

Findings of the Legal Working Group

As adopted on December 10, 2009

Over the past year a series of meetings and consultations has taken place to engage both members of the legal community and traditional leaders in discussions about justice reform in Liberia, in particular regarding the dual legal system. A legal working group (LWG), made up of prominent legal scholars from relevant government institutions, the bar association, civil society and the law school met four times to explore key issues including constitutional questions of separation of powers, due process and equality, and the legal framework governing the dual system. They also reviewed new empirical evidence concerning Liberian's experience with and perceptions of justice options derived from recent field studies throughout Liberia, most notably those conducted by the United States Institute of Peace / George Washington University as well as by Oxford University's Centre for the Study of African Economies. Members of the LWG met with traditional leaders in three counties to discuss differing perspectives, common concerns and possible options for reforming the dual justice system. UNMIL, the United States Institution of Peace and the Carter Center provided support to these discussions.

This document:

1. Outlines the LWG's baseline findings of fact.
2. Identifies primary considerations and principles that should guide justice reform policy-making.
3. Begins to define the most vital policy reform questions that must be addressed.

This will allow Liberian stakeholders to begin to generate a menu of policy options for addressing these questions and provide a framework for analyzing the cost/benefit implications of competing options.

I. BASELINE FINDINGS

There was general agreement on the following assessment of the dual justice system:

I.A. Existence of the dual justice system:

- I.A.1. Liberia currently has a dual justice system involving a formal court hierarchy under the judiciary, and a system of customary courts originally authorized under the Hinterland Regulations. This system evolved as a result of the Liberian state's efforts to extend its authority over the hinterland through the Ministry of Internal Affairs and use of indirect rule.
- I.A.2. The Liberian Constitution provides the basis for the integration of customary justice into the formal system. Specifically, Article 5b provides that the Republic shall "protect and promote positive Liberian culture ensuring that traditional values which are compatible with public policy and national progress are adopted and developed as an integral part of the growing needs of the Liberian society." Also Article 65 states that "the Judicial Power of the Republic shall be vested in a Supreme Court and such subordinate courts as the legislature may from time to time establish. The courts shall apply both statutory and customary laws in accordance with the standards enacted by the Legislature."

I.A.3. The legal framework governing the dual justice system is full of gaps and ambiguities and is in need of revision. For example, there is a lack of clarity as to whether the Hinterland Regulations remain legally in force, but they are still relied on by executive officials and chiefs, despite the fact that they contain several anachronistic provisions. The Regulations also contain provisions that refer to outdated geographic divisions and rules regarding portorage (e.g. where chiefs are to promptly supply porters for travelers in their areas).¹

I.B. Empirical Findings about the Customary Justice System:

Available empirical evidence² strongly suggests that:

I.B.1. Customary justice institutions have survived the civil war and/or been revived after it, and remain active in most rural Liberian communities. The structure of customary justice institutions still reflects the pre-war structure, by which cases are referred up a hierarchy that starts with heads of kinship groups, up through a hierarchy of chiefs. The overarching principles that guide the exercise of customary justice have not been fundamentally altered.

I.B.2. The customary system serves many positive purposes, including providing an accessible, affordable and efficient means of resolving disputes.

I.B.3. Despite many specific variations, customary justice generally adheres to a broad set of shared principles and processes. These include:

- an emphasis on revealing the truth in an expansive way that includes the root causes and additional social factors that inform a dispute.
- a primary emphasis on social reconciliation of the aggrieved parties, which may include compensation or repair of the harm, an apology and a reconciliation ritual.

¹ The Revised Hinterland Regulations include many outdated provisions. For example, Article 18 establishes the requirements for a “regular runner service” between districts. Article 22 delegates some responsibility for the maintenance and constructions of roads and bridges to Paramount Chiefs. Article 34 provides that “all male citizens are liable for compulsory labor of public works projects.” Article 35 outlines the responsibilities of chiefs for portorage. Article 38 governing the administration of justice refers to non-existent officials. Article 54 establishes an outdated schedule of costs, fees, and taxes. Article 73 prohibits the practice of sassy-wood, but allows for the use of some forms of trial by ordeal in contradiction to Liberian Supreme Court jurisprudence including *Jedah v. Horace* (1916) and *Possum v. Pardee* (1935). See Jallah A. Barbu, “An Analysis of the Formal Legal Framework Governing Customary Law in the Republic of Liberia,” sec. II D (i) (Submitted to the United States Institute of Peace, 2009).

