

NEITHER STATE NOR CUSTOM – JUST NAKED POWER: THE CONSEQUENCES OF IDEALS-ORIENTED RULE OF LAW POLICY-MAKING IN LIBERIA

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Introduction

Eight years ago Liberia emerged from a ravaging civil war that had raged for fourteen years and that had been preceded by a decade of political coups and coup attempts, violent governance, and unrest. In 2012, as the country recently held a hotly contested second round of national elections, Liberia is regarded as a tentatively successful, but fragile, case of post-conflict peace-building and democratization. There are many encouraging signs that the current democratically elected government is striving to break with the predatory and repressive practices of previous administrations such as those of Liberia's recent warlord Presidents—Samuel Doe (1979-1990) and Charles Taylor (1997-2003). At the same time, Liberia still confronts significant challenges in its effort to secure peace, consolidate democracy, and jumpstart reconstruction and development. High levels of unemployment, continuing land disputes that often map onto wartime ethnic divisions, the continuing ruminations of ex-combatants, and the charged atmosphere surrounding the pronouncements of the Truth and Reconciliation Commission all provide potent reminders that volatile forms of social and political antagonism continue to lurk perilously near the surface of Liberia's fragile polity.

In this article we examine the effort to rebuild and reform the justice system in Liberia, which has been one of the cornerstones of peace-building policy. Our key

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argument is that while the approach that is being used to reform the justice system aims to correct a historical legacy of discrimination that had been embodied and implemented through a pluralist legal system, it is failing to address and in fact may actually be accentuating the ‘justice vacuum’ faced by most Liberians. Moreover, in characterizing customary justice and other informal dispute resolution mechanisms primarily as sources of inequality and discrimination, while simultaneously neglecting to explore how the formal justice system works in actual practice, this approach at best misses the rationale behind popular preferences for customary over formal forms of legal recourse and at worst simply dismisses it as a form of unreasoned adherence to “tradition” that should and can be ‘educated away’. As this article will explore, these preferences do not channel any form of blind or reflexive adherence to culture but rather are based upon an empirically well-founded suspicion that the state justice system privileges the powerful while ignoring many of the concerns that average Liberians believe justice should address as well as the principles they believe should prevail in order to produce results that can effectively modify undesirable behavior and safeguard the interests of victims and society—or in other words, deliver “satisfactory” justice.

We further explore the consequences of this “policy ignorance” by examining how— somewhat paradoxically—justice reform measures that are intended to be a pillar that supports Liberia’s post-war peace-building strategy are in fact doing little to contain mounting perceptions that power and resources are the only true determinants of justice outcomes. These sentiments underwrite growing dissatisfaction with all forms of justice, though particularly with the state system. Perhaps most ironically, these reform efforts that aim to address a historical legacy of discrimination are being interpreted by many rural Liberians as a process of political subjugation rather than of civil emancipation. Thus rather than contributing to the legitimation of Liberia’s incipient democratic state and to a sense of participation in the political process, these policies are in fact fomenting resentment against the state by contributing to a view that sees it as an intrusive mechanism for promoting the interest of Monrovia-based elites. The argument we present in this article is based on an extensive collaborative field study conducted under the supervision of Deborah Isser and Stephen Lubkemann in 2008-09.¹

¹ Isser, Lubkemann and N’Tow, (2009). This study was based on 10 months of fieldwork conducted by teams in four counties (Lofa, Nimba, Grand Gedeh, Montserrado) involving in-depth case interviews with over 130 disputants, 39 local customary justice practitioners, and 35 focus groups (disaggregated by gender and age).

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Conducted primarily in the three most war affected rural counties in Liberia (Nimba, Lofa and Grand Gedeh)—and to a more limited extent amongst residents of the capital city of Monrovia—this study extensively documented how average Liberians perceived and navigated the topography of post-war options for seeking justice and how they reacted to specific justice reform policies.

Simultaneously with this field study, Isser and Lubkemann collaborated with our third co-author, Peter Chapman in the supervision of a legal review of the history and current status of Liberian legislation on legal pluralism, and the co-ordination (with partners from the United Nations Mission in Liberia and the Carter Center) a multi-year high-level dialogue that brought senior Liberian policy-makers together with legal and sociological specialists and international partners to discuss the policy implications of the findings of both studies. Involving extensive one-on-one consultations with senior level officials, in addition to several group meetings, and culminating in a *National Conference on Enhancing Access to Justice* in early 2010 this process afforded us a great deal of insight into the imperatives, constraints and (often divergent) interests that inform the community of policy-makers who are shaping justice reform efforts in post-conflict Liberia.²

The article is divided into four sections. First we provide a brief review of Liberia's turbulent political past that highlights how the dual justice system developed historically and how a specific configuration of state (formal courts), state-linked (customary chiefs), and non-state institutions (e.g. churches, voluntary associations, other community-based institutions) interacted in the past. In the second section we explore how the international community largely dismissed all but the state-specific institutions in their justice reform vision and efforts during the immediate post-war period and as a consequence have yet to develop contextualized, empirically-based strategies for justice reform that effectively respond to the needs and demands of the majority of Liberia's population. In the third section we discuss what our field study reveals about how Liberians view the performance of the customary and formal justice systems, what they believe satisfactory justice should entail, and how they are coping with what is by and large an unmet need for justice. We highlight how local preferences for customary justice options often contrast with international efforts to curtail and constrain these same institutions. We also explore how redress is being pursued in the justice vacuum that has resulted.

² This article builds on Lubkemann, Isser and Banks (2011).

In the fourth section we conclude by exploring some of the implications of popular perceptions and reactions to post-war justice reform for rule of law and peace building objectives in Liberia and reflect more on how this case suggests the need to reframe the questions that guide justice reform in comparable contexts. Our approach in this article mirrors the approach that informed our field study; to empirically ascertain the real alternatives and choices that Liberians perceive and react to on the ground, rather than attempt to compare idealized alternatives that exist only on the paper on which they are written. This approach is an analytical reaction to both policy debates about and academic analysis of customary justice institutions that juxtapose a rather oversimplified—and sometimes grossly caricatured—portrayal of customary systems against an idealized portrayal of a western-style formal justice system.

Justice and Internal Colonialism in Liberian History

Liberia's origin as an independent nation traces its roots to the founding in 1816 of the American Colonization Society (ACS), which was started in the United States by a coalition of Quaker abolitionists and slave owners in order to repatriate freed slaves back to Africa. The first group of freeborn blacks and freed slaves arrived in 1822 and established a permanent settlement at Cape Mensurado (Monrovia). These first settlers were augmented by large numbers of captives who were rescued from slave ships bound to the Americas but interdicted by British and later US naval vessels. Just a quarter century later, in 1847, Liberia declared itself an independent nation.

The country's first Constitution in 1847 laid out civil rights and a plan of government based on the American model, but these laws and rights were reserved exclusively for the Americo-Liberian settlers and did not apply to the various ethnic groups who were gradually and violently brought under the sovereign control of the Liberian state throughout the late 19th and early 20th centuries. The origins of a dual justice system can be traced back to this historical project of conquest. Thus, as early as 1869 the Interior Department was granted broad powers to govern all aspects of the 'hinterland', including the exercise of judicial power over the native subjects "with due regard to native customary law and native institutions."³ This form of indirect rule evolved into a dual legal system

³ January 23, 1869 Act of the Legislature; Gray v. Beverly (1 LLR: 500; 1907).

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whereby the hinterland was governed by customary law and institutions under the purview of the executive branch, while Americo-Liberians were subject to statutory law and courts of the judiciary.

This system received its highest form of official elaboration in the Rules and Regulations Governing the Hinterland of Liberia (1948) (commonly known as the ‘Hinterland Regulations’), which were ostensibly revised, although substantively unchanged, in 2000.⁴ The Hinterland Regulations remain, in large part, an archaic blueprint for nineteenth century colonial style rule. With regard to the administration of justice, they lay out the jurisdiction and appellate hierarchy through the establishment of customary courts, which essentially comprise a five-tiered system of courts: Clan Chiefs Courts, Paramount Chiefs Courts, District Commissioner, Provincial Commissioner (County Superintendent), the Provincial Court of Assize (now the statutory Circuit Court). The jurisdiction of the chiefs covers circumscribed geographic areas (i.e. the town or clan).

