Legal Pluralism, Access to Justice and Women's Rights

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"Ensuring and strengthening access to justice for all women and girls, including by promoting inclusive and equitable legal systems, eliminating discriminatory laws, policies, and practices, and addressing structural barriers"

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Terms of Reference: Theme: Legal Pluralism and Women's Rights
Traditional legal anthropology views legal pluralism as a system of different legal orders, conceived of as separate entities coexisting in the same political space. It consists of different bodies of law that form part of the state legal system. As Dow and Kidd argue: 'State law is not the only body of rules governing social behaviour, and … there exists in a society elaborate and complex and sometimes competing rules that govern people's actions and behaviour.'
The CEDAW Committee General Recommendation number 33 highlights that the presence of plural justice systems can, in itself, limit women's access to justice by perpetuating and reinforcing discriminatory social norms.
The interplay between state laws, customary laws, religious laws, and other laws is a critical issue in the determination of women's rights and gender equality. This is because there are tensions and competition among the various laws that operate within one country setting. It is not just the substantive content of the law itself that is problematic, but also the forum where one accesses justice that also suffers a similar fate.
The expert will examine the complexity that the plurality of the legal system in many countries globally where social norms, modern life, culture, and formal laws are intermingled, creating tension, complementarity, and competition, and will come up with recommendations.

Abstract

The paper starts with a definitional section to frame legal pluralism which is followed by a brief history of laws from pre-colonial to post-colonial states within the African context. Using family law as an example, the paper then looks at the ways in which states have sought to engage plural norms and the impact on women's lives. Thereafter the paper considers access to justice and the interaction with legal pluralism. The recommendations and conclusion follow.

Preamble/Scene Setting

Imagine a family deciding to order a takeaway (take out) on a Saturday evening. Each shouts out the cuisine that they would like. If one substitutes individual cuisine choice, with a different system of law whether grounded in religion, custom or practice, statutory law, common law or human rights law, then if one legal system is to be privileged over the others, which should it be? Who decides? What is the process for deciding? Does the family, take the matter to a vote, or should the head of the household simply impose their view on the collective? Who is the head of the family and how is this decided? If it is a family vote, are all members entitled to cast a vote or is franchise to be determined by status including age and gender?

Put differently, how shall a decision be reached?

To honour individual wishes (legal pluralism), or to insist that the family will order the same meal from one outlet? What is that outlet? If the family should seek help in coming to a decision, where should they look for an arbiter? (Access to Justice) Someone familiar (community) or a neutral external (state court)? These are some of the questions considered in this paper.

Introduction

This paper begins with a working definition of legal pluralism. It considers the evolution of legal pluralism in different national settings and within human rights law. Legal pluralism is as much about law as it is about politics. This is clear from regional interpretations of rights and also the reservations to the Convention on the Elimination of all Forms of Discrimination, 1979 (CEDAW).[1]

Thereafter I ask, how do we understand justice? It is just about access to courts or is justice more richly construed? The jurisprudence of the CEDAW Committee indicates that it considers plural justice dispute processing mechanisms comprising religious, indigenous or customary systems to be inimical to women's rights. The paper interrogates this one size fits all approach. It is clear that for some, the justice forums of their communities may best meet their needs. In an age where decolonisation and intersectionality are demanded, might there be a via media whereby both formal and informal justice can continue to co-exist?

Research shows that people move back and forth between systems. Is polyphonic justice the way forward? What guardrails are needed to ensure that women really do get access to justice as they define it? Are these the right questions? Does a better framing require us to move beyond our respective 'nativisms', recognising our heterogeneity but requiring mutual respect underpinned by equality, which Ngwena has termed inclusive equality[2]

The short recommendations section provides a retrospective look /link to the many access to justice reports produced by the UN and other agencies. There is no need to keep reinventing the wheel.

Definitions

Legal pluralism recognises that there can be more than one set of laws applying simultaneously within a state. These act in concert with, or independently of, the central 'state' legal system.[3] It is like a house with many rooms, or a Venn diagram

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[1] Convention on the Elimination of all Forms of Discrimination against Women, 1979, 1249 UNTS 13.
[2] C. Ngwena What is Africanness? Contesting Nativism in Culture, Race and Sexualities (PULP, 2018)
[3] J. Griffiths "What is Legal Pluralism?" 1986 (34) Journal of Legal Pluralism 1.

where the circles overlap.[4] These points of intersection offer the possibility of congruence or conflict.

Legal anthropologist Sally Falk Moore coined the term, 'semi-autonomous social field' to denote norms and practices that could constitute law beyond the centralised system.[5] These 'social fields had internal rules and sanctions that interacted with the official state regulations that were filtered through the internal normative order.' [6] The fields can include the norms of a family group, a religious body, a community or even a trade guild.[7]

A Brief History- An Example from Africa[8]

Pre-colonial states took many forms; empires, acephalous (headless) societies; rule by council or head of a group.[9] Norms (laws) were localised and dispute processes were responsive to the problem at hand.[10] Nzegwu has argued that some precolonial societies were 'ungendered' allowing participation in decision making of both men and women.[11]

Colonisation created a two-tier system of justice. General law (the law of the colonising state) was transplanted to new soil and imposed on the governed

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[4] International Council on Human Rights (ICHR) When Legal Worlds Overlap Human Rights, State and Non-State Law, (ICHR. 2009); Galanter, M., 1981. Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law. The Journal of Legal Pluralism and Unofficial Law [online], 13(19), 1–47. Available at: https://doi.org/10.1080/07329113.1981.10756257DOI: https://doi.org/10.1080/07329113.1981.10756257

[5] Sally Falk Moore, "Law and Social Change: The Semi-Autonomous Social Field as an Appropriate Subject of Study", Law & Society Review, Vol. 7, No.4, 719-746.

[6]K. von Benda-Beckmann, B. Turner, "Legal Pluralism, Social Theory and the State" The Journal of Legal Pluralism and Unofficial Law, 50 (3) 255-274.

[7] International Development Law Organisation (IDLO) Issue Brief Navigating Complex Pathways to Justice: Women and Customary and Informal Justice Systems (IDLO, 2020. A. Hellum Women's human rights and legal pluralism in Africa: mixed norms and identities in infertility management in Zimbabwe (Mond Books, 1999)

[8] Clearly this is a snapshot and not intended to represent the whole continent.

[9] B. Sousa Santos Law and Justice in Multicultural Society (Dakar, Codesria, 2006) preface. Interesting is the Manden Charter Declaration of Kukura Fuga of the Malian Kingdom. UNESCO Manden Charter, proclaimed in Kurukan Fuga, Inscribed in 2009 (4.COM) on the Representative List of the Intangible Cultural Heritage of Humanity, Inscription: 4.COM 13.59

[10] B. Davidson The Black Mother (Oxford, OUP, 1961); M. Chanock, Law, Custom and Social Order (Portsmouth, Heinemann, 1998).

[11] N. Nzegwu Family Matters: Feminist Concepts in African Philosopsy of Culture. (Albany, SUNY Press, 2006). For similar claims about the Americas see Lugones, M. (2016). "The Coloniality of Gender" In: Harcourt, W. (eds) The Palgrave Handbook of Gender and Development, (Palgrave Macmillan, London, 2016) 13-33.

populations. A shortage of colonial officials in British run colonies resulted in a transition to Indirect Rule where the colonised people were allowed to use their personal status laws. There was a proviso that those laws should not be repugnant to British notions of natural justice, good conscience and morality. Localised disputing was guided by Chiefs and 'traditional' leaders who were to apply the customary law of their people, subject to the repugnancy clause.[12] In this way, the centralised legal system which governed public law (including crime) was to be adjudicated in the upper courts.[13]

Post-colonial states have sought to restore pride in their cultures and institutions by formally recognising customary and religious laws alongside the 'general law'.[14] These plural normative orders are recognised in national constitutions. The national constitution is regarded as the supreme law of the country. Three constitutional models emerged: strong cultural affirmation/relativism; weak and universalist. [15] Those that privileged customary or religious laws and exempted them from scrutiny for gender discrimination (strong cultural preference)[16]; those that said gender equality trumped discriminatory personal status laws (universal/equality compliant), and those that recognised both equality and plural laws without specifying a hierarchy (weak). Constitutional reform means that most now operate the

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[12] T. Ranger, "The Invention of Tradition" in T. Ranger and E. Hobsbawm The Invention of Tradition (Cambridge, CUP, 1983, 211. For Portuguese colonies B. de Sousa Santos, "From Customary law to Popular Justice" Journal of African Law, 1984 (28) 90-98.

[13] M. Chanock Law, Custom and Social Order: The Colonial Experience in Malawi and Zambia (Portsmouth, Heinemann, 1998).

[14] Himonga and Bosch identify three forms of customary law: that which has been enacted; that derived from decisions of courts and 'the living law' meaning the everyday practices of people. C. Himonga and C. Bosch "The Application of African Customary Law under the Constitution of South Africa: Problems Solved or Just Beginning?" 117 SALJ 306 2000. M. Paulos Bapela "Using Margaret Archer's sociological concepts of structure, culture, and agency to investigate the dissemination of customary marriage literature in South African Higher Education Institutions" (58) 2025 De Jure Law Journal pp 14 –31. It is also important to recognise that 'religion' may also comprise different sub-groups and interpretations of the key religious tenets. F. Banda and L. Fishbayn-Joffe (eds)Women's Rights and Religious Law: Domestic and International Perspectives (London, Routledge, 2016). See also F. Deng Customary Law in the Modern World: The crossfire of Sudan's war of identities (London, Routledge, 2010) 45.

