

## Access to Justice and Legal Pluralism in Fragile States: The Case of Women's Rights

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Perhaps the most significant trend in justice reform efforts in the last decade in fragile states and developing societies has been a growing interest in informal justice systems. This trend is partially in response to the poor track record of interventions aimed at transforming formal justice institutions into well-functioning systems that meet the ideals of Western rule of law. It also reflects an effort to accommodate what is now recognized as an empirical fact – in many societies, informal justice systems are the primary locus of dispute resolution for the vast majority of the population, and therefore cannot be ignored. However, the rhetorical recognition of the importance of informal systems has far outpaced change in strategies or even programming. There are several reasons for this, but the biggest challenge is a normative one. International actors regard the alternative paradigms of justice offered by local communities as desirable only to the extent that they offer accessible and restorative remedies in ways that do not contravene international standards of rule of law and human rights. Here, the recognized advantages tend to be outweighed in the minds of many development actors by the perceived failure of informal systems to comply with these norms – especially when it comes to women's rights.

The dilemma this poses has resulted in two primary approaches. The first assumes that informal systems are inherently and irremediably inconsistent with women's rights and therefore the formal system must be the primary, if not sole, forum for adjudicating disputes involving women. The second approach seeks to engage with informal systems with the aim of transforming them to comply with international standards, while retaining the positive features of accessibility, familiarity and effectiveness. This note discusses and analyses the limitation of these two approaches. Ultimately, it is argued here, they are flawed.

This note presents an alternative way of problematizing women's access to justice and corresponding ways of addressing the inequality. Rather than focus on selecting, promoting or changing the formal or informal justice system, intervenors need to embrace processes of social change as the means for instituting legal change.

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INTRODUCTION<sup>1</sup>

Perhaps the most significant trend in justice reform efforts in the last decade in fragile states and developing societies has been a growing interest in informal justice systems.<sup>2</sup> This trend is partially in response to the poor track record of interventions aimed at transforming formal justice institutions into well-functioning systems that meet the ideals of Western rule of law. It also reflects an effort to accommodate what is now recognized as an empirical fact – in many societies, informal justice systems are the primary locus of dispute resolution for the vast majority of the population, and therefore cannot be ignored. The idea that informal systems should be a key part of justice reform strategies due to their greater accessibility and their reflection of local norms and conceptions of justice was promoted in the first major United Nations report on post-conflict rule of law efforts in 2004.<sup>3</sup> It is also reflected in guidance papers produced by several donors and international agencies<sup>4</sup> as well as the high-level Commission for Legal Empowerment of the Poor.<sup>5</sup>

However, the rhetorical recognition of the importance of informal systems has far outpaced change in strategies or even programming. There are several reasons for this, including a lack of guidance and best practices on how to engage informal justice systems, and the difficulty of shifting from the well-trodden programs aimed at supporting state institutions to more diffuse and complex types of programming (and the lack of the corresponding skill set that requires). But the biggest challenge is a normative one. International actors regard the alternative paradigms of justice offered by local communities as desirable only to the extent that they offer accessible and restorative remedies in ways that do not contravene international standards of rule of law and human rights. Here, the recognized advantages tend to be outweighed in the minds of many development actors by the perceived failure of

<sup>1</sup> Parts of this article have been published online in: T. Chopra and D.H. Isser, 'Women's Access to Justice, Legal Pluralism and Fragile States', in P. Albrecht et al. (eds.), *Perspectives on Involving Non-State and Customary Actors in Justice and Security Reform* 2011, IDLO and DIIS.

<sup>2</sup> The authors recognize the debate on the appropriate terminology as between 'informal', 'customary', 'traditional' and 'non-state'. For the purposes of this chapter, the terms are used interchangeably to refer to a broad range of community-based social regulation and dispute resolution practices that are distinct from, even if influenced by and intertwined with, the state-sponsored formal justice system. See D.H. Isser, 'Introduction', in D.H. Isser (ed.) *Customary Justice and the Rule of Law in War Torn Societies* 2011, Washington, DC, USIP.

<sup>3</sup> United Nations Security Council, 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Report of the Secretary-General', 23 August 2004, S/2004/616.

<sup>4</sup> DFID Briefing, 'Non-State Justice and Security Systems' (May 2004); OECD, *Enhancing Security and Justice Service Delivery* 2007.

<sup>5</sup> Commission on Legal Empowerment of the Poor, *Making the Law Work for Everyone. Vol. 1, Report of the Commission on Legal Empowerment of the Poor*, 2008, pp. 63-64.

informal systems to comply with these norms – especially when it comes to women's rights. It is widely assumed that customary systems are based on patriarchal social norms that reaffirm a subordinate role for women.<sup>6</sup> Indeed, the practitioner literature on informal systems has largely served to document the various ways that informal justice systems contradict fundamental human rights standards.<sup>7</sup>

The dilemma this poses has resulted in two primary approaches. The first assumes that informal systems are inherently and irremediably inconsistent with women's rights and therefore the formal system must be the primary, if not sole, forum for adjudicating disputes involving women. This approach calls for strengthening the capacity of the formal system, removing the authority of informal justice providers on these matters, and promoting women's use of and access to formal courts. The second approach seeks to engage with informal systems with the aim of transforming them to comply with international standards, while retaining the positive features of accessibility, familiarity and effectiveness. They tend to focus on training and awareness, introducing formalized approaches, and instituting regulation and oversight.

The first and second sections of this note discuss and analyze the limitation of these two approaches. Ultimately, it is argued here, they are flawed in that they both take systems – formal or informal – as their entry point. They assume that these systems can be 'fixed' into desired and known end states through legal and capacity-building support. What this fails to take into account is that neither system exists in isolation from the underlying socio-economic, cultural and political context that determines the very real gender inequality and other power asymmetries. Justice institutions and processes are a reflection of the fundamental inequalities in society. While in some cases, focusing on formal legal mechanisms can help correct social inequalities, in others – particularly where the reforms are superficial impositions, and where the legal institutions themselves are not seen as legitimate – it can have the opposite effect. Similarly, efforts to make informal

<sup>6</sup> See, for example, S. Quast, 'Justice Reform and Gender', in *Gender & Security Sector Reform: Toolkit*, DCAF, OSCE Office for Democratic Institutions and Human Rights (ODIHR), UN-INSTRAW, 2008, Tool 4, 13.

<sup>7</sup> W. Scharf et al., '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 and the Customary Justice Forums', Report prepared for the Department of International Development (2002); S. Golub, *Non-State Justice Systems in Bangladesh and the Philippines* 2003; C. Nyamu-Musembi, *Review of Experience in Engaging with 'Non-State' Justice Systems in East Africa*, Institute of Development Studies, Sussex University, Brighton, Commissioned by Governance Division, DfID (2003); E. Wojkowska, *Doing Justice: How Informal Justice Systems Can Contribute* 2006, p. 21; S. Douglas, 'Gender Equality and Justice Programming: Equitable Access to Justice for Women', UNDP, in: *2 Primers in Gender and Democratic Government* (2007), pp. 14-15; S. Everett, *Perceptions of Law and Justice: Timor-Leste 2008*, Asia Foundation, 2008, p. 8; Amnesty International, *No Place for Us Here: Violence against Refugee Women in Eastern Chad* 2009.

systems embrace gender equality tend to be fruitless unless they engage with deeper processes of social change.