The Hinterland Regulations also lay out certain substantive rules regarding, for example, customary marriage, the use of corporal punishment, and the use of trial by ordeal. It thus created a system of state-sponsored customary justice that was distinct from the statutory system that serviced the Americo-Liberian elite, but also from the systems that had been historically practiced by local populations. As in many colonial societies, this manufactured hybrid system enabled the native population to retain at least some semblance of their existing practices and laws even as it enshrined forms of exclusion that protected the political power of the Americo-Liberian elite and transformed native leaders and institutions into agents of the state. The relegation of the overwhelming majority of Liberians to a state-backed form of customary justice and their exclusion from the formal system was emblematic of the more general policies of governance that also excluded the ‘indigenous’ population from meaningful participation in the political process, from most economic benefits, and from access to education.

For those with access to the formal justice system, it proved to be largely a tool of elite domination. While the justice system was directly modeled on the common law and legal principles of the United States, it never lived up to the structure prescribed by law, nor to the ideals of a rights-based justice system it was purported to be modeled after. Liberian history is replete with frequent episodes of

⁴ There is some debate as to whether the Hinterland Regulations are still in effect. See, e.g., Barbu 2009.

executive interference in the judiciary and manipulation of the courts to serve political aims (Sawyer 1992; Banks III 2006). The power struggles, coups, and wars waged over the last quarter century only accentuated and aggravated these historical tendencies. At the time of the 1980 coup the formal system was believed by most Liberians to cater to the wealthy and political elite whose criminal conduct went largely unpunished, even while poor people lingered in jail for extensive periods without trial. Open and unchecked corruption tainted public confidence in the formal judicial system and played a significant role in undermining the legitimacy of the Americo-Liberian state and ultimately in underwriting its violent overthrow in 1980.

Following the coup, the Liberian Constitution was suspended, the branches of government were dissolved, the functions of the Legislative and Executive Branches were consolidated in a new military People's Redemption Council, led by Master Sergeant Samuel K. Doe, and the entire core of judges of the formal Liberian court system were dismissed (except for the Chief Justice of the Supreme Court who was publicly executed). Throughout his decade-long rule Doe used the judiciary to consolidate power, eliminate opponents of the regime, silence dissent, suppress basic fundamental and human rights, and curtail freedom of thought and the press. These measures together with his campaign of ethnic cleansing played major roles in fostering popular resentment that others would capitalize upon to ignite the Liberian civil war. Between 1989 and 1997, the first stage of Liberia's civil war, the country experienced the effective dissolution of the national government, the re-collapse of what remained of its formal legal and judicial system and institutions, and the reign of anarchy.⁵ The war appeared to finally end in July 1997, with the election of Charles Taylor as President of Liberia. However, those elections failed to resolve the political crisis and within three years Liberia was once again engulfed in civil war. Under pressure from the international community and effectively losing the war, Charles Taylor resigned the presidency on August 11, 2003. Shortly thereafter a National Transitional Government of Liberia (NTGL) was established with significant United Nations support.

⁵ It is estimated that during the fourteen years of armed conflict at least 100,000 Liberians were killed (Ellis 2006: 312-16). Moran suggests up to 200,000 were killed during the conflict (Moran 2006: 5), while thousands more died from causes associated with or accentuated by the war. At least 300,000 inhabitants fled the country and a much larger number were internally displaced. Liberia became one of the poorest countries in the world.

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By the end of the war the formal justice system retained virtually no capacity and enjoyed no legitimacy amongst the populace or the international community. Its condition was described as follows by a team from the International Legal Assistance Consortium (ILAC) that visited Liberia in 2003:

There is an almost unanimous distrust of Liberia's courts and a corresponding collapse of the rule of law. Liberia's Constitution provides for an Anglo-American legal system, but in reality, there is no effective separation of powers, a limited understanding of the principles of transparency and accountability, little knowledge of contemporary notions of human rights, limited access to legal advice and defense counsel, and unconscionable delays. Taylor's government withheld salaries from judges, prosecutors, court staff, police, and prison officers for 2.5 years. Judgment, freedom, and even life itself, were often sold to the highest bidder (ILAC 2003: viii).

Customary Justice and Authority in the Aftermath of War

The civil war also had an effect on customary justice systems. While there was some evidence that internal and refugee displacement and the intervention by warlords and military commanders had prevented many customary justice institutions from working effectively, or distorted their function in at least some parts of the country, almost nothing was known (though much was assumed) about the status of these institutions prior to our field study. In fact, empirical ascertainment of the extent of this system's post-war existence and the manner in which it might be functioning—or not—was the first question that animated the field study from which this analysis is drawn (Isser, Lubkemann and N'tow 2009).

One of the key - and somewhat surprising - findings of our study was that customary justice institutions continued to function in virtually all rural communities and at all levels down to the most local.⁶ Our findings in this respect

⁶ We argue that if our research has found strong evidence of the survival and continuity of customary justice institutions in Liberia's most conflict-devastated and socially-disrupted counties - Lofa, Nimba, and Grand Gedeh- it is likely that customary institutions remain at least as relevant throughout the rest of the country's rural counties.

dovetail with a survey conducted by the Oxford Centre for the Study of African Economies in 2008-9 (“CSAE Survey”), which found that some form of customary justice accounts for almost ninety percent of dispute resolution (Sandefur and Siddiqi 2011). Our field study also indicated that the post-war customary justice system was structured more or less as set out in the Hinterland Regulations, involving a hierarchy from senior members of a household or a family, extending through a succession of chiefs: in ascendant order, quarter chiefs, town chiefs, clan chiefs, and paramount chiefs. Beyond the paramount chiefs the customary system’s chain of referral continues first to the District Commissioner, and then to the County Superintendent. Decisions that fail to satisfy one or both parties in a dispute at lower levels are appealed through this chain of referral. The Liberian state itself—and more specifically the Ministry of Internal Affairs, which has taken the lead in re-constituting the administrative system of chiefs that was disrupted during the war—thus remains an important source of authority and legitimacy invoked by the chiefs much as it had been prior to the conflict.⁷ At the same time our interviews ascertained a strong articulation of preference for the chiefly system, which underwrites the expressed belief of many chiefs that they are the best equipped to understand and deal with most justice issues in their communities. Government of Liberia consultations on the dual justice system, in late 2009 and early 2010, revealed similar opinions.

The ‘ritual officers’ (masters, zoes) of the secret societies, such as the Poro and Sande in central and western Liberia⁸ or others⁹ in Southeastern Liberia, comprise

⁷ The Ministry of Internal Affairs remains responsible for liaising with chiefs. Nearly all of the chiefs in Liberia we interviewed view themselves as government officials and agents of the state in their communities. The “National Traditional Council of Liberia” is a part of the Ministry of Internal Affairs (MIA), which has a Deputy Minister for Cultural Affairs who is responsible for liaising with chiefs. Even with Liberia’s weak bureaucratic capacity, the Government of Liberia keeps many chiefs on payroll. While traditional leaders note that they are not regularly paid, there is often an understanding between chiefs and the MIA that they should be. Furthermore, an (unpublished) study produced by Saah N’Tow for the United Nations Mission in Liberia revealed that of the nearly 80 Tribal Governors interviewed in six counties, nearly all reported they were officials of the Liberian government and more than 60% reported being on Government of Liberia payroll (United Nations Mission in Liberia 2011).

⁸ Poro is a male sodality [secret society] found among several groups in central and western Liberia, including the Vai, Gola,

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another category of customary justice practitioners who survived the war and who continue to exercise considerable influence now in the post-war period. Having no form of official articulation with the state their basis of legitimacy is derived solely from local communities.

Much as family heads and elders are expected to serve as the first line of customary resolution for disputes that arise within immediate and extended families, society officials are expected to be the first – and often ultimate – authorities to deal with disputes that arise among members of their constituent groups. This expectation includes even significant crimes that the law stipulates should be referred to the formal court system (such as cases of rape and violence that result in blood). In this second category of solely community-based authority an important role is also played by religious leaders such as Imams and some church leaders, in particular of Pentecostal and charismatic sects, by professional association officials, such as market associations, and by minority chiefs, such as local Fula chiefs. As with the Poro and other societies, these authorities often act as the first line of recourse for disputes amongst their constituent members.