[15] F. Banda Women, Law and Human Rights: An African Perspective (Hart, 2005) 32-40, 33.

[16] Section 27(4)(d) of the Constitution of Sierra Leone, 1991 continues to prioritise customary law.

'universalist' model that prioritises equality. This is reflected in the plethora of case law in multiple jurisdictions upholding the equality principle.[17]

Women's rights organisations, aided by university law clinics, have been the key drivers in undertaking research to expose discrimination and in lobbying for the move towards universalist constitutions and in bringing strategic litigation.[18] The case law shows that courts are receptive and increasingly deliver decisions that recognise the principle of equality as overriding. Living law is often invoked.[19]

Worthy of note is the Latin American region that has made the most progress in building gender sensitive constitutional dispensations. The jurisprudence points to an inclusive equality that actively engages intersectional considerations to embrace the rights to freedom from discrimination for all groups including those belonging to the LGBTI community.[20]

Separately, it is worth noting that in some jurisdictions state laws are founded on religion.[21] Here there may be hierarchical differences in recognition or application of 'other' laws including non-state religions, customs or practices.[22]

Marriage Laws as an Example

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[17] E. Durojaye, S. Nabaneh and J. Bond (eds) Harmful Practices and Human Rights (Springer, 2025); F. Banda (2019) "The Impact of the Convention on the Elimination of All Forms of Discrimination Against Women in Select African States," International Journal of Law, Policy and the Family, 33(2), 252-275;

[18] C Albertyn 'Women and the Transition to Democracy in South Africa' (1994) Acta Juridica 39, 49–54. R. Wael Negotiating the Power of NGOs: Women's Legal Rights in South Africa (CUP, 2019)

[19] M.H. Sungay "A constitutional analysis of the disqualification of the child born out of wedlock from the inheritance principle found in the Islamic law of compulsory succession" (58) 2025 De Jure Law Journal 75. Mburu & 4 others v Mburu & 3 others; AIC Kijabe Hospital (Interested Party) [2025] KEHC 12574 (KLR) para. 32 (who has the right to decide where someone should be buried); ND v. Attorney General of Botswana and Others, ESCR case note at: https://www.escr-net.org/caselaw/2019/nd-v-attorney-general-botswana-and-others/# (gender identity-right to change documents); Lekgowe GR. A New Dawn for Gay Rights in Botswana: A Commentary on the Decision of the High Court and Court of Appeal in the Motshidiemang Cases. Journal of African Law. 2023;67(3):477-485.

[20] F. Pou Gimenez, R. Rubio Marin and V. Undurraga Valdes (eds) Women, Gender and Constitutionalism in Latin America (Routledge, 2024). See also A. Beltran Y Puga and R. Celerio Building Bridges: Contemporary perspectives on gender, sexuality and international human rights law (Editorial Universidad de Rosario, 2024).

[21] UN Women Global Gender Equality Constitutional Database is a repository of gender equality related provisions in 194 constitutions, https://constitutions.unwomen.org/en.

[22] The Constitution of Thailand recognises the King as Buddhist and as the 'Upholder of religions'-section 7. It recognises Theravada Buddhism as the religion followed by the majority of Thai people (s. 67). Significantly, the rights of minorities are covered, "The State should promote and provide protection for different ethnic groups to have the right to live in the society according to the traditional culture, custom, and ways of life on a voluntary basis…" (s.70)

It is in the Family laws of states where legal pluralism thrives. Let us take East Africa as an example. Uganda has retained a multiple law system covering Christian marriages, Civil law marriages, customary marriages, Hindu marriages, Islamic marriages and Bahai marriages as the legally recognized marriages in Uganda.[23] Kenya repealed its plural system in favour of one Marriage Act which allowed for different marriage forms according to personal law rites.[24] Ethiopia operates a Federal system that allows the individual states or nations, to pass their own family laws. The Ethiopian Reformed Marriage Code, 2000 which is used in Addis Ababa and Dire Dawa, recognises different personal laws but requires that whatever the forum of marriage, certain basic rules apply.[25] It seeks to follow human rights principles.

The trend seems to be moving to one marriage statute but allowing pluralism. There are minimum criteria requiring proof that the spouses consent to marriage, that they are over the age of 18 and that the marriage is registered.[26]

It is interesting to note that while all three states ban same sex marriage, some jurisdictions, such as South Africa, also with plural marriage laws, recognise them.[27] Research undertaken in South Africa also shows that there is a mixing and matching of practices across groups, so Black Muslim men may follow both Muslim law while also honouring their customary heritage by giving lobolo (bride wealth).[28] More common is the phenomenon of a couple marrying under customary law before then registering a civil marriage creating a double decker marriage. Sometimes there is

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[23]Memorandum to the Uganda Marriage Bill No. 73, 16 August 2024. Uganda has also been in the process of trying to unify its marriage laws, the second time of trying.
[24] The Marriage Act No. 4 of 2014 (Kenya).
[25] Ethiopia: Proclamation No. 213/2000 of 2000, The Revised Family Code. Ethiopia is a Federal State so the 2000 Code applies in Addis Ababa and Dire Dawa. Other states may have their own Codes. M. Taye, "Resolving Marital Disputes in a Plural Legal Order: Jurisdiction, Recognition, and Legal Uncertainty." (2026) IJLFP (forthcoming).
[26] COVID showed that minimum age laws were flouted with impunity.
[27] South Africa Civil Union Act, Act 17 of 2006. Kareithi M, Viljoen F. "An Argument for the Continued Validity of Woman-to-Woman Marriages in Post-2010 Kenya." Journal of African Law, 2019;63(3):303-328.
[28] N. Moosa "Implications of Islamic mahr (Dower) and African lobolo (Bride-Price) on Religious and Customary Marriages and the Rights of Muslim Women to Inherit in South Africa" 2024 Yearbook of Islamic and Middle Eastern Law 266–298.

lane switching where a man marries two women under different systems of law; customary which is potentially polygynous and civil law which is monogamous.[29]

In the Middle East and North Africa (MENA) region, religious laws may be the state law. Here one religion may form the official religion with some recognition of other religious forms. (Egypt).[30]

UN Women's 2019-20 biennial report on Families reminds us that there are different family forms, not all founded on marriage and not all of which receive state recognition. The report highlights that the heteronormative two spouse family is in retreat, replaced by a variety of other family forms including single headed households. These de facto families offer a plural view of families and practice, whether or not state law 'sees' or recognises them.[31]

Epidemics, pandemics and genocide have also changed families and norms. Separately, there is an intergenerational divide that seems to be appearing. Digital technologies have opened up conversations including about community and norms. Younger generations may not be as bound by legal or internal community prescriptions as their elders.[32]

Legal Pluralism as a Global Phenomenon

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[29] E. Bonthuys. (2025) Legal Pluralism in South Africa: The Implications of Co-Existing Customary and Civil Marriages. Legal Pluralism and Critical Social Analysis 57:1, pp 51-71.
[30]See also Musawah "Comparative Legal Review of the Impact of Muslim Family Laws on Women Across Commonwealth Asia and Africa." Commissioned by Sisters for Change,2019; Marwa Sharafeldin, "How Does Change Happen? Social Norms, Religion and Muslim Family Laws in the MENA Region" Musawah 2025.
Prepared for the UN Women, EGM Access to Justice for CSW, 2026, September 2025; Sarah Alhussein "The Impact of Legal Pluralism on the Promotion and Protection of Human Rights: A Case Study of Saudi Arabia, PhD Thesis, SOAS, University of London, 2025.
[31] UN Women "Progress of the world's women 2019–2020: Families in a changing world" (UN Women, 2019). See also F. Banda and J. Eekelaar, "International Conceptions of Family" 2017 ICLQ 833-862 (Article based on a report commissioned by UN Women for the Progress report-Families).
[32] No. 25 (2021) on children's rights in relation to the digital environment, CRC/C/GC/25; See also GREVIO General Comment No. 1 on the digital dimension of violence against women, 2021. For an insight into social change in Moroccan society see L. Slimane, translated by Sophie Lewis Sex and Lies (Faber, 2020).

Legal pluralism is not unique to states colonised by Europeans. It is a global phenomenon for as Benda-Beckman and Turner note, "where there is society, there is law."[33]

Migration has forced states to consider the pluralism within.[34] They have developed different models which range from assimilation to multiculturalism.[35] The migrants adapt in different ways. Berry identifies the following:

> (i)Assimilation (where the individual abandons his/her cultural values in favour of those of the host community);
> (ii) integration, or 'biculturalism' (where the individual retains his/her cultural values, but also places importance on relations with the host community);
> (iii)marginalization (where the individual becomes distant from both sets of values);
> (iv) separatism (where the individual identifies with only his/her community and values).[36]

Again, using marriage as an example, one can see two models. In civil law states like France, all are required to marry in a civil registry. This is the state recognised law. They remain free to enter into marriage according to the rites of their religion, but this solemnisation, while important for community or religious purposes, does not carry any legal weight. In England and Wales, the state has made provision for the recognition of marriages entered into according to religious or other rites. Humanist and Scientology marriages have been recognised, as have proxy marriages.[37] However, there are criteria to be followed. These include the need to be married by a

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[33] K. von Benda-Beckmann and B. Turner (2018) 255-274. Tamanaha, Brian Z., Ubiquity of Legal Pluralism and Its Consequences (March 19, 2024). 54 Vic. Univ. Wellingt. Law Rev. 895 (2023), Washington University in St. Louis Legal Studies Research Paper No. 24-03-01, Available at SSRN: https://ssrn.com/abstract=4765220 (I am grateful to Shazia Razzaque for directing my attention to this article).

