

Introduction

Shifting Assumptions from Abstract Ideals to Messy Realities

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Ten years ago, the United Nations Transitional Administration in East Timor (UNTAET) faced the herculean task of creating a justice system in that devastated new nation. Forging ahead with the construction of courthouses and the importation of Portuguese judicial and legal personnel to fill the vacuum, UNTAET sought to supplant the customary justice systems that had maintained order and meted out justice for the vast majority of the population over centuries of colonialism and occupation. This policy was driven by UNTAET's ideological adherence to a particular—Western—justice model, which required it to reject the local systems because they diverged from this institutional and normative template. The customary system further challenged UNTAET's notion of state building in that it represented an alternative authority to the one UNTAET sought to establish. But reality belied these assumptions. Unrealistic expectations of how quickly a formal system could take root, combined with an utter lack of appreciation of the social context of justice, led to perverse results. On the one hand, the United Nations and the subsequent Timorese government deposed the functioning customary system before the formal system could provide a viable alternative. On the other hand, where the formal system did work, the population largely rejected it as dispensing a “strange” form of justice that impeded satisfactory resolution of disputes according to community values. A decade later, the formal justice system is the least accessible and legitimate

of state institutions, whereas the customary system, despite having no official status, remains the forum of choice for the population. This disconnection has had a significant negative impact on both the stability and the legitimacy of the fledgling state.

Most peacekeeping and stability operations of the past decade have taken place in countries that, like East Timor, have pervasive customary justice systems—long-standing community-based dispute resolution mechanisms. While there is growing recognition among rule-of-law practitioners that justice reform efforts must engage these systems, the field is nowhere near overcoming the kinds of problems encountered in East Timor. Fundamental questions remain:

- In what ways can customary justice systems further the goals of stability and rule of law in the immediate post-conflict period? In what ways do they obstruct those goals?
- How can rule-of-law practitioners engage with customary justice systems to promote their positive (and mitigate their negative) impact on the delivery of justice?
- How can national and international policymakers bridge the divide between formal and customary justice systems, in both the short and longer terms?

This volume grapples with these questions head-on in seven rich and insightful case studies: Mozambique, Guatemala, East Timor, Afghanistan, Liberia, Iraq, and Southern Sudan. It is intended primarily for practitioners and policymakers in the fields of justice and peacebuilding in conflict-affected states. But scholars of sociolegal studies and international peace operations should also find much to interest them, particularly in the wealth of empirical data and analysis of contemporary justice reform efforts. This volume makes three key contributions to the field. First, the seven country studies constitute a unique body of data, analysis, and recommendations concerning justice reform and efforts to engage customary practices in some of today's most significant peace and stability operations. Second, while taking international rule-of-law interventions as its point of departure, the volume situates these activities in the broader and more complex social, historical, and political context where they occur. This broader perspective challenges several key assumptions that underpin standard justice reform approaches, and offers an alternative way to conceive of the justice agenda. Third, by being grounded in the messy realities of countries struggling to emerge from violent conflict, this volume—and the concluding chapter in particular—provides practical and concrete guidance on how to account for customary systems in ways that promote both justice and sustainable peace.

Three Key Constraints

Despite post-conflict rule-of-law practitioners' rhetorical recognition of the need to engage customary systems, three fundamental constraints continue to hinder a shift in practice. The first is the widely held tendency to see justice reform as a technical exercise of drafting laws and building institutions, to be done by international legal professionals. But lawyers schooled in Western formal law rarely have the background, skills, or access needed to account for the contextual complexities of customary justice systems in their work. This attitude is symptomatic of the broader flaws of the rule-of-law enterprise in post-conflict societies. Numerous critiques have pointed to the general lack of knowledge about how to achieve the rule of law, the failure to see justice reform as a deeply social and political process, and the consequent overemphasis on form—institutions and laws—over function.¹ The ill-fated law and development movement of the 1960s came to the hard realization that even a formal legal system is bound up in complexities of culture, socioeconomic realities, and politics that do not necessarily respond to top-down legal reforms and training.² Yet, the problematic and unimpressive track record of contemporary post-conflict rule-of-law interventions includes several examples of institutional shells and paper laws that have minimal effect on most of the population.