Post-War Donor-Supported Reform Efforts (2003-2009)

The establishment of rule of law was highlighted by the international community and its first elected government as a core objective and task for post-conflict peace-building. Throughout this first five-year post-war period (2003-2009)

Dei, Mende, Bandi, Loma, Kpelle and part of the Ma [Mano]. The society serves two primary functions. It is the main institution to enculturate young males and to formally carry them through the rite of passage from child to adult. In addition, the elders of the Poro serve as the intermediaries between the ancestors and the living, and thus act as the ultimate arbiters of asocial actions which affect the society. The female counterpart of this organization is the Sande Society. (Gibbs 1962: 349).

For more detailed discussion of these and comparable institutions in Liberia and in West Africa—including their roles in dispute resolution see (historically): Little 1949; Bellman 1984; (and contemporary) Fanthorpe 2001, 2007.

⁹ One example is the kui societies of the Grebo in Southeastern Liberia. (Olukoju 2006: 25).

international donors and those in leadership roles in the Liberian government coalesced around a series of orienting principles that in effect have provided a general approach to justice reform. Thus despite differences in emphasis and perspective amongst actors who on occasion had disagreements they largely shared an overall approach that will be explored below. This approach may be characterized as:

- 1) 'Dismissive of Non-State Justice Actors' (in the sense that it has either ignored or sought to reduce the power and minimize the role of customary institutions in the provision of justice);
- 2) 'Legalist' (in the sense of placing a primary emphasis on legislation and legal forms, as opposed to taking a functionalist approach to justice);
- 3) 'Formalist' (in the sense of privileging investment in and capacity building of the formal justice institutions in the image of western ideals);
- 4) 'Centralist' (in the sense of pursuing a top-down model for effecting legal and institutional reform that emphasizes and invests in change at higher institutional echelons first and foremost).

Dismissing non-state actors

During the post-war period justice reform efforts took two approaches to legal pluralism and to non-state justice providers more specifically. One approach simply dismissed Liberia's historical model of legal pluralism as well as any ongoing role played by non-state justice providers as largely inconsequential to future reform efforts. The other approach viewed the dual justice system as emblematic of the fundamental and historically constituted forms of structural socio-political inequality that underwrote social discontent and fueled violent conflict over the previous three decades, and therefore needing to be 'fixed' (Sawyer 1992; Banks 2006; ICG 2006). Consequently, most justice reform efforts have focused on building the infrastructure and professional capacity of formal institutions, often with an underlying belief that as the formal system becomes reestablished Liberians will simply choose to engage with the formal system. When mainstream justice reform efforts have engaged with the dual justice system they have often been driven by a well-meaning and 'progressive' intent to remove what they see as the discriminatory dichotomy between the formal and customary justice systems in order to establish a single system that conforms to international

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legal and human rights standards and that equally applies to all Liberians.

One overarching assumption embedded in this approach to justice reform is that this objective will be accomplished by ensuring that the formal legal system eventually becomes the primary - or even sole - forum of recourse for Liberians who seek justice. This assumption is buttressed by two paradigms that dominate state-building and peace-building as conceived by the United Nations and other members of the international development community: the concept of the Weberian state (and its notions of sovereignty) and the doctrine of the universality of human rights. To some, legal pluralism violates both of these precepts and is therefore incompatible with the modern state-building and/or human rights proliferation project. By early 2006, for example, the International Crisis Group reported that some officials within the University of Liberia were discussing elimination of the dual justice system (ICG 2006).

The operationalization of this approach to pluralism has typically involved three primary types of action: (1) an effort to constrain the scope of jurisdiction of customary courts to minor disputes; (2) reaffirmations of prohibition of specific customary justice practices (such as trial by ordeal) that are viewed as inherently at odds with international human rights norms; and (3) the drafting of a number of 'exemplary' laws that aim to address either high profile human rights violations (e.g. the so-called 'Rape Law') or that correct gendered forms of inequality that previously enjoyed legal protection (e.g. the 'Inheritance Law').

This approach has largely been pursued through a two-pronged strategy that couples civic education with more coercive forms of action. Civic education has largely consisted of a barrage of programs that aim to 'sensitize' the Liberian public about human rights and the rule of law and that inform chiefs that all but the most trivial civil cases—and certainly all criminal cases including rape, murder, and any case that draws blood—are to be the sole purview of the formal courts.¹⁰ There has also been an effort to make it known that chiefs who accept such cases are liable for prosecution. This also included a campaign of public media denouncement of all forms of trial by ordeal as illegal and the allocation of scarce

¹⁰ The Government of Liberia, in collaboration with their international partners, has pursued this through radio messaging. The joint Ministry of Justice and Judiciary Pre-Trial Detention Taskforce has established a Public Education Subcommittee which is tasked with finding ways to educate the population and community leaders on due process guarantees and the Liberian constitution.

prosecutorial resources to go after a particular brutal incident of trial by ordeal in order to serve as a warning to others.

Form over Function: a legalist and formalist belief in the transformative effect of law

Policy-makers have diagnosed the problem of justice primarily as a matter of flawed laws. The solution that follows therefore, is to reform these laws so that they meet international ‘best practice’ standards. Once such exemplary laws and policies are drafted, reformers contend that the Liberian public simply needs to be educated about the benefits, after which their behavior will be modified. Accordingly, resources have been prioritized to improve the law and the legal knowledge of lawyers—through regular County Attorney and Public Defender trainings, through the establishment of the Judicial Institute, and by providing support to the only law school in Liberia. Additional resources have been allocated to educate the public about their rights and about the formal law—through measures such as the ubiquitous signs along the roads leading into Monrovia that exhort motorists to avoid paying bribes to police officers, to pay their taxes, or refuse to ‘compromise rape’ cases and instead report these to the police. Other visible measures include public notices in court houses that inform the public about what fees are legitimate—in an effort to curtail bribery and the charging of all manner of ‘informal fees’. Resources have also been allocated to NGOs and civil society organizations tasked with carrying out public dissemination campaigns about new laws and regulations. In short, this approach conceptualizes the transformation of the justice system as a task that can be accomplished primarily by drafting the right laws and then addressing knowledge deficits about those new laws.

This approach fails in the Liberian context for two primary reasons: First, it ignores the fact that law and justice are always deeply implicated in social and political relations and informed by culturally-differentiated concepts and hierarchies of value. Change in behavior and belief cannot be simply legislated or taught but rather must be socially and politically negotiated. The relationship between laws and behavior is thus always mediated by those factors that underwrite the extent of law’s social endorsement. Notably, conformity to international standards is not usually a factor that matters much in securing local social endorsement. Factors that are much more influential include local perceptions of both the relevance and moral legitimacy of the laws, and of the

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power and political legitimacy of those who promulgate and attempt to enforce them¹¹.

This last point highlights the second primary fallacy of an approach that places its faith in the law as a primary mechanism for transformation—namely: it ignores what Pritchett et al. (2010) term ‘state capability traps.’ Pritchett et al. (2010) seek to understand how state capabilities expand and why some (or many) projects fail. After demonstrating that development, even under the best circumstances, takes significant time, they suggest there are two primary reasons for consistent underperformance of development agendas: (1) the adoption of ‘best practice’, leading to what they term as ‘isomorphic mimicry,’ where state institutions try to emulate successful models in more developed states and (2) ‘premature load bearing,’ where, often encouraged by the development community, a state’s bureaucracy can become ‘unhinged’ due to wishful thinking and overloading institutions with unrealistic demands.

The belief that the institutional mechanism that is supposed to deliver and enforce these laws can be relatively rapidly and dramatically transformed through inputs such as trainings and the rebuilding of infrastructure is unrealistic—particularly in a post-conflict context such as Liberia. As Pritchett et al make clear, bureaucratic transformation under even the best of circumstances always takes significant time. Moreover it is also always a political process and not merely a technical one—all the more so when the institutional apparatus itself is a branch of government in a country where political power has been violently contested and the legitimacy of government is still itself being re-established (Brinkerhoff 2005; Pugh 2000).

