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Customary Law &
Juvenile Justice

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Introduction

Should customary justice be incorporated into development programmes aimed at guaranteeing human rights and access to justice? This issue is crucial when you consider that today, in developing countries, more than eighty per cent of disputes are resolved outside the framework of formal justice.[1]

In many countries, access to justice is a matter of life or death. The illegal expropriation of land removes peasants' livelihood forcing them to migrate. Many women find themselves deprived of their belongings by their in-laws upon the death of their husbands, leaving them in total destitution.[2] Extremist groups thrive in some areas because they offer forms of dispute resolution where the state is absent,[3] leaving wide room for arbitrariness. These examples, and many others, demonstrate the need for governance tools and for effective justice systems. Unfortunately, these needs remain unmet.

The international community and local authorities have focused on assistance programmes to support official institutions, such as the judiciary, the police, or penitentiary administrations. Customary justice is often seen as incompatible with the "values" of a modern nation state. But despite these massive aid projects and this focus on state systems, it has not been possible to establish justice systems for all: they are often geographically inaccessible; they are considered as being corrupt; court decisions take a long time to be issued; they do not always have the validation of local religious authorities; they are not culturally appropriate.[4]

As a result, local or community dispute resolution mechanisms remain overall very widely used. Customary institutions govern the lives of a large part of the population in developing countries. But we see that the individual within customary justice systems is not the priority; social peace within the community is the aim. This, therefore, raises questions about respect for the fundamental rights of the person.

Definition and General Characteristics of "Custom"

Custom is "an oral legal practice, consecrated by time and accepted by the people of a given territory"[5]. Custom is a rule of law born of prolonged usage and gradually considered mandatory.[6] These two definitions seem particularly relevant as they demonstrate the key elements that define the existence of a custom - namely its acceptance by the majority of a given population, prolonged use and its binding nature. It should be added that to become custom, its application must be general, that is widely used, and it must be constant, or regularly followed.

The notion of custom is an old one, certainly predating laws in legal history, but contrary to a law, it is more difficult to characterize, it is regarded as "elusive"[7]. A custom is defined by its repetitive

[1] Danida, How to Note: Informal Justice Systems, 2010, p.2.
[2] Hope, K., and Colliou, Y. 'Situating the best interests of the child in community-based arbitration of marriage disputes: Reflections from a pilot intervention of Terre des hommes Foundation in Assiut, Egypt', 2015.
[3] See, for example, the case of Taliban Justice in Afghanistan: C. Guistozzi, C. Franco and A. Baczko, Shadow Justice: How the Taliban run their judiciary, 2012, Integrity Watch Afghanistan.
[4] E. Harper, Customary Justice: From Programme Design to Impact Evaluation, 2011, IDLO, Rome
[5] Le Grand Robert, Dictionnaires le Robert, 1994. Coutume, p.5201.
[6] Patrick Courbe - Jean-Sylvestre Bergé, Introduction générale au droit, Dalloz, 2013, p66.
[7] Gilles Paisant « B. Oppetit, Sur la coutume en droit privé, Droits, n°3, 1986, p.46.

nature. According to Virginia Saint James [8], it is very difficult to study the customary process: classically it is accepted that it takes a long period of time to establish a custom; however it is difficult, if not impossible, to define the temporal origin of most of our customs. Ancient French law had sometimes, for its part, provided a minimum standard of duration with a requirement for a practice to be repeated for a minimum of forty years.

Customs are variably accepted depending on the continents and legal systems considered[9]. In countries of Germano-Roman law, custom can only theoretically play a role if the law refers to it. Legal custom arguments are inadmissible before the courts but are conversely accepted in the *Common Law* legal system.

Customary Law and Settlement

In this paragraph, we are mainly interested in the phenomenon of colonization and its relation to customary law on the African continent.

Colonial powers upset traditional political structures. Judicial power was exercised by the colonial power, but faced many difficulties with the coexistence of local law and "imported" law. Particularly in civil matters, the legal system was supposed to take into account local laws and install jurisdictions that demonstrated an understanding of it and willingness to integrate it.

According to Stanislas Melone [10], the Civil Code system and that of customary law are fundamentally opposed. The differences are tied to notions of family; of the roles of husbands and wives; of the responsibilities of a father to his children ; of the rights and responsibilities of these children ; of the position of the individual in the social order; and also of the ties between an individual and property, namely land.

