

ACCESSING JUSTICE:
MODELS, STRATEGIES
AND BEST PRACTICES
ON WOMEN'S EMPOWERMENT



The International Development Law Organization (IDLO) is an intergovernmental organization devoted to empowering people and enabling governments to reform laws and strengthen institutions to promote peace, justice, sustainable development and economic opportunity.

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SHIRIN EBADI
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Discrimination against women is often justified in the name of culture. For 27 years, I have lent my voice to campaigns by women's rights advocates, lawyers and other activists to end the unequal legal position of women and girls and to ban corporal punishments such as stoning, flogging or cutting off hands. I have learnt from my work that to implement women's rights on the ground we need to frame women's demands in a language that is culturally appropriate and culturally persuasive.

The present study highlights the critical role legal empowerment strategies can play in changing and challenging oppressive gender relations that are justified under the name of culture. By showcasing an impressive range of legal empowerment approaches in diverse geographical and cultural settings, the study indicates the value of empowering women, through efforts aimed at legal education, legal training, the provision of legal services and the creation of a space for women to question and negotiate discriminatory 'cultural' norms.

The initiatives presented in the study indicate that legal empowerment strategies can slowly pay long term dividends, by allowing women to claim power from those who rule in their name, rather than leaving reforms to the whims of the state and community decision-makers, whose interests often lie in the preservation of the status quo. The key message of the study is that by empowering women to claim their rights, women are better equipped to bring about change in their communities. I am confident that when such projects are pursued in conjunction with legal and institutional reforms, we will finally make progress in making women's rights a lived reality.

➤ THE KEY MESSAGE OF THE STUDY IS THAT BY EMPOWERING WOMEN TO CLAIM THEIR RIGHTS, WOMEN ARE BETTER EQUIPPED TO BRING ABOUT CHANGE IN THEIR COMMUNITIES ◀



IRENE KHAN
Director-General, IDLO

Far too often, in far too many countries, women cannot find justice. They are denied the very essence of the rule of law — that we are all equal, and equally protected by the law.

Gender equality is increasingly a feature of national constitutions, yet the law frequently continues to restrict women's rights and

freedoms, dictates their submission to male relatives, and limits what women may own or inherit. Tragically, even as it interferes with how women live their lives, the law fails to protect them from gender-based violence.

Governments and the international community have invested heavily in legal systems. In some places, the situation for women is improving. In many settings, however, women still suffer appalling discrimination and violence. Even where women have rights, they may not know they have them. Add to that a host of economic, social or cultural barriers — poverty, poor access, lack of education, social stigma, family pressure, fear of violence, the unfamiliarity with, or lack of confidence in, state institutions — and it is easy to understand why women rarely turn to courts and the legal system for justice.

More often than not, whether out of choice or necessity, women look to informal set-ups in their rural communities to settle grievances. Matters that concern them most frequently — family disputes, inheritance, access to land and ownership of it — are usually handled at the village or community level. It costs less, the process is less formal, the people are familiar, and one need not travel far.

This is not to say that informal justice systems provide fair outcomes for women. On the contrary, many such systems raise serious human rights concerns. Customary justice may reinforce traditional hierarchies and discriminatory practices, and exclude women from the decision-making process. It often fails to recognize marital rape or domestic violence as crimes; in some cases, it encourages brutal treatment of women.

Women's own experience, in fact, suggests the issue at stake is not the choice of one form of justice over another. No measure taken in isolation — whether it is a law banning gender discrimination, or the nomination of women leaders in a customary justice system — will in and of itself bring about change, as long as the political, social and economic factors that feed injustice and gender discrimination are left unaddressed. What matters is to ensure that women do get justice, no matter where they seek it. And even as attempts are made to improve formal legal systems, customary systems cannot be ignored.

In a world where plural justice systems are a reality and show every sign of enduring, the best answer is therefore to empower women, so that they may themselves bring about the change to which they aspire. Systems, whether formal or informal, must become equally responsive to women's demand for justice. Women's empowerment is fundamental to creating a culture of justice.

I hope IDLO's report, *Accessing Justice: Models, Strategies and Best Practices on Women's Empowerment*, will be seen as an important contribution to women's struggle for justice and equality.

➤ WHAT MATTERS IS TO ENSURE THAT WOMEN DO
GET JUSTICE, NO MATTER WHERE THEY SEEK IT ◀

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EXECUTIVE SUMMARY, LESSONS LEARNED AND POLICY RECOMMENDATIONS

EXECUTIVE SUMMARY

The law is an essential tool for advancing women's and girls' rights and equality. A robust and effective legal system based on the rule of law is central to assisting women to become equal partners in decision-making and development. Over the last couple of decades, the international community has invested substantially in programs aimed at strengthening the rule of law in developing countries. Despite this investment, the rule of law continues to mean very little for the vast majority of women and girls.

IDLO's study *Accessing Justice: Models, Strategies and Best Practices on Women's Empowerment* explores some of the challenges and solutions for women's access to justice in diverse legal systems. It shows that women face structural and cultural barriers to accessing justice – insufficient knowledge of rights and remedies, illiteracy or poor literacy, and lack of resources or time to participate in justice processes. This is all the more so as women usually have intensive family responsibilities. Even where women can access the formal justice sector, the outcomes of the process often fall far short of those envisaged by international standards, particularly with regard to property rights, inheritance, divorce and child custody, and spousal abuse.

Focusing on legal empowerment as a way to improve both access to justice and the quality of justice women receive, the study presents strategies and best practices in both formal and informal justice systems. Legal empowerment approaches share one core concept:

using the law to enable disadvantaged groups to access justice and realize basic rights. They include legal education; legal aid services; support for non-discriminatory dispute-resolution fora to complement or supplement informal systems; training of paralegals; and rights awareness.

In considering whether such approaches can improve the quality of justice women receive, *Accessing Justice* brings together a number of IDLO-sponsored case studies in Afghanistan, India, Namibia, Rwanda, Mozambique, Tanzania, Morocco, Papua New Guinea and the Solomon Islands. These highlight a variety of lessons for development practitioners, both in terms of engagement with the informal legal sector and, more generally, for the use of legal empowerment and top-down / bottom-up strategies. In an appropriate context, carefully designed legal empowerment strategies may constitute a valuable contribution to improving women's access to justice.

The case studies also confirm that programs designed to address women's rights in informal justice systems remain a highly sensitive issue. These programs require thorough knowledge of the social, economic, and political context in which the informal system is operating. Moreover, legal empowerment approaches in both the formal and informal justice sectors are likely to be more sustainable when a) they are locally owned; and b) when they are coupled with top-down reforms to ensure domestic laws and regulations are in line with international legal standards on gender equality.

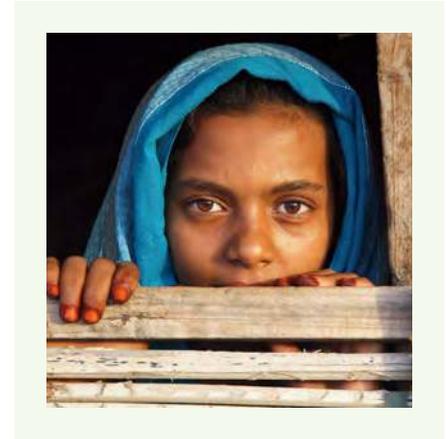


Image: Martin Sojka

> THE RULE OF LAW MEANS LITTLE TO MOST WOMEN AND GIRLS: ACCESS TO JUSTICE DEMANDS KNOWLEDGE, LITERACY, MONEY AND TIME <

¹Hereinafter referred to as *Accessing Justice*.

LESSONS LEARNED

Although small scale and taking place in different contexts, the case studies featured in *Accessing Justice* provide some important lessons as to how legal empowerment approaches can be used effectively to enhance women's access to justice in diverse legal systems:

1. Legal empowerment strategies can be successfully used to improve women's access to justice in both formal and informal systems

One of the key problems for the achievement of gender equality lies in the inability of many women to use existing legal standards to realize their rights. Legal empowerment strategies, through legal literacy programs, legal aid or alternative dispute resolution mechanisms, can help create a 'culture of justice' among women and ensure that principles of equality and non-discrimination are not only enshrined in law, but also translated into practice.

Evidence suggests that legal empowerment approaches to enhance women's access to justice may work well in a variety of legal settings, including informal ones. For example, the fluidity and dynamism of informal justice systems can open up opportunities for modernization and progressive reforms around women's rights.² Where women are provided with a forum to discuss and (re)interpret cultural or legal rules, the system may be open to positive transformation, particularly when it is both women and men who are advocating for a reinterpretation of such rules. Legal empowerment approaches may also

work in informal justice settings because the customary authority of male leaders is generally connected to their ability to reflect the values and interests of the community.³ Thus, while customary male leaders often benefit from the status quo and resist positive change for women, they may also have incentives to respond to community expectations. In the same way, bottom-up legal empowerment approaches targeting women can pressure community leaders to reform discriminatory practices. When women are informed of their rights and encouraged to discuss or challenge informal laws and practices, they can put pressure on customary justice systems to better protect basic rights.⁴ In turn, this can reduce power imbalances and elite capture and improve the transparency of local government decision-making.

2. Legal empowerment strategies are most effective where implemented in conjunction with 'top-down' measures and through local partners

While the state legal system alone cannot cure gender injustice, it is a key avenue for the achievement of gender equality. Law has the ability to deter discriminatory practices against women with the threat of punishment, and the

capacity to influence and guide the behavioral norms and social interaction between men and women. A well-functioning and non-discriminatory legal system can also serve as an accountability mechanism to ensure the compliance of informal practices with basic human rights standards and to prevent power abuses, while at the same time enhancing the predictability of informal decisions.

Grassroots efforts to empower women are therefore more effective when coupled with 'top-down' reforms aimed to ensure that justice systems, whether formal or informal, are in line with international laws and standards pertaining to gender equality. The presence of supportive constitutions and national laws plays a critical role in ensuring the effectiveness of legal empowerment interventions.

Moreover, legal empowerment projects are most likely to have an impact on women's access to justice and gender inequality if they creatively draw on local knowledge and practices. This contributes to the legitimacy of the reforms and ensures their eventual sustainability.

3. Barriers to women's access to justice are multidimensional and go beyond legal aspects

Political, social, cultural, economic and psychological barriers that obstruct women's access to justice and legal empowerment are found at every stage of the 'justice chain'. The case studies clearly indicate that the disempowerment of women is not

➤ FOR LEGAL EMPOWERMENT TO WORK, CULTURAL ATTITUDES, ECONOMIC DEPENDENCY AND DISCRIMINATION MUST ALSO BE TACKLED ◀

² E Harper, 'Engaging with Customary Justice Systems' in J Ubink (ed), *Customary Justice, Perspectives on Legal Empowerment IDLO* (2011) 29, 35.

³ T Mennen, 'Putting Theory into Practice – Improving Customary Justice' (paper presented at 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*, Washington, 17-18 November, 2009, 140) cited in Harper, *ibid*.

⁴ J Ubink and B van Rooij, 'Towards Customary Legal Empowerment', in J Ubink (ed), *Customary Justice, Perspectives on Legal Empowerment IDLO* (2011) 7, 14-15 (writing in relation to legal empowerment interventions more generally).

POLICY RECOMMENDATIONS

simply due to lack of knowledge of laws and legal procedures, but rather due to a host of economic, social and cultural practices that perpetuate inequality in the community and the society at large. Programs which encourage women to object to discriminatory practices are unlikely to provide meaningful relief unless the broader economic, social and security context is addressed. Research indicates that legal empowerment projects targeting women work best when combined with activities addressing a rule of law culture, women's economic autonomy and discriminatory attitudes within the community. To this extent, while legal empowerment is not the panacea to the wider problems of inequality, discrimination and the poverty of women, it can make a positive contribution, which, if properly integrated with other initiatives, will place women on a better trajectory towards effectively addressing discriminatory practices.

4. Legal empowerment programs designed to address women's access to justice need to be context-specific

Women's experiences in the justice system are diverse. There are no ready-made formulas as to how women can be empowered to assert their rights and act as agents of sustainable social change. Rather, a number of questions should be asked: what is the best entry point for women to be empowered to use the legal system to advance their rights? What is the forum in which women's core concerns are dealt with? Is that system open to reform or would legal empowerment have limited results in that context, due to deeply entrenched gender stereotypes, vested interests in the status quo and power inequities? Each intervention should carefully examine where the opportunities are in a given context, whether that be in the formal or informal justice system and whether that be in targeting procedural or substantive aspects. Ultimately, projects designed to be pragmatic, realistic and reflective of the local context demonstrate a higher rate of success.

1. Consider legal empowerment approaches as part of the solution to advance women's access to justice. Invest more resources to identify and design effective, context-specific strategies to promote gender equality.

2. Explore the interface of informal and formal justice settings. Empowerment strategies need to be complemented with efforts to address discriminatory laws and obstacles to the use of the formal legal sector.

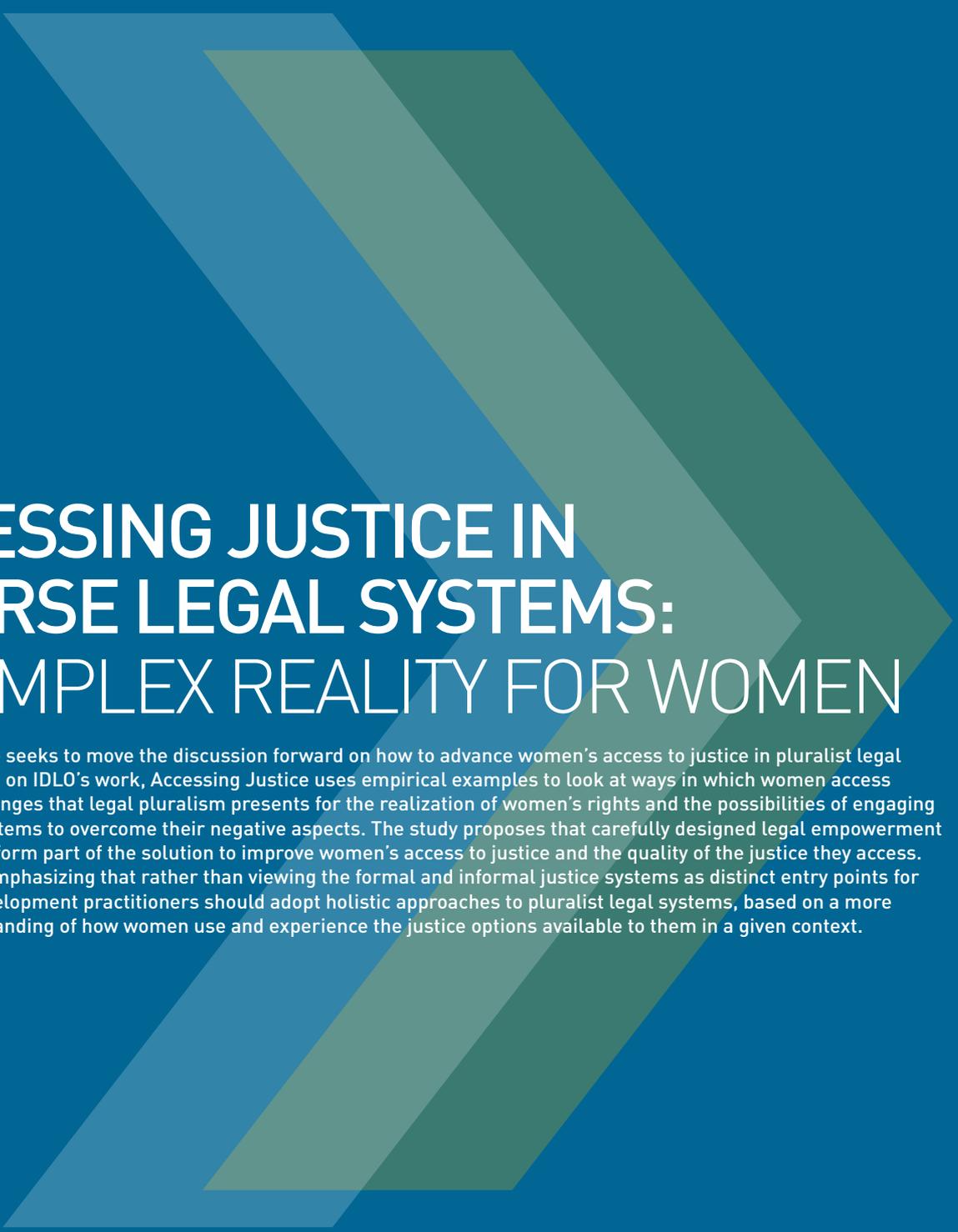
3. Engage with informal justice systems, despite the challenges of program design. Informal justice systems should not be pivoted against formal justice systems in a zero-sum game.

4. Engage with civil society and support local ownership to ensure the legitimacy and sustainability of measures targeting women's access to justice.

5. Adopt a multi-disciplinary approach to women's access to justice. Investigate the potential of partnerships with non-legal service providers, in particular those working in the areas of women's economic empowerment and income generation, protection from violence and food security. Best practices include legal aid providers teaming up with non-legal service providers, such as combining with domestic violence counseling in women's shelters, or bundling legal aid delivery with existing services frequently accessed by women, such as midwifery services or microcredit schemes.

Image: Benzene Mohamed Aseel Hassam





ACCESSING JUSTICE IN DIVERSE LEGAL SYSTEMS: A COMPLEX REALITY FOR WOMEN

Accessing Justice seeks to move the discussion forward on how to advance women's access to justice in pluralist legal settings. Drawing on IDLO's work, Accessing Justice uses empirical examples to look at ways in which women access justice, the challenges that legal pluralism presents for the realization of women's rights and the possibilities of engaging with informal systems to overcome their negative aspects. The study proposes that carefully designed legal empowerment approaches may form part of the solution to improve women's access to justice and the quality of the justice they access. It concludes by emphasizing that rather than viewing the formal and informal justice systems as distinct entry points for intervention, development practitioners should adopt holistic approaches to pluralist legal systems, based on a more nuanced understanding of how women use and experience the justice options available to them in a given context.

WHERE DO WOMEN GO TO SEEK JUSTICE?

Research suggests that in developing countries, up to 80% of the cases are resolved by informal justice systems, signifying that most women in the developing world access justice in a plural legal environment.

The law is an essential tool for advancing women's rights⁵ and gender equality. When a society is governed by the rule of law, with an accessible and just legal system, women can thrive, contribute to the system and improve it for future generations.⁶ The rule of law requires that laws are free from bias and discrimination⁷ "equally enforced and independently adjudicated, and consistent with international human rights norms and standards".⁸ As such, a robust and effective legal system based on the rule of law is central to assisting women to become equal partners in decision-making and development.

Just as a strong legal system can protect and open up opportunities for women, a justice system that is inaccessible or that contains discriminatory rules or practices can significantly impede the advancement of women's rights. The United Nations Development Programme (UNDP) has highlighted the danger of women being left vulnerable to becoming victims of criminal acts, such as fraud, theft, sexual or economic exploitation, violence, torture or murder, if they are not empowered to benefit from the full protection of the law.⁹ The global study conducted by the Commission on Legal

Empowerment of the Poor (CLEP) also concluded that groups that experience discrimination and exclusion from the protection of the rule of law are more likely to fall victim to a range of socio, economic, political and criminal injustices.¹⁰

Over the last couple of decades, the international community has invested substantially in programs aimed at strengthening the rule of law in developing countries. Yet despite this investment, the rule of law continues to mean very little for the vast majority of women and girls. Many women are simply unable to access and navigate their way through formal legal institutions. This can be due to structural as well as cultural barriers, including women's inadequate knowledge of rights and remedies, illiteracy or poor literacy, and lack of resources and time to participate in justice processes, especially given the heavy burden of labor that women bear for their families.¹¹ These challenges are even greater for women who are subject to multiple forms of discrimination based on factors such as being part of indigenous or ethnic minority communities, religious minorities or sexual minorities, or for disabled women, migrant workers, and women living with HIV/AIDS.¹²

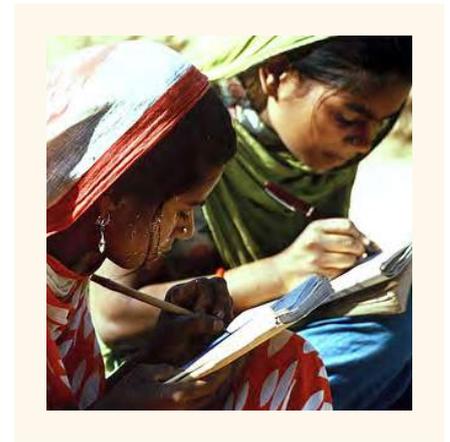


Image: UN Photo

➤ FOUR OUT OF FIVE CASES IN DEVELOPING COUNTRIES ARE SOLVED BY INFORMAL COURTS ◀

⁵ References to women's rights in this study also refer to girls' rights.

⁶ Ban Ki-Moon, *UN Women, 2011-2012 Progress of the World's Women: In Pursuit of Justice* (2011) 2.

⁷ See *International Covenant on Civil and Political Rights (ICCPR)* opened for signature 19 December 1966, 999 UNTS 171, arts. 2(1), 14 and 26, (entered into force March 23, 1976).

⁸ UN General Assembly, 'The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies: Report of the Secretary-General' (23 August 2004) UN Doc S/2004/616 [6].

⁹ United Nations Development Programme (UNDP), *Programming for Justice: Access for All - A Practitioner's Guide to a Human Rights-Based Approach to Access to Justice* (2005) 3 (writing in reference to 'the poor and disadvantaged' generally).

¹⁰ Commission on Legal Empowerment of the Poor (CLEP), *Making the Law Work for Everyone: Volume I, Report of the Commission on Legal Empowerment of the Poor* (2008).

¹¹ UNDP, *Gender Equality and Justice Programming: Equitable Access to Justice for Women* (2007) 18.

¹² Notably, in the *Concluding Observations of many Southeast Asian countries*, the Committee on the Elimination of Discrimination against Women (the CEDAW Committee) has consistently recommended that greater attention and resources go towards improving the situation of excluded women and ensuring their voices are heard and their priorities included within mainstream policy decision-making. UNIFEM, *Time for Action: Implementing CEDAW in Southeast Asia* (2009) 141.

WHERE DO WOMEN GO TO SEEK JUSTICE? (continued)

When women do manage to access the justice sector, they often receive outcomes that are not in line with international standards.¹³ For example, out of the 112 countries scored in the 2012 Organization for Economic Co-operation and Development (OECD) Social Institutions and Gender Index, 86 were found to have discriminatory laws or practices in relation to property and inheritance.¹⁴ The study showed that on average, women hold only 15 percent of land titles in countries where data is available.¹⁵ In family law, women continue to have difficulty receiving fair treatment in the areas of marriage, divorce and child custody. In addition, many justice systems do not treat gender-based violence as a criminal offence, or they consider it to be a family matter for which a fine against the offender will suffice.¹⁶

Either by choice or through necessity, many women, and especially those living in rural environments,¹⁷ seek justice through informal systems. Such informal or 'customary' justice systems often exist alongside formal systems of law. While not gender specific, research suggests that in developing countries, up to 80% of the cases are resolved by informal justice systems,¹⁸ signifying that most women in the developing world access justice in a plural legal environment.¹⁹ Evidence indicates that in a globalized world, legal pluralism is not disappearing but, in fact, is becoming more entrenched and complex.²⁰ In plural legal settings the formal justice system "is simply one possible avenue in the reality of multiple legal orders".²¹

➤ LAWS AND PRACTICES THAT DISCRIMINATE AGAINST WOMEN REMAIN PREVALENT ◀

¹³ International standards of justice and non-discrimination are enshrined in a number of international instruments including arts. 2(1), 3, 14, 15, 16, 17 and 26 of the ICCPR. Specifically relevant is art. 26 of the ICCPR ("all persons are equal before the law and are entitled without any discrimination to equal protection of the law. In this respect, the law shall prohibit discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status"). The International Covenant on Economic, Social and Cultural Rights (ICESCR) contains a similar provision under art. 3 ("The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant") with arts. 2(2), 4 and 5(2) also relevant: ICESCR, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January, 1976). Potentially the most relevant article of the Convention on the Elimination of Discrimination against Women (CEDAW) in this regard is art. 15 (women's right to equality before the law, with reference to equal rights to conclude contracts, administer properties, to be treated equally in all stages of procedure in courts and tribunals and to have the same rights with regard to the law relating to the movement of persons and the choice of residence and domicile): CEDAW, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 September 1981).

¹⁴ OECD Development Centre, 2012 *Social Institutions and Gender Index: Understanding the Drivers of Gender Inequality* (2012) 4, <<http://www.genderindex.org/content/team>> at 16 August 2012.

¹⁵ *Ibid* 4.

¹⁶ For example, in a report undertaken by the UN Secretary-General in 2006, it was found that eighty-nine States had some legislative provisions that specifically address domestic violence while 102 States were not known to have any specific legal provisions on domestic violence. Twenty States have draft legislation on domestic violence in varying stages of development, with a further four states having expressed an intention to develop specific legislation, or provisions, on domestic violence. UN General Assembly 'In-depth Study of all Forms of Violence against Women: Report of the Secretary-General' (6 July 2006) UN Doc A/61/122/Add. 1 [318]. More recent research from 2012 indicates that in the Middle East and North Africa region only Iraq, Jordan, Kuwait and Tunisia have some form of specific legislation in place protecting women from domestic violence. OECD Development Centre, above n 14, 23.

¹⁷ However Odinkalu has emphasized that in many contexts urban and rural life are extremely permeable, noting that the distinction between urban and rural in the African context often refers to degrees of acceptance of Westernization, rather than to physically separated spaces. C A Odinkalu, 'Poor Justice or Justice for the Poor? A Policy Framework for Reform of Customary and Informal Justice Systems in Africa' in C Sage and M Woolcock (eds), *The World Bank Legal Review: Law, Equity and Development* (2006) 141, 156.

¹⁸ UK Department for International Development (DFID), *The Policy Statement on Safety, Security and Accessible Justice* (2003) 58 cited in S Golub, *Beyond the Rule of Law Orthodoxy: The Legal Empowerment Alternative*, Carnegie Endowment for International Peace Democracy and Rule of Law Series, Number 41 (October 2003) 16.

¹⁹ The term legal pluralism in this context is used to describe the interaction between an official legal system and one or more of the other normative systems. See B Z Tamanaha, 'Understanding Legal Pluralism: Past to Present, Local to Global' (2008) 30(1) *Sydney Law Review* 374, 399. This paper provides an excellent analysis of the problem of defining non-state legal orders and 'law' in this context.

²⁰ *Ibid* 374.

²¹ D Isser and T Chopra, 'Women's Access to Justice, Legal Pluralism and Fragile States' in Albrecht P et al (eds), *Perspectives on Involving Non-State and Customary Actors in Justice and Security Reform*, IDLO and Danish Institute for International Studies (2012) 23, 34. It is important to recognize that some national legal systems, often following independence, have integrated informal justice systems into their wider legal and regulatory frameworks. For example, in Malawi, as noted above, the customary system has been incorporated into the hierarchy of the formal justice system, while in Ethiopia the Constitution permits the adjudication of personal and family matters by religious or customary laws. Efforts to recognize customary tenure and customary land rights have also been made more recently in Latin America and South East Asia. See L Chirayath, C Sage and M Woolcock, *Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems*, prepared as a background paper for the World Development Report 2006: *Equity and Development* (2005) 2.

CAN EMPOWERMENT STRATEGIES HELP?

Legal empowerment strategies can help create a 'culture of justice' among women and ensure that principles of equality are translated into practice.

Women's access to justice in plural legal settings can be challenging. On the one hand, formal law reforms targeting women are often inhibited by a number of hurdles at the implementation stage. On the other hand, statutory attempts undertaken in isolation to improve women's rights through engagement with informal justice systems have had minimal success. The limitations of both approaches are largely based on the same factors, including resource constraints within the justice sector, cultural biases among those responsible for upholding the law, women's economic dependence on men, and discriminatory social codes.

An alternative strategy to strengthen efforts to improve women's access to justice is to integrate legal empowerment components into broader law reform projects aimed at providing women with quality justice. Legal empowerment programs encompass a range of activities sharing a common core concept: using the law to empower the disadvantaged within society.²² Typical legal empowerment activities include legal education, legal aid services, support for non-discriminatory alternative dispute resolution fora to complement or supplement customary systems, training of paralegals, and rights awareness for disadvantaged and marginalized groups.²³ Such activities often focus on the legal obstacles of most critical importance to strengthen the livelihoods of the poor, such as access to land, employment and micro-credit.

In the legal empowerment paradigm, the critical actors are the people themselves. The main assumption is that when citizens are better equipped to protect their own rights, it will not only benefit their own socio-economic position, but also contribute to the furtherance of their community's development. As a process, the legal empowerment of women may include initiatives in support of legal reforms and services that improve the negotiating position of, for instance, women claiming their right to inherit land from their deceased husbands. As an outcome, legal empowerment strengthens women's income, assets, health, physical security and more generally, women's capacity to act independently.²⁴ This may have positive flow-on effects in terms of making women agents of good governance at the local level.

Practitioners have come to favor legal empowerment as one of the key approaches to improving access to justice for disadvantaged groups, including women.²⁵ However, the practical impact of legal empowerment interventions has rarely been comprehensively evaluated. This has resulted in a burgeoning gap between a wealth of legal empowerment programs being tested in the field and the actual assessment of the impact of such programs,²⁶ which in turns creates difficulties in understanding whether these interventions are indeed the best available means for meeting the needs of women.

Where legal empowerment projects have been evaluated, the methodology adopted has mostly relied upon relatively easy-to-measure data, such as the number of persons trained or information resources disseminated and the number of cases addressed.²⁷ The focus has been on outputs (i.e. the service or product) as opposed to outcomes (the benefits to the target group as a result of the intervention). While this quantitative information is important in assessing the breadth of an intervention and the extent to which it has been able to contribute to the objectives of the project, the measurement of legal empowerment impacts cannot be based exclusively on such figures. It must include elements targeting the quality of justice delivery and the long-term behavioral changes within a given community.

The case studies featured below represent diverse and innovative legal empowerment approaches undertaken at the local, state and national levels to improve women's access to justice. They demonstrate that legal empowerment approaches can be successfully used to improve women's access to justice in both the formal and informal justice sectors. They also reveal that the effectiveness of a given project depends upon a variety of situation-specific factors, including, among others, social norms, a strong rule of law culture, socio-economic realities and national and geo-politics.²⁸ The cases clearly indicate a need for practitioners to possess in-depth knowledge of the target country, its people and the legal system (both formal and informal) so as to ensure that interventions are effective and sustainable.