Thus, even with a core group of dedicated personnel in the Ministry of Justice, Judiciary, and other government agencies, Liberia is decades away from, say, the United States, or even Ghana—a system frequently cited as a ‘best practice model’ to which Liberia might aspire. Failing to take into account the long-term nature of reform can be problematic as—especially in a post-conflict environment like Liberia—it is critical to develop mechanisms capable of addressing grievance and building public trust in legitimate institutions, be they formal, informal or hybrid. *Missing the User: a centralist strategy of building formal institutions from the top-down*

¹¹ For a discussion of analytical models of social change and the factors that affect social endorsement see Lubkemann 2008.

Justice reform efforts have further focused on the highest levels of the Liberian justice system—the capacity and resources of the Supreme Court; formal legal training (e.g., training lawyers, rebuilding the University of Liberia’s law school); public defenders for circuit courts and magisterial courts in Monrovia. However, with limited resources, the lower levels of the formal system—the interface at which the average citizen is most likely to engage—were entirely neglected after the war and remain secondary in emphasis even now.

The lack of capacity within the formal system is most acutely visible at the local level. Thus, of over 400 Magistrates in Liberia 2008, only 5 had a law degree as required by statute and many were not even high school graduates (Lubkemann, Isser and Banks 2010). In the post-war period most courts in the counties were not functioning due to widespread absenteeism of judicial personnel reluctant to take up remote posts. While Public Defenders and County Attorneys have been hired and resourced in recent years, there continue to be reports that they are not present for entire terms of court. In general, police throughout the country continue to lack the most basic equipment necessary to do their jobs, such as vehicles to transport those arrested or carry out investigation; handcuffs; or even typewriters and simple stationary supplies (Lubkemann, Isser and Banks 2010). Moreover, ‘capacity’ itself has typically been cast as a matter of providing formal institutions with training and equipment and thus that requires a ‘technical fix’ –without necessarily addressing far more fundamental sociological, political, and economic factors that play a fundamental role in the *quality* of the services these institutions provide. Thus, as we will discuss at greater length below improving the ‘capacity’ of these institutions—in the sense of empowering them with tools that facilitate their action—without addressing ‘capacity’ in the sense of *how* they act is likely to be seen as particularly problematic by the vast majority of the Liberian public.

This approach has also typically placed relatively little emphasis on institutions that are not part of the formal justice system. When existing informal institutions have been engaged by donors and policy-makers, they are often seen either as mechanisms through which to provide civic education about the formal system or as the targets for that education itself. Many policy-makers still express the need to ‘sensitize’ traditional leaders as to the tenets of formal law and international human rights law and there is a continued focus on the need to expand the capacity of state institutions (in the Weberian sense) at the local level. The Zero Draft of the United Nations Peacebuilding Priority Plan for 2011-2013, envisioned measuring success in “Enhanc[ing] access to justice and community security at regional and

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county level” by, among other indicators, monitoring the number “of cases referred from traditional/customary mechanisms to the formal system.” (United Nations Peacebuilding Commission 2011). Instead efforts have focused on expanding access to a formal system, for example, through the James A. A. Pierre Judicial Institute’s Professional Magistrate Training Program which educated a class of non-lawyer Magistrates to be deployed in rural areas. While there is no doubt that the formal justice system is in dire need of increased capacity, research demonstrates that these top-down approaches have largely failed to address the justice concerns of the majority of the Liberian population (Schia and Carvalho 2009; Sandefur and Siddiqi 2011).

The Formal and Customary Systems in Comparative Perspective: Local Liberian Views

The Liberians interviewed in the course of our study very clearly expressed an overwhelming preference for the customary system over formal court alternatives, that is, when they seek a third party of any sort to resolve a dispute. The CSAE Survey shows that resort to a customary authority for purposes of dispute resolution was over ten times more likely to be the case than resort to a formal court (Sandefur and Siddiqi 2011). This survey found that formal courts were approached in 3% of the civil disputes reported and 2% of the criminal disputes reported, whereas over 30% of the time (civil) and 24% of the time (criminal) disputes were taken to customary authorities.

Calculating the costs of formal and customary justice: accessibility, opacity, and corruption in comparison

The marked preference of Liberians for customary justice forums over formal ones relates—in part—to differences between the two in their accessibility (especially for rural inhabitants) as well as in costs, perceived transparency, and their perceived susceptibility to undue influence (for all Liberians). Costs refer not only to fees, but to the significant indirect costs associated with the distance traveled, the number of such trips and the duration required, which mean time spent away from livelihoods—whether it is subsistence farming or wage-based work.

The cost of hiring a lawyer remains another financial obstacle faced by any Liberian who opts for recourse through the formal system. Many of our respondents abandoned plans to pursue cases in the formal justice system, or they

simply never considered this option in the first place. Many rural respondents could not even afford the cost of travel to Monrovia to find a lawyer, much less the lawyer's fees. Since our field study was completed, Public Defenders were hired to reach rural areas, and while they are responsible for serious criminal cases, we would argue that they have resulted in little gains in the sorts of disputes that most Liberians face. Such lawyers typically charge for civil representation and, again, are typically not present at the interface between average citizens and the state and in most counties instead focus efforts on cases at the Circuit Court.

A further significant cost that all Liberians invariably take into account is that of corruption. Outright bribery is assumed to play a far more determining role in most formal court outcomes than the substantive merits of the case. It is simply taken as a matter of fact that bribery is indispensable if one wants to win a case, and consequently that there is little point in pursuing a case in court if one cannot or is unwilling to assume such 'costs.' In fact, our study found that the expectation that officials in the formal court system will find some way to illegitimately extort money is sometimes so strong that it affects the willingness of litigants to reveal exactly what wrong they have suffered because they fear it may be further compounded by official extortion:

One funny thing that I thought of about the court was, when I carried the complaint, I did not mention about the planks. I only told the judge that 'E' and his brothers beat me on my land because if I have mentioned about the planks, the court could have definitely demanded to have a share in it. And so I felt for my nephew and never exposed it out. (Man interviewed in Nimba County who had been beaten and robbed by his nephews, as quoted in Isser, Lubkemann and N'tow 2009: 41).

The menu of dubious costs that Liberians expect to confront in a typical formal court proceeding are likely to include: 'sponsorships' to pay for police transportation costs and perhaps time to take someone into custody, or fuel to investigate a case; a variety of ad-hoc 'writ', 'filing', 'bond fee', 'referral' and 'case registration' fees (with police and courts alike); the financial responsibility on the part of the accuser/presumed victim to provide food for an accused who is imprisoned (or else that person will be set free); and even money to pay for the paper on which depositions are taken. Time after time, Liberians report that even the most egregious crimes fall by the wayside within the state courts unless money for such 'fees' keeps flowing.

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Second, Liberians cite concerns with the opacity of formal court proceedings. To most Liberians the formal legal process is profoundly bewildering and consequently disempowering. Victims / plaintiffs and perpetrators / defendants alike express frustration at being bounced around from official to official, court date to court date, or detention cell to detention cell – all without ever understanding the reason why. In even the most egregious cases, such as the following one documented in our USIP/GWU Study, the formal system seems incapable of addressing the plight of victims—even as it disempowers and re-victimizes them in other ways:

A man raped an eighty-three-year-old woman. The woman was taken to the hospital where the rape was confirmed, and the suspect was arrested and jailed. The victim's daughter went to the magistrate court to pursue the case, but she was told that she had to pay five hundred Liberian dollars. After she did, she was told to get a second medical report. The case was then referred to the circuit court. After traveling a second time to the circuit court in Voinjama, they were told that it was the end of the term and they would need to come back the next term. The next term, there was no transportation available and it was the rainy season. The victim was put in a wheelbarrow for transport, but as her health was failing, her daughter decided to bring her mother home and to go to the court herself. Once there she was told that unless her mother was present the court would not hear the case. The next day she was told by the court that the suspect had broken out of jail. In the meantime, while she was at the court, her mother died. (Isser, Lubkemann and N'Tow 2009: 40)

The opacity of formal court proceedings is a second factor that underwrites the widespread suspicion that formal courts are inevitably biased, subject to undue influence, and to the whims and interest of presiding officials. For instance, we collected evidence of cases in which the 'laws' that were invoked by the officials in the formal justice system seem to be simply invented outright so as to further their self-interest. Some of the starkest examples include legally unfounded invocations of impunity—exemplified by a statement such as: “a state official cannot be charged or imprisoned if he is standing/working under the flag of the nation” (Isser, Lubkemann and N'Tow 2009: 43-4)—and made-up laws, as for instance stated by a judge in one case: “if you go to someone's house and

afterwards something is found missing you are responsible according to Liberian civil law.” (Isser, Lubkemann and N’Tow 2009: 44) Even in instances where court officials do follow the letter of Liberian law, limited understanding of normative and procedural features of the law often leads aggrieved parties to believe they were in fact taken advantage of. Our evidence also suggests that it is not uncommon for women litigants in a variety of types of cases to report being victims of sexual harassment and sometimes even violence at the hands of the very state justice officials to whom they turn for assistance.