² In formulating its findings, the Legal Working Group relied on recent empirical studies including Deborah H. Isser, Stephen C. Lubkemann and Saah N’Tow, “Looking for Justice: Liberian Experiences and Perceptions of Local Justice Options” (USIP Press) (Hereinafter “USIP/GWU Study”) and Bilal Siddiqi and Justin Sandefur, “Community Based Justice and the Rule of Law in Liberia,” (Oxford: Centre for the Study of African Economies, University of Oxford, 2009) (Hereinafter “CSAE Study”). The USIP/GWU Study is based on ten months of field research in Lofah, Grand Gedeh and Nimba counties, consisting of 130 individual interviews and over 35 focus groups. The CSAE Study conducted a representative household survey of 2,500 households spread over 176 villages in five Liberian counties: Bong, Grand Gedeh, Lofa, Maryland, and Nimba on the household’s experience with a range of crimes and conflicts including forums visited, time taken and cost incurred, and details of the judgment.

- consideration of a broader set of social interests than those of the immediate parties, in particular those of kinship groups and the broader community.
 - a strong effort to bring the parties together to a consensus resolution.
- I.B.4. The customary system is the preferred system of many Liberians – for both civil and criminal cases – both because of its accessibility and effectiveness relative to the formal system, and because of the kind of justice it provides (emphasis on social reconciliation).³
- I.B.5. The majority of disputes in Liberia that reach resolution are resolved through some form of customary justice. Notably, a very high percentage of incidents of crime or dispute are not taken to *any* forum for resolution.⁴
- I.B.6. State policies that are constraining the scope of action of customary courts and certain practices (such as Trial by Ordeal) without offering viable alternatives are leading to perceptions of a growing justice vacuum. Under these conditions, traditional leaders are concerned that their authority and ability to maintain peace and stability in their communities is being undermined by these government policies that limit their jurisdiction.
- I.B.7. There is a very strong local demand for justice mechanisms that will address the full range of offenses, problems, and crimes most Liberians believe they confront, but that the formal justice system generally refuses to recognize, such as “witchcraft”. Simply denying this demand is not an effective way of dealing with it.

I.C. Legal Findings about the Customary Justice System

- I.C.1. There are aspects of the customary justice system that raise constitutional concerns. These include:
- concerns about separation of powers, to the extent that executive officers perform judicial functions without judicial review.
 - concerns about due process and human rights, to the extent that it metes out sanctions and enforces judgments against accused offenders, and to the extent certain methods of trial by ordeal are used to identify perpetrators.
 - concerns about gender equality, to the extent it follows norms and practices that deviate from constitutional and statutory equality rights, particularly those granted to women.

³ The USIP/GWU Study, the CSAE Study, and workshops conducted by the Legal Working Group revealed most rural Liberians are largely unenthusiastic about efforts to provide a singular legal system and framework that works the same way everywhere for everybody in Liberia; rather, they prefer to retain the customary system which they consider to reflect their values more than the “foreign” Monrovia-based system.

⁴ CSAE Study.

I.C.2. The resolution (“compromising”) of cases involving serious crime by the customary system may raise concerns about the state’s responsibility and authority to bring justice to crime, in particular crimes of murder and rape.

I.D. Findings about the Formal Justice System:

Available empirical evidence strongly suggests that:

- I.D.1. Despite notable progress, the formal justice system suffers from insufficient resources and capacity⁵, and most particularly so at the local level and in rural areas.⁶
- I.D.2. The effectiveness of the formal justice system is constrained, especially in rural areas, because it is too inaccessible, time consuming, and expensive for most Liberians.
- I.D.3. The formal justice system is widely regarded as being prone to corruption (influence of money and/or social power), generally to a much greater extent than is the case in the customary system. Formal courts are often chosen when individuals believe they can gain an advantage over another party by exploiting personal power, social connections or wealth.
- I.D.4. To the extent cases do enter the formal justice system, they are often subject to severe case backlogs and delays that contribute to a sense of injustice. The formal system is also largely seen as ineffective and failing to enforce judgments against offenders that are found guilty.
- I.D.5. Even when the formal system performs fairly, many Liberians find that it does not deliver a satisfactory form of justice because of its emphasis on an adversarial and penal process focused on the narrow case before it, rather than on resolving root causes and promoting social reconciliation.

