An Examination Of The Effect Of Informal Justice Systems Upon Women

—Tanvee Nandan*

Part of the struggle for 'access to justice' has been the struggle to find substitutes or additional processes for dispute-resolution and justice-dispersal, other than the formal state machinery. While these alternatives, broadly categorised as 'informal justice systems' exist and offer options for accessing justice, marginalised groups such as women face multiple challenges. Informal justice systems, whether customary or otherwise, do not usually conform to international or constitutional human rights standards; their priority for harmonious dispute resolution perpetuates power imbalances and asymmetries and the dominant discourse and norms in such informal justice systems lead to social coercion for minority groups. In order for women to have access to justice, informal justice systems need transformation and subversion through community engagement and women's participation, with the ultimate goal of 'mainstreaming' informal justice systems such that they can be reimagined and reconfigured to meet the goal of equitable access to justice.

***Keywords**: informal justice, access to justice, gender justice, legal pluralism, human rights, customary justice, women's rights, equality, power imbalance, power asymmetry, community engagement, women's participation.*

"Equitable justice requires both the removal of harmful laws and practices, and ensuring that women are empowered to claim their rights" (Sarah Douglas, Gender Equality and Justice Programming: Equitable Access to Justice for Women, UNDP, 2007).

I. Introduction

This paper will discuss the impact of informal justice systems on women and whether informal justice is a reliable instrument of justice. I posit that while informal justice increases access to justice for women, especially in developing

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countries or rural areas where the formal court system is not easily available, informal justice remains mired in dominant patriarchal values and there are several steps required to be taken for it to be effective in clearing the impediments to achieving justice for women.

To understand the impact of informal justice on women, we must first understand what informal justice means and entails, and why women often turn towards it rather than choosing formal justice. Since the impact of informal justice systems is most apparent in multi-ethnic and multicultural post-colonial countries, I have chosen to analyse various systems found in South Asia and Africa in particular, rather than restricting myself to a single country or system.

The structure of my paper, therefore, will be as follows: the first section below will examine the defining characteristics of the informal justice system. The second section will assess what justice means to women and where it is lacking in the formal system, which has led to women opting for various informal systems. In the third section, I will elaborate upon some of the shortcomings of the informal justice system which make it a less than ideal solution, and in the fourth section I will make suggestions and recommendations for the improvement of the system to make it more efficacious, before concluding by summarising the arguments I have made.

II. Setting The Scene: Key Features Of Informal Justice Systems

While it is difficult, and indeed inadvisable, to attempt a narrow and precise definition of an all-inclusive concept such as informal justice, it would be fairly accurate to define it as "encompassing the resolution of disputes and the regulation of conduct by adjudication or the assistance of a neutral third party that is not a part of the judiciary as established by law and/or whose substantive, procedural or structural foundation is not primarily based on statutory law".[1]

At the outset, it is essential to differentiate between those systems which are state-administered, i.e. formal justice systems, and those that are not state-administered, i.e., informal justice systems.[2] However, it is equally important to note that the word 'informal' does not necessarily imply that the procedures and practices of non-state mechanisms are simplistic or inferior but rather that they are outside of the traditional court mechanism. I should also add that 'informal

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[1] United Nations Development Programme, "Informal Justice Systems: Charting a Course for Human Rights-based Engagement", (UNDP, UNICEF, UN Women 2009) 8 <https://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2013/1/informal-justice-systems-charting-a-course-for-human-rights-based-engagement.pdf?la=en&vs=5500>accessed 3 August 2020 (IJS Report).

[2] *Ibid.* 9.

justice systems' are not always detached from state sponsorship or state support, and often the lines between formal and informal systems can be blurred. For instance, countries do sometimes recognise the legality of customary or traditional law, which makes systems of justice closer to 'semi-formal' rather than entirely informal.[3]

The understanding of informal justice arises from its special set of characteristics, which I will elaborate upon further in the paper. These characteristics include their local nature, their reliance on community norms and standards rather than formal laws, and their goal of harmonious coexistence in their community, rather than justice per se, among others. For this paper, the term 'informal justice' is synonymous with systems which are "traditional, indigenous, customary, restorative or popular".[4]

In addition to the fact that there may well be a blurring of lines between formal and informal systems, particularly with reference to state involvement, there is also an element of legal pluralism which is associated with informal justice. At its core, legal pluralism refers to the idea that "in any one geographical space defined by the conventional boundaries of a nation state, there is more than one law or legal system".[5] In particular, legal pluralism is relevant to post-colonial nation-states, where there is a tussle between indigenous customs and the colonial justice system. Termed 'classic' legal pluralism by Sally Engle Merry,[6] as far back as 1988, this form of legal pluralism has long since been of interest to scholars working on access to justice in post-colonial contexts.[7]

Therefore, informal justice systems are a creation of, or at least are legitimised through, this understanding of legal pluralism. It allows us to develop a theory of multiples, be it from the perspective of justice, dispute resolution, or even legal standards themselves. However, within the framework of legal and cultural pluralism, the nature of informal justice derives itself from certain features, and these include geographical and social locality, reliance upon customs and traditions, and arriving at a settlement or agreement as a goal.