²² S Golub, 'What is Legal Empowerment? An Introduction' in S Golub (ed), *Legal Empowerment: Practitioners' Perspectives IDLO (2010) 9, 12-13.*

²³ S Golub, *Beyond the Rule of Law Orthodoxy: The Legal Empowerment Alternative Carnegie Endowment for International Peace Democracy and Rule of Law Series, Number 41 (October 2003) 26.*

²⁴ Golub, 'What is Legal Empowerment?' above n 22, 13 (writing specifically in relation to "the disadvantaged").

²⁵ While legal empowerment has been a strategy used by NGOs for decades, it has received increased attention since the 2008 CLEP report. It has been embraced by the UN Secretary-General in the report 'Legal Empowerment of the poor and the eradication of poverty' in 2009. See also M Stephens, 'The Commission on Legal Empowerment of the Poor: An Opportunity Missed' (2009) 1 *Hague Journal on the Rule of Law* 132.

²⁶ Golub, 'What is Legal Empowerment?' above n 22, 17. For an analysis of the challenges of assessing the impact of legal empowerment activities, see S Khair, 'Evaluating Legal Empowerment: Problems of Analysis and Measurement' (2009) 1 *Hague Journal on the Rule of Law* 33.

²⁷ E Harper, 'Introduction' in E Harper (ed), *Working with Customary Justice Systems: Post Conflict and Fragile States IDLO (2011) 11, 12.*

²⁸ *Ibid* 13.

DO LEGAL EMPOWERMENT STRATEGIES WORK IN INFORMAL JUSTICE SYSTEMS?

Evidence suggests that legal empowerment approaches to enhance women's access to justice may work well in informal legal settings. Where women are provided with a forum to discuss and (re) interpret cultural or legal rules, the system may be open to positive transformation, particularly when it is both women and men who are advocating for a reinterpretation of such rules. When women are informed of their rights and encouraged to discuss or challenge informal laws and practices, they can put pressure on customary justice systems and achieve better protection for basic rights. In turn, this can reduce power imbalances and elite capture and improve the transparency of local government decision-making.

What do we mean by informal justice systems?

Often described as 'traditional', 'customary' or 'non-state' systems, informal justice systems are not all the same and may differ sharply in normative rules, processes and genesis.²⁹ They can include indigenous or religious legal orders, NGO-led alternative dispute mechanisms³⁰ or popular justice fora,³¹ among others.

Although extremely diverse, informal systems are commonly distinguished from state justice systems in that they frequently aim to resolve disputes through mediation or arbitration, usually through a person or a group with standing in the community.³² They often adopt practices that draw their authority from perceived cultural, customary or religious concepts, rather than the political or legal authority of the state.³³ Informal justice systems

tend to emphasize community harmony rather than individual rights. They aim to restore peace within the community by repairing relationships between the disputing parties so that they can "get on with the daily business of living and working together in close communities".³⁴

Another common characteristic of informal justice systems is that the process including any decisions made are rarely recorded. Rules and procedures tend to be applied flexibly and as such, it is possible to have competing versions of a particular rule, with the result that there are usually multiple versions of informal laws, a situation unknown in formal legal systems. Nevertheless, such systems can still be properly described as constituting law because, regardless of structure or origin, decisions hold an authoritative status within the community through popular consent or deference.³⁵

The diversity of these systems does, however, make them extremely difficult to categorize. While such systems are usually classified as informal, many of their institutions can be highly complex, such as the intricate code of rules and procedures in the customary system in South and East Afghanistan (the Pashtunwali).³⁶ It is also potentially incorrect to refer to such systems as non-state. For example, the informal system in Malawi has been incorporated into the hierarchy of the formal justice system. Finally, describing such systems as 'customary' or 'traditional' is often inaccurate given the widespread acknowledgement that such systems have been substantially transformed by different eras of colonial and post-colonial rule and socio-economic change.³⁷ In some circumstances these changes have resulted in far more rigid or discriminatory informal systems than may have previously been the case.³⁸

²⁹ A vast array of practices and traditions has been categorized by policy makers and researchers as informal or customary, all existing within vastly different contexts. In this study, we use the term "informal justice systems" to refer to those systems that exist outside the formal justice system, although we recognize that many informal systems have a relationship to the formal justice system. In this study, alternative dispute resolution services provided by NGOs are not included in the definition of informal justice systems.

³⁰ According to Harper, alternative dispute resolution services provided by NGOs, are "a recent but growing response to access to justice vacuums caused when formal and/or customary justice systems are unsatisfactory or ineffective. These fora are often grafted upon customary dispute resolution methodologies and then adjusted to offer enhanced procedural and rights guarantees." E Harper, above n 2, 35.

³¹ Popular justice is defined by Engle Merry as an "informal process for making decisions and compelling compliance to a set of rules" S Engle Merry, 'Popular Justice and the Ideology of Social Transformation' (1992) 1(2) *Social and Legal Studies* 161, 162. Penal Reform International (PRI) is more specific and describes popular justice fora as justice fora which are not traditional, not run by NGOs and non-state. PRI notes that these have mainly been created in urban and peri-urban systems where no traditional justice systems previously existed. Penal Reform International, *Access to Justice in Sub-Saharan Africa: The Role of Traditional and Informal Justice Systems* (January 2001) 12, 14.

³² This may be a village head, elder, religious leader or other community figure. In practice the divide between mediation and arbitration is not always evident, and the resolution of a given dispute may be a blend of the two and/or may change according to the nature of the dispute under consideration. E Wojkowska and J Cunningham, 'Justice Reform's New Frontier: Engaging with Customary Systems to Legally Empower the Power' in S Golub (ed), *Legal Empowerment: A Practitioners' Perspective* IDLO (2011) 93, 95.

³³ E Harper, *Customary Justice: From Program Design to Impact Evaluation*, IDLO (2011) 17.

³⁴ Wojkowska and Cunningham, above n 32, 98.

³⁵ *Ibid* 95.

³⁶ Harper, above n 33, 17.

³⁷ For examples in sub-Saharan Africa see Odinkalu, above n 17, 147-148.

Why do women rely so much on informal justice systems?

Although exact figures are difficult to obtain, evidence clearly indicates that a significant number of women in the developing world access informal justice systems,³⁹ especially in rural areas and poor urban areas.⁴⁰ It is frequently at the informal justice level that a number of key issues of particular significance to women are administrated and adjudicated, such as inheritance, family law and access and ownership of land and natural resources.

Informal justice systems operate alongside formal justice systems in a wide variety of nations across the globe.⁴¹ The use of informal justice systems has been noted in countries in the Pacific,⁴² South America⁴³ and South and South East Asia,⁴⁴ as well as in Africa.⁴⁵ Such systems can cover

extensive parts of the population within the society. For example, customary tenure is said to cover 75 percent of land in most African countries, with such figures increasing to 90 percent in Mozambique and Ghana.⁴⁶ IDLO's research on non-state dispute resolution systems in Afghanistan, analyzing 271 case studies, found that 30.9 percent of disputes were first reported to community elders, a *jirga* or a *shura*⁴⁷ and that approximately 51 percent of cases were resolved at the local *jirga* or district *shura* level.⁴⁸

The high use of informal justice systems by women can be explained by a number of factors that both drive women away from the formal legal system and draw them towards informal justice systems.⁴⁹ UN Women has highlighted institutional and social factors that provide disincentives for women to engage with

LEGAL PLURALISM IS GETTING STRONGER, NOT WEAKER

the formal justice systems,⁵⁰ including discriminatory state laws or a failure to apply the law in a non-discriminatory manner. For instance, while not gender specific, in an Asia Foundation study conducted in East Timor, 50 percent of respondents thought the formal system favored the rich and powerful, whereas only 15 percent felt the same way about the informal system.⁵¹ Overall, 9 out of 10 respondents indicated that they were comfortable with solving a problem through the informal systems.⁵²

³⁸ According to Falk Moore, *indirect rule by the British in Africa, for example, distorted "native" authority, by strategically assigning duties to certain individuals and fundamentally altering the pre-existing balance of power.* S Falk Moore, 'Treating Law as Knowledge: Telling Colonial Officers What to Say to Africans about Running 'Their Own' Native Courts' (1992) 26 *Law and Society Review* 11, 16 cited in L Chirayath, C Sage and M Woolcock, *Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems*, prepared as a background paper for the World Development Report 2006: *Equity and Development* (2005) 8. A detailed analysis of the evolution of customary law in the colonial and post-colonial context in relation to women's access to land is provided in the case study on the Solomon Islands.

³⁹ This conclusion is supported by a recent study on the use of informal justice systems which showed that in Lesotho, Mozambique and Vietnam more than three times as many women reported that they had contacted a traditional or community leader about a grievance than a government official in the last three years. The data refer to the percentage of respondents who said that in the previous three years they had at least once contacted a government official or traditional/community leader for personal, family or neighborhood problems, or problems with government officials and policies. UN Women, *2011-2012 Progress of the World's Women: In Pursuit of Justice* (2011) 52, 66.

⁴⁰ DFID, *Non-state Justice and Security Systems* (May 2004) 1.

⁴¹ See L Chirayath, C Sage and M Woolcock, *Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems*, prepared as a background paper for the World Development Report 2006: *Equity and Development* (2005) 2.

⁴² See UNICEF, *Traditional Justice Systems in the Pacific, Indonesia and Timor-Leste, Paper commissioned by UNICEF Papua New Guinea for the 2009 Justice for Children in the Pacific, Indonesia and Timor-Leste, EAPRO Sub-Regional Workshop* (2009).

⁴³ For examples of informal justice mechanisms in Colombia and Peru see DFID, *Non-state Justice and Security Systems* (May 2004).

⁴⁴ For example, in Bangladesh an estimated 60-70% of all disputes are processed through the traditional *Shalish* (*Salish*) councils, a type of traditional alternative dispute resolution system that is often used at the local level. UNDP, *Programming for Justice: Access for All - A Practitioner's Guide to a Human Rights-Based Approach to Access to Justice* (2005) 100.

⁴⁵ For example, evidence points to the fact that "up to 90% of cases in Nigeria are settled by customary courts". C A Odinkalu, 'Poor Justice or Justice for the Poor? A Policy Framework for Reform of Customary and Informal Justice Systems in Africa' in C Sage and M Woolcock (eds), *The World Bank Legal Review: Law, Equity and Development* (2006) 141, 144 [citation omitted] while in Sierra Leone up to 85% percent of the population is said to turn to informal courts to adjudicate disputes: UNDP, *Gender Equality and Justice Programming: Equitable Access to Justice for Women* (2007) 15.

⁴⁶ C Augustinas, *Comparative analysis of land administration systems: African review with special reference to Mozambique, Uganda, Namibia, Ghana, South Africa*, World Bank (2003) cited in Chirayath, Sage and Woolcock, above n 41, 3.

⁴⁷ *Jirga* is a Pashto term usually used for more ad hoc meetings gathered to address a specific dispute. *Shura* is a Dari word referring to permanent and quasi-permanent local councils. J Dempsey and N Coburn, *Informal Dispute Resolution in Afghanistan*, US Institute for Peace, *Special Report* 247 (August 2010) 2.

⁴⁸ IDLO, *Report on Formal-Informal Justice Relations in Afghanistan* (forthcoming 2012) 19.

⁴⁹ Wojkowska and Cunningham above n 32, 96.

⁵⁰ UN Women, *2011-2012 Progress of the World's Women: In Pursuit of Justice* (2011) 52.

⁵¹ Asia Foundation, *Law and Justice in East Timor: A Survey of Citizen Awareness and Attitudes Regarding Law and Justice in East Timor* (2004) cited in Wojkowska and Cunningham, above n 32, 96.

⁵² *Ibid* 96.

DO LEGAL EMPOWERMENT STRATEGIES WORK IN INFORMAL JUSTICE SYSTEMS? (continued)

Furthermore, formal courts and institutions of justice may be physically inaccessible or may operate in a language that women do not understand. IDLO's research on informal justice in Aceh, Indonesia, for example, observed that while neighborhood heads, village heads, informal justice leaders (adat leaders) and religious leaders are based in the village, known to community members and accessible, the police and the courts are often located in distant district capitals.⁵³

Social factors may also prevent women from turning to the formal justice system to assert their rights. Lack of legal awareness, dependence on male relatives for assistance and resources, and the threat of stigma or sanction can all contribute to this.⁵⁴

In a study on women's access to land rights in Kenya, it was reported that when women go to court they are seen to "undercut the man's household role of 'owner' and 'controller', with respondents also calling it 'insulting and disrespectful toward a husband and community'".⁵⁵ The study noted that when a woman succeeds in court, she may subsequently face threats of violence, altercations, beatings and murder.⁵⁶

Also, women typically have less time and money, and lower levels of education compared to men.⁵⁷ This, combined with the high costs often associated with formal justice systems, can make such systems incomprehensible and ineffective in ensuring the speedy resolution of women's grievances.⁵⁸ Finally, women may mistrust towards formal legal institutions, particularly where the legal system supports or is associated with oppressive practices.⁵⁹

With these shortcomings in mind, many women turn to informal justice systems. These systems may be attractive because of the "familiar procedures and language, the limited costs of dispute settlement procedures, the short duration of case resolution, knowledge of the local context among the dispute settlers and the more restorative nature of the process".⁶⁰ For example, the procedure common in many informal justice systems of providing compensation to victims of criminal activity may be popular among women because it "reflects the economic consequences of crime",⁶¹ a concern of particular importance to women in countries with no social security system and where women may be barred from access to the labor market. By contrast, the mostly retributive approach of the

formal justice system rarely orders the payment of compensation for criminal acts.

IDLO research in Afghanistan confirms citizens' preferences for local jirgas and district shuras over state courts, with 73 percent describing them as fair and trusted, and 70 percent describing them as following the local norms and values of the people.⁶² By contrast, only 53 percent of respondents found the state courts fair and trusted and 51 percent stated that the state courts follow the local norms and values of the people.⁶³ Of particular relevance to women, 66 percent of respondents indicated that they would prefer non-criminal family disputes to be arbitrated by the jirga or shura,⁶⁴ while 66 percent indicated that they would first turn to the jirga to seek justice relating to violence inside the home.⁶⁵

Similarly, respondents in a study on informal justice systems in Liberia overwhelmingly expressed a desire for traditional leaders to have an official role in the formal justice system.⁶⁶ Respondents indicated that even if the formal justice system operated fairly and was free from corruption, the average Liberian would still prefer the informal system, which was credited for

⁵³ S Clark and M Stephens, 'Reducing Injustice? A Grounded Approach to Strengthening Hybrid Justice Systems; lessons from Indonesia' in J Ubink (ed), *Customary Justice: Perspectives on Legal Empowerment IDLO* (2011) 67, 79.

⁵⁴ *UN Women*, above n 50, 52.

⁵⁵ T Chopra and A Harrington, *Arguing Traditions: Denying Kenya's Women Access to Land Rights*, World Bank: *Justice for the Poor Research Project*, Number 2 (2010) 15.

⁵⁶ *Ibid.*

⁵⁷ *UN Women*, above n 50, 52.

⁵⁸ *Ibid.* 52.

⁵⁹ E Wojkowska and J Cunningham, above n 32, 96.

⁶⁰ J Ubink and B van Rooij, 'Towards Customary Legal Empowerment: An Introduction' in J Ubink (ed), *Customary Justice, Perspectives on Legal Empowerment IDLO* (2011) 7, 8.

⁶¹ E Harper, above n 33, 29.

⁶² IDLO, *Report on Formal-Informal Justice Relations in Afghanistan* (2011) (forthcoming) 7.

⁶³ *Ibid.*

⁶⁴ *Ibid.* 9.

⁶⁵ *Ibid.* 10

⁶⁶ A C Rawls, 'Policy Proposals for Justice Reform in Liberia: Opportunities Under the Current Legal Framework to Expand Access to Justice' in J Ubink (ed), *Customary Justice Perspectives on Legal Empowerment IDLO* (2011) 91, 92. The study discussed the results of the United States Institute of Peace field research in Liberia, *Looking for Justice: Liberian Experiences with and Perceptions of Local Options* (November 2009).

taking into account the underlying cause of a dispute and seeking to repair the tear in the social fabric.⁶⁷

Finally, the outcomes of the formal justice system can also have negative economic consequences for female members of the community more generally, which may push women to seek justice at the informal level. For example, in situations where prisons are located far away from the community in which the crime took place, and where the male perpetrator is the breadwinner for a large family, removing the male perpetrator from the community may indirectly punish those female relatives who are economically dependent on him.⁶⁸

What are the challenges of informal systems for women's access to justice?

Over the last decade, there have been considerable discussions over the challenges of informal justice systems to advance the rights of women.⁶⁹ Indeed, skeptics of engagement with informal systems have argued that it may be preferable to limit the role

of the informal justice system and encourage women's empowerment by outlawing discriminatory practices and addressing the deficiencies women face in accessing justice in the formal legal system.⁷⁰

Informal systems have been often criticized for applying practices that fail to uphold international human rights standards,⁷¹ in particular those pertaining to women's equality and non-discrimination, as enshrined in the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).⁷² Indeed, the CEDAW Committee (the Committee) has often expressed concern about the growing integration of informal laws into the state hierarchy and has urged State Parties to monitor carefully the impact of such laws on women's rights protections. For example, in its Concluding Comments on Namibia in 2007, the Committee noted that the Traditional Authorities Act, which gives traditional authorities the right to supervise and ensure the observance of customary law, "may have a negative

WOMEN'S VICTORIES IN COURT MAY MEAN OSTRACISM IN PRACTICE

impact on women in cases where such laws perpetuate the use of customs and cultural and traditional practices that are harmful to and discriminate against women."⁷³ The Committee thereby called upon Namibia to:

Study the impact of the implementation of the Traditional Authorities Act (Act No. 25 of 2000) and the Community Courts Act (October 2003) so as to ensure that customs and cultural and traditional practices that are harmful to and discriminate against women are discontinued.⁷⁴

⁶⁷ *Ibid.* Interestingly, Rawls observes that the Liberians consulted for the project rarely, if at all, raised gender-equality as an issue of concern. This was left to be raised by international NGOs and representatives of Liberia's formal system.

⁶⁸ E Harper, above n 33, 29.

⁶⁹ For discussion of critiques of engagement with informal justice systems see: E M Grina, 'Mainstreaming Gender in Rule of Law Initiatives in Post-Conflict Settings' (2011) 17(2) *William and Mary Journal of Women and the Law*, 435, 461-462. For an analysis of African feminists perspectives see A Whitehead and D Tsikata, 'Policy Discourses on Women's Land Rights in Sub-Saharan Africa: The Implications of the Re-turn to the Customary' (January and April 2003) 3(1-2) *Journal of Agrarian Change*, 67.

⁷⁰ See C Nyamu-Musembi, 'How Should Human Rights and Development Respond to Cultural Legitimization of Gender Hierarchy in Developing Countries?' (Spring 2000), 41(2) *Harvard International Law Journal* 381,391.

⁷¹ For example, these practices contravene arts. 1, 2, 3, 4, 7, 8 and 16 of the Universal Declaration of Human Rights (right to life, liberty and security of person, right to non-discrimination and equality before the law, right to effective remedy for acts violating fundamental rights, equal rights in marriage), UN General Assembly, Universal Declaration of Human Rights GA Res. 217 A (III) U.N. Doc A/810 (10 December 1948) [71]; art. 23 of the ICCPR (right to marriage with full and free consent); art. 16 of the CEDAW (equality of men and women in marriage); art. 17 of the ICCPR (freedom from unlawful interference in privacy, family, home or correspondence, honor and reputation, and the right to the protection of the law against such attacks); arts. 3 and 12 of the ICESCR (the equal right of men and women to the enjoyment of all economic, social and cultural rights and the right to the highest attainable standard of physical or mental health) and arts. 2, 3, 9, 16, 19 and 28 of the Convention on the Rights of Child (non-discrimination of the rights contained in the Convention on the basis of sex, obligation to make the best interests of the child the primary consideration, non-separation of children from parents against their will, non-interference with child's liberty and privacy, obligation to protect children from all forms of physical and sexual abuse and exploitation, right of the child to education). Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990).

⁷² CEDAW above n 13. The CEDAW has been ratified by 187 countries. However, a significant number of states have made reservations to the articles in the CEDAW. Potentially the most relevant article in the CEDAW pertaining to informal justice systems is art. 2(f) which obligates State Parties to undertake all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women. Other articles of significance art. 13 (the obligation on State Parties to ensure women's equal right to enjoyment of all aspects of cultural life); art. 15 (the obligation to ensure women's equality with men before the law, including an identical legal capacity to that of men) and art. 16 (the obligation to eliminate discrimination against women in all matters relating to marriage and family relations).

⁷³ CEDAW Committee 'Concluding comments of the Committee on the Elimination of Discrimination against Women: Namibia' (2 February 2007) 37th Session, UN Doc CEDAW/C/NAM/CO/3 [16-17].

⁷⁴ *Ibid.*

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In its jurisprudence, the Committee systematically encourages states to eradicate discriminatory practices, through awareness-raising and education campaigns. For example, in its Concluding Comments on Rwanda in 2009 the Committee called upon Rwanda to:

➤ *Implement comprehensive measures directed to change the widely accepted attitudes and practices of women's subordination and the stereotypical roles applied to both sexes. Such measures should include awareness-raising and educational campaigns addressing women and men, girls and boys, religious and community leaders, parents, teachers and officials, in accordance with the obligations under articles 2 (f) and 5 (a) of the Convention. The Committee also recommends that the State party encourage the media to discuss and promote non-stereotypical and positive images of women, and promote the value of gender equality to society as a whole.*⁷⁵

Informal systems may be male-dominated and favor patriarchal outcomes. While it is important not to generalize, informal justice systems often tolerate or reinforce discriminatory practices such as female genital mutilation, bride sales, denial of widow inheritance, or discriminatory sanctions such as forced marriage or the exchange of women or young

girls as resolution for a crime or as compensation.⁷⁶ One example of this can be seen in the customary practices in many of Somalia's tribes (xeer), which require the forced marriage of a girl into another clan as part of a compensation payment or inter-clan peace settlement, so as to link the two groups together. In some circumstances, women may be excluded from participating at all in informal justice dispute resolution processes. A case study on the institution of *bashingantahe* in Burundi reveals that women are only considered in their role of wives or widows in the institution's deliberations.⁷⁷

As in the formal justice system, informal systems may also not consider gender-specific crimes as offences, including rape, (both within and outside marriage) and domestic violence, or may view such acts as only minor offences.⁷⁸ For example, in some areas of northern Kenya, the customary penalty for rape is usually a fine and the amount will differ depending on whether the victim is married or single.⁷⁹

Informal systems have been criticized for being not open to modernization or broader development goals, in part due to their perceived lack of democratic accountability mechanisms and lack of legal authority and enforceability of decision.⁸⁰ Many community leaders with power and authority to speak on

informal laws and to represent the community may be overtly or indirectly hostile to changes in local customs that result in a depletion of their power base or that challenge long-entrenched prejudices. In these circumstances, attempts by individual women to challenge discriminatory norms may result at best in accusations that such women are acting against local culture or have become 'Westernized'. At worst, such attempts can lead to outright ostracism and physical harm.

It is also important to acknowledge that informal justice systems often embody the dominant social code and power hierarchies. The lack of written procedural and substantive rules in informal justice systems means that outcomes are determined on a case-by-case basis according to the "power, status and wealth differentials and relations between disputants, discriminatory social norms, and leaders' perceptions of group cohesion". In addition, the parties' individual relationship with the community leader can influence the outcome of the dispute. Indeed, it has been noted that community-mediated settlements often reflect "what the stronger is willing to concede and the weaker can successfully demand".⁸¹

Thus, while decisions are said to be consensual, the parties are frequently under pressure to agree to what is

⁷⁵ CEDAW Committee 'Draft Concluding observations of the Committee on the Elimination of Discrimination against Women: Rwanda' (9 September 2009) 43rd Session, UN Doc CEDAW/CO/6 [22].

⁷⁶ D J Gerstle, *Under the Acacia Tree: Solving Legal Dilemmas for Children in Somalia*, UNDP (2007) 88, 59, J Gundel, *The Predicament of the Oday: The Role of Traditional Structures in Security, Rights, Law and Development in Somalia, DRC (2006)* 55-56, and in some areas of Afghanistan: USAID, *Afghanistan Rule of Law Project: Field Study of Informal and Customary Justice in Afghanistan and Recommendations on Improving Access to Justice Between Formal Courts and Informal Bodies (2005)* 49-50, both sources cited in E Harper, above n 33, 95.

⁷⁷ The term *bashingantahe* refers to "men of integrity who are responsible for settling conflicts at all levels". A Naniwe-Kaburahe 'The Institution of *Bashingantahe* in Burundi' in L Huysse and M Salter (eds), *Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences (2008)* 149, 154.

⁷⁸ For example, in Somalia, the concept of rape within marriage is poorly understood and scarcely acknowledged: Gerstle, above n 76, cited in Harper above n 33, 95.

⁷⁹ 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) 19. The example cited refers to the Borana community. The report notes that visible physical injuries on women are unacceptable in this community and the elders will punish the individual responsible, with the measure of compensation and/or punishment depending on the degree or severity of the injuries.

⁸⁰ Chirayath, Sage and Woolcock, above n 41, 4.

⁸¹ Merry, *Local, Non-Traditional Justice: the Case for Change in Non-State Justice in Indonesia*, World Bank Indonesia, *Justice for the Poor Program (2006)* cited in E Wojkowska, *Doing Justice: how informal justice systems can contribute*, UNDP, Oslo Governance Centre, *The Democratic Governance Fellowship Programme (2006)* 20.

fair and equitable in the view of the leaders and to accept outcomes with which they are not necessarily satisfied. These outcomes are often legitimized in the name of religion, local custom or tradition.⁸² This situation tends to disadvantage women, who lack the power to challenge these social constructions.

Furthermore, given the weak regulatory environment in which informal justice systems often operate, community leaders are rarely accountable to their communities or to a higher authority, making them prone to corruption, elite capture, nepotism and politicization. Any profound changes to the existing status quo - for example, by expanding women's involvement in decision-making - may diminish the community leader's stronghold over valuable community resources. This can result in reforms being fiercely and powerfully resisted, as has been demonstrated by a number of studies on attempts to reform informal systems in sub-Saharan Africa.⁸³

Can engagement with informal systems enhance women's access to justice?

Yet, if it is agreed that one of the objectives of rule of law reform is to enhance women's access to justice and improve their substantive rights, ignoring informal justice systems can result in dismissing one of the few and most probable entry points for enhancing such access.⁸⁴ As the above discussion shows, informal justice systems are used by a large number



Image: Luke Powell

of women in the developing world and they are often the "cornerstone of dispute resolutions for the poor and disadvantaged in developing countries".⁸⁵ It follows that any serious attempt at improving access to justice for women needs to consider ways to engage with such systems. Indeed, informal systems may be the only available option for justice in fragile or conflict-affected countries where formal courts are incapable of processing cases in a timely manner,⁸⁶ or where judicial officers send women

back to community authorities in cases perceived as "private matters".⁸⁷ IDLO research in Aceh, East Timor and Afghanistan revealed that this is a common problem. In these contexts, it is preferable to find the best entry points, rather than making a "choice" between informal systems and formal justice. Simply ignoring informal systems will leave women between the cracks of the two systems - neither protected by the formal legal system, nor adequately served within the informal system.⁸⁸

⁸² For instance, in disputes relating to property in some parts of Kenya, village leaders are frequently bribed by the more powerful party to uphold illegal practices, including efforts to deny women's statutory right to inherit land from their husbands. These actions are justified on the basis that "traditionally" land cannot be passed outside the patrilineage and must remain in the hands of male community members. See Chopra and Harrington, above n 55, 2.

⁸³ See Chopra and Harrington, above n 55. Salter and Huyse also record that efforts to increase the participation of women in traditional mechanisms of accountability in sub-Saharan African are frequently "being held up by the conservative reflexes of men". L Huyse and M Salter (eds), *Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences* (2008) 184 cited in F Ni Aolain and M Hamilton, 'Gender and the Rule of Law in Transitional Societies' (2009) 18 *Minnesota Journal of International Law*, 380, 394.

⁸⁴ E Harper, above n 2, 31.

⁸⁵ *Ibid.*

⁸⁶ For example, Harper notes that in the aftermath of the 2004 Indian Ocean tsunami the only functioning dispute resolution apparatus in Aceh, Indonesia was the informal justice system. Even after the courts re-opened, they were incapable of processing the huge number of inheritance, property and guardianship cases that were generated. As such, strengthening the customary fora was deemed the most cost-effective means of resolving small-scale disputes. *Ibid.*

⁸⁷ *Ibid.*

⁸⁸ *Ibid.*

DO LEGAL EMPOWERMENT STRATEGIES WORK IN INFORMAL JUSTICE SYSTEMS? (continued)

Arguably, the dynamic nature of informal justice systems may give scope to creative and more meaningful projects targeting women's interests that do not exist at the formal justice level.⁸⁹ The flexibility of informal systems can allow leaders "to craft pragmatic solutions that suit local conditions and respond to the issues at the crux of a dispute",⁹⁰ whereas progressive statutory reforms, while important, can be slow to implement and may not be the ideal solution to address specific community needs. As a matter of fact, engagement with informal justice systems is increasingly recognized as essential to address poverty reduction, protect the vulnerable and ensure adequate implementation of international human rights standards.⁹¹ For example, the 2008 CLEP Report proposed that alongside programs to improve state justice systems "reformers should seek out opportunities for strategic interventions that improve the operation of informal or customary justice systems and facilitate the efficient integration of formal and informal systems".⁹² More recently, the 2011 UN Secretary-General Report on the Rule of Law recognized "the potential of informal justice mechanisms in strengthening the rule of law" while noting "the potential role of informal justice practices to enhance peace and security through traditional

mediation techniques".⁹³ Implicit in this approach is the assumption that such strategies will improve access to justice⁹⁴ by enabling rights-holders to enjoy agency and claim their rights. This policy transformation has taken place against the backdrop of an increased emphasis on national ownership of aid projects, a principle underlying the 2005 Paris Declaration on Aid Effectiveness and the 2008 Accra Agenda for Action.⁹⁵

At the same time, engagement is not without challenges. In particular, as informal justice systems are inclined to embody inequalities and patriarchal interpretations of culture, it is critical that engagement proceeds with caution. The case studies featured below show that it is extremely difficult to address the profound structural inequalities, power asymmetries and discriminatory social norms that perpetuate women's disempowerment within the informal justice setting. In these circumstances, it has been proposed that the development community needs to seek greater input on the views of local women's organizations, justice seekers and community groups in order to determine whether equitable mediated solutions might ever be considered possible in communities where disputants have gross power differentials, discounting the power

interest the systems already embody.⁹⁶ Also, it is important to consider that engagement with informal justice systems may inadvertently result in the formalization of a two-track system that reinforces unequal access to justice, whereby courts are reserved for the wealthy and the victims of serious crime, while the poor and victims of 'minor' injustices are forced to accept 'secondary' forms of justice.⁹⁷ Notably, the definition of 'minor' in this regard is generally determined by power-holders in society, who frequently tend to be men.

