

## IDLO GLOBAL CONSULTATION ON CUSTOMARY AND INFORMAL JUSTICE

### Navigating Complex Pathways towards Justice for All

*A Roundtable organized by  
IDLO and the Albert Hirschman Centre on Democracy  
17 October 2019 | 12:00 - 14:30  
The Graduate Institute of International and Development Studies  
Maison de la paix, Room P1- 745*

### MEETING SUMMARY

IDLO and the Albert Hirschman Centre on Democracy convened an expert Roundtable to gain deeper reflection on access to justice through customary and informal systems, provide greater insight into tensions with human rights imperatives, and facilitate the identification of culturally appropriate, sustainable and effective paths for policy, programming and further research.

#### CONTEXT

Access to justice is a fundamental right as well as an essential prerequisite for the protection and promotion of all other human rights. The ability to access justice is a crucial part of the human rights system - it is only through effective remedies that the rights enshrined in the international human rights framework gain real meaning. This is reinforced by Sustainable Development Goal (SDG) 16 and Agenda 2030 which recognize that equal access to justice for all is necessary for securing peaceful and inclusive societies where effective and accountable institutions govern at all levels.

Yet, as noted in the recent Report of the Task Force on Justice, the global justice gap affects 5.1 billion people and 4.5 billion are excluded from the social, economic, and political opportunities that the law provides, while 1.5 billion have a criminal, civil, or administrative justice problem they cannot solve. Further, 253 million people live in extreme conditions of injustice, without any meaningful legal protections.<sup>1</sup>

As Agenda 2030 advances, globally, there is great demand for justice, but pathways to justice are diverse and there are many complex challenges in the architecture and supply of justice. To improve the scope and quality of justice systems, it is important to understand the variety of justice actors and mechanisms that exist and are used by individuals, including resolution of disputes outside formal courts and the underlying normative frameworks of plural legal environments.

Meaningful access to justice for all will not be achieved without engaging with both formal and customary and informal justice systems. Customary and informal systems are critical pathways in the complex journey to justice for many people around the globe, but often do not receive sufficient attention from policy makers, practitioners and the international community.

During 2019, IDLO launched a series of global consultations, backed by a [Policy and Issue Brief](#) and a [Practitioner Brief](#), which underline the advantages of customary and informal justice including accessibility, affordability, flexibility, speed, and cultural relevancy, which have led to a high level of

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<sup>1</sup> Task Force on Justice, Justice for All – Final Report. (New York: Center on International Cooperation, 2019), available at: <https://www.justice.sdg16.plus/>.

use and trust within communities. They also point out the disadvantages, many of which are rooted in traditional, community or religious values that are at odds with international human rights standards and the rule of law.

Of primary concern is failure to uphold international legal standards as well as rights-abrogating practices which are harmful to the rights, health, and dignity of individuals. These practices result in cruel or inhuman treatment and often subordination of particular groups, such as women, children and minorities. The two Briefs highlight the importance of understanding the context in which such systems operate and recommend a range of practical entry points and solutions for engagement, with the aim to improve justice outcomes and delivery for the benefit of justice seekers.

## OBJECTIVES

Against the backdrop of a [public event](#) and [online knowledge exchange](#), the Roundtable brought together international experts in customary and informal justice, leading human rights practitioners, academics and civil society representatives to reflect on key questions:

- *While customary and informal justice systems often fill gaps in justice, what are the primary challenges and steps required to address the significant human rights violations within many customary and informal justice systems?*
- *What works to change norms regarding harmful traditional practices?*
- *Are harmful norms malleable or should customary and informal justice systems be disbanded in some instances to protect rights and further access to justice?*

