creating a framework for reintegration, whereas the aim of state justice is deterrence through individualized, retributive punishment. Given that these purposes are not completely aligned, it is not surprising that the state justice system is not always an effective means of addressing the demands of customary users.

30 On the other hand, this dichotomy reflects complex and political tensions that go far beyond a correlation of user needs to system modalities; it involves issues such as conceptions of justice and equity, as well as the rights of individuals within society. These factors are interwoven, mutually reinforcing, and inextricably bound up in tradition and socio-economic realities. Cultural relativists would be supportive of groups whose normative practices place community rights above individual rights and apply differing levels of protection based on gender and social status. In contrast, universalists would argue that culture is no defense to practices that violate human rights. These tensions are explored in greater detail in chapter 7.

In summary, although customary justice systems have many positive aspects, 'preference' alone should not be interpreted as a blanket endorsement of customary norms or precepts. Instead, such factors need to be considered alongside a nuanced analysis of factors that restrict access to justice at the state level, traditional mores and socio-economic realities. Frameworks for such analyses are presented in the following chapters.

footnotes

- 1 This definition was adapted from R. Yrigoyen Fajardo, K. Rady and P. Sin, *Pathways to Justice: Access to Justice with a Focus on Poor, Women and Indigenous Peoples*, UNDP Cambodia and Ministry of Justice, Royal Government of Cambodia (2005) 34.
- 2 This description was adapted from International Council on Human Rights Policy (ICHRP), *When Legal Worlds Overlap: Human Rights, State and Non-State Law* (2009) 43.
- 3 See, for example, sections 1-3 the *Land Act 1998*; S Callaghan, 'Overview of Customary Justice and Legal Pluralism in Uganda' (Conference Packet for the United States Institute of Peace, George Washington University and World Bank Conference on Customary Justice and Legal Pluralism in Post-Conflict and Fragile Societies, 17-18 November 2009, 75).
- 4 See generally W. Schärff, C. Banda, R. Röntsch, D. Kaunda and R. Shapiro, *Access to Justice for the Poor of Malawi: An appraisal of access to justice provided to the poor of Malawi by the lower subordinate courts of the customary justice forums*, report prepared for the United Kingdom Department of International Development (DFID) (2002), Governance and Social Development Resource Centre <<http://www.gsdc.org/docs/open/SSAJ99.pdf>> at 17 March 2011.
- 5 T. Barfield, N. Nojumi and J.A. Their, 'The Clash of Two Goods: State and Nonstate Dispute Resolution in Afghanistan' in D. Isser (ed), *Customary Justice and the Rule of Law in War-Torn Societies* (2011), 165, 173.
- 6 ICHRP, above n 2, 43.
- 7 See for example, J. Gundel, *The Predicament of the Oday: The Role of Traditional Structures in Security, Rights, Law and Development in Somalia*, Danish Refugee Council (DRC) (2006) 27-28.
- 8 These definitions were adapted from UNDP, above n 1, 30, 34.
- 9 A. Akechak Jok, R. Leitch and C Vandewint, *A Study of Customary Law in Contemporary Southern Sudan*, World Vision International and the South Sudan Secretariat of Legal and Constitutional Affairs (2004) 17.
- 10 E. Harper, *Guardianship, Inheritance and Land Law in Post-Tsunami Aceh*, IDLO (2006) 14.
- 11 Penal Reform International, *Access to Justice in Sub-Saharan Africa* (2000) 22.
- 12 *Ibid* 22.
- 13 *Ibid* 24, 33.
- 14 DRC, *Harmonization of Somali Legal Systems*, Final Report (2002) 10.
- 15 J. Faundez, *Non-State Justice Systems in Latin America Case Studies: Peru and Colombia*, University of Warwick (2003) 1.
- 16 A. Danne, 'Customary and Indigenous Law in Transitional and Post-Conflict States: A South Sudanese Case Study' (2004) 30(2) *Monash University Law Review* 199, 202.
- 17 J. Faundez, 'Should Justice Reform Projects Take Non-State Justice Systems Seriously? Perspectives from Latin America' in C. Sage and M. Woolcock (eds), *World Bank Legal Review: Law, Equity and Development* (Vol. 2, 2006) 113, 130.
- 18 See examples from countries such as Somalia: Gundel, above n 7, 21; Afghanistan: United States Agency for International Development (USAID), *Afghanistan Rule of Law Project: Field Study of Informal and Customary Justice in Afghanistan and Recommendations on Improving Access to Justice and Relations between Formal Courts and Informal Bodies* (2005) 9; Timor-Leste: T. Chopra, C. Ranheim and R. Nixon, 'Local-Level Justice under Transitional Administration: Lessons from East Timor' in D. Isser (ed), *Customary Justice and the Rule of Law in War-Torn Societies* (2011), 131; and Guatemala: J.A. Hessbruegge and C Garcia, 'Mayan Law in Post-Conflict Guatemala' in D. Isser (ed), *Customary Justice and the Rule of Law in War-Torn Societies* (2011), 94.