However, while a substantial body of analytical work on informal justice systems has mentioned the challenges engagement poses for women's rights, much of the analysis fails to provide practical guidance as to how to foster women's rights in these systems. Some solutions tend to be contradictory, arguing for compliance with human rights standards, but at the same time supporting local ownership even where local practices are clearly at odds with women's human rights.⁹⁸ Consultation is the cornerstone of the development community's mantra relating to local ownership, but often the voices that speak for a given community are male. Although there is a push to ensure women's voices are heard in these

⁸⁹ *Ibid.*

⁹⁰ Harper, above n 33, 19.

⁹¹ For example, in 2009 the Australian government's Strategic Framework for Access to Justice stated "to improve the quality of dispute resolution, justice must be obtained in individuals' daily activities...reform should focus on everyday justice, not just the mechanics of legal institutions which people may not be able to afford." Australian Commonwealth Government, 2009 Strategic Framework for Access to Justice cited in Clark and Stephens, above n 53, 67.

⁹² CLEP, *Making the Law Work for Everyone: Volume II: Working Group Reports (2008)* 43.

⁹³ UN Security Council, 'The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies Report of the Secretary General' (12 October 2011) UN Doc S/2011/634 [39].

⁹⁴ R Clarke, 'Customary Legal Empowerment: Towards a More Critical Approach' in J Ubink (ed), *Customary Justice, Perspectives on Legal Empowerment IDLO (2011)* 43, 45.

⁹⁵ Paris Declaration on Aid Effectiveness and the Accra Agenda for Action (2005/2008) OECD <<http://www.oecd.org/dataoecd/11/41/34428351.pdf>> at 21 August 2012. "Ownership" is defined in the Paris Declaration as "developing countries set their own strategies for poverty reduction, improve their institutions and tackle corruption".

⁹⁶ Clarke, above n 94, 48.

⁹⁷ R Mani, *Beyond Retribution: Seeking Justice in the Shadows of War (2002)* 37. See also Wojkowska, above n 81, 5.

⁹⁸ See, for example, the 2004 Report of the UN Secretary-General on the Rule of Law which requires that development strategies be driven by local needs, aspirations and realities, and at the same time remain compatible with international legal norms and human rights standards. UN Security Council 'The rule of law and transitional justice in conflict and post-conflict societies: Report of the Secretary-General' (23 August 2004), UN Doc S/2004/616 [17]. For a discussion of the challenges of local ownership see E Sheye, 'Unknotting Local Ownership Redux: Bringing Non-State/Local Justice Networks Back In' in T Donais (ed), *Local Ownership and Security Sector Reform Geneva Centre for the Democratic Control of Armed Forces (2008)* 61.

consultative processes, such objectives are highly challenged in environments where women do not have the same access to public space as their male counterparts.

Where women's rights have been actively addressed within the informal justice context, the main donor approach and that adopted by some national governments has been to target the interface between the formal and informal legal system by fixing the problems in informal justice systems. These efforts aim to align customary rules and procedures with internationally recognized standards of women's rights – through expanding women's participation in informal decision making, codifying informal laws to comply with international human rights, outlawing harmful customary practices, ensuring that informal justice systems are accountable to the state system, or a combination of these approaches.⁹⁹ These strategies, mostly reflecting orthodox theories of reform, are technocratic in nature and raise a number of practical concerns when implemented in isolation.

'Fix it' approaches risk being unsuccessful if they fail to consider the underlying reasons for which local norms do not align with international

human rights standards. Some argue that these approaches do not encourage a holistic understanding of the context in which discriminatory practices are embedded and, as a result, prevent the development of comprehensive solutions.¹⁰⁰ For example, in some settings the practice of making men who commit rape marry their female victims arises from the concern that the victim would otherwise be unable to support herself, due to stigma and discriminatory attitudes towards rape victims. While such practices are neither justifiable nor supportable, simply outlawing them without considering the basic economic, financial and social safeguards for female victims may leave women in an equally vulnerable position.

Similarly, research indicates that law reform aiming to engineer informal justice systems to comply with women's rights without addressing male dominated community power structures is generally unsuccessful in furthering women's rights.¹⁰¹ For instance, attempts in Kenya to transform customary procedures relating to land titling so as to widen women's access to land had the effect of cementing male ownership, and in addition, precluding women's access and use of land under custom.¹⁰² In this way, approaches that

› STATUTORY INTERVENTIONS MUST BE EMBRACED FROM WITHIN THE COMMUNITY ◀

concentrate exclusively on bringing informal systems into alignment with international norms might be shortsighted and can even result in outcomes that are even more problematic for women in that community.

In addition, reforms achieved with isolated fix it approaches are unlikely to be sustainable in the long term. They risk being perceived as alien to the community concerned, especially when discriminatory practices are deeply entrenched.¹⁰³

⁹⁹ For a detailed analysis of each of these strategies see Harper 'Engaging with Customary Justice Systems' above n 284, 32-42.

¹⁰⁰ Nyamu-Musembi, above n 70, 393.

¹⁰¹ For example, in Uganda, Area Land Committees must have at least three women members and in the United Republic of Tanzania, women must make up three of the Village Land Council's seven members. Both strategies have had mixed results, with appointment not necessarily followed by meaningful participation of women. Some women are selected specifically because they do not question dominant norms, while in other circumstances they are constrained from acting freely. C Nyamu-Musembi, *Review of Experience in Engaging with 'Non-State' Justice Systems in East Africa*, Commissioned by Governance Division, DFID (2003) 4, 26 cited in Harper, above n 33, 42 See also the study undertaken by Chopra and Harrington, above n 55 and the examples in Harper, above n 33, 42.

¹⁰² Evidence suggests that in Kenya the introduction of statutory law related to title registration and land ownership actually eroded women's claims to land. Individualized tenure was instituted in Kenya in part to overcome a system of inheritance via the male members of the community. However, overwhelmingly men registered their names on land deeds because of their traditional powers to allocate within the family structure. Women lacked the opportunity to contest the customary access and usage rights that the statutory scheme did not recognize. As a consequence, women in Kenya are now dependent on what male family members own, with the statutory law trumping their broader rights to access land under the customary system. This has particularly impacted on widows, who may have rights to stay on the land under some Kenyan customs which tie land rights closely to family and clan identities, but whose position in practice is frequently subject to land grabbing by in-laws. Such actions are based on economic motivations and justified under the tradition of ensuring land remains within the paternal line, even when this may be contrary to the formal law. See Chopra and Harrington, above n 55. See also P C Diaz, *Customary Law Reform in Sub-Saharan Africa: The Status of Women Between Customs and Statutes*, UNIFEM Briefing Note (February 2006) cited in UNDP, *Gender Equality and Justice Programming* above n 45, 15.

¹⁰³ For example, evidence suggests that legislation in South Africa and Liberia outlawing black magic did not have a significant impact on the practice, and frequently drove such practices underground. Harper, above n 33, 46-47.

DO LEGAL EMPOWERMENT STRATEGIES WORK IN INFORMAL JUSTICE SYSTEMS? (continued)

This is particularly the case for reforms aiming to enhance women's rights, which are often perceived by decision makers as 'Western-imposed' and not necessarily as an organic element of the cultural or religious landscape. It is therefore well accepted that statutory interventions are unlikely to produce results unless changes are embraced from within the community and reforms are grounded in local practices, history and culture.¹⁰⁴

Finally, statutory reforms targeting discriminatory informal practices will have little impact for women in circumstances where the courts and other services remain physically inaccessible, or the laws themselves remain unknown to women.

It is partly for these reasons that some critics view such approaches towards informal systems as "decontextualized, hegemonic and counterproductive for gender equality".¹⁰⁵ They highlight that these approaches presume culture is static and that women are merely the recipients of informal practices. Rather than turning away from informal or 'traditional' practices, these scholars emphasize the need to question all political, social and

economic institutions involved in the production of culture and the shaping of gender relations, including the role of the state.¹⁰⁶ They see women as potential agents that can be involved in the production of culture and the shaping of gender relations¹⁰⁷ and argue for recognition that informal systems change over time and are not stagnant. As a result, they press for development practitioners to look for appropriate openings presented within the local justice framework to work collaboratively with community members committed to social change and the redefinition of culture, including women's groups active at the local level.¹⁰⁸

These observations do not imply that attempts to bring informal systems into the human rights framework through statutory measures have no place as a strategy to address women's access to justice.¹⁰⁹ Rather, they are made to emphasize that such reforms are generally more successful when they are complemented by efforts to address asymmetric power structures at the local level¹¹⁰ and when they take into account the wider economic and social context in which discriminatory practices take place.

> CULTURE IS NOT STATIC,
AND NOR ARE INFORMAL
SYSTEMS <

¹⁰⁴ As noted by Khair "it is important to bear in mind that simply grafting borrowed ideas from foreign legal cultures would not produce the desired effects. Rather it is the 'local' as opposed to the 'borrowed' that essentially lends efficacy and meaning to laws and legal institutions, influences the use and administration of laws and values in a society". S Khair, 'Evaluating Legal Empowerment: Problems of Analysis and Measurement' (2009) 1 *Hague Journal on the Rule of Law* 33, 35. The importance of reforms being located in local culture also noted by women's rights activists, who have observed that "there is a pressing need for women's rights activism to be grounded in local history and idiom to be relevant", *Report of the South Asia Plus Consultation on Culture, Women and Human Rights* September 2-3, 2010, Dhulikhel, Nepal, *Partners for Law and Development* (2010) 29.

¹⁰⁵ Nyamu-Musembi, above n 70, 394.

¹⁰⁶ *Ibid* 405. The case study provided below on the Solomon Island's customary land tenures system demonstrates that state recognition of the rights of customary groups to mining royalties has generally benefited male leaders but not women. The case study shows that this is not necessarily due to the inherent discrimination against women in the informal system, but rather because the historical processes that have disempowered women within the customary community have not been adequately addressed by the state.

¹⁰⁷ See comments in *Report of the South Asia Plus Consultation on Culture, Women and Human Rights*, above n 104, 29.

¹⁰⁸ Nyamu-Musembi, above n 70, 406.

¹⁰⁹ In some contexts, legislative reforms have had some successes, such as for example in the Namibian case study below where it appears that women felt more empowered in connection with the legal and political changes occurring at the central government level.

¹¹⁰ I van den Meene and B van Rooij, *Access to Justice and Legal Empowerment: Making the Poor Central in Legal Development Cooperation*, Leiden University Law Governance and Development Research and Policy Notes (February 2008) citing L Cotula, *Legal empowerment for local resource control*, *International Institution for Environment and Development* (2007) 113.



Image: Eric Kanalstein



LEARNING FROM PRACTICE:
EIGHT SUCCESSFUL WAYS OF
EMPOWERING WOMEN TO
ACCESS JUSTICE

Reforming justice systems to advance the position of women in plural legal settings can be highly challenging. So far, practical attempts to address discriminatory practices against women accessing diverse justice fora have mostly fallen into two principle categories. The first presumes the patriarchal character of informal systems. It thus targets the obstacles that undermine women's access to and use of formal courts and seeks to limit the role of informal systems. This strategy may be of limited success because it presumes the formal law is effective and implemented in a non-discriminatory manner, whereas all too often the formal law replicates many of the discriminatory practices that are found in the informal setting.¹¹¹ The second approach focuses on ensuring that informal systems comply with international human rights standards (the 'fix it' approach), for example through statutory oversight or the appointment of women leaders. As is discussed in more detail above, in isolation, this approach is equally limiting because it can suffer from a lack of local legitimacy and fails to address the power dynamics and the social and economic context that sustains women's inequality and discriminatory practices at the community level.

The eight case studies described below share a common objective: they seek to institute progressive reforms and secure fairer justice outcomes for women through empowerment approaches. Most of them also share a common methodology in designing the intervention, which involves compiling detailed historical and contemporary analysis of the local setting, understanding the core issues for women in that community and identifying the best entry points to address such issues, whether at



Image: Martin Sojka

the formal or informal level. In the Rwandan case study for example, the intervention took place at the village level because of the perceived opportunities the mediation model offered for women when compared with the formal adjudication model used at the next stage. By contrast, the paralegal projects in Mozambique and Tanzania sought to address both mediated decision-making fora and formal courts in relation to widow's claims to inheritance, based on the fact that both systems were used by widows. In addition, all interventions cater to the actual everyday needs and experiences of women. For example, the Moroccan project supported women in understanding the procedures needed to issue a Family Booklet. In West Bengal, the project addressed the

lack of services available for girls who have been the victims of trafficking so as to ensure that the girls' statutory rights under anti-trafficking laws were adhered to, thus providing an instructive illustration as to how empowerment strategies need to target the justice platform that is the most receptive to the advancement of women's rights.

Overall, the case studies tend to show that legal empowerment strategies can be successfully used to enhance access to justice for women in a variety of justice systems, both at the formal and informal levels. If correctly applied and tailored to local needs, legal empowerment approaches can improve justice outcomes and contribute to the fair resolution of women's everyday grievances.

¹¹¹ Chopra and Isser, above n 21, 21.

GENDER EQUALITY ON THE HORIZON: THE CASE OF UUKWAMBI TRADITIONAL AUTHORITY IN NAMIBIA¹¹²

1

Introduction

The Namibian customary system and its administration was severely gender imbalanced and both opponents and proponents of gender equality long believed that women's rights and traditional rule were eternal foes. Whether or not this was the case in pre-colonial times is not certain, as the presumption of women's traditional inferiority within such systems is highly disputable.¹¹³ What is clear is that colonial intervention during the twentieth century promoted changes in local customary norms, resulting in extensive gender disparity in Namibia. Women leaders were all but purged from the local traditional arena and women were largely excluded from participation in traditional courts. As such, the emerging structures of the colonial tribal system evolved into all-male domains. Other factors, such as the emergence of male contract labor resulting in the introduction of a male-controlled cash economy, as well as the influence of Western missionaries and Christianity, exacerbated the subordinate position of women in society and combined to create a widespread

belief in Namibia that traditional rule could not and would not accommodate women's rights. In particular, the traditional system included norms that were detrimental to women's rights. A salient example is the customary inheritance norm that states that upon a man's death, his estate is inherited by his matrilineal family. Despite a customary obligation of the husband's family to support needy widows and children, widows and their children were often chased out of the house, back to the widow's matrilineal family, in a practice often referred to as 'widow chasing' or 'property grabbing'.

Notwithstanding these shortcomings, traditional leaders played and continue to play an important role in present-day rural Namibia, with evidence showing that despite regional differences and individual dissatisfaction, traditional leadership is considered a necessary and viable institution. Empirical studies undertaken in the mid-1990s showed a positive attitude towards traditional authority among respondents in both the north and south of Namibia. Notably, support for traditional leadership did not preclude negative feelings toward the incumbent traditional leaders. In this context, any intervention aimed at empowering women in Namibia would likely have considerably more impact if it addressed the customary sphere.

2

The intervention

The traditional court system exists side-by-side the formal justice system in Namibia, and is specifically provided for by legislation.¹¹⁴ The legislation confirms that the designation of a Chief shall be regulated by customary law and defines the powers, duties and functions of traditional authorities.¹¹⁵

Since 1993 there has been a push in Namibia to increase women's participation in traditional courts, for example by appointing women as leaders and as representatives in village court cases. The Uukwambi Traditional Authority¹¹⁶ in northern Namibia sought to address gender inequality within the customary system in three ways:

i) Under the leadership of Chief lipumbu, the Uukwambi Traditional Authority (the Traditional Authority) embarked on a process to increase the number of women traditional leaders and women members of the traditional leaders' committee.

The Traditional Authority, and Chief lipumbu in particular, actively promoted women's leadership, both in public

¹¹² The full text of this case study, including references, is found in J Ubink, 'Gender Equality on the Horizon: The Case of Uukwambi Traditional Authority, Northern Namibia' in E Harper (ed), *Working with Customary Justice Systems: Post Conflict and Fragile States IDLO* (2011) 51-71.

¹¹³ According to Becker, writing specifically in relation to the role of women in pre-colonial Owambo, in many communities women had access to property, the matrilineal system tempered the control of men over women and especially of husbands over wives and women played important roles as healers and ritual leaders. H Becker, 'We want women to be given an equal chance. Post-independence rural politics in northern Namibia' in Meintjies, Pillay and Turshen (eds), *The Aftermath: Women in Post-Conflict Transformation* (2001) 255, 277, cited in Ubink, above n 112, 55.

¹¹⁴ The 1990 Constitution of the Republic of Namibia does not mention traditional authorities or traditional courts. However their existence can be deduced from arts. 66(1) and 102(5). The former stipulates the validity of the customary law and common law in force on the date of independence, subject to the condition that they do not conflict with the Constitution or any other statute. Art. 102(5) calls for the establishment of a Council of Traditional Leaders whose function is to advise on communal land management and on other matters referred to it by the President. An inquiry into traditional leaders led to the passage of the Traditional Authorities Act 1995 the provisions of which were largely reproduced in the Traditional Authorities Act 2005 (the Act). The Act currently regulates traditional leadership and provides for the establishment of traditional authorities in traditional communities, which comprises of a chief or head, senior traditional councilors and traditional councilors. Section 14(a) of the Act states that "any custom, tradition, practice or usage which is discriminatory or which detracts from or violates the rights of any person as guaranteed under the Constitution of Namibia or any other statutory law" shall cease to apply. Art. 10 of the Constitution prohibits discrimination on the grounds of inter alia sex, therefore rendering redundant any customary law that violates the norms of gender equality.

¹¹⁵ Their main function, according to the Act, relate to the promotion of peace and welfare in the community, the administration and development of customary law and the supervision of its observance, and the preservation of the local culture.

speeches and by appointing women at various levels of traditional leadership. This included the appointment of a woman deputy in the Traditional Council to preside over its meetings in the absence of the Chief. According to one headman in Onamega District, “the senior headman tells people around him that if they see a woman capable of leading, she must be the first choice”.

ii) The Traditional Authority formally opened up traditional dispute settlement meetings and actively encouraged women’s participation on an equal basis as men.

This was brought about in part as a result of the 1993 decision of the Owambo Traditional Authorities¹¹⁷ to allow women to participate fully in the work of community courts.

This resolution, which was subsequently written into Uukwambi’s written customary laws, gave momentum to a process to involve women more actively in political and judicial decision-making. Following the 1993 decision, the Traditional Authority decided that a female representative and advisor had to be selected in each village. It was also decided that women were to actively participate in traditional court meetings.¹¹⁸ At many court meetings women are now expressly encouraged to actively participate in the proceedings. At one of the senior traditional councils, the chairman always addresses the woman at the beginning of a court

session “You women have been neglected. Now it is time for change. So if you see something you don’t like, speak up. Everyone now, watch carefully. Stand up and speak if you think something is not right or if you don’t understand something”

iii) The Traditional Authority modified a number of customary norms that were detrimental to the position of women and sought to create broad local awareness of these changes.

At the 1993 Customary Law Workshop, leaders of six Owambo traditional communities came together to draw up recommendations to the various councils with the aim of harmonizing their customary laws. They unanimously decided that widows should not be chased from their lands or out of their homes, and that they should not be asked to pay for such land again. This decision was subsequently codified in the Laws of Uukwambi 1950-1995. This normative change reflected a widely felt need among society members to enhance the position of widows, both at the local and national levels. These measures were subsequently promoted by the Traditional Authority, with the active involvement of Chief lipumbu.

Before discussing these changes and their impact on the people of Uukwambi, it is useful to highlight that the achievements in Uukwambi were inextricably intertwined with change processes occurring in

TRADITIONAL HEADMAN:
YOU WOMEN HAVE
BEEN NEGLECTED!
IT’S TIME FOR CHANGE

Namibia at large. When Namibia gained its independence in 1990, the country experienced a tremendous momentum for change, including in gender relations. Women had played a prominent role in the period before independence, both as freedom fighters and in the functioning of the rural localities when men were away fighting or working on labor contracts at white owned farms. The notion of ‘women’s rights’ entered Namibian politics when women freedom fighters not only expressed their opposition to colonial occupation, but also to contrived custom and tradition. The collaboration of traditional leaders in indirect rule of the apartheid government, which cost them the respect of the population, was a determining factor in this articulation. Recent decades have seen further progression towards more gender equality. The Constitution of the Republic of Namibia, adopted February 1990, reflected the demand for gender parity in guaranteeing equality and freedom from discrimination on a number of grounds, including sex [section 10(2)].

¹¹⁶ The Uukwambi Traditional Authority is divided into five districts, each of which is headed by a senior headman or senior headwoman. Each district contains a number of villages, up to 70, which are headed by their own headman or headwoman. At the village, district and Uukwambi level, leaders are supported by a Council. Chief lipumbu is the Chairman of the Uukwambi Traditional Council, which comprises the five senior headmen / headwomen, as well as several other traditional councillors.

¹¹⁷ Uukwambi is one of the six traditional communities that constitute the Owambo Traditional Authorities.

¹¹⁸ The new representatives were expected to actively participate in hearings of customary courts and generally act as deputies to the headmen in order to enhance the equal representation and treatment of women in the customary arena.

GENDER EQUALITY ON THE HORIZON: THE CASE OF UUKWAMBI TRADITIONAL AUTHORITY IN NAMIBIA (continued)

3

Results analysis

The increased presence and participation of women leader does not necessarily correlate to positive gender outcomes. For this reason, between September 2009 and February 2010 data was collected principally through qualitative data collection methods in three districts of Uukwambi,¹¹⁹ which included semi-structured interviews with women, women leaders, traditional leaders, farmers, government authorities, academics, and the staff of non-governmental organizations (NGOs). Focus group discussions with women and NGO staff, as well as participant observation of traditional court meetings were also conducted to determine whether justice outcomes have changed with the inclusion of women leaders and participants. In addition, structured interviews based on a survey were conducted in 216 rural households to explore issues associated with access to, participation in and satisfaction with the customary justice system.

A. Perceptions of female leaders / leadership

Traditionally in Namibia, traditional leaders (i.e. headperson, senior councilors or traditional councilors) were selected from the family of the last leader.¹²⁰ Over time it became common for a headman to nominate one of his sons or grandsons. Today, the criterion of belonging to the same family is no longer decisive, although it is still often preferred if a suitable candidate is available.

Table 1. "My headman/headwoman does his/her job well"

| | The village leader is a woman (n=51) (%) | The village leader is a man (n=101) (%) |
|-------------------|------------------------------------------|-----------------------------------------|
| Strongly agree | 23.5 | 28.7 |
| Agree | 56.9 | 53.5 |
| Neutral | 7.8 | 7.9 |
| Disagree | 11.8 | 9.9 |
| Strongly disagree | 0 | 0 |

Table 2. "The relationship between you and your headman/headwoman"

| | The village leader is a woman (n=54) (%) | The village leader is a man (n=108) (%) |
|-----------|------------------------------------------|-----------------------------------------|
| Very good | 33.3 | 34.3 |
| Good | 40.7 | 40.7 |
| Neutral | 11.1 | 10.2 |
| Bad | 13.0 | 13.0 |
| Very bad | 1.9 | 1.9 |

Table 3. "The senior headman/headwoman does his/her job well"

| | Ogongo (SHW) Women (n=15) (%) | Ogongo (SHW) Men (n=17) (%) | Onamega (SHM) Women (n=21) (%) | Onamega (SHM) Men (n=11) (%) | Otuwala (SHM) Women (n=41) (%) | Otuwala (SHM) Men (n=35) (%) |
|-------------------|-------------------------------|-----------------------------|--------------------------------|------------------------------|--------------------------------|------------------------------|
| Strongly agree | 26.7 | 17.6 | 28.6 | 36.4 | 31.2 | 34.3 |
| Agree | 66.7 | 76.5 | 57.1 | 54.5 | 56.2 | 57.1 |
| Neutral | 0 | 0 | 4.8 | 0 | 3.1 | 5.7 |
| Disagree | 0 | 5.9 | 9.5 | 9.1 | 9.4 | 2.9 |
| Strongly disagree | 6.7 | 0 | 0 | 0 | 0 | 0 |

SHW = senior headwoman SHM = senior headman

Currently, one of the five district senior councilors in the Traditional Authority is a woman. In the three districts of the Traditional Authority where interviews were conducted, the proportion of women village headpersons range from approximately one out of four of the villages surveyed (in Onamega District) and one out of five (in Ogongo District), to a mere one out of 19 (in Otuwala District). Although still heavily outnumbered by headmen, this represents a significant change from the traditional rule of ten years ago.

Women appointed to leadership positions around the time of independence recall a difficult start: men were reluctant to accept their new role and largely excluded them from traditional court and village meetings. This seems to have changed over time: headwomen and the senior headwoman who took up their positions more recently have not reported any overt resistance. A number of respondents opined however, that women had a restricted scope of operation compared to their male counterparts. For instance,

¹¹⁹ These were Otuwala, Onamega and Ogongo districts.

¹²⁰ Originally there was a preference for a member of the former headman's matrilineal family, but it was not uncommon for the son of a traditional leader to succeed his father if no matrilineal family members were deemed eligible.

while a new headman can select his own council, a new headwoman must select her councilors in consultation with male elders.

In the survey, several questions were asked regarding the performance of men and woman leaders. The data indicated that a large majority of respondents believed that their headwoman was doing her job well, with no significant difference between male and female respondents. There was a slight, but insignificant difference in how the performance of headmen was regarded (Table 1). In the same vein, respondents in villages with female leaders described the relationship with their village leader almost identically to respondents in villages with male leaders (Table 2). Here also, the gender of the respondents did not account for a substantial deviation in opinion. The statistical data regarding the senior headmen/women reveal similar opinions: leaders of both sexes were assessed similarly and received strong support from men as well as women (Table 3).

One interesting finding from the survey data is that, while men and women assessed headwomen more or less similarly, and that this assessment did not substantially differ from women's assessments of headmen, these same headmen were assessed significantly more positively by male respondents (Table 1b). With regard to senior traditional leaders, the senior headwoman and the senior headman of Onamega District were assessed almost identically by male and female respondents. Only Otuwala District showed a significant difference between male and female respondents, again indicating that men assessed their male leader more positively than women did (Table 3b).

Table 1b. "My headman/headwoman does his/her job well"

| | Villages with headwomen (mean) | Villages with head man (mean) |
|--------------|--------------------------------|-------------------------------|
| Men | 2.05 | 1.78 |
| Women | 2.10 | 2.11 |
| Total | 2.08 | 1.99 |

Table 3b. "My headman/headwoman does his/her job well"

| | Otuwala district (SHM) (mean) | Otuwala district (SHW) (mean) | Ogongo district (SHW) (mean) |
|--------------|-------------------------------|-------------------------------|------------------------------|
| Men | 1.77 | 1.82 | 1.94 |
| Women | 2.07 | 1.95 | 1.93 |
| Total | 1.94 | 1.91 | 1.94 |

The interviews highlighted that the shift in mindset required for women to occupy a fully equal role in traditional leadership functions is not nearly complete. Many headmen still saw their sons as the preferred candidate to succeed them, and their daughters as substitutes if sons were absent or unsuitable. They often referred to tradition as the reason for this opinion. Others also favored a male leader, either pointing to tradition or to what they considered character traits of men and women. The latter provides an insight into the characteristics deemed important for traditional leaders, and in the interviews, these centered on the dichotomies patient/impatient, forgiving/resentful, active/lazy, and powerful/weak. In the survey, the respondents listed the following character traits of a good headman/woman: he/she needed

to be fair and honest (mentioned by 80 respondents); he/she needed to listen to and solve problems (49 respondents); he/she needed to treat people equally (41 respondents); he/she needed to be strong and powerful (39 respondents); and he/she needed to be educated and intelligent (33 respondents).

When respondents were then asked whether men and women have these above character traits in equal measure, a large minority of the women and more than half of the men answered that men possessed these qualities in larger measure than women (Table 4). This is consistent with the recorded preferences for male or female leadership. Headmen were preferred over headwomen by a majority of the male respondents, as well as a large minority of the female respondents (Table 5).

Table 4. "Do women and men have the necessary qualities for leadership in equal measure?"

| | Women (n=89) (%) | Men (n=66) (%) | Total (n=155) (%) |
|----------------|------------------|----------------|-------------------|
| Yes | 41.6 | 36.4 | 39.4 |
| No, men more | 40.4 | 53 | 45.8 |
| No, women more | 15.7 | 9.1 | 12.9 |
| Do not know | 2.2 | 1.5 | 1.9 |

GENDER EQUALITY ON THE HORIZON: THE CASE OF UUKWAMBI TRADITIONAL AUTHORITY IN NAMIBIA (continued)

Table 5. "If you could vote for a new traditional leader in your village, would you prefer a headman or a headwoman?"

| | Women (n=92) (%) | Men (n=66) (%) | Total (n=158) (%) |
|---------------|------------------|----------------|-------------------|
| Headman | 37.0 | 57.6 | 45.6 |
| Headwoman | 26.1 | 7.6 | 18.4 |
| No preference | 37 | 34.8 | 36.1 |

Table 6. "It would be good if more traditional leaders were women"

| | Women (n=90) (%) | Men (n=67) (%) |
|-------------------|------------------|----------------|
| Strongly agree | 12.2 | 3.0 |
| Agree | 31.1 | 20.9 |
| Neutral | 7.8 | 16.4 |
| Disagree | 47.8 | 44.8 |
| Strongly disagree | 1.1 | 14.9 |
| Mean | 2.94 | 3.48 |

In a similar vein, only 21 percent of male respondents and 43 percent of female respondents supported the statement that more traditional leaders should be women (Table 6). The answers to the statement "Men generally make better leaders than women" similarly show that men were still regarded as the most suitable leaders (Table 7).

With regard to the latter two statements, "It would be good if more traditional leaders were women" and "Men generally make better leaders than women", the gender of the respondents accounts for a substantial deviation in opinion. When the gender of the village leader was taken into account, the data show that male respondents living in villages led by a headman were significantly more negative towards increased women's leadership than the female respondents in the same villages, and more negative than male respondents in villages headed by women. Similarly, with regard to the statement "Men generally make better leaders than women", both male and female respondents in villages headed by women indicated significantly lower agreement to this statement than respondents, and in particular male respondents, in villages headed by men.