The third section presents an alternative way of problematizing women's access to justice and corresponding ways of addressing the inequality. Rather than focus on selecting, promoting or changing the formal or informal justice system, intervenors need to embrace processes of social change as the means for instituting legal change. The argument is based on the view that access to justice in legally plural environments needs to be understood from the perspective of the user. Rather than examine distinct systems, formal and informal, as entry points for the analysis, this section begins with an empirical understanding of how women use and experience the justice options available to them. This often reveals far more complex and nuanced means of navigating legal pluralism in search of justice.

The analysis is further guided by the notion that for positive change to be sustained in favor of women's equality and rights, it needs to be socially embedded. Here, legal orders are understood as the reflection of social norms and dynamics, which implies that they are not static, but the product of continuous processes of social and political contestation.<sup>8</sup> Thus, supporting women and women's rights through these processes of contestation is the most constructive avenue to promoting legal orders that constitute a legitimate and durable framework for social order.

While this article focuses on how to promote women's rights through justice sector interventions, the argument to focus on good contests and social change similarly can be made to tackle general power asymmetries and inequities. The problematique of women's access to justice is used as an example for a much wider exclusion from access to justice among marginalized parts of populations.

Finally, the focus is on fragile states, understood here as states recovering from or vulnerable to a relapse of violent conflict. While the analysis would hold true for more stable developing contexts, the issues are amplified in these countries given the heightened degree of state – including formal justice – dysfunctionality and social fragility, combined with the intensity of international engagement, the multitude of such actors and their more overtly political objectives.

## THE LIMITATIONS OF FORMAL JUSTICE REFORM

The main formula of international organizations and donors to strengthen women's access to justice in fragile states has consisted in interventions aimed at estab-

<sup>8</sup> See C. Sage et al., 'Taking the Rules of the Game Seriously: Mainstreaming Justice in Development', World Bank Justice and Development Working Paper Series 7/2009, available at <[www-wds.worldbank.org/external/default/WDSPContentServer/WDSP/IB/2009/11/25/000333038\\_20091125023547/Rendered/PDF/518450NWP0J1D010Box342050B01PUBLIC1.pdf](http://www-wds.worldbank.org/external/default/WDSPContentServer/WDSP/IB/2009/11/25/000333038_20091125023547/Rendered/PDF/518450NWP0J1D010Box342050B01PUBLIC1.pdf)> (last accessed May 25, 2011).

lishing or reforming formal justice system.<sup>9</sup> This approach builds on the organizational mandates and conceptual assumptions that underlie the state-building efforts of many international actors. For example, it is assumed that the aim is to strengthen the capacity of the state to exercise a monopoly on force and fulfill core state functions including justice service delivery in a way that complies with international human rights standards. Further, it is assumed that women's rights can only be enforced through formal justice institutions, and therefore the role of alternative institutions should be minimized. The standard reform package includes efforts to mainstream gender in legal frameworks, ensure non-discrimination clauses in constitutions,<sup>10</sup> limit the jurisdiction of informal systems, raise women's awareness of their rights,<sup>11</sup> promote legal assistance to women through civil society organizations or governments, provide gender sensitivity training to law enforcement agencies, cut court costs, and/or make courts physically more accessible.<sup>12</sup>

There are several reasons why this approach often fails to serve women. What they all have in common is the underlying assumption that technical inputs can make formal systems comply with international standards. In fact, the practice of formal institutions is often as reflective of the complex socio-political context in which they operate as are informal systems.

### *Subjecting women to failed systems*

Pushing women's issues into the formal system in fragile states often means subjecting them to a dysfunctional system. Nearly every rule of law assessment by United Nations agencies or other international actors highlights how malfunctioning existing formal systems are in fragile countries in terms of weak technical

<sup>9</sup>This analysis is based on the experience of conflict-affected states such as Timor-Leste, Liberia, Afghanistan, the Palestinian Territories and Southern Sudan. While the formal justice systems in these countries are particularly problematic, much of this analysis also holds for developing countries with lesser extents of dysfunctionality. However, differences in such cases are worthy of more focused study and research.

<sup>10</sup>Australian Government, AusAid, 'Gender Guidelines: Peace-building', Australian Agency for International Development (2006), <[www.ausaid.gov.au/publications/pdf/gender\\_peacebuilding.pdf](http://www.ausaid.gov.au/publications/pdf/gender_peacebuilding.pdf)>, 15 March 2011.

<sup>11</sup>In reality, since it is sometimes the male members of the community who hold back women from addressing the formal system or who make use of the formal system themselves, the first important step would be to realize that legal awareness is fundamental for the whole community and not just women. It is problematic, however, that women will understand these new instructions through the lens of their own normative system.

<sup>12</sup>See, for example: Douglas, 'Gender Equality and Justice Programming', above n. 7; Amnesty International, *No Place for Us Here*, above n. 7; M. Bastick and K. Valasek (eds.), 'Justice Reform and Gender' (Practice Note 4), in *Gender & Security Sector Reform: Toolkit*, DCAF, OSCE Office for Democratic Institutions and Human Rights (ODIHR), UN-INSTRAW, 2008.

financial, institutional, and human capacity. The general success rate of building or reforming justice systems in such scenarios has been considerably low. While every mission is guided by timeframes and budgets measured in years (and sometimes just months), (re)establishing a well-functioning formal justice system that complies with basic international norms and standards is a matter of decades.<sup>13</sup>

The problem is well illustrated by efforts in Liberia to crack down on the horrific proliferation of rape. The Association of Female Lawyers in Liberia successfully lobbied for a law requiring that all rape cases be heard exclusively by the Circuit Courts, which were empowered to enforce harsh penalties. While there was obvious good intention, the impact was far less constructive for the simple reason that the formal justice system was incapable of effectively implementing the law. As a result, detention centers swelled with the accused, jail breaks were rampant, and society perceived that rape could be committed with impunity.<sup>14</sup> Several years after the conflict, the formal justice system remains exceedingly weak, corrupt and undercapacitated.

#### *Reproducing local norms and biases*

Even when formal justice systems are relatively functional, practitioners make the mistake of equating them with the ideals they aspire them to be. In reality, while they may exhibit some of the trappings of rule of law mechanisms and standards, they may simultaneously operate in ways that reflect dominant social norms and biases of the societies they serve. Simply put, the formal system in practice may provide no better access to justice for women than other institutions, because they reproduce the social inequalities of the societies in which they function.