It is this tendency that strongly underscored UNTAET's exclusive focus on the formal system. But if customary systems receive any attention, it is generally through a technical, legalistic lens. This, in turn reinforces the notion that customary systems, too, can simply be "fixed" through legal interventions. However, as Chopra, Ranheim, and Nixon stress in the East Timor chapter, "To understand local perceptions of law and justice requires understanding the holistic and interdependent nature of all sociopolitical aspects and belief systems of local societies." This requires empirical research and in-depth ethnographic, political, and historical analysis—which calls for a skill set both alien to the typical lawyer and rarely valued in the action-oriented crisis environment of post-conflict reconstruction.

This volume seeks to shift the technical and legalistic way that rule-of-law practitioners approach customary systems—and, indeed, the justice sector as a whole—toward a more sociological understanding of their role

1. See, for example, Thomas Carothers, ed., *Promoting the Rule of Law Abroad: In Search of Knowledge* (Washington, DC: Carnegie Endowment for International Peace, 2006).

2. For extensive discussion of the failures of the law and development movement, see David M. Trubek and Marc Galanter's seminal article "Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States," *Wisconsin Law Review*, no. 4 (1974): 1062–1102.

and context. This awareness forces us to see customary systems not as an isolated phenomenon on the margins of the justice sector but as an undeniable component of the justice landscape. It draws on the long-standing observations of legal anthropologists such as Sally Falk Moore that “there is an intimate relation between law and society, that law is part of social life in general and must be treated analytically as such.”³

The second constraint is a normative one. As the rule-of-law enterprise has grown into a core element of peacebuilding operations over the past fifteen years, its normative basis has also become firmly established. The United Nations’ definition of “rule of law” explicitly calls for consistency with international human rights norms and standards:

[Rule of law] refers to a principle of governance in which all people, institutions and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principle of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.⁴

A primary and generally unquestioned goal of most post-conflict rule-of-law interventions is often stated as nothing less than full compliance with these standards. This built-in normative bias poses an obvious challenge facing customary systems that are not based on the international ideal of rule of law (based on Western liberal democracy) and include practices that fall short of international norms. But at this fragile time, the state legal system that is meant to be the guarantor of international standards is often far less functional and popularly legitimate than the customary systems it is meant to regulate. To many rule-of-law practitioners, the choice is, either eradicate the deviant customary justice system or intervene to “fix” it in line with the required standards.

This volume addresses this normative bias in two ways. It takes as its starting point the international community’s ultimate objective—to seek compliance with human rights—while questioning tactical approaches to getting there. The chapters thus point out the limits, as well as the unintended negative consequences, of uncompromising top-down legalistic approaches while exploring more flexible strategies that are calibrated to

3. Sally Falk Moore, *Law as Process: An Anthropological Approach* (Boston: Routledge and K. Paul, 1978), 218. On legal anthropological approaches, see Werner Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa*, 2nd ed. (Cambridge: Cambridge University Press, 2006), 82–119.

4. United Nations, Report of the Secretary-General, “The Rule of Law and Transitional Justice in Conflict and Post-conflict Societies,” S/2004/616.

on-the-ground social dynamics, capacity constraints, and political realities. At the same time, the volume challenges this bias by laying out an analytical framework assessing the actual benefits and flaws of customary justice from the perspective of its users, in light of the socioeconomic and political realities in which they live, rather than measuring it against a Western legal template. These perspectives, complex and contradictory though they may be, should ultimately inform the objectives of justice reform.

The third constraint concerns the nature of the post-conflict peacebuilding enterprise. The objective of state building calls for the (re)establishment or expansion of state sovereignty, which is generally seen as entailing a state monopoly on delivery of justice and regulation of crime. Rule-of-law practitioners thus tend to regard customary systems as a distraction from their main task—or even as an obstacle that undermines the sovereign authority of the state. UNTAET’s wildly unrealistic expectation that a formal state system could be established in a mere few years is continually replicated by rule-of-law missions. The immediate post-conflict period is often hailed as a “window of opportunity” for the international community to step in and “get it right.”

But a more appropriate analogy for this complex period may be that of hitting a moving target. One characteristic that distinguishes societies emerging from conflict from other developing countries is the condensed and accelerated process of shifting political and power structures, demographic movements, and mass social flux. The exclusive focus on building the formal system dangerously ignores the deeper political implications of the customary system: the extent to which it was connected to the causes and forms of conflict, and the impact this turbulent period has had on its effectiveness and aspirations.