➤ JUST OVER HALF OF RESPONDENTS EXPRESSED SATISFACTION WITH TRADITIONAL COURT PERFORMANCE ◀

When aggregating the data discussed above, two patterns become visible. First, in villages led by a headman, male respondents had a significantly more negative view of female leadership than female respondents, a difference that was not found or was considerably less than in villages with headwomen. Second, male respondents showed a more positive general attitude towards female leadership in abstracto when living in a village led by a woman compared to males living in a village led by a man. The latter indicates that men's opinions about gendered leadership — whether based on traditional values or preconceived opinions regarding the character traits of men and women — undergo significant change as a result of exposure to successful female leadership.

B. Changed perceptions of quality and fairness of traditional courts

Customary courts in Uukwambi play a major role in the resolution of local disputes. Dispute settlement is by far the most time-consuming task of traditional leaders in Namibia. During the colonial period women were largely excluded from active participation in the traditional judicial arena. Today, both men and women are free to participate and women do so to a large extent.¹²¹ This subsection considers whether opening up of traditional courts has resulted in a positive perception of women and their role in the courts and whether such perceptions are influenced by the gender of the traditional leader in the respondent's village.

When discussing perceptions of the traditional courts, it is important to highlight that approximately two-thirds of the respondents had never attended a traditional court meeting in their village. Thirty-two percent of the respondents had participated in court meetings, but only 8 percent reported to have attended "many times" or "almost always". Traditional court meetings therefore do not engage the majority of the adult population of a village.

The 51 respondents who answered that they had attended court meetings showed high satisfaction with traditional court performance: only 18 percent reported a need to improve the performance of traditional courts. Male respondents reported a slightly higher need to improve the performance of traditional courts led by headwomen, compared to those led by headmen. Female respondents, on the other hand, were more negative about the performance of traditional courts led by headmen than those led by headwomen.

¹²¹ This should, however, be understood within the context of the high out-migration which characterizes the rural areas of northern Namibia. This phenomenon, caused by the poor economic situation in rural areas, has resulted in a high percentage of women-headed houses.

When these same respondents were asked whether they felt they could actively participate in proceedings, 72 percent of female respondents and 92 percent of male respondents answered positively, and 28 percent of female respondents felt that they could not actively participate. Notably, women were more positive about participation in villages led by headwomen than by headmen (Table 10).

When confronted with the question of whether men or women were more influential in the traditional court in their village, 56 percent of female respondents and 60 percent of male respondents believed that power was equally divided, with most of the others claiming that men enjoyed more power than women. Opinions of male respondents did not differ with the gender of the village leader; however, female respondents believed that there was more equal power sharing in villages with headwomen (Table 11).

When all respondents — including those who had never attended a traditional court meeting — were asked their opinion about the statement, “Men and women are treated equally in traditional courts”, only nine percent did not agree. Both male and female respondents were slightly more positive about this statement where the traditional courts were headed by women as opposed to men. Similarly, only six percent of respondents disagreed/strongly disagreed with the statement “In the traditional court, women and men have an equal chance to get a fair decision or settlement”.

Almost half of all respondents stated that they found it difficult to speak up and give their opinion at a traditional court meeting. These data show a significant difference between men and women (women reporting more difficulty than men). When disaggregated by court attendance, the data indicate that respondents who had never attended a traditional court felt that it was much more difficult to speak up than did respondents with actual court experience. Of those respondents who

Table 7. “Men generally make better leaders than women”

| | Women (n=92) (%) | Men (n=67) (%) | Total (n=159) (%) |
|-----------------------|------------------|----------------|-------------------|
| Strongly agree (1) | 27.2 | 41.8 | 33.3 |
| Agree (2) | 17.4 | 20.9 | 18.9 |
| Neutral (3) | 3.3 | 1.5 | 2.5 |
| Disagree (4) | 42.4 | 25.4 | 35.2 |
| Strongly disagree (5) | 9.8 | 10.4 | 10.1 |
| Mean | 2.90 | 2.42 | 2.68 |

Table 10. “Do you feel that you can actively participate in traditional court proceedings?”

| | Women (n=25) (%) | Men (n=25) (%) |
|---------------------------------|------------------|----------------|
| Villages with head woman | | |
| Yes | 5 (83.3%) | 10 (100%) |
| No | 1 (16.7%) | 0 |
| Dont Know | 0 | 0 |
| Villages with head man | | |
| Yes | 13 (68.4%) | 13 (87.7%) |
| No | 6 (31.6%) | 0 |
| Dont Know | 0 | 2 (13.3%) |
| N=51, missing=1 | | |

Table 11. “In the traditional court in your village, who do you think are more influential, men or women?”

| | Villages with headwoman (%) | Villages with headmen (%) |
|-----------------|-----------------------------|---------------------------|
| Women | | |
| Men | 1 (16.7) | 7 (36.8) |
| Women | 0 | 0 |
| Equal | 5 (83.3) | 9 (47.4) |
| Don't know | 0 | 3 (15.8) |
| Men | | |
| Men | 3 (30) | 4 (26.7) |
| Women | 1 (10) | 1 (6.7) |
| Equal | 6 (60) | 9 (60) |
| Don't know | 0 | 1 (6.7) |
| N=51, missing=1 | | |

had attended a traditional court, 80 percent of the male respondents and 68 percent of the female respondents disagreed or strongly disagreed with the statement; 28 percent of the female respondents strongly agreed, compared to 4 percent of the male respondents. Further, the data indicate that male respondents found it easier to speak up in traditional courts in villages led by women compared to those led by men.

In summary, respondents generally perceived the treatment of men and women by the traditional courts as equal, as well as their chances of receiving a fair decision. Critically,

there was a marked difference between respondents in villages with a headwoman and those with a headman. Female respondents were significantly more positive about traditional court proceedings in female-headed villages, in terms of overall satisfaction, ability to participate in the proceedings and the equal division of power among the sexes. Male respondents were slightly more positive about traditional courts in male-headed villages, but indicated that they spoke up more easily in courts in female-headed villages.

GENDER EQUALITY ON THE HORIZON: THE CASE OF UUKWAMBI TRADITIONAL AUTHORITY IN NAMIBIA (continued)

C. Change in justice outcomes for women?

The semi-structured interviews conducted in the case study indicated that the changed norms had become widely known and enforced in the Traditional Authority. Many people were familiar with the new rules, and it was generally stated that there was a drop in the number of cases of property grabbing, both in traditional courts and at the Communal Land Boards (CLBs). Widespread awareness was corroborated through the survey data, which showed that of the 162 respondents in Uukwambi, 82 percent were aware of the norm prohibiting property grabbing and 81 percent of the norm prohibiting payment to the headman/woman by the widow. Of the 132 respondents who were aware of the norm prohibiting property grabbing, 92 percent stated that they were unaware of any case of property grabbing in their village in the past three years, compared to 8 percent who had heard of such a case. These figures are particularly striking when compared to another research project carried out in 1992-1993 in Uukwambi. In this research, when asked about property and inheritance in a customary marriage, 51 percent of the 600 female respondents answered that they were convinced that on the death of their husbands, all of the belongings of the husband would be transferred to his family. This was despite that when they were asked whether they agreed or disagreed with the statement "The husband's family should inherit all the property when the husband dies", 96 percent disagreed, and when asked whether "Women should be allowed to inherit land without having to pay", 97 percent agreed.

Property grabbing and payments by widows to headmen to retain land were first outlawed in the written Laws of Uukwambi 1950-1995 and later in statutory law. During interviews, both customary law and statutory law were referred to as sources of the new norm, and both the Traditional Authority and the Government were perceived as the enforcing agencies. It is difficult to clearly deduce which regulatory system has contributed most to the awareness of these norms. On the one hand, the data of the CLBs show that these institutions still received many property grabbing cases in 2003-2006 and then saw a gradual decline from this period to the present date, where there have been few cases. This coincides with the introduction of the Communal Land Reform Act 2002 (the Act), rather than with the abolishment of the customary norm by the Owambo Traditional Authorities in 1993.

On the other hand, the quantitative data show that 21 percent of respondents who were aware of the norm attributed its basis to statutory law, with 5 percent specifically referring to the Act; 64 percent referred to customary law as the source; 14 percent did not know. A further important point is that respondents often noted that when both parents die, the inheriting child is not exempted from making a payment to the headman to retain the land. The fact that this practice contravenes the Act but not the written Laws of Uukwambi 1950-1995 suggests that knowledge of the content of the Act is at best incomplete and that awareness of statutory norms may be stronger when they reflect customary norms.



Conclusion

A number of interesting observations concerning legal empowerment projects aimed at the customary justice sector might be drawn from this study.

First, it is important to increase participation of women in leadership roles. Having women in visible leadership positions has a positive impact for improving both women and men's views on the capabilities of women as community leaders and in improving justice outcomes for women.

Second, increasing the presence of women in court proceedings and encouraging them to take an active role, for example as participants as witnesses, leaders, or as representatives can positively affect women's feelings about the performance of the traditional court system.

> IN NORTHERN NAMIBIA
NEW 'TRADITIONAL' WOMEN
LEADERS ENJOY CROSS-
GENDER SUPPORT <

Third, active promotion and support by village chiefs on new cultural norms is essential in increasing awareness of rights. Codifying developing customary norms, for example by abolishing property grabbing, reflects the changes in the traditional views, can raise awareness for these new cultural norms that are promulgated at the village level.

Overall, the actions taken by the leadership to introduce gender equality into the customary system in the Traditional Authority appear to have enhanced the fairness and equity of traditional rule and the customary dispute settlement process for women, and thus present a successful approach to women's legal empowerment.

It is important to note three factors in the Uukwambi case study that set it apart from many other attempts to enhance the position of women regulated by customary law in Africa:

- *The simultaneous change undertaken in all three domains of traditional rule – leadership, dispute settlement, and normative content of customary norms. These three domains are interconnected in such a way as to suggest that any effort to promote normative change needs to be holistic.*
- *The complementarity of local, regional and national efforts. For instance, the change processes in Uukwambi were part of a broader effort in Owambo to harmonize customary laws and align them with the new Constitution. This harmonization process was encouraged, legitimated and, at least in part, driven by the Namibian Government.¹²²*
- *The momentum for change in Namibia following its independence.¹²³*



Image: eGuide Travel

Key lessons that may be useful for legal empowerment programming:

- (i) It is important to increase participation of women in leadership roles. Having women in visible leadership positions has a positive impact for improving both women and men's views on the capabilities of women as community leaders and in improving justice outcomes for women.
- (ii) Increasing the presence of women in court proceedings and encouraging them to take an active role can positively affect women's feelings about the performance of the traditional court system.
- (iii) Active promotion and support by village chiefs of new cultural norms is essential to increase awareness of rights.

¹²² The Owambi Traditional Authorities, in their bid to assert their relevance in independent Namibia, took heed of the government's 'suggestions' for reform. The decisions made by the Owambo Traditional Authorities in turn legitimized change processes in Uukwambi. The active engagement of the Uukwambi and the personal involvement of Chief Iipumbu greatly influenced the success and vigor of the reforms.

¹²³ See the discussion at the introduction and intervention description in this case study.

BUSH JUSTICE IN BOUGAINVILLE: MEDIATING CHANGE BY CHALLENGING THE CUSTODIANSHIP OF CUSTOM¹²⁴

1

Introduction

During the period of civil conflict in Bougainville (1989-1998), the formal justice system was essentially inoperative, leaving the population with few tools to manage conflicts and stem escalating violence. Since the new Bougainville Constitution and Autonomous Government was created in 2005, central authorities have been slowly building their capacity and legitimacy, but continue to rely heavily on civil society and customary institutions to maintain peace, order, and security.

In Melanesia, gender-based violence and prejudices against women are severe and widespread. Some customary norms tolerate it. For example, in most Melanesian communities, violence against women is not seen as a serious issue worthy of community-level adjudication. Rape is conceptualized more in terms of damage to a woman's reputation, potential marriage prospects and dowry implications than as a criminal act or a violation of basic human rights. Where customary systems are open

›FOR MELANESIAN
WOMEN, EMPOWERMENT
IS COMPATIBLE WITH
CUSTOM◀

to dealing with such complaints, there are few opportunities for women to participate in the hearing or resolution of their grievance, and the penalties are normally mild and unduly exonerate perpetrators.

Despite the challenges faced by women in accessing justice through the customary fora, research in Melanesia has shown that women largely support localized systems, even if they feel that some aspects should change to become fairer to them. For these women, empowerment does not require a rejection of custom, but a re-examination of norms and processes so that they support, rather than victimize women. While this is the preferred solution, challenges arise in devising a methodology that is appropriate to serve this objective.

2

The intervention

It is against this backdrop that the Bougainville Centre for Peace and Reconciliation (PFM)¹²⁵ started to conduct grassroots training on non-violent dispute resolution. In 1994, in an effort to address some of the social consequences of the Bougainville conflict, the Bougainville Interim Government invited PFM to conduct a conflict resolution training session focused on mediation.

Participants immediately recognized the commonalities between PFM dispute resolution techniques and customary approaches to conflict resolution that emphasized values such as the preservation of community relationships and consensus-based decision-making.

Participants and local actors requested additional training, which led to the development in cooperation with local chiefs of a training methodology considered congruent with Bougainville customary principles and practices.

The PFM training course targeted a cross-section of community members

¹²⁴ The full text of this case study, including references, is found in N Johnstone, 'Bush justice in Bougainville: Mediating Change by Challenging the Custodianship of Customs' in E Harper (ed), *Working with Customary Justice Systems: Post-Conflict and Fragile States* IDLO (2011) 15-33.

¹²⁵ PFM was formerly called the People and Community Empowerment Foundation Melanesia (PEACE).

including chiefs, women, youth, civil society leaders and church leaders of different denominations. The main objective was to build conflict resolution skills in local communities, and thus promote intra- and inter-community social harmony and local ownership over justice processes. The “empowerment of women as equal partners” was a recurrent message in many training modules.

The training aimed to equip women with the information and skills necessary to assert themselves and speak up among men and chiefs, while promoting a community-wide appreciation of women’s rights and contributions. A related goal was to facilitate greater participation in decision-making by other members of the community, including women and vulnerable groups, so that outcomes would represent their perspectives as well. The modalities of the training were structured accordingly.

By bringing men and women together into small working groups – a situation that pushed cultural boundaries – women were given a forum to try out their skills as mediators and decision-makers, while chiefs and other men were compelled to observe them in these roles. This facilitative space was tightly controlled through established guidelines on issues such as mutual respect, which were communicated at the beginning of training and monitored by the facilitator.

3

Results analysis

In May 2010, field research was conducted in Bougainville in order to understand the impact of the PFM intervention. The research aimed to assess specifically whether and to what extent the intervention was able to apply legal empowerment strategies in a way that was locally perceived to be legitimate and that preserved the positive aspects of customary justice process. Using a subject-centric methodology, a survey was developed that included indicators designed to:

- › *Measure users’ perceptions of the quality of justice in terms of process and outcome;*
- › *Test the impact of the intervention on perceived positive aspects of the customary system, such as the restoration of relationships and community harmony; and*
- › *Test whether the intervention resulted in changes in attitude towards women and power-sharing in dispute resolution.*

The survey was administered to 394 people in Bougainville communities where PFM training had taken place. The responses of individuals who had resolved a dispute through a customary mediator and who had participated in PFM training were compared to responses from individuals whose disputes were resolved by a customary mediator who had not participated in PFM training.

As noted above, the research was directed toward gauging the impact of the intervention for women’s legal empowerment. Accordingly, each area of quantitative investigation was statistically tested for gender



Image: djringer

differences. This was supplemented by qualitative data from 25 interviews with female members of civil society, the parties to disputes, mediators, as well as trained and untrained chiefs.

A. Participation and Satisfaction

An examination of the survey and interview data suggests that PFM training made a positive difference to the satisfaction of parties to disputes and led to an increased participation by disputants. Table 1 illustrates that over 84 percent of the 146 respondents whose disputes were mediated by a party with PFM training agreed that:

- › *They were encouraged to express their views;*
- › *They were satisfied with the dispute resolution process;*
- › *They participated fully in the dispute resolution process;*
- › *They were satisfied with the mediator or chief;*
- › *Their views were considered during the dispute resolution process; and*
- › *They experienced healing through the dispute resolution process.*

BUSH JUSTICE IN BOUGAINVILLE: MEDIATING CHANGE BY CHALLENGING THE CUSTODIANSHIP OF CUSTOM (continued)

Respondents whose mediator did not participate in PFM training agreed with these statements only 50 to 70 percent of the time. There was also a significant difference when these data were disaggregated and analyzed by gender. Male respondents were more likely than female respondents to have been satisfied with and participated in the dispute resolution process. An additional finding was the positive effect that training appeared to have on the disputants' relationships. However, the difference between the two groups was less than other findings: 78 percent of those whose dispute was resolved by an untrained chief also agreed that the process improved their relationships.

B. Rights, power and bias

Table 2 illustrates that 75 percent of respondents whose mediator received PFM training and 52 percent of respondents whose mediator did not receive PFM training had their legal rights explained to them. The gender of the disputants also seemed to have an impact on whether their rights would be communicated to them; men were more likely (regardless whether their mediator was trained or untrained) to have their legal rights explained to them than women (72 percent and 62 percent, respectively).

Anecdotal evidence suggests that, although statutory legal rights relating to gender equality were not part of the PFM training, participants retained some knowledge of women's rights as articulated in the Constitution, as well as women's decision-making rights in relation to land and land-related resources.

Table 2 shows that 90 percent of respondents whose mediator received PFM training agreed that the dispute resolution process was objective and unbiased. Only 42 percent of respondents whose mediator did not receive PFM training agreed. Again, perceptions of bias were affected by gender: regardless of whether their mediator was trained or untrained, 80 percent of men agreed with the statement compared to 66 percent of

Table 1. Survey findings on users' experience of the dispute resolution process

| Survey Statement | Dispute was handled by: | | Respondent | |
|----------------------------------------------------------|-----------------------------|------------------------|-------------|---------------|
| | Trained 3rd Party (n = 146) | Untrained Chief (n=85) | Men (n=103) | Women (n=128) |
| Percentage of participants who agreed with the statement | | | | |
| I was encouraged to express my views | 98** | 65** | | |
| I was satisfied with the mediator/chief | 91** | 54** | | |
| I participated fully in the process | 94** | 55** | 81* | 66* |
| I participated fully in the process | 97** | 61** | 89* | 79* |
| My views were considered during the process | 89** | 55* | | |
| I experienced healing through the process | 85** | 58** | | |
| The process had a positive impact on my relationships | 86* | 78* | | |
| *Statistically significant difference at $p < .05$ | | | | |
| **Statistically significant difference at $p < .01$ | | | | |
| Total sample size: n=231 | | | | |

Table 2. Survey findings for users' perceptions of the dispute resolution process

| Survey Statement | Dispute was handled by: | | Respondent | |
|---------------------------------------------------------------------------------------------------|-----------------------------|-----------------|-------------|---------------|
| | Trained 3rd Party (n = 146) | Untrained Chief | Men (n=103) | Women (n=128) |
| Percentage of participants who agreed with the statement | | | | |
| My legal rights were explained to me | 75** | 52** | 72* | 62* |
| I was confused about what my legal rights were | 25 | 21 | | |
| The process was objective and unbiased | 90** | 42** | 80* | 66* |
| It was hard to express my perspective because I was not as powerful as the other parties involved | 32 | 39 | 28* | 39* |
| *Statistically significant difference at $p < .05$ | | | | |
| **Statistically significant difference at $p < .01$ | | | | |
| Total sample size: n=231 | | | | |

women.

A further topic examined in the survey was how power dynamics impacted the resolution of disputes. Approximately 35 percent of all disputants found it difficult to express their perspective because they felt that they were not as powerful as the other party involved. Whether the third party had received training or not made no significant difference. However, female disputants overall were significantly more likely than male disputants to find it hard to express their

view because of power asymmetries between the parties involved (39 and 28 percent, respectively). This finding was supported by interviews with trained mediators and untrained chiefs, most of whom had very little awareness or understanding of how power asymmetries impact dispute resolution, nor practical techniques to ameliorate such imbalances within the context of a dispute. Notably for all of the process-related survey statements, no correlation was found between training

LEGAL EMPOWERMENT TRAINING MEANS WOMEN DEMAND MORE EQUALITY

and gender, that is, the intervention did not improve or make worse the gap between men’s and women’s perceptions of the dispute resolution process. Indeed, the PFM training improved the satisfaction levels of both women and men, but in those areas where there were differences in men’s and women’s responses, the impact of training on this gender gap was neutral.

C. Outcome satisfaction

The second part of the survey focused on the result of the dispute resolution process, namely user satisfaction and perceptions relating to the outcome (Table 3) and whether an outcome was reached or the dispute remained unresolved (Figure 1).

Figure 1 demonstrates that disputants whose mediator participated in PFM training were more likely to obtain an outcome than those whose mediator did not (80 percent and 58 percent respectively). Once again, men fared better overall than women (whether their mediator received training or not); 81 percent of men obtained an outcome to their dispute compared to only 62 percent of women.

The research also analyzed how satisfactory these outcomes were, the impact of the outcome and what factors were taken into consideration.

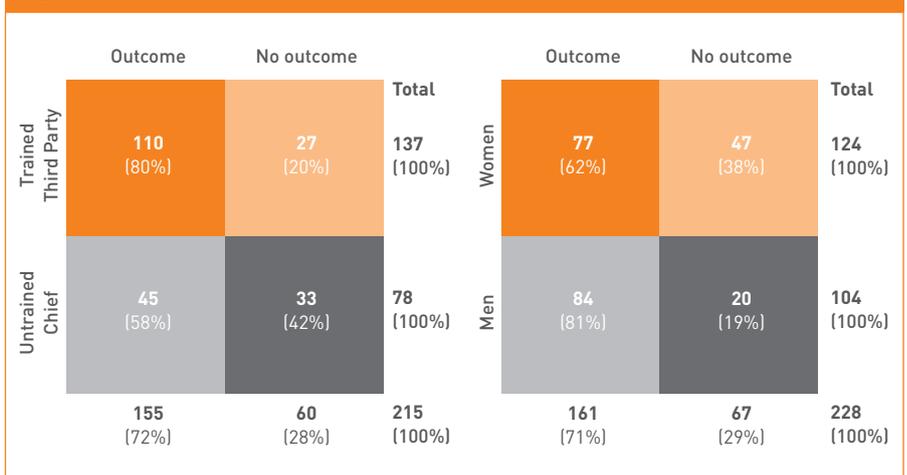
With respect to the overall satisfaction with the outcome and the process’ restorative aspects, PFM training seemed to have significant positive impact. Between 84 and 89 percent of disputants whose mediator was PFM trained agreed that:

Table 3. Survey findings on users’ perception of the dispute resolution outcome

| Survey Statement | Dispute was handled by: | | Respondent | |
|-----------------------------------------------------------|-----------------------------|-----------------|-------------|---------------|
| | Trained 3rd Party (n = 146) | Untrained Chief | Men (n=103) | Women (n=128) |
| Percentage of participants who agreed with the statement | | | | |
| The outcome restored community harmony | 86** | 76** | | |
| The needs of the community were considered in the outcome | 75* | 67* | | |
| My individual needs were considered in the outcome | 69** | 49** | | |
| The outcome enabled me to move forward with my life | 88** | 64** | 86* | 73* |
| The outcome restored my emotional harmony | 88** | 59** | 85** | 70** |
| I received an explanation for the outcome | 84** | 52** | 82** | 64** |
| I was satisfied with the outcome | 85** | 60** | 86** | 68** |

*Statistically significant difference at p<.05
 **Statistically significant difference at p<.01
 Total sample size: n=231

Figure 1. Survey findings on the effect of training and gender on whether an outcome was reached



- > The outcome restored their emotional harm;
- > They received an explanation for the outcome;
- > The outcome enabled them to move forward with their lives; and
- > They were generally satisfied with the outcome.

For parties to disputes whose mediator was not PFM-trained, the results for these four statements were all between 52 and 64 percent; for those with a trained mediator, the results were

significantly higher (between 84 and 88 percent). Women were less likely than men to agree with these statements, showing that they were less satisfied with the outcome and its impact. As with the process-related results, the intervention was found to have a neutral affect on the gap between how men and women perceived the outcome of the dispute resolution process. Overall though, the research showed that fairness was often perceived in terms of procedure and participation, rather than outcome.

BUSH JUSTICE IN BOUGAINVILLE: MEDIATING CHANGE BY CHALLENGING THE CUSTODIANSHIP OF CUSTOM (continued)

The final element of the survey sought to compare the attitudes of respondents who had participated in the PFM community training on dispute resolution (178), compared to respondents who had not participated (216).

Respondents who had participated in the PFM training demonstrated extremely high levels of agreement with the statements “men and women should have equal opportunities to participate in dispute resolution” and “it is important for women to participate in dispute resolution” (98 and 92 percent, respectively), compared to respondents who did not benefit from the PFM training (76 and 72 percent, respectively).

Anecdotal evidence collected through interviews revealed that the community training had dramatically changed the way that some men thought about women. One community chief stated that the training had helped him realize that women play a major role in the household and community, that they also have rights and are important, and that they are capable of accomplishing things. Others came to realize that they should listen more to women’s perspectives and opinions and that men often quash women’s rights. Fifty-three percent of respondents who did not participate in the PFM training felt that domestic violence was a private issue, compared to 22 percent of trained respondents. Similarly, while only 18 percent of trained respondents believed that dispute resolution was the exclusive domain of community chiefs, approximately 33 percent of untrained respondents believed this to be true.

Interviews revealed that women mediators dealt with issues relating to gender, particularly gender-based violence, in different and more empowering ways than most male mediators and chiefs, indicating the importance of women’s participation in the justice section in improving justice outcomes for women. Women mediators tended to have a greater awareness

of gender-based power imbalances, and used tools to address them. For example, female mediators were more likely to refer a case to the formal justice before arranging a meeting where both parties would have to meet face-to-face.

Female mediators interviewed were also overall more likely to recognize substantive legal rights, especially in relation to violence against women, and had little hesitation drawing normative and legal boundaries in regard to acceptable decision-making by the parties involved. They were also more inclined to refer cases to the formal justice system where they believed that they could not guarantee an equitable outcome for the victim and, almost exclusively, would prohibit a solution that involved a victim marrying her rapist.

Similarly, in cases of domestic violence, the approach of female mediators differed from male mediators and untrained chiefs. Women mediators would threaten the perpetrator with action at the state court if the violence did not stop and simultaneously informed the victim of her right to refer the case to court and explained how to do so. They would also counsel women victims of domestic violence on their options should they decide to change their situation, including by providing referrals to NGOs that offered support to them and arranging for trauma counseling.

Overall the survey results indicated that the PFM training greatly improved women’s participation. Increased participation, however, proved insufficient to fully promote legal empowerment in the absence of a sound understanding of substantive rights and the capacity to uphold them. Three considerations emerge from the study:

➤ *First, in a context of generalized gender discrimination, negotiated settlements and minimal recognition of legal rights present particular risks for female parties to disputes. This risk is increased by various kinds of power asymmetries within a dispute.*

➤ FEMALE JUSTICE MEDIATORS ARE NOW WELL ESTABLISHED IN BOUGAINVILLE COMMUNITIES ◀

➤ *The second key issue to highlight is that the PFM training did not adequately address how these power asymmetries affected the capacity of the disputing parties to assert their opinions or legal rights. Although it was more likely that a disputant with a PFM-trained mediator would participate more fully, they were often under significant pressure to agree to outcomes that reflected certain notions of fairness. Such understanding often favored more powerful parties, including men, leaving less powerful parties vulnerable to having their legitimate grievances ignored or being pressured into accepting solutions they found unsatisfactory. This was most apparent when numerous power asymmetries were in play, such as in cases of gender-based violence.*

➤ *The third consideration in this discussion on participation and rights is neutrality. Interviews revealed that there was widespread misunderstanding among mediators about the meaning of neutrality. Many interpreted this as not requiring the application of any legal or normative boundary in the resolution of the dispute, but instead to aim primarily for a mutually acceptable solution. For example, cases were found where a mediator “resolving” a rape case did not feel able to condemn a decision where the victim was forced to marry the perpetrator, provided that both parties were (at least ostensibly) in agreement.*

4

Conclusion

Many argue that the failure of Pacific customary legal systems to protect women from violence marks a significant departure from the past.¹²⁶ They state that protective norms have been eroded through processes of colonization and conflict, which contributed to a breakdown of customary mechanisms.¹²⁷ These critics advocate challenging the dominant male interpretations of custom by evoking traditional practices where women had equal status, their own ceremonies and leadership roles.¹²⁸ A related approach is to encourage a review of customary practices in light of underlying customary values. Where such values align with substantive or procedural human rights, they may be weaved into the cultural and customary law fabric, and hence “introduced in ways that are relevant to Pacific peoples and legitimate in terms of the peoples’ own norms”.¹²⁹

The PFM intervention highlights some of the key challenges and opportunities associated with an approach that

focuses on women’s participation in customary legal settings to advance women’s empowerment. It suggests that interventions that encourage local discourse on challenging ideas and that are structured around locally legitimate change processes can have progressive results. The results of the PFM intervention indicate that female mediators were slowly but successfully challenging the interpretation and application of customary legal norms so as to offer greater protection to women. These mediators appeared to be largely accepted and supported by trained male mediators and chiefs, both of whom expressed a desire for more female mediators. This is surprising given the experiences of other countries where moves to displace traditional power-holders, and more generally to challenge men’s interpretations and application of custom have been strongly resisted.¹³⁰

The intervention also revealed the limits of a legal empowerment program that i) focuses only on process rather than substantive rights and ii) that does not address power asymmetries. Focusing on process rather than substantive content meant the PFM intervention was regarded as locally owned and compatible with customary values. However, it also meant that the intervention had no impact on the gap between men and women’s perceptions of the dispute resolution process. As such, the PFM intervention is an important reminder that the kinds of broad and deep issues that legal empowerment efforts seek to address are not prone to quick or simple fixes, particularly those relating to power differences between parties. But by learning from each attempt and remaining flexible and reflexive, any change that does occur is more likely to be sustainable.

Key lessons that may be useful for legal empowerment programming:

- (i) Interventions that encourage local discourse on challenging ideas and that are structured around locally legitimate change processes can have progressive results.
- (ii) The broad and deep issues that legal empowerment efforts seek to address are not prone to quick or simple fixes, particularly those relating to power.