Liberians are also deeply frustrated by the ease with which detainees secure release, which may happen by bribing officials, because the police will release a detainee unless the accuser agrees to pay for that individual’s food and lodging in prison, or because the detainee has been held for the constitutionally mandated period and there is not sufficient evidence to hold him or her further. The ‘privatization’ of the responsibility for sustaining detainees ultimately means that the detention of a suspect has been transformed into a responsibility that victims are forced to assume in practice. The sentiment of injustice and outrage that this imposition engenders is obviously considerable.

All of these factors in combination lead many Liberians to conclude that the formal justice system is overwhelmingly governed by three dominant factors: the personal power and interests of state officials, the monetary wealth of individuals that allows them to pay bribes; and, the capacity to mobilize forms of social and political power in order to influence court officials. We collected numerous accounts of Liberians reporting that a decision to resort to the formal system was made not to secure a just or fair outcome but rather to leverage personal resources that could provide an unfair advantage in the resolution of a case. In short, the formal court system is actually seen as an effective mechanism by which an individual who has more resources (personal connections, political power, money) can gain an unfair advantage against someone who cannot mobilize such resources. Thus rather than a remedy for injustice the formal system is viewed by many as *a mechanism by which the rich and powerful very effectively perpetrate injustice*. From this perspective, the social ubiquity of this refrain by a female interviewee is unsurprising: “there is no justice for the poor.” (Isser, Lubkemann and N’Tow 2009: 42) Ultimately—and notwithstanding the resources poured into the reform of the formal justice system by the international community since 2005—our research demonstrates that the formal justice system has continued to suffer from an extreme deficit of popular credibility.

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In contrast to the formal courts most rural Liberians have ready access to customary justice institutions, in particular to the chiefly courts.¹² Customary justice institutions were also consistently reported to involve far lower direct costs than formal courts and to reach resolutions much more rapidly, which reduces many indirect costs associated with the loss of time. The costs in customary forums are also viewed as far more consistent, predictable, and fair than in the formal system. Most chiefs use a publicly known standard set of fees for most offenses. Fees collected by a chief tend to be used to cover transportation or other administrative costs, including the cost of stationary. Many chiefs even report foregoing fees for parties who cannot afford them, accepting chickens or rice in lieu of money, or substituting fees with work for the chief or the community.

The procedures involved in customary justice proceedings are generally described as far more understandable and transparent than those in the formal courts. Particularly, Liberians feel that because they can understand customary proceedings they are more readily able to identify situations of partiality. The transparency also allows them to take measures that can counterbalance such partiality, which may involve appeal within the customary system itself. Our research established that rulings pronounced in customary justice settings are not viewed by either customary justice providers or local users as terminally binding—in the sense that they can be, and often are, appealed to higher authorities in the customary system, local Ministry of Internal Affairs officials, and even on occasion to the state justice system itself. Arguably, it is the particular way in which Liberian customary systems allow for an extensive and relatively rapid appeal process that absolves it of the accusations of generalized and inherent

¹² Customs, and by extension customary law, vary significantly amongst Liberia's major ethno-linguistic groups, but also to a considerable extent within them (Moran 2006). Thus, for example, religious professions while being highly varied, including a broad continuum of Christianities (assorted zionisms, various mainstream denominations, Roman Catholicism), Islam, and a variety of indigenous animist religious beliefs often vary within ethnic groups and local communities alike. Throughout different parts of the country there is also significant variation in the extent to which power and authority is centralized at even the most elementary levels of social organization including families, kinship networks, and local communities. Nevertheless, the broad principles that we discuss below are largely shared by Liberia's customary legal systems at least to an extent that clearly differentiates them from the principles that inform the formal justice system, historically derived directly from the US system.

partiality that Liberians associate with the formal system.

Customary and formal justice principles: local views of fundamental differences

Entirely aside from factors such as cost, ease of access, and transparency, our interviewees also preferred the customary justice forums because they provided a service that embodies values and priorities that are different to those of the formal system. Liberians draw a strong contrast between the fundamental principles and values that define ‘justice’ and govern its application in how they perceive the formal court system and those that are applied in customary justice resolution. For instance, one of the most consistent complaints levied against the formal court system is that it is overly narrow in how it defines the case at hand, consequently failing to address the full range of social factors and relationships that ultimately inform any specific instance of conflict or dispute. Customary mechanisms by contrast focus on what lies ‘behind’ the immediate dispute, and which is seen to powerfully inform it:

So actually looking at the [formal] court, they only focus on the nature of your complaint and care less to know what transpired in the past. So in short, the court does not satisfy the both parties when cases are resolved by them. But for our traditional people they look at the nature of the case and also dig out the past to know what happened, and based upon that they peacefully resolved the matter. And at the climax the both parties leave with smile. And so to conclude, I prefer the Customary System (Isser, Lubkemann and N’Tow 2009: 47).

[...] what I like about the customary system is, it is not expensive and our elders and chief focus on how to reunite the disputing parties. Above all, they gave the both parties the opportunity to explain the underlying cause that resulted in the current dispute.... In court the judge only focus on the existing current matter at hand, leaving the underlying causes. So I solely prefer our traditional people to handle our matters. (ibid: 47)

Thus, when resolving a case, chiefs strive to do more than to merely ascertain which immediate party is at fault and who is innocent. Instead they probe more deeply in search of a form of ‘truth’ that goes beyond the narrow dispute at hand and beyond the two immediate disputing parties to identify and address the more fundamental root issues and broader social factors that inform and are affected by

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the dispute. Liberians evaluate the adequacy of justice in terms of its ability to address such deeper social maladies of which any particular dispute is viewed as merely symptomatic. The formal system defines the scope of action for 'justice' in almost exactly the opposite way: as limited to the immediate disputants and demonstrable violations in a specific instance of wrong-doing.¹³

In order to adequately address the deeper truth of the matter, chiefs do not usually make determinations alone. Instead, most of the time they rely extensively on the counsel and participation of community elders and, where deemed relevant, on representatives of specific social constituencies such as youth, women elders, or even the elder members of the families of the contending parties. Chiefs and elders also specifically seek out the counsel of what might be termed 'expert witnesses' who can provide insight into either the deeper social dynamics that underwrite the root truth of a matter (such as in the case of elders from the families of aggrieved parties), or on the substantive issue in question (such as in cases where elders knowledgeable about customary land boundaries are asked to testify). Liberians' interest in seeing root 'truths' addressed rests on a deeply held assumption that incorrect or injurious behavior ultimately stems from damaged and acrimonious social relations. In order to be seen as adequate, justice must work to repair those relations, which are the ultimate and more fundamental causal determinants, rather than merely treat the behavioral expressions that are viewed as their symptoms. Redress is therefore considered inadequate if it does not attempt to produce reconciliation among the parties.

Thus although the specific balance struck among different priorities may vary from case to case and across individual customary justice practitioners, most descriptions of procedures and of actual case proceedings that we collected suggest that after ascertaining the truth of the matter, achieving social reconciliation is the overriding concern. Chiefs often speak about 'compromising' a case, which means finding a resolution that satisfies both parties and allows them "to go with smiles on their faces." (Isser, Lubkemann and N'Tow 2009: 48)

The customary approach takes up the mitigation of adversarialism as an inherent objective of justice and a key factor in determining the quality of the outcome achieved. In stark contrast the formal justice system takes adversarialism as the

¹³ For similar findings elsewhere see for example Benda-Beckman 1984; Huyse and Salter 2008; West 2005.

given point of departure—and the core driving mechanism—of the justice process. Following the western model, the formal system's legal proceedings are thus supposed to determine winners and losers among adversaries—but have no business addressing adversarialism per se. In fact, in the formal system, the resolution of a case that clearly determines guilt and innocence (and that punishes the offender) is considered to have fully satisfied the requirements of 'justice', even if the resolution also happened to increase adversarialism and social friction among the contending parties.