The institutions of family and property law have traditionally resisted the invasion of French law, preventing the advent of a uniform body of law. But this “terrible assimilative folly”, as Eduardo da Costa [11] calls it, eventually led to the establishment of metropolitan law in all of the French colonies. This was not the case in all colonies, despite an overwhelmingly hegemonic and dominant attitude. One should distinguish between several approaches. Portuguese methods of colonization stand out in their assimilationist tendencies; the French invited colonial magistrates in 1900 to create a new indigenous justice system based on the careful study of the mores and customs of the population; and the British were careful to maintain the local political and legal order with some minimal adjustments.[12]

Alongside the legal systems in place, complementary jurisdictions developed, namely courts presided over by an officer of the colonial administration, which were in some cases handed over to national actors, while others were gradually removed. The idea of more and more effective participation of indigenous peoples in the management of their communities and the administration of justice became increasingly popular. [13] So-called “Indirect rule” [14] principles were also applied for some years in British West Africa. "Customary law was not relegated to the

[8] Maître de conférences de droit public à l'Université de Limoges.
[9] Gilles Paisant « F. Terré, Introduction générale au droit, 5è éd. Dalloz, 2000, n°202 ».
[10] « Les juridictions mixtes de droit écrit et de droit coutumier dans les pays en voie de développement », 1986.
[11] “Estudo sobre a administração civil das nossas possessões africanas (Etude sur l’administration civile de nos possessions africaines)”, 1903.
[12] For more information, see Malone, S. *Les juridictions mixtes de droit écrit et de droit coutumier dans les pays en voie de développement*, 1986.
[13] Stanislas Melone.
[14] Principle whereby the daily administration of a territory is implemented by local, traditional rules.

background and threatened with extinction as in other countries. Instead, it fed into both common law and British law, growing and developing into a harmonious synthesis of both systems"[15].

According to Anne-Claude Cavin [16], upon gaining independence, some states contented themselves with retouching certain details, and opted for the voice of continuity in leaving dual jurisdictions. Others preferred to integrate traditional courts into the common law jurisdiction, but no state, however, tried to redevelop old traditional justice, and most legislators limited their efforts to nationalizing the judicial systems inherited from colonial rule. In some countries, including Mali, Cameroon and Mauritania, customary courts of first instance were merged with modern common law courts. Other states, such as Senegal, Ivory Coast, Togo and Gabon, created customary courts of first instance positioned below the ordinary court of the justice of the peace. This setup allows them to position traditional justice one degree below modern justice; these courts of first instance usually become their court of appeal.

[15] Stanislas Melone, « Les juridictions mixtes de droit écrit et de droit coutumier dans les pays en voie de développement » 1986.
[16] « Droit de la Famille Burkinabé: Le code et ses pratiques à Ouagadougou »

The Limits of State Justice

Colonial heritage and the imposition of systems of justice based on Western models, combined with a lack of resources in many countries, gradually resulted in avoidance of the formal justice system.

Standards and values

In Western societies of Judeo-Christian culture, law is based on notions of what is right and what is not, on the concept of good and evil. In clan-based and patriarchal societies where social organization and law is based on the authority of men, the concept of justice as it relates to the individual is secondary to the preservation of the social bonds, which is considered the true objective of justice.

In many cases, state justice systems are not considered a reflection of the standards and values of the communities. On the other hand, customary justice is above all a means of settlement of disputes that is culturally accepted and understood by the persons concerned, based on consensus and reconciliation.

In many contexts, customary justice is considered to be a form of restorative justice, unlike formal justice, which is considered as retributive justice. The goal is not to punish the person who has committed a crime, but to respond to or compensate the victim so that his/her honour is restored. The aim is also to avoid any act of recidivism, though only in theory, because in fact there are no accompanying measures aimed at reintegrating the persons who have committed offences.

Preserving civil peace and harmony and preventing revenge and vendetta mechanisms are the main objectives of customary justice. Administrators of informal justice see themselves as mediators whose role it is to maintain stability and to avoid the escalation of a conflict between two parties. They think that civil peace is more important than protecting the rights of the individual.[17] A judge from a foreign group is seen as incompetent to mend the social fabric because the subject of the proceeding is not, primarily, to say who is right or at fault but to manage social relationships.[18]

Various studies and research are consistent with these elements:

In Indonesia, according to a study conducted in 2006 by the United Nations Development Programme, 28% of respondents believed that the formal justice system deals fairly with people, while 50% of respondents felt that formal justice benefits the wealthy and the privileged.

According to a study conducted in East Timor by Asia Foundation in 2004, some 77% of the population believe that the "*adat*"[19] system reflects their values, 80% of the population recognized leaders in the community and not the police as guarantors of just policing, and 90% of the population preferred to refer to traditional justice for problems.