## AGENDA

TIME	DESCRIPTION	PARTICIPATION
12:00-12:30	<b>LUNCH</b>	
12:30- 12:45	<b>Welcome and Introductions</b> <ul style="list-style-type: none"> <li>▪ <b>Dr. Christine Lutringer</b>, Executive Director, Albert Hirschman Centre on Democracy, Graduate Institute of International and Development Studies</li> <li>▪ <b>Ms. Pamela Kovacs</b>, Manager, Research &amp; Learning, IDLO</li> </ul>	
12:45-14:00	<b>Current ideas on pluralism, normative change, and pathways to justice</b> <i>For Discussion:</i> <ul style="list-style-type: none"> <li>▪ What are risks and challenges, especially with respect to normative change and inclusiveness of justice processes and outcomes?</li> <li>▪ How can we ensure women, children, and minority populations receive fair justice outcomes and their rights are realized within customary and informal justice systems?</li> </ul>	*** All Participants ***  <i>Facilitator:</i> <b>Prof. Shalini Randeria</b> Graduate Institute
14:00-14:30	<b>Emerging opportunities to advance access to justice and human rights and SDG-16</b> <i>For Discussion:</i> <ul style="list-style-type: none"> <li>▪ How can customary and informal justice systems add value to acceleration actions for SDG-16 and justice for all? What are emerging opportunities? What further research is needed?</li> </ul>	*** All Participants ***  <i>Facilitator:</i> <b>Ms. Pamela Kovacs</b> IDLO

## MEETING SUMMARY

The luncheon roundtable was opened with welcome remarks by **Mr., Julian Fleet**, IDLO Permanent Observer in Geneva, and **Ms. Christine Lutringer**, Executive Director, Albert Hirschman Centre on Democracy, Graduate Institute.

### **PAMELA KOVACS, Manager, Research and Learning, IDLO**

Ms. Kovacs presented a brief summary of IDLO's Practitioner and Policy / Issue Briefs titled "*Navigating Complex Pathways to Justice: Engagement with Customary and Informal Justice Systems.*" The Briefs contribute to the realization of SDG 16 by advancing policy dialogue and distilling lessons from IDLO programming and research to help strengthen customary and informal justice systems as an integral part of providing access to justice for all. Ms. Kovacs highlighted the practical tools and good practice recommendations for development practitioners engaging with customary and informal justice systems.

Ms. Kovacs also highlighted that to achieve equal access to justice for all, it is important to understand the variety of justice actors and mechanisms that exist and are used by individuals, including in dispute resolution outside formal courts. Recurring estimates suggest 80 to 90 percent of legal disputes in developing, fragile and post-conflict states are resolved using customary and informal justice systems. People seeking justice through such systems are disproportionately marginalized, such as the poor, women and remote and minority populations. Regardless of the justice mechanism utilized, the quality of justice is important and so are principles such as equal protection and benefit for all, fair processes, and justice institutions that are people-centered and have legitimacy.

Finally, Ms. Kovacs stressed that the purpose of the global consultation was to hear a diversity of perspectives and to challenge and interrogate what is and isn't working within customary and informal systems, adopting both a pragmatic and principled approach.

### **SHALINI RANDERIA, Director, Albert Hirschman Centre on Democracy, Graduate Institute of International and Development Studies**

Professor Randeria expressed both a practitioner and academic point of view on customary and informal justice, pointing out the problematic, but fundamental, coexistence between formal and informal justice systems. A main problem is the terminology used and the possible misunderstanding between formal and customary justice because "*the standards are not universal, and they are as particular as the communities they work with. What is necessary is more attention to translations and to translators who do not misunderstand and misconstrue rule of law concepts.*"

Professor Randeria also focused on the importance of power, resources, and the political nature of justice. In relation to impartiality of judges, she referenced the example of Afghanistan and the rotation of judges. "*In Taliban courts it is very clear how judges are recruited: they rotate every two years to get them out of related conflict (of interest) situations and make them independent in the eyes of population.*"

Professor Randeria highlighted two main points in relation to customary and informal justice systems: (i) it is important to pay more attention to all justice actors, not only justice seekers; and (ii) the legitimacy of courts in the eyes of the people is key. For example, Taliban courts are often seen to have more legitimacy than Afghan state tribunals because they are not dependent upon foreign resources: "*It is a whole question of legitimacy and to find who are the legitimate actors. This is also the reason why Taliban courts are seen as more legitimate even among people who are not Taliban supporters.*"

Professor Randeria also discussed the example of the Indian justice system where custom often prevails over law. The dichotomy between formal and informal is problematic in India because those who belong to lower castes go to caste systems where women are often excluded and enforceability of formal court decisions is problematic: *“Women’s organizations follow up on cases and check regularly on domestic life and abuses, but enforcement mechanisms is a problem. It is not about affordability or reachability or speed but about follow up and follow through.”* Women and other marginalized people are often afraid to go to state courts because the laws applied are far from local traditions and corruption is expected.