With respect to Somalia Gundel states that irrespective of the system, the clan will maintain responsibility, and 'rights of women and children will continuously be seen in the context of the interests of maintaining the strength of the male-based clans.'<sup>15</sup> Cases from Timor-Leste demonstrate how neither system is able to protect women, since the justice actors in both systems reflect the social norms of the

<sup>13</sup> See, for example, the latest Security Council Report on Timor-Leste, February 2010, <[www.securitycouncilreport.org/site/c.glKWLeMTIsG/b.5764299/k.1C78/February\\_2010brTimorLeste.htm](http://www.securitycouncilreport.org/site/c.glKWLeMTIsG/b.5764299/k.1C78/February_2010brTimorLeste.htm)> (last accessed 15 March 2011); see also L. Pritchett and F. de Weijer, 'Fragile States: Stuck in a Capability Trap', Background Paper to the World Development Report 2011, <[http://wdr2011.worldbank.org/sites/default/files/pdfs/WDR%20Background%20Paper\\_Pritchett\\_0.pdf?keepThis=true&TB\\_iframe=true&height=600&width=800](http://wdr2011.worldbank.org/sites/default/files/pdfs/WDR%20Background%20Paper_Pritchett_0.pdf?keepThis=true&TB_iframe=true&height=600&width=800)> (last accessed May 25, 2011).

<sup>14</sup> See S. Lubkemann et al., 'Justice in a Vacuum: The Unintended Consequences of the Constraint of Customary Justice in Post-Conflict Liberia', in Isser, *Customary Justice and the Rule of Law in War Torn Societies*, above n. 2.

<sup>15</sup> J. Gundel, *The Predicament of the Oday: The Role of Traditional Structures in Security, Rights, Law and Development in Somalia*, Danish Refugee Council, 2006, p. iii.

society.<sup>16</sup> In a report on Afghanistan, it was found that the failure to protect women's rights in customary decisions was not a flaw of the customary system itself, but rather a consequence of prevailing gender roles and relations in Afghanistan's societies.<sup>17</sup>

Where international standards are imposed without general societal consent, justice sector personnel, including the police, judges and prosecutors are likely to continue to act in accordance with the dominant social code. Thus, in many places, judicial personnel send women back to community authorities, where they believe their cases should be handled. In Timor-Leste, for example, victims of sexual and gender-based violence are frequently referred back to communities by formal authorities, who consider such cases to be 'private matters.'<sup>18</sup> Similarly, in Aceh, Indonesia, law enforcement officials dismiss cases brought to them by women.<sup>19</sup> And in Afghanistan, women are turned back by formal justice actors at every step of the chain.<sup>20</sup>

Where the formal system does adjudicate matters affecting women, local attitudes tend to overshadow legal rights. According to a United Nations Office of Drugs and Crime (UNODC) report, half of the women they interviewed at Pule-Charki Prison had been charged with 'moral crimes' such as running away from forced marriages.<sup>21</sup> In Liberia, women victims of sexual crimes, as well as female litigants in civil and petty criminal cases, have been subjected to abuse by formal system personnel.<sup>22</sup>

Beyond succumbing to social norms, formal systems are also vulnerable to politics and power interests, which may lead to compromising women's rights. At various points in Afghan history, governments that have pushed for rapid changes in discriminatory practices 'found that this undermined their political legitimacy because they were accused of abandoning true Afghan values.'<sup>23</sup> Due to pressure by powerful interest groups, a variety of countries have embraced the role

<sup>16</sup> See, for example, S. Butt et al., *Local Dispute Resolution Mechanisms in Timor Leste*, Australian Legal Resources International, 2004, p. 31.

<sup>17</sup> AREU, *A Holistic Justice System for Afghanistan* 2009.

<sup>18</sup> See, for example, on Timor-Leste: *Report on Human Rights Development in Timor Leste* (September 2007-June 2008), p. 11; Butt et al., *Local Dispute Resolution Mechanisms in Timor Leste*, above n. 16, p. 31; USAID, *Rule of Law in Timor Leste* 2007, p. 5.

<sup>19</sup> See, for example, UNDP, *Access to Justice in Aceh Report: Making the Transition to Sustainable Peace and Development in Aceh* 2007, p. 79.

<sup>20</sup> Human Rights Watch, "'We Have the Promise of the World'", *Women's Rights in Afghanistan*, 2009, p. 7.

<sup>21</sup> T. Barfield et al., *Clash of Two Goods: State and Non-State Dispute Resolution in Afghanistan*, United States Institute of Peace (USIP), 2006, p. 15.

<sup>22</sup> D. Isser et al., *Looking for Justice: Liberian Experiences and Perceptions of Local Justice Options*, USIP, George Washington University, and CSAE, 2009, p. 47.

<sup>23</sup> Barfield et al., *Clash of Two Goods*, above n. 21, p. 22.

of religious or customary laws concerning personal status and family issues, which can result in serious inequities for women in the matters most important to their social and economic survival – marriage and divorce, inheritance, child custody.<sup>24</sup>

These examples may involve an insufficient legal framework, yet changes in formal law alone are not likely to end discrimination, because deep-seated social norms are a stronger determinant of behavior than is the law. Due to insisting that women's issues be handled by formal systems in the absence of concomitant social change and credible enforcement, formal institutions that have been established with international support are used against women rather than to uphold their rights.

### *Promoting inaccessible systems*

Promoting formal mechanisms exclusively will have little impact on the many women who are unable to access the system due to social pressures.<sup>25</sup> In Somalia, for example, local norms prohibit a woman from directly accessing courts, requiring that she be represented by her husband or a male family member, who may have interests at odds with hers. In Afghanistan, women and girls who act against the wishes of their families often face threats and intimidation.<sup>26</sup> In addition, in Aceh, local leaders actively discourage women from turning to the formal system, as it may upset the community order.<sup>27</sup>

Where women do bring cases to the formal system, their access may be undermined by those in power. In Afghanistan, perpetrators have successfully lobbied for rape cases to be rejected by the highest judicial authorities.<sup>28</sup> A United States Institute for Peace (USIP) report on Southern Sudan notes that: 'men frequently have the upper hand in court cases through their potentially closer relationships with chiefs and judges.'<sup>29</sup> Among the pastoralist communities in northern Kenya, Magistrates report that community elders frequently seek to withdraw cases reported by women, promising that they will solve them through communal mechanisms. Where Magistrates do not allow the withdrawal of the case, communities will stop cooperating with the police and may hide complainants, witnesses and the accused.<sup>30</sup>

<sup>24</sup>International Council on Human Rights Policy (ICHRP), *When Legal Worlds Overlap: Human Rights, State and Non-State Law* 2009.

<sup>25</sup>UNWomen, *Progress of the World's Women 2011-2012: In Pursuit of Justice*, 2011, pp. 52-53.

<sup>26</sup>Human Rights Watch, 'We Have the Promise of the World', above n. 20, p. 7.