In Afghanistan, "*jirgas*" and "*shuras*" [20] focus on reconciliation and peace among the parties involved in a dispute or conflict. Therefore, unlike the decisions issued by the state courts in which there is always a loser and a winner, customary justice proposes restorative justice as opposed to

[17] Ahmad Barak, Mohammed Zaki Abu Arrah, p41.
[18] Etienne Le Roy.
[19] *Adat* is a Malagese word of Arabic origins *('adat*) which translates roughly as « customary law ».
[20] '*Jirgas'* are the key decision-making and dispute-resolution institutions in Pashtun areas, and 'Shuras' are approximate equivalents in non-Pashtun areas.

retributive justice, it helps to restore peace and dignity between victims, perpetrators and the community. [21]

Accessibility

In the majority of cases, informal justice systems are more accessible to disadvantaged populations and provide quick, relevant, culturally-accepted and cheap solutions. Countries in post-conflict situations, in which formal mechanisms may have totally disappeared, can encourage informal justice systems because they allow order and a form of judicial system to exist. Although it's important to note that in some cases, the prevalence of informal justice systems can be explained more by a rejection of the state system than by approval of customary norms. [22]

Multilingualism also plays an important role in francophone African countries where the official language of justice, namely French, is a obstacle for the majority of the population and the plurality of languages obstructs "judicial communication". It is, according to Nazam Halaoui, very important to highlight the paradox of using the language of the minority of the population to judge the majority of it. French is considered as being the language of the "haves", those who hold power. [23]

In geographical terms, the problem of access to justice in developing countries constitutes a real challenge. In many countries, primary police stations are often based in the capital of a district or department, the courts of first instance are often at the level of provinces or regions, detention centres are located at best at regional level, and often in the case of detention centres for minors in the capital. The remoteness, high transport costs and the lack of means of transport deters rural people to reach out to state justice. Meanwhile, customary justice is pronounced quickly, its organization and its procedures are simple and known to all.

In addition, the cost of formal procedures is high. For example, in Palestine, it is obligatory to pay the Palestinian Authority 1% of the total value of the land to get a title of property and counsel rates vary between 1,200 euros and 12'000 euros depending on the case. Conversely, the majority of customary justice actors operate without receiving reward, except in some cases identified in research such as the "*baltagy"* in Egypt[24] or in the "*islah men"* in the Palestinian territories.[25]

Accessibility to customary justice is often the first element that emerges – land issues are settled virtually for free, however issued documents are not recognized by the state.

Research by Terre des hommes demonstrates that processing times are significantly lower in customary justice. In the Gaza Strip, 15.4% of land dispute cases are not resolved at the end of four months versus 30.8% in formal courts. Some 76.9% of cases are solved in less than 2 months informally versus 69.2% under 3 months at the level of formal justice.

[21] Voir, par exemple, *The Community-Based Dispute Resolution Series* du Afghanistan Research and Evaluation Unit. Voir aussi S. Taizi, *Jirga System in Tribal Life*, 2007, Tribal Analysis Center; R. Lamb, Formal and Informal Governance in Afghanistan, *Reflections on a Survey of the Afghan People*, Part 1 of 4, 2012; The Asia Research Foundation; EUREKA Research, *Pre-Assessment for Local Justice Programme in Kapisa and Surobi*, 2011.
[22] HARPER E. *Customary justice: from program design to impact evaluation* IDLO/OIDD (2011), p. 118.
[23] Nazam, H. « La langue de la Justice et les Constitutions africaines », *Droit et société*, 2002/2 n°51-52, p. 345-367.
[24] "*Baltagy*" signifie "*voleur*" ou "*criminel*" dans l'Arabe Egyptien. Voir : Mohamed, E. M., Abdel Mon'em, A. M., Badr, A. M. *An assessment of the informal juvenile justice system in Assiut, Cairo and Damietta Governorates*, 2013, Terre des homes.
[25] Barak, A. *Children in Conflict with Law and Informal Justice System in Hebron Governorate*, 2013, Terre des hommes.

The lack of confidence in formal justice

Often people are suspicious towards the law: they are afraid, intimidated and lack understanding. As a result, state justice systems are often perceived as mechanisms of coercion and control used by repressive regimes [26].

One of the most serious problems Afghan justice faces is the corruption of institutions. A study conducted by United Nations Office for Drugs and Crimes carried out in 2010 reveals that Afghans paid approximately 2.5 billion dollars in 2009 in bribes and "*bakchich"*, which represents 23% of the gross domestic product. The study noted that justice officials are among the most corrupt.[27]

The confidentiality of proceedings allows minor victims and culprits to not be stigmatized by the rest of the community. In Afghanistan the minors incarcerated in a detention centre are stigmatized: their reintegration into their communities of origin is almost impossible; it is difficult if not impossible to find work; they soon become a burden on their family; it is often impossible for them to marry[28].