- 19 T. Dexter, *The Role of Informal Justice Systems in Fostering the Rule of Law in Post-Conflict Situations: The Case of Burundi*, Centre for Humanitarian Dialogue (2005) 11.
- 20 *Ibid* 12.
- 21 *Ibid*.
- 22 See examples from countries such as Indonesia: UNDP, *Access to Justice in Aceh: Making the Transition to Sustainable Peace and Development in Aceh*, in partnership with *Badan Rehabilitasi dan Rekonstruksi (BRR)* Agency for Rehabilitation and Reconstruction, *Badan Perencanaan dan Pembangunan Nasional (BAPPENAS)*, *Syiah Kuala University (UNSYIAH)*, *Institut Agama Islam Negeri Ar-Raniry (IAIN Ar-Raniry)*, IDLO and the World Bank (2006) 62; Burundi: Dexter, above n 19, 21.
- 23 Faundez, above n 15, 1.
- 24 Danne, above n 16, 209; Penal Reform International, above n 11, 29.
- 25 See further Chapter 6, Section 3.1.
- 26 Penal Reform International, above n 11, 26.
- 27 *Ibid*.
- 28 *Ibid* 28.
- 29 *Ibid* 8. See examples from countries such as Malawi: E. Wojkowska, *Doing Justice: Informal systems can contribute*, UNDP, Oslo Governance Centre, The Democratic Governance Fellowship Programme (2006) 50; Guatemala: Hessbruegge and Garcia, above n 18, 94; Afghanistan: Barfield, Nojumi and Their, above n 5, 168; and Indonesia: World Bank Indonesia, *Forging the Middle Ground: Engaging Non-State Justice in Indonesia*, Social Development Unit, Justice for the Poor Program (2008) 27.
- 30 World Bank, above n 29, 27.
- 31 Penal Reform International, above n 11, 36.
- 32 *Ibid*.
- 33 *Ibid* 32.
- 34 Penal Reform International, above n 11, 33. However, restorative solutions are not a universal characteristic of customary justice systems (see, for example, ICHRP, above n 2, 52).
- 35 See further Chapter 6, Section 2.
- 36 Penal Reform International, above n 11, 33.
- 37 See examples from countries such as Afghanistan: USAID, above n 18, 29-30; and Burundi: Dexter, above n 19, 13.
- 38 For example, in areas of Guatemala: Hessbruegge and Garcia, above n 18, 93.
- 39 For example, in areas of Afghanistan: Barfield, Nojumi and Their, above n 5, 168.
- 40 E. Harper, 'Studying Post-Conflict Rule of Law: The Creation of an 'Ordinary Crimes Model' by the United Nations Transitional Administration in East Timor' (2006) 8 *Australian Journal of Asian Law* 12; similarly, in parts of Indonesia, locals believe that breaching customary sanctions can lead to death or illness (see Wojkowska, above n 29, 18). See further Penal Reform International, above n 11, 33-34.
- 41 For example, in areas of Afghanistan: Barfield, Nojumi and Their, above n 5, 43.
- 42 DRC, above n 14, 76.
- 43 Penal Reform International, above n 11, 34-35.
- 44 Harper, above n 40, 11-12.
- 45 For example in countries such as Burundi: Dexter, above n 19, 13; and Afghanistan: Barfield, Nojumi and Their, above n 5, 44-45.
- 46 Harper, above n 40, 12.
- 47 ICHRP, above n 2, 57-58.
- 48 See generally S. Engle Merry, 'Human Rights Law and the Demonization of Culture (and Anthropology Along the Way)' (2003) 26(1) *Political and Legal Anthropology Review* 55, 63; M. Chanock, 'Neo-Traditionalism and the Customary Law in Malawi' (1978) 16 *African Law Studies* 80; M. Chanock, 'Neither Customary Nor Legal: African Customary Law in an Era of Family Law Reform' (1989) 72 *International Journal of Law and the Family*, 72.
- 49 See, for example, ICHRP, above n 2, 77-78.
- 50 UNDP A2J, *Programming for Justice: Access to All - A Practitioner's Guide to a Human Rights-Based Approach to Access to Justice* (2005) 100-101; Penal Reform International, above n 11, 37.
- 51 World Bank, above n 29, 30; See further Penal Reform International, above n 11, 36-37; Wojkowska, above n 29, 20. For country examples see Burundi: Dexter, above n 19, 13; Afghanistan: Barfield, Nojumi and Their, above n 5, 168, USAID, above n 18, 5; Indonesia: UNDP, *Justice for All: An Assessment of Access to Justice in Five Provinces of Indonesia* (2007) 72; World Bank, above n 29, 62-63.