<sup>27</sup>UNDP, *Access to Justice in Aceh Report*, above n. 19, p. 73.

<sup>28</sup>Human Rights Watch, 'We Have the Promise of the World', above n. 20, p. 7.

<sup>29</sup>C. Leonardi et al., *Local Justice in Southern Sudan*, USIP and RVI, 2010, p. 41.

<sup>30</sup>T. Chopra, 'Dispensing Elusive Justice. The Kenyan Judiciary Amongst Pastoralist Societies', in: 2 *Hague Journal on the Rule of Law* (2010), pp. 95-110.



In other cases, women have been able to get legal recognition of their rights in formal courts, only to find enforcement undermined by social realities. Among the agriculturalist communities in Kenya, women have been encouraged by non-governmental organizations (NGOs) to contest property inheritance cases in court. Their legal victories, however, have proved pyrrhic as more powerful community members have rejected the judgments, sometimes even excommunicating the claimant.<sup>31</sup>

*Producing negative results*

Finally, formal systems that are effective in upholding international standards may produce adverse and unwanted, if unintended, consequences for women. Here, again, the problem is the gap between these standards and social realities. Women who are 'victorious' from a rights perspective may end up as losers in their lives. As this happens, evidence shows that women and/or their families may avoid the formal justice system and seek alternative remedies more in line with socio-economic realities.

In Timor-Leste, for example, cases of sexual and gender-based violence are predominant, and there is consent among the government and donors that all cases should go before a formal court. Yet, punitive sanctions of the perpetrator can seriously threaten a woman's socio-economic survival if the community cuts off the woman for rejecting family or communal resolution. In domestic violence cases, imprisonment of the husband may leave a woman destitute. It has been documented that women have stopped reporting domestic violence for fear of these consequences.<sup>32</sup>

Empirical studies in both Southern Sudan and Liberia document how formal resolution of crimes against women, including rape, adultery, defilement or impregnation, may not be in the best interests of the women victims. In Southern Sudan, these cases 'provide a clear example of how attempts to impose statutory law can lead to the avoidance of government judges' courts because of dissatisfaction with strict application of the penal code,' which will lead to the 'needless' imprisonment of the perpetrator and increased shame for the victim and her family.<sup>33</sup> In Liberia, the prospect of compensation, including medical expenses and school fees, may be far more desirable than the crippling court fees, delays and difficulties involved in taking cases to court.<sup>34</sup>

<sup>31</sup>A. Harrington and T. Chopra, *Arguing Traditions: Denying Kenya's Women Access to Land Rights*, World Bank, Justice for the Poor, Research Report No. 2, 2010.

<sup>32</sup>T. Chopra et al., *Fostering Justice in Timor-Leste: Rule of Law Program Evaluation USAID* 2009; Butt et al., *Local Dispute Resolution Mechanisms in Timor Leste*, above n. 16, p. 31.

<sup>33</sup>Leonardi et al., *Local Justice in Southern Sudan*, above n. 29, p. 66.

<sup>34</sup>D. Isser et al., 'Looking for Justice: Liberian Experiences with and Perceptions of Local Justice Options', USIP Peaceworks No. 63 (2009).

Land, property and inheritance represent another area where formal mechanisms and standards may undermine rather than protect women's interests. For example, in Kenya, the introduction of individual land ownership and formalization of title had the unintended consequence of cutting many women off from their usage rights under the pre-colonial system. Similar experiences are described in Mozambique.<sup>35</sup> As noted by Tamanaha, 'The flaw in these efforts is the unthinking application of a single (Western) state law model for property, failing to consider alternative arrangements that better conform to local understandings of property while also satisfying economic needs.'<sup>36</sup>

The examples above are not meant to suggest that formal justice systems cannot be an important means of promoting women's rights in fragile societies, nor that donors should not seek to improve their quality and effectiveness. But expectations for change need to be based on a deeper understanding of the socio-political dynamics in which formal systems are situated. Butt et al. argue that '[e]ncouraging women to pursue rights that are not adequately recognized by the available mechanisms might place them at greater risk. It could also create disenchantment and disengagement with a system that does not provide them with the resolutions they have been encouraged to expect.'<sup>37</sup>

#### THE PROBLEM OF 'FIXING' INFORMAL LEGAL SYSTEMS

The second main approach to promoting women's rights in fragile states recognizes some of the limitations explored above and seeks to engage with informal justice systems. The task is usually defined as modifying the gender biases and discrimination within these legal orders to make them more compliant with and accountable to international standards. The idea is to 'fix' customary systems by eliminating 'negative' features, while building on their positive aspects, such as their accessibility, low costs and general local legitimacy.

Exactly how to achieve this remains a key question for many international agencies, generating conferences, workshops and commissioned studies, which are all in search of programmatic guidance and best practice.<sup>38</sup> Current thinking and programming generally fall into three approaches.

<sup>35</sup> C. Tanner and S. Baleira, 'Mozambique's Legal Framework for Access to Natural Resources: The Impact of New Legal Rights and Community Consultations on Local Livelihoods', FAO, Livelihood Support Program Working Paper 28 (2006), p. 2.

<sup>36</sup> B.Z. Tamanaha, 'The Rule of Law and Legal Pluralism in Development', in: 3(1) *Hague Journal on the Rule of Law* (2011), pp. 1-17.

<sup>37</sup> Butt et al., *Local Dispute Resolution Mechanisms in Timor Leste*, above n. 16, p. 32.

<sup>38</sup> See, for example, the Danish Institute for Human Rights, 'Study on Informal Justice Systems: Access to Justice and Human Rights,' commissioned by UNDP, UNICEF and UNIFEM (2011); E. Harper, *Customary Justice: From Programme Design to Impact Evaluation*, IDLO, Rome, 2011.

The first is based on the assumption that lack of knowledge underlies discriminatory systems. Thus, it involves programs that aim to reduce gender-bias in decision-making<sup>39</sup> by educating local justice authorities about human rights<sup>40</sup> and by training and sensitizing them to address sexual and gender-based violence.<sup>41</sup>

The second approach may be more ambitious in its attempt to re-engineer informal systems by introducing new mechanisms and procedures that aim to remedy deficiencies. The language used in such prescriptions is telling: it is proposed to 'adapt' informal systems and 'amend' them to overcome their lack of responsiveness to women,<sup>42</sup> so as to promote the 'evolution' of informal systems (assuming a linear development of justice in society).<sup>43</sup> This approach includes attempts to regulate decision-making structures, for example, by: requiring the participation of women;<sup>44</sup> prohibiting discriminatory practices; introducing elements of due process into procedure; and standardizing and modifying customary law.<sup>45</sup> One approach that was particularly fashionable during the colonial period was the codification of customary laws, in order to make them conform to the legal standards of the colonial state.<sup>46</sup> Recently, codification or 'ascertainment' processes have become popular again, most notably in the customary law strategy developed by the United Nations Development Programme (UNDP) and the Ministry of Legal Affairs and Constitutional Development of Southern Sudan.<sup>47</sup>

The third approach focuses on the interaction between informal and formal systems, with the aim of clarifying and delimiting clear roles for each by creating 'formalized interactions between systems'<sup>48</sup> or by establishing 'interfaces' between

<sup>39</sup>Wojkowska, *Doing Justice*, above n. 7, p. 41.