[26] Ewa Wojkowska, Doing Justice: How informal justice systems can contribute, December 2006.
[27] Ewa Wojkowska, Doing Justice: How informal justice systems can contribute, December 2006.
[28] Interview with the Director of the Jalalabad juvenile detention centre, Afghanistan, 2012.

The Limits of Customary Justice and Resistance

Customary justice exhibits a number of practices that violate human rights. Informal justice is not always recognized by state justice. Informal justice is not homogeneous; its organization differs depending on region, which does not make it credible in the eyes of the state. Decisions are taken by individuals with the subjectivity and arbitrariness that this entails.[29]

The fact that, in many contexts, customary status is transmitted from father to son is not a guarantee in terms of skills. The actors of customary justice are not appointed on the basis of their skills but on more subjective criteria. In some contexts there can be a lack of skills and knowledge of traditional norms on the part of the actors in the informal justice system themselves.

Customary justice systems have often been linked to abuse of power, a lack of accountability, non-compliance with international standards, degrading punishments, unfair trials and discrimination against women, children and minorities.[30] The limits of customary justice are particularly evident when it comes to children.

The main conventions and international standards[31] of juvenile justice are not met by customary courts. International conventions set the age of majority to 18 years. In all contexts that we studied, customary justice actors consider the age of majority at puberty - between 13 and 15 years. Customary justice does not provide for special procedures for minors and do not respect this area of international conventions and national laws. In Afghanistan, certain practices of customary justice violate both national laws and international law and are sometimes contrary to the principles of Muslim law[32].

[29] Interview with customary judges and a lawyer, Cairo, April 2014.
[30] Danida, 2010, op. cit.
[31] Including the United Nations Convention on the Rights of the Child, the UN Standard Rules for the Administration of juvenile Justice (Beijing Rules).
[32] Xinxin Yang, International Development Law Organization, Support to Local Justice in Kapisa and Surobi Final Project Report.

Customary Justice for Children

There is little existing research on children and systems of customary justice.[33] Since 2012, Terre des hommes has engaged in a process of research that aims to address this subject specifically in the Middle East and Afghanistan.

In terms of methodology, an action-oriented research model was used that combines qualitative and quantitative methods. Situation analyses were conducted based on qualitative methods including interviews and targeted focus groups. Pilot activities combining quantitative and qualitative methods were used including a systematic collection and recording of cases dealt with by customary justice actors. Between September 2013 and December 2015, 974 cases of children involved in customary justice systems was recorded in Egypt, in the West Bank and the Gaza Strip.

The following analysis will present the findings of Terre des hommes' research according to the four guiding principles of the Convention on the Rights of the Child: the survival and development of the child; the best interests of the child; child participation and non-discrimination.

The survival and development of the child

One of the recurring elements in the literature related to customary justice is the use of harmful punishments and degrading treatment. However, in the Middle East, such practices are rarely observed.

For example, the practice of *baad* [34] in Afghanistan is much less common than in previous years. Conversely, in a situation analysis conducted among Palestinian refugees in Lebanon revealed that informal justice actors maintain the practice of shaving the heads of minor and adult thieves and exposing them in public.[35]

According to research conducted by Terre des hommes in 2013 in the West Bank, whether they are victims or accused of an offense, many minors who have been involved in customary processes have been victims of abuse. Victims are often treated as criminals: they are punished and do not get any support for what they have suffered.

Children consulted within the framework of the studies in Afghanistan, Egypt and Jordan have clearly stated that they preferred to be confronted with customary justice mechanisms rather than formal ones because, in their views, whatever the decisions may be, customary processes allow them to remain in their community and family environment. They viewed the penalties imposed by the formal justice system as synonymous with violence, especially in detention facilities. After spending time in detention, they felt it was very difficult to escape from stigma on the part of the community, which negatively impacts their future.