¹²⁶ P Martin, ‘Implementing women’s and children’s rights: the case of domestic violence in Samoa’ (2002) 27 *Alternative Law Journal* 240; L Behrendt ‘Human Rights Trump Customary Law Every Time’ (2006) *National Indigenous Times*, 75, cited in Johnstone, above n 124, 18.

¹²⁷ Johnstone, above n 124, 18.

¹²⁸ G J Zorn, *Women, Custom and International Law in the Pacific* (2000) cited in Johnstone, above n 124, 19.

¹²⁹ *New Zealand Law Commission, Custom and Human Rights in the Pacific* (2006) 12 cited in Johnstone, above n 124, 18.

¹³⁰ Two factors are tentatively posited as an explanation for the lack of resistance in the Bougainville context. First, the PFM training engaged a broad range of stakeholders, including men, women, youth, religious actors and chiefs. This approach may have facilitated changes in attitude towards the contribution and roles of women. Second, due to the specific circumstances of Bougainville — the impact of colonization, copper mining and the civil conflict — traditional power structures were already in upheaval. When PFM commenced their training program, chiefs had lost their previously strong power base, which is likely to have contributed to them being supportive or at least open to women and other community members becoming decision-makers. This state of uncertain power dynamics may be present elsewhere during transitional periods, providing opportunities and space for legal empowerment outcomes.

ENGAGING WITH CUSTOMARY LAW TO CREATE SCOPE FOR REALIZING WOMEN'S FORMALLY PROTECTED LAND RIGHTS IN RWANDA¹³¹

1

Introduction

Given the importance of land, both in terms of rural development and securing livelihoods, much of the debate on the role that customary law can play in the legal empowerment of the poor in Africa has focused on customary land rights. This raises the question to what extent it is possible to increase the scope for acceptance of women's land claims under customary law by promoting more inclusive dispute resolution, including participation by women's interest groups. Is it possible for women to capitalize on the inherent flexibility in customary decision making to draw on moral obligations that support their interest in land?

In terms of substantive norms pertaining to property rights, in Rwanda, as in other African systems of customary law, women generally claim access to land on the basis of their relationships with men. Wives can claim access to their husband's land and, often, they will have one or more forms of residual claims to their biological family's land. This creates multiple overlapping claims to the same land. As far as the pre-colonial period is concerned, these claims should not be understood to have been structured or well-defined rights.

The extent to which claims could be realized and the relationship between claims to the same land depended on a process of negotiation within families and communities in which needs and circumstances played an important role. Codifications and other law reforms during and after colonialism — often inspired by concepts in Western law — combined with population pressure and changing economic circumstances, modified the nature of these claims and the extent to which women could rely on them to gain access to land. While some studies maintain that women were positively affected by these changes,¹³² the weight of the evidence suggests that such processes adversely affected their ability to exercise derived and residual land claims.¹³³ As a result, women face significant challenges where land ownership, transfer and management are principally regulated by customary law, and statutory laws protecting their land interests remain largely out of reach.

The primary means for women to access land under customary law in Rwanda is through marriage. Even in such cases, however, the husband is generally recognized as owning and exercising authority over such land, even if he is expected to consult his wife on matters regarding its management. Women may also be gifted land, but that can also be complicated. Where the land is gifted by her family, control over the land (selling, gifting, renting, building, etc.) will generally be exercised by her father or

› LAWS FOR WOMEN ARE GOOD IN RWANDA, BUT THE REALITY IS LESS SO ◀

one of her brothers. When land is used and controlled by a brother, that brother then assumes a moral obligation to pay visits to his sister on important occasions and to support her in times of financial or material need. If the land comes from elsewhere, such control will be exercised by her husband. Frequently, the rights acquired over gifted land are therefore symbolic in nature. In principle, a woman's children are not entitled to inherit her rights over gifted parcels of land.

When a woman's husband dies, the division of matrimonial property depends on whether she has male offspring, her age and her relationship with her in-laws. Where the son/s are minors, the widow can generally retain rights of use over her husband's land and will continue to stay in the matrimonial home, holding both in trust for her son/s. If she is young enough, she may be required to marry one of her former husband's brothers to reinforce familial ties. In other cases, widows may be forced to leave their husband's land and return to their biological families. This may pose difficulties because she will need to lay claim on resources that have been allocated to her own brothers and their families.

¹³¹ The full text of this case study, including references, is found in M Lankhorst and M Veldman, 'Engaging with Customary Law to Create Scope for Realizing Women's Formally Protected Land Rights in Rwanda' in E Harper (ed), *Working with Customary Justice Systems: Post-Conflict and Fragile States* IDLO (2011) 93-107.

¹³² See J Pottier, 'Customary Land Tenure in Sub-Saharan Africa Today: Meanings and Contexts' in C Huggins and J Clover (eds), *From the Ground Up: Land Rights, Conflict and Peace in Sub-Saharan Africa* (2005) 55, 61 cited in Lankhorst and Veldman *ibid*, 94.

¹³³ A Whitehead and D Tsikata, 'Policy Discourses on Women's Land Rights in Sub-Saharan Africa: The Implications of the Re-turn to the Customary' (January and April 2003) 3(1-2) *Journal of Agrarian Change*, 67, cited in Lankhorst and Veldman, *ibid*.

In terms of process, land disputes are often referred first to the inama y'umuryanga (inama), roughly translated as 'a family meeting'.

The inama is not a tightly regulated institution of customary law.¹³⁴

Sometimes women take an active part in the debates whereas in some families, the discussion will be male dominated. When the inama cannot resolve the dispute, or the dispute is between members of different families, the dispute will be brought before the umudugudu council (the village administration). It is noteworthy that there is no law that provides for or regulates interventions by these local authorities. An inyangamugayo, which means man (or woman) of integrity, works with heads of the umudugudu council in dispute resolution sessions as part of a regular form of cooperation.

Abunzi committees, composed of 12 elected community members are also important for the resolution of land disputes. These committees were expressly created by a law adopted in 2006 to deal with all disputes before they can be submitted to a Primary Court and generally deal with disputes involving women's rights or interest in land. Abunzi committees primarily mediate between disputants to persuade them to reach some kind of settlement. The committee's debate is led by three members, two of whom are chosen by the respective sides of the dispute and one who is then chosen by the two nominated abunzi. Interventions from other members of the committee vary a great deal between abunzi committees, with some leaving more room for discussion than others and some excluding them altogether. If the parties cannot be reconciled, the abunzi must apply the law and adopt a binding

adversarial decision. It is then open to the parties to the dispute to submit the decision to a Primary Court for review.

Statutory reform relating to inheritance was initiated in 1996. This was driven by a number of developments related to the violence against the Tutsi that marks Rwanda's recent history. The death or flight into exile of husbands and fathers forced many Tutsi women into roles as family breadwinners and farmers. The customary system did not meet the needs of this new generation of Rwandan women who were effectively running households on their own. Moreover, formal laws dating from before the genocide did not recognize their claims to the land they depended on for livelihoods, which made them vulnerable to attempts by more distant male relatives to obtain additional lands. This was viewed as a potential threat to political stability and economic development.

To remedy this, the Matrimonial Regimes, Liberties and Succession Law (the Inheritance Law) was introduced in 1999 with the effect of ending important aspects of customary law. Firstly, it granted daughters the right to inherit land from their parents. Like their male siblings, therefore, women are entitled to a share of family land when they get married or when their parents die. Secondly, it gave wives rights to matrimonial property: land, houses and movable goods are owned jointly by husband and wife. Thirdly, it allowed widows to inherit their deceased husbands' property.

The adoption of formal laws guaranteeing women's access to marital and biological family land has not led to significant changes on the

ground, however. While there is a basic awareness among most men and women that the law has changed in favor of the latter, in practice customary law continues to have a strong influence on how marriage and inheritance are regulated in rural areas. In particular, if daughters are allocated an inheritance share, brothers and particularly younger brothers who have not yet married see the share of the land that they will come to inherit shrink, which may negatively affect their marriage prospects. There are also social implications for women that result from the operation of the new laws. A woman who contributes considerable assets to a marriage is likely to be seen as behaving independently and being less respectful to her husband because if she were to divorce, she would not be dependent on the support of her male family members. It is also clear that women risk being ostracized by both men and women community members if they try to enforce their legally guaranteed inheritance rights.

The resolution of women's rights or interests in land is often dealt with at the abunzi level because the umudugudu generally consider them too complex. Once referred to the abunzi committees, the dispute is likely to be adjudicated, rather than mediated. In practice, many abunzi understand their position to be that of a judge. Out of a total of 105 disputants interviewed for this study, 43 indicated that the abunzi did not make any attempt to mediate a decision between the parties and instead just applied a ruling. Most commonly, the abunzi have difficulty imagining that a dispute could be brought to an end without one party admitting fault and asking for forgiveness.

¹³⁴ The way and frequency in which a family organizes meetings and the reasons for the meeting vary from one family to another. In some families, elders and younger members of the family considered trustworthy, wise and eloquent will be heavily involved in the debates whereas in other families, the umukuru or head of the family, will act alone. It is important to also recognize that there is strong variation in the methods that families adopt to resolve disputes, which range from mediation to strict adjudication.

ENGAGING WITH CUSTOMARY LAW TO CREATE SCOPE FOR REALIZING WOMEN'S FORMALLY PROTECTED LAND RIGHTS IN RWANDA (continued)

As such, the problems for women seeking to protect their land interests in Rwanda are two-fold. First, it is disadvantageous to them that most land-related disputes are not resolved at the umudugudu level because the further away from the village that dispute resolution takes place, the more difficult it becomes for them to secure equitable outcomes. This is because outside of the village structure the scope for successful mediation diminishes and so does the likelihood that issues of moral responsibility can be used as a leverage to secure women's land rights. Second, when a dispute is resolved by a head of umudugudu or an abunzi committee, observations of cases indicate that women have less probability of upholding their land interests when an adjudicatory approach is adopted. Such proceedings are backwards-looking and focus on rights and facts, which in the context of gender-discriminatory customary laws does not favor women.

In the Rwandan context, women's interests are therefore more likely to be better served by mediation approaches that aim to restore peace between the disputing parties and where there is more room to consider issues such as the disputants' needs and the moral obligations that may exist between them. Phrased another way, mediation offers a better forum for individuals with weak legal claims but strong needs backed by moral claims, such as a family obligation to protect weaker members from destitution. Likewise, women are likely to receive better outcomes if disputes are resolved at the village level where there is greater scope for them to use the negotiability and flexibility inherent in customary decision-making to promote outcomes in their favor. This scope might increase even further if, at this level, the dispute resolution 'circle' was expanded beyond the heads of the current arbitrators to those who are skilled in mediation and local representatives of the National Women's Council (NWC), who are more likely to have a better insight into and lobby for women's needs.

2

The intervention

With this view in mind, the organization RCN-Justice et Démocratie (RCN), selected six villages in the Rulindo district in northwest Rwanda for an intervention based on the hypothesis that outcomes in cases involving women's land interests would improve if they were consistently resolved at the village level, with representatives of the NWC present. The group of participants included 20 women (six members of the umudugudu council, eight inyangamugayo, five representatives of the NWC, and an official of a higher ranking local authority) and 12 men (six inyangamugayo, five heads of umudugudu and an official of a higher-ranking local authority). Multi-stakeholder focus group discussions were held that addressed three topics:

- *How to better coordinate their efforts to resolve disputes;*
- *How to ensure that all relevant interests and views were taken into account in dispute resolution with a view to ensuring that the outcome of the process was considered fair by both disputants; and*
- *The implementation of basic mediation techniques in dispute resolution.*

Following this, a workshop was organized. Participants were divided into six groups and asked to describe a land dispute they had recently dealt with and explain how they had resolved it. These cases were used to exchange views on principles regarding land rights and women's inheritance rights embodied in statutory law. In the months following the workshop, 12 coaching field visits were delivered (two per village). There was also an intervention at the abunzi level, which targeted all 55 abunzi members (25 of whom were women) in four selected abunzi committees in the district of Rulindo. Two participative training sessions were delivered followed by two follow-

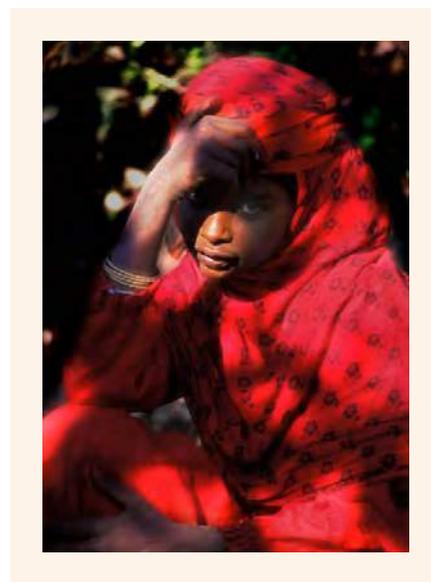


Image: Sheila McKinnon

➤ THERE IS VALUE IN CHALLENGING MALE DOMINATION FROM WITHIN THE CUSTOMARY FRAMEWORK ◀

up coaching visits to each committee. The training focused on approaches to dispute resolution and women's statutorily protected land rights. Sketches based on typical cases observed during earlier monitoring visits to the target committees were used to stimulate discussion on the nature of dispute resolution and basic procedural principles, such as the right of the parties to the dispute to be treated equally in presenting arguments and evidence and the importance of informing them of the procedure that would be followed. Abunzi were also asked to reenact a land dispute involving an inheritance matter that they had dealt with as a committee. This provided a concrete basis for a dialogue on women's land rights as enshrined in statute.

3

Results analysis

A research framework was designed to gauge the impact of these interventions, principally through qualitative data collection techniques, including observation of dispute resolution sessions, interviews and focus group discussions with disputants and beneficiaries. A control area was selected nearby, making it possible to compare and contrast developments in the intervention zone with developments in a similar but intervention-free environment. Data for both the village level study and the abunzi study were collected over a ten-month period (October 2009 – August 2010).

A. Expanding the dispute resolution circle

Following the training, all 21 land-related inheritance disputes that arose were dealt with at the village level by the heads of umudugudu in collaboration with the inyangamugayo and NWC representatives. In terms of expanding the participants in dispute resolution, the inyangamugayo in all the targeted localities acquired an established role in dispute resolution together with the head of umudugudu. On average, three inyangamugayo would be present at mediation sessions. It is also noteworthy that through the intervention, the various inyangamugayo within the target area came to know or became more familiar with each other and continued to regularly meet to exchange experiences. A practice also emerged whereby inyangamugayo started attending abunzi sessions in cases that they themselves had not been able to resolve.

Critically, in cases involving women's inheritance rights, one or two NWC representatives were generally found to participate in the dispute resolution. The change in the approach adopted by the NWC representatives is particularly noteworthy. Prior to the intervention, in

the few cases in which they participated, the approach adopted was far from rights-based. Generally, the forum advised women on how to behave as 'good wives', how to avoid clashes with their husbands, and how to restore ties once a clash had occurred (usually by coaching the women to show modesty, acceptance and forgiveness). Women's rights to matrimonial property or to participate in decision-making on important family affairs were seldom included in their advice. Following the intervention, NWC representatives actively took part in dispute resolution along with heads of umudugudu and inyangamugayo, and frequently took the lead in demanding attention to the interests of the women involved in the dispute.

B. Encouraging the use of mediation techniques in the resolution of disputes

Following the intervention, four positive changes were observed in how dispute resolution was approached by both village-level actors and abunzi committees. First, such actors took more time to understand the arguments presented by — and the circumstances and interests of — both parties to the dispute and to reflect this understanding in their attempts to forge a solution. Second, disputing parties and members of the public were more often encouraged to propose solutions to the dispute. Third, possible solutions were presented at a later stage in the discussion and not, as often observed in the control zone, at the start of the discussion. Finally, more effort was made to explain the reasoning behind the solutions found, particularly to disputants who were asked to make concessions.

With respect to whether these changes in practice were observed more strongly at the village or the abunzi level, it can be noted that while the intervention promoted positive changes in the approach adopted by abunzi committees, in a significant share of the cases observed committees continued to behave as panels of judges presiding over adversarial

proceedings. This occurred much less frequently at the umudugudu level, presumably due to the involvement of the inyangamugayo, whose approach is generally more conciliatory and facilitative. The inyangamugayo, in particular, became more pro-active in their mediation approach. They would speak to disputants prior to and after the mediation session in order to try to overcome the obstacles that kept them from reaching a solution. Further, before a mediation session, they would often urge neighbors and other affected community members to take part in the meeting.

C. Did a successful intervention translate into improved outcomes for women?

Each of the intended objectives of the intervention was realized with a reasonable level of success: land-related inheritance disputes were resolved by using improved mediation techniques and conducted jointly by heads of umudugudu, inyangamugayo and NWC representatives. The critical question, however, is whether such changes translated into improved outcomes for women in terms of greater protection of their land claims. To answer this question, attention to the protections afforded to women under statutory law is important. The Inheritance Law explicitly grants women the right to inherit property held by their natal family and also to make a claim to such property before the death of the rights holder. It does not, however, go so far as to guarantee women the right to receive an equal share (in terms of value, size and quality) to that of male siblings. It is also important to recall that under customary law it is common to grant women residual claims to land or to make symbolic gifts of land to women upon marriage. Women's statutorily protected land rights, therefore, were generally not considered to be completely at odds with customary law.

ENGAGING WITH CUSTOMARY LAW TO CREATE SCOPE FOR REALIZING WOMEN'S FORMALLY PROTECTED LAND RIGHTS IN RWANDA (continued)



Image: Sheila McKinnon

With this in mind, the intervention did not result in a significant change in customary dispute resolution practices, at least with respect to incorporating entirely new ideas. Cases in which women asked for *umunani* (land given to men upon marriage to establish a household) were very few - 8 out of 256 cases at the *abunzi* level. With the exception of two ambiguous examples, all were unsuccessful. It should be highlighted that since, in practice, women about to wed benefit from their future husband's *umunani* and *intekeshwa* (gifts received by a man from members of the family or occasionally from the family of his wife, either when he marries or when a son is born), equalizing such endowments would amount to 'double gifting' and, in a situation of land scarcity, this is generally seen as undesirable.

Yet, on a small and modest scale, improvements in outcomes were observed following the intervention. First, particularly at the village level, the number of unresolved disputes fell markedly. During the final month of the program, for example, only 13 unresolved cases were reported, which represents about half of the pre-intervention caseload and none relating to the inheritance of land.

Moreover, targeted actors were more inclined to accept claims of women that were conceivable under customary law, although certainly not guaranteed. Three cases were observed where a woman — divorced or widowed — was permitted to access her portion of the *ingarigari* (residual land remaining after the death of a rights holder) before the death of her parents. Traditionally, *ingarigari* is divided among male offspring; however, under certain circumstances, widowed or divorced daughters may be allowed to make use of part of it. Allowing daughters to claim undivided family land during the life of the rights holder represents a meaningful and positive change in the concept of *ingarigari*.

There were also five cases observed where women were permitted to make real, rather than symbolic, use of *igiseke* (land promised to daughters by the family in case they ran into difficulty). Again, granting women real access to family land on the basis of a claim, such as *igiseke*, which was traditionally primarily symbolic in nature, constitutes an expansion in their ability to claim land and a marked departure from common practice - only two similar cases were observed prior to the intervention. Finally, it is noteworthy that these outcomes were realized in cases where the *abunzi* and village-level actors engaged in mediation, rather than adjudication.

4

Conclusions

The intervention led by RCN discussed in this case did not wrestle with or modify the customary rules in question. It was accepted that, although such rules were the root problem, there were strong social and economic factors that made it unlikely that they could be significantly modified through a short-term pilot intervention. It was reasoned that the most effective way to deliver more equitable outcomes for women was to exploit the flexibility inherent in customary justice systems and draw on moral obligations within existing structure of culture and custom. The study yielded two key lessons that may be useful for legal empowerment programming:

(i) In any strategy aimed at expanding women's rights under customary law, the modality of dispute resolution can be equally as important as the substantive rules in play. The results of the intervention support the conclusion that, with appropriate training and advocacy, community-based dispute resolution actors can be encouraged to make greater use of such techniques, which can translate into better outcomes for women. In this way policymakers and development programmers can make positive use of the flexibility in customary systems by stimulating reliance on forms of dispute resolution that place greater weight on the needs and circumstances of more vulnerable disputants. In short, while flexibility can be exploited to protect male interests in situations of inequality and social change, change can also lend itself to the other direction.

(ii) Modifying customary practices requires policymakers and development programmers to look beyond strategies that seek to align customary practice with statutory law to better understand why rights-abrogating customary practices exist and what other purposes they might serve. The RCN intervention, while enlarging the space for women, did not open the door for daughters to claim land from their father on an equal footing with their brothers, as provided in statutory law. The limitations preventing women from realizing land claims are anchored to a larger framework of social beliefs, practices and reciprocal rights and obligations from which they cannot be easily severed and any changes to comply with statute clearly challenge the interests of men.

It is therefore too simplistic to frame interventions as simply informing the population of the changes to women's statutory rights and requiring them to modify their practices accordingly. Instead, it is best to encourage a transformation of customary practices in ways that simultaneously meet the interests of male power holders. By involving — rather than challenging — men and appealing to their sense of responsibility for the well-being of family or community members, positive outcomes can be reached. By promoting reflection and debate within communities on prevailing practices surrounding marriage and inheritance, change can potentially arise. The results of such dialogue processes should be fed into policy debates at the national level on the implementation of new statutory laws.

Admittedly, appealing to power-holders sense of good conscience is not the ideal approach for vesting women with enhanced land tenure security.



Image: Sheila McKinnon

However, in situations where the most accessible justice system contains structural impediments of such a nature that making them the subject of reform is highly unlikely to yield success and might even be detrimental to the

interests of the intended beneficiaries, development actors must duly consider the reforms that are most likely to secure beneficial outcomes for women, in a timely manner, irrespective of the path taken.

Key lessons that may be useful for legal empowerment programming:

(i) In any strategy aimed at expanding women's rights under customary law, the modality of dispute resolution can be equally as important as the substantive rules in play.

(ii) Modifying customary practices requires policymakers and development programmers to look beyond strategies that seek to align customary practice with statutory law to better understand why rights-abrogating customary practices exist and what other purposes they might serve.

TWO FACES OF CHANGE: THE NEED FOR A BI-DIRECTIONAL APPROACH TO IMPROVE WOMEN'S LAND RIGHTS IN PLURAL LEGAL SYSTEMS¹³⁵

1

Introduction

In sub-Saharan Africa women are disproportionately affected by a lack of property rights, leading to lower incomes, inadequate health, nutrition, education, and lifestyle. Contemporary deprivation of women's land rights results from the current land scarcity, conflict driven and socially transformative challenges facing traditional communities. Many customary systems have come to entrench discrimination and exclusion along status, age or gender lines, or worse, have manipulated traditional rules to consolidate legal entitlements and the subsequent economic advantages in the hands of a few customary chiefs. For example, immediately prior to the introduction of the Village Land Act 1999 and the Land Act 1999, Tanzanian widows who had historically been allowed to stay on their husbands' land, were increasingly dispossessed of that land as it increased in value.

Land titling, registration, formalization and distribution have been key processes in the long-term strategy to promote economic growth and development, and women's access to land. To a large extent, however,

such policies and subsequent laws have been unsuccessful in pluralist legal contexts, as customary law continues to be observed by the majority of the population who live in rural communities and are largely ignorant of or unfamiliar with formal law and its institutions. The challenge is thus to ensure that the formal law will offer sufficiently secure land rights to women, and to persuade or coerce local governance structures to follow the formal law.

Customary practices in Mozambique and Tanzania demonstrate the complex interrelationships in pluralist legal systems. Both countries are governed by statutory law, customary law and religious law, which overlap to varying degrees. In Mozambique, community courts have existed since colonial times to deal with civil disputes and minor crimes. Although they are formally recognized in the Constitution, they are not part of the formal justice system. Accordingly, community courts receive no financial or material assistance from the government or judicial courts, and there is no right of appeal of community court decisions to the district courts. They comprise of local elders elected by the community who generally try to mediate and/or conciliate, or make decisions according to "equity, good sense and justice", rather than legally trained individuals bound to apply the law.¹³⁶ In practice, this results in the continuing application of customary law

> IN BOTH MOZAMBIQUE AND TANZANIA, TRADITIONAL PRACTICE LAGS FAR BEHIND WOMEN'S RIGHTS IN LAW <

as understood by the local leaders at the time, which often focuses on women's duties, rather than women's rights. In recent history, customary practices have prevented women from owning their land because control rights are vested with her husband or maternal uncles or nephews.

A survey of 15 institutions in Mozambique involved in providing legal support to the poor and 104 individuals across various districts was organized by the CLEP in 2007, with the objective of contributing to a national consultation process with a specific focus on property rights. The CLEP study¹³⁷ identified a number of difficulties encountered by the poor, particularly those related to the defense of their property rights, including: weak access to justice due to lack of legal knowledge; low levels of schooling and literacy; difficult access to institutions defending them and their property; cultural habits negatively influencing property transfer rights upon death; and weak institutional capacity to provide the poor with legal support. The CLEP study confirmed that many widows and their children are

¹³⁵ The full text of this case study, including references, is found in A Kapur, 'Two Faces of Change: The Need for a Bi-Directional Approach to Improve Women's Land Rights in Plural Legal Systems' in E Harper (ed), *Working with Customary Justice Systems: Post Conflict and Fragile States* IDLO (2011) 73-89.

¹³⁶ P Raina, 'Republic of Mozambique – Legal System and Research' *Globalex – Hauser Global Law Scholar Program*, cited in Kapur, *ibid*, 79.

¹³⁷ E Alfai, *Legal Empowerment of the Poor: Defending Property Rights (2007) 1*, cited in Kapur, *above n 135*, 83.

dispossessed of their inheritance and that 95 percent of interviewees resorted first to neighborhood, district and traditional leaders as a response to such dispossession. However, 92 percent of respondents in rural areas stated they would comply with the decision made by local structures — taking a case to the judicial courts was a very rare phenomenon. The CLEP study concluded by highlighting four areas of change that were needed to overcome the obstacles faced by the poor in protecting their property rights: education in and dissemination of property rights; facilitation of access to registration; inter-sectoral strengthening and coordination; and reinforcement of policies. In a 2007 survey of six provinces of Mozambique, 80 percent of the 384 interviewees considered that land would be inherited according to the gender of the heir. This was despite the fact that some 52 percent of widows and women heads-of-households knew about the laws establishing gender equality, as did 48 percent of the men and 68 percent of the justice officials interviewed.¹³⁸

In Tanzania, the Constitution accords “equal opportunities to men and women alike” (article 9(g)) and the Land Act 1999 provides for women to have the same rights to land as men and requires land co-ownership by married couples. Under the Land Act a spouse cannot transfer, mortgage, sell, lease or give away land that is under co-occupancy without the other spouse’s explicit consent, even if the land is registered in only one spouse’s name. The Village Land Act 1999 protects existing customary rights in land, which de facto, excludes women who never owned land

under customary law. However it also prohibits discrimination against women in the application of customary law. Finally the Law of Marriage Act 1971 (the LMA) (applicable only in mainland Tanganyika) explicitly supersedes Islamic and customary laws and grants women the equal rights to acquire, hold and dispose of property (section 60(a)).¹³⁹

Despite these progressive and explicit statutory provisions, customary law remains the law closest to the people, especially in rural Tanzania, and continues to feature practices, norms and tradition-driven perceptions of rights that hinder women’s ability to be allocated land as independent individuals. Specifically, land rights are still “viewed in light of a woman’s marital status, and women are required to obtain their husband’s consent.”¹⁴⁰ For example, the Constitutional prohibition of discrimination based on sex or religion is not enforced in cases of customary inheritance. Similarly, despite the existence of provisions in the LMA on property rights for women, their application depends on the status and wishes of the head of the household, a reflection of the inconsistent and often ineffective implementation of the LMA. Moreover as the LMA does not cover inheritance, it does not explicitly supersede customary inheritance practices which often preclude women from inheriting land, even following their husbands’ deaths. Despite their illegality due to their inconsistency with the Constitution, this makes little difference in practice: several cases on appeal to the High Court have simply been referred back to clan councils or local customary elites. Further it is necessary for marriages to be registered with

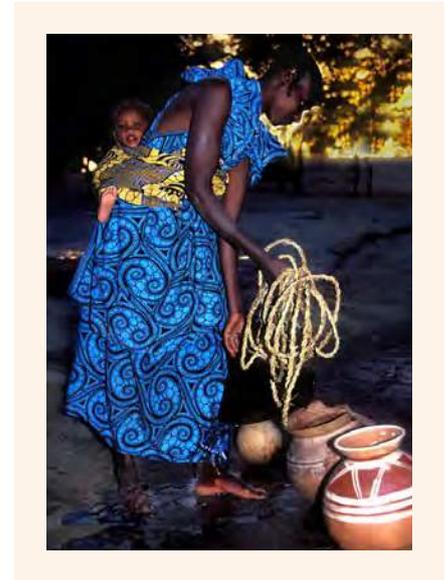


Image: Sheila McKinnon

the state for many of these statutes to effectively apply to widows or divorced women. On the other hand, the High Court has opined that customary laws should be modified to meet the requirements of equality and the human rights standards of the Constitution and international law.

As such, the formal law for both Mozambique and Tanzania are more progressive than the customary laws. In both countries there are statutory provisions that give women the legal right to own and inherit land, either through specific wording that gender should not be a distinguishing factor, or by stating that every person is entitled to own property, which constructively includes women.

¹³⁸ *Save the Children, Denied Our Rights: Children, Women and Inheritance in Mozambique (2007)*, cited in Kapur, above n 135, 83.

¹³⁹ Section 114 also requires the court to have regard for whether the spouse’s domestic service amounts to such efforts and contributions that entitled her to a share of the property upon divorce. Neither the husband nor wife may unilaterally transfer rights in the matrimonial home without the other person’s consent.

¹⁴⁰ P Koskinen, ‘To own or to be owned; women and land rights in rural Tanzania’ (2002) *Human Rights and Development Yale Book* 145, 177, cited in Kapur, *ibid*, 84.