#### **PATRICIA MBOTE, Professor of Law, University of Nairobi and Advocate, High Court of Kenya**

Professor Mbote began by noting that *“Engaging customary justice is not a choice, but a way of life because these systems are safe places for those who are marginalized and do not have access to justice”*. She also highlighted the importance of including marginalized people in access to justice: *“Women, for example, are always marginalized and do not have access to justice for land rights. If they cannot go to courts to address their rights, where should they go?”* Professor Mbote noted research conducted in Kenya on access to justice for women and affirmed that in Kenya only 10% of people go to formal state courts to solve their disputes and few of these are brought by women.

Professor Mbote reflected on the importance of the coexistence and interaction between formal and customary and informal justice mechanisms. She focused on the interaction of colonial laws and local norms, explaining that customary and informal justice is fundamental because it has resisted colonial systems that usually do not resonate with local communities. There is resistance to formal state systems because they are often seen as foreign by local communities. The coexistence between the two systems is necessary, but it is crucial as well to define hierarchy: *“It is difficult to choose which system is superior to the other, but the usual perception is that customary and informal justice applies where formal and state systems do not”*. In turn, customary law cannot be *“repugnant to justice or morality”*.

Referring to Professor Randeria’s remarks, Professor Mbote reinforced that language does matter because formal and state justice often use particular terms that are not familiar to local communities and populations, resulting in the alienation of many people: *“In Kenya, English is the language used in justice systems and people often have to deal with language barriers”*. In addition, formal laws use a particular language – “legalese” – which is another form of language not widely understood and a barrier to access to justice.

Professor Mbote also noted that norms are very powerful and unfortunately, *“in some cases customary and informal justice is deeply rooted in practices of discrimination, not just against women but also against minorities and indigenous people”*.

#### **MATT POLLARD, Senior Legal Adviser, International Commission of Jurists (ICJ)**

Matt Pollard noted that the starting point for the International Commission of Jurists is its mandate which since the 1950s *“is universalist and seeks to promote universal norms on human rights and the rule of law.”* For most of its history, the ICJ has focused on judges and lawyers in formal justice systems, and essentially avoided discussing traditional and customary justice systems; historically, its approach was mainly to seek to limit or abolish such systems. However, after a 2013 ICJ [report](#) on South Sudan exposed how such an approach risked ignoring the reality of access to justice for some 90% of the population in the country, the ICJ developed a project to reassess the potential role, and how best international and national justice actors can engage with traditional and customary justice systems. As noted by Mr. Pollard: *“We used to exclude customary and informal*

*justice, but it has become much more prominent for us*". Although Mr. Pollard also highlighted that the relationship between formal justice and customary and informal justice systems, in relation to international human rights and rule of law standards in particular, is extremely complicated.

To assist with some of the complex issues, the ICJ has published a [compilation](#) of international standards and guidance on indigenous and other traditional or customary justice systems, and in 2017 convened a [global forum](#), followed by regional [consultations](#), with an overall aim to produce a guidance document by the end of 2020. Some of the practical questions to be addressed include: (1) how can engaging with customary and informal systems improve access to justice, and realization of universal human rights and rule of law standards?; (2) how do concepts of fair trial and independent and impartial judges apply in the customary and informal context, if at all?; and (3) to what extent should individual victims or accused persons be able to select between formal and customary systems?

Mr. Pollard concluded with an overarching dilemma: on the one hand, if we simply seek to have indigenous and other customary and informal justice systems become more like formal ones, we risk losing the very elements that make such systems appealing; on the other hand, if we set aside long-established universal human rights and rule of law norms as benchmarks for engagement with such systems, then what criteria do we use to assess whether our engagement is having positive effects?

#### **CHRISTINE EVANS, Human Rights Officer, Office of the Special Rapporteur on the Rights of Indigenous Peoples, OHCHR**

Dr. Evans explained that the mandate of Special Rapporteur on the rights of indigenous people of the Human Rights Council (resolution 42/20) is to promote the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and international instruments relevant to the advancement of the rights of indigenous peoples. The mandate provides recommendations and addresses violations of human rights in the countries where they occur.

