



## WOMEN AND CUSTOMARY AND INFORMAL JUSTICE SYSTEMS: A GLOBAL CONSULTATION ON NAVIGATING COMPLEX PATHWAYS TO JUSTICE

Side event organized by the International Development Law Organization (IDLO) with the support of Federation of Women Lawyers (FIDA-Kenya), Landesa, Uganda Women's Network (UWONET) and Rights + Resources (RRI) on the occasion of the 63rd session of the Commission on the Status of Women Friday, 15 March 2019, 3:00 to 4:15 pm Ex-Press Bar, United Nations HQ

### SUMMARY REPORT

#### Background

In the developing world, 80% of disputes are resolved by customary or informal justice systems (CIJs).<sup>1</sup> Many justice seekers turn to CIJs as they are often more accessible, affordable and familiar than formal systems. They are also seen as offering other advantages such as speedy resolution, cultural relevance, use of non-confrontational approaches and flexibility. However, despite their perceived advantages, CIJs are often reported as skewed against women, favoring male-dominated structures, patriarchal values, and discriminatory and harmful outcomes for women.

Within the broader justice, governance and development sector, there has been growing discussion on engaging with CIJs to enable broader access to justice. IDLO itself has consistently interrogated possible avenues for engagement with CIJ systems<sup>2</sup>. The CEDAW Committee, in its General Recommendation 33 on women's access to justice, "has observed a range of models through which practices embedded in plural justice systems could be harmonized with the Convention". While there are significant challenges to working with CIJs, there are also models, lessons and approaches that are showing possible opportunities for strategic engagement.<sup>3</sup>

The Women and Customary and Informal Justice Systems side-event provided space for an open consultation on the relationship between women and CIJs. The event focused on two main questions: (a) What challenges do women encounter when they seek justice through CIJs? And (b) Are there lessons and approaches for strategic engagement with CIJ systems?

The event was organized as part of a series of global consultations to inform policy and programming on customary and informal justice systems, legal pluralism and access to justice, within the context of achieving the 2030 Agenda 2030.

<sup>1</sup> For a discussion of these estimates, see: IDLO. 2019. Practitioner Brief. Navigating Complex Pathways towards Justice – Engagement with Customary and Informal Justice Systems, p.4 and note 4.

<sup>2</sup> For more information on IDLO's work on CIJ, visit: <https://www.idlo.int/what-we-do/rule-law/informal-justice>

<sup>3</sup> See also: IDLO. 2013. Accessing Justice: Models, Strategies and Best Practices on Women's Empowerment



## Experts and Participants

The panel consisted of: (a) *Professor Patricia Kameri Mbote*, Professor of Law and former Dean at the School of Law of the University of Nairobi and an advocate of the High Court of Kenya with the rank of Senior Council; (b) *Dr. Gina Alvarado*, Senior Researcher and Evaluation Advisor, Landesa; (c) *Ms. Jemimah Aluda*, Senior Prosecution Counsel at the Office of the Director of Public Prosecutions, Department of Offences against the Person of Nairobi, Kenya and Board Member of the Federation of Women Lawyers (FIDA-Kenya); (d) *Ms. Rita Hope Aciro-Lakor*, Chief Executive Officer of Uganda Women's Network (UWONET); (e) *Dr. Omaira Bolanos*, the Director of the Latin American Program, Rights and Resources Initiative; and (f) *Ms Ketty Marcelo*, the President of ONAMIAP, the Organización Nacional de Mujeres Indígenas Andinas y Amazónicas del Perú. The event was moderated by *Dr. Ilaria Bottigliero*, Director of Policy, Research and Learning at IDLO. *Ms. Irene Khan*, Director General of IDLO provided the concluding remarks to the event.

About 100 participants attended the event, representing a wide constituency of women's groups – international, national and local, government policy makers and officials – such as from South Africa<sup>4</sup>, Mozambique, and Finland, researchers and justice professionals<sup>5</sup>.

## Summary of Issues Discussed

### A. Overall approach to engaging with customary and informal justice systems

Participants in the event strongly put across the view that engaging with customary and informal justice systems is not a choice, it is a response to the reality of women's everyday lives. Especially in situations when 'women have absolutely no rights' (Dr. Alvarado), it is a must, a responsibility, to be present and explore what are the practical ways to engage for the benefit of women.