- 52 Wojkowska, above n 29, 21.
- 53 World Bank, above n 29, 27.
- 54 For example, in areas of India: UNDP, above n 50, 102 and Somalia: Gundel, above n 7, 56-57.
- 55 M.J. Simojoki, 'Unlikely Allies: Working with Traditional Leaders to Reform Customary Law in Somalia' in IDLO Working Paper Series, *Enhancing Legal Empowerment Through Engagement with Customary Justice Systems* (2011) 12. International Development Law Organization <<http://www.idlo.int/download.aspx?id=251&LinkUrl=Publications/WP150>

- malia.pdf&FileName=WP1Somalia.pdf> at 17 March 2011.
- 56 B. Ayuko and T. Chopra, *The Illusion of Inclusion: Women's Access to Rights in Northern Kenya*, World Bank Justice for the Poor research report (2008) 16 (note that this specifically relates to the Samburu community).
- 57 See further Chapter 6, Section 1-2.
- 58 As practiced in areas of Kenya: Wojkowska, above n 29, 21.
- 59 As practiced in areas of Afghanistan: USAID, above n 18, 49-50.
- 60 Ibid 49; as practiced in areas of Somalia: Simojoki, above n 55, 13.
- 61 Simojoki, above n 55, 13.
- 62 For example, in the case of trial by ordeal in Liberia: D. Isser, S. Lubkemann and S. N'Tow, *Looking for Justice: Liberian Experiences with and Perceptions of Local Justice Options*, United States Institute of Peace (USIP) Peaceworks No. 63 (2009) 57-65, United States Institute of Peace <http://www.usip.org/files/resources/liberian_justice_pw63.pdf> at 29 March 2011.
- 63 For example, in areas of Timor-Leste: D. Mearns, *Looking Both Ways: Models for Justice in East Timor*, Australian Legal Resources International (2002) 46-47; Chopra, Ranheim and Nixon, above n 18, 50; and Sierra Leone: Open Society Institute Justice Initiative, *Between Law and Society: Paralegals and the Provision of Primary Justice Services in Sierra Leone* (2006) 7. See also generally, J. Widner, 'Courts and Democracy in Postconflict Transitions: A Social Scientist's Perspective on the African Case' (2001) 95(1) *American Journal of International Law* 64-75, 71.
- 64 UNDP, above n 50, 103.
- 65 A. Swaine, *Traditional Justice and Gender Based Violence*, International Rescue Committee Research Report (2003) 50.
- 66 See Section 2.8 of this chapter.
- 67 For example, in areas of Somalia: Wojkowska, above n 29, 20; Simojoki, above n 55, 8-9.
- 68 For example, in areas of Indonesia: World Bank, above n 29, 28-29 (although note that such practices are declining).
- 69 For example, in areas of Bangladesh: S. Golub, *Non-State Justice Systems in Bangladesh and the Philippines*, paper prepared for the DFID (2003) 5; and Guatemala: Hessbruegge and Garcia, above n 18, 96.
- 70 For example, in areas of Somalia: Gundel, above n 7, 22-23.
- 71 For example, in areas of Afghanistan: USAID, above n 18, 49-50.
- 72 *Universal Declaration of Human Rights 1948* (hereinafter *UDHR*) art 3; *International Covenant on Civil and Political Rights 1966* (hereinafter *ICCPR*) art 6(1).
- 73 *ICCPR* art 7; *UDHR* art 5.
- 74 *ICCPR* arts 2-3; *UDHR* art 2.
- 75 T. Barfield, *Afghan Customary Law and Its Relationships to Formal Judicial Institutions*, Draft Report, USIP (2003) 5-6; Barfield, Nojumi and Their, above n 5, 166.
- 76 Gundel, above n 7, 22-23.
- 77 Kenya: T. Chopra, *Reconciling Society and the Judiciary in Northern Kenya*, World Bank Justice for the Poor (2008) 22-23; Somalia: Simojoki, above n 55, 8.
- 78 The right to a remedy is protected under *UDHR* art 8 and *ICCPR* art 2(3) (a)-(c); the right to equality before the law is protected under *UDHR* art 7 and *ICCPR* arts 14(1) and 26.
- 79 Gundel, above n 7, 55-56; D.J. Gerstle, *Under the Acacia Tree: Solving Legal Dilemmas for Children in Somalia*, UNDP (2007) 43.
- 80 Gerstle, above n 79, 31.
- 81 As practiced in areas of Afghanistan: USAID, above n 18, 49-50.
- 82 P. Banks, 'Grappling with Legal Pluralism: The Liberian Experience' (Conference Packet for the United States Institute of Peace, George Washington University and World Bank Conference on Customary Justice and Legal Pluralism in Post-Conflict and Fragile Societies, 17-18 November 2009, 65, 67).
