

### Bridging the gap between modern legislation and legal reality: Working with customary legal structures to improve women's rights

#### The relevance of customary norms and practices

In most developing countries state law, religious as well as a variety of customary norms and institutions, coexist with more recent international legal obligations. The state's recognition of customary and religious norms is often restricted to specific domains, such as family rights, and is increasingly subordinated to constitutional provisions.

In many countries, large parts of the population refer to customary and religious norms and institutions to solve family conflicts such as inheritance disputes or land conflicts. The attraction of customary institutions is due to a number of reasons:

- Traditional legal systems are culturally and historically rooted. They are familiar to the people, close-by and rather inexpensive.
- They are generally oriented towards finding a compromise between the opponents and towards re-establishing harmony within the community.
- On the other hand, dispute settlement in state courts through formal judgments is often disliked by the local population because it bears the risk that people will be ostracized from their community.
- State judicial structures are scarce, urban-based and under-equipped. They often have lengthy, expensive, and very bureaucratic procedures, are using technical and therefore unfamiliar languages, and often are accompanied by corrupt practices.
- Most people, apart from a well-educated elite, are not aware of many of their statutory rights and are unfamiliar with the state legal system.
- Negative experiences with legal institutions during colonial times and even after independence, particularly in authoritarian states, have resulted in a general reluctance towards using modern law.

These factors contribute to the continuing coexistence of different normative orders and legal institutions. In some instances these systems are hierarchically related, whereas in others they stand side by side as alternatives. 'Modern' and 'traditional' law contain parallel and often contradictory rules based on different notions of legitimacy. They have their own legal cultures, i.e. their own ways of expressing and legitimising claims, amending rules, settling disputes and sanctioning infringements (F. and K. von Benda-Beckmann 2005). These legal cultures mirror and manifest local power structures.

On the one hand legal pluralism diminishes the authority of state law and the partial improvements for human rights, and especially women's rights, that are contained therein. On the other hand, it is often the only affordable or accessible option. Legal pluralism also makes it possible to negotiate one's rights by combining arguments from different normative orders or by playing the various norms and institutions against one another. However, this makes the legal system inefficient and can be a source of social and political conflict. Furthermore, it bears a great risk of legal insecurity for those individuals who do not possess the legal knowledge, communicative skills, personal strength, economic resources and influential contacts that are necessary for such negotiations (Kipfer-Didavi 2004).

However, many people are likely to rely on local / customary legal institutions in the medium-term. This is due to the limited governmental capacities and resources in many countries, as well as the above-mentioned shortcomings of the modern legal structures.

Therefore, judicial reforms - often supported by development cooperation - need to understand and recognise how these traditional legal systems operate and how they interact with state legal institutions. This is also true for any project intervention that directly or indirectly addresses resource / access issues e.g. in the water sector or agriculture. (Weilenmann 2002, Bruns and Meinzen-Dick 2000, Netherlands Development Assistance 1997).

### **Customary legal norms and practices are dynamic**

Outsiders often perceive customary legal norms as being static. However, rather than a body of fixed rules, they can be seen as a series of socio-religious principles for finding pragmatic and flexible solutions in conflict situations. Even if these principles as such are generally undisputed, there may be room for contention about how they should be applied in practice. Therefore, customary law is always subject to interpretation and, so long as it is not written down and codified, it is inherently pre-disposed to change (Comaroff and Roberts 1977). This dynamism implicit in customary law is an important dimension, which might enable constructive cooperation in legal reform processes.

However, the dynamism and flexibility of customary legal systems can also invite arbitrary practices. Indeed, customary law is often closely tied to individual authorities, which exercise considerable power with regard to interpretation and application of customary legal rules.

Reference to tradition and religious power is often misused to justify discrimination against certain social groups - especially along gender, ethnic, religious, or economic lines.