The 2019 annual thematic HRC report of the Special Rapporteur on the human rights of indigenous peoples was on the subject of access to justice, both through the ordinary justice system and through indigenous justice mechanisms. The report assesses the role of both systems of justice from the perspective of indigenous peoples. Racial discrimination and criminalization are often prevalent in State justice systems, the latter particularly in the context of indigenous peoples' efforts to exercise land rights. Challenges in terms of accessibility, costs, language barriers etc. are also present in State justice systems.

In general, the concept of justice is different for indigenous peoples; it emphasizes the reintegration of offenders rather than retribution, requires the offender to provide reparation for the harm caused and seeks restoration of harmony within the community as an ultimate goal. It is future oriented and situated in a broader context of maintaining the relationship between humans and the environment. UNDRIP asserts indigenous peoples' right to maintain their own juridical systems in accordance with international human rights standards.

Dr. Evans provided background on the work of the Special Rapporteur and the recent report and referred to her recent country visits. In some countries, indigenous justice principles and approaches are integrated into formal state systems. Dr. Evans provided examples, notably from Latin America, where indigenous justice systems are legally recognized, Mexico is an example.

Reference was also made to Guatemala where criminalization of indigenous peoples and violations of their rights, especially the right to land, occurs. The Special Rapporteur visited indigenous leaders in prison for peacefully demanding their land rights and who were targeted and remained in jail,

despite having successfully litigated in favor of their community's land rights in formal courts, at times even up to the Constitutional Court.. In Australia, the Special Rapporteur visited several prisons and observed how indigenous peoples are disproportionately over-represented among the prison population: *"In one of the prisons visited over 90% of those incarcerated were Aboriginal"*.

In contrast, Timor-Leste provides an example of good practice in combining formal justice and indigenous or customary justice, as both systems play a crucial role in the country. Dr. Evans noted in Timor-Leste the concept of justice is extended to the obligation to care for the environment. During the Special Rapporteur's visit, she noted how judges in the State justice system openly recognized the importance of customary justice.

Effective access to justice for indigenous peoples implies access to both the State legal system and their own systems of justice. Dr. Evans highlighted recommendations from the recent HRC report, including the importance of dialogue and harmonization between the ordinary and indigenous justice systems and the opportunities offered by legal pluralism.

Dr. Evans encouraged further attention and research on the contribution of indigenous justice to the conceptualization of justice and approaches to victims from the community perspective, not solely from the perspective of western approaches with emphasis on perpetrators.

#### **CHIARA CASOTTI, Amnesty International, Italy section**

Ms. Casotti welcomed the discussion of the relationship between customary and informal justice systems and formal state systems. She noted that people turn to Amnesty International for help with the most profound issues of life, freedom and dignity, and justice is integral to human rights. She pointed out that violations of human rights occur in virtually all justice systems and offered several examples from different countries, noting that human rights are a paramount objective in engagement with all justice systems.

#### **CHIAN YEW LIM, Mandate of the Special Rapporteur on Freedom of Religion and Beliefs, OHCHR**

Ms. Lim presented the mandate of the Special Rapporteur on freedom of religion or belief, which includes conducting country visits and publishing thematic reports. The Special Rapporteur's upcoming report to the 43<sup>rd</sup> Human Rights Council is on freedom of religion and gender equality. Hence, the mandate has been engaged in a project in partnership with the Stefanus Alliance and Danish Human Rights Institute on SDGs (focusing on education, justice, health and climate change), freedom of religion or belief and gender equality. The project explores the intersection of the chosen SDG with the right to freedom of religion or belief and gender issues

Ms. Lim further elaborated that in various country visits, it is often found that women or people of different sexual orientation and gender identity are put in a more vulnerable position in securing equal rights in personal status law where matters are handled through informal justice, customary, or religious courts. Moreover, the challenge is that individuals must often choose between their faith or their sexuality or role as a woman. She noted that it is encouraged to promote a plural legal environment by keeping both the formal justice and religious courts options open so that people are left with the choice to settle their personal matters through civil or religious systems.