TWO FACES OF CHANGE: THE NEED FOR A BI-DIRECTIONAL APPROACH TO IMPROVE WOMEN'S LAND RIGHTS IN PLURAL LEGAL SYSTEMS (continued)

2

The intervention

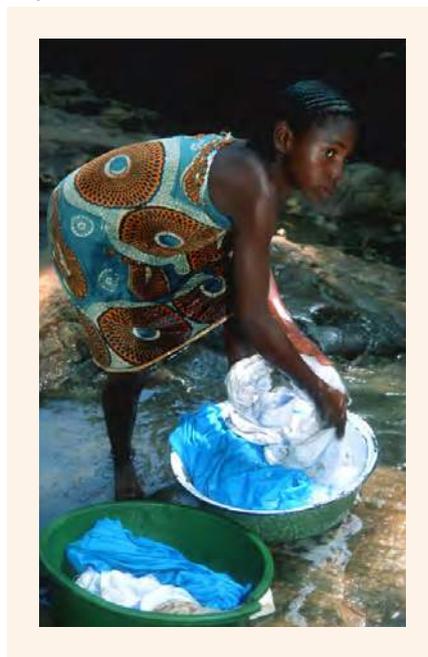
A burgeoning community of domestic non-governmental organizations (NGOs) is undertaking a range of initiatives promoting women's awareness and exercise of their rights under statutory law in Mozambique and Tanzania. These initiatives, carried out with the support of lawyers and legal experts, are based upon the premise that women's land rights will be better secured through statutory law reform than by allowing and encouraging customary law to evolve. Lawyers place emphasis on different approaches, including legal training, land redistribution, registering titles, the education of officials, special loan facilities for women, and quotas to ensure that women are represented on decision-making bodies. In Mozambique, organizations such as the Association for Women in Legal Careers, the Rural Association for Mutual Assistance and the Association of Women, Law and Development are providing legal assistance and legal education on women's rights.

NGOs in Tanzania are also targeting judicial courts, which apply statutory law as the preferred venue for improving land tenure security for women, particularly following the death of their husband or divorce. In 2004, a Gender

and Poverty Program promoting equal land rights was established across six regions in the country by the Law and Human Rights Centre, the Women's Legal Aid Centre, the Women Advancement Trust, the Tanzanian Women Lawyer's Association, and ENVIROCARE. In each region, a program comprised of a baseline survey, a needs assessment, training, workshops/seminars, and interactive activities were conducted to identify issues requiring future intervention.

The logical enquiry following these interventions is whether NGO initiatives that disseminate and utilize statutory law were changing practices with respect to women's land tenure security in rural communities. More specifically, in reference to the major obstacles outlined at the start of this case study, are these NGO initiatives overcoming the lack of knowledge, application and enforcement that have previously prevented the efficacy of statutory law in protecting women's land rights?

Image: Sheila McKinnon



3

Results analysis

To assess accurately whether current NGO strategies are effective, the statutory legal framework must be sufficiently progressive and explicit with respect to gender equality, land and/or property ownership and, if possible, family and inheritance law. Mozambique and Tanzania were selected as target countries for this research because the land reforms explicitly promote gender equality. A sound indicator of the extent of change as a result of statutory law and NGO activities is the experiences of women most likely to encounter gender discriminatory land practices in rural communities. For both countries, such women were identified to be divorced women and widows because their relationship to the man through which access to property is granted under customary law had been severed. For divorced women, the issue is one of retaining control over some of the land as a result of the marriage partnership, whereas for widows, the issue is one of inheritance; both involve practices traditionally considered to be properly administered under customary law. In both Mozambique and Tanzania, surveys were administered to divorced or widowed women and community leaders in three villages where:

- (i) paralegals had been trained on legal rights related to land and to help resolve conflicts (paralegal villages);*
- (ii) there was an established paralegal office with trained paralegals working under the supervision of a qualified lawyer (office villages); and*
- (iii) there were no legal education or paralegal services available (control villages).*

Partner organizations were selected on the basis of specialization or coverage of land-related rights, the provision of paralegal services and access to women in rural communities.

Despite logistical and methodological challenges, the data obtained through the surveys suggested definitive trends and a complex interplay of various social and economic contextual factors; both allow inferences that could prove useful for a range of stakeholders in developing countries with plural legal systems.

A. Common themes

A noteworthy pattern has been that formal court decisions were, without exception, in favor of women's land rights claims following dispossession upon divorce or widowhood. While a number of court decisions are still pending in Mozambique, those that have been delivered resoundingly reinforce women's rights to inherit land when their husband dies, and women presumptively receive half the assets upon divorce, including land. This not only bodes well for the high number of cases awaiting decisions, but also for the consistency in application of the law in the formal justice system. However, the small sample size of NGO-assisted land claims in court makes it difficult to conclude with certainty that this trend applies universally across formal courts. If it can be assumed that judicial officers who are trained in gender equality and land rights are uniformly applying the relevant statutory law, this is encouraging for both domestic civil society and development agencies and donors.

Secondly, compliance with formal court orders remains a challenge in rural communities. Regardless of the reason, the implication is that increasing compliance with formal court orders depends on better communication of the decision to the relevant parties, and a commitment to enforcement by

local authorities, including leaders and police. Given women's general lack of influence within their local communities, there is an important role for NGOs to play in notifying police and community leaders of formal court decisions and their obligations to ensure adherence to them. Strengthening relationships and information sharing between civil society and enforcement authorities through seminars and networks could enhance awareness of binding court orders and the sense of responsibility to see them executed.

Thirdly, there was a strong preference among women in villages without paralegal services for formal courts over community structures. This could be read as an indication of dissatisfaction with their experiences with customary procedures and their negative results, and a general perception that formal courts are fair and follow the law. Community leaders across the two countries had knowledge, to varying degrees, of the relevant laws and acknowledged the benefit of women controlling land. Contrasting with their knowledge was their striking failure to resolve land conflicts in favor of women claimants, including those who went on to obtain court judgments in their favor. Three of the four exceptions to this disappointing trend (out of the 25 women who asked their community leader for a resolution) occurred in a community where the leader was a woman who was knowledgeable about and committed to enforcing gender equality, including in land disputes.

Finally, although paralegal services attempted mediation as the first method for resolving conflicts brought to them by widows and divorced women, they were generally unsuccessful. Resistance to paralegal mediation by husbands or the husbands' families is likely to be a reflection of the prevalence of contemporary practices

› WHEN WOMEN TOOK LAND CLAIMS TO FORMAL COURTS, THEY WON ‹

of customary norms, as reinforced by local community leaders. Accordingly, at this preliminary stage a sustained focus on strengthening NGO expertise in dissemination, education, legal drafting and practice is likely to be more impactful than diverting resources into mediation. Moreover, cases of dispossessed widows and divorcees tend to legally favor the woman; using mediation, which is often reserved for legally complicated situations or situations in which all parties are legally at fault, is unlikely to be as effective in promoting women's land rights as unequivocal public court judgments explicitly referring to and reliant on statutory law.

B. Mozambique

In Mozambique, the presence of a paralegal office coincided with a general trend in women seeking to challenge their dispossession; preliminary appeals being made to the community leadership, which generally failed to satisfactorily resolve the situation; women unanimously turning from community leaders to the paralegal service; and an emerging trend whereby women bypassed their community leaders and sought legal advice directly. Women in villages with paralegals generally (all but one) only challenged their dispossession in some way; only a few sought legal advice after their community leader failed to resolve their case; and even fewer women took their case to court.

TWO FACES OF CHANGE: THE NEED FOR A BI-DIRECTIONAL APPROACH TO IMPROVE WOMEN'S LAND RIGHTS IN PLURAL LEGAL SYSTEMS (continued)

These differences are not surprising. The paralegals in each village educated, trained and provided advice to women, but were extremely limited in their capacity to assist with drafting claim documents for court submission. Thus, while women's social attitudes and behavior had changed in these villages, they did not have the support, expertise and therefore capacity to take their claims to a formal venue. Mozambican women in villages with paralegals and paralegal offices preferred community courts in stark contrast to the women in the control villages, who preferred formal courts; their reasons highlight the dilemma underlying the present study. While community structures have a greater capacity to be responsive, adaptive and accessible, it is the content of their decisions that is problematic. All of the reasons cited in support of community courts relate to the process, rather than the substance of the decisions made. For those who preferred the formal courts, it was on grounds related to enforceability of decisions and the absence of corruption. This combination of reasons reinforces the ultimate goal — that land rights conflicts be resolved at the local level consistent with gender-neutral legislation.

I. Tanzania

In Tanzania too, interventions supported by the presence of a paralegal had a significantly greater impact as compared to those featuring the presence of mere paralegals or no paralegals at all. The largest difference between women in villages with a paralegal office and women in villages with paralegals only or with no paralegal services at all lay in

the rate of seeking advice and resolution from the community leader. Women in villages with paralegals only or without any services, were far less likely to approach a community leader. These women explained that the patriarchal culture was the reason for not approaching their community leader. By contrast women with paralegal offices continued to approach community leaders, but would revert to the formal courts if this decision was considered discriminatory.

This suggests that the stronger and more visible the presence of NGOs, the more likely are women to consider challenging the existing patriarchal culture. Ultimately, the ability of an established legal service to assist them with taking claims to the formal court emboldens and empowers women to take the first step of challenging their dispossession.

>WITH LEGAL ASSISTANCE,
WOMEN WILL CHALLENGE
DISPOSSESSION<

4

Conclusions

Overall, there are some interesting cross-country comparisons that further illustrate the importance and nature of the role of NGOs in this context. First, Tanzanian women had a markedly higher knowledge of and preference for formal court systems across all three conditions, which implies higher levels of understanding about rights, awareness of the functioning and role of the court, and knowledge of decisions made according to the law. Therefore, it can be fairly concluded that NGO efforts in disseminating laws to the population and in educating them about the law and how to use it are correlated with a preference for (and therefore an increased likelihood of accessing) formal courts.

Conversely, Mozambican women had a stronger preference for community courts. This may be due to a combination of: ignorance of the formal law; lack of familiarity or understanding of the operation of formal law and courts; lack of faith in the efficacy; relevance and/or wisdom of the formal court; or merely an attachment to locally applied norms. The cross-country comparison is useful in this case. As Tanzanian women were more likely to be permitted to stay on their land, it is obvious that the preference of Mozambican women is not due to better, more rights-protective practices with respect to women's control over land. It

also confirms that legal dissemination and education are critical precursors to any civil society intervention; women who do not feel familiar with or comfortable about the formal justice system are unlikely to approach NGOs for assistance in accessing its courts.

Consistent with the above differences, it can reasonably be concluded that knowledge, application and compliance with respect to women's land rights are inextricably linked to the relative prevalence, capacity and expertise of civil society organizations educating communities and providing legal assistance to women. The reasons for these trends are multiple, complex and interrelated; they are likely to canvas the nature, age and level of dissemination of the laws, differences in customary practices and their development, and the capacity of NGOs and government agencies to educate and facilitate the exercise of women's rights.

Further wider positive impacts are likely to result, provided that judicial officers who are trained in gender equality and land rights are uniformly applying the relevant statutory law. For example, given the prerequisite of paralegal assistance for women to take land claims to formal court increasing support for this type of NGO assistance should yield consistently positive results in cases of dispossession. However, given the difficulties identified in compliance with court orders remains a challenge in rural communities, as noted above NGOs an important role in notifying the relevant authorities of these decisions and their obligations to ensure adherence to them.

As already highlighted, the varying degrees of knowledge of community leaders across the two countries of the relevant laws and acknowledgement of the benefit of women controlling land contrasted with their striking failure to resolve land conflicts in favor of women claimants. Two important conclusions follow from this: first, consistent with the literature, despite their knowledge of legislation, community leaders tend to ignore the law in resolving land disputes within the communities; and second, the presence of NGOs and their capacity to assist with land rights claims is even more important because community leaders should not be expected to apply their knowledge of formal law.

Finally, although paralegal services attempted mediation as the first method for resolving conflicts brought to them by widows and divorced women, they were generally unsuccessful. Thus, an approach using law as a tool to coerce behavioral change seems a necessary precursor to a softening of position by adverse individual parties. Legal dissemination, education and assistance through NGOs appear to be coaxing change in communities and encouraging women to challenge their dispossession, both within their communities and through formal structures. This combined with the discrepancy between



Image: UN Photo/Eskinder Debebe

legal knowledge levels and decisions in land disputes by community leaders suggests that NGOs are a better target group to further catalyze change in rural community land practices with respect to women. Women's experiences in Mozambique and Tanzania suggest that this is perhaps the most important in securing their rights to land: without accessible legal advice and assistance, even the best and most progressive statutory land laws have little chance of changing community perceptions and practices in land distribution so that they recognize and sufficiently protect women's land rights.

Key lessons that may be useful for legal empowerment programming:

- (i) Knowledge, application and compliance with respect to women's land rights are inextricably linked to the relative prevalence, capacity and expertise of civil society organizations educating communities and providing legal assistance to women.
- (ii) An approach using the law as a tool to coerce behavioral change seems to be essential to a softening of position by adverse individual parties at the informal justice level.

LEGAL EMPOWERMENT OF UNWED MOTHERS: EXPERIENCES OF MOROCCAN NGOs¹⁴¹

1

Introduction

Unwed mothers in Morocco face a unique and difficult set of legal and cultural challenges in obtaining identity papers that are essential to move freely within Moroccan society and access social services, such as education, transportation, and medical care. The existing legal context presents significant barriers to access for unwed mothers. Both criminal and civil laws in Morocco severely repress behavior associated with being an unwed mother and have gaps that prevent unwed mothers from accessing their rights, leading to their social invisibility and legal inexistence.

Sexual relations outside of marriage are illegal in Morocco, with increased penalties where one or both parties are married to another person. At present, women are disproportionately imprisoned under these provisions. The mere threat of arrest and the definition of sexual relations outside of marriage as illegal, impacts on people's behavior, attitudes, health, which in turn limits their access to their rights. This is particularly true for unwed mothers. The Moroccan Penal Codes also criminalize abortion as a public morality offense. Abortion is illegal unless deemed necessary to protect the mother's health and conducted by a medical doctor. As a result, many single women may be forced to be mothers, whether the pregnancy resulted from illicit sexual relations between two consenting parties or rape, due to the lack of access to legal, safe and affordable means by which to end unwanted – and in this context, illegal – pregnancies.

The Family Code only recognizes legitimate paternal filiation, by which children are attributed to a father when he is legally married to the mother at the time of conception. 'Illegitimate' or 'natural' paternity does not exist under Moroccan law and children born to unwed mothers have no rights from their biological fathers, such as the right to bear his name, receive financial support or inherit. In contrast, mothers are legally affiliated to and responsible for their children merely by the fact of giving birth to them.

These facets of the laws are often, whether correctly or incorrectly, attributed to religious precepts. As a result, they are more difficult to contest and challenge.

The law provides for DNA testing to establish paternity, but only to prove or contest the parentage of a child conceived during a legal marriage. However, the law does not provide for court-ordered paternity testing of a biological father against his will upon the request of the unwed mother or her child. Finally, the fact that adoption is not legal in Morocco further limits options available to unmarried women who become pregnant.¹⁴²

The two main procedures impacting on unwed mothers and their children relevant to this discussion are registering a child's birth and obtaining a Family Booklet.

First, for a child to legally exist, the birth must be registered at the Civil Status Office where s/he was born. Reforms undertaken in 2002 introduced specific provisions allowing an unwed mother to register her child's birth. Registration requires a birth attestation written by a doctor or midwife and legalized by the local authorities, as well as a copy of the

parents' marriage certificate. Unwed mothers may register their child's birth, but must choose a first name for the child's fictional biological father that begins with Abd.

Second, the Family Booklet is the main official document proving one's legal identity and civil status, and is of utmost importance in one's daily life. The Family Booklet is required for, inter alia, obtaining a National Identity Card, a passport, a driver's license, free medical care and other social services, legal aid assistance in courts and a vaccination booklet. Also, to request an official birth, marriage or residence certificate, the requesting individual needs to present the Family Booklet. It is also necessary as proof of identity to be able to obtain employment, register for government literacy classes, be admitted to the hospital, start a business, purchase a home or other property based on credit, get married, open a bank account, receive money transfers, and claim inheritance rights from one's parents. Registration in a Family Booklet is generally required to enroll children in school. Without a Family Booklet, people simply do not legally exist, a situation in direct contravention of article 16 of the International Covenant on Civil and Political Rights. Finally, it is illegal not to have official identity papers on one's person.

A central question thus is whether or not unwed mothers have the legal right to obtain a Family Booklet for themselves and their children. It is worth noting that under the pre-2002 Civil Status Law, any single person, man or woman, could obtain their own Family Booklet. In contrast, the current law restricts the drafting and granting of a Family Booklet to a married man only, with only a few exceptions where his wife may obtain a copy.

¹⁴¹ The full text of this case study, including references, is found in S Willman Bordat and S Kouzzi, 'Legal Empowerment of Unwed Mothers: Experiences of Moroccan NGOs' in S Golub (ed), *Legal Empowerment: Practitioners Perspectives IDLO* (2011) 179-201. This research for this paper was undertaken prior to the Constitutional reforms in Morocco in 2011 which potentially changes the status of unwed mothers and their children under Moroccan law.

¹⁴² The system of *kafala* exists in Morocco, which is a system of guardianship or legal custody of children however such children cannot inherit from their guardians.

2

The intervention

A. Grassroots-level human and legal rights education

Local non-governmental organizations (NGOs) in Morocco have established different methods of assisting unwed mothers to find avenues to secure their identity papers and assert their legal rights, while at the same time helping them to find support from other program participants. Since the early to mid-2000s, four local NGOs have been leading members of a group of local organizations from across the country, which, in collaboration with Global Rights, designed and implemented a widespread grassroots-level program of human and legal rights education for primarily illiterate women from traditionally underserved and marginalized populations (the program).

This broad-based, long-term initiative includes:

- (i) participatory drafting of an Arabic language facilitator's manual with 74 two-hour program sessions on diverse human and legal rights topics (the Manual);*
- (ii) intensive training and ongoing peer evaluation of hundreds of local NGO members – primarily young women – as program facilitators; and*
- (iii) implementation of the program by network member NGOs with tens of thousands of women participants in different areas across Morocco.*

Based on in-depth consultations with the participants, the program was expanded to contain additional themes identified by the women themselves. The program does not limit itself to providing mere information about the laws, but uses a participatory methodology appropriate for developing individual capacities to defend one's rights and building group skills for advocacy and social change.

The program also enables unwed mothers to break the silence and speak out about their lives. In 2002, unwed mothers participated actively with other women beneficiaries to revise the first draft of the program manual, suggesting modifications and additions related specifically to sessions on the rights of unwed mothers. They also proposed new topics of interest to them for the program. As a result, the second version of the Manual, published in 2004, contains a session on procedures for obtaining a Family Booklet, as well as field visits to Civil Status Offices, hospitals and the police, all of which also benefit other women.

An integral part of the program includes group field trips to local public institutions responsible for women's rights – such as the police station, Civil Status Office and courthouse – during which women meet and hold question and answer sessions with relevant personnel.

In field visits to Civil Status Offices, women learn about services offered, papers necessary for different applications and files, and procedures to follow. They also become familiar with the offices, and make contact and form relationships with the staff that then allow them to return to the Civil Status Offices for assistance.

Unwed mothers actively ask questions during these field visits, including on procedures for registering children and obtaining a Family Booklet. Local NGOs also report how these field visits demystify the local public administrations and make them a less intimidating and threatening place for women.

B. Court Accompanying Program

In 2006, in collaboration with Global Rights, local NGOs in eight different regions in Morocco launched a one-year pilot initiative to set up structures for Court Accompanying Programs within their organizations. Local NGO staff accompanies women to courts and other relevant government offices and public services in order to orient

them to the justice system and provide support during the process. The NGO staff monitors the authorities' behavior and decisions on these cases and conduct outreach activities for local authorities and civil servants, raising their awareness on women's rights. They also provide legal counseling for women and referrals to lawyers for pro bono or reduced fee services.

The four local NGOs handle diverse family and criminal law matters concerning hundreds of women beneficiaries per year. Unwed mothers comprise approximately 10 percent of their total beneficiaries of court accompanying activities.

While the program was initially conceived as primarily accompanying women to courts and monitoring the judiciary, women also frequently approach NGOs for assistance with legal problems involving other public administrations, such as the police station, Civil Status Offices and hospitals. For example, NGOs also intervene with local authorities to find solutions to the obstacles listed above to unwed mothers when registering their children's births and obtaining a Family Booklet. Their staff frequently accompany these mothers to the hospital if they have difficulties obtaining a birth attestation. When unwed mothers cannot obtain certain required documents, the NGOs work with local administrative authorities to find an alternative solution that will allow them to eventually register their children. In frequent cases where the 30-day deadline to register a child's birth has expired, volunteer lawyers help unwed mothers file a court case to obtain a judicial declaration of birth.

As with the human and legal rights education program, while the Court Accompanying Program was intended first and foremost to help women access their rights through individualized legal orientation and assistance, the Court Accompanying Program also impacted local authorities' attitudes, behavior and policies towards unwed mothers.

LEGAL EMPOWERMENT OF UNWED MOTHERS: EXPERIENCES OF MOROCCAN NGOs (continued)

3

Results analysis

A. Grassroots-level human and legal rights education

Unwed mothers concretely benefited from the legal information in the specific program session on their rights, which explains the procedures for registering a child's birth and applying for a Family Booklet. In one example in south-central Morocco, two rural, unwed mothers participated in an education session on the procedures for registering children out of wedlock. Afterwards, they approached the facilitator, who directed them to the NGO court accompanying services. As a result, both women went on to file court cases and obtain judicial birth declarations for their previously unregistered children. In the four NGO experiences described here, unwed mothers also formed independent discussion, peer education and support groups among themselves to share their experiences and collectively analyze them. In one medium-sized town in particular, the unwed mothers who participated in the program decided to create their own NGO just for unwed mothers.

Similarly NGOs describe the impact that participating in the legal and human rights education has had on other program participants as a result of unwed mothers' presence in the groups, as well as the specific program sessions on unwed mothers' rights. They mention how attitudes of rejection towards unwed mothers were replaced with sympathy and support. On a larger scale, as a result of the program there was a shift from the consensus of silence around the issue of unwed mothers to a shared vision of

participants that unwed motherhood is a social reality that must be addressed. One participating NGO noted that the other women started behaving normally towards the unwed mothers and stopped marginalizing them. Another unanticipated positive result reported by local NGOs is the effect the program has had on local public administrative staff and authorities, particularly due to the field visits organized in the program. As specifically concerns unwed mothers, NGOs organized field trips to Civil Status Offices where program participants meet with the local authorities and public servants, mainly from the Civil Status Office. Since the authorities address the entire group, positive, superficial answers to questions posed are witnessed by many. The authorities then become accountable for such statements when women later return to apply the laws and procedures in their specific cases.

Unwed mothers are reportedly treated with more dignity at the Civil Status Office if an NGO representative accompanies them. Anecdotal evidence from local NGOs describes how local Civil Status authorities are now friendly, polite, respectful and willing to provide unwed mothers with information and try to simplify procedures for them. In one large city, local Civil Status officers accommodate unwed mothers known to be beneficiaries of the local NGO, and help them with their paperwork from other offices and administrations, facilitating all the steps necessary to process the case with other civil servants.

When consulted by local NGOs, unwed mother beneficiaries expressed conflicting opinions about trying to obtain their own Family Booklet. Some complain that registering a natural child's birth and obtaining an individual

› NGO HELP IS CRUCIAL
IN ACHIEVING SOME
RECOGNITION AND DIGNITY
FOR UNWED MOTHERS ‹

Family Booklet maintains their current stigmatization and that of their child. Since the law requires a symbolic father's name beginning with Abd for registration, children are easily identifiable as being born to unwed mothers. Following reforms in 2002, unwed mothers are now requesting exemptions to the law restricting Family Booklets to legally married couples.

Further, although the program has been successful in making certain changes, many unwed mothers still express concern with the fact that if an unwed mother obtains a Family Booklet, it effectively exonerates the biological father from ever having to take responsibility for the child. As one NGO member summarized the viewpoints of many unwed mothers, "what is the point of being legally empowered as an individual if other actors – the state, biological fathers – are thus absolved of their legal responsibility?" Some women emphasized the need for sustainable measures, for instance, where the father's paternity is attributed and where he assumes his share of responsibility for the child's upbringing. This seems preferable as compared to the current solution of forcing the biological father to marry the mother, only to divorce her immediately afterwards and have no legal responsibility for the child. Local NGOs have now requested assistance from Global Rights to design and implement future activities to address this perspective voiced by unwed mothers.

B. Court Accompanying Program

One indicator of social change highlighted by local NGOs is that unwed mothers actively seek out NGO services and assert their rights openly, rather than hiding and accepting their plight. Second, local NGOs describe how the Court Accompanying Program led some unwed mothers to confront authorities directly and resolve problems themselves without the NGO accompanying them. Third, nearly all of the unwed mothers who contacted the four local NGOs to date have been able not only to register their children's births, but also to obtain Family Booklets in their name in which to record their children.

In the two years since the May 2007 completion of the initial one-year pilot period of training and setting up of the Court Accompanying Program structures, the four local NGOs were each able to obtain Family Booklets for 11 unwed mothers per year on average, a significant number in the context. If it were not for the Court Accompanying Program, the number would likely be zero.

In addition to the limited NGO human and financial resources described earlier, the lengthy procedures mean that even with NGO assistance, it takes unwed mothers three to eight months to obtain a Family Booklet. Many unwed mothers still hesitate to address their situation openly because of the taboo and criminal nature of the issue. Since legal reforms impacting unwed mothers' status have only recently been enacted, the authorities are still grappling with their interpretation and application.



Image: Matthewb

Most importantly, unwed mothers do not have a clear legal right to obtain a Family Booklet in the legislation as it currently stands. In many places, such as small cities where there is no NGO Court Accompanying Program, the Civil Status Office does not give unwed mothers Family Booklets.

Finally, as with the human and legal rights education program, while the Court Accompanying Program was intended first and foremost to help women access their rights, through individualized legal orientation and assistance, the Court Accompanying Program also impacted the attitudes of local authorities, behavior and policies towards unwed mothers. Moreover, local NGOs describe how many of their unwed mother beneficiaries are referred to them now by the local authorities themselves.

4

Conclusions

Practitioners, policymakers and donors should pay careful consideration to the details of any given legal context when designing, implementing and evaluating law-oriented development initiatives aimed at women. Laws concerning unwed mothers have implications for the role of local NGOs, and highlight implications for the definition of results and the measuring of success. Different circumstances can make it difficult to consider whether or not projects promote women's legal empowerment.

The popular discourse one frequently hears in Morocco – especially among the authorities, intellectuals and other members of the elite – is that the current problem is the population's ignorance of the laws and their rights.

A recurring comment by both official and civil society actors is that legal education campaigns are the needed solution to many social ills. Under the above circumstances, in which laws are either not applied, are unclear, or have gaps, awareness of them is insufficient; knowledge alone is not power and does not effect change. The situation of unwed mothers in Morocco illustrates the need for concrete assistance in accessing the public administration and in navigating the system in order to obtain some measure of justice for themselves.

LEGAL EMPOWERMENT OF UNWED MOTHERS: EXPERIENCES OF MOROCCAN NGOs (continued)

4

Conclusions (continued)

The question then becomes what the role of local NGOs is in this context. In addition to providing legal information and advice, they serve as intermediaries between women and the authorities. The NGO staff members' knowledge of procedures and their personal contacts with staff at different administrations facilitate the process for unwed mothers, as well as the civil servants' jobs. The NGO presence also serves as watchdog over local authorities. Through such accompanying, NGOs help unwed mothers avoid humiliation at public administrations and provide protection from corruption and abuse of authority by civil servants. In the absence of traditional family support networks and social connections that usually facilitate this, NGOs step in to fill this role for unwed mothers. In areas where the law is unclear or vague, NGOs complement the work of the local authorities and encourage advantageous interpretations of laws. This is the case with the local police, who now limit their interventions at hospitals to determine the unwed mother's identity in order to avoid the child being abandoned. Without any orders or specific guidelines on how to deal with unwed mothers, the police frequently refer the unwed mother to local NGOs for assistance instead of arresting them.

In areas where there is a legal gap, as with the issuance of a Family Booklet to an unwed mother, local NGOs work with local authorities to encourage alternative solutions that are more beneficial to women's rights, such as convincing the local Civil Status Office to give unwed mothers their own Family Booklet.

Practitioners, policy-makers and donors must realize that support for NGOs that provide such direct assistance to marginalized populations will be necessary over the long term until the larger structural issues of social stigmatization, illiteracy, corruption, and legal and administrative reform are addressed. Promoting a dialogue between program participants about their situations and struggles can help shift reactions of silence to a socially taboo subject toward sympathy and support and the acknowledgment that unwed mothers are a social reality that must be addressed.

The current legal context in Morocco also raises questions about defining legal empowerment. Legal empowerment for unwed mothers in Morocco not only concerns ensuring that good laws are applied or that women have access to the rights contained therein, as is the case with registering births, but also involves NGOs working with local authorities to identify discriminatory laws, such as the Penal Code provisions outlawing sexual relations outside of marriage, overcome legal gaps, or in the case of the Family Booklet, interpret the law in a progressive manner. Future legal empowerment initiatives concerning unwed mothers should therefore



Image: See Wah

focus on access not only to the justice system, but also to the legislative reform process. In a long-term strategic process to respond to unwed mothers' priorities and opinions, NGOs can build on the pilot experiences implemented at the local level and consolidate current unofficial practices to generate support and mobilize the state to integrate and recognize unwed mothers and their specific realities and concerns in the law.

Key lessons that may be useful for legal empowerment programming:

- (i) In addition to providing legal information and advice, NGOs can serve as intermediaries between women and the authorities.
- (ii) Practitioners, policy-makers and donors must realize that support for NGOs that provide such direct assistance to marginalized populations will be necessary over the long term until the larger structural issues of social stigmatization, illiteracy, corruption, and legal and administrative reform are addressed.

THE TRAFFICKING OF GIRLS IN WEST BENGAL¹⁴³

1

Introduction

The state of West Bengal in India is a major source, destination and transit point for victims of trafficking. The Indian National Crime Records Bureau reports that in 2009 there were 160 registered cases of trafficking in West Bengal, although the reports of both governmental and other actors suggests the actual number of trafficking cases is much higher. Within West Bengal, the districts of Jalpaiguri, Darjeeling, North 24 Parganas and South 24 Parganas present particular challenges from a trafficking standpoint. Jalpaiguri and Darjeeling, which are located in the north of West Bengal, have long faced problems of unsafe out-migration by individuals bound for Kolkata and other metropolitan cities in search of better employment opportunities. Kolkata is also generally considered as a major trafficking destination and center for brothel-based prostitution, along with Mumbai and Delhi.

It appears that girls are more vulnerable than boys to be the victims of trafficking. A 2003 study of trafficking in Madhusudanpur, a village in South 24 Parganas, showed that every second to third household in the village lives off the income of a trafficked girl between the ages of 13 and 15. It is reported that traffickers in West Bengal have obtained access to girls by pretending to be grooms without dowry demands. In other cases, trafficking has been facilitated by relatives or 'friends' of the victims, as well as teachers and placement agencies. Girls who have been exploited are also commonly used to lure girls from source areas. A recent

study on trafficking in India by the Indian National Human Rights Commission (NHRC) notes that some parents expressed a willingness to send their daughters away "as soon as they get the chance."