[34] R. Chin, The Crisis of Multiculturalism in Europe (Princeton, Princeton University Press, 2017); M. Maclean and J. Eekelaar (eds) Managing Family Justice in Diverse Societies (Hart, 2013).

[35] J. Eekelaar Family Law and Personal Life (Oxford, OUP, 2017) 73-176. France and the United Kingdom display assimilationist and multicultural policy making respectively.

[36] J Berry, U Kim, S Power, M Young and M Bujaki, 'Acculturation attitudes in plural Societies' (1989) 38 Applied Psychology: An International Review 185–206.

[37] J. Eekelaar "Marriage, Religion and Gender Equality" in F. Banda and L. Fishbayn Joffe (eds) (2016) 32-44. On proxy marriage see:

registered marriage officer, in a registered building, between certain hours and ensuring that certain prescribed words are said during said ceremony. The marriage must be registered and a marriage certificate issued. If these criteria are not followed, this imperils the recognition of the marriage and with it the entitlement to property settlement should the relationship end.[38] The legal uncertainty can only be resolved by recourse to the courts. However, in England and Wales, there is no legal aid available for this category of case, meaning women can be left in legal limbo.[39]

Migration also throws up conflicts of laws where parties who have married in one state seek recognition of the marriage in another state.[40] Child marriage has raised complex questions.[41] In its Joint General Recommendation on Harmful Practices drafted with the Children's Rights Committee, CEDAW provides:

"That legislation establishes jurisdiction over offences of harmful practices that applies to nationals of the State party and habitual residents even when they are committed in a State in which they are not criminalized."[42]

This may be easier said than done. In Germany a Syrian girl was found to have been married while in Syria to 21-year-old man when she was 14. This marriage was void under a 2017 German law which did not allow marriage where either party

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[38] T. Cummings, 'Akhter v Khan: Recognising (or not recognising) religious marriages in the UK' (OxHRH Blog, March 2020) <https://ohrh.law.ox.ac.uk/akhter-v-khan-recognising-or-not-recognising-religious-marriages-in-the-uk/> [date of access].

[39] M. Maclean and J. Eekelaar, After the Act: Access to Family Justice after LASPO (Oxford, Hart, 2019).

[40] The test for validity of marriage is the law of the place of celebration and the parties' domicile at the time of the marriage. For the UK see Gov.Uk. "Assessing the relationship with a partner based on the Immigration Rules: Appendix Relationship with Partner" version 7, 2024 at https://www.gov.uk/government/publications/relationship-with-a-partner-caseworker-guidance/relationship-with-a-partner-accessible, site visited 24 August 2025. It even permits proxy marriage. Clearly the rules are slightly different.

[41] BBC "Migrant Child Brides Put Europe in a Spin" BBC, 30 September 2016, https://www.bbc.co.uk/news/world-europe-37518289, per 24 August 2025. S. Weaver and S. Nabaneh "Child Marriage in the United States: A Human Rights and Feminist Perspective" in E. Durojaye et al (2025) 189.

[42] Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment No. 18 of the Committee on the Rights of the Child (2019) on harmful practices, CEDAW/C/GC/31/Rev.1 CRC/C/GC/18/Rev.1 8 May 2019, para. 55(l). See also paras. 31-33.

was under the age of 18.[43] Should German law recognise this marriage which occurred before the parties arrived in Germany?[44]

“The Constitutional Court reviewed the constitutionality of the Act to Combat Marriage from 2017.[45] It found the existing rule to be incompatible with Article 6(1) of the Basic Law (Grundgesetz), which protects the right to marry and family life. The unconstitutionality was not based on the right to prohibit child marriage, but on the disproportionate consequences of the automatic nullity. The 2017 law failed to include essential protective provisions for the formerly minor spouse such as no regulations existed for the consequences of the nullity, particularly regarding maintenance claims and the lack of a possibility to validate or "cure" the marriage after the minor partner reached full legal age (18), thereby violating their right to marry.

The court's balancing test focused on the proportionality of the 2017 law's consequence- nullity. The Court found that by removing all legal consequences (like maintenance) and all future confirmation options, the law itself caused greater harm to the dependent, formerly minor spouse.

The Court did not, however, annul the law immediately but ordered the German Parliament to create a new, compliant law. Until then the law's nullity rule provisionally remained in force for the Syrian case and all similar cases.”[46]

In July 2024, the state passed the Act for the Protection of Minors in Foreign Marriages. Marriages contracted outside the country are void if the parties were under 16. However, there is recognition of the right to maintenance and the possibility of affirming the marriage after the age of majority.[47]

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[43] Act to Combat Child Marriage, 17 July 2017 (Gesetz zur Bekämpfung von Kinderehen).
[44] N. Yassari and R. Michaels “Early marriage in the Constitutional spotlights” Max Planck Institute for Comparative and International Private Law, 2 September 2021, https://www.mpipriv.de/early-marriage-in-the-constitutional-spotlight.
[45] R. Michaels, “Foreign Child Marriages and Constitutional Law – German Constitutional Court Holds Parts of the German Act to Combat Child Marriages Unconstitutional” Conflict of Laws. Net, 30 March 2023.
[46] I am enormously grateful to my two LLM 2025 students, Laura Biermann and Hannah Von Haeffen for their clarification of the German position which I quote.
[47] Knauer, A. “Whose Interest is the ‘Best Interest of the Child’? – The German Federal Constitutional Court’s Decision of 1 February 2023 on the Law to Combat Child Marriage.” German Yearbook of International Law, 67(1), 419-432. https://doi.org/10.3790/gyil.2025.

Returning residents within the European Union may also encounter legal dissonance. In 2025, the European Court of Justice found that Poland had violated the rights of a same sex couple when it refused to register the marriage that they had contracted in Germany. Polish law does not recognise same sex marriages. However, it does have a facility for recognising heterosexual marriages contracted elsewhere. The refusal to offer the same registration facility for same sex unions constituted discrimination and a breach of their rights to freedom of movement within the Union and to marry and to family life.[48]

Significantly, the Court did not order Poland or other European Union member states to change their laws to recognise same sex marriage. This latitude shows respect for difference between states. Moreover, given that the European system gives states latitude to make localised, contextual decision making, why do we not see this as a form of pluralism?

Pluralism is as much about political pragmatism as it is about law.[49] India entered a declaration/reservation, to the provision in CEDAW requiring states to modify social and cultural patterns and article 16 on marriage and family relations citing, “its policy of non-interference in the personal affairs of any Community without its initiative and consent.”[50] It further entered a declaration to article 16(2) which aims to prohibit child marriage, noting: “that though in principle it fully supports the principle of compulsory registration of marriages, it is not practical in a vast country like India with its variety of customs, religions and level of literacy."[51] Are these reservations excuses for failure to address gender based discrimination within family laws and eradicate both inter and intra-group distinctions.

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[48] In Case C-713/23, Jakub Cupriak-Trojan, Mateusz Trojan v Wojewoda Mazowiecki and others, ECLI:EU:C:2025:917.
[49] Oba AA, Ismael IS. Disputes Relating to the Appointment of Imams in Nigeria: Jurisdictional Competition Between Islamic Courts and the High Court. Journal of African Law. 2025;69(3):423-439. doi:10.1017/S0021855325000063
[50] CEDAW reservations: https://treaties.un.org/pages/viewdetails.aspx?src=treaty&mtdsg_no=iv-8&chapter=4&clang=_en Israel has a similar Declaration.
[51] Ibid

India has had decades long debates about the efficacy of adopting a Uniform Marriage Code, but this has yet to be realised nationally.[52] Are there positives in maintaining these differences? The Joint CEDAW and Children's Rights General Recommendation 31 on Harmful Practices suggests not.[53] However, inn Arunkumar v. Inspector General of Registration, the court recognised a marriage entered into between a transgender woman and their husband as legal under the Hindu Marriage Act.[54] If one personal law systems gives rights not permitted in others, should the more generous system prevail?

Further, while states that reserve are often condemned, it may well be that reservations show that the state is seeking to take an evolutionary approach bringing the population along the human rights journey.[55] For example, cannot a reservation entered to article 6(d) of the Maputo Protocol on registration as a condition to validity of a marriage, be considered defensible, pragmatic and protective of the many women who are living in unregistered customary marriages?[56]

We can see what happens when change is imposed too quickly. In Kenya, a woman who had cohabited and then married according to customary law in 2012, before splitting in 2020, had her divorce petition struck down because the couple had failed to register their marriage within the time prescribed by the Marriage Act of 2014.[57] What about her legal protections and entitlements?