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3 Ewa Wojkowska, "Doing Justice: How Informal Justice Systems Can Contribute" (UNDP and Oslo Governance Centre 2006) <https://www.un.org/ruleoflaw/files/UNDP%20DoingJusticeEwaWojkowska130307.pdf> accessed 3 August 2020.

4 *Ibid.* 9.

5 Margaret Davies, "Legal Pluralism" in Peter Cane and Herbert M. Kritzer, *The Oxford Handbook of Empirical Legal Research* (OUP 2010) <https://www.oxfordhandbooks.com/view/10.1093/oxfordhb/9780199542475.001.0001/oxfordhb-9780199542475-e-34> accessed 13 March 2020.

6 Sally Engle Merry, "Legal Pluralism" (1988) 22(5) Law & Society Review, 869.

7 *See* generally Ido Shahar, "Legal Pluralism Incarnate: An Institutional Perspective on Courts of Law in Colonial and Postcolonial Settings" (2012) 44(65) Journal of Legal Pluralism 133.

A. Geographical And Social Locality

The first feature that sets apart a system of informal justice is the fact that it is often a 'local' system, that is to say, a system which is prevalent in and understood by the members of a certain region, and this differs from area to area. In addition to the fact that the system is geographically localised, the procedural law used in many informal systems is not formal procedural law but rather it is reliant on the local standards of conduct prevalent in the community.[8] This is further elaborated upon below.

B. Reliance Upon Customs And Traditions

Another major reason for its popularity is that informal justice often derives itself from the cultural norms of the community. This is true not only for the 'substantive law' applied in the system, but also for the procedure, and the adjudicators of the system.

A study conducted by the United Nations Development Programme ('UNDP'), United Nations Children's Fund ('UNICEF'), and the United Nations Entity for Gender Equality and the Empowerment of Women ('UN Women') indicated that informal justice is often preferred by communities because of its reliance on the cultural norms and social relations, especially in cases where the state law is inherited from a colonial past.[9]

Informal justice is also validated in the eyes of its subjects because the arbitrators of the disputes are often respected members of the community; the cost of the procedure is much lower, if there is any at all, than a formal resolution process; and the procedure is guided by informal and flexible rules.[10] This makes the informal justice system more acceptable to the local communities since there is a perceived legitimacy to the resolution of the dispute, as it has been resolved by a "traditional or religious leader with the legitimate authority to adjudicate".[11]

C. Arriving At A Settlement Or Agreement

The goal to be achieved by informal justice is vastly different than that of the formal justice system. Given that it derives itself and its legitimacy from a coherent social community, the aim of the system is rooted in preserving the harmony of the community,[12] and the solution is often based on the recognition of the collective interests of the community.[13] However, this communitarian

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8 Simon Roberts and Michael Palmer, *Dispute Processes: ADR and the Primary Forms of Decisions Making*, Ch. 2 (2nd edn., CUP 2005) 10 (Roberts and Palmer).

9 IJS Report (n 1) 10.

10 Wojkowska (n 3) 16.

11 IJS Report (n 1) 10.

12 Roberts and Palmer (n 8) 10.

13 Wojkowska (n 3) 16.

practice can often have adverse results since the resolution of the disputes are likely to be guided by the existing systems of power relations,[14] there by being unfavourable to those parties which are lower in the community hierarchy.

The phrase 'informal justice system' actually encompasses a variety of individual mechanisms, all of which may be considered 'informal' in different ways. As described above, they could be procedurally informal having little or no fixed rules for their conduct; or they are often substantively informal, using no codified standards but general principles of harmony and custom; or they may also be informal in their relation to state machinery, where they are operating outside its purview and are either self-sustained within the community or dependent on non-state actors (non-governmental organisations or international organisations) for funding and conduct.