Girls who have been forced into prostitution are often only permitted to leave if they find replacements. Even where girls fall pregnant, Madams insist that the girls' children must remain in the brothel to repay debts that are owed. Where girls are able to return to their families and communities, they are frequently rejected, marginalized and vulnerable to being trafficked again.

The Indian Constitution explicitly prohibits trafficking of human beings and forced labor, and makes both offenses punishable. Article 23(1) provides that: "(t)raffic in human beings [...] and forced labor are prohibited and any contravention of this provision shall be an offence punishable in accordance with law." The Immoral Traffic Prevention Act 1956 (ITPA) is the main legal instrument addressing the trafficking of human beings in the country. The ITPA is focused on trafficking for the purpose of prostitution. The ITPA also provides for the rescue and rehabilitation of victims/survivors of trafficking, action against exploiters and increased punishment for trafficking offenses involving children.

The extant law establishes a legal framework for addressing human trafficking, but difficulties arise in the enforcement of the laws. Prosecution and convictions of traffickers is extremely challenging. Adequate training of law enforcement officers and immigration officials, and enhanced competence to act both within and across state borders, are fundamental elements in recognizing, preventing and combating trafficking

cases on a global scale. The training of public prosecutors in trafficking laws and procedures is a fundamental component in ensuring the effective prosecution of human traffickers and the full enjoyment of victims' rights, including the right to redress for harm suffered.

In West Bengal, girls are often trafficked from villages with poor legal support structures. In many cases, police stations are far away and the staff of community-based organizations generally has poor knowledge of the ITPA. Where girls and their families are referred to local lawyers, the latter often compound problems, due to lack of sufficient training and sensitivity to the issue.

Furthermore, human trafficking is usually exacerbated by the lack of legal assistance services available to victims and by the lack of awareness concerning the existing legal protection available to victims of trafficking. Victims and witnesses of human trafficking are often not aware of the mechanisms available to obtain justice and redress. In addition, law enforcement officials and judicial organs may not have adequate resources and training to ensure full victim protection.

The study on trafficking in India by NHRC raises serious concerns regarding re-victimization of trafficked victims (the NHRC study).¹⁴⁴ For example, girls are likely to be re-victimized in cases where they have been:

- *charged with solicitation and/or with undocumented status;*
- *not notified of the charges against them;*
- *not informed about their legal rights;*
- *not informed of the progress and disposition of proceedings against their alleged traffickers;*
- *kept in custody for long periods; and/or*
- *subjected to insensitive, traumatic cross-examination in court.*

¹⁴³ This study provides a summary of two IDLO reports entitled *Preventing and Combating the Trafficking of Girls in India Using Legal Empowerment Strategies (2011)* and *Final Report: Crossing the Hurdles: Strengthening the Legal Protection Framework for Girls in Developing Countries (2011)* under the title 'Project Report Phase II - Legal Awareness' <<http://www.idlo.int/english/WhatWeDo/Research/LegalEmpowerment/Pages/PilotProjectHumanTrafficking.aspx>> at 28 August 2012. These reports contain all references.

¹⁴⁴ S. Sen and P.M. Nair, *A Report on Trafficking in Women and Children in India 2002-2003*, Vol. 1, Institute of Social Sciences, National Human Rights Commission and UNIFEM (2004), cited in IDLO, *ibid*.

THE TRAFFICKING OF GIRLS IN WEST BENGAL (continued)

The NHRC study found that victims and exploiters are commonly rounded off together by the police (sometimes along with non-governmental organizations (NGOs)), taken to the police station and kept together during the registration of a first instance report, as well as during interviews and other processes of investigation. This gives ample opportunity to the exploiters to terrorize the victims, and prevent them from speaking out and exposing the crimes.

Under pressure from brothel keepers and other exploiters, girls tend to present themselves as adults. According to the NHRC study exploiters then:

... lose no time in getting [the girls] released on bail [...] to re-traffic them back to the same or a different brothel. Had they been held as children (under 18 years of age), they would have come under the purview of the [Juvenile Justice] Act, where the response mechanism is quite different. As per [this Act], trafficked children are defined as children 'in need of care and protection' and [...] are not to be produced before a court of law.

It should also be noted that in the NHRC study, over half of females rescued from trafficking indicated that women police officers were not present while they were subjected to a body search, although this is required by law. More than 90 percent indicated that following rescue, they were not informed of their rights by the police.

Given the existence of anti-trafficking laws, it is appropriate to consider whether legal empowerment could be an appropriate strategy to improve the implementation of formal laws and thereby reduce the structural and cultural factors that provide an incentive for trafficking to take place. However, as trafficking is accomplished by deceiving girls and their families, legal empowerment of the victims of child trafficking is significantly challenging, particularly in light of the widespread power imbalances that are operative in this setting.

2

The intervention

In June 2010 IDLO, in partnership with SANLAAP¹⁴⁵ in West Bengal, sought to undertake a year-long legal empowerment project aimed at preventing and combating child trafficking in the region (including cross-border trafficking), with a particular focus on the legal empowerment of girls who are victims of, or vulnerable to, trafficking.

Importantly, the project did not focus directly on providing legal counseling and assistance services to the girls; rather, it focused on capacity building and creating a network of legal and paralegal officers who would in turn assist the girls. Specifically, the project was designed to ensure that rescued girls in the four key trafficking districts of Jalpaiguri, Darjeeling, North 24 Parganas and South 24 Parganas were provided with prompt, efficient and effective legal assistance. The objective was to make girls more aware of their rights under existing laws, make legal assistance available to girls, and in particular ensure that girls' procedural rights were guaranteed before, during and after all legal proceedings in which they were involved. A priority was to provide legal/paralegal services as soon as possible after the need for such services has arisen. The services were intended to be provided at the first and most likely entry point for girls looking to be rescued from trafficking situations, typically in shelters, hospitals or similar rescue points. In emergency situations, legal and paralegal support needs to be provided promptly and efficiently. In order for girls to be assisted during police investigations, medical check-ups, the filing of police reports or similar emergency post-rescue situations, legal or paralegal experts

➤ POLICE ACTION REMAINS DEFICIENT IN THE FACE OF RAMPANT GIRL-TRAFFICKING ◀

have to be either present at a given rescue point, or have to be able to reach the rescue point within a short time - ideally no longer than one hour after a victim asks for emergency services. For other non-emergency situations, legal or paralegal experts have to be available on a regular basis for consultations and assistance.

To achieve these objectives the intervention undertook a number of legal empowerment projects at the local, district and state level in West Bengal. These projects began with trainings at the local and district level and later operated at the state level, while also seeking to raise community awareness through rallies.

At the local level, selected staff members of a number of community-based organizations (CBOs) were trained to work as 'barefoot legal counselors' on trafficking laws and the problems faced by girls who have been trafficked. SANLAPP trainers emphasized the need for gender-sensitive and child friendly services in handling trafficking cases. Trainees were provided with information, education and communication materials highlighting specific provisions of trafficking-related laws. The training also involved discussing the drivers of trafficking and outlining the existing child protection infrastructure. Contact information for district protection officers, child welfare committees and shelter homes was also provided.

¹⁴⁵ SANLAAP, a non-governmental developmental organization operating in West Bengal, has operated since 1987s to combat the trafficking of women and girls by providing shelter homes, advocacy, prevention, stakeholder sensitization (including training of police and prosecutors), rescue, restoration and rehabilitation of trafficked persons, and socio-economic reintegration.

Local organizations were chosen on the basis of demonstrated success in addressing concerns within their communities. SANLAAP organized residential trainings for selected staff on the law related to trafficking and the rights of trafficking victims. This initiative supported the establishment of a cadre of individuals working at the grassroots level who are trained to provide girls rescued from trafficking situations with basic information concerning their rights. These 'barefoot legal counselors' were also involved in raising awareness in vulnerable communities on girls' rights and actions that should be taken when girls are missing (i.e. lodging a first instance report with local police) and in disseminating information concerning existing statutory schemes and bodies meant to benefit trafficking victims. Following the trainings, girls who had been trafficked, as well as families of trafficking victims, were subsequently provided legal assistance and support by CBO staff and lawyers trained under the project. This involved assistance with trafficking prosecutions and the promotion of the safe repatriation of trafficking survivors.

Subsequently, selected lawyers in the four districts of West Bengal were trained to provide assistance to victims of trafficking in connection with legal proceedings - for instance, where trafficked girls have been charged with crimes and where they are witnesses in trafficking prosecutions. The trainings, which were informal and highly interactive, included a discussion of the main legal provisions of relevance for trafficking in India, as well as basic information on the Indian legal system, including, notably, information on the difference between civil and criminal cases and the role of police and prosecutors. Public prosecutors and police officers operating in the districts attended the trainings as resource persons, in order to help in creating an anti-trafficking network.



Image: Sheila McKinnon

In parallel with district-level advocacy efforts, SANLAAP organized a state-level consultation in February 2011 in Kolkata, designed to examine ways to improve access to justice for victims of trafficking, including the question of delayed court cases, difficulties in the prosecution of trafficking cases, and the need for changes in attitude vis-à-vis trafficking victims. It was also stressed that those working in the anti-trafficking field must receive additional training on how to access justice mechanisms and procedures and be made more aware of how to use anti-trafficking legislation for the benefit of victims.

Rallies at the community level were held in order to enhance awareness of trafficking issues and to provide basic information on how to obtain legal assistance in cases of trafficking. Consultations were held with girls who

had been trafficked and their families to assess their needs and to provide them with information on their legal rights.

Finally, legal awareness training for female self-help group members,¹⁴⁶ legal awareness camps with the residents of shelter homes, and legal training of youth leaders were also undertaken. Discussions revolved around the existing legal provisions in place to protect women and girls, such as the Domestic Violence Act 2005, and how they could seek justice if their rights were violated. The aim of enhancing the knowledge of these stakeholders was to sensitize and orient these groups on trafficking related legal issues and to develop links between district based NGOs and CBOs, as well as to advocate on the legal rights of the victims.

¹⁴⁶ Self-help groups are functional in almost all the West Bengal communities and are very active in supporting other women and children who face abuse and exploitation. It was understood that if they were aware of the legal issues, they could actively support the vulnerable women and children and could also help the restored victims.

THE TRAFFICKING OF GIRLS IN WEST BENGAL (continued)

3

Results analysis

The evaluation was conducted using mainly qualitative methods and tools including semi-structured interviews and focus group discussions. The evaluation sample was drawn from three areas — South 24 Parganas, North 24 Parganas and Kolkata.

A. Trafficked girls perceptions and improvements in justice outcomes

During the project period, legal assistance was provided to 83 victims of trafficking, sexual abuse/ exploitation and other violence and 69 girls were rescued from prostitution and other exploitative situations. SANLAAP/CBOs aided in the arrest of 56 traffickers, 18 of whom were convicted.

A quantitative survey (the Polling Booth Survey 11) was used to collect preliminary information in relation to girls' perceptions of the program. Following the survey, each respondent was asked for their consent to participate in a focus group discussion covering issues related to the counseling and assistance they received. Twenty-four out of the 28 girls involved in the polling booth survey accepted to participate in a focus group discussion. Both exercises were proposed because the team was not sure if the girls would have accepted to participate in a focus group discussion, so the polling booth was a discreet methodology used that allowed the evaluation team to capture quantitative data on the beneficiaries specific to legal services offered.

Eighteen of the 28 girls surveyed said that they received legal counseling and/ or legal assistance from SALAAP and the CBOs¹⁴⁷ and eighteen agreed that the CBO helped to file or follow up on the criminal complaint against their

trafficker; twenty-two of the 28 girls surveyed using the polling booth method agreed that it is a useful service and that they would recommend it to their friends.

The evaluation staff visited the Sneha Shelter home, a shelter operated by SANLAAP in Kolkata, and were allowed to observe operations at the shelter and to better understand the environment in which the girls lived and their daily routine, as well as the types of services provided by the staff and counselors. The evaluators noted that legal counseling was scheduled to take place once a week and the girls seemed comfortable with the personnel.

B. Counselors and lawyers

The project trained 39 barefoot legal counselors from 23 CBOs and 16 staff members from SANLAAP. Additionally, they were able to train 40 lawyers, which doubled the initial objective. The evaluation team met 15 barefoot legal counselors representing ten organizations.

In the focus group discussions, all the counselors mentioned that the trainings increased their knowledge on legal procedures and that they were able to use this knowledge to provide better legal assistance. The consultations also revealed that the project training courses had facilitated rapport and networking among the barefoot legal counselors. Additionally, the barefoot legal counselors learned about the process of repatriation, suo moto filing of cases, and alternative redress mechanisms, such as approaching the Superintendent of Police or the District Magistrate in case of police inaction. The counselors gave examples of how they have put this knowledge into practice.

The barefoot legal counselors also mentioned that the increased knowledge and understanding of legal procedures ensured that the police were more

alert and responsive towards them. Overall, all the respondents said that their confidence in dealing with the police had increased since the training. Furthermore, all the respondents mentioned that following the training, they were able to provide better counseling and assistance to victims of trafficking, domestic violence and child abuse.

The legal training has also helped lawyers gain a better understanding and sensitivity of trafficking issues and has improved their knowledge on its related legal procedures. The lawyers also mentioned that they became more sensitive towards trafficking victims and empathized with them. The training removed their negative opinions and feelings towards prostitution and has motivated them to support the victims. However, according to the evaluation, the services of these trained lawyers were not used by all CBOs and there is a need to improve networking between them.

A weakness in the project was the lack of connections between the CBOs and the lawyers. Three lawyers mentioned that they barely knew the CBOs and had never provided any legal advice to them. The CBOs had not established a rapport with them or used their services after the training. The lawyers stated that they were willing to provide legal assistance to trafficking victims referred by the CBOs, but that not many cases had been referred to them since the training. One solution to this issue could be to have regular networking events, such as quarterly/bi-annual meetings to be held in which the CBOs and lawyers would discuss trafficking issues with the aim of identifying ways to address them. In addition the use of law enforcement agencies, the judiciary and lawyers was valuable, yet could have been increased. The involvement and input of these agents would contribute to the delivery of more quality services and, ultimately, to the pilot project's greater success.

¹⁴⁷ Only 18 girls reported that they had received legal assistance and counseling services, as the rest of them have not filed or are not pursuing their court cases. As a result, they did not need and had therefore not accessed legal counseling and assistance provided under the project. These girls participated in the project legal awareness activities and were therefore included in the sample.

4

Conclusion

The intervention in West Bengal raises a number of issues concerning the scope and effectiveness of legal empowerment projects for the international development community. First and foremost, it reveals the importance of local partner organizations in legal empowerment interventions. Not only do they have considerable knowledge of the issue at hand, in this case trafficking, they often have strong networks with other CBOs and members of the legal community. Associating with an experienced partner should be an essential part of the project design.

The intervention further indicates the value in training local CBO staff to work at the grassroots level as paralegals. They should work in conjunction with the lawyers to provide easy access to legal counseling and assistance services. This two-tier system encourages easier access for the intended beneficiaries to counseling at the village level and to speak to lawyers for further legal assistance.

Moreover, the participatory training methodology, easy-to-use resource material (drafted in the local language) and use of public prosecutors, lawyers and police personnel as resource persons are three factors that ensured that the training programs were effective. Programs should especially encourage the involvement of more women paralegal and legal experts.

Addressing the problem of child trafficking in India requires a multi-faceted approach, including the undertaking of legal reform to ensure compliance with international standards and protection for child victims. Training

law enforcement officers, public sensitization, efforts to reduce the financial insecurity that often pushes girls into trafficking, strengthening of community vigilance structures and intensifying birth registration efforts are all essential components of the global effort to combat human trafficking. Furthermore, it requires action on a range of fronts and not only in the legal arena. As frequently observed, poverty alleviation and the expansion of opportunities for education are crucial to the fight against trafficking, as are campaigns designed to address the pervasive gender discrimination that frequently causes girls to be regarded as less worthy of care and protection. To this end, the case study indicates that to be successful legal empowerment strategies require coordination and cooperation from a wide array of participants. Legal education was not sufficient in the absence of a support structure to enforce victims' rights. The same problem existed for the passing of legislation dealing with trafficking - unless it was enforced by agents within the justice realm, it would provide little change. In this particular intervention, the combined use of 'top-down' and 'bottom-up' approaches proved to be the key element to maximize protection.

> 'BAREFOOT COUNSELORS' BOOST EMPATHY TOWARD TRAFFICKING VICTIMS – AND PROSECUTIONS <

Ultimately, in order to address women's access to justice, social and cultural issues need to be examined and considered as part of empowerment strategies, including structural problems such as poverty and lack of education. By identifying these elements as part of the problem, development initiatives can cast a wider net than just to focus on the girl victims, they can stimulate policy changes and can encourage CBOs to assess family risk factors which may lead to the selling of girls in the first place. The case study illustrates that when multiple actors are engaged - victims, paralegals and CBOs, lawyers, police, and ultimately to the judiciary - victims have a better chance to realize their rights and entrenched problems are more likely to be effectively tackled.

Key lessons that may be useful for legal empowerment programming:

- (i) Legal education is not sufficient in the absence of a support structure to enforce victims' rights.
- (ii) Legal empowerment strategies require coordination and cooperation from a wide array of participants. When multiple actors are engaged - victims, paralegals and CBOs, lawyers, police, and ultimately the judiciary - victims have a better chance to realize their rights and entrenched problems are more likely to be effectively tackled.

USING LEGAL EMPOWERMENT TO ADDRESS VIOLENCE AGAINST WOMEN IN AFGHANISTAN

1

Background

Violence against women in Afghanistan remains a pervasive and deeply rooted problem, taking wide ranging and varying forms, from domestic violence, sexual harassment and rape to trafficking of women and children and honor killings, among others.¹⁴⁸ The Afghan Constitution of 2004, domestic legislation, in particular the 2009 Law on the Elimination of Violence against Women (the EVAW Law),¹⁴⁹ as well as international obligations provide extensive protection for Afghan women. However, many women have not been able to benefit from such provisions because of an acute lack of awareness among citizens and justice personnel about fundamental rights and the implementation of domestic laws. In the case of the EVAW Law, even where illegal discriminatory practices are reported, widespread beliefs among justice providers that such practices are legitimate, or a family matter rather than a legal matter, often undermine

the implementation of the law.¹⁵⁰ A survey undertaken by IDLO in 2010 indicates that in some instances where bride stealing, honor killing and forced marriages were reported to the police, the police did not respond and the matter remained unresolved.¹⁵¹ Even where the state brings acts criminalized under the EVAW Law before the court, judges may decide to prosecute such acts under the Penal Code or Shari'a law instead. This often results in the perpetrator being acquitted, charges being reduced to less serious crimes, lighter sentences being imposed and women victims being accused of 'moral crimes'.¹⁵²

In fact it has been extensively documented that women who seek to escape abusive relationships or forced marriage by running away are frequently jailed.¹⁵³ Although running away is not in itself a criminal offence under Afghan law, women who do so are often imprisoned on the assumption that they either have committed, or will commit, the offence of having sexual intercourse outside of marriage (zina).¹⁵⁴

A 2011 report by the Office of the High Commissioner for Human Rights

and the UN Assistance Mission in Afghanistan on the implementation of the EVAW Law (the OHCHR/UNAMA Report)¹⁵⁵ also documents the extensive use of mediation for domestic violence complaints. Institutions utilizing mediation practices ranged from the Police Family Response Units to the Department of Women's Affairs and the Afghanistan Independent Human Rights Commission.¹⁵⁵

Violations of women's rights take place against a backdrop of a serious shortage of legal professionals and justice resources in the country. Justice institutions, particularly in the provinces, struggle to recruit and retain qualified legal professionals and women legal professionals in particular. IDLO research on women's participation in Afghanistan's formal justice system identified that in May and June 2010 women constituted approximately 6 percent of attorneys, 6.4-9.4 percent of prosecutors and 4.7-5.4 percent of judges.¹⁵⁶ The low representation of women in the justice sector has been identified as one of the factors preventing women from coming forward, lodging complaints and seeking redress.¹⁵⁷

¹⁴⁸ IDLO, 'Attorney General of Afghanistan and IDLO Launch Violence against Women Unit' (Press Release, 18 March 2010)

<<http://www.idlo.int/english/Media/Pages/NewsDetail.aspx?IdNews=162>> at 29 August 2012. See also Office of the High Commissioner for Human Rights (OHCHR) and the United Nations Assistance Mission in Afghanistan (UNAMA) *Silence is Violence: End the Abuse of Women in Afghanistan* (July 2009); OHCHR and UNAMA, *Harmful Traditional Practices and Implementation of the Law on Elimination of Violence against Women in Afghanistan* (9 December 2010).

¹⁴⁹ The 2009 Law on the Elimination of Violence against Women (the EVAW Law) was enacted in August 2009. It provides for the first time in Afghanistan a dedicated legal framework for criminal investigation and prosecution of twenty-two offences concerning women, including assault, rape, harassment, forced and underage marriage or deprivation of property and inheritance.

¹⁵⁰ OHCHR and UNAMA, *A Long Way to Go: Implementation of the Violence against Women Law in Afghanistan* (November 2011), 2, 6, 18.

¹⁵¹ IDLO, *Report on Formal-Informal Justice Relations in Afghanistan* (forthcoming).

¹⁵² OHCHR and UNAMA above n 150, 2.

¹⁵³ OHCHR and UNAMA *Harmful Traditional Practices*, above n 148, ii. The OHCHR/UNAMA Report notes that there have been some improvements in the government's response to harmful practices.

¹⁵⁴ For a discussion on how zina is applied in Afghanistan, see OHCHR and UNAMA, above n 150, 17. See also OHCHR and UNAMA *Harmful Traditional Practices*, above n 148, 37-39.

¹⁵⁵ OHCHR and UNAMA, above n 150, 2.

¹⁵⁶ IDLO, *Women's Challenges to Professional Participation in Afghanistan's Justice Sector: Key Findings and Recommendations* (forthcoming) 5.

¹⁵⁷ *Ibid* 5.

The prejudicial views by justice providers and the dearth of women in the justice sector are compounded by Afghanistan's system of "extreme legal pluralism".¹⁵⁸ While reports vary, many experts believe that as many as 80 percent of all disputes in the country are resolved through the various informal justice systems.¹⁵⁹ Largely composed of influential male elders, many of the informal justice systems operating in Afghanistan seek to preserve family units and prevent tribal and other conflicts from escalating, rather than protect individual rights and enforce the law.¹⁶⁰ According to the OHCHR/UNAMA Report, many cases of violence against women, including serious crimes falling within the scope of application of the EAW Law, are either withdrawn from the formal legal sector and/or 'dealt with' by these informal justice institutions, which rarely offer solutions that protect the victim from future harm.¹⁶¹



Image: Peter Cowe

Further these systems¹⁶² often condone or even endorse discriminatory practices against women, such as the exchange of daughters between families for marriage (baadal),¹⁶³ the giving away of a girl or woman in marriage as blood price to settle a conflict over murder or a perceived affront to honor (baad)¹⁶⁴ and forced marriage.¹⁶⁵ Despite the

prevalence of these practices OHCHR/UNAMA have noted that many Afghans, both women and men, strongly oppose to them, particularly baad and child marriage. The OHCHR/UNAMA Report also noted that these practices are more frequent in areas where the government exercises less authority or has lower legitimacy.¹⁶⁶

> AFGHANISTAN'S
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¹⁵⁸ N Yassari and M H Saboory, 'Shari'a and National Law in Afghanistan' in J M Otto (ed), *Shari'a Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries* (2010) 273.

¹⁵⁹ See Centre for Policy and Human Development, *Afghanistan Human Development Report 2007: Bridging Modernity and Tradition—The Rule of Law and the Search for Justice* (2007) cited in J Dempsey and N Coburn, *Informal Dispute Resolution in Afghanistan*, US Institute for Peace, Special Report 247 (August 2010) 3.

¹⁶⁰ OHCHR and UNAMA, above n 150, 26.

¹⁶¹ One case documented in the OHCHR/UNAMA Report highlights some of the concerns with the use of traditional dispute resolution for serious cases of violence against women. The incident took place in the Daikundi province and involved a man who stabbed his sister-in-law multiple times on 21 November 2010. She survived, was hospitalized, and the police arrested the alleged perpetrator. However, a few days later, authorities told OHCHR/UNAMA that the case had been resolved through the informal justice system with the assistance of community elders. Their resolution was a pledge from the man that he would leave his sister-in-law alone, with no prosecution taking place for the crime he committed. The prosecutor denied responsibility for this failure, blaming the police for referring the case to the elders. *Ibid.*

¹⁶² The term informal justice in Afghanistan generally includes shuras, a Dari word referring to permanent and quasi-permanent local councils, and jirgas, a Pashto term usually used for more ad hoc meetings gathered to address a specific dispute. US Institute for Peace, above n 159, 2.

¹⁶³ OHCHR and UNAMA *Harmful Traditional Practices*, above n 148, vi.

¹⁶⁴ *Ibid.*

¹⁶⁵ *Ibid.*

¹⁶⁶ *Ibid.* 13.

USING LEGAL EMPOWERMENT TO ADDRESS VIOLENCE AGAINST WOMEN IN AFGHANISTAN (continued)

2

The intervention

IDLO has been working with the Government of Afghanistan to improve justice sector delivery since 2001. More recently this has been with the specific objective to improve awareness, investigation and prosecution of crimes of violence against women and girls, in accordance with the ERAW Law. In particular, IDLO has been working to:

- improve access to justice for women victims of gender-based violence;
- increase public awareness of the ERAW Law, particularly amongst women; and
- improve knowledge on the ERAW Law among legal/justice sector professionals, civil society and informal justice providers.

To improve awareness, investigation and prosecution of crimes of violence against women and girls, IDLO has supported the creation of the Violence against Women Units (the VAW Units) in the Attorney-General's office. Since the introduction of the first VAW Unit in Kabul in March 2010, the program has expanded to include VAW Units in seven other provinces in Afghanistan. The Afghan Attorney General has remarked that the establishment of the VAW Units is one of the "key achievements of Afghanistan in its new era of progress

after 30 years of war", noting that the VAW Units are "critical to justice for the country".¹⁶⁷ As part of its activities in support of gender justice in the country, IDLO has also established the Legal Aid Organization of Afghanistan (LAOA), which is equipped with a specialized women's section,¹⁶⁸ and IDLO has carried out dissemination campaigns on the ERAW Law through media outlets and education providers.¹⁶⁹ These legal empowerment activities have taken place in close co-operation with local stakeholders and civil society so as to enhance their sustainability and effectiveness.

To support the process of attitude and behavioral change among informal justice leaders towards 'traditional' practices that condone violence against women, IDLO set up a training program for informal justice actors on Afghan and Shari'a law in two districts. To date, a total of 197 participants attended the training, with a high level of satisfaction in terms of its usefulness to solve disputes and women's rights violations such as forced and underage marriage.¹⁷⁰ The training addressed the lack of information about Shari'a and Afghan Constitutional law which is seen as representing one of the major factors behind the use of traditional practices harmful to women in the informal setting. While small-scale, the apparent success of this project highlights the opportunities to reduce gender based violence through targeted and culturally sensitive interventions aimed at the informal justice sector.

3

Results analysis

According to the OHCHR/UNAMA Report, comprehensive official statistics on the number of cases of violence against women in Afghanistan are not available and most incidents go unreported. Because of the absence of any baseline, measurable indicators or milestones, it is impossible to make an absolute statement about the degree to which IDLO's objective of improving awareness, investigation and prosecution of crimes of violence against women and girls has been met. The difficulty of assessing impact is further compounded by the large scope of IDLO's engagement in Afghanistan.

Nonetheless, available data at this stage suggests that the interventions mentioned above have made considerable advances in improving women and justice providers' knowledge of the ERAW Law and providing women with a user-friendly service to seek justice for violent acts. During its first year of operation, the VAW Unit in Kabul received 300 cases originating from 15 different provinces in Afghanistan. Throughout the year 2010, the number of cases submitted to the Kabul VAW Unit doubled from the first month to the last month. At the end of March 2012, the total number of registered cases in the Kabul VAW Unit was 869.

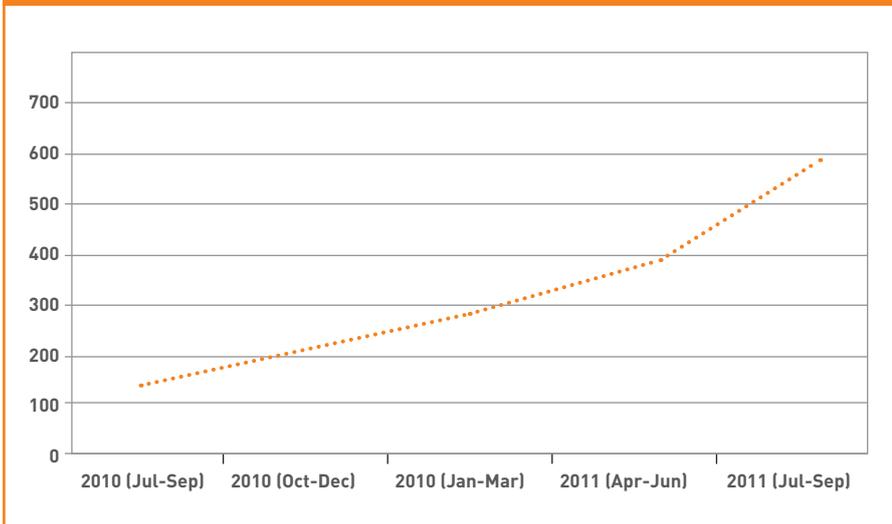
¹⁶⁷ Cited in Italian Ministry of Foreign Affairs (MAE-DGCS) and IDLO, *Supporting the National Justice Sector Strategy of Afghanistan: Improving Security, Legal Rights and Legal Services for the Afghan People Year II, Narrative Report, 1 July 2010 – 31 August 2011*, [2011] 18.

¹⁶⁸ The LAOA currently operates in over twenty of Afghanistan's 34 provinces. It provides legal representation to women in criminal and civil cases, including adultery and violation of honor, running away from home, and divorce due to abuse.

¹⁶⁹ For example, IDLO produced and distributed over ten thousand copies of the booklet "Know Your Rights and Duties: the Law on the Elimination of Violence against Women", available in Dari, Pashto and English. The booklet, the first of its kind in Afghanistan, describes the crimes against women covered by the ERAW Law with illustrations to explain the law to women of limited or no literacy. It also includes telephone numbers of the entities that women can contact for help.