In *APDF & IHRDA vs Republic of Mali*, Mali informed both the African Court on Human Rights and CEDAW, that the reason it had felt unable to equalise the age of

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[52] Poppy Kemp "Legal Pluralism in India: Divisive and Discriminatory' Cambridge University Law Society-undated. Israel has a similar reservation to article 16.
[53] CEDAW/C/GC/31/CRC/C/GC/18.
[54] Arunkumar v. Inspector General of Registration W. P. (MD) No. 4125 of 2019.
[55] Cf Mullally, S. "CEDAW Reservations and Contested Equality Claims" in R. Cook (ed) Frontiers of Gender Equality: Transnational Legal Perspectives, Pennsylvania, Penn Press, 2023).
[56] Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa, 2003, (adopted 11 July 2003) OAU Doc CAB/LEG/66.6. - known as the Maputo Protocol Equality Now, "Our Rights are non-negotiable" 11 July 2025; Resolution 632 (LXXXII) 2025 on the Need to Raise Awareness for States to Withdraw Reservations on Some Provisions of the Maputo Protocol, ACHPR.
[57] SML v RKM [2023] KEMC 38 (KLR). While couples marrying after the 2014 Act had six months to register, those who had married before 2014 had 3 years to register their marriage. They had fallen foul of sections 96(2) and (3) of the Act. Para.12 of the judgement.

marriage, or to provide for equal inheritance and to legislate to prohibit FGM was because the society was resistant. Changing the law without consensus would lead to rebellion.[58] Yes, both the Court and CEDAW ordered compliance with human rights norms, but that has not reduced either the rate of child marriage or the incidence of FGM. If anything, the government was later overthrown by Islamist forces. Without the right conditions, there are limits to the realisation and enjoyment of rights, even coming when from a superior tribunal. Sousa Santos reminds us:

"An excessive preoccupation with centralization and uniformity may end up by being detrimental to the acceptance of the new law and administration of justice now under construction. It is necessary to use prudence to safeguard the basic unity of the polity, without, however, destroying the capacity for traditional popular creativity, at a local and regional level, without which it will not be possible to create a true national identity towards a more just society."[59]

It is important to acknowledge, that unchecked, or if given too much latitude, states can simply choose to continue the oppression of women.[60]

There can also be invisible 'legal' forces at work in legal centralist states. (Unseen pluralism) Laws that prohibit abortion are technically state laws, but they are inflected with religious overtones. In the context of abortion, right to life and conscientious objection are built on the tenets of Catholicism, an often unacknowledged, but nevertheless powerful legal 'influencer.'[61] The death of an Indian woman needing a

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[58] Application 046/2016 - APDF & IHRDA vs Republic of Mali; G. Pecorella "A commentary-on-the-african-courts-decision-in-the-case-apdf-and-ihrda-v-republic-of-mali-why-socio-cultural-endemic-factors-of-a-society-could-never-support-arguments-based-on-force-majeure" ; https://internationallaw.blog/2019/01/14/ site visited 23 August 2025; Inquiry concerning Mali under article 8 of the Optional protocol to the Convention on the Elimination of all forms of Discrimination against Women : report of the Committee, CEDAW/C/OP.8/MLI/R.1, 10 May 2019.

[59] Sousa Santos (1984) 90, 98. See also Geoffrey Swenson, Legal Pluralism in Theory and Practice, International Studies Review, Volume 20, Issue 3, September 2018, Pages 438–462, https://doi.org/10.1093/isr/vix060

[60] K. Bennoune, "The International Obligation to Counter Gender Apartheid in Afghanistan" 54(1) Columbia Human Rights Law Review 1. UN Working Group on Laws and Practices that Discriminate against Women, Escalating backlash against gender equality and urgency of reaffirming substantive equality and the human rights of women and girls, A/HRC//56/51.

[61] F. Bloomer and K. Turtle (eds) Reimagining Faith and Abortion: A Global Perspective (Bristol, Policy Press, 2024). See also G. de Burca Reframing Human Rights in a Turbulent Era (Oxford, OUP, 2021) on the influence of Catholic doctrine in Irish law, at 158 and for the push back 164.

termination in an Irish hospital is an example that sometimes other peoples' religious norms will govern.[62]

Even when the person meets the criteria for a therapeutic termination, it may be denied. The most reserved provision of the Maputo Protocol is article 4(2) © permitting terminations in certain circumstances.[63] The reason is religious deference. Elsewhere, three separate tribunals have ruled that Peru violated the rights of abused girls to termination (permissible in the circumstances) by frustrating their efforts, or by accusing them of aborting illegally following miscarriage. One was even visited in hospital by priests to persuade her and her mother not to terminate.[64] Camila, an indigenous girl impregnated by her father, was visited at home and school for prenatal checks-she was 13; another was forced carry an anencephalic foetus while the third, LC was paraplegic following a suicide attempt when she had jumped from a building. All were the victims of abuse, institutional indifference and stereotypes about motherhood regardless of the context of conception and consequences.

Conversely, the perception of poverty as being a personal failure means that some are not seen as entitled to have families, or to have them safely. This status discrimination led to the death of a pregnant Afro-Brazilian woman who was transferred from a public to a private hospital in an emergency. They left her to die.[65] Inter-generational descent-based slavery may treat some families within the same legal framework differently. Status inferiority may be transmitted from mother to children.[66] Other forms of prejudice which results in pluralism in the interpretation of human rights norms occurs when lesbian mothers are denied custody of their children despite this being in their best interests.[67]

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[62] G. de Burca (2021).
[63] African Commission on Human and Peoples' Rights March 2025 of Resolution 632 (LXXXII) 2025 on the Need to Raise Awareness for States to Withdraw Reservations on Some Provisions of the Maputo Protocol, March 2025. See also Centre for Reproductive Rights, "Maputo Protocol at 20: Progress on Abortion Rights in Africa" at: https://reproductiverights.org/wp-content/uploads/2023/08/CRR_Maputo-Protocol_4pg_08292023.pdf.
[64] *Camila v. Peru*, CRC/C/93/D/136/2021; *L.C. v. Peru*, CEDAW, U.N. Doc. CEDAW/C/50/D/22/2009 (2011*); KL v. Peru*, CCPR/C/85/D/1153/2003
[65] Alyne da Silva Pimentel v. Brazil CEDAW/C/49/D/17/2008
[66] ECW/CCJ/JUD/19/21 Fodi Mohamed & Ors v. Niger. Enslavement of a woman since childhood, forced pregnancy. Challenge= freedom for her and her six children. She was awarded US$115,000 (roughly).
[67] See Atala Riffo and Daughters v. Chile. Merits, Reparations and Costs. Judgment of.

In *Volodina v. Russia*, a case about domestic violence, the court noted the Russian Orthodox Church as having influenced state officials who refused to intervene.[68] The church opposed domestic violence legislation which it said, 'destroyed families.'

Hiding is plain sight is the abuse of domestic workers who are described as members of the family to cover the fact that they are made to work without pay or rest. Their family status is revocable, as became clear during COVID.[69] State refusal to regulate domestic work or the conditions of domestic workers means that they are left at the mercy of the family's 'laws' or diktats.[70]

Legal Pluralism in Human Rights

Human rights instruments contain both the right to equality and freedom from discrimination and the right to culture.[71] Customs and culture have long been seen as bad for women because they led to discrimination against women especially in the family.[72] This is reflected in the work of the CSW which has included lobbying for the adoption of the 1962 Convention on Consent to Marriage, Minimum age of Marriage, Registration of Marriage and the1967 Declaration on the Elimination of All Forms of Discrimination which is the precursor to CEDAW.[73]

Nevertheless, there is pluralism within human rights with regional instruments demonstrating a sensitivity to local contexts. The Maputo Protocol recognises polygyny whereas CEDAW does not.[74] Similarly, the article 3(3) the Arab Charter

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February 24, 2012. Series C No. 239.

[68] (Application no. 41261/17)Volodina v. Russia (1) ECtHR. See also Volodina v. Russia (no. 2) - 40419/19 on a failure to protect her from cyberviolence.

[69] UN News https://news.un.org/en/story/2021/06/1094022. ILO Convention 189 (2011) on Domestic Workers is unknown or ignored.

[70] F. Banda African Migration, Human Rights and Literature (Hart, 2022) chapter 4. See also N. Dube, "The complex marginalisation of domestic workers" in Nani Jansen-Reventlow, E. Bruce-Jones et al (eds)In Intersectionality and Human Rights: Reimagining European Court of Human Rights Judgements (Elgar Publishing, 2025) 18.

[71] ICCPR arts 2, 26 and 27.

[72] UN General Assembly, Status of women in private law: customs, ancient laws and practices affecting the human dignity of women, A/RES/843, UN General Assembly, 17 December 1954, https://www.refworld.org/legal/resolution/unga/1954/en/5839 [accessed 24 August 2025]; UN Human Rights Committee (HRC), CCPR General Comment No. 28: Article 3 (The Equality of Rights Between Men and Women), CCPR/C/21/Rev.1/Add.10, 29 March 2000, UN Working Group on Laws and Practices that Discriminate against Women, Thematic analysis: eliminating discrimination against women in cultural and family life, with a focus on the family as a cultural space, A/HRC/29/40.