<sup>40</sup>K. Kalla and J. Cohen, *Ensuring Justice for Vulnerable Communities in Kenya: A Review of HIV and AIDS-Related Services*, Open Society Institute, 2007, p. 9.

<sup>41</sup>T. Dexter and P. Ntahombaye, *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, p. 34.

<sup>42</sup>K. Samuels, 'Rule of Law Reform in Post-Conflict Countries: Operational Initiatives and Lessons Learnt', The World Bank, Social Development Papers 37 (2006), p. 19; Dexter and Ntahombaye, *The Role of Informal Justice Systems*, above n. 41, p. 8; IDLO, *Enhancing Legal Empowerment through Engagement with Customary Justice Systems: Concept Note 2010*; Quast, 'Justice Reform and Gender', above n. 6, p. 13.

<sup>43</sup>Commission on Legal Empowerment of the Poor, *Making the Law Work for Everyone* 2008, pp. 63-64.

<sup>44</sup>Dexter and Ntahombaye, *The Role of Informal Justice Systems*, above n. 41, p. 40.

<sup>45</sup>T. von Gienanth und W. Hansen, *Post-Conflict Peacebuilding and National Ownership: Lessons from the Sierra Leone Peace Process. Executive Summary*, Zentrum für Internationale Friedenseinsätze, Report 2, 2006, p. 6.

<sup>46</sup>See S. Falk Moore, 'Treating Law as Knowledge: Telling Colonial Officers What to Say to Africans about Running "Their Own" Native Courts', in: 26(1) *Law and Society Review* (1992), pp. 11-46.

<sup>47</sup>Leonardi et al., *Local Justice in Southern Sudan*, above n. 29.

<sup>48</sup>See, for example, Dexter and Ntahombaye, *The Role of Informal Justice Systems*, above n. 41; UNFPA, *Gender Based Violence in Timor-Leste: A Case Study*, 2005, p. 2.

them.<sup>49</sup> A report from Afghanistan points out the opportunity for ‘developing a more formalized interaction between informal and formal justice providers in order to strengthen the credibility of the formal court system on the one hand, and increase the legitimacy of the customary system within the Afghan justice system.’<sup>50</sup> In Liberia, Somalia, Timor Leste, and Southern Sudan, among others, government and donor policies call for a definition of possible areas of cooperation between formal and informal justice,<sup>51</sup> for their ‘review and harmonization into a complementary whole,’<sup>52</sup> for defining clear jurisdictional limits,<sup>53</sup> and establishing regulatory oversight over the informal by the formal system.<sup>54</sup>

These approaches are too new and/or have been subject to insufficient study to enable proper empirical evaluation of their impact. Project evaluations tend to count the number of women or justice personnel ‘trained’ or simply state that people’s understanding of law has increased. They may point to the introduction of new mechanisms and forms of regulation that look good on paper, but there is rarely an inquiry into how this translates into actual justice delivery.

There are, however, reasons to be concerned that such approaches may, at best, be too superficial to have any serious impact on underlying social norms and power dynamics, or, at worst, be counterproductive. The few assessments that do exist indicate alarming results. In Timor-Leste, for example, after nearly a decade of intense international support for justice sector development, a survey by the Asia Foundation showed that the understanding that sexual and gender-based violence is a crime had decreased.<sup>55</sup> Once again, the problem is that most approaches that take systems as their entry point risk increasing the gap between laws and institutions, on the one hand, and social dynamics and realities, on the other. Some specific examples, provided below, can illustrate how efforts to engineer local systems can backfire.

<sup>49</sup> E.g., UNDP Global Programme on Accelerating Access to Justice for Sustainable Human Development.

<sup>50</sup> The Liaison Office, *Linkages between State and Non-State Justice Systems in Eastern Afghanistan*, 2009, p. 26; Barfield et al., *Clash of Two Goods*, above n. 21, p. 2.

<sup>51</sup> Ibid.

<sup>52</sup> A. Le Sage, *Stateless Justice in Somalia: Formal and Informal Rule of Law Initiatives*, Centre for Humanitarian Dialogue, 2005, p. 7.

<sup>53</sup> In the authors’ experience, this has been a common refrain in Afghanistan, Liberia, Timor Leste and southern Sudan.

<sup>54</sup> OECD, ‘Enhancing the Delivery of Justice and Security: Governance, Peace and Security’ (2007).

<sup>55</sup> Asia Foundation, *Law and Justice in Timor-Leste: A Survey of Citizen Awareness and Attitudes Regarding Law and Justice 2008 2008*.

*Codification and its variants*

Southern Sudan provides an interesting case study on the pitfalls of ascertainment and codification as a means of promoting women's rights in customary systems. The policy of codification has been promoted by several policy makers in the Government of Southern Sudan for a variety of reasons, including: (a) to incorporate the norms and values of Southern Sudan's customary heritage into its body of legislation; (b) to modernize the legal framework by harmonizing the many systems of customary law and modifying them to meet modern needs, including the elimination of discriminatory provisions; and (c) to ensure predictable and equal application of customary law. Good intentions notwithstanding, a 2010 report by USIP has identified several ways in which this policy may backfire, based on empirical research of the dynamics of local dispute resolution.

The report argues that a process of codification is likely to formalize social relations in favor of those in power. Even a process of 'self-statement' as advocated in the Customary Law Strategy of the UNDP and Ministry of Legal Affairs and Constitutional Development,<sup>56</sup> is likely, under the current realities, to crowd out women's voices. Forcing certain elements of the written customary law – by prohibiting discrimination or rewriting norms – may produce a law that looks good on paper, but is unlikely to be enforced or to have any impact on social norms. Several chiefs interviewed for the report were in favor of codification because it would increase their stature, but they also admitted they were unlikely to change their process of dispute resolution as a result.

More fundamentally, the problem with reducing customary law to a written code is that it fails to appreciate the fluid and dynamic nature of customary dispute resolution. In practice, the flexible and negotiated nature of customary law provides considerable space for contestation and adaptation, including for women, who have been adept at using these spaces to advance their rights. In the name of predictability and equal application, codification is likely to reduce these constructive spaces of contestation and with it, the practical options available to women to define and redefine norms as their rights consciousness grows.<sup>57</sup>

Codification may be a satisfying legal 'fix', but – especially where the formal legal system is rudimentary, broken, and/or not protective of women's rights – ineffective in changing underlying social norms and possibly destructive to existing mechanisms of rights promotion. Important experience in this comes from

<sup>56</sup>A 2010 Customary Law Strategy developed by UNDP and the Ministry of Legal Affairs and Constitutional Development calls for 'self-statement' rather than codification. Modeled on a process in Namibia, self-statement is intended to avoid the pitfalls of codification by establishing an inclusive process for communities to define, review and update their own laws. Key government policy makers, however, have expressed codification as their intention.