⁵ Liberia’s Poverty Reduction Strategy (PRS) states that Liberia faces “weak public institutions, corruption, limited justice and a lack of human capacity” in the rule of law sector. Government of Liberia, “Liberia Poverty Reduction Strategy”, available at <http://www.mofliberia.org/lprs.htm> (2008). Others have also documented the lack of resources and capacity amongst the justice sector. Isser, Lubkemann and Philip A.Z. Banks III, for example, suggest that the judiciary suffers from a serious lack of qualified personnel. Of the over 400 Magistrates, only 5 have a law degree as required by statute and many are not even high school graduates. At the end of 2008, only 60 of the 1,624 prisoners held in Liberian prisons were convicted, the rest were pre-trial detainees. Deborah Isser, Stephen Lubkemann and Philip A.Z. Banks III, “Justice in a Vacuum: The Unintended Consequences of the Constraint of Customary Legal Practices in Post-Conflict Liberia”, (forthcoming) (Hereinafter “Justice in a Vacuum”). Niels Nagelhus Schia and Benjamin de Carvalho highlight the lack of resources in the SGBV context, articulating that the LNP and formal justice sector face a “dire lack of infrastructure and resources.” Niels Nagelhus Schia and Benjamin de Carvalho, “Nobody Gets Justice Here!”, *NUPI Working Paper 761*. (Oslo: Norwegian Institute of International Affairs (NUPI), 2009), p. 13 (Hereinafter “NUPI Working Paper”).

⁶ For example, the NUPI Working Paper notes that institutions of rule of law are particularly lacking outside of Monrovia. A 2006 report by the International Crisis Group referred to a “crisis in the statutory courts” and reported that the statutory system is “often non-existent” in rural areas. International Crisis Group, “Liberia: Resurrecting the Justice System,” (2006). The UN reports slow progress was made in the hearing of cases due to non-assignment of Judges in River Gee, Grand Kru and River Cess counties, and “absenteeism on the part of some judicial officials, Defense Counsel or Prosecutors”. United Nations Human Rights and Protection, “Report on the Human Rights Situation in Liberia November 2007 – June 2008”

II. BASIC PRINCIPLES THAT SHOULD GUIDE JUSTICE POLICIES:

- II.A. The starting point for policies regarding justice reform should be focused on ways to *functionally* improve the quality of justice for all Liberians. Rather than only focusing on the legal framework, the approach should be a problem-solving one that focuses first and foremost on how best to meet the justice needs of the population.⁷ Rather than starting with the legal framework this approach first considers the capacity, effectiveness and potential roles of the full spectrum of dispute resolution mechanisms, including formal, customary, alternative dispute resolution and other community-based mechanisms. Resolving the legal and structural relationships between the customary and formal systems should serve the primary purpose of improving access to justice needs. In other words, questions of structure and form are subordinated to those of function.
- II.B. Policies need to correspond to *current* realities on the ground, and *realistic* expectations of development and reform, rather than to an ideal image of the justice system. In particular, policies need to take into account:
- The capacity and legitimacy shortfalls of the formal system, so as to avoid creating a justice vacuum in reality by limiting the customary system without having viable alternatives in place.
 - Foreseeable improvements in formal system capacity based upon realistic assessments of the resources that are likely to be directed to this effort over the next 15 years.
 - The social realities and conceptions of justice of the Liberian people, so as to promote a justice system that is able to meet needs and expectations of the people.
- II.C. Justice reform efforts need to fully consider the potential consequences of justice policies on broader peace-building, political development, and human rights objectives. Careful consideration must be given to the effects of justice policies on social stability and the legitimacy of the state as well as to the promotion of human rights. Policy makers must negotiate tradeoffs between these factors, since they may be in tension with each other.
- II.D. The process of justice reform must focus on achieving far greater and more meaningful forms of local social participation than has hitherto been the case.

⁷ The legal framework refers to the laws and regulations that govern the dual system, as well as the structural relationship amongst justice institutions. The USIP/GWU Study found that the formal justice system – even if it were working as intended – might not satisfy most Liberians, who place a much higher value on social reconciliation than on the zero sum game of standard western justice.

III. KEY POLICY QUESTIONS AND OPTIONS:⁸

III.A. *How can justice be further improved at the local level?*

III.A.1. *Given the current capacity limitations of the formal system and the challenges it will confront for the foreseeable future, how can Liberia meet the demand for justice and address the justice vacuum? Options worth considering include:*

- Decrease the backlog in the formal courts especially of criminal cases, by reconsidering the types of cases that must be heard by the circuit courts, and circumstances under which both civil and criminal matters might be resolved out of court, including by customary courts and other forms of alternate dispute resolution. A set of criteria that might help determine when cases (civil and criminal) may be appropriately handled by the customary system might include: (1) if both parties voluntarily submit to the customary system; (2) if the customary system is limited to a restorative resolution and no punitive sanction; (3) if neither the state or another third party has an overarching interest in the case; (4) if resort to the formal system remains an option in the event the customary system fails to resolve the dispute.
- Provide increased resources and focus to capacity-building of the formal system at the local level, including by improving access, equipment and quality. Mobile courts, a set of incentives for legal personnel to work in rural areas, clinical legal programs that send lawyers to rural areas, and the use of paralegals might be considered.
- Increase the availability and accessibility of legal aid, assistance and information for all parties, victims and the accused.