[73] https://cdn.un.org/unyearbook/yun/chapter_pdf/1960YUN/1960_P1_SEC2_CH7.pdf page 34

[74] C. Nyamu Musembi "Pulling apart? The treatment pluralism in the CEDAW and the Maputo

spotlights religion whereas other treaties are neutral; “Men and women are equal in respect of human dignity, rights and obligations within the framework of the positive discrimination established in favour of women by the Islamic Shariah, other divine laws and by applicable laws and legal instruments.” [75] The Maputo Protocol provisions on division of property call for equity in decision making while CEDAW is firmly against equity as a measure, insisting on equality.[76] Which standard is to apply in Djibouti which has ratified CEDAW, the Arab Charter and the Maputo Protocol?

Egypt has a reservation to articles 2 and 18(3) the non-discrimination and equality provisions of the African Charter as well as to article 16 of CEDAW on property division. The Egyptian reservation provides:

“Reservation to the text of article 16 concerning the equality of men and women in all matters relating to marriage and family relations during the marriage and upon its dissolution, without prejudice to the Islamic Sharia’s provisions whereby women are accorded rights equivalent to those of their spouses so as to ensure a just balance between them. This is out of respect for the sacrosanct nature of the firm religious beliefs which govern marital relations in Egypt and which may not be called in question and in view of the fact that one of the most important bases of these relations is an equivalency of rights and duties so as to ensure complementary which guarantees true equality between the spouses. The provisions of the Sharia lay down that the husband shall pay bridal money to the wife and maintain her fully and shall also make a payment to her upon divorce, whereas the wife retains full rights over her property and is not obliged to spend anything on her keep.
The Sharia therefore restricts the wife's rights to divorce by making it contingent on a

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Protocol” in A. Hellum and S. Aasen (eds) Women’s Human Rights: CEDAW in international, regional and national law (Cambridge, CUP, 2013) 183-214. Marieme Lo “Gender Equality and the Sustainable Development Goals” in R. Cook (ed) Frontiers of Gender Equality (Pennsylvania, Penn Press, 2023) 1080125.

[75] F. Banda, “Blazing a Trail: The African Protocol on Women's Rights Comes into Force,” Journal of African Law, Vol. 50, No. 1 (2006), pp. 72-84. Arab Charter on Human Rights, 2004, ST/HR/] CHR/NONE/2004/40/Rev.1. M. Rishmawi, & C.M. Quiroga, “Advancing Gender Equality through the Arab Charter on Human Rights.” in R. J. Cook (ed). Frontiers of Gender Equality (Penn Press, 2023) 279–302.

[76] Maputo articles 7 and 21. See also ACHPR, General Comment No. 6 on Article 7(d) on the Right to Property during Separation, Divorce or Annulment of Marriage, 4 March 2020. Compare CEDAW General Recommendation No. 28 on the Core Obligations of States Parties under Article 2 of the Convention on the Elimination of All Forms of Discrimination against Women, CEDAW/C/GC/28, 2010, para. 22.

judge's ruling, whereas no such restriction is laid down in the case of the husband." (Emphasis added).[77]

Two things stand out. One is that the Egyptian reservation is defensible under article 3(3) of the Arab Charter being in keeping with one interpretation of the Sharia. One could counter this by noting that article 3(1) of the Arab Charter is drafted in the same way as the non-discrimination provisions found in UN treaties, so that discrimination, including on grounds of sex, is prohibited. Which of these two interpretations in the same article is to be preferred? It does not help that the interpretive provision, article 43 allows for both domestic and international laws/norms to be used.[78] Also unhelpful is the fact that objections entered by states to reservations made show that European states only seem to object to reservations made by non-European states with a particular focus on Muslim majority states.[79] This creates tension and seems to re-introduce the idea of 'civilised' that is rule complying states, and 'the rest.'[80]

It is important to recognise that even human rights treaty bodies do not always agree about how to balance culture and equality rights. Take the example of the veil worn by Muslim women. The European Court on Human Rights has supported Belgium and France in their banning of the veil in public buildings, but the UN Human Rights Committee takes the opposite view.[81] Whatever happened to intersectionality?[82] Did the European Court's stance enhance the rights of Muslim women, or constrain

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[77] UN Declarations and Reservations to CEDAW at: https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&clang=_en#EndDec. Egypt has changed its laws on divorce to permit khula divorce where a woman sacrifices her entitlement to a post-settlement in exchange for freedom to demand a divorce. Clearly this option is for the privileged. See also S. Mullally, "CEDAW Reservations and Contested Equality Claims" in R. Cook (ed) (2023) 88-107.

[78] M. Rishmawi "Advancing Gender Equality through the Arab Charter on Human Rights" in R. Cook (ed) (2023) 279-302. See also Maputo Protocol art. 6 on nationality allowing nationality of children to be determined by reference to national law.

[79] They ignore the many reservations entered by states such as Monaco. See again https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-8&chapter=4&clang=_en#EndDec

[80] See also S. Mullally (2023) 88,102.

[81] Sarah H. Cleveland, Banning the Full-Face Veil: Freedom of Religion and Non-Discrimination in the Human Rights Committee and the European Court of Human Rights, 34 Harv. Hum. Rts. J. 217 (2021).

[82] Dube, Nozizwe. "Not Just Another Islamic Headscarf Case: LF v SCRL and the CJEU's Missed Opportunity to Inch Closer to Acknowledging Intersectionality." European Law Blog, 2023.

them? Discussing reservations to CEDAW, Mullally reflects, “Dismissing religious cultural claims as oppositional forces is damaging to feminism.”[83] Allowing Muslim women to wear their veils in public buildings may have enhanced access to education, employment and all the opportunities associated with ‘empowerment.’ Mullally quotes Benhabib’s demand for, “the articulation of ‘a pluralistically enlightened ethical universalism.’”[84] This is necessary if, “feminism is to be truly emancipatory, to work toward a radical feminism.”

Respect for intersectionality still requires that both inter and intra group discrimination is eliminated. The Declaration on Indigenous People recognises indigenous justice systems but also makes clear that the principle of equality is to infuse all decision making.[85]

Access to Justice[86]

Justice. Just us.[87] When people speak of justice you have to listen carefully to understand what they mean. For most, access to justice is linked to the ability to enforce one’s rights through the courts.[88] Clarke calls this a ‘juridified’ view of

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[83] S. Mullally (2023) 102.
[84] S. Mullally (2023) 88, 101.
[85] UN General Assembly, United Nations Declaration on the Rights of Indigenous Peoples: resolution / adopted by the General Assembly, A/RES/61/295, 2 October 2007, art. 40. See also CEDAW GR 33 para. 64(a) and CEDAW General Recommendation No. 39 on Indigenous Women UN Committee on the Elimination of Discrimination Against Women (CEDAW), General Recommendation No. 39 (2022) on the Rights of Indigenous Women and Girls, CEDAW/C/GC/39, 31 October 2022, paras. 24-33. CEDAW is cognisant of the challenges faced by Indigenous women, including racism and a lack of resources brought on by dispossession from their lands as well as, ‘disruptions and threats to their spiritual lives.’ Para. 24. Finally see, L. Cahier, “Indigenous Women at the United Nations: Exploring their Creative Claims and Critical Perspectives on International Human Rights Law.’ in A. Beltran Puga and R. Celerio (eds) (2024) 177-202
[86] The UN has a rich literature on access to justice. A. Dias and G. Welch Justice for the Poor: Perspectives on Accelerating Access (UNDP, OUP, 2009); UN Women Progress of the World's Women: In Pursuit of Justice (UN Women, 2011) UN WOMEN A Practitioner’s Toolkit on Women’s Access to Justice Programming (UN Women, 2018)
[87] “When white people speak of justice, they mean just us.” African American aphorism reproduced as an epigraph in C. Mills The Racial Contract (Ithaca, Cornell University Press, 1997)
[88] F. Banda, ‘Women and access to justice’, in A. Dias and G. Welch (eds.), Justice for the Poor:

justice. Writing about the International Criminal Court, she goes on to note that this 'narrative justice of law' is about protecting survivors against powerful 'perpetrators' of violence who have engaged in the exemption from punishment for too long."[89]

A feminist reading of access to justice requires a broader understanding that takes in socio-economic and political justice. This is most clearly articulated by Fredman who proposes a four-dimensional approach: "to redress disadvantage (redistribution); address stigma, stereotyping, prejudice, and violence (recognition); enhance voice and participation (participation); and accommodate difference and achieve structural change. "[90] (transformation) One can see this vision reflected in the SDGs.[91]

Access therefore requires the removal of any barriers to facilitate vindication of one's rights. It requires states to engage their obligations to respect the rights of women by removing discriminatory laws; to protect them, by limiting the actions of third parties including community and family members and to fulfil their obligations; by ensuring that courts are geographically and financially accessible, that they uphold equality principles, steer clear of stereotypes and are alive to intersectional needs of users including in the provision of translation services if needed and other assistance depending on need.[92]

For CEDAW,

The scope of the right to access to justice also includes plural justice systems. The term "plural justice systems" refers to the coexistence within a State party of State laws, regulations, procedures and decisions on the one hand, and religious,

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Perspectives on Accelerating Justice (Delhi: OUP), 125–49.