The formal system also tends to emphasize punitive forms of redress against perpetrators, while paying little if any attention to the restoration of a victim's condition. While most Liberians do believe that punishment has a role in the process of redressing injustice, most believe it should generally be subsumed under other priorities that are viewed as more important. While there are cases in which behavior is judged to be so horrific that perpetrators are viewed as entirely beyond social repair, in the vast majority of situations (even including many cases of murder and rape), the repair of the victim's condition and social reconciliation are viewed as more important objectives than punishment per se. In fact punishment that inflicts some form of pain or loss (including imprisonment) upon a perpetrator in a manner that does not directly contribute to reconciliation or that overlooks or even hinders the repair of a victim's condition is seen as augmenting adversarialism in undesirable ways that impede, rather than contribute to, true justice. When comparing the solutions meted out by the two systems most Liberians tend to agree with the following assessment by one of their compatriots:

Our traditional laws help us to handle our dispute very easily and after the settlement of these disputes, the disputants go with smiles in their faces . . . In fact, the statutory law brings separation among our people. After the [formal] court ruling we observe that the guilty one is either put in prison or heavily charged to pay cost of court, bond fee, etc. So I prefer the customary system (Town Chief from Nimba County as quoted in Isser, Lubkemann and N'tow 2009: 54).

Compensation that attempts to restore the condition of a victim is also a very high priority, and one that most Liberians accused the formal system of neglecting. At the same time it is interesting that compensation is still often viewed as secondary to the objective of reconciliation. Thus we found a number of cases in which victims chose, or were convinced to forgo compensation entirely when it was a

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hindrance to reconciliation, for example where the perpetrator did not have the means to pay. In some cases victims actually chose to incur additional costs in order to resolve the case peacefully through customary means. In one instance, we encountered that the victim even voluntarily covered the fees of the perpetrator associated with hearing the case in customary court. Such an instance of compensation differs from experiences in the state justice system where victims and perpetrators are forced to pay by police and such monetary exchange is not driven by a restorative or conciliatory purpose.

Ultimately preference for the values that govern customary justice reflects the interest of most Liberians in deploying practical and proven measures that can realistically minimize the chances that undesirable behavior will be repeated in the future in the particular socio-economic and political context in which they live. Preference for measures that provide for the social reinstatement and redemption of a perpetrator rather than merely his or her punishment, that attempt to address the underlying grievances that may inform immediate behavior, that prioritize repair to victims, and that ensure that disputants and their extended relatives can continue to ‘get along’ do not merely reflect some sort of reflexive and unconsidered ‘cultural preference’ that is subscribed to simply because ‘that is what we have always done in the past.’ Rather such priorities represent an astute reading of the realities, constraints, and possibilities of social survival in the context in which they live. Given that there is a large body of legal anthropological work spanning decades that has underscored precisely this point¹⁴, what is perhaps most remarkable—and bears further investigation—is why legal reform programs in places like Liberia still remain so thoroughly unaware of and/or disinclined to account for these well established facts.

It must be highlighted that this is a context in which the formal legal system and the police are more likely to be a source of predation than of normative enforcement and thus in which local communities must rely heavily on their own mechanisms for norm enforcement rather than on state officials who have little capacity and are not trusted. Similarly those mechanisms must account for forms of local economic and social interdependency – embodied in and enacted through social relationships—upon which daily survival may quite literally depend. Moreover, in this context there are no ‘social service backstops’ that can attend to

¹⁴ See for example: Middleton and Winter 1963; Evans-Pritchard 1976; Douglas 1970; Fisiy and Geschiere 1990; Comaroff and Comaroff 1993; Geschiere 1997; Ashforth 2005; West 2005).

the condition and plight of victims—and thus justice must include mechanisms for attending to these problems.

Liberians covered by our study also prefer the customary system because they believe it is far more capable of and willing to address the full range of offenses, problems and crimes that they believe they confront. Some of the issues that Liberians want to see addressed as justice include forms of behavior such as public insults that might be considered offensive but not worthy of treatment, or even admissible, in the formal justice system. Again the practical importance of maintaining workable social relations in a particular socio-economic and institutional context goes a long way to explain why behavior that puts those relations at risk is viewed as a problem that needs to be addressed.

A large majority of Liberians also hold a deep-seated and pervasive belief that mechanisms and practices exist by which some individuals deploy supernatural means to hurt or even kill others, most often in order to augment their own power (Ellis 1999). As we discuss in greater detail below, and has been found to be the case elsewhere as well (e.g. Douglas 1970; Evans-Pritchard 1976; Ciekawy and Geschiere 1998; Fisiy 1998; West 2005; Ashforth 2005; Lubkemann 2008) the formal system's refusal to recognize or address witchcraft does nothing to diminish beliefs and concerns that it exists and poses a serious threat to society. The formal system's refusal to address these issues undermines public confidence in its capacity to address the root of many crimes and civil offenses, while policies to suppress the tools used to identify witches increase popular recrimination against and suspicions about the officials and institutions driving this effort.

Finally, in contrast to the formal system, Liberians for the most part also report that resolutions reached through customary processes are more likely to be carried out. As we have already noted a key feature of customary law is that it aims for a solution agreed upon by both parties. When achieved such consensus assures a relatively high degree of 'enforcement success'. Indeed much of the work of customary dispute resolution is sitting down with both parties and their family members and other people of influence to bring them to agreement and acceptance of the resolution. Of course a party that does not accept the resolution of a customary court is free to reject it and appeal to the next level. However, our research indicates that ultimately the decisions of customary courts are not usually coercively enforced.¹⁵

¹⁵A handful of the chiefs we interviewed did refer to the use of prisons and corporal punishment (usually lashes or 'country hand-cuffs', referring to the

Rather, in the absence of mutual agreement, it is social pressure that is the factor of last resort in ensuring that the parties accept and comply with the decision in the case.

No Justice in Sight: Popular Perceptions and Reactions to the Justice Vacuum-and their Implications

If the popular preference for customary over formal justice is a stark one it is also to some degree a relative one that fails to fully capture the options—or lack of options—that shape local approaches to justice as a whole in post-war Liberia. In fact most Liberians are so frustrated and disillusioned with all their justice options that they are opting against taking their disputes to either formal or customary justice institutions. The aforementioned CSAE Survey thus found that despite a marked preference for customary over formal forums when a third party was sought, on average, over 59% of the time Liberians chose not to approach either formal courts or to use customary mechanisms at all. (Isser, Lubkemann and N'tow 2009: 75). It is in this space that we locate Liberia's current 'justice gap'.

Mounting skepticism about the effectiveness of both formal and informal justice forums are rooted in somewhat different reasons and rationales. Thus, while the authority of customary law was buttressed before the war by the weighty role that kinship-based and gerontocratic forms of authority played in the organization of Liberian societies, those very forms of authority became the source of grievances that underwrote the armed mobilization of youth (Richards 1996; Hoffman 2011a; Utas 2005). An entire generation of Liberian child-soldiers has thus been socialized with reference to other logics of social authority (Hoffman 2011b). In this sense the social basis of authority that underwrites customary systems may be less stable in certain contexts—particularly urban ones—than it once was. Massive urbanization and displacement may have also contributed to the erosion of these former underpinnings of customary authority in rural areas as well. While some chiefs bemoan the war's effect on inter-generational relations, the evidence we

process of restricting the movement of a detainee by tying him or her in a set location), as something that they used in the past, and in some cases, as something they would like to have at their disposal again. Our data indicates only that the use of such measures is currently a rarity, although there remains a somewhat greater tendency to use force in the process of detaining and investigating reluctant perpetrators.

collected on how youth view the legitimacy of customary authorities and practices was somewhat mixed. This leads us to conclude that this is still an open question that requires more focused empirical research.