III.A.2. *How can all justice mechanisms (criminal/civil) at the local level more fully account for the values (such as restorative redress⁹) to which most Liberians subscribe and account for the realities they confront?*

- The formal penal system might allow restorative remedies in lieu of penal sanctions at the request of the victim, or incorporate a civil action by the victim against the accused.
- A process of consultation between traditional leaders and formal justice actors on how to incorporate restorative practices and how to link with community restoration and reconciliation processes should be undertaken.

III.A.3. *How can customary justice practices that are problematic from a human rights or due process perspective be addressed effectively?*

⁸ The bulleted options following the questions represent a menu of possible options for consideration. This is neither meant to be prescriptive nor comprehensive, but to stimulate thinking on the range of options. These or other options will need to be subjected to further consultation.

⁹ Most rural Liberians continue to emphasize restorative and socially reconciliatory objectives as more important than punitive objectives. Restoration for many Liberians may take the form of compensation or repair of the harm, an apology or a reconciliation ritual as opposed to punitive sanctions such as jail.

- There needs to be a greater effort to understand onerous practices, the population's perceptions of them and the social purposes they may serve. Instead of top-down bans, efforts should focus on working with traditional leaders and local communities to find alternative socially acceptable ways of addressing their concerns.

III.A.4. *How can practices in both formal and customary systems that promote injustice (e.g. partiality, corruption, lack of transparency, and predatory forum shopping¹⁰) be effectively addressed?*

- Efforts to combat corruption in the formal system should focus on the incentives that drive corruption, and should provide adequate resources to ensure proper salaries, equipment and legal materials.
- Within the customary system attention should be paid to promoting downward accountability of traditional leaders to their constituents. Care should be taken not to interfere with community mechanisms that effectively ensure the accountability of traditional leaders to their community.
- Increase grassroots legal aid, assistance and awareness.
- Consider ways to restrict predatory forum shopping (where the more wealthy or powerful party seeks unfair advantage), for example, by encouraging out of court settlement and/or the exhaustion of customary remedies before a formal case can be heard (except where this would cause injustice).

III.B. *As Liberia considers the future of its justice, how can it move toward a system that inclusively reflects the values of the Liberian people?*

III.B.1. *How can public participation and ownership in the justice reform process be enhanced?*

III.B.2. *How can better understanding of the formal and informal justice principles and practices be promoted?*

¹⁰ Predatory forum shopping refers to the practice of litigants choosing a customary or formal venue based on where they are likely to secure a better result through power, wealth, or influence. Empirical data suggests that Liberians from across the social spectrum widely believe that the powerful, wealthy, and socially connected are increasingly able to secure unfair advantages in dispute resolutions given the relationship between the formal and customary systems. Litigants are most likely to appeal to the formal court 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. See Justice in a Vacuum.

IV. PROCESS RECOMMENDATIONS:

- IV.A. Meaningful justice reform should be based on a social consultation process that is engineered to solicit local ideas for change and that fosters a sense of community engagement in the national legal reform process.
- IV.B. A political decision must be made about the relative responsibilities and roles of the Ministry of Internal Affairs, the Ministry of Justice, the Judiciary and other relevant institutions in the future administration of customary justice in Liberia.
- IV.C. The policy and practitioner community should make a concerted effort to be far better informed about the social context and realities of Liberian justice as actually practiced at the local level and as actually experienced by most Liberians. To this end additional empirical research on local perceptions and experiences of justice should cover Liberia in its socio-geographic entirety, notably including the urban areas of Liberia in which one third of the country's population resides. Other priority empirical research needs are for:
- a comprehensive baseline assessment of the local legitimacy and practices of customary authorities throughout Liberia;
 - an empirical study of the extent of gender-bias in customary justice resolution;
 - a study of children/minor's experience with formal and customary justice institutions.
- IV.D. In preparation for a national conference that will determine the way forward for Liberian justice reform, key Liberian institutional stakeholders should conduct their own review of the key questions posed in this document. This review should generate a menu of options and an analysis of the implications of different choices for justice provision as well as broader peace-building, political development, and human rights objectives. This internal analysis should also take account of the legal, political, and social realities outlined in the findings summarized in this document.