[89] K. Clarke Affective Justice: The International Criminal Court and the Pan-Africanist Pushback (Duke, 2019). 50.

[90] Fredman, Sandra (2016) "Substantive equality revisited" International Journal of Constitutional Law. 14. 712-738. This framework has been adapted by the UN Working Group on Laws and Practices that Discriminate against Women, A/HRC/56/51: Escalating backlash against gender equality and urgency of reaffirming substantive equality and the human rights of women and girls - Report of the Working Group on discrimination against women and girls; See also Cook, R. J., & Quiroga, C. M. (2023). "Introduction.: Many Paths to Gender Equality" in R. J. Cook (ed) (2023) 1–16.

[91] See in particular SDG 5, especially 5A and SDG 16:3. All the SDGs are important as is CEDAW and the Maputo Protocol. M. Lo (2023) "Gender Equality and the Sustainable Development Goals" in R. Cook (ed) (2023) 108-125, 115.

[92] CEDAW General Recommendation No. 39 on Indigenous Women paras 30 and 33(f). See generally UN Committee on the Elimination of Discrimination Against Women (CEDAW), General Recommendation No. 28 and the papers in A. Dias and G. Welch (eds) (2009).

customary, indigenous or community laws and practices on the other. Therefore, plural justice systems include multiple sources of law, whether formal or informal, whether State, non-State or mixed, that women may encounter when seeking to exercise their right to access to justice. Religious, customary, indigenous and community justice systems — referred to as traditional justice systems in the present general recommendation — may be formally recognized by the State, operate with the acquiescence of the State, with or without any explicit status, or function outside of the State's regulatory framework.[93]

With the exception of its General Recommendation 39 on Indigenous women, it is clear from looking at CEDAW jurisprudence, that the Committee is against 'plural justice systems.' [94]The tribunals overseeing customary or religious systems are often labelled 'informal' contrasted with the state court system which is seen as 'formal'. The two are compared with informal systems being regarded as inferior. They are criticised for their composition - made up of officials who tend to be disproportionately male and are not trained in human rights law.[95] The charge is that both the laws that they apply and the manner in which they interpret those laws is discriminatory and that women are the losers. There is said to be inequality of bargaining power between the parties and between the parties and the mediator/council leading to injustice. [96] Women may be silenced or forced to accept unfair decisions.[97]

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[93] CEDAW General Recommendation No. 33 on Women's Access to Justice, CEDAW/C/GC/33, 15 August 2015, para 5. Cf SDGs 5A and 16:3. See also UN Human Rights Committee (HRC), General comment no. 32, Article 14, Right to equality before courts and tribunals and to fair trial, CCPR/C/GC/32, 23 August 2007.

[94] A. Nairan (2022) "Article 15" in in P. Schulz et al Commentary on the Convention on the Elimination of all Forms of Discrimination against Women(Oxford, OUP, 2022) 553, 568-570 R. Halperin-Kaddari and M. Freeman "Article 16" in P. Schulz et al (2022)577,598-601; Joint general recommendation No. 31 of the Committee on the Elimination of Discrimination against Women/general comment No. 18 of the Committee on the Rights of the Child (2019) on harmful practices, CEDAW/C/GC/31/Rev.1 CRC/C/GC/18/Rev.1 8 May 2019 para. 55(o). Cf General Recommendation No. 39 para 25 where it notes: "The Committee reiterates that the right of Indigenous Peoples to maintain their own judicial structures and systems is a fundamental component of their rights to autonomy and self-determination."

[95] Art 10(d) of the Maputo Protocol calls on law officials in all organs to be "equipped to effectively interpret and enforce gender equality rights" while article 8(e) requires equal representation of women in judiciaries. This has not been achieved in both state and community forums.

[96] F. Banda "Article 14" P. Schulz et al (2022) 510, 535-536.

[97] U. Wanitzek, (1990) "Legally Unrepresented Women Petitioners in the Lower Courts of Tanzania: A Case of Justice Denied?" The Journal of Legal Pluralism and Unofficial Law, 23(30–31), 255–271. On the different forms of mediation, See also S. Roberts "Three

The result is that treaty bodies such as CEDAW have issued multiple statements that seek to oust or limit, the jurisdiction of 'informal' tribunals. In its General Recommendation on Rural Women, the Committee recognises that there will be localised dispute resolution. It requires states to ensure that the rural women can access both formal and informal dispute resolution systems. States are also to ensure "physical access to courts and other justice mechanisms, for example through the provision of mobile courts that are accessible to rural women.[98] In its General Recommendation on Equal Representation, the Committee calls on states to:

"Adopt laws and other measures to ensure parity in decision-making. positions at all levels in public administration and the judiciary, including local, customary and informal justice systems, and include the capacity to eliminate gender stereotypes and conduct gender analysis and integration in training and exams for such appointments"[99]

The challenge is that as long as states retain plural legal systems, there will be a need for the relevant tribunals.[100] Many national legal systems recognise traditional authorities, panchayats and religious courts.[101] Kenyan and Ethiopian marriage laws make provision for the use of mediation/arbitration/conciliation.[102] Research

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Models of Family Mediation" in R. Dingwall and S. J. Eekelaar Divorce Mediation and the Legal Process (Oxford, OUP, 1988) 145.

[98] CEDAW General Recommendation No. 34 on Rural Women, CEDAW/GC/34, 7 March 2016 paras. 8; 9 (f) and (g).

[99] CEDAW General Recommendation No. 40 on Equal and inclusive representation of women in decision-making systems, CEDAW/C/GC/40 (2024) para 49(a). See also 49(f) on peace processes and mediation. See also CEDAW General Recommendation No. 25 on article 4, paragraph 1, of the Convention on the Elimination of All Forms of Discrimination against Women, on temporary special measures, 2004, para. 10.

[100] Simwatachela, M. (2024). The Dual Legal System and Its Effects in the Administration of Justice in Zambia. Beijing Law Review, 15, 285-294. https://doi.org/10.4236/blr.2024.151018

[101] India and Pakistan both recognise panchayats; South Africa recognises Traditional authorities, the Kenyan Constitution, 2010, recognises Khadi courts.

[102]Ethiopia: Proclamation No. 213/2000 of 2000, The Revised Family Code.
Art 82(1) provides that a court that is presented with a divorce petition should speak to the parties about mediation (arbitration/conciliation). They can choose their mediators. See also arts. 118 – 122. Again art 121(1) speaks of the arbitrator encouraging reconciliation. For an in-depth discussion see also Mihreteab Taye (2026) International Journal of Law, Family and Policy (forthcoming). Kenya Marriage Act 2014, section 68 says that parties in customary marriages may undergo mediation before applying to terminate the marriage. Significantly the mediation has to be conducted in keeping with constitution principles, presumably a reference

undertaken in South Africa shows that chiefs continue to adjudicate disputes, including those which the central system says is outside their jurisdiction.[103]

Moreover, many reservations to CEDAW invoke religious laws as the interpretive framework through which the Convention will be applied.[104] Israel has a reservation to article 7(b) of CEDAW on participation:

"The State of Israel hereby expresses its reservation with regard to article 7 (b) of the Convention concerning the appointment of women to serve as judges of religious courts where this is prohibited by the laws of any of the religious communities in Israel."[105]

There is gender dimension to this exclusion of women from disputing. Halperin-Kaddari and Freeman note that Jewish law gives the husband unilateral decision-making power to grant a divorce by giving a get or bill of divorce. They describe appealing to the rabbinical courts as involving "a further tortuous process."[106]

Writing about his role as a rabbi in Boston, Klapper acknowledges that there is an exit option for those who do not want, or like, the ruling of the Beth Din. Simultaneously, those who are unhappy with the state courts may, in his words, 'get religion'. This forum shopping offers some scope for manoeuvre but it is not without consequences. A Beth Din that is rejected may refuse to help with the property settlement. If a get is ordered by a civil court, it is not seen as valid in Jewish law.[107]

The question is, cannot respect for religious communities include allowing women versed in the religion to sit on religious tribunals? In this way knowledge of the tenets of the religion remain important, but the gender bar is removed. CEDAW article 2(f) calls for states to modify or abolish those customs and practices that constitute

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to equality s.68(2).
[103] Ubink, J., & Duda, T. (2021). Traditional Authority in South Africa: Reconstruction and Resistance in the Eastern Cape. Journal of Southern African Studies, 47(2), 191–208. https://doi.org/10.1080/03057070.2021.1893573 WLSA Struggling Over Scarce Resources: Women and Maintenance in Southern Africa (Harare, WLSA, 1997) 69.
[104] See for example, J. Connors "Article 28" in P. Schulz et al (2022) 785-813, 787-798. See in particular 788.
[105] Halperin Kaddari and Freeman, "Article 16" in P. Schulz et al (2022) 596
[106] Halperin-Kaddari and Freeman (2022) 596.
[107] Rabbi A. Klapper "Systemic misunderstanding between rabbinical courts and civil courts: the perspective of an American rabbinical court judge." in F. Banda and L. Fishbayn Joffe (2016) 202-222, 204-206.

discrimination against women. Might this be a modification?[108] Modification shows respect for core principles while removing discriminatory elements.