<sup>57</sup>Leonardi et al., *Local Justice in Southern Sudan*, above n. 29.

countries where minority religious elites have negotiated the formalization of their religious legal codes, such as in India. Women organizations describe a harsh fight in order to change religious legal elements that have been added into formal legislation.<sup>58</sup>

### *Jurisdictional clarity*

The policy response to complex and overlapping rule systems in legally plural contexts is often to establish clear lines of jurisdiction. One problem with this policy is that it assumes a clear dichotomy between formal and informal justice systems. In reality, the lines are blurred, with police enforcing informal decisions, formal courts applying customary law, and a whole range of ad hoc linkages between the two.<sup>59</sup>

Nevertheless, the effort to define jurisdictional boundaries persists, with a variety of consequences for women's rights. The impact of forcing matters affecting women out of the customary systems and into the formal has been discussed above. But the converse – authorizing specific subject matters for customary systems – can also be adverse to women. The International Council on Human Rights Policy (ICHRP) has documented how matters of personal status and family law are most frequently delegated to customary or religious courts, with potentially devastating social and economic consequences for women with regard to marriage and divorce, child maintenance and inheritance.<sup>60</sup> As in the previous section, establishing a clear jurisdiction between different legal orders may cut off mechanisms that work for women by decreasing the opportunity to 'forum shop', i.e., to select the justice institution with the outcome most beneficial to them.

Legal determination of jurisdictional boundaries is usually reflective of a political or ideological decision – perhaps a strict interpretation of international standards, in the latter, or the interests of customary or religious elites. Legal pluralism in general opens up the law for political manipulation,<sup>61</sup> and encourages what might be called 'legal patrimonialism'. It is critical to be aware of how these power interests play out, and to promote ways for legal approaches to follow empirical evidence and the interests of practical positive outcomes for women.

<sup>58</sup> UN Women, p. 72.

<sup>59</sup> Asia Foundation, above, see also Leonardi et al., *Local Justice in Southern Sudan*, above n. 29.

<sup>60</sup> ICHRP, *When Legal Worlds Overlap*, above n. 24, p. 69.

<sup>61</sup> See, for example, Y. Sezgin, 'A Political Account for Legal Confrontation Between State and Society: The Case of Israeli Legal Pluralism', in: 32 *Studies in Law, Politics, and Society* (2004), pp. 199-235.

*Training/awareness*

Training and awareness-raising activities constitute a large portion of donor support to promoting women's rights in customary systems. Rights awareness is critical to empowering women and mobilizing a bottom-up demand, and training may be essential to ensuring that justice providers understand laws and international standards. The problem is that these activities are often carried out as a one-way, top-down, 'sensitization' or 'awareness' of legal standards, rather than a contextualized dialogue that engages socio-political realities. Furthermore, where informal authorities are targeted as subjects of awareness and teaching, the power asymmetry between those marginalized and those in power at the local level may be widened.

It is specifically questionable whether top-down teaching of foreign concepts can have an effect on local realities, especially where there is little opportunity for rights vindication. Awareness alone may set up expectations that cannot be met, especially where the state is not able to deliver. Rather than 'teaching', it is important to allow for 'rights consciousness' to be developed through positive experiences with the law.<sup>62</sup> This may require a broader set of empowerment activities, as well as appreciation of the non-linear trajectories from rights awareness to realization.

#### SUPPORTING PROCESSES OF CHANGE

It is necessary to develop more innovative approaches to improve women's access to justice in legally plural environments where the formal justice sector is weak. A key problem with the two approaches discussed above is their fixation on justice systems, formal and informal, as both the problem and the solution. In fact, both systems are just elements in the much larger theater of social and political processes. Three additional points argue in favor of moving away from systems as entry points.

First, it is important to recognize that legal pluralism is not a passing phenomenon. Experience shows that, especially in fragile states, there is a long road to a well-functioning formal justice sector, which is both acknowledged by the population and has the capacity to be the exclusive deliverer of justice. Tamanaha points out that legal pluralism is not only not disappearing, but is even getting more complex in a globalized and capitalist world: 'One must avoid falling into either of two opposite errors: the first error is to think that state law matters above all else (as legal scholars sometimes assume); the second error is to think that other

<sup>62</sup> S. Engle Merry, 'Rights Talk and the Experience of Law: Implementing Women's Human Rights to Protection from Violence', in: 25(2) *Human Rights Quarterly* (2003), pp. 343-381, 343.

legal or normative systems are parallel to state law (as sociologists and anthropologists sometimes assume).<sup>63</sup> The implementation of women's rights therefore requires engaging with legal pluralism, rather than seeking to hasten its end.

Second, customary systems are neither essentially bad nor good for women. It depends on how they are interpreted and applied by various groups in society, and on the power dynamics and general inequities that inform justice processes. Most discriminatory elements are not engrained in a specific justice system, but in asymmetric power relations in society, including those between men and women. A report by ICHRP suggests that 'virtually every criticism leveled at non-state orders for failing to match the characteristics of an "ideal" justice system has also been leveled against formal state legal systems, often in the same national context.'<sup>64</sup> In fact, individuals who are powerless – particularly women – will have difficulties to obtain their rights under any system.

Third, ordering formal and customary law in binary divisions does not reflect reality. In most situations, there is not only a formal and a customary justice system operating, but also, there can be various other legal orders and actors at play, such as religious legal orders, new orders created by rebel or resistance movements and orders that developed around economic markets. These orders often do not operate in a clear-cut way. Justice processes are often conglomerations of different legal orders in various hybrid forms.<sup>65</sup>

In the following sub-sections, some alternative entry points and perspectives to the systems approach are presented.

#### *Assuming a user perspective*

An alternative entry point to justice systems is justice experiences. Studying how litigants perceive and navigate their complex legally plural landscapes reveals more nuanced ways of understanding both obstacles and opportunities to achieve justice that take the broader social context into account. A user perspective demonstrates that, in most fragile contexts, the formal justice system is often simply one possible avenue in the reality of multiple legal orders. This perspective clearly shows that in many fragile contexts, the notion that the state is, or even should be, the primary definer and implementer of justice is a fallacy. In the justice landscape as a whole, different actors assert their claims based on a range of calculations. The way in which people either try to claim their rights or address their grievances may reveal a range of authorities or institutions that stand for specific sets of values or

<sup>63</sup> B.Z. Tamanaha, 'Understanding Legal Pluralism: Past to Present, Local to Global', in: 30 *Sydney LR* (2008), pp. 375–411.