*For example, in a violent conflict between migrating Mossi and autochthonous Gurunsi over access to increasingly scarce land in Burkina Faso, the district officer referred the case back to local (Gurunsi) authorities. These authorities then settled the case "according to tradition", i.e. in favour of the autochthonous population, thus ignoring the interests of the Mossi minority (Stamm 1997).*

### **The pros and cons of customary legal systems for women**

Contrary to the common stereotype that customary norms and practices always suppress or disadvantage women, a differentiated analysis reveals more ambivalent results:

*A study about domestic violence in Zimbabwe (Armstrong 1998) revealed that traditional chiefs generally played a very important role in dealing with matters of domestic violence. Bringing men before the traditional open courts meant that the whole community got to hear about the abusive husband's actions. Moreover, traditional leaders often expressed their disapproval of domestic violence. The resulting humiliation was quite effective in curtailing the practice of domestic violence. However, in some cases the men refused to appear before the local courts. In such instances it is important to be aware of the alternative ways of addressing the problem that exist outside of the traditional system.*

*A study about southern Cameroon (Jansen 1998), showed that women wanting a divorce preferred to address unofficial customary legal institutions instead of state courts. Even though customary legal institutions were generally dominated by men, women felt they were treated by them with more respect e.g. by being given more space to present their point of view. In particular, they appreciated the attempts of the customary institutions to reconcile the couple in situations where the state courts' focus on culpability would render reconciliation impossible. In a similar way, going to the formal state courts is considered a shame on the family in Kyrgyzstan. As a consequence, Kyrgyzstani women also prefer to apply to the customary courts with respect to the division of property upon divorce. (Giovarelli/Akmatova 2002).*

*In Togo, customary norms prevent the widow from inheriting from her husband whilst privileging her in-laws. However, many women were strongly critical when the state tried to improve the situation of widows by establishing spousal inheritance rights in a new family code. The women pointed out that the mother of the deceased had spent all her energy raising, feeding and educating her son, in the hope of being maintained by him in her old age. They therefore condemned the fact that the new law deprived these mothers of their fair share of the inheritance, whilst failing to offer them any other form of old-age provision (Kipfer-Didavi 2004:219).*

This is not to deny the discriminatory character of many customary norms or the exclusion of women from decision-making that is common in customary legal institutions. The point here is that programmes engaged in rights-awareness can actively highlight the positive aspects of customary legal systems and engage therein, whilst also encouraging a culturally sensitive reform of the problematic features

within these systems. In doing so, such approaches can avoid creating “cultural defensiveness” – a key challenge facing those working in plural legal contexts.

### **Addressing gender-based discrimination in customary law**

There are several ways of addressing the challenges posed by gender-specific discrimination in customary legal settings. One way is by recognising and highlighting the changes that are taking place within societies where traditional and religious practices are strong.

*For example: a study on inheritance by the Women and Law in Southern Africa Research Project found numerous examples where in practice (and contrary to what was stated as custom and customary law) women were inheriting from the estate of their deceased husband or father.*

Highlighting such examples can help to illustrate the dynamism that is implicit within customary practices. More significantly, people might be less resistant to change if they know that changes are already taking place among people like themselves or within communities that have similar values to their own.

In instances where religious laws are fairly strong, such as in Islamic countries, it is also important to engage into the gender debate within the context of people’s value systems. As some theologians have pointed out: the various interpretations that have been given to the Qur’an over time have been influenced by the power dynamics dominant during those periods. However, there are as many verses conferring rights to women under the Qur’an as there are those that appear to accord them a minority status. Locating arguments for equality within the local context is more likely to yield results than an approach that relies solely on concepts that may be seen as external (GTZ 2005).

Engaging traditional leaders in reform processes is another approach that can be used to address gender and power imbalances in communities with strong traditional and religious laws.

*For example: following the introduction of the new constitution in Ghana, chiefs have been tasked with evaluating traditional customs and their usage so as to identify those that are outmoded and socially harmful.*

Since chiefs have an important role to play in most customary legal systems, including them in the debate from the outset is a positive strategy that makes it easier for them to persuade people to embrace change.

The following two case studies explore new ways of bridging the gap between customary and state law, by building on people’s knowledge and experiences and encouraging them to critically reflect and creatively change existing norms.