Professor Mbote spoke about the "ubiquity of customary and informal justice systems" and the fallacy of speaking about engaging with customary and informal justice systems, as if it were a choice that women made. Customary justice is all that women have, good or bad, so it is not an issue of either-or. The reality is that customary informal justice systems exist and govern the lives of many women, so international law practitioners and other justice and development partners must find ways of engaging with CIJs to benefit women.

Rita Aciro who shared the network's firm conclusion that, after twenty-five years of working as a feminist, radical, national women's organization, committed to challenging anything that is patriarchal, and having focused on influencing the legislative and policy framework particularly to conform to international, regional, and national legal frameworks, they realized that, even if they excelled at such reforms, nothing much changed for women on the ground. UWONET recognized that, while Uganda may have all the right laws and policies in place, women were not accessing justice because most of them overwhelmingly relied on the traditional or customary justice systems. UWONET had to find means and mechanisms to respond to that reality.

<sup>4</sup> Ms. [Hendrietta Bogopane-Zulu](#), the Deputy Minister of Social Development in the Republic of South Africa was in the audience.

<sup>5</sup> Three representatives of the International Association of Women Judges were in the audience, including Justice Susan Glazebrook, the incoming President of IAWJ.

The consultation repeatedly emphasized the wide diversity of CIJs, including in how they are positioned vis-à-vis women's rights.

Dr. Alvarado observed that a range of situations exist going from those where women have absolutely no rights and are treated as men's ownership; to those where women are considered individuals with rights, but they are given less rights than men; and finally, a third situation where women may be given equal rights to men, but actually realizing these rights is a huge challenge.

The diversity is such, observed Rita Aciro (Uganda Women's Network – UWONET), that there may not be global principles of engagement. It has to be recognized that, under international (human rights) law and national constitutions, legal pluralism in some cases is mandatory, in others it is permissible, and yet in others it is prohibited.<sup>6</sup>

Many constitutions of the world do recognize customary law<sup>7</sup>; elsewhere, CIJs may be merely tolerated or wholly disavowed. Furthermore, customary and informal justice systems are diverse and cannot easily be clustered as one type; they differ according to traditions, regions, peoples and settings. This points also to the need for any consideration of the gendered dynamics of human rights and legal pluralism to be located within a broader analysis of regimes of governance, power relations, history (including the experience of colonialism) and political context.

#### *B. Centrality of gender/ women's issues to discourse on customary and informal justice*

Panelists and participants emphasized that it is critical to place women's issues and concerns at the center of any conversation on CIJs. This means thinking about the diverse groups of women and the range of contexts they are situated in.

Professor Mbote highlighted that many customary informal justice systems operate within the private sphere and the question is how engagement with such systems can be made more effective by confronting not just public power, which is in the state, but private power, which is found in communities and in families.

Dr. Alvarado, that women are not the same; class, race, religion, nationality and other factors bring more or less challenges, from interfering with the enjoyment of social and economic rights, such as rights of ownership to land, to other limitations on women's ability to exercise any right and to fully participate. Women experience a variety of manifestations of the power of the law. Whether it is formal or customary, law affects women in many more ways and sometimes in different ways than it does men. Whereas the state claims monopoly of violence and can coerce people to follow law, in the micro spaces there are other ways of forcing people to conform through shaming, through pressure, or through being threatened with not belonging.

---

<sup>6</sup> For example, one branch of human rights law, i.e. the regime governing the rights of indigenous peoples, makes the recognition of legal pluralism mandatory, whereas another branch of human rights law, ie the case law of the European Court of Human Rights, forbids it as a violation of human rights (Corradi, 2017).

<sup>7</sup> UN Women Global Gender Equality Constitutional Database: <http://constitutions.unwomen.org/en>

### C. Challenges for engagement

The panel identified several challenges that women encounter when they seek justice through CIJs.

*Challenges relating to women's participation and inclusion.* Professor Mbote observed, "formal and informal laws seem to conspire to relegate women to the backburner". Ms Aciro stated that over time, UWONET became aware that practically women and girls overwhelmingly use the traditional, customary justice system for issues of violence against women and land rights. However, in the traditional customary systems, 99% of leaders are men. This constitutes a strong barrier for women to bring up issues of violence to the traditional customary systems, and more so when it is sexual violence, as in many countries in Africa, and particularly Uganda, issues of sex and sexuality are not to be spoken of in public.

Some other challenges that women encounter in customary informal justice systems are the lack of standing because of the power structures within the local spaces; the lack of agency; the lack of voice in the community. In some places, women are perpetual minors and therefore need to be represented by somebody else (a male representative) to vindicate their case. There is also sanctioned discrimination and unequal treatment on the basis of gender in many customary spaces.

