Chapter 13

IMPROVING THE JUSTICE SECTOR: LAW AND INSTITUTION-BUILDING IN SIERRA LEONE

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13.1 Introduction

Efficient, fair and low-cost legal systems can have a variety of positive effects. The legal system regulates personal actions and economic transactions, with the aim of resolving disputes, enforcing rules of conduct, providing certainty to economic actors and 'justice' to citizens. In providing quick and cheap resolution of welfare- and productivity-reducing disputes, an effective legal system can have direct economic impacts. Any private sector or public sector initiative is ultimately subject to the rules and procedures specified by the legal system. Improving the justice sector in this way can lead not only to enhanced safety and less crime, but to efficient regulation of business activity, an environment more conducive to entrepreneurship, and overall growth.

13.1.1 Legal Institutions and Economic Development

In the macro picture, the impact of strong legal institutions on economic growth and development has been widely explored in the cross-country literature, under the popular label of 'institutions' (North 1981, 1990; La Porta *et al.* 1997, 1998, 1999; Acemoglu *et al.* 2001; Rodrik *et al.* 2004; Acemoglu and

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Johnson 2005; La Porta *et al.* 2008) or 'governance' (Kaufmann and Kraay 2002). North (1981, 1990) famously posited that the enforcement of contract law and property rights made nineteenth-century growth in England possible, spawning a range of literature. An influential paper by Acemoglu *et al.* (2001) argued that cross-country variance in growth can be explained by such property rights institutions, and showed that one standard deviation increase in protection against expropriation risk triples gross domestic product (GDP) per worker. There has been some debate about the IV techniques used in Acemoglu *et al.* (2001), however, and thus the usefulness of the results. Glaeser *et al.* (2004), for instance, argue that human capital is more crucial to growth than institutions are, and that poor countries often grow through policies implemented by dictators, only improving their institutions after periods of economic development.

Recent micro research has also explored various kinds of regulatory or institutional reform (see Pande and Udry 2006) and found positive impacts on a host of economic variables such as credit use (Castelar Pinheiro *et al.* 2001; Japelli *et al.* 2005), debt recovery (Visaria 2006), and entrepreneurship and investment (Chemin 2007). For example, Chemin (2007) uses a difference-in-difference analysis to prove that a new legal reform in Pakistan reduced the time a case spent in court, which in turn triggered an increase in entrepreneurship and influenced people to take out loans. Similarly, Visaria (2006) exploits variation in the spread of debt tribunals in India to show that tribunal establishment reduced loan repayment delinquency by 3–10%. Besley and Burgess (2004) and Field (2003) find similar impacts of labour regulations in India and land titling in Peru, respectively.

Weak legal institutions and lack of 'access to justice' disproportionately affects the poorest and most vulnerable members of society (UNCLEP 2008), who tend to have little bargaining power in the customary justice system (Kane *et al.* 2005; Sandefur and Siddiqi 2011), little knowledge of their legal rights (e.g. McLaughlin and Perdana 2010), and few resources with which to meet the high financial and social costs of accessing the formal system (e.g. Manning 2009a). For example, Deininger and Castagnini (2004) show in the case of Uganda that land conflict most severely affected female-headed households and widows. Interventions to strengthen legal institutions and improve 'access to justice' are therefore likely to have a pro-poor impact.

Finally, legal institutions also play a key role in strengthening the state structures, improving accountability, and, in a fragile state context, preventing localized grievances from evolving into mass conflict. Few examples are better than the civil war in Sierra Leone, which according to the country's Truth and Reconciliation Commission (TRC) had its roots in decades of sustained bad governance that eroded the tenets of justice and made the populace lose confidence in the justice sector's ability to resolve disputes – pushing many to take the law into their own hands. In most instances, both the formal and customary systems meted out heavy-handed and arbitrary justice (Kane *et al.* 2005; TRC 2007).

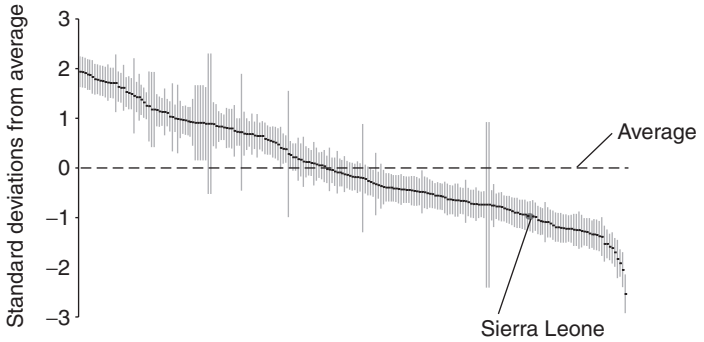

FIGURE 13.1. Global governance indicators: rule of law. *Source*: authors, using Kaufmann and Kraay (2010) Aggregate Governance Indicators data set.

13.1.2 Governance and Growth

A useful overall picture of the relationship between economic growth and governance has been provided by Kaufmann *et al.* (2002, 2004, 2010a,b), who find robust positive relationships between good governance and per capita income for a sample of 175 countries. They develop perceptions-based indices for each of six governance 'clusters': voice and accountability, political stability, government effectiveness, regulatory quality, rule of law, and control of corruption. The last two are most relevant to the discussion here. The rule of law cluster includes indicators for predictability of the judiciary, the enforceability of contracts, and perceptions of the rate of violent and non-violent crime, all of which can measure success in providing a fair and just environment for economic interactions to occur. The control of corruption cluster includes indicators for political or elite corruption, having to pay bribes to complete tasks, and the ease of conducting above-board business. Kaufmann and Kraay focus on presenting correlations, but stop short of making causal inferences. However, others have since used their measures to establish the causal relationship between governance and growth. For example, Rodrik *et al.* (2004) use the 2000/01 rule of law index developed by Kaufmann *et al.* (2002) to show that a one standard deviation increase in rule of law doubles per-capita GDP, controlling for distance from the equator.