¹⁷⁰ See results contained in IDLO, *IDLO Quarterly Report April – June 2012: Support to Local Justice in Kapisa and Surobi – Government and Traditional Actors' Legal Training SCS/2011-22* (20 July 2012) 13.

Chart 1: Number of Cases Received by the Kabul VAW Unit 2010-2011



> THE LAW ON ELIMINATING VIOLENCE AGAINST WOMEN AND THE VAW UNITS ARE SLOWLY ERODING WHAT REMAINS AN OPPRESSIVE SETTING <

By June 2012, this number increased to 1175.¹⁷¹ Chart 1 indicates the increase in cases received by the Kabul VAW Unit during its first year of operation.¹⁷²

While there is no precise indication of how many of these cases proceeded to prosecution, a recent evaluation of the IDLO project highlights the positive impact of the VAW Units on women and girls in Afghanistan, citing the following account:

"I got married 10 years ago and my husband is illiterate. The problem is because we don't have child. I always concealed the violence of my husband from my family. I have the doctor's document that he beats me, and when I went to clinic center they referred me to

*here (VAW unit). This unit assists me with my case, and as a first step I need to go to Huquq (Rights) department, then court, because I want to get a divorce."*¹⁷³

Other accounts from users of the service are also instructive:

"Two brave women seeking assistance recently went to a radio station in Balkh province after hearing a Public Service Announcement (PSA) about the new VAW unit. Radio spots are running daily in the provinces where the new units are located, announcing the openings and providing contact information for women who may need legal help. One of the women was crying and covered in bruises. She said she had been forced to marry an older man who beat her regularly. The manager of the radio station took her to the new VAW unit.

*The other woman, who had been traded as a bride to settle a dispute, said "I came here despite many difficulties because I heard some messages [on the radio] that said if a woman is under torture and violation then there is the VAW unit to support and protect her from injustice."*¹⁷⁴

The breakdown of offenses/categories of crimes of the cases reported to the VAW Units between January-March and April-June 2012 are reflected in the table below. These cases were reported from the VAW Units in Kabul, Herat, Balkh, Parwan and Kapisa and the new VAW Units of Nangarhar and Badakhshan.¹⁷⁵

¹⁷¹ IDLO, *Supporting the National Justice Sector Strategy of Afghanistan – Improving Security, Legal Rights and Legal Services for the Afghan People: IDLO Quarterly Report April–June 2012*, (2012) 10. However, due to challenges in data entry an updated analysis of convictions, acquittals and appeals is pending.

¹⁷² *Supporting the National Justice Sector Strategy of Afghanistan: Improving Security, Legal Rights and Legal Services for the Afghan People Year II, Narrative Report*, 1 July 2010 – 31 August 2011, above n 167, 16.

¹⁷³ IDLO, *Supporting the National Justice Sector Strategy (NJSS) of Afghanistan: Improving Security, Legal Rights and Legal Services for the Afghan People: Mid Term Evaluation Report*, January 2011 – December 2012 (2012) Unpublished.

¹⁷⁴ IDLO 'Courageous Women Seek Justice Through New Violence Against Women Units in Afghanistan' (Press Release, 28 November 2011) <<http://www.idlo.int/english/Media/Pages/NewsDetail.aspx?IdNews=324>> at 29 August 2012

¹⁷⁵ IDLO, *Supporting the National Justice Sector Strategy of Afghanistan – Improving Security, Legal Rights and Legal Services for the Afghan People: IDLO Quarterly Report April–June 2012*, (2012) 11. Note that in the January–March 2012 Quarterly report harassment and threats were reported in the same category.

USING LEGAL EMPOWERMENT TO ADDRESS VIOLENCE AGAINST WOMEN IN AFGHANISTAN (continued)

| Crime type | January-March 2012 | April-June 2012 |
|--------------------------------|--------------------|-----------------|
| Beating | 166 | 235 |
| Unclassified domestic violence | 7 | 1 |
| Running away/moral crime | 2 | 1 |
| Harassment | 17 | 33 |
| Threats | n/a | 20 |
| Sexual assault | 14 | 10 |
| Murder | 11 | 6 |
| Kidnapping | 2 | 4 |
| Suicide | n/a | 3 |
| Cancellation of engagement | n/a | 5 |
| Failure to pay alimony | n/a | 8 |
| Forced marriage/Baad | 3 | 8 |
| Other | 34 | 25 |
| TOTAL | 256 | 375 |

Notwithstanding these early indications of the success of the intervention, significant challenges have been documented in relation to some of the VAW Units, including:

› *lack of transportation for women to attend the VAW Unit;*

- › *lack of trust in VAW Unit prosecutors;*
- › *disputing parties' requests to settle cases unofficially, through mediation or a jirga;*
- › *difficulties with prosecutors' perceptions of their role, including an understanding that they are 'mediators'; and*
- › *lack of information related to the role of the VAW Unit in the community.*

Key lessons that may be useful for legal empowerment programming:

(i) Legal empowerment programs to address violence against women in plural legal settings are optimized when they are undertaken in conjunction with programs targeting decision makers in the formal and informal justice sectors.

4

Conclusion

The challenges facing women's access to justice in Afghanistan are not amenable to quick fixes. IDLO's activities in Afghanistan, particularly in relation to the VAW Units, reflect the complexity of using legal empowerment tools in an environment where discriminatory social codes and a preference for informal mediation are deeply entrenched.

Nonetheless, tentative indicators of success, including continually increasing rates of crime reporting to the VAW Units, indicate the critical role such services play in providing women with an opportunity to seek justice.

By targeting decision makers in the formal and informal justice sectors, as well as the women themselves, IDLO's approach in Afghanistan highlights the value of a holistic and context-sensitive strategy to address violence against women.

NEGOTIATING LAND TENURE: WOMEN, MEN AND THE TRANSFORMATION OF LAND TENURE IN THE SOLOMON ISLANDS¹⁷⁶

This final case study examines the interaction of customary tenure systems with the state legal system in a particular peri-urban area of Honiara, the capital of the Solomon Islands. Unlike the previous case studies, the discussion below focuses on the interface between the state and non-state systems from a historical perspective, rather than a purely project intervention viewpoint.

In the Solomon Islands, customary land is the dominant form of land tenure, with more than 80 percent of land held according to customs that vary from place to place. Landlessness is virtually unknown, but the recognition of rights to land by the state legal system and the distribution of financial benefits associated with these rights are a source of significant concern for many women and men.

Kastom, the Pijin term which is generally used to refer to local norms and practices, varies throughout the Solomon Islands, not only from island to island, but even between villages.

Land is not merely an economic asset for Solomon Islanders, but has spiritual, political and social significance. Land is vested in exogamous kin-based groups whose lineage may be traced to an original settler through the mother, father or both. Access to knowledge about certain aspects of kastom can be passed on in a controlled and deliberate manner. For example, information about genealogies may be given to a particular people, rather than readily available to everyone. Women are not selected to receive this information as often as men, and this places them at a power disadvantage when seeking to control land.

Other influences, such as the influx of foreign companies and Christianity have reformed tribal power structures for making decisions about land. What once was much more of a community decision has become controlled by a small number of men, to the exclusion of most other members of the landowning group.

Historically, before the influx of colonists, kastom had three important people in positions of power. One of them, the vuluvulu, was always supposed to be a female and she was consulted on issues related to land, war, and witchcraft. Interactions with European traders, who only wanted to deal with men, diminished the influence of women. Additionally, the failure of the state legal system to accord any recognition to the role of vuluvulu contributed to the marginalization of the connection between women and the land, at least within the arena of the state. This had implications for the role of women in the society, which continue today.

Forested land in the Solomon Islands is usually subject to multiple and overlapping rights. Logging companies have focused their efforts on negotiating with individuals that are influential within the landowning group and proponents of logging. These individuals are nearly always men, some of whom are male leaders and some of whom are younger, entrepreneurial individuals with a relatively high level of formal education.

While many men are marginalized by these processes, women as a social group are particularly likely to be



Image: GlobalCitizen01

excluded. Of the dozens of court records reviewed, none listed women as parties or witnesses in timber rights hearings or court appeals. Some women report that they have attempted to attend hearings and have waited on the bench for hours for this purpose, only to be told that “there’s only room for men, there’s no room for any women”. Women’s names are absent from the official documents and agreements produced by the state legal system. This confirms and constructs women’s role in decision-making agreements as marginal, at least within the arena of the state; while simultaneously reinforcing the dominance of a small number of men in decision-making for the entire landowning group.

¹⁷⁶ The full text of this case study, including references, is found in R Monson, ‘Negotiating Land Tenure: Women, Men and the Transformation of Land Tenure in Solomon Islands’ in S Golub (ed), *Customary Justice: Perspectives on Legal Empowerment* IDLO (2011) 169-185.

NEGOTIATING LAND TENURE: WOMEN, MEN AND THE TRANSFORMATION OF LAND TENURE IN THE SOLOMON ISLANDS (continued)

Missionaries and colonial administrators may not have intended to 'rewrite' kastom, but by empowering a certain segment of the bush polity and disregarding others, like the vuluvulu, political authority and control over land has become concentrated in the hands of the male leaders.

Case study on Kakabona

Kakabona refers to a series of peri-urban villages strung out along the coastline and the Tandai Highway as it runs west from Honiara, between White River and Poha River. Kakabona is densely populated. The bulk of the population is located relatively close to the coastline, in the narrow strip of flat land between the beach and the foothills. On the eastern side, close to the town boundary, numerous parcels of land have been registered under the Land and Titles Act 1996 (LTA). These parcels are registered in the names of a small number of male leaders who are representatives of the landowning tribe. Land around the Kongulai water source, which provides most of Honiara's water supply, has been registered in a similar manner.

A man is usually appointed as the spokesperson for the family and kin group on all land-related issues. These spokespersons are often described, in Pijin, as having the "ability to talk". Since women often have less access to education than men, they are less likely to possess the skills necessary to negotiate the state legal system and manage land transactions. People in Kakabona often explain that women must "stand behind" the men when it comes to speaking about land and dealing with land in the public arena. This norm is often explained by reference to the role of men as warriors and protectors of women. Today, these concepts are being translated into the state legal system in a manner that turns the customary "right to speak" about land into effective control over land.

During the 1980s and 1990s, a number of disputes concerning land in west Kakabona came before the chiefs and courts. These disputes were often triggered by attempts to register blocks under the LTA, and usually concerned the boundaries and "ownership" of the land. Historically, land tenure on the Solomon Islands largest island, Guadalcanal, was characterized by a complex web of nested and overlapping interests in land, with particular tribes living in close proximity to one another and intermarrying. However the requirements of the LTA meant that land acquisition officers, chiefs and courts are now required to identify which of these groups "own" the land. Other groups are often described as "living under" the "owners". In some cases, the land was later registered under the LTA and in the name of a maximum of five "duly authorized representatives" of the landholding group, who are joint owners on a statutory trust. These representatives are, with few exceptions, the individuals that appeared before land acquisition officers, chiefs and courts on behalf of the successful tribe; in the vast majority of cases, they are male leaders. Thus, the individuals who have the authority to speak about land within the arenas established by the state are able to consolidate that authority through registration.

It is a principle of both kastom and the state legal system that the trustees of land consult with the other landowners before dealing in the land. There is evidence, however, that trustees have often failed to fulfill this obligation. Land in Kakabona has often been sold to migrants from other areas, as well as to local landowners who wish to establish new hamlets or gardens. Many of these sales have been made by trustees, although other members of landowning groups have also sold land. These transactions are often illegitimate in the eyes of many landowners, because deals are often struck by individuals in exchange for cash, without adequate consultation of other members of the landholding group and without

› IN A NATION WHERE LAND OWNERSHIP IS CRUCIAL, THE MARGINALIZATION OF CUSTOMARY LAW HAS WORKED AGAINST WOMEN, NOT FOR THEM ◀

distributing the proceeds of sale. As a result, land transactions are often highly controversial and a significant source of conflict.

While women are rarely listed as land trustees and are largely absent from records of public hearings, they nevertheless play a role in determining access to and control over land. There is much that occurs beyond the purview of the state. Women influence land transactions and court disputes through informal conversations, particularly with their husbands, brothers and uncles. Many of the women consulted in Kakabona believed that they were more likely to be consulted in land matters if they had extensive knowledge of kastom. For example, a recent instance in which a woman's knowledge of kastom and genealogy appeared to show women's influence in preventing the sale of land:

A businessman in Honiara tried to buy the Kongulae water source, which provided water to the Honiara township. He used his mother, who is from Guadalcanal, to pay each of the landowners US\$50,000 to transfer to him their rights to the water source. Payments were made to all the men who for the transaction were deemed principal landowners, but when a particular woman's uncle's turn came, he turned to his niece for a decision. This was her response:

"If you sell my land right, you have sold my great, great grandmother, my great grandmother, my grandmother, my mother and me to this businessman. If you respect my ancestors who are your ancestors also, then you will not sell my right to Kongulae water source."

This woman's words were influential in the final decision: the Kongulae water source was not sold to the businessman.

This woman appears to have successfully drawn on *kastom*, in particular her knowledge of genealogy (*tutungu*) and the idea of land being passed through women, in order to persuade her uncle not to sell the land. Information about certain aspects of *kastom* appears to be more closely guarded in Kakabona and some information may only be handed down to men.

Nevertheless, there are also many aspects of *kastom* that can be learnt by women. In 2009, the author, together with the Landowners Advocacy and Legal Support Unit in the Public Solicitors Office, held a participatory legal literacy workshop on natural resource management in Kakabona. During the workshop, women openly discussed the fact that they are not as knowledgeable of *tutungu* as their mothers and grandmothers were. They traced this to a number of factors, including involvement both in the subsistence and cash economies, as well as in activities run by donors, non-government organizations and churches. These activities limit the ability of many women to engage in the time-consuming task of learning about *kastom*. The women acknowledged that this contributes to the likelihood that it will be men, rather than women, who speak in public fora, as it is often men who have the knowledge of *kastom* necessary to make a case in court hearings. One of the outcomes of these discussions at the workshop was a resolution by the women to take active steps to learn more about *tutungu*.

However, even if women have extensive knowledge of *tutungu* and other aspects of *kastom*, their participation in land matters may be constrained by the consolidation of the customary role of male leaders within the realm of the state legal system. Many women report that they find out about the details of a land transaction or dispute only after



Image: Slider_1980

male leaders have reached a decision. If such decisions have been entrenched in signed agreements or in court decisions, it may be difficult to challenge them due to state legal norms and due to many people's hesitation to challenge leaders in formal settings, such as court appeals. All of this contributes to a trend whereby the belief that "women no save tok" ("women should not/cannot talk") about land limits the role of women in the legal system and strengthens the control of tribal elders over land.

Many of the residents of Kakabona are members of landowning groups that are involved in logging and have had difficult experiences in the decision-making processes and ensuring the distribution of financial benefits. The distribution of benefits from other resource uses is similarly problematic. The Kongulai catchment, more commonly known as the Kongulai water source, is a case in point.

The Kongulai water source lies to the west of Honiara and provides about 70 percent of the city's water supply. Land in this area has been divided into parcels and registered in the names

of trustees, all of whom appear to be members of a relatively small group of male leaders. The role of traditional "big men" or chiefs has carried over into the cash economy, which is important for negotiations and in the signing of agreements providing access to the Kongulai water source. The men who are listed as leaders on the official documents and agreements are also those who receive royalties when they are distributed. Under both the state legal system and *kastom*, they are obliged to share these benefits with other members of the landowning group. However, as is the case with logging, there is a general lack of transparency and accountability as to how this occurs. Landowners complain that they do not know when royalties are distributed or how much money they are entitled to. Most women need to be vigilant if they want to receive a share of royalties associated with either logging or the Kongulai water source. News that a payment will be made is often passed by word of mouth. As a result, women may travel into Honiara and spend several days sitting outside the office buildings where payments are made.

NEGOTIATING LAND TENURE: WOMEN, MEN AND THE TRANSFORMATION OF LAND TENURE IN THE SOLOMON ISLANDS (continued)

They report that it is necessary for them to be there when their male relatives emerge with money; otherwise, "they will just drink it and eat it."

The inequitable distribution of financial benefits is related to inequality in decision-making. Male leaders have been registered as the trustees and therefore assume control of negotiations with Solomon Islands Water Authority. Women do not appear to be adequately consulted in decision-making or informed of royalty distributions. This is a common feature of resource-dependent industries in Solomon Islands. Initial research by the author also suggests, however, that some landowning groups may have more transparent and inclusive methods of decision-making, dispute-resolution and distribution of financial benefits than others. Further research is required to determine whether this is the case, and if so, why.

When violence escalated in mid-2000 (the Tensions), the volunteer Women for Peace Group was formed with the aim of enabling women to contribute to the peace process. Their activities and strategies drew on customary practice, cultural values (particularly the idea of 'women as mothers'), and principles inspired from Christianity. For example, in some cultures in Solomon Islands, women may intervene in conflict both physically and verbally, and Women for Peace members drew on this approach to physically stand between warring parties. Women also visited the camps of militants, where women and militants (predominantly young men) shared food, prayed together and discussed issues, such as the consequences of the violence for women and children. Women for Peace also held conferences and meetings with police officers, parliamentarians and foreign diplomatic missions. Prayers and Bible readings were always an important part of these meetings. It is noteworthy that the strategies adopted by Women for Peace in affirming women's roles in dispute resolution and peace-building drew on kastom and Christianity, rather than the

state legal system or international human rights standards.

In the years since the Tensions, similar strategies appear to have been adopted by Guadalcanal landowners seeking to expand the role of women in land matters. For example, one Guadalcanal woman believed that the role of women has expanded since the Tensions because many people have realized that it is a "sin" to exclude them from land matters:

"God made Adam and Eve, and it is a Christian principle that women should be included in decision-making regarding land. It is a sin to not include women. When we sin, there will be consequences... and now we've seen what those consequences are."¹⁷⁷

The case study demonstrates that land tenure in Solomon Islands is characterized by a highly complex and dynamic interplay of kastom, Christianity, and state laws and institutions that varies from place to place. While this institutional and normative plurality provides ample scope for the renegotiation of tenure, the examples cited clearly show that some people, generally men, are better equipped than others to influence the direction of those renegotiations.

Three key messages emerge from this case study:

➤ *Neither kastom nor the state legal system provides adequate mechanisms for ensuring transparency and account-*

ability in relation to land matters. For example, in the field site considered, transparency and accountability for the distribution of royalties might be improved if they were highly public and advance notice was given to all landowners pending royalty payments.

➤ *While attention must be paid to the intersection of kastom with the state, the case of Kakabona demonstrates that women may be more likely to draw on informal systems based on kastom and Christianity in affirming their roles in relation to land, dispute resolution and the distribution of financial benefits, rather than human rights law. Efforts could therefore focus on increasing women's experience and understanding of these systems of knowledge.*

➤ *In the context of Solomon Islands, where land reform is on the agenda of the national government and donors, there is an urgent need for further research into the operation of local norms and practices, which arguably play a more significant role in determining women's rights to land.*

In summary, to develop sustainable changes for women's legal empowerment it is necessary to understand the full cultural and historical context of the societal structure within which they live. By doing so, NGOs can easier identify key cultural elements, such as kastom and vuluvulu, that may be used in aiding women achieve their social and legal goals.

Key lessons that may be useful for legal empowerment programming:

- (i) Women may be more likely to draw on informal systems such as kastom and Christianity in affirming their roles in relation to land, dispute resolution and the distribution of financial benefits, rather than human rights law. Efforts could therefore focus on increasing women's experience and understanding of these systems of knowledge.
- (ii) To develop sustainable changes for women's legal empowerment it is necessary to understand the full cultural and historical context of the societal structure within which they live. By doing so, NGOs can easier identify key cultural elements that may be used in aiding women to achieve their legal goals.

¹⁷⁷ *Ibid* 181.

SUMMARY OF CASE STUDIES

Gender equality on the horizon: The case of Uukwambi Traditional Authority in Namibia

Legal development cooperation increasingly emphasizes that legal empowerment can only be achieved when reforms incorporate customary justice systems. This brings to the fore pertinent questions regarding the alignment of these systems with human rights standards. A typical concern is that customary justice systems often lack gender equality. The dominance of men in all three interwoven domains of customary rule — leadership, dispute settlement and normative content — raises questions on how the inclusion of women in customary structures of administrative and judicial decision-making might be facilitated, and how customary norms can be modified so that they better protect women and their livelihoods. To gain insight into these questions, this case study explores a range of activities undertaken by the Traditional Authority of Uukwambi in northern Namibia to eliminate the severe gender inequality inherent in its system of customary justice and administration. These activities include the installation of women traditional leaders, the promotion of women's active participation in traditional court meetings, and the modification of customary norms that were detrimental to the position of women. The research data collected indicates that these steps led to certain positive changes in customary practice, including the near complete eradication of 'property grabbing' and increased participation of women in traditional courts. Although the shift in mindsets needed for gender equality is still incomplete, the initiatives undertaken have enhanced the fairness and equity of traditional rule and customary dispute settlement.

Negotiating land tenure: Women, men and the transformation of land tenure in the Solomon Islands

Land issues are currently high on the agenda of national governments and donor agencies throughout the South Pacific. At the center of debates about land in the Pacific lies an issue common to many post-colonial countries, namely, the interaction between customary and state legal systems. In most South Pacific nations, constitutional or statutory law expressly provides that land is governed by "custom" or "customary law".

Compared to other geographic regions, the gendered aspects of land tenure, or natural resource management more broadly, have received only very limited attention in the South Pacific. In the Melanesian nation of Solomon Islands, very little of the research on land has been undertaken by women, or focused on differences in men's and women's perspectives and experiences of land tenure. There is, therefore, a general lack of accessible information on women's experiences of customary and state laws governing land, or on the ways in which women might be empowered within these systems.

This case study examines the interaction of customary tenure systems with the state legal system in one site in the Solomon Islands. It focuses in particular on transformations in customary systems occurring since colonization, and the impact of those transformations on women. The case study examines some of the ways in which kastom and the state legal system interact in Kakabona, a peri-urban area on the outskirts of the capital of Honiara, on north Guadalcanal. The state legal system requires that landholding groups be represented by a small number of individuals. In practice, this has concentrated control over lands in the hands of a small group of male leaders who have the customary authority to discuss land matters inside a public arena. The interaction of kastom and the state legal system has therefore enabled

the transformation of customary "rights to speak" into effective ownership. The concluding section makes some general observations about the interaction of custom and the state, and the ways in which women may be empowered within these systems.

Bush justice in Bougainville: Mediating change by challenging the custodianship of custom

Since 1994, the Papua New Guinean non-governmental organization, People and Community Empowerment Foundation Melanesia, has delivered dispute resolution training aimed at strengthening customary justice systems in Bougainville. Research was conducted in 2010 to assess whether and to what extent such training has been successful in enhancing the legal empowerment of marginalized groups such as women. The research focused on six access to justice indicators: participation and satisfaction in dispute resolution; protection of legal rights; mitigation of power asymmetries; operation of neutrality and bias in decision-making; balance of individual and community rights; and the influence of women in dispute resolution decision-making. The research found that the training increased the participation and satisfaction of both men and women users of the dispute resolution system. However, by neglecting to address issues of substantive legal rights and power asymmetries, the intervention failed to enhance legal empowerment to the extent it might otherwise have done. Further, while the intervention improved the justice experience of women disputants in almost every area, it had a neutral effect on the satisfaction gap between men and women. The intervention was most successful where it transferred dispute resolution skills to women and created opportunities for them to become mediators. This enabled them to engage more effectively in internal dialogue processes and challenge the interpretation and application of discriminatory customary norms.

SUMMARY OF CASE STUDIES (continued)

Engaging with customary law to create scope for realizing women's formally protected land rights in Rwanda

In rural Rwanda, women, particularly widows and divorced women, face severe obstacles protecting and upholding their interests in land, resulting in diminishing land tenure security. Women have weak rights under customary law, and while reforms have strengthened their statutory land rights, such entitlements have limited practical value in rural areas where customary law dominates. Research was launched to investigate the types of interventions that might improve the likelihood that women's land interests would be upheld in the context of customary dispute resolution. It was hypothesized that women would receive better outcomes if land-related disputes were resolved consistently at the village level, through mediation by a wider group of stakeholders, including representatives of a women's interest group. The results demonstrate that it may be possible to widen the scope for women's land claims without modifying the substantive aspects of customary law, provided that such outcomes do not sit too uncomfortably with the overarching structure of the customary framework.

Two faces of change: The need for a bi-directional approach to improve women's land rights in plural legal systems

The complex relationship between law, land rights and customary practices is increasingly recognized as foundational to formulating successful development policies. Similarly, the essential role of women's economic participation in

development and the current trend of gender discriminatory land and inheritance customary practices have prompted domestic civil society organizations in developing countries to use statutory provisions guaranteeing gender equality to improve women's land tenure security. This case study examines the particular need for secure land rights for women in the African pluralistic development context, and the mixed results of targeting law reform as a mechanism for change. Relying on primary research conducted in Mozambique and the United Republic of Tanzania on land practices as experienced by divorced and widowed women, it evaluates strategies employed by domestic non-governmental organizations to enhance women's access to justice and land tenure security. In particular, the case study analyses whether initiatives to disseminate and use statutory law (rather than customary law) are overcoming the lack of knowledge, application and enforcement that have previously limited the effectiveness of rights-affirming legislation. Specific and general conclusions are drawn from the data to generate recommendations for donors, governments and development institutions.

Legal empowerment of unwed mothers: experiences of Moroccan NGOs

Social stigmatization, criminal repression and legal discrimination marginalize unwed mothers and their children and impact on their ability to obtain official identity papers. Without such legal identity, they cannot access a host of other fundamental rights, and legal

empowerment can be impossible. In focusing on child registration and the procedures to receive a Family Booklet as they affect unwed mothers, this case study argues that law and development initiatives should take into account complex, intimidating legal realities that disadvantaged populations such as these women and children face. This includes existing laws that may not be applied in reality, that are discriminatory on their face, that are unclear and open to disparities in their interpretation or that are silent on an issue and thereby create legal voids.

Four youth-led local women's rights NGOs, in collaboration with an international human rights capacity-building organization, implemented grassroots-level legal rights education in diverse regions across Morocco and launched a pilot Court Accompanying Program in 2006 primarily for illiterate women in their respective communities. Initial indicators of the impact of these two initiatives hint at shifts in attitudes and behavior among unwed mothers and local authorities charged with helping them access their legal rights.

The popular discourse in Morocco claims that the main obstacle to people making use of their rights is their ignorance of the laws and their rights, which could be remedied by legal education campaigns. The experience of these NGOs working with unwed mothers illustrates how knowledge of the laws alone is not sufficient. In order to access their rights, women need concrete help in navigating government services and bureaucracies that are often indifferent, intimidating or even hostile.

The trafficking of girls in West Bengal

The Indian state of West Bengal is, like India as a whole, a major source, destination and transit point for victims of trafficking, largely due to porous international borders with Bangladesh and Nepal. Addressing the problem of child trafficking in India requires a multi-faceted approach, including improvement of law enforcement capacity and infrastructure, public sensitization, efforts to reduce the financial insecurity that often pushes girls into trafficking and the strengthening of community vigilance structures. Many anti-trafficking initiatives have been developed in recent years, but the scope of such initiatives is often limited, with much of the formal administrative machinery for addressing trafficking not put into practice.

One of the most formidable trafficking-related challenges in India relates to rights awareness and legal assistance. The Indian Constitution explicitly prohibits trafficking of human beings, and domestic legislation (notably the Immoral Traffic Prevention Act 1956 and the Indian Penal Code 1860) addresses many trafficking and related offences. While such legislation is not comprehensive, and would benefit from revision to ensure its compliance with international standards, the more immediate problem is the widespread lack of awareness regarding the existing protections for trafficking victims contained in these legal instruments. This has serious implications for justice delivery.

This case study focuses on IDLO's Preventing and Combating the Trafficking of Girls in India using Legal

Empowerment Strategies a short-term pilot project aimed to ensure that girls who are victims or at risk of human trafficking have access to relevant legal and regulatory systems to protect and realize their rights.

Violence against women in Afghanistan

Violence against women in Afghanistan remains a pervasive and deeply rooted problem, taking wide ranging and varying forms, from domestic violence, sexual harassment and rape to trafficking of women and children and honor killings, among others. The Afghan Constitution of 2004, domestic legislation, in particular the 2009 Law on the Elimination of Violence against Women (the EAW Law), as well as international obligations provide a wide range of protections for Afghan women.

Many women have not been able to benefit from such provisions because of an acute lack of awareness among citizens and justice personnel about fundamental rights and the implementation of domestic laws. In the case of the EAW Law, even where illegal discriminatory practices are reported, widespread beliefs among justice providers that such practices are legitimate, or a family matter rather than a legal matter, often undermine the implementation of the law. Even where the state brings acts criminalized under the EAW Law before the court, judges may decide to prosecute such acts under the Penal Code or Shari'a law instead. This often results in the acquittal of perpetrators of gender crimes, charges being reduced to less serious crimes, lighter sentences being

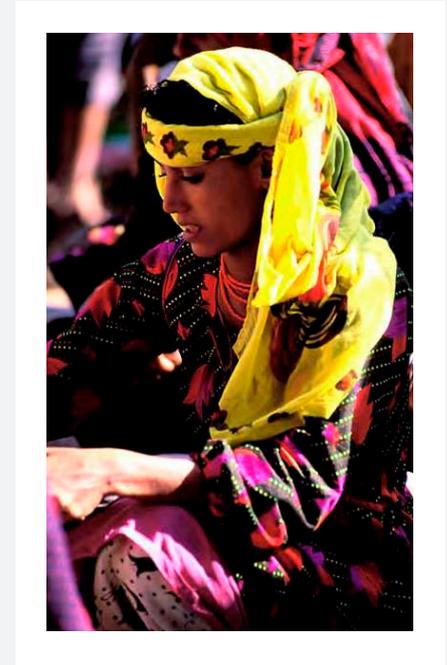


Image: Sheila McKinnon

imposed and/or women victims being accused of 'moral crimes'. This case study features IDLO's efforts to improve access to justice for women in Afghanistan through increased awareness and support for the implementation of domestic laws on violence against women. It explores the effectiveness of the Violence against Women Units in the Attorney-General's office, and the impact of a small-scale pilot project to train decision-makers in the informal justice sector. Preliminary findings suggest that the interventions have made considerable advances in improving legal awareness among women and justice providers, and in providing women with a user-friendly service to seek justice for violent acts committed against them.

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