A positive example is provided in socio-legal research undertaken by Saris in Montreal. She interviewed imams about how they mediated family disputes. They were very gender sensitive. They adopted techniques from mediation and sometimes invited a neutral third parties. Other times they took a more interventionist approach refusing to remain neutral by taking a "proactive stance in order to defend the woman's interests."[109] In this way they sought to redress the power imbalance. Saris also credits the adaptability of Sharia norms and the Quebec socio-legal context in which the disputes were being decided.

Petersen's seven-year empirical research on the use of Sharia processes in Denmark shows that even where the state system denies, or does not facilitate, non-state disputing, parties seek it out. He notes that there is an unmet need that creates a juridical vacuum so that:

"plaintiffs project their need for Islamic legal verdicts onto Muslim leaders and Islamic institutions. Women may, for example, request an Islamic divorce from a Muslim leader or a mosque, and if an individual or an institution successfully delivers on this – issuing an Islamic divorce without the consent of the husband – they are transformed into a qadi (Islamic judge) or an Islamic divorce council. Once their Islamic legal performance becomes known, the demand of the field is projected onto them, thereby sucking them into the vacuum."[110]

CEDAW's caution about informal tribunals, identified above, is rooted in distrust about systems that do not resemble its view of what a justice system ought to look like and what it ought to do. The Committee is concerned that the procedures of informal justice systems are biased and, so too, the outcome.

Is this unique to the 'alternative' just forums? Is state law the only, or best form of justice? What if there is a perception of state law as compromised by corruption, bias or as insufficiently responsive to the particular need? Research undertaken by

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[108] A. Saris in F. Banda and L. Fishbayn Joffe (2016) 255-277,271.
[109] A. Saris (2016) 255, 271.
[110] Jesper Petersen, The Islamic Juridical Vacuum: In What Sense is Islamic Religious Law Legally Recognised in Denmark? (Brill, 2025), introduction.

Koroma in Sierra Leone reveals what he calls a 'justice marketplace."[111]An extensive multi-jurisdictional review of case law on gender-based violence, show that not even formal systems are not free of stereotypes or bias nor do they deliver justice consistently.[112].

In a post-colonial world where intersectionality and decoloniality is celebrated/demanded, can there be only one model for justice delivery?[113] According to Gallien:

"Decolonial thinking proposes to re-experience, re-imagine, and re-think the world based on different epistemic foundations and ontologies. In other words, if postcolonial critique produced studies about the systemic subjugation of subalternized people, decolonial studies focus on the production of alternative discourses with and from a subaltern perspective."[114]

Legal anthropologist Kamari Clarke highlights the scepticism that has arisen in African states about the perceived targeting of Africans by the International Criminal Court. There is a perception of bias and thus the court is increasingly seen as illegitimate.[115] In a different theatre, Perez Vasquez challenges the gender blindness of institutional transitional justice mechanisms used in Timor Leste. These ignored the ways in which women were violated. The effect was that they were not entitled to pensions or compensation for harms experienced.[116]

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[111] Koroma S. Following the money: Understanding forum shopping and the 'Justice Marketplace' in Sierra Leone. Social and Legal Studies. 2023 Aug 22;33(3):328-350. Epub 2023 Aug 22. See also Citizens' Barray at: https://citizensbarray.org.

[112] C. Chinkin and L. Gormley "Violence against Women" in P. Schulz (ed) 627-683. Volodina v. Russia, 9 July 2019, 41261/17, ECtHR. 9 July 2019.

[113] A. An-Naim Decolonizing Human Rights (Cambridge, CUP, 2021); Ramstedt, M. (2025) "Towards an epistemological decolonization of legal pluralism: The case of Indonesia", Oñati Socio-Legal Series. doi: 10.35295/osls.iisl.2157; Araújo, S. (2024) "Legal pluralism as co-presence: Disobeying the hierarchies of the western canon", Oñati Socio-Legal Series. doi: 10.35295/osls.iisl.1931; Sousa Santos (1984) 90,98.

[114] Gallien, C., 2020. A Decolonial Turn in the Humanities. Alif: Journal of Comparativ Poetics, no. 40, 28–58, 33 as quoted by. Kokal, K. (2024) "Moments of decolonisation in Indian women's navigations of interpersonal conflict", Oñati Socio-Legal Series at 16. doi: 10.35295/osls.iisl.2017.

[115] K. Clarke Affective Justice: The International Criminal Court and the Pan-Africanist Pushback (Duke, 2019).

[116] N. Perez Vasquez Women's Access to Transitional Justice in Timor-Leste: The Blind Letters (Hart, 2022). Significantly this book was translated and distributed to those interviewed and more broadly within the country.

Localised justice forums are said to have the advantage of familiarity, comprehensibility (language and norms); legitimacy, enforceability and affordability. Moreover, they may speak to a worldview that prioritises community over individuality highlighting the interconnectedness of ubuntu.[117]

Here it is as well to acknowledge that communal harmony may come at the cost of women's autonomy.[118] Is community justice democratic? Does it allow for an exit option? The aim should be gender sensitive vernacularisation of norms and practices, especially in the distribution of access to resources such as land.[119] Key is training in transformative equality to ensure that decision makers do not succumb to stereotypes whatever the forum.[120]

An example of this is *Reuben v. Reuben*, a case about whether a woman needed to return bride wealth as a precondition to the granting of a customary divorce. This was heard in the Kaduna Upper Customary Tribunal in Nigeria. The Kaduna Customary Tribunal reached exactly the same conclusion as the Ugandan Constitutional Court in the Mifumi decision where the constitutionality of bride wealth had been litigated.[121] The two courts ruled that the return of bride wealth was not a pre-condition to the dissolution of a marriage. They identified the inequality of bargaining power between the spouses and found that it was both oppressive and objectionable to make divorce conditional. The Kaduna Upper Customary Tribunal even cited the Ugandan decision.

Key is individual choice, including of dispute forum. One can see the importance of this when looking at empirical research undertaken in Ethiopia on gender-based violence.[122]

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[117] S. Tamale Decolonisation and Afro-Feminism (Daraja Press, 2020).
[118] MR Bartolomei "African women and the law: Justice systems, legal professions and land rights in Zambia", Oñati Socio-Legal Series. doi: 10.35295/osls.iisl.2200.
[119] Claassens, Aninka & Mnisi, Sindiso. (2009). Rural women redefining land rights in the context of living customary law. South African Journal on Human Rights. 25. 491-516.
[120] A. Timmer and R. Holtmaat "Article 5" in P. Schulz (ed) (2022) 221. A. Mahmoudi "'Nothing to report on': Revitalising resocialisation as an obligation in the African human rights system in the context of gender discrimination" (2025) 25 African Human Rights Law Journal 85-113
[121] Samaila, Emmanuel. (2024). Judgment declaring the Demand for the Refund of Bride Price under Kagoma custom Repugnant - Reuben v. Reuben (2024) (Unreported). SSRN Electronic Journal. 10.2139/ssrn.4708741; Mifumi (U) Ltd & Anor v Attorney General & Anor (Constitutional Appeal 2 of 2014) [2015] UGSC 13 (6 August 2015).
[122] Istratii, R. Adapting Gender and Development to Local Religious Contexts: A Decolonial Approach to Domestic Violence in Ethiopia. (London, Routledge, 2023).

While both CEDAW and the 2025 AU Convention on violence are against the use of mediation in gender-based violence between intimate partners[123], research by Istrati in Ethiopia seems to indicate that mediation involving religious leaders is more accepted and effective in reducing a recurrence. She decries the Euro-centric approach to addressing gender-based violence saying they are 'ill-equipped to understand gender-related realities and human behaviour in non-western religious contexts and knowledge systems.' She and argues "for an approach to gender-sensitive research and practice which is embedded in insiders' conceptual understandings as a basis to theorise about gender, assess the possible gendered underpinnings of local issues and design appropriate alleviation strategies." [124]

Van Klinken also argues that there is a need to interrogate the idea of religion and religious leaders always embodying an unmoveable, oppressive patriarchy. In ethnographic research undertaken in the Pentecostal church in Zambia, Van Klinken came upon a pastor who preached the idea of the husband as head of the family as needing to follow Jesus's lead of servant leadership.[125]

The International Council on Human Rights (ICLHR) reviewed a range of initiatives within a diverse range of societies and the evidence is that these forums can be a positive force for good reducing violence and providing remedies to the affected person. Nevertheless, the ICHLR does note:

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[123] CEDAW GR 33 para. 58©. See also General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, CEDAW/C/GC/35, 26 July 2017; African Union (AU), African Union Convention on Ending Violence against Women and Girls, 17 February 2025, Art. 10(A) (II) https://www.refworld.org/legal/agreements/au/2025/en/150096 [accessed 25 August 2025]
[124] Istratii, R. (2023). Adapting Gender and Development to Local Religious Contexts: A Decolonial Approach to Domestic Violence in Ethiopia. Routledge. Cf Fang Li "Reckoning with the spirits of the dead: towards a thicker understanding of transitional justice through local cosmologies in Cambodia and Timor-Leste" (2025) The International Journal of Human Rights 1-18. Cf World Bank, "Gender-based Violence (GBV) Response Services in Ethiopia: Empowering Women and Girls in Conflict-Affected Areas", World Bank, 11 October 2024;
[125] A. Van Klinken (2011). Male Headship as Male Agency: An Alternative Understanding of a 'Patriarchal' African Pentecostal Discourse on Masculinity. Religion and Gender. 1. 10.18352/rg.19. See also his work on sexuality. A. Van Klinken Kenyan, Christian, Queer: Religion, LGBT Activism, and Arts of Resistance in Africa (Pennsylvania, Penn Press, 2019); R. Sandberg (ed), Religion and Legal Pluralism (Routledge, 2015).