- 83 Barfield, Nojumi and Their, above n 5, 167.
- 84 Isser, Lubkemann and N'Tow, above n 62, 3.
- 85 UNDP, above n 50, 79.
- 86 Penal Reform International, above n 11, 25-26, 30.
- 87 The right to a remedy is protected under *UDHR* art 8, *ICCPR* art 2(3), the right to freedom of marriage is protected under *ICCPR* art 23(3), *UNHR* art 16(2), and the right to freedom from treatment that is cruel, inhumane or degrading is protected under *ICCPR* art 7 and *UDHR* art 5.
- 88 Wojkowska, above n 29, 21.
- 89 Gundel, above n 7, iii, 9.
- 90 Somalia: Gerstle, above n 79, 31; southern Sudan: Jok et al, above n 9, 41.
- 91 Gerstle, above n 79, 38-39.
- 92 Wojkowska, above n 29, 18; see also The Asia Foundation, *Law and Justice in East Timor: A Survey of Citizen Awareness and Attitudes Regarding Law and Justice in East Timor* (2004). The Asia Foundation <http://asiafoundation.org/pdf/easttimor_lawsurvey.pdf> at 17 March 2011.
- 93 Isser, Lubkemann and N'Tow, above n 62, 60; B Siddiqi, 'Customary Justice and Legal Pluralism Through the Lens of Development Economics' (Conference Packet for the United States Institute of Peace, George Washington University and World Bank Conference on Customary Justice and Legal Pluralism in Post-Conflict and Fragile Societies, 17-18 November 2009, 121, 124).
- 94 UNDP, above n 50, 64-76, 32-35.
- 95 For example, in a 4,524-respondent survey conducted by UNDP in 2005, it was found that "expense was the problem that survey respondents most frequently associated with the police and lawyers — bribes and other costs for the police (36 percent of respondents) and high fees and bribes for the lawyers (89 percent of respondents). In comparison, only 12 percent of respondents cited cost or bribes as a problem when dealing with the informal system..." (UNDP, above n 50, 78).
- 96 M.R. Anderson, *Access to Justice and Legal Process: Making Legal Institutions Responsive to Poor People in LDCs*, Institute of Development Studies Working Paper 178 (2003) 18; K Decker, C Sage and M. Stefanova, *Law or Justice: Building Equitable Legal Institutions*, World Bank (2005) 16, World Bank <http://siteresources.worldbank.org/INTWDR2006/Resources/477383-1118673432908/Law_or_Justice_Building_Equitable_Legal_Institutions.pdf> at 17 March 2011.
- 97 B. Baker, 'Hybrid Policing in Sub-Saharan Africa' (Conference Packet for the United States Institute of Peace, George Washington University and World Bank Conference on Customary Justice and Legal Pluralism in Post-Conflict and Fragile Societies, 17-18 November 2009, 167, 167).
- 98 UNDP, above n 50, 76.
- 99 For example, in areas of Zambia: W. Schärf, 'Non-State Justice Systems in Southern Africa: How Should Governments Respond?' (paper delivered at workshop on *Working with Non-State Justice Systems*, Overseas Development Institute, 6-7 March 2003, 51), Governance and Social Development Resource Centre <<http://www.gsdrc.org/docs/open/DS35.pdf>> at 17 March 2011; and Indonesia: UNDP, above n 50, 81.
- 100 Chopra, above n 77, 19.
- 101 T. Chopra, *Building Informal Justice in Northern Kenya*, World Bank Justice for the Poor (2008) 11-12.
- 102 J. Adoko and S. Levine, 'How can we turn legal anarchy into harmonious pluralism? Why Integration is the Key to Legal Pluralism in Northern Uganda' (Conference Packet for the United States Institute of Peace, George Washington University and World Bank Conference on Customary Justice and Legal Pluralism in Post-Conflict and Fragile Societies, 17-18 November 2009, 80, 81-82).
- 103 Penal Reform International, above n 11, 10.
- 104 For example, in Guatemalan legal culture: Hessbruegge and Garcia, above n 18, 104.
- 105 See Section 2.7 of this chapter.
- 106 Penal Reform International, above n 11, 9.
- 107 For example, in areas of Timor-Leste: Chopra, Ranheim and Nixon, above n 18, 139.
- 108 See for example, Chapter 4, case study 5.
- 109 Penal Reform International, above n 11, 9; see for example in certain parts of Indonesia: World Bank, above n 29, 4; and Liberia: Isser, Lubkemann and N'Tow, above n 62, 3-4.
- 110 UNDP, above n 50, 101.
- 111 USAID, above n 18, 32-33.
- 112 Isser, Lubkemann and N'Tow, above n 62, 4.
- 113 ICHRP, above n 2, 79-80.
- 114 Ibid 53.
- 115 Ibid.