The following chapters underscore the relationship between the role of customary justice, and peace and stability by probing the political undercurrents as well as emphasizing on-the-ground analyses of conflict fault lines. They explore the objectives of human rights, societal stability, state legitimacy, and unitary authority as potential trade-offs that must be acknowledged and weighed. Finally, the volume borrows from the concept of legal pluralism to challenge the notion that a justice system must emanate from the state, and to examine and propose more nuanced relations between the different legal orders, which can then be more responsive to social and political imperatives in ways that support sustainable peace.

Embracing Complexity

This volume explores the realities of this complex interrelationship between customary law, formal law, and post-conflict peacebuilding, with

the aim of equipping justice practitioners with analytical tools and practical guidance. It builds on and complements the emerging body of practitioner literature on customary law and justice reform of the past several years. Specifically noteworthy are the practitioner guidance papers put out by the UK Department for International Development (DFID) in 2004 and by the United Nations Development Programme (UNDP) in 2006, which lay out a useful starting point for international actors considering engagement with customary systems to improve access to justice.⁵ The Organisation for Economic Development/Development Assistance Committee's (OECD/DAC's) 2007 study broke ground in advocating a "multilayered approach" to justice and security programs that takes into account both state and nonstate (including customary) providers of those services.⁶ Other works have advanced our understanding of the role of customary justice systems in transitional justice initiatives—specifically, in seeking justice and reconciliation following mass abuses committed in the course of conflict. The International Institute for Democracy and Electoral Assistance's (International IDEA's) 2008 publication stands out for its detailed case studies and rich analysis.⁷ The intellectual contributions and extensive field experience of the World Bank's Justice for the Poor program have perhaps done the most to push the study of customary justice out of the shadows, highlighting the need to engage with it not only in justice sector reform but as a fundamental aspect of wider development initiatives.⁸

Important literature on sociolegal studies and legal pluralism in particular has emerged since the mid-1970s. While conceptually, legal pluralism remains a hotly contested topic, the scholarship offers some very useful insights. Some of the highlights include Sally Falk Moore's anthropological grounding of law, Sally Engle Merry's work on the vernacularization of

5. DFID, "Non-state Justice and Security Systems" (GSDRC document, 2004, www.gsdrc.org/go/topic-guides/justice/non-state-justice (accessed Dec. 15, 2010); Ewa Wojkowska, "Doing Justice: How Informal Justice Systems Can Contribute," UNDP Oslo Governance Centre, Dec. 2006, www.undp.org/oslocentre/docs/07/DoingJusticeEwaWojkowska130307.pdf (accessed Jan. 3, 2011).

6. OECD "Enhancing the Delivery of Justice and Security: Governance, Peace and Security" (OECD publication, 2007), www.oecd.org/dataoecd/27/13/38434642.pdf (accessed Jan. 3, 2011).

7. Luc Huyse and Mark Salter, eds., *Traditional Justice and Reconciliation after Violent Conflict: Learning from African Experiences* (Stockholm: International IDEA, 2008).

8. See, for example, Leila Chirayath, Caroline Sage, and Michael Woolcock, "Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems" (World Bank background paper, Jul. 2005), http://siteresources.worldbank.org/INTWDR2006/Resources/477383-1118673432908/Customary_Law_and_Policy_Reform.pdf (accessed Jan. 3, 2011); Caroline Sage, Nicholas Menzies, and Michael Woolcock, "Taking the Rules of the Game Seriously: Mainstreaming Justice in Development. The World Bank's Justice for the Poor Program" (Justice and Development working paper, Jul. 2009), www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2009/11/25/000333038_20091125023547/Rendered/PDF/518450NWP0J1D010Box342050B01PUBLIC1.pdf (accessed Jan. 3, 2011).

human rights, and Brian Tamanaha's pragmatic approach to legal pluralism.⁹ However, while this volume is informed by some of these concepts and seeks to connect them with the practitioner world, it does not pretend to engage this literature academically. The volume's focus remains its original empirical research and practitioner-oriented analysis.

Case Studies

This volume goes beyond the existing literature by offering originally researched, detailed case studies that provide an interdisciplinary perspective on a wealth of new material concerning customary justice systems and the effects of justice policies in seven conflict-affected countries. The customary justice systems that constitute the subject of our research are generally community-based social regulation and dispute resolution practices that are distinct from—even though influenced by and intertwined with—the state-sponsored Western-style justice system. The term “customary justice” encompasses a vast array of practices that vary from community to community, and is not meant to imply a single, uniform system. What such systems generally have in common is their origins in long-standing localized social structures, which greatly inform their notions of justice. At the same time, one of the most important characteristics of customary systems is that, embedded as they are in the local social context, they are contested spaces subject to continuous influence and change. While using the term “customary” as a general reference, this volume respects the individual authors' choices of terms. Thus, the chapters discuss “customary law” in Mozambique, Liberia, and Southern Sudan; “Mayan law” in Guatemala; “local law” in East Timor; “nonstate” law in Afghanistan; and “tribal law” in Iraq.