"The rigid boundaries that can result from identity-based laws can amount to a segregation that may strengthen socially and politically conservative identity-based politics, including religious fundamentalisms."[126]

Hybridity

It is to the potential positive outcomes evidenced by cross-pollination between formal and customary/local institutions that we should turn our attention.

Following ethnographic research in a police station in India, Kokal argues in favour of what she terms a decolonial framing of justice. This requires us to move away from a universal conceptualisation to one which centres the individual and their preferences. These may lead the individual to cross-pollinate norms which may involve an engagement with dispute processes.

To illustrate her thesis, Kokal gives the example of a young Muslim woman, Saba, who elopes but the marriage is short-lived (three months) and she returns to the parental home. The husband refuses to grant her a divorce. She then approaches the Police for help. They go through her options including informing her that the Supreme Court has outlawed talaq divorce. One recommendation is that if the husband is refusing, then she should seek the assistance of an imam who may be able to issue a divorce. Kokal notes how Saba is keen to have the marriage formally dissolved by an imam, in part to mitigate her earlier breach of community norms by eloping. She also wishes to signify to her family and her community that she is free to marry. The different justice forums serve different needs.[127]

In the 2023 Kenyan case of EMM v. PMK, a divorce petition was filed to end a customary marriage that had been concluded in 1987. The High Court noted the allegations and dispute processing attempts:

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[126] International Council on Human Rights, When Legal Worlds Overlap, Human Rights, State and Non-State Law (Geneva, ICHR, 2009) 80-85.

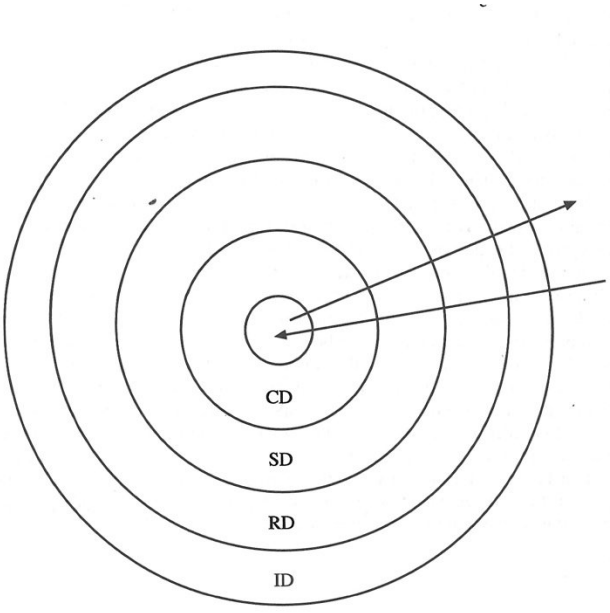
[127] Kokal (2025). See also R. Wael "Negotiating the Power of NGOs: Women's Legal Rights in South Africa (Cambridge, CUP, 2019). Section 3 of the Zimbabwean Customary Law and Local Courts Act Cap 7:05 gives courts guidance on which law to apply to a particular case. Party choice, context and knowledge of the law are all important. For example, see *Lopez v. Nxumalo* SC-H 115/85 applying customary law to a seduction action brought by a Black Zimbabwean woman against a white Portuguese man who had claimed customary law should not apply to him. The court said that he was familiar with customary law and that it was justice and proper to apply it.

“It was also alleged that the respondent had committed acts of exceptional depravity since 2018 through failure to maintain and educate their two children, denial of conjugal rights and desertion for 5 years. The petitioner attempted to salvage the marriage including use of traditional dispute resolution mechanisms with her brother and aid of elders but failed due to rejection by the respondent.”[128]

She could legitimate her decision to leave.

From forum shopping to decolonial approaches, it is clear that people have always navigated plural normative orders in strategic ways. The aim has been to optimise the outcome. The optimisation can be seen as linked to the maintenance of important relationships, the need for protection or to secure an advantageous or fair settlement.

The diagram below shows how the personal, community and international are in constant conversation.[129]



Key
Centre circle represents the individual,
CD represents community
SD represents public domain or state
RD represents regional domain
ID represents international domain

[94] *Ibid* at 35.

[128] ***EMM v PMK* [2024] KEMC 11 (KLR) under brief facts.**

[129] **From F. Banda (2005) 261-262.**

The circles are permeable showing free flow of norms and justice seeking. There is movement indicated by the arrows between all the circles, with norms and values flowing in both directions. There is interaction between the two farthest points, so that international norms of human rights are designed to benefit the individual, or the centre circle. At the individual level the language of entitlement and rights has permeated so that, for example, the case law shows that many women are prepared to invoke human rights principles to justify their demands. In reverse, we have seen how what constitutes family or community values (CD) has an impact on the pace of change in state policy, particularly in consultation before changes to the law are made. Community values also influence the relationship between the state (SD) and the regional (RD) and international domains (ID), for while states are responsible for implementing human rights norms, when reporting to international or regional human rights bodies, states often say that they are not able to, due to local resistance. Similarly at the international level, the recognition of local/community resistance to cultural change is seen by the constant references to culture in international conference documents.

How can access to justice initiatives better respond to legal pluralism?

It is clear that engaging in a process of holding culture as the culprit and doing a search and delete in favour of equality norms, has not worked. We need to move beyond this. Sally Engle Murry's vernacularisation may offer a path forward.[130] This should not mean a return to privileging of dominant voices but rather an internal dialogue that honours collective humanity; that recognises that we are all harmed when one of our body is harmed.

Ngwena's *What is Africanness?* may also be helpful in our reconceptualization. He argues for inclusive equality where differences are seen and recognised but each must respect the equality of the other. There must be a baseline standard that binds all - the glue that holds the disparate pieces of the mosaic together.[131]

The Women and Law in Southern Africa research group offers a way forward and answers the question posed in the preamble, family take away/take out scenario:

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[130] Merry S.E, Levitt P. "The Vernacularization of Women's Human Rights" In: Hopgood S, Snyder J, Vinjamuri L, eds. Human Rights Futures. Cambridge University Press; 2017:213-236.
[131] C. Ngwena, What is Africanness: Contesting nativism in culture, race and sexualities, (Pretoria, PULP, 2018)

“If we take the family as a site of power, a resources base that affects the allocation of resources, it is there that the democratisation process needs to be sited. The family has to be encouraged to respond to women’s needs, while being open to scrutiny so that if it fails to deliver, a rights formula can be imposed against it to enforce protection of women’s interests and rights.”[132]

This formulation is in keeping with both CEDAW’s General Recommendation No. 25 where it calls the ‘redistribution of power and resources” and its recommendations in its Access to Justice General Recommendation.[133]

[132] WLSA “Standing at the Cross Roads: WLSA and the Rights Dilemma. Which way do we Go?” WLSA undated, circa 1997.
[133] CEDAW GR 25 on Temporary Special Measures para. 8. This formulation borrows from Fredman (2016). It is also in keeping with CEDAW GR 33 para. 64(a).

RECOMMENDATIONS

The recommendations below mirror earlier research which should be consulted.[134]

1) Ensure justice systems are accessible, well-funded and staffed with properly trained staff.

2) When integrating marriage laws, ensure the same standards for all groups.

3) Embed equalities training in all dispute forums.

4) Simplify the language of law and processes.

5) Reinforce choice of forum especially for rural women so that they are not bound by personal status law.

6) Focus on positive examples of living law and make inclusive equality the goal.

7) Make use of new technologies but also retain the old ones, including radio, online forums, church groups, paralegals to bridge the knowledge gap.

8) For older people, use clinic visits and friendship benches[135] to give information and to talk through choices about what they should do about their property.

9) Provide simple legal rights pamphlets in languages and formats that are comprehensible to people.

10) Locate legal assistance and advice near the users and at justice entry points including police stations.

11) Tackle corruption.

12) Where informal systems continue-ensure intersectional representation including intergenerational panels.

13) Ensure equal representation of women.

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[134] International Development Law Organisation Issue Brief Navigating Complex Pathways to Justice: Women and Customary and Informal Justice Systems (2019) pp 22-23. https://www.idlo.int/sites/default/files/pdfs/publications/idlo-issue-brief-women-cij-final-web.pdf Women and Law in Southern Africa Zambia "Women and Justice: Myth or Reality in Zambia" 163-167 See further International Council on Human Rights Policy (ICHRP)When Legal Worlds Overlap: Human Rights, State and Non-State law, (ICHRP, 2009) 147-156. Provides recommendations on how to assess and use informal justice systems. See also all the UN reports on access to justice cited earlier. UN Women Measuring social norms for gender and development: Lessons and priorities UN Women 2024

[135] D. Chibanda, The Friendship Bench: How Fourteen Grandmothers Inspired a Mental Health Revolution (New World Library, 2025).

14) Engage non-state actors as equals and partners in transformative equality not as autocrats and adversaries.

15) Strengthen enforcement and implementation.