At times, there seems to be conflict between freedom of religion or belief and gender equality and the mandate tries to explore how formal and informal justice may contribute to the solution of the alleged conflict. The Special Rapporteur recognizes the importance to engage with local communities and religious actors in shaping justice systems of any State. Ms. Lim also distinguished between moral authority versus legal authority, as well as legitimacy versus legality.



## FIONA SCHNELL, Operations Division, DCAF

Ms. Schnell noted that DCAF trains security forces and police officers and seeks to harmonize formal and informal justice systems. She noted that in six months DCAF is launching with the Economic Community of West African States (ECOWAS) a toolkit on non-state security and justice providers, including informal justice systems and would welcome further exchange on this toolkit.

## NEUS TORBISCO CASALS, Law Professor, Graduate Institute of International and Development Studies

Dr. Neus Torbisco Casals explained that she works with Professor Andrew Clapham of the Graduate Institute on building legitimacy for international courts and tribunals and to create more inclusive justice institutions. There is a proliferation of courts for international adjudication but to what extent does this reflect consensus for international human rights law? *“Universalism is a project.”*

Dr. Casals highlighted that the notion of breach of justice is a breach of community. The goal is not only solving conflicts. Thus, an important goal of indigenous or customary justice is the aim of healing within the community, *“versus the western concept of winners and losers”* in legal disputes. There is also a presumption, not always well founded, that formal state legal systems are more consistent with international law and human rights, thus casting suspicion on customary informal systems. However, some formal systems severely discriminate against racial minorities or others. On the other hand, Dr. Casals concluded, when we look at the risks of customary systems, we often need to look at the risk of *“double standards”*.

## DEVAL DESAI, Graduate Institute of International and Development Studies

Dr. Deval Desai noted the importance of this work and queried how the research community can further contribute, for instance, through clarifying the need for and the concept of legitimacy: *“why legitimacy and what legitimacy?”*

He explained that there are four specific ways to consider legitimacy: (1) functional or how people use something; (2) ideological or what people believe; (3) universal or that process and form have universal legitimacy (e.g., universal human rights, universal legitimacy in terms of substantive results); and (4) substantive as linked to instrumentality, but also an intrinsic value. Dr. Desai noted that institutions and systems are not simply instrumental, but they also have a declarative function and the relational aspect should be considered seriously. For instance, corporate actors have to be considered through multi-stakeholder initiatives on the ground, or mining companies and dispute resolution affecting land distribution. Dr. Desai concluded that tensions between different systems are important to acknowledge and harmonize.

## CONCLUSION

**Ms. Pamela Kovacs**, IDLO Manager of Research & Learning thanked all participants, noting the valuable nature of the discussion and highlighted some of the key points, including:

- *Language and terminology*: language can reinforce or remove legitimacy in many instances and terminology and how systems are presented / understood by the international community can also raise particular world views, perceptions, biases, inclusions/exclusions, and hierarchies.
- *Hierarchies*: who is empowered to decide is an important aspect of justice discussions and in plural environments, there are tensions. A common misconception about customary and informal justice is that it is used where formal or State justice is weak, but it is often also a reasoned or conscious choice, for a variety of reasons, which are often context specific.

Hierarchies need to be explored and resistance and legitimacy understood, also in the context of evolving norms, protections, and vested interests.

- *Discrimination*: regardless of justice system, discrimination is of deep concern, for instance, while indigenous and other populations may face discrimination in formal systems, discrimination often persists in customary and indigenous systems. A key question is accountability and how to strengthen justice processes and outcomes for all.

Ms. Kovacs noted that SDG 16 offers the opportunity to continue to advance justice goals and focus practically on mechanisms that individuals are utilizing and perceive as legitimate, while keeping in focus human rights and quality justice standards. The complexity of interactions and power relations that govern and interact will continue to be important for reflection and further study.

**Dr. Christine Lutringer**, Executive Director of the Albert Hirschman Centre on Democracy of the Graduate Institute of International and Development Studies, closed the discussion by thanking all of the participants for their substantive contributions. She expressed the hope that the roundtable represented the beginning of a continuing conversation and fruitful exchange between IDLO, the Graduate Institute and other participating organizations to foster additional research in the area of customary and informal justice and to promote greater interaction between the different systems and greater consistency of all systems with international human rights norms and standards.

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