As this suggests, 'informal justice system' is not necessarily a cohesive system, but rather a combination of distinct processes which are outside the formal court scheme. Having covered the key elements of an informal justice system, the next section will deal with access to justice for women, and where informal justice comes into play.

III. Women And The 'Access To Justice' Myth

UNDP has defined 'access to justice' as "the ability of people to seek and obtain a remedy through formal or informal institutions of justice, and in conformity with human rights standards."[15] It is also clarified that the understanding of access to justice is contextual, and can mean different things depending on a variety of factors, social, economic and political. Access to justice can be achieved through both formal and informal justice systems, but while it is a laudable goal, it is highly gendered in its achievement. Even where strides have been made towards a more effective legal system, the obstacles faced by women and other minority communities remain significant. Whether it pertains to the formal or the informal justice system, one primary criticism revolves around its perpetuation of power asymmetries in society, and this is particularly true where women are concerned.

There is an enormous disparity in the ability of women to access justice, as compared to their male counterparts. As a report by the International Development Law Organisation ('IDLO') elucidates:

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[14] *Ibid*.

[15] United Nations Development Programme, "Programming for Justice: Access for All —A Practitioner's Guide to a Human Rights-Based Approach to Access to Justice" (UNDP 2005) 5 <https://www.un.org/ruleoflaw/files/Justice_Guides_ProgrammingForJustice-AccessForAll.pdf> accessed 3 August 2020 (Programming for Justice).

> "*... [T]he rule of law continues to mean very little for the vast majority of women and girls. Many women are simply unable to access and navigate their way through formal legal institutions. This can be due to structural as well as cultural barriers, including women's inadequate knowledge of rights and remedies, illiteracy or poor literacy, and lack of resources and time to participate in justice processes, especially given the heavy burden of labour that women bear for their families. These challenges are even greater for women who are subject to multiple forms of discrimination based on factors such as being part of indigenous or ethnic minority communities, religious minorities or sexual minorities, or for disabled women, migrant workers, and women living with HIV/AIDS*."[16]

Women have been failed repeatedly by the formal justice system, in terms of the approach taken, the judgments rendered, and also the level of participation in the decision-making process. The 2014 Organisation for Economic Cooperation and Development ('OECD') Social Institutions and Gender Index showed that of 160 countries, 105 were found to have discriminatory laws or practices in relation to inheritance[17] and 102 countries did not provide women with the same rights and the same kind of access to land as men, in their laws or customary practices.[18] Other than property, women also suffer in the areas of family law, divorce, child custody; not to speak to the gender-based violence which is often all but written off by the legal system as being a 'family matter' or a matter where a fine is sufficient punishment.[19]

In addition, there is a combination of factors responsible for driving women towards informal justice systems, and away from formal justice. For one, there is a general perception amongst the less privileged classes that the legal system favours the wealthy and influential.[20] Another factor is the physical accessibility of the informal systems; as often courts and the police are located in districts capitals distant from rural areas.[21] There are also social barriers to formal justice, such as lack of legal awareness, dependence on male relatives for resources, and the threat of sanction if women approach formal authorities.[22]

Despite the fact that there are a number of reasons that propel women towards informal justice, these do not in any way exculpate informal justice,

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16 International Development Law Organisation, "Accessing Justice: Models, Strategies and Best Practices on Women's Empowerment" (IDLO 2013) 11 <https://www.idlo.int/sites/default/files/Womens_Access_to_Justice_Full_Report.pdf> accessed 3 August 2020 (IDLO Report).

17 OECD Development Centre, "2014 Social Institutions and Gender Index: Understanding the Drivers of Gender Inequality" 8 <http://www.genderindex.org/sites/default/files/docs/Brochure SIGI2015.pdf> accessed 19 March 2016.

18 *Ibid.*

19 IDLO Report (n 16) 12.

20 IDLO Report (n 16) 15.

21 *Ibid.* 16.

22 *Ibid.*

which imposes its own restrictions on women, sometimes more severe than formal justice. Researchers working on the particular consequences of informal justice mechanisms on women posit two approaches:

> "*The first assumes that informal systems are inherently and irremediably inconsistent with women's rights and therefore the formal system must be the primary, if not sole, forum for adjudicating disputes involving women. The second approach seeks to engage with informal systems with the aim of transforming them to comply with international standards, while retaining the positive features of accessibility, familiarity and effectiveness*."[23]

Chopra and Isser[24] disagree with both approaches and argue that neither sufficiently address the challenges that women face within the informal system. In the next section, I focus on a few of the challenges that informal systems places on women seeking justice.