*Challenges relating to the interface between formal and informal laws and systems.* Formalization of informal norms has been used and advocated as a promising modality of engagement. Informal norms have been brought under the formal system, for example through constitutions. However, such formalization does not necessarily bring informal norms into stronger compliance with fundamental rights. There is a lot of permeability between formal and informal norms. People who apply the formal norms belong to the community. It is a myth that they would be able to remove themselves from what the society considers to be right or wrong. In certain instances, people bring to formal courts considerations from their beliefs as community members.

*Lack of procedural safeguards and enforcement.* Other challenges in the customary and informal justice systems mentioned by panelists were: the lack of procedural safeguards; and limited capacity to enforce decisions from the customary and informal systems. The handling of criminal matters by the informal justice system was discussed as one of the most controversial and sensitive issues that is at stake when discussing women's access to justice through the informal systems.

*Challenges relating to women's access to land and other resources, within the context of local autonomy and indigenous communities.* There are current efforts to use informal, customary and religious norms and institutions to support women – and men – in their struggles for basic resources, such as land and water. Such initiatives may on the one hand expand the spaces for the exercise of local autonomy by different social, ethnic and religious groups, but may on the other hand reinforce existing inequalities within these groups, particularly in terms of gender.

Ms. Marcelo states that *“We need to be mindful that the local autonomy of indigenous territories and their own systems is sometimes violating women’s rights. Sometimes, protecting indigenous people rights as a community is diminishing the right of indigenous women.”* Ms Marcelo highlights that the recognition of local autonomy and collective ownership of indigenous communities over their territories has sometimes diminished the rights of indigenous women.

Dr. Bolanos states that RRI, as a global coalition made up of different indigenous organizations, research organization, development organizations, have been trying to understand what the recognition of collective rights in community-based land tenure regimes had brought to the communities and particularly to indigenous women. In its report on *Power and Potential*, it found that: in Latin America, there was progress on women’s equal inheritance rights, however, at the local level, as inheritance rights are considered customary rights, implementation was difficult. They also found that there was very limited recognition of women’s leadership at the community level, as there is a lot of resistance in the customary system to sharing power and decision-making.

### **Strategic engagement opportunities**

The panelists observed that working to repeal discriminatory practices in customary justice systems is an imperative for promoting women’s rights and should be an important modality to engage with CIJs. More specifically, the following strategies for engagement were provided:

Based on the experience of Landesa, Dr. Alvarado recommended as entry points for engagement:

- Analyzing and reviewing land bills that formally recognize customary rights, and to advocate for legal definitions of membership that clarify it means to be a community member (recognizing that there is a wide variety of local arrangements).
- Recommending provisions that ensure women’s equal participation in community land governance structures. At the same time, realizing women’s land rights involves many other types of laws and requires that marital regimes be reformed, for example.
- Training elders or local leaders and authorities on women’s rights and women’s land rights through legal literacy programs for customary authorities or awareness of women’s land rights, which also increase transparency and inclusiveness in the local processes.
- Establishing and/ or supporting multi-stakeholder platforms for the inclusion of women and advancement of their rights that can hold the government and other decision-makers accountable for their commitments to women’s (land) rights through shadow reporting, advocacy, and participating in land campaigns.

FIDA-Kenya’s strategy for engaging with CIJs included:

- Training for advocates of the High Court on mediation, so that they are not just focusing on representation in court, but also encouraging mediation.
- Training for the council of elders, who are the authorities doing the customary mediation. FIDA-Kenya provided them with training on how to ensure that the decisions made are also favorable to women.
- Advocacy for women to be elders in the council of elders to challenge the male-dominance of the council of elders. FIDA-Kenya succeeded in having women sit in the council of elders in many communities.

- Training women on self-representation in mediation fora on issues such as inheritance and family disputes. Women are trained to be able to articulate their issues when they face the council of elders, which is an intimidating experience for many women.

FIDA-Kenya has used a multifold strategy to promote positive justice outcomes for women in customary justice system, customary mediation and at the intersection between formal and informal. FIDA-Kenya has significant experience using mediation and out of court dispute resolution with positive outcomes for women, having sent 1,700 cases out for mediation, especially in family disputes. The courts in Kenya are able to formalize the mediations by issuing orders and recognizing the agreement reached through mediation. It is hoped that this recognition will make the agreement binding to the parties. This is subject to a new policy currently under development, where the proposal is to make the court-recognized mediation agreement binding upon the parties and also ensure the enforceability of the decision.

