

Traditional and Customary Justice Systems

8th annual Geneva Forum of Judges & Lawyers 22-23 November 2017

The eighth annual Geneva Forum of Judges & Lawyers, 22-23 November 2017, will bring together judges, lawyers, and other legal experts from around the world, as well as relevant United Nations representatives, to discuss the relationship between traditional and customary justice systems and international human rights, access to justice, and the rule of law.

A draft Programme for the Forum is attached. This brief concept note explains the context for the discussion of this topic at this year's Geneva Forum.

The potential for improving access to justice

In numerous countries the majority of legal disputes, especially in rural areas, are resolved by traditional and customary justice systems that are not necessarily recognised by national law as a part of the official court system. The role of traditional and customary justice systems is therefore a key question for realization of "access to justice for all" and "effective, accountable and inclusive institutions" under Sustainable Development Goal 16.

Traditional and customary justice systems are particularly present in Sub-Saharan Africa and parts of the Asia-Pacific region, as well as the indigenous justice systems present in some countries in the Americas. They are often more practically and culturally accessible to local populations than is the official court system, and may be seen by local people as having greater legitimacy as well. Indeed, official recognition of the existence of traditional and customary courts in a country can be a positive reflection of the international human rights of ethnic, religious or linguistic minorities, or the particular rights of indigenous peoples, or cultural rights more generally.

For marginalized and disadvantaged rural populations in developing countries, traditional and customary courts may in practical terms be the only form of access they have to any kind of justice. Development agencies have increased their engagement with informal justice systems, and are considering much greater investment in capacity-building of such systems, noting their potential to reach large portions of the population who face significant obstacles to realizing access to justice in the official justice system.

The risks for human rights, particularly of women and children

At the same time, the composition, procedures, and outcomes of traditional and customary justice system mechanisms and processes can conflict with the human rights protections contained in international law and standards on human rights and the rule of law. One key concern is in relation to the rights of women and children. Traditional and customary justice systems may be rooted in patriarchal systems and, as such, can reinforce harmful gender stereotypes and cultural assumptions that are inherently likely to discriminate against women and children and therefore negatively impact upon their rights. Other concerns include consistency with the right to a competent, independent and impartial tribunal established by law; respect for fundamental guarantees of fairness comprising the right to fair trial; accountability of judicial decision-makers in relation to corruption and other misconduct; and non-discrimination and equality before the law more generally.

Thus, as development agencies look to reach more people by investing in engagement with traditional and customary justice systems, these agencies and other actors are currently struggling with the question of how to ensure such interventions do not undermine human rights, particularly of women and children, and the rule of law more generally. Equally, there is potential for significant positive impacts on human rights, to the extent that reform of traditional and customary courts can reverse any existing negative impacts.

Global interest in developing research and technical guidance

Academics, development agencies, and civil society have done some initial work at the national level to map out and assess traditional and customary justice systems. Practical and theoretical work has also begun to address the relationship between legal pluralism and international human rights more generally. However, these sources of experience, research and analysis have not necessarily yet been used to develop detailed practical guidance at the global level. Current guidance from UN human rights bodies on the relationship between such justice systems and the right to fair trial by an independent and impartial tribunal and other human rights remains very general.

Development of Guidance by the International Commission of Jurists

Composed of some sixty distinguished judges and lawyers from all regions of the world, the International Commission of Jurists (ICJ) works to promote the rule of law and the legal protection of human rights, using its unique legal expertise to develop and strengthen national and international justice systems. Established in 1952 and active on the five continents, the ICJ aims to ensure the progressive development and effective implementation of international human rights and international humanitarian law; secure the realization of civil, cultural, economic, political and social rights; safeguard the separation of powers; and guarantee the independence of the judiciary and legal profession.

The ICJ's global experience and expertise, together with further research and global consultations with judges, lawyers and other relevant experts, including through the 2017 Geneva Forum, will provide a foundation for the development by ICJ of legal, policy and practical guidance, including conclusions and recommendations on the role of traditional and customary justice systems in relation to access to justice, human rights and the rule of law. The intended focus of the Forum discussions, and the ICJ guidance, is more on the mechanisms and procedures of traditional and customary justice systems, as opposed to tackling all aspects of the substantive law and principles applied by them, though the ICJ recognises that these two aspects are not in practice entirely distinct.

The guidance to be produced by ICJ will aim to be useful and relevant for State officials, the judiciary, the legal profession, actors within informal justice systems, and civil society. While the ICJ will seek for the guidance to reflect the broadest possible level of concurrence among those consulted, the guidance will remain the sole responsibility of the ICJ and will not necessarily reflect the views of every individual participant in the consultations.

The ICJ guidance will need to take into account the many variations and differences between different traditional and customary justice systems that exist around the world, while seeking to articulate conclusions and recommendations sufficiently universal to be applicable across the widest possible range of contexts. At the same time, the ICJ does not intend for its guidance directly to address official religious courts or the application of customary law by official courts that do not incorporate mechanisms or processes of a traditional or customary character, as these may potentially raise somewhat distinct issues.

The guidance will take as a starting point key elements of existing international law: that the administration of justice through any of these mechanisms outside of the official judiciary must accord with international fair trial standards, that all national justice systems should effectively protect the rights of marginalized and disadvantaged groups, and that for certain types of cases in principle the use of such mechanisms may never be appropriate (see for instance, Human Rights Committee, General Comment no 32, UN Doc CCPR/C/GC/32 (2007), para 24).

It will seek to assist all actors involved in implementation and assessment of Sustainable Development Goal 16 on promoting just, peaceful and inclusive societies, having regard as well to Sustainable Development Goal 5 on achieving gender equality and empowering all women and girls.

The guidance will be published and disseminated through activities with ICJ regional programmes, and national sections and affiliates, through a series of regional launch events and workshops, as well as at the global level at the United Nations and in other settings. The guidance will provide the basis for ICJ strategic advocacy at the national level in the years following the conclusion of this initial phase of this work.

The 2017 Geneva Forum of Judges & Lawyers is made possible by the support of the Republic and Canton of Geneva, Switzerland.