## **Case study 1: Culturally sensitive approaches to stop harmful traditional practices in Ethiopia** (cf. GALPO 2003, HUNDEE 2001, Osterhaus 2005)

### **Background**

In a patriarchal society such as Ethiopia, women have little power and influence in decision-making. They also perceive themselves as helpless against a situation of allegedly “natural” inferiority and subordination. Gender-based discrimination is mirrored in customary and religious norms, and backed-up by the elders’ councils i.e. the traditional mediating institution at the local level. For example, women do not inherit a share of their parent’s estate that is equal to that of their brothers and they are also denied an equal share of common property in instances of marital dissolution. Moreover, forms of violence against women are widespread and include wife battering, abduction and rape, female genital mutilation (FGM) or forced marriage at a very young age.

In rural communities most people refer to the customary legal system. However, even where the police do get involved, their investigations into infringements of women’s constitutional rights are often hindered because traditional practices are treated as being above criticism. Thus, there is a failure to enforce state laws, which formally guarantee equal rights to men and women.

### **Strategy**

The GTZ-supported *Gender and Law Project Oromiya (GALPO)* has worked in partnership with the Oromiya Regional Women’s Affairs Bureau to build on the innovative work pioneered by the Ethiopian NGO HUNDEE. In essence, the resulting cooperation has drawn from local notions of Oromo culture to successfully raise community awareness about the discrimination of women and girls. The approach involved traditional authorities and elders who perform legal functions in the customary law system, as well as representatives of modern legal structures such as the police, prosecutors and judges.

Separate dialogue workshops were held with women (including circumcisers) and men in a series of communities. Importantly, traditional and religious authorities were also included in these meetings. In a highly participative and interactive way, group members were encouraged to critically reflect on the unequal gender distribution of work and power in daily life; as well as on gender-based violence, women’s role in decision making and the behaviour of the community towards these forms of discrimination. The practice of marriage by abduction and female genital mutilation (FGM) were among the concerns raised by the women: the former is a key reason preventing young girls from attending school, whilst the latter seriously harms a woman’s bodily integrity and can expose them to AIDS and other serious health problems. Village elders pointed out that these practices are, contrary to popular beliefs, not rooted in Oromo culture.

Furthermore, participants also discussed interpretations of the Islamic *sharia* law with regard to polygyny, FGM and property rights. Finally, workshop participants scrutinized whether their culture protects women's constitutional rights.

Women and men shared their opinions in subsequent joint workshops. The idea of adopting new community rules slowly gained shape during these further discussions and the participants then presented these new ideas to the public at various village gatherings. The proposals were later submitted to further debates moderated by respected community leaders and elders. Finally, traditional law-making ceremonies (*Seera Tuma*) were held.

Drawing from the previous debates, the traditional authorities proclaimed new customary law provisions that explicitly banned the discrimination of women and girls in key areas such as FGM and forced or juvenile marriage. Representatives of the police and local government who welcomed and supported this rapprochement between customary and state law also attended these official, solemn ceremonies.

Initially introduced by HUNDEE, this innovative approach was taken up by GALPO and reinforced with supplementary measures such as: training of trainers on gender and law implementation, training of paralegal advisors, the establishment of legal aid counselling centres, the provision of capacity building for the Women's Affairs Office and women associations, as well as school community trainings, radio programmes, publications on women's rights and the establishment of support committees at all administrative levels.

## **Impact**

The establishment of paralegal services and the widespread involvement of the community in the dialogues have changed men and women's perception of gender-based discrimination. A number of traditional and religious leaders, as well as circumcisers, are now in favour of protecting women's rights. Law enforcement agencies such as the police, prosecutors and civil courts, have also changed their attitudes towards harmful traditional practices. This in turn has had an effect on the attitudes of rural men and women:

- o Cases of rape, abduction, early marriage and genital mutilation (which would have been kept secret before) are increasingly reported to the Women's Affairs Office or to the police. Reporting is often by the women themselves or by their relatives or elders. These cases are regularly transferred to prosecutors, who are now aware of women's rights and handle such cases with priority. In numerous cases specific instances of the practices have been prevented from being carried out. Several "former circumcisers" have also organised themselves into an association. These women claim to have completely abandoned genital mutilation and now sensitise others about its negative implications.