IV. Challenges Of The Informal Justice System

While the lack of access (both literally and metaphorically) to formal justice has necessitated that women turn towards informal justice for their solutions, informal justice is not without its drawbacks. For one, it has long been criticised for its failure to uphold international human rights standards[25] and has been responsible in many cases for negatively impacting the role of women in society.

This section will delineate the major challenges that are posed by the informal justice system in allowing women to achieve an equitable solution to their problems. To give a real-world perspective to these challenges, practical examples for each of these challenges will also be enumerated.

A. Informal Justice And International Human Rights Standards

There are a number of international documents espousing human rights, the Universal Declaration of Human Rights; the International Covenant on Civil and Political Rights; the International Covenant on Economic, Social and Cultural Rights; the European Convention on Human Rights, to name but a few. All of these treaties and covenants place great significance on equal treatment of the genders, and treatment of men and women differently, in matters of property

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[23] Tanja Chopra and Deborah Isser, "Access to Justice and Legal Pluralism in Fragile States: The Case of Women's Rights", (2012) 4(2) Hague Journal on the Rule of Law 337.

[24] *Ibid*.

[25] IDLO Report (n 16) 17.

ownership and inheritance, are taken to be in contravention of the principles of equal treatment.[26].

To take the example of the Universal Declaration of Human Rights, 1948, Article 1 deals with freedom and equality of all persons; Article 2 deals with the right against discrimination on the basis of gender (among others) and equality before law; Article 7 deals with equality and equal treatment before the law. These fundamental rights have been guaranteed in all human rights documents internationally, and are often violated by informal justice practices, as discussed below.

One particular instrument which is crucial to women's rights is the Convention on the Elimination of all Forms of Discrimination Against Women ('CEDAW') which has been ratified by 187 countries.[27] CEDAW provides that the State parties must "take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women."[28] Further, it provides that "States Parties shall take all appropriate measures to eliminate discrimination against women in other areas of economic and social life,",[29] and significantly, in "all aspects of cultural life".[30] It also calls for equality of women before the law[31] including "a legal capacity identical to that of men and the same opportunities to exercise that capacity"[32] and elimination of "discrimination against women in all matters relating to marriage and family relations."[33] However, informal justice systems often pose a threat to this equality of legal treatment and opportunities for justice; which has been acknowledged in General Recommendation 33 of the Committee on the Elimination of Discrimination Against Women,[34] which states that there are substantial obstacles to access to justice for women in informal and traditional justice systems, which women often approach:[35]

> "*The presence of plural justice systems can in itself limit women's access to justice by perpetuating and reinforcing discriminatory social norms. In many contexts, the availability of multiple avenues for gaining access to justice within plural justice systems notwithstanding, women are unable to effectively exercise a choice of forum. The Committee has observed that, in some State parties in which systems of family and/or personal law*

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[26] OECD Social Institutions and Gender Index, "SIGI Synthesis Report 2014", 8-11 <http://www.oecd.org/dev/development-gender/BrochureSIGI2015-web.pdf> accessed 5 January 2020.

[27] Although some nations have entered reservations to certain parts of the convention.

[28] Convention on the Elimination of All Forms of Discrimination Against Women, 1979, Art. 2(f) ('CEDAW 1979').

[29] CEDAW 1979, Art. 13(c).

[30] CEDAW 1979, Art. 13.

[31] CEDAW 1979, Art. 15(1).

[32] CEDAW 1979, Art. 15(2).

[33] CEDAW1979, Art. 16.

[34] Committee on the Elimination of Discrimination Against Women, General Recommendation 33, CEDAW/C/GC/33, 23 July 2015.

[35] *Ibid*.

> *based on customs, religion or community norms coexist alongside civil law systems, individual women may not be as familiar with both systems and/ or at liberty to decide which regime applies to them.*"[36]

Therefore, when an analysis of informal justice is undertaken, the first challenge that must be recognised is the violation of international human rights standards caused by informal justice in many cases.

B. Power Asymmetries And Imbalances

Another crucial reason that informal justice is so challenging in its application is that it can often "embody the dominant social code and power hierarchies"[37] and is used by parties who have greater social power to influence the decisions in the cases that are brought before the system. It is well established that women are universally disempowered by traditions and norms, and a system that derives its legitimacy from these cultural mores is unlikely to be just towards women,[38] or even to tolerate attempts at reformation. Women who challenge these prejudices and power structures may be accused of "acting against local culture or having become 'Westernised'. Even worse, such attempts can lead to outright ostracism and physical harm."[39]

Essentially, informal justice is "susceptible to elite capture (whereby) domination by power holders can be detrimental to the poor and disempowered."[40] In order for alternative dispute resolution mechanisms (such as those employed in informal justice) to succeed, there must be a position of 'relative equality' between the parties,[41] which is rarely, if ever, the case in informal justice systems.