Another significant limitation of customary forums recognized by many chiefs themselves is that their intervention only works when litigants share an interest in, or are at least open to, the goal of reconciliation. For the practical reasons already discussed previously, interest in reconciliation is likely to increase to the extent that litigants are part of the same local community. This adds a further limit to customary justice: it is far less effective in dealing with cases when one of the litigants is an outsider. It may also be less effective in contexts where different forms of socio-cultural heterogeneity underwrite different sources of 'legitimate custom', such as those of mixed ethnic communities or in which religious pluralism is significant.¹⁶

The chiefs, disputants, and focus group participants in our study tended to attribute the most significant limitations on the effectiveness of the customary justice system to the new post-war government and donor-supported policies that effectively restrict the jurisdiction of chiefs and the methods they can deploy, as outlined earlier. Chiefs claimed, for the most part, to be adhering to these policies and refusing to take cases that involve death, rape, violence that induces blood, and, less consistently, major theft, and referring these cases to state officials.

The most general and overarching of these is the policy that limits the jurisdiction of customary mechanisms to minor crime, requiring that all cases of bodily injury and serious theft be handled exclusively by the formal system. While this is not necessarily new – the Hinterland Regulations set out a limited criminal jurisdiction for chiefs courts' – it was historically honored more in the breach. However, under the new post-conflict dispensation chiefs are being pressured to respect the limits set by the new policies, sometimes under threat of prosecution.

Chiefs and local community members do not find that the limits placed on the jurisdiction of chiefs are legitimate or constructive. There was a fairly broad

¹⁶ Ongoing research led by Lubkemann on the topography of urban justice that is documenting the range of informal justice forums, their interactions with each other and with formal institutions, and the justice choices made by Liberians in urban Monrovia may provide additional empirical evidence that speaks to these questions.

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consensus that chiefs are generally better-equipped and customary principles far more appropriate, to the task of bringing justice to all but the most heinous forms of murder, rape, and violence. Manslaughter (involving accidental killing) and cases of alleged rape between young lovers in particular were two examples that respondents felt the customary system could resolve more effectively and for which it would produce rulings that would be fairer than those afforded by the formal court system. Chiefs reported that they are frequently pressured by members of their community to consider cases they are officially forbidden from taking. Some admitted that in practice they did so, provided both parties requested it.

Another finding of our study is that the majority of Liberians interviewed feel that the government's blanket prohibition on the use of trial by ordeal (TBO) is further crippling the effectiveness of customary justice resolution. Perhaps no other practice has received as much attention from the United Nations and human rights community. A recent Solicitor-General, with strong backing from the international community, spearheaded a widely publicized campaign to end this practice with a blanket prohibition and the showcasing of exemplary prosecutions.

There is also perhaps no practice that is more caricatured and whose local meanings, social uses, and nuances of practice are less well understood—to great consequence—by rule of law reformers. As we have argued elsewhere there are in fact a wide variety of types of practices and reasons for their use that are lumped under the terms TBO and/or 'sassywood'. The differences among these practices are immensely important to consider for purposes of formulating legislation and a justice reform policy that adequately attends to local concerns (see Lubkemann, Isser and Banks 2010 and uses for TBO). First, TBO can be used as a means of identifying the guilty party when an admission is not forthcoming. In such cases, some form of TBO is administered to the suspect or suspects, and it is believed that only the guilty party will suffer some form of harm. Second, TBO can be used to ensure that truth is spoken by suspects, witnesses, or others. Here, it is believed that those who undergo the TBO will suffer some form of harm if they do not tell the truth. TBO in this way is used most commonly as part of the fact finding in a customary proceeding, but was also cited as an important way for men to determine if their wives committed adultery. In a variation on the first and second uses, suspects themselves may ask to undergo TBO in order to prove their innocence. Third, TBO can be used to 'get rid of the witch.' This is most commonly used to enable suspected members of witch societies (known variously as snake societies, 'Bambah' societies, Korsaw-Korsaw, among other names) to

'swear off the witch' and become mainstream members of the community.

Indeed most rural Liberians that we interviewed called for some form of TBO to be reinstated because they firmly believed the ban was causing considerable harm in their communities by depriving them of a reliable and effective tool for solving crime and keeping order. TBO was also seen as the only tool for solving certain types of particularly pernicious and feared problems, such as witchcraft. The ban on TBO is blamed for a litany of problems: the inability to resolve crime because the guilty cannot be identified; the inability of the innocent to clear their name; for reducing the incentive for parties to admit their guilt (given the lack of alternative means of proving it); for a general increase in criminality and sense of impunity; and most significantly, for a drastic increase in the most lethal forms of witchcraft, coupled with the growing strength of the 'snake societies', which promote and are believed to benefit from witchcraft. While Liberian discourse is marked by allegations of increasing strength of 'snake societies' and 'heart men', measures are being read by local populations as mere 'naysaying' which suppresses what is regarded as 'known and proven' solutions to genuinely feared problems while failing to offer any viable alternative solutions, and often inadvertently creating new problems altogether.

We also found evidence that the struggle to find alternatives to TBO for dealing with witchcraft may actually be strengthening other purely community-based customary justice institutions, in particular so called 'secret societies', whose legitimacy is grounded in local socio-cultural precepts, such as the Poro society. Unable to deal directly with witchcraft themselves because of the prohibition against TBO, several chiefs report that they now rely even more heavily on the ritual specialists of the Poro society to produce solutions. As a result social pressure to join these societies is increasing in some communities. Such pressures can have markedly negative effects in mixed communities. In Lofa County, for example, throughout 2010 and 2011 there were reports of a Guinean ritual specialist moving from town-to-town investigating witchcraft. Lorma community members were typically prepared to pay for the specialist's services while Mandingo community members were not. This led to numerous allegations of witchcraft and further fractured community relationships.

Policy makers implementing the Rule of Law agenda have surely intended to both improve access to and the quality of justice for average Liberians, to cultivate popular knowledge of and subscription to international human rights norms, and to strengthen and assert the legitimacy of the state. However, contra these intentions

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we have found significant evidence that most Liberians believe the current approach is merely undermining the effectiveness of the customary system without providing any alternative mechanisms that improves security and justice or effectively copes with social antagonisms and disputes. The net result for most Liberians has been what we have termed elsewhere a ‘justice vacuum’ (Lubkemann, Isser and Banks 2010) where justice and accountability not improved and may even have declined despite millions spent on the justice system.

Liberians from across the social spectrum widely view this vacuum as a place in which the powerful, wealthy, and socially connected are able to secure unfair advantages in dispute resolution—often through the formal courts. In a context in which formal courts and police are believed to be guided by self-interest and as highly susceptible to undue influence, litigants are most likely to appeal to the formal system if and when they believe they will be able to leverage money or social connections that will produce admittedly partial, and unjust rulings that are in their favor. Referral to the formal courts, or the threat of such a referral, was also recounted to us as a tactic that is used to advance contentious social agendas, for retaliatory purposes, or for gaining leverage in other matters that had nothing to do with the actual case in question. Thus in the opinion of one woman: “The new rape bill should be revisited because there are people here who are using it to attack one another.” (Woman in a focus group as quoted in Isser, Lubkemann and N’tow, 2009: 54). This practice of ‘making the case big’ was mentioned in a number of our interviews as a typical way in which new laws, such as the rape law, were being deployed to nefarious ends never intended and with pernicious effects on the social legitimacy of that law and its legitimate users.

Under these circumstances the very meaning of formal law has been perversely distorted into a source of perceived injustice rather than a solution to it. The extension of the jurisdiction of formal courts is thus seen by many as reinforcing the mechanism through which the rich and the powerful –and justice officials themselves—can, and do, advance their own predatory interests. The current approach to justice reform is thus negatively affecting the legitimacy of formal justice institutions and human rights norms throughout Liberia.