<sup>64</sup> ICHRP, *When Legal Worlds Overlap*, above n. 24, p. 145.

<sup>65</sup> See Leonardi et al., *Local Justice in Southern Sudan*, above n. 29; Isser et al., 'Looking for Justice', above n. 34.



that have developed out of certain socio-political scenarios or power hierarchies. Local norms, socio-political realities and power structures mediate how people navigate between the different values and fora of justice available to them. There is often a whole array of possibilities, such as institutions informed or influenced by 'customary', socio-cultural, religious, and/or formal legal norms.

Power often plays out strongly against women in legally plural settings. Several examples show how forum shopping benefits the powerful. Kelly describes for the Palestinian Territories: 'In a context where law has no absolute moral value, but is attractive for the substantive claims that can be made through it, people are willing to use whatever resources are available to them in order to enforce the tangible benefits of legal claims.'<sup>66</sup> Moore indicates a similar phenomenon for Tanzania when it was a British protectorate, where community leaders exerted power by controlling the fora their fellow community members would use to resolve conflict.<sup>67</sup> Tamanaha also points out that people will simply make use of the competition between the systems in order to fulfill their interests.<sup>68</sup> As women are usually not in power, they lose out. A UNDP report states: 'The result is competing sets of laws and procedures that, while giving claim-holders some degree of choice, in many instances serve to obstruct claim-holders' access to justice and impede effective handling of grievances by duty-bearers.'<sup>69</sup>

### *Finding opportunity in fluidity*

Forum shopping may, however, also present an important opportunity to contest prevailing social norms and to promote women's rights. Unravelling the dynamics of legal pluralism, and the power interests that influence them can help point to important entry points for change. Most legal orders are fluid, as they depend on the definition and interpretation of norms by members of society and can therefore readily adjust to social changes. This continuity of the process can be key in the positive change of orders. The same is true of the existence of multiple justice fora. The availability of multiple legal orders provides the opportunity to select the institution that is more likely to grant women's rights. While those in power use forum shopping for their own advantage, it can also be strategically employed by women or those supporting women's access to rights. Where multiple legal orders exist, they can be used to contest each other. By supporting good contests, international actors can support women to become more active in shaping and defining legal norms and processes to advance the implementation of their rights.

<sup>66</sup>T. Kelly, 'Access to Justice. The Palestinian Legal System', LSE Working Paper No. 41, p. 2.

<sup>67</sup>Falk Moore, 'Treating Law as Knowledge', above n. 46, p. 12.

<sup>68</sup>Tamanaha, 'Understanding Legal Pluralism', above n. 63, p. 24; Isser et al., 'Looking for Justice', above n. 34.

<sup>69</sup>UNDP, *Access to Justice in Aceh Report*, above n. 19, p. 11.

*Using formal law and international standards as tools of contestation*

As argued earlier, there is usually a significant gap between law and society. Unless they are aligned, it is difficult to expect the formal justice system to function well to provide order and justice within the nation-state. One of the questions is, therefore, how far 'ahead' of society can the law be without losing its regulatory powers due to its distance from the people it serves. Conversely, to what extent can law that is 'ahead' of society have a positive impact in shaping society and instigating social change? The answers are clearly context-dependent.

Bearing this in mind, rather than expect that the aim is to put formal laws in place, formal law and international standards must be seen as a framework and set of tools that can help tackle discrimination and contest problematic practices. Such legal frameworks can: (a) hold states accountable before international law (this is also important where communities want to contest the government's action); and (b) be used by citizens as a tool to contest norms or practices that are not compliant with human rights or gender equity, such as through advocacy and strategic litigation.<sup>70</sup>

A human rights-based legal framework can also influence justice processes at the local level. In Mozambique and Tanzania, for example, a study of mechanisms to promote women's access to land rights concluded that while a formal judgment does not necessarily impact behavior or lead to increased adherence to law, it can be a powerful tool for NGOs to increase awareness of women's rights and request support from official actors.<sup>71</sup> Descriptions from Afghanistan make a similar point: 'even if the formal law is not resorted to in an explicit manner, the simple fact that it exists and that people whose interests concur with its prescriptions can threaten to use it, might create a situation in which its objectives are partly met.'<sup>72</sup>

The training of community paralegals has also been a promising approach in injecting women's rights at the community level – where they are not just thought to act as agents that take cases to the formal courts. Community paralegals can negotiate between different legal orders and foster contestation where systems discriminate against women. They can ease access to formal systems<sup>73</sup> and provide

<sup>70</sup> See, for example, S. Pradhan Malla, 'Upholding Women's Right through Litigation', Paper submitted to Interactive Expert Panel, United Nations Commission on the Status of Women, Fifty-fourth session, New York, 1-12 March 2010, <[www.un.org/womenwatch/daw/beijing15/interactive\\_panel\\_III/Sapana%20Pradhan%20Malla%20paper.pdf](http://www.un.org/womenwatch/daw/beijing15/interactive_panel_III/Sapana%20Pradhan%20Malla%20paper.pdf)> (last accessed 15 March 2011).

<sup>71</sup> A. Kapur, 'Two Faces of Change: The Need for a Bi-Directional Approach to Improve Women's Land Rights in Plural Legal Systems', IDLO, Working Paper No. 2, *Enhancing Legal Empowerment through Engagement with Customary Justice Systems*, 2010, p. 21.

<sup>72</sup> G. Aldashev et al., 'Custom in the Shadow of the Formal Law: An Economic Analysis' <[www.ecares.org/ecaresdocuments/seminars0708/aldashev.pdf](http://www.ecares.org/ecaresdocuments/seminars0708/aldashev.pdf)> (2007) (last accessed 15 March 2011).

<sup>73</sup> L. Teale, *An Evaluation of the Way That Paralegals at the Timap Programme in Magburaka, Sierra Leone, Deal with Family Cases* 2007, p. 4.

an alternative address for women to turn to, where their formal rights are not acknowledged by the prevalent local institutions.<sup>74</sup> However, while there is plenty of evidence that community paralegals have helped women to navigate the systems, there is still a lack of empirical evidence of the impact paralegals may have on local power structures.

In Sierra Leone, a case where a woman was raped by a police officer illustrates a positive impact of the intervention of paralegals. After mediation efforts by a community paralegal, who informed the police officer about the punishments of the formal law, the police officer paid the victim compensation.<sup>75</sup> The paralegal allowed the woman to circumvent local power structures, which would have prevented the case from proceeding, and helped to promote the formal rights of the woman without having to rely on a malfunctioning formal system. While the police officer was not punished by a court, the compensation payment to the victim is a first step towards acknowledging the 'wrongdoing', preventing further incidents, and shifting power relations between men and women, but also between village authorities and the community paralegal as an alternative source of power.

At the same time, seeing formal law and international standards as tools of contestation also implies that they should not always be directly implemented. Instead, taking into account the fact that women across society will have varied socio-economic status, degrees of power and define their interests differently, these tools are to help women make informed choices rather than force them into a particular legal approach.