The practical result of these power asymmetries is that when a mediated settlement is sought to be achieved, it is often merely a representation of "what the stronger (party) is willing to concede and the weaker (party) can successfully demand."[42] Where women are concerned, their position as the weaker party can lead to them being forced to accept agreements and local norms which are discriminatory in nature, such as practices of being forced to marry their rapists[43] or cases of wife inheritance[44] (where widows are married to a male relative of their

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[36] *Ibid*., para 62, *see* also paras 61-64.
[37] IDLO Report (n 16) 18.
[38] Erica Harper, "Engaging with Customary Justice Systems" in Thomas McInerney, *Customary Justice: Perspectives on Legal Empowerment* (Janine Ubink (ed.), IDLO 2011) 31.
[39] *Ibid*.
[40] Janine Ubink and Benjamin van Rooij, "Towards Customary Legal Empowerment: An Introduction" in Thomas McInerney, *Customary Justice: Perspectives on Legal Empowerment* (Janine Ubink (ed.), IDLO 2011) 9.
[41] *Ibid*.
[42] Wojkowska (n 3) 20.
[43] Wojkowska (n 3) 21.
[44] Wojkowska (n 3) 22.

husband) and 'ritual cleansing'[45] of widows (by forcing them to have sexual intercourse with a man), and these practices are often linked to women's inability to own and inherit property.[46]

Therefore, in prioritising consensus over resolution or justice, "the language of consensus becomes a means for suppressing dissent. This ideal of consensus and social harmony frequently translate into the imposition of decisions that are far from consensual."[47]

C. Social Coercion And Lack Of Consent

Leading from the absence of consensus that results from power asymmetries, I will now discuss the lack of free consent and social coercion that plays a role in informal justice using the *kitcha* system in Ethiopia as an example. The *kitcha* system is essentially one used by the Gurage ethnic group. It is a set of conservative and patriarchal customary mediation practices used to resolve marital conflicts.[48] In a country like Ethiopia, customary law has been given formal recognition, due to the heterogeneous nature of the population in terms of ethnicity and culture. The Ethiopian Constitution in Article 34(5), recognises the use of customary law as an alternative in cases relating to matters like marital disputes, with the 'full consent' of the parties.[49] While this recognition is aimed at empowering ethnic groups and freeing them from the imperial and ethnocentric history through which they have suffered, it also creates a conflict within the legal system. For instance, customary practices such as '*kitcha*' "subjugate women to a cultural domination"[50] which is contrary to the principles enshrined in the Ethiopian Constitution, such as Article 34(1) which grants equal rights to men and women in the matter of marriage.[51]

In the context of 'alternative' uses of customary justice, another issue that becomes relevant is the actual consent of the parties to its use. In a system that structurally disempowers women, it is important to bear in mind that free consent of women is unlikely to be present. In the *kitcha* system itself, women who choose to bypass an informal system that is stacked against them, in favour of the formal court system, face social repercussions.[52] Members of the communities practicing *kitcha* customary law face ostracism if they choose to venture outside it for dispute resolution and a woman doing so will be considered to have violated the norms and values of the society, if she does not accept the decision

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45 *Ibid.*
46 *Ibid.* 21.
47 *Ibid*.
48 Tigist Shewarega Hussen, "Empowering the Nation, Disempowering Women: The Case of *Kitcha* Customary Law in Ethiopia" (2009) 23(82) Agenda 94-99, 94.
49 *Ibid*. 94.
50 *Ibid.* 95.
51 *Ibid*. 96.
52 *Ibid.* 97.

made by the elders of the community.[53] Choosing the formal system means exclusion from society, and given that women are already at a disadvantage in such communities, it is not a step that can easily be taken by them. A greater challenge also awaits them at the formal court system. If the court decides to send the case back to customary law for its resolution, it is extremely unlikely that the woman will receive a 'fair' verdict back in her community.[54]

As Hussen[55] rightly observes with regard to the *kitcha* system:

> "*The practical implications are that despite making women's participation in customary practices conditional on their voluntary consent, the Constitution fails to recognise the oppressive patriarchal social context in which the majority of women find themselves, especially in rural parts of the country, which subjects them to a plethora of discrimination, violence and stigma for refusing to adhere to a customary practice that works against them*."[56]

This criticism applies equally to all forms of informal justice. Due to the entrenched nature of discriminatory social and cultural practices in many societies, informal justice itself has taken on a discriminatory character.[57] It is a false assumption that patriarchal societies take the consent of women, and even if they do, that this consent is free from social coercion.