The authors recognize the criticism of the term “customary law” as an invention of colonial authorities and their chosen local counterparts as a tool of indirect rule.¹⁰ Alternative terms are also problematic. “Traditional justice” implies a static quality or the existence of an ideal form of justice from some glorified past; “nonstate,” by definition, excludes forms of local justice that have been officially recognized or regulated by state law or incorporated into the state justice system; and “informal” belies the reality of the systems we studied, in which complex and well-developed systems of rules and procedures are applied. Finally, both “nonstate” and “informal”

9. See, for example, e.g., Moore, *Law as Process*; Sally Engle Merry, “Global Human Rights and Local Social Movements in a Legally Plural World,” *Canadian Journal of Law and Society* 12, no. 2 (1997): 247–71; Brian Z. Tamanaha, “Understanding Legal Pluralism: Past to Present, Local to Global,” *Sydney Law Review* 30, no. 3 (2008): 374–411.

10. See, for example, Mahmood Mamdani, *Citizen and Subject: Contemporary Africa and the Legacy of Late Colonialism* (Princeton, NJ: Princeton University Press, 1996), 49–50.

have been used to describe a variety of ad hoc innovations that lack roots in the particular social history of a community. While such systems may well be present in post-conflict societies, they raise distinct issues that are beyond the scope of this study.

The seven case studies were selected with the aim of deriving broadly applicable conclusions and, thus, share a number of features: countries with a robust history of customary justice, which experienced a period of internal violent conflict, and which have struggled to (re)construct a justice system with some degree of international involvement. The diversity of the cases in every other way allows us to account for contextual specificity. Thus, the cases span three continents and cover a wide array of landscapes, ethnicities, cultures, and social structures. They further cover a range of typologies of state relations with the customary justice systems, from nonrecognition to full incorporation in the state judiciary, with a variety of models in between. The cases also demonstrate how these relations have been determined by the specific historical effects of power struggles, colonialism, and tensions between the central authority and the periphery. The nature of the armed conflict and its relation to customary justice also varies considerably from case to case, as does the current state of peace and stability. Finally, the cases illustrate a range of roles for the international community in justice sector reform, including full executive authority, military intervention, and light advisory roles.

The interdisciplinary approach of the chapters—achieved by the collaborative authorship of lawyers, political scientists, and anthropologists—contributes to the richness and depth of our understanding of these cases, freeing them from the normative constraints of a purely legalistic approach by examining them in their larger sociocultural and political context. The authors further combine scholarship with deep practical—and, in several cases, native—experience in the countries they write about. The result is a remarkable set of case studies that provide nuanced contextual analysis while speaking to the concrete and pragmatic concerns of practitioners and policymakers.

With nearly two decades of post-conflict experience, Mozambique (1993 peace agreement) offers a rich account of the role of customary justice from the immediate transitional period through subsequent consolidation of peace and institutional reform. Lubkemmann, Garvey, and Kyed examine the shifting government policies on the recognition of customary justice from the perspective of the local justice needs and social realities of the population. The trend toward more, rather than less, reliance on customary mechanisms, even as the country has had an impressive recovery, serves as an important caution to those who look to customary justice as merely a necessary stopgap solution.

Guatemala (1996 peace agreement) highlights the positive value of embracing customary justice as a key element of peace. Here, Mayan law is not just a fact on the ground but a symbol of an indigenous population brutally oppressed during the conflict. Hessbruegge and Ochoa García critique the government's efforts to integrate aspects of Mayan law into the state system and offer an alternative approach that would serve to reinforce, rather than weaken, the strengths of customary justice.

As noted above, East Timor (1999 Transitional Administration) presents the unique situation of a UN executive mandate tasked with building a brand-new justice system. Having served under UNTAET, Chopra, Ranheim, and Nixon analyze the practical effects of the United Nations' failure to come to grips with the reality of customary justice. The chapter underscores the superficiality and dangers of rule-of-law strategies driven by idealized Western templates and makes a compelling case for the need to ground interventions in social context analysis and inclusive local participation.