### *Working with change processes*

Given that the fundamental barriers to women's access to justice in formal and informal systems are underlying socio-cultural norms and power relations, efforts to promote women's rights must engage with these deeper dynamics. Rather than focus on legal reforms of the systems, advocates and donors should seek to support constructive processes of social change that in turn will influence the emergence of more equitable justice systems.<sup>76</sup>

Promising methods to achieve this include: empowering women through positive experiences with the justice system;<sup>77</sup> creating alternative sources of

<sup>74</sup>This is distinctly different from alternative dispute resolution (ADR) initiatives, which are usually led by formal justice institutions. Here, once a woman has actually addressed the formal system, she may not want to be subjected again to mediation. Community paralegals, on the other hand, can support women in navigating the plural legal systems and possibly, addressing the formal courts.

<sup>75</sup>V. Maru, 'Working to Break the Chains of Injustice', in: *OSI News* (2006–2007), p. 19.

<sup>76</sup>Sage et al., 'Taking the Rules of the Game Seriously', above n. 8.

<sup>77</sup>Engle Merry, 'Rights Talk and the Experience of Law', above n. 62, pp. 343–381, 344.

power (such as community paralegals); and supporting spaces for contestation. Successful initiatives, for example, have fostered dialogue between affected women and community justice providers.<sup>78</sup> The Kenyan National Human Rights Commission, for example, facilitated meetings between Luo women who were denied inheritance of the land from their dead husbands and community authorities. The Commission created the framework, in which women were encouraged to articulate their plight, while the elders had to defend that Luo culture does protect women. Challenged this way, the elders started to help women to obtain land titles from families denying the women inheritance.<sup>79</sup> What is important in this example is that: (a) women were able to contest local practices; (b) women were enabled to interpret and shape their own culture in a way that produced a different outcome; and (c) women's formal rights to inherit underwent a process of 'vernacularization'<sup>80</sup> and are now formulated in a locally understandable idiom.

These three elements together may produce more legitimate and sustainable change for women and society as a whole. Providing more space for women to define their own conceptions of justice (e.g., the best outcome in a given case) may provide more protection than enforcement of formal norms and allow for change at their pace. It also allows them to bring in their own versions of justice and shape justice processes in a bottom-up manner.

Vernacularization, in which rights awareness is increased through engagement with local concepts and institutions, helps foster the dynamic of contestation. Levitt and Merry describe the local adaptation and appropriation of international rights as 'vernacularization'. A woman's group in Lima, Peru, for example, interpreted women's rights within the framework of the Andean traditions that shape their lives, regarding them more as communal rights than individual rights.<sup>81</sup> Such processes are more likely to be aligned with available mechanisms to enforce rights, because they make sense for local communities. Vernacularization in this regard can be an important tool in closing the gap between formal law and society, and in making formal rights useful at the local level.

A promising element in fostering change has been to work with 'insider' agents such as community paralegals or local NGOs. These are community members who are not only legitimate contesters, but are also familiar with the socio-cultural and political contests in a specific community, and can therefore challenge

<sup>78</sup> See also A. Brown and A. Nolan, *Towards Effective and Legitimate Governance: States Emerging from Hybrid Political Orders: Vanuatu Report*, Australian Center for Peace and Conflict Studies, 2008.

<sup>79</sup> T. Chopra, 'Promoting Women's Rights by Indigenous Means: An Innovative Project in Kenya', World Bank, Justice for the Poor, *Briefing Note 1.2* (2007).

<sup>80</sup> P. Levitt and S. Engle Merry, 'Vernacularization on the Ground: Local Uses of Global Women's Rights in Peru, China, India and the United States', in: 9(4) *Global Networks* (2009), p. 451.

<sup>81</sup> Levitt and Engle Merry, 'Vernacularization on the Ground', above n. 80.

systems in the right spot. Laws and justice institutions that have been shaped from the inside also allow outcomes that maintain women's rights to their culture – and their rights to change it.

However, context needs to be understood in order to select the right insider agents for change so as not to reproduce gender-biased power relations and values. Closer cooperation and more serious substantial engagement with local and national women's organizations, NGOs and government can help to identify such agents.

Legal empowerment initiatives over the last decade have partly included such activities, in opposition to top-down justice sector reform, and in recognition that justice must be demand-driven and should serve to achieve increased socio-economic equity. The High Level Commission for Legal Empowerment of the Poor (CLEP), which informed the United Nations Secretary-General Report on 'Legal Empowerment of the Poor and the Eradication of Poverty,' specifically called for attention to legal empowerment of women.<sup>82</sup> While the focus of these reports has been on the socio-economic angle of justice, such as access to labor, property and business rights, there is no reason to exclude criminal issues.

### *Acknowledging context*

Another extremely important aspect of the alternative approach proposed here is the paramount importance of context. The World Bank's World Development Report 2011 on Conflict, Security and Development emphasizes that considering context is one of the key requirements in engagement in fragile scenarios.<sup>83</sup> A report by the Organisation for Economic Co-Operation and Development (OECD) calls upon practitioners to consider that 'local context should determine what development activities occur when, how and in what order, as the provision of justice and security is based upon historical legacies, cultural value systems, political calculations and intricate balances of power.'<sup>84</sup> However, many interventions continue to replicate models used elsewhere, rather than develop localized solutions.

One of the biggest gaps in designing context-specific approaches is the lack of empirical data. Most empirical work has focused on the substance of customary systems and how they operate in order to design ways to link them with formal systems. There needs to be a significant shift to more thorough evaluations and assessments of the impacts of justice initiatives on society at large, including their

<sup>82</sup> United Nations, 'Legal Empowerment of the Poor and Eradication of Poverty', Report of the Secretary-General, 13 July 2009, A/64/133.

<sup>83</sup> World Bank, World Development Report 2011: Conflict, Security and Development, Washington, DC 2011.

<sup>84</sup> OECD, 'Enhancing the Delivery of Justice and Security', above n. 54, p. 6.

unintended consequences. Furthermore, in order to understand the real gaps and opportunities, empirical work should focus on documenting how women navigate between multiple legal orders, rather than assessing how customary law treats them. Research should be used not only to inform donor programming, but can also be a powerful tool of empowerment and contestation for NGOs and for women themselves.

## CONCLUSION

Admittedly, this note does more to deconstruct dominant paradigms of donor support to women's access to justice than it does to provide a new blueprint. In part, this is because of the lack of hard evidence of the impact of the proposed alternative way of approaching the issue. More documentation of reform strategies and an evaluation of their impact are clearly needed. But more fundamentally, it is because the very notion of a blueprint is anathema to this argument that legal fixes and systemic entry points fail to enact real change. Donors and advocates would do well to stop focusing on customary justice systems as such and should try instead to understand and engage with the processes of contestation and social change through which power relations and rights are mediated.

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