However, these critiques of informal justice should not be taken to mean that the systems are unworkable or that I recommend prohibition of these systems by the State. Rather, I would suggest that in countries like India, Bangladesh and various African nations, where the legal system is quite often a colonial implant, informal justice can often be much more comforting to people, particularly in the case of marginalised people. For that reason, and for reasons of flexibility and adaptability of informal justice systems, the solution is to transform the informal justice systems from within so that their positive characteristics can be strengthened, and their weaknesses can be reduced. In the section below, I discuss ways in which informal justice systems can be improved so that they offer meaningful access to justice to women and other marginalised groups.

V. Room For Improvement: Suggestions For Informal Justice

Having outlined the negative aspects of the informal justice system, this section will expound on the changes that can be applied to informal justice to

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53 *Ibid*.
54 *Ibid*. 98.
55 Hussen (n 48).
56 *Ibid*. 99.
57 IDLO Report (n 16) 21 (footnote omitted).

make it a more efficacious and just system. The first recommendation pertains to engagement with informal justice, and to what extent it is suitable. The second relates to increasing the participation of women in the justice system, not just as complainants, but as jurors, and the potential impact of this move. The final and perhaps most important recommendation concerns community engagement with informal justice.

A. Engaging With Informal Justice

The first suggestion is to have a justice system that makes place for both formal and informal justice within it, and can reflect varying levels of engagement between the two. Often, "communities that apply customary law are recognised and regulated by the state either by law, regulations or by jurisprudence, and are therefore 'semi-formal'"[58] and in other scenarios, the informal justice system could exist in the fringes of the formal system, not entirely recognised and enfolded into one.

While considering the correct method of engagement with informal justice systems, it is also important to reconsider the value of informal justice itself. There is no doubt that for the majority of developing countries, informal justice offers a forum to air grievances which citizens would be unable to bring before the state mechanisms either due to geographic or socio-economic challenges. That being said, it is equally true that informal justice sometimes results in decisions which are deeply entrenched in dominant values, such as marriage between a rapist and his victim.[59] The solution is not to disassociate from informal justice, but rather "to question all political, social and economic institutions involved in the production of culture and the shaping of gender relations, including the role of the state."[60]

Given that the value of informal justice depends to a large extent on the substance of justice delivered through it, one option open to the formal system is codification of the customary laws that govern informal justice, since the codification of customary law gives the state the ability to sift between those customs and norms which are harmful and inimical to human rights, and those which actually promote justice, and ensure that the latter are codified.[61] Another benefit is that customary law itself will be made more accessible and certain.[62] At the same time, codification robs informal justice of its "fluid, informal and accessible character"[63] and makes it more rigid, taking away its dynamism. A paramount concern is that

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58 Wojkowska (n 3) 9.
59 IDLO Report (n 16) 21.
60 IDLO Report (n 16) 22 (footnote omitted).
61 Ubink and Rooij (n 40) 12.
62 *Ibid*.
63 *Ibid.* (footnote omitted).

> "*[F]ormalisation of a two-track system that reinforces unequal access to justice, whereby courts are reserved for the wealthy and the victims of serious crime, while the poor and victims of 'minor' injustices are forced to accept 'secondary' forms of justice. Notably, the definition of 'minor' in this regard is generally determined by power-holders in society, who frequently tend to be men.*"[64]

Given these challenges, perhaps codification is best suited to circumstances where the customs in question are long standing and without conflict, and those that cannot be misused by socially powerful groups to perpetrate their idea of justice. Towards the end of this paper, I will explore whether engagement with informal justice systems is a viable solution and suggest alternative ways to do so.

B. Women's Participation In The Justice System

Women suffer at the hands of both formal and informal justice systems not only because they are not provided justice, but also because their avenues for participation in the justice system are severely limited as observers, judges or even interested members of society. However, the involvement of women (and in other cases, marginalised groups) is a solution that needs to be considered thoughtfully before arriving at a conclusion.