The Afghanistan chapter (2001 Bonn Agreement) offers insight into an issue that is increasingly considered critical to current efforts to stem the Taliban insurgency and strengthen the legitimacy of the state: the recognition and promotion of traditional justice mechanisms.¹¹ The case study puts the relationship between the state and customary systems in historical perspective and analyzes the social and political factors that determine the effectiveness of each. Based on their extensive experience in country, including involvement at the level of national policy and in local pilot projects, Barfield, Nojumi, and Thier set out concrete guidance for constructive engagement with the complex justice landscape.

As Liberia (2003 peace agreement) struggles to reform its governance and justice institutions—which have both fueled and been decimated by the ravaging civil war—it must contend with the cavernous gap between the American-style legal system it aspires to and the realities on the ground. Buttressed by extensive original empirical data, Lubkemann, Isser, and Banks point out the need to evaluate justice options as they function in fact (not in ideal form on paper) and from the perspective of their users. This approach urges policymakers to rethink efforts to curb the role of customary justice and, instead, adopt a more pragmatic strategy that takes into account severe capacity limitations of the formal system as well as the social conceptions of justice held by most Liberians.

11. "Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions" (Dec. 5, 2001), www.usip.org/files/file/resources/collections/peace_agreements/pa_afghan_12052001.pdf (accessed Jan. 26, 2011).

The Iraq chapter (2003 fall of Baath regime) focuses on the social structures and dispute resolution mechanisms of tribalism among the Sunni population of Al-Anbar Province. The case study further examines the political vicissitudes that formed the state's response to tribal law in this region from which Saddam Hussein and, later, the Sunni insurgency drew significant support. Asfura-Heim provides an insider's perspective on the U.S.-led Coalition forces' efforts to engage tribal law in counterinsurgency efforts.

Finally, the Sudan chapter (2005 peace agreement) provides an insightful overview of the complex historical, political, and cultural dynamics that continue to shape policies concerning customary law. Drawing on extensive interviews with key authorities, Deng analyzes the overarching tensions between the aspirations of Southern Sudanese policymakers to modernize customary law into a common basis of legislation, and the inherently decentralized nature of customary authority.

Practical Guidance

Taken together, the case studies offer considerable insight into how the rule-of-law community might make the leap beyond rhetorical recognition of the importance of customary justice systems, toward a practical approach that incorporates the realities of their role in justice strategies. The volume's conclusion draws these lessons out in two steps. The first challenges the narrow legalistic and normative bias generally applied by the rule-of-law community in assessing customary justice. It argues that the tendency to measure customary systems against Western rule-of-law templates obscures realities on the ground and leads to strategies that not only fail to address the concerns of the population but often undermine rather than strengthen access to justice. It lays out an alternative analytical framework that incorporates a far more detailed and nuanced analysis of the social, cultural, historical, and institutional context of the justice system as a whole.

This framework emphasizes the sociocultural and economic context of local societies, which determines local conceptions of justice, and a variety of internal and external factors that affect the scope, effectiveness, and legitimacy of customary systems. It further uses the concept of legal pluralism as a means of understanding customary systems, not as isolated phenomena but as part and parcel of a complex justice landscape in which they intersect with, clash with, and merge in hybrid forms with the state justice system. Here it is crucial to recognize the deep political implications of legal pluralism and the role of customary systems, often bound up in contests for power and national identity. Finally, this framework accounts for the inevitable gap between the legal framework determining the relationship between

customary and formal law, and the de facto practices on the ground. Arguing that the actual experience of litigants is far more determinative of the nature and quality of justice than are any written laws, it calls for empirical research as the starting point of justice assessments.

The second step presents a series of recommendations for designing strategies to promote justice and sustainable peace that take into account this contextual and nuanced understanding of customary justice. Emphasizing the need to calibrate strategies to local particularities, societal fragility, and capacity limitations, these recommendations focus on principles and process. They grapple with the need to anticipate unintended negative consequences of justice reforms and to assess potential trade-offs between the objectives of international standards, security, stability, social cohesion, and state legitimacy. The recommendations stress the importance of focusing on practical solutions to real and current problems as determined by the population, rather than on pushing toward a predetermined end state. They further suggest ways to support a constructive and inclusive process through which constituents can debate and shape the particular form of legal pluralism that will best reflect the needs and aspirations of the society as a whole. Finally, these principles are used to suggest concrete strategies in the context of three of the most pressing issues to rule-of-law practitioners: addressing practices that violate human rights, strengthening the effectiveness of customary justice systems, and promoting constructive linkages between the formal and customary systems.