- o Other harmful traditional practices such as milk tooth extraction and widow inheritance have been stopped or reduced considerably.
- o A number of men have accepted divorce agreements that accord women a greater share of the spousal property - although their respective shares are still far from equal. Women's access to, and ownership of, land has generally improved.
- o Women have more control over their property, household resources and land. In cases of death or divorce, women increasingly inherit and get their fair share.
- o More women attend public meetings and raise their voice against gender-based injustices. For the first time, women have been accepted as members in the elders' councils. This has improved women's chances in the arbitration of marital disputes, inheritance and cases concerning violence.
- o In all areas, the number of girls enrolled in school has increased.

### **Key factors for the successes achieved**

- A multi-stakeholder approach involving the rural population - both male and female -, traditional and religious leaders, law enforcing bodies (police, prosecutors and judges), civil society groups and relevant governmental departments.
- A special emphasis on the linkages between traditional legal structures and the modern legal system.
- A participative and interactive process of dialogue and joint reflection that is held in the local language and moderated by locally respected individuals. People's perceptions were at the centre of this process and served as 'starting point'.
- A focus on prevention by intensive awareness raising *at* (on) the community level and effective sanctioning by making the law enforcing agencies more gender-aware and supportive of women's claims.
- The successful establishment of sup support committees who not only served as networking forums for the various stakeholders, but also contributed to raising awareness about progressive traditional values and practices, and facilitated the changing of discriminatory ones.
- A political situation that includes non-discriminatory legislation, ministerial gender desks and a nation-wide gender policy as well as a general political willingness towards the advancement of women's rights.

- Back up for decentralized law-making through the new constitution, allowing communities to adopt their own customary law - provided it does not contradict human rights provisions.

## **Case study 2: Supporting local communities in Togo to adapt customary norms** (cf. Komlan 2003, Kipfer-Didavi 2004)

### **Background**

In Togo, the existence of a national family law formally secures equal rights for both sexes. However, in everyday life customary legal norms dominate with the effect that the right to inherit land or to receive an equal share of property following their spouses' death is denied to women. In the southwestern Fiokpo canton, a woman is expelled from her husband's house following divorce or widowhood. In addition, child custody is frequently denied to the widow, the widow is prohibited by traditional law from inheriting from her husband and is prevented from acquiring maintenance from her husband or from accessing her widow's pension. Such women are also submitted to humiliating and dangerous widowhood rituals which aim to protect the widowed woman from the spirit of the deceased and which can last between three to five years. During this time a woman is not allowed to work her fields, prepare her own food or participate in social life. Furthermore, the widow has to withdraw into a hut, let herself be washed by other widows and is required to wear a torn cloth and a special string to represent the mystical link between herself and the deceased. To get rid of this string and to be reintegrated back into society, the woman is obliged to have sexual intercourse with an unknown man before organising an expensive village party.

### **Approach**

The Togolese NGO *Groupe Femme, Démocratie et Développement (GF2D)*, one of GTZ's partner organisations, is focussing on promoting women's rights and participation in political decision-making. Since its foundation in 1992, GF2D has been training over 350 paralegal advisors from all districts of the country on women's rights. These paralegals are locally trusted and respected social leaders. Working on a voluntary basis, they apply their new legal knowledge in their community work or through their profession in order to inform and give advice about women's rights.

In the aforementioned Fiokpo area, GF2D trained the cantonal chief and a queen mother to become paralegal advisors. Cantonal chiefs and queen mothers are responsible for mediation and customary dispute settlement in local conflicts about land and other civil affairs. In fulfilling this role, they apply both, customary law and state law (to the extent there are familiar with it). The paralegal training contributes to increased knowledge about state law and enables the participants to sensitise their communities

about women's rights, assist community members in n bureaucratic procedures, as well as equipping them to give qualified legal advice or to direct local people to the relevant state services or NGOs.

Back from their training and supported by the NGOs *GF2D* and *ALAFIA*, these traditional leaders organised workshops to raise awareness among their communities and colleagues about: the negative effects of discriminating practices against girls in education and schooling, the advantages of civil marriage, the statutory rights of widows, statutory inheritance rights, the functions and importance of the registry office, as well as the civil and political rights of women. Discussions arose which focused especially on the degrading customary widowhood ceremonies and the exclusion of daughters from inheritance rights as contradicting state law. Participants were concerned that the ceremonies impoverish the mourning families. Indeed, following a death the widow's economic and agricultural activities are reduced whilst the accompanying ceremonies induce high costs. The ceremonies also harm the physical integrity and dignity of widows and expose them to the risk of contracting HIV/AIDS.