There are many instances where having women involved in the decision-making process has had a beneficial effect on informal justice. In Burundi for instance, the traditional justice system involves *bashingantahe* which is the "circle of elders responsible for decision making at the community level."[65] While traditionally this circle comprised only males, UN Women supported initiatives have amended the *bashingantahe* charter and brought about the necessary change which allows women to take part in the decision-making process.[66] Having women involved with the system ensures greater understanding and sensitivity towards gender based violence and sexual assault, and leads to meaningful justice for women.

However, there are a number of considerations to be kept in mind regarding women's participation. At the threshold level, the powerful groups in a community would not be inclined to share or hand over their power to marginalised groups such as women, and to do so would require external pressure, which could create conflict in the community.[67] Another potential hurdle is the quality of justice meted out as a result of female participation. While it is assumed,

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[64] IDLO Report (n 16) 20.

[65] UN Women, 2011-12 Progress of the World's Women: In Pursuit of Justice (UN Women 2011) 77 <https://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2011/progressoftheworldswomen-2011-en.pdf?la=en&vs=2835> accessed 3 August 2020.

[66] *Ibid*.

[67] Harper (n 38) 33.

and for the most part correctly, that having female judges or jurors would make women more comfortable, often the women chosen to be decision-makers in their community are selected "specifically because they are unlikely to question dominate norms; (and) in other cases, prevailing social attitudes constrain appointees' freedom to act independently."[68]

An illustration of this arises in the case of women's courts, sometimes called *mahila mandals,* in India.[69] This term is used to connote:

> "*[A] broad and somewhat diverse category of dispute resolution bodies set up specifically to deal with women's marital and family problems, usually by counselling and mediation between the complainant and her husband or other relatives. Their goal is to avoid matrimonial litigation and, if possible, find a way to reconcile the couple and keep the family unit intact.*"[70]

However, in doing so, these women's courts often end up "validating the male breadwinner ideology"[71] by arranging settlements predicated on the idea of the woman as an obedient wife who is subservient to her husband to some extent, and often these compromises come with the instruction to behave or not pick fights and to maintain peace in the household.[72]

This kind of agreement often ends up reinforcing the stereotypes that it aims to deconstruct. The reality is that many women who approach the *mandals* do not have a better alternative, and in asking them to adjust to their (often difficult) family life, the women's courts are trying to use "patriarchal bargaining"[73] whereby "women in male-dominated societies, rather than actively resisting patriarchy, respond to the constraints it imposes by trying to maximise their options within it."[74]

Given these strengths and weaknesses, the answer to the question of whether there should be female participation in the decision-making process of informal justice is not one-dimensional. Traditionally, only the most powerful (male) groups in communities had the power to broker agreements and resolve disputes.[75] Even with these reservations, it cannot be denied that there is great value in disrupting this narrative to make space for female participation.

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68 *Ibid*. (footnote omitted).

69 Sylvia Vatuk, "The 'Women's Court' in India: An Alternative Dispute Resolution Body for Women in Distress" (2013) 45 Journal of Legal Pluralism and Unofficial Law 76.

70 *Ibid*. 76.

71 *Ibid*. 92.

72 *Ibid*.

73 *Ibid*. 92 citing Daniz Kandiyoti, "Bargaining with Patriarchy" (1988) 2(1) Gender & Society 274.

74 *Ibid*.

75 Harper (n 38) 33.

C. Community Engagement

The third potential solution to the hindrances in the informal justice system is that of community engagement. In this, education and training can be tools used to make communities more aware of gender issues and more just in their decision making.

One method of community engagement can be through NGO participation and awareness-raising. An example of how NGO involvement can promote justice exists in the context of the informal justice system in Bangladesh, known as a *shalish*.[76] The *shalish* is an indigenous form of arbitration[77] which is a combined arbitration and mediation process that takes place in the household of the parties between whom the dispute has arisen.[78] Traditionally, this *shalish* did not make space for female participation, but Fauzia Erfan Ahmed[79] writes about the benefits of having female jurors in the *shalish,* through NGO intervention. The four key features of an NGO mediated *shalish* are:

> *"(i) jurors must receive prior training, the philosophical basis of which puts women's rights at the center of social justice and poverty alleviation,*
>
> *(ii) jurors should be linked with a panel of lawyers in order to keep abreast of current civil law and to seek advice on how to proceed further with a case that may be unresolved at the village level,*
>
> *(iii) the resolutions have to be signed (or thumbprinted) by all parties and a record kept on file in the NGO office. Should there be a violation of resolutions, the complainant can use this document in the formal court system, and,*
>
> *(iv) the jury must have female jurors."*[80]

Ahmed writes that it gives female parties a sense of belonging, as having women as jurors means that there is someone to listen to what they have to say.[81] Certainly the quality of justice for women is improved by the presence of women in the justice system, but there is a chasm between female participation and feminist governance, and progressive masculinity,[82] whereby men can be counted

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[76] Fauzia Erfan Ahmed, "The Compassionate Courtroom: Feminist Governance, Discourse, and Islam in a Bangladeshi Shalish" (2013) 25(1) Feminist Formations 157.

