

RELEVANT POINTS FOR A CONSTRUCTIVE JUSTICE DUALISM

Key things to take into account on dualisms of traditional and modern justice

The constructive dualism is based on concepts of protection of fundamental human rights and freedoms, efficiency, effectiveness, and pragmatism.

- **Protection of fundamental Human Rights and freedoms**

Greater penalties deserve better protection to the person being judged. And this protection and due procedure is better provided in the modern court system in which the decision should be based on written and objective law and the accused party shall be accompanied by a counsellor that has a legal training.

- **Efficiency and effectiveness**

The court system is expensive and may take long time. Empower traditional justice systems instead of fighting them helps to guarantee access to justice and reduce its financial burden. That is compatible with guaranteeing the rights of the parties when the locally based traditional justice is in a position to identify grave violations of human rights and to inform of them to the formal justice system.

- **Pragmatism**

The promotion to access to speedy and fair justice system needs to be based on the availability of sources. Preaching access to justice and not being able to deliver can be considered an action-with-harm, undermining the credibility of the institutions, the state, and the Nation in front of its citizens. Hence to support and supervise existing forms of access to justice and, when possible, integrate them into an articulated offer of judgment is also a practical option.

- The best practices are those of, for instance, Rwanda and Eritrea, in which the court system incorporates traditional justice as the first instance for every jurisdiction (civil, criminal, administrative, social)
- In these cases, the limits go on the amount of the fines and other type of penalties that may be imposed. Above specific fine amount and for penalties that would require privation of liberty the cases need to transfer to the second instance (provincial court).
- In this system, each village chooses its judges, following the traditional way of choosing them. They also perform following the ancestral modus operandi
- The selected judges need minimum training on the things that they cannot deal with, leaving them to deal with any other subject apart from those excluded.
- Ideally, an officer from the ministry of justice is designated to provide backstopping to a given number of villages for continuous training and for supervising the case referral procedure.



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Alternative dispute resolution and its relation with traditional justice

Alternative Dispute Resolution Mechanisms (ADRM) have points in common with transitional justice, and it is wise to move towards empowering the traditional system to access to justice to master ADRM techniques.

The basic ADRM is negotiation. That means the direct talk between the confronted parties and the external support is only to provide such space. The second level of ADRM is mediation, which means that the negotiations incorporate a facilitator. The facilitator's role is (i) to propose a list of subjects for the talks after consulting each party involved and (ii) taking notes of the agreements and disagreements expressed in each of the themes listed and analysed in the discussions among the parties involved. The third level of ADRM is conciliation, which means that the mediator is not only facilitating the talks but also proposing solutions to the dispute to be analysed by the parties. Once the parties reach an agreement, he/she put in on writing, give a copy for the signature to each of the parties, and keep one for the registry. This document is of high value if any of the parties consider that the agreement has not been fulfilled. The primary instance of the court system can prepare the hiring based on the content of the conciliation agreement. The fourth level of ADRM is arbitration; in this case, the parties in conflict agree beforehand that they will accept and implement resolution proposed by the facilitator or facilitators. This document has a high value to start formal court proceedings by any party involved, considering that the other is not honouring the arbitral decision.

The ADRM, as the transitional justice, has its limits on the type of issues it can deal with. For the ADRM the facilitators should receive a training on: A-.how to be a good mediator, conciliator or arbiter and in B-. which topics cannot be deal in the ADRM and need to be referred to the court system.

Collective rights and traditional justice

It is relevant to point out that in many cases, indigenous communities attached to forest and nature do not have the same concept of rights that modern law has. In this vein, the protection of the individual rights of their members needs to receive the supervision and support government and judiciary authorities. And the traditional regulation of collective rights needs to be recognized and respected since it is no harm to the Rule of Law. Many cases brought to traditional justice will be on collective rights, and it will be counted cases in which their protection enters in conflict with modern law.

Restorative justice and traditional justice

Restorative justice is a form of justice related to both ADRM and traditional justice. It revolves around making the perpetrator / victimizer measure the harm that he/ she has inflicted on an individual or the community and engage him/ her in repairing the victim. The method used is mediation and is often used to deal with minor criminal offenses.

The concept of repairing the victim and having the victim heard is also included sometimes within parts of the formal court proceedings. It is a useful tool that needs to be used selectively and carefully not to expose the victim to additional harm than the one already received.



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Collection and preservation of evidence and traditional justice

One big problem of justice is provisional detention, which may include a large percentage of imprisoned people and for outrageous long time. The support of traditional justice mechanisms already presents all over the territory may include the implementation of protocols to identify, protect, collect, and refer elements prove. The identification and protection can be in the hand of the traditional systems of justice based at the community level. When that is the case, the contribution the qualified judgment based on evidence and not only in witness could be paramount.

Traditional justice and the right to appeal

The right to appeal is a cornerstone of the justice system. In the ADRM there is no right to appeal, and yet, as mentioned, the unfulfillment of the ADRM agreements can be a useful base to start judicial proceedings. Furthermore, the articulation of traditional justice and ADRM with the court system/ formal justice is a great contribution to the production of reliable judgments less likely to be applied by the parties.

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