Liberians confront this justice vacuum by seeking to mobilize extra-legal mechanisms that are neither part of the formal nor the customary justice systems per se, to influence formal and informal justice proceedings. As such, seeking justice is primarily an effort to identify someone you believe can effectively exert power over an opponent in order to achieve a partial outcome on your behalf, and

to use money or some form of social capital to activate that power for your benefit. It is also an effort to monitor and prepare for (or even pre-empt) the possibility that an adversary in a case will manipulate similar social connections and use money to subvert justice. The only ‘solution’ is to make sure one is capable of playing this game with greater ultimate effect than one’s opponent. In short, in the minds of most Liberians ‘justice’ is co-equal to the securing of influence.

Liberians thus decide how they will seek recourse based on a careful assessment of their own position (relative to that of other interested parties) within a single pool of institutional power, but which is embodied in particular persons. This single ‘power pool’ includes both customary and formal justice institutions, but is not limited to these sources alone. It also includes state officials who have no legal role in the statutory system but nevertheless may be called upon or chose to intervene in formal court or police proceedings. Our research identified a wide range of such officials including superintendents, national legislators, deputy ministers, immigration officers, and even diplomatic bodyguards, international NGO officials, UN personnel wealthy businessmen, and former military commanders.

Frustration with the perceived pervasiveness of the ‘injustice of justice’ also results in Liberians choosing to take matters into their own hands. To wit the conclusions of the brother of a murder victim whose inability to pay fees that would advance the case through the (statutory) courts led him to plan to: “take justice into our hands. We will take some boys and kill the perpetrator.”

Such trends do not bode well for broader rule of law and peace-building objectives—including efforts to cultivate the legitimacy of the fledgling post-conflict state itself. Our research thus noted a disturbing tendency for ordinary Liberians to blame the government for the justice vacuum—both because its courts have proven incapable of providing justice, and because it has prevented other (customary) institutions believed to be capable of providing justice from doing so. Even more disturbing is the rise of a conspiratorial public discourse that imputes more nefarious motives and intentionality to government justice reform efforts. Thus some of our respondents went so far as to voice suspicions that the highest level government officials (e.g. Liberia’s former Solicitor General being accused by name in at least two interviews) would surely only be suppressing TBO rituals that diagnose witchcraft if they themselves were members of the snake-type societies who performed and benefited from witchcraft.

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In a social context in which the relationship between political power and socially subversive relationships to the supernatural have been extensively documented as potent sources for violent political mobilization (Ellis 1999; Richards 1996; Hoffman 2011b) the implications of such discourses for undermining the legitimacy of the government and re-invigorating conflict should not be taken lightly. Similarly, local suspicions that the extension of formal court authority over issues previously left to customary chiefs is a potential political incendiary that should not be ignored. This particularly regards the transfer of land dispute resolution to the formal courts, which could be seen as serving the land-grabbing ambitions of urban elites at the expense of the local rural citizens.

Finally, the anti-pluralist tendencies of the ‘One Liberia’ approach may be a source of political divisiveness that engenders stiff resistance from those whose very interests it is supposedly meant to serve. Our research found that customary justice institutions are not seen locally as merely the products — or mechanisms for reproducing — of historical discrimination, but also as a means by which local communities cope with both genuine challenges of order and practical concerns and historically served to resist the imposition of Americo-Liberian power. These mechanisms help express positive values that are deeply held and that differ in substantial ways from those that inform the formal justice system. As a consequence a ‘One Liberia’ justice policy that is all about extending the protections of the formal system (even in its ideal state) over all Liberians is greeted with considerable skepticism and resistance. In fact our research strongly suggests that a majority of rural Liberians view the current effort to constrain customary justice not as the eradication of discriminatory injustices that have harmed them but as yet another negative imposition by a central state that neither understands their social context nor favors their interests. While some blame foreign influence as the source of this intrusion, many also view recent government policies through a lens that emphasizes a specific interpretation of Liberian history in which a Monrovia elite is (again) seeking to impose its norms on those in the ‘country’, ultimately as a means to exploit them. This view brings rural Liberians directly into conflict with the ‘progressive’ assumptions that seem so self-evident to rule of law reformers who view the dual legal system as the embodiment of discrimination and inequality.

The Liberian Truth and Reconciliation Commission itself identified as an antecedent cause of the conflict the choice made by the early settlers to define Liberia as an Americo-Liberian state with a civilizing mission to be imposed upon the ‘savage and barbaric’ indigenous population, rather than to engage all of the

Liberian people in the building of the emergent nation. It further warns that: “Liberia has yet to reconcile the two opposing ideas – the civilizing mission and the building of an African nationality” (Truth and Reconciliation Commission 2010: 240). Efforts to deal with this question of national identity will be further complicated by a range of political questions that extend far beyond the rule of law sector, including debates about the future role of the Ministry of Internal Affairs and the future of local governance. However, as we have argued elsewhere (Lubkemann, Isser, and Banks 2009) the crucial question of who gets to participate in making decisions about what that identity can and will be, is likely to be at least as critical to the success of Liberia’s legal reform efforts –and to the broader task of building public confidence in democracy as a process that provides for genuine popular representation rather than the protection of elite privilege—as are concerns with eradicating past inequalities.

Conclusion

The process of post-war justice reform in Liberia is, in many ways, illustrative of broader ailments and quandaries that confront justice reform undertaken in societies with a history of legal pluralism. As the Liberian government, and their international partners, have entered a next phase of post-war rule of law reform there has been an increasing effort to engage with the multitude of actors active in dispute resolution—particularly at the local level. Forced to confront the fact that centralized reform has not lead to significant efficiency gains or improvements in access to or quality of justice, the rule of law community now generally recognizes that dispute resolution actors at the local level may have to play significant roles in the process of reform (even if this is viewed as an ‘interim’ role by more orthodox rule of law actors).

The *National Conference on Enhancing Access to Justice* held in April 2010 is an example of this recognition (Republic of Liberia 2010). The conference brought together traditional leaders, community leaders, and members of the formal legal community to discuss how different dispute resolution systems could work together to expand access to justice. This cooperation, to date, has been largely conceptualized in similar ways to that of formal justice reform in Liberia. Discussions have been centralist and formalistic, with the belief that modified behavior will flow from new legislation or new policies. ‘Cooperation’ between the two systems can be facilitated through new policy frameworks; trial by ordeal can be ‘addressed’ by reauthorizing those forms that are determined to be ‘non-

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harmful' and then disseminated to traditional communities; problems with the performance of magistrate judges can be improved by making the public aware of the appropriate statutory fees.

Experience of the government's Pre-Trial Detention Taskforce in many ways mirrors the discussion of the *National Conference on Enhancing Access to Justice*. With limited reductions in the overall numbers of pretrial detention, government and international partners began to discuss how traditional and community leaders may work to solidify reductions in instances of prolonged pretrial detention. Such discussion, however, seeks to 'harness' these actors in support of the formal system. Traditional leaders may oversee bail and probation from the formal system; they may relieve the stress on the formal system by mediating 'small-scale' disputes in an effort to free up the formal system for more significant cases; and communities simply need to be educated about the due process provisions of Liberian law to 'understand' why detainees are being released after they exceed the constitutional provisions for detention.

While both of these endeavors may realize some gains, improving justice in any substantial way for the average Liberian ultimately requires a far more dramatic and radical reconceptualization of the problem itself. New momentum for reform that reaches beyond central actors of the formal justice system must do more than educate communities and 'improve' community systems. The question itself must be recast from that of how to improve the formal system, or, for that matter even from how to define the relationship between the formal and customary systems. Instead, the question of how to improve outcomes for users should be the new point of departure for rule of law programming.

This is a significant shift in paradigm: rather than approaching justice reform as a means of bringing the laws and institutions up to a pre-determined structure and standard, it requires accepting that justice is not a technology or known formula, but a socially-embedded and contested concept. Legal pluralism is neither good nor bad; it simply describes a social fact. This requires an altogether different skill set and mandate for justice reform actors, one that allows them to focus on and engage with the idiosyncrasies of context, and to have the stomach for diverse, transitional and non-linear paths to change. This is also a much harder approach, with no clear blueprint for action. But a good starting place is to focus on a constructive process of community engagement to understand what people consider to be the greatest obstacles to justice and to encourage innovative means of addressing these in ways that are suitable to local particularities. This by no means

excludes capacity building and reform of formal and informal justice institutions, but significantly it sees these as means to the end of improved justice rather than the end in themselves.

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