[77] *Ibid*. 161.

[78] *Ibid*.

[79] *Ibid*. 175.

[80] *Ibid*. 179-80.

[81] *Ibid*. 175.

[82] *Ibid*. 159, 178; *see* particularly: Fauzia Erfan Ahmed, "Hidden Opportunities: Grassroots Muslim Feminism, Masculinity, and the Grameen Bank" (2013) 10(4) International Journal of Feminist Politics 542-62.

on and enabled to become allies and engage with other men, rather than staying silent and leaving women's issues on the side-lines.

Another effective technique to engage members is through legal empowerment. Such empowerment could be initiated through legal aid or community paralegals. In issues of women's rights, training community paralegals can be a powerful strategy for women to access justice and gain information about their rights.[83] Other than informing them of their rights and helping them in individual cases, paralegals can also assist women in campaigning for amendments in laws which are unfair towards women, particularly in customary law, where there is usually no legal process for amendment.[84] For instance, the Shirkat Gah Women's Resource Centre in Lahore, Pakistan was instrumental in increasing "'legal consciousness', which enabled women to make informed choices about which legal forums to approach and also to be part of shaping laws and campaigning for change."[85] Using their research on religion and customary practices, the paralegals trained at Shirkat Gah were able to influence the government's Commission of Inquiry deliberations "through a questionnaire that was developed to solicit inputs from the grassroots using real-life examples of the impact of the law from their experiences in local communities."[86]

In essence, externally mandated changes are less likely to have a positive impact on societies which engage in informal justice systems. The best way of bringing about change is to do it through "self-regulation and internally-generated reforms."[87] The methods of community engagement described above, such as NGO participation or community paralegals are two means of achieving the necessary change.

VI. Conclusion

In conclusion, although the informal justice system poses an accessible forum of justice to women, it is hindered by the prevailing patriarchal norms which reduce and even destroy the quality of justice that women receive. In order for this to change, and for informal justice to be meaningful, reforms are necessary.

The first step towards any kind of reform, including legal reform is through recognition. The reality of legal pluralism must be 'mainstreamed', not just by recognition of informal justice systems, but also its acceptance as the dynamic and ever-changing process that it is. Once this process is recognised, non-state actors such as community leaders and NGOs would step forward to ensure

[83] UN Women (n 65) 74.
[84] *Ibid*.
[85] *Ibid*.
[86] *Ibid*.
[87] Harper (n 38) 34.

that development takes place regarding rights of women and other marginalised groups.

When we talk of 'mainstreaming' informal justice systems, it refers to the idea that state mechanisms should engage with informal justice rather than exclude or prohibit the use of informal processes by marginalised groups. Once again, the idea of legal pluralism is relevant here. Quite often, in post-colonial and post-conflict nations, even though the State is interested in being the only arbiter of justice, "state power is frequently contested even after violence ends".[88] Legal pluralism plays an important role in mainstreaming informal justice:

> "*Robust legal pluralism challenges the state's claim to a monopoly on legitimate resolution of legal disputes as well as the ideal of uniform application of the law. It enables participants to select dispute resolution forums based on accessibility, efficiency, legitimacy, jurisdiction, and cost, as well as the state and nonstate systems' respective abilities to make binding decisions and sanction individuals that choose other systems. This process leads to a sustained struggle between state and non-state justice actors for legitimacy, resources, and authority.*"[89]

To summarise, informal justice, though not without its faults, is a form of justice dispensation intrinsic to many nations and communities presently. A profound and long-term reformation of informal justice is required to deal with issues such as social coercion, power imbalances and violation of human rights. While undertaking reforms, it is equally important that the wider economic and social context in which discrimination takes place, should be kept in mind. This reformation can be undertaken through state and non-state engagement with informal justice and by widening the pool of participation in the processes that informal justice entails.

However, the most important mechanism to ensure that informal justice is restructured is by involving the communities in the restructuring so that the changes to the informal justice system are brought from within.

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[88] Geoffrey Swenson, "Legal Pluralism in Theory and Practice" (2018) 20 International Studies Review (2018) 438, 439.

[89] *Ibid*. 440.