Participants, many of whom are Christians, admitted that they had wanted to drop these practices for a long time already. However, they had refrained from doing so out of fear of spiritual retributions. The traditional authorities raised their desire to change these practices in order to reduce poverty and misery among their communities. Eventually, these groups jointly decided to abolish the identified practices but insisted on doing so in their own way. With the support of the two NGOs, a solemn ceremony was organized involving all the villages of the canton, as well as inviting the district officer, the president of all the traditional chiefs in the district, and NGO representatives. The chiefs, queen mothers, and their advisors then sacrificed animals to invoke the ancestral spirits and obtain their approval to change inheritance and widowhood norms. The sacred drum of prohibition was beaten; and this was followed by joyful festivities. From now on, people risk spiritual punishment if they continue with the old practices.

### **Impact**

- Daughters in the canton in question increasingly inherit land on an equal basis with sons. Chiefs are also putting pressure on reticent male family members.
- Widows are completely spared the humiliating and harmful widowhood ceremonies: they have to wear a mourning dress but are allowed to remain living in their marital house and can continue to work and live as before. This change spares families and in-laws the costs of maintaining the widow and paying for the ceremonies. Queen mothers are ensuring that the widows' rights are respected and NGOs are supporting the women by providing training to help them develop additional income-generating activities.
- NGOs have recognised harmful customary practices in other areas. They then raise these issues in careful dialogues with the local population and traditional leaders, so as to find out people's perceptions and support their possible interest in changing these practices.

-NGOs plan to sensitise more traditional leaders to women's rights and to make them aware of the possibility of reconciling customary norms with the state law.

### **Conditions for success**

- Both a female and a male traditional leader were trained as paralegals. This training allowed them to reach the whole population and to ensure that these new norms are respected.
- The traditional leaders who received training were dynamic and literate. They were also eager to improve their performance and reputation by acquiring basic legal expertise that would enable them to respond more effectively to the needs of their communities. At the same time, the leaders also seized the opportunity to revive societal modes to transform customs. In doing so, they were able to present themselves as beneficial, modern agents of change with customary legitimacy.
- The approach put people's ownership of the process before any external objective or solution. In particular, it emphasised the value of listening and discussing with rural populations and their traditional leaders on an equal footing, accepting their priorities, and supporting their desire to change the customary practices in their own way. In this way, the approach avoided devaluing people's knowledge and experiences.

### **Challenges**

The Fiokpo solutions cannot simply be transferred to other contexts. In order to ensure people's ownership of the reform process, people and their traditional leaders have to be given the opportunity to discuss their own concerns and priorities, and to develop ways to respond to these issues. While this might require more time and energy, it promises a more sustainable strategy than that offered by a "blueprint" approach.

In Togo, traditional leaders are enthroned partly on the basis of traditional lines of succession and partly due to political loyalty to the highly undemocratic government regime. As such, these leaders often lack democratic and social legitimacy. However through the approach described above, these actors are strengthened in their position and acquire new authority. This approach presents both opportunities and risks with respect to democracy and the rule of law within the Togolese context.

The rapid spread of HIV/AIDS in many countries has added urgency to the reform of customary norms - especially on the issue of widows' economic and social security. This disease is constantly increasing the number of widows (and widowers) who have to provide for their young children on their own. Sometimes these widows are very young and they are often, themselves, in poor health (USAID/UNICEF/UNAIDS 2002). These women can only survive and care for their children if they gain access to inheritance, housing, maintenance and property rights.

## Conclusion

Customary norms and practices can appear static, undemocratic and outdated when viewed from a formal legal and state-centric perspective. However in reality, customary processes are frequently controlled by the community and are adaptable to new circumstances. In many countries state law has a limited reach, while customary legal systems continue to be widely applied and recognized - especially in rural communities. Many countries have only limited resources and capacities available in order to improve and significantly broaden the scope of the existing state legal institutions. With this in mind, it is important to explore possibilities of cooperation with customary legal systems: using their strengths and supporting reforms in order to overcome violations of Human Rights.

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