The data from Kaufmann *et al.* has important implications for a country like Sierra Leone. Sierra Leone falls nearly one standard deviation below the average in both rule of law and control of corruption (Figures 13.1 and 13.2), ranking 17th from the bottom in rule of law (at 176) and 16th from the bottom in control of corruption (at 177). Ghana and Uganda, two countries whose justice sectors are commonly compared to Sierra Leone, both rank well ahead in the rule of law cluster at 103 and 130, with Liberia a few ranks behind Sierra Leone at 183. In the corruption cluster, Sierra Leone ranks last of the four at 177, behind Uganda at 166, Liberia at 139 and Ghana at 86 (Kaufmann and Kraay 2010).

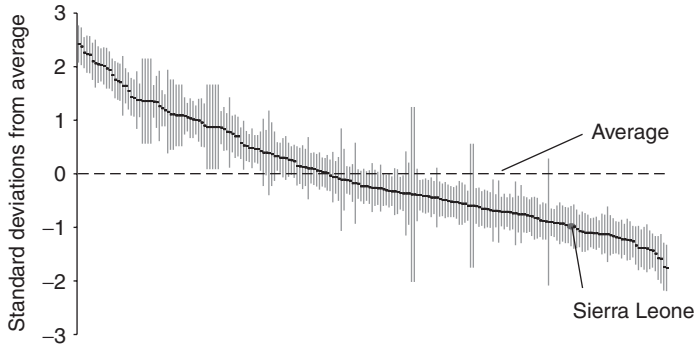

FIGURE 13.2. Global governance indicators: control of corruption. *Source*: authors, using Kaufmann and Kraay (2010) Aggregate Governance Indicators data set.

Weak legal institutions contributed to Sierra Leone's war (TRC 2007). Conversely, while conflict had a profound impact on all sectors in Sierra Leone, the justice sector was particularly affected. Crime incidence rose dramatically as courthouses and police stations were destroyed. In a 2005 national household survey conducted by the Institutional Reform and Capacity Building Project (IRCBP) and Statistics Sierra Leone (SSL), 68% of respondents said that someone in their community had died during the war, and 47% that community members had been injured (Bellows and Miguel 2006). Sierra Leone is now far safer and more stable than it was before, but the country still suffers from crushing poverty, with US$367 GDP per capita in 2010 and a 2010 ranking of 158 on the Human Development Index (IMF 2010; UNDP 2010). Still a post-conflict nation only a decade out of civil war and one of the poorest countries in the world, Sierra Leone's justice sector is grossly under-resourced and operates on a limited capacity.

Sierra Leone has a dualistic legal structure, incorporating both a formal system rooted in British common law and a customary system based on traditional or customary law into its justice sector. In practice, the formal system remains difficult to access, slow to respond and alien to most Sierra Leoneans, while the customary system is autocratic, somewhat arbitrary, and generally biased towards males, elders and local elites (Kane *et al.* 2005; Dale 2007; Manning 2009a,b).

This chapter will focus on both the formal and customary legal systems. We argue that justice sector reform is most effective if reforms are implemented in both systems, rather than prioritizing the formal over the customary as is the case today. We do not imply that either the formal or the customary system is 'better', 'more efficient', or 'more just' than the other, but rather that the two systems together serve the populace and require equal attention so that they form an effective complement to each other. Further, we argue that development initiatives – projects in any sector, such as health, education, or infrastructure – which respect the customary system will receive more

buy-in from local leaders, whose influence would curry favour for such projects amongst their communities. This makes the projects' ultimate goals easier to achieve.

We also highlight issues specific to each system, and argue that policies to promote growth and development should target these specific issues, the most prominent of which are delays, corruption and poor implementation in the formal system; and capture, corruption, and inconsistency in the customary. We identify policy measures to tackle each issue: training of officials, development of monitoring systems, amendments to inappropriate laws and procedures, and broad-based civic education programmes that communicate legal information to the public.

Section 13.2 begins with a history of Sierra Leone's dualistic legal sector and the present state of the formal and customary systems. Section 13.3 then goes into further detail about the structural and situational inefficiencies in each system and how they inhibit social and economic development. Finally, we discuss policy recommendations and how to achieve complementarity between the two systems, arguing in Section 13.4 that complementarity will help maximize the justice sector's positive effect on Sierra Leone's growth and social progress. Section 13.5 concludes.

13.2 Context: Justice in Sierra Leone

13.2.1 Overview

Sierra Leone is divided into 13 districts. The Western Area, one of the 13, includes the capital, Freetown, and the rural areas around Freetown. The other 12 are predominantly rural. The 13 districts are subdivided into 149 chiefdoms administered by local government. Paramount Chiefs are in charge of each chiefdom, while town or village chiefs are in charge of individual towns and villages. Section chiefs sometimes preside over small groups of villages.

Sierra Leone's dualistic legal structure is split between a formal legal system overseen by the judiciary arm of government and a customary system supervised by