Other examples from Kenya were given also on settling disputes in criminal cases through customary courts. Ms Aluda observed that this has helped women, because women do not favor having their husband sent to prison, which weakens the economic wellbeing of the household and may send women into poverty and exclusion.

Ms Aciro mentions that Uganda has a dual legal regime that recognizes both the traditional (or customary) justice system and the formal one. At the onset, this creates an ambiguous situation, as people can simply invoke culture or tradition as justification for any behavior. As a starting point for engaging with traditional or customary justice, UWONET conducted research to understand both the negative and the positive aspects of customary beliefs; to identify strategies for changing and transforming the negative ones; to identify entry points for raising awareness among traditional institutions on how the negative practices do not conform to the legal regime; and approaches that promote and further strengthen the positive practices.

Highlighting UWONET as a women's rights and feminist organization, Ms. Aciro stated that it has engaged in a lot of negotiation with the traditional customary systems, through strategies such as:

- Building the capacity of traditional leaders, conscientizing them, giving them information especially from comparative studies that show that certain practices are not universal, and once change happens it improves also the situation of their daughters.
- Emphasize the positive aspects of culture and how it has changed over time. Culture is not static, and UWONET uses examples from the communities/ societies it works to show how change happens.
- Advocate to get women into the traditional justice systems, especially for sensitive cases, like those of sexual violence. Women help little girls, listen to them, and then they report. (Cases such as that of a seven-year old who was defiled by an uncle and who has to report her case to a council that most probably includes that uncle.) Women have now been brought on board to hear out these girls and women and find ways of reporting to their elders.
- Develop guidelines together with traditional leaders and try to ensure that they meet the international legal framework.
- Developing the referral pathway for cases of SGBV. Women receive information about both the traditional or customary system referral pathway and the formal one. Where can

a case be reported so that survivors build confidence? Survivors are provided with alternatives. And even for cases of SGBV, the customary justice system plays an important role. It provides alternatives, but it has limitations, and UWONET is also working to inform traditional justice authorities about where their jurisdiction should end.

- Supporting cooperation between informal and formal justice system, bringing them to work together. There is a divide between the customary and the formal justice system and there is a tendency for the (formal) elites to look down upon the customary leaders. And yet, the customary leaders do hold a lot of power and UWONET tries to bring them together to work as partners, so that they follow the referral pathway (in cases of SGBV) and know where their jurisdictions end.

Ms. Marcelo shared that ONAMIAP's work with the indigenous justice systems is to sensitize men about the importance of women's rights and participation. In order to have access to participation and decision-making, ONAMIAP is working to change the local norms, at the community level, the definition of the membership in the community at a policy level, as well as trying to have quotas adopted for a set percentage of representation of women in the community assembly.

### ***Recommendations for Moving Forward***

Panelists and participants provided the following recommendations for next steps:

1. Continue and expand the global consultations and policy dialogues on customary and informal justice systems to include the human rights community more broadly and to elicit views and opinions from different regions of the world (Africa, Asia, Latin America) on how to make the informal justice system much more responsive to the needs of people.
2. Invest in research and learning on customary and informal justice systems, as a promising pathway to innovating law and ensuring access to justice, but also preventing injustice.
3. Prioritize contextual understandings of CIJs, that take into account broader analysis of regimes of governance, power relations, history (including the experience of colonialism) and political context.
4. Develop policy positions that take into account that, given the wide diversity of customary and informal justice systems, including in how they are positioned vis-à-vis women's rights, there may not be global principles of engagement.
5. Ensure that women's perspectives are included in any consultation on customary and informal justice, as women are a very important constituency for customary and informal justice systems. International law practitioners and the international community more widely needs to engage with the reality of customary and informal justice systems and the lived experiences of women in those systems.
6. *Women's empowerment* is a crucial aspect of justice for women, whether in formal or informal settings. Promote women's empowerment in CIJ interventions by:
  - Involving women in the system of leadership in the traditional justice systems

- Challenging and working to repeal discriminatory practices in customary and informal justice systems
  - Sensitize men/ traditional leaders about the importance of women's rights and participation
  - Promoting community-led change of social norms and mindsets
  - Train women on self-representation in customary mediation for a
  - Advocate for women's representation in customary justice fora especially in cases of sexual and gender-based violence (to bring report from survivors and to represent survivors)
7. Garner the potential of youth and engage young lawyers, even during their studies, to learn about (rural, remote) communities and how they can apply the law in a way that is fair and just.