Regarding stigma, different perspectives emerged from these consultations. In the West Bank, children who committed an offence were considered by the community as offenders or criminals,

[33] A notable exception is the study by Save the Children UK: *Indigenous administration of justice and its impact on the protection of children: The Tagabawa-Bagobo and Subanen experience*, 2006.
[34] The practice of giving away a girl in order to settle a dispute.
[35] Tdh, *An informal juvenile justice assessment, Palestinian refugee camps and Gatherings, Tyr area, Lebanon*, 2011, Terre des homes.

they are labelled as "the thief", “the rapist" or even "the guilty". On the other hand, in Jordan, participating children indicated that resolving conflicts at the community level focuses not on the crime itself but on reparation; a view that was supported by stakeholders like teachers and religious leaders who were also consulted.[36]

Respecting confidentiality remains an issue in systems of customary justice. Whenever conflict resolution is done through assemblies, as is the case in Afghanistan with "*jirgas*" and "*shuras*" or in Egypt with dispute resolution committees, the identity of the persons involved and the confidentiality of the case are no longer preserved. In cases of sexual abuse, however, confidentiality is closely guarded, which implies that the perpetrators have no treatment or external support, and, in turn, can promote recidivism.

The best interest of the child

The aim of customary justice is to preserve community harmony and promote the safety of the group, sometimes at the expense of individual interests. This is particularly apparent in cases of sexual relations out of wedlock or without the consent of families, as well as sexual assaults. Most of these situations result in a forced or arranged marriage between the individuals involved or in between the offender and the victim.

In the same vein, in the context of domestic violence, when a woman is a victim of violence at the hands of her husband, customary justice will almost never encourage divorce, without of course taking into account the consequences for women. Egypt is a case in point.[37]

Forced exile is often a sentence for perpetrators and their families in severe cases. This has the effect of disenfranchising these families, putting them in a position where they may be forced to commit illegal acts in order to survive. In Damietta in Egypt, in the case of murder with or without premeditation, the murderer is excluded from the community, village or town where he lives. Unless the victim's family explicitly requests it, customary justice actors do not refer these cases to the police.

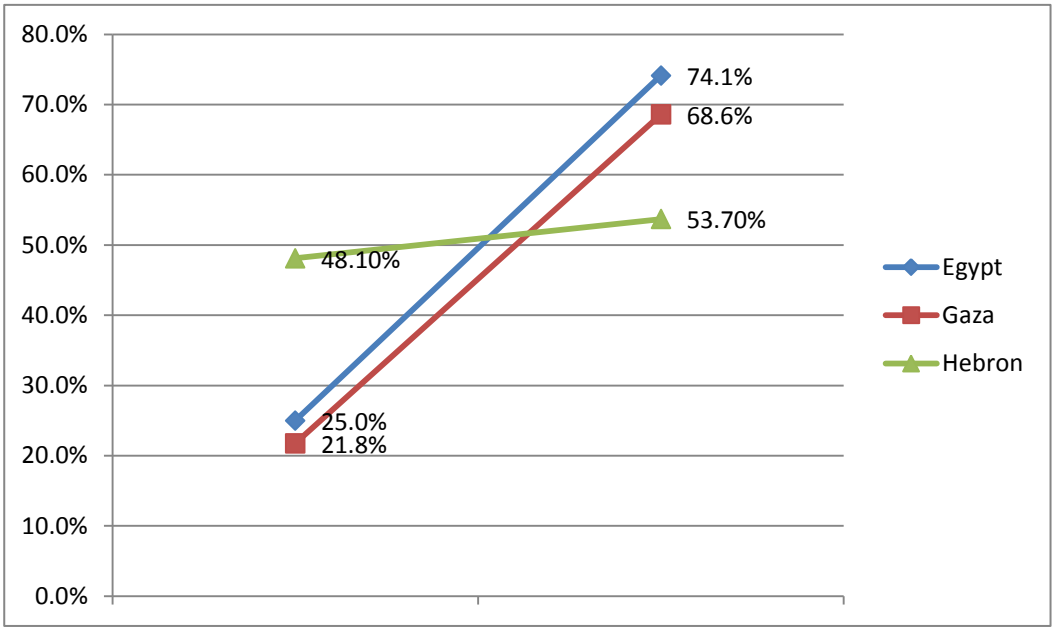
Child participation

In the framework of Tdh research, during consultations that took place with children, one of the elements which appears most often is the lack of participation on the part of children: they are almost never consulted, their opinion is not sought.

However, this is not irreversible. The simple act of regularly collecting information and recording cases in a systematic way for twenty-four months with some players in the customary justice in Egypt, in the Gaza Strip and in the West Bank (Hebron area) had a positive influence on rates of child participation. Meeting regularly with these actors of customary justice to raise awareness of the concept of child participation had a significant impact, as shown in the table below which improved the rate of participation from the beginning of pilot activities to 24 months later.

[36] Habboub, S and AlArishly, O. The informal justice system for children in Jordan, 2014, Terre des hommes, p.34.
[37] Hope and Colliou, 2015.

Table 1: Evolution of participation rates of children over a period of 24 months



These elements suggest that actors of customary justice, when they are aware, have a real influence on the involvement of children. This does not, however, tell us if their opinions have been taken into account and have influenced decisions.

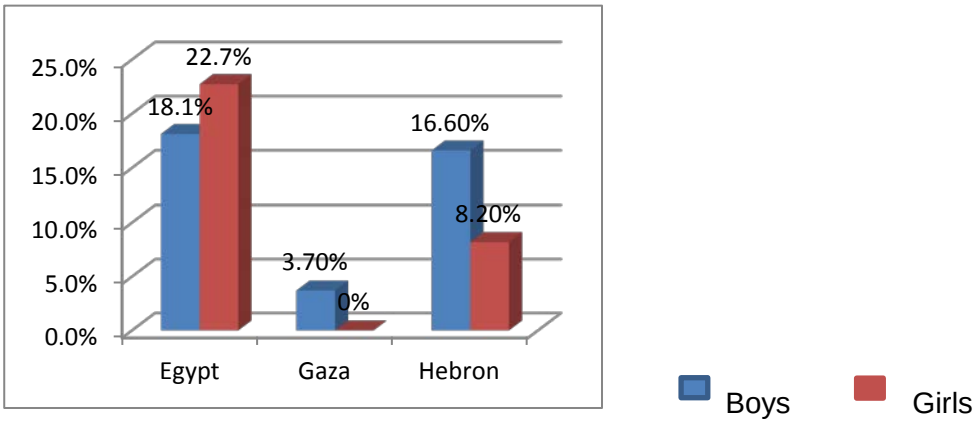
Non-discrimination

We saw previously that customary justice is favoured by communities because it is more culturally adapted. However, we have no data today to determine if the socio-economic status of the individuals and families involved in these modes of conflict settlement affect the decisions that are handed down. At this stage we have no tangible elements that allow us to mention that the socio-economic status is a discriminatory element or not.

Gender remains a major concern in the area of customary justice: customary judges and traditional leaders are overwhelmingly men, and we tend to think that decisions are more lenient with respect to boys. Literature notes concerns about the manner in which customary justice systems reproduce patriarchal social relations.[38] The quantitative information collected through Terre des hommes activities indicate that girls have more limited access to their rights in legal proceedings. The table below shows that in Gaza and in West Bank (Hebron) girls benefit to a lesser extent of the services of a legal expert. This is not the case in Egypt.

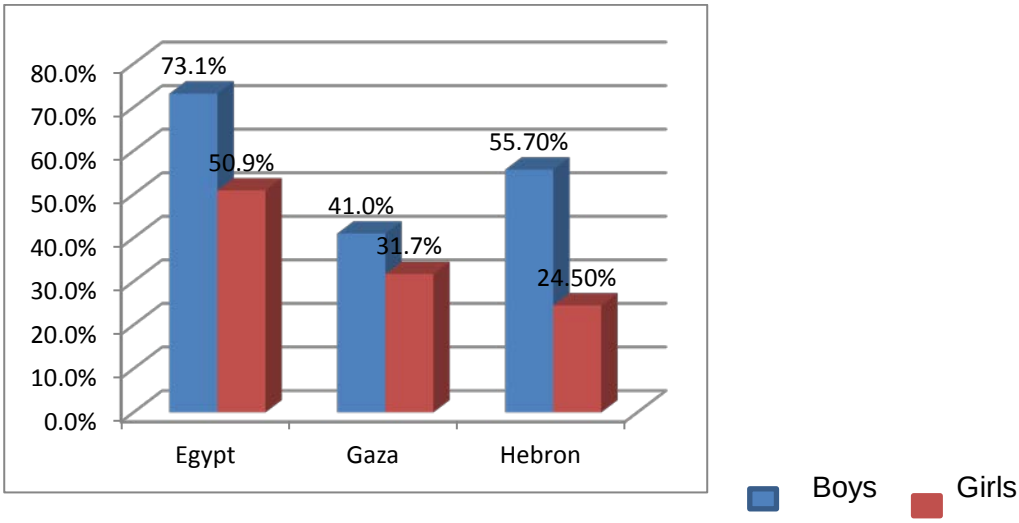
[38] UNWOMEN et al; Wojkowska; A. Wardak and J. Braithwaite, 'Crime and War in Afghanistan. Part II: A Jeffersonian Alternative?', *British Journal of Criminology*, 2013, Vol. 53 pp.179-214.

Table 2: Percentage of cases benefiting from a legal expert according to gender



In three contexts where we have collected quantitative data, the participation of boys in the procedures of customary justice is more important than for girls.

Table 3: Percentage of children who had been consulted in customary procedures according to gender



In conclusion, we can say that customary justice maintains discriminatory practices against girls. We can at the same time report changes through time and the intervention of Terre des hommes, which suggest that these practices can evolve in the right direction.

Integrating Customary Justice in order to Strengthen Access to Justice

Informal justice systems may be more accessible than the formal mechanisms and have the advantage of quickly and relatively inexpensively proposing remedies tailored to cultural specificities, with particular impact on women and children. Informal justice systems can serve as an alternative to official proceedings against children, and are likely, as such, to respond favourably to the change of cultural attitude concerning children and justice. [39]

There is now a consensus at the level of international humanitarian organizations that, in order to be effective and comprehensive, reform of the justice sector programs must integrate formal and informal aspects in the exercise of justice[40].

Considering the potential tension between the state justice and customary justice, reforms should proceed in stages and with a methodology appropriate to all players. Intervention in the area of customary justice must be aligned with constitutional law. For this it is necessary to make a rigorous inventory of all legal texts of the country concerned. It is essential to carry out an analysis of situation, in advance of any intervention. These situation analyses should involve meeting the players in state justice, customary justice actors and potential beneficiaries.

Basing ourselves on the pilot activities of Terre des hommes, as well as on the work done by Erika Harper of the International Organisation for Development Law [41], we will discuss below some activities which appear to be essential to achieving a better understanding and approach to customary justice, namely, interdisciplinary research; situation analysis; recording of customary law activity; and rapprochement with State justice.

Interdisciplinary research

There is little research into this kind of justice for its own sake without putting it into the perspective of establishing a centralized civil justice. It is not that anthropological research has been disinterested in Yemen or in Egypt, far from it; but these studies have addressed the customary judicial phenomenon mostly incidentally. In addition, by anthropological tropism without doubt, the impact of the state apparatus on customary modes of adjudicating justice has been constantly neglected[42]. The observations made by Baudouin Dupret in Egypt and Yemen can, in our opinion, be applied to developing countries.

In general, we should certainly deepen the study of the different modes of conflict resolution, namely the crossover points between the judicial institutions of the state - with their professionals, legislation and strategies - and "customary instances" of justice - with their own actors, references and strategies[43].

Situation analysis

According to the stages of the project cycle management, initial situation analysis should lie upstream of any intervention. This is specifically aimed at development actors wishing to implement programmes in the field of access to justice who consider incorporating customary

[39] Susan Bissell, Directrice générale adjointe de l'UNICEF et Chef Protection de l'enfance à la Division des programmes, 2012.
[40] Gaït Archambeaud. Harper, E. *Customary Justice: From Programme Design to Impact Evaluation*, 2011, International Development Law Organisation
[41] OIDD / IDLO International Development Law Organisation.
[42] Baudouin Dupret, « Le shaykh et le procureur : introduction », Égypte/Monde arabe, Troisième série, 1 | 2005, mis en ligne le 20 novembre 2008, consulté le 29 août 2014. URL : http://ema.revues.org/1034.
[43] Idem.

justice. In light of the work that we have done and in light of research by the Terre des hommes Foundation, we have found that there is little research that supports intervention in the area of customary justice. It also seems necessary to quantify customary legal practices within a given geographical area prior to implementing an intervention; we will detail this aspect in the next paragraph related to the recording of the customary activity.

The registration of customary activity

Although local and community conflict resolution practices remain dominant in developing countries, as stated by Etienne du Roy, we do not have statistics. Some figures have been presented by contributors, but we have no reliable surveys on that the relationships between local communities and the relevant customary justice systems.

Rapprochement with state law

Reconciling custom with state justice constitutes a real challenge, but also a necessity. It is inconceivable to continue to consider interventions in the field of access to justice in developing countries without considering the two dimensions of justice, namely state justice and customary justice. This element is crucial and should be considered not only as a goal or a result to be achieved but rather as part of the purpose of a project.

Prosper Nkou Mvondo[44] notes that the law in Cameroon is a transposition of legal solutions developed in the West and that in fact it is ignored by the Cameroonian who, when resolving disputes which arise between them, turns towards a parallel justices systems that directly conflict with state justice. But insofar as they participate in social regulation and peacekeeping, he wonders whether it would be more appropriate for the Cameroonian State to tame them and shape them rather than fight them.

This question is relevant for many contexts. We should not assume that all customary justice practices are welcome everywhere. They often pose a problem for local state representatives who merely acknowledge the existence of such practices and tolerate them, while maintaining that a state of law can only be exist in reference to a centralized judicial system upheld by the country's formal legal bodies.

In Papua New Guinea, UNICEF is working with the Secretariat of village tribunals within the Ministry of Justice to develop training materials and establish procedures for submissions and references to the courts. Also, they provide systems of monitoring and evaluation for the judges and judicial officers who officiate in village courts. This effort encompasses the rights of children and women as well as other rights guaranteed by the constitution and the instruments relating to the administration of juvenile justice.

Dr. Ahmad Barak, Deputy Attorney General of the Palestinian Authority advocates that it would be necessary to legislate the prerogatives of customary justice and specify the links that it should have with state justice. He believes that its role should be limited to guaranteeing social peace and to ensuring the implementation of decisions in the event of financial penalty imposed on the offender, specifying that in cases of homicide, customary justice must in no way substitute for the Public Ministry. It is important that the decisions taken by customary justice actors are recognized or validated by the formal justice so that the persons concerned can refer to it.

[44] La Justice parallèle au Cameroun: la réponse des populations camerounaises à la crise de la Justice de l'Etat.

Conclusion

We note that, unfortunately, despite the fundamental obligation that states have to ensure unconditional access to justice, there is a huge gap between the theory and the reality faced by people in developing countries.

This work has allowed us to see that the lack of ownership of formal justice systems by populations is not due not only to the failure of the state, but also to another factor: there is a dissonance between justice systems of Judeo-Christian and Western design – which seek to establish the truth and restore the individual victim to his right – and traditional justice systems. The object of justice in the patriarchal or clan-based societies dominant in most developing countries is to preserve social ties and harmony within the community. Indeed, judicial institutions representing the laws of the state are therefore ill-adapted to the needs of a large part of the population.

While there are some initiatives that recognize customary justice systems, they remain insufficient when confronted with the needs of communties. The states in question and the international community in general must become aware of this situation and commit to the resources necessary to reducing the divide between the positive laws of developing countries and endogenous legal practices which have resisted the assimilation policies of colonial powers and survived with a lack of attention from successive governments in post-colonial times.

Reform strategies must integrate informal structures and at the same time encourage appropriate reforms. Interventions with informal justice systems should be included in all strategies for holistic reform aimed at improving access to justice[45]. In order to overcome barriers related to access to justice, strategies and reforms should be designed for specific contexts and the process must be driven by national actors involving the plaintiffs as well as those responsible for meting out justice. To that end, development agencies in general and UNDP particularly should first assess the difficulties that the plaintiffs, the citizens, face, with a view to supporting their access to justice. Secondly they must look at the difficulties those actors in the informal and formal justice systems face in fulfilling their obligations to the people. Both efforts require taking the informal justice system into account[46].

To a certain extent, failure to recognize informal systems may be in itself discriminatory. In many contexts these systems are an essential component of identity and the individual and collective dignity of the populations concerned. In this case, human rights are inseparable from the recognition of the systems of informal justice in question. Indigenous peoples have a collective right to a certain degree of normative and institutional autonomy, which is specifically stated in the convention of the International Labour Organization.[47]

The work done so far by the Terre des hommes Foundation indicates that it is quite possible and credible to intervene at the level of customary justice systems to strengthen mutual understanding and cooperation between formal and informal systems, thereby transforming harmful practices and promoting better respect for international standards.

In light of these findings, if the objective is to promote and ensure access to justice for the greatest number, then strategies to reform the justice sector must integrate the customary dimension of justice. But the task is, of course, not simple, especially if we take into consideration the persistent

[45] UNDP Doing Justice.
[46] UNDP Doing Justice.
[47] Idem.

tensions between the centralised and hegemonic state justice and the codes and standards of customary justice, which are sometimes considered as incompatible with the concepts of rule of law and good governance.

From our point of view, to overcome these divisions, it is important to focus on each context specifically, building programs based on an excellent knowledge of conflict resolution mechanisms and actors. This implies rigorous research on customary justice systems and practices and a sound knowledge of the multiple profiles of the actors of customary justice, with a view to implementing activities focused on the harmonization between the state justice and customary justice.

By definition, the force of law cannot be effective if it has not been shared with and accepted by the majority, insofar as it is not the authority of a legislator, but the recognition that a system of rules is paramount. This requires reach across geographical and linguistic barriers as well as the democratization of state justice systems.

Access to justice is defined generally by the possibility for the population to obtain justice through formal or informal institutions in accordance with the international standards of human rights. The challenge will be for customary justice systems, as well as those who present themselves as its representatives and its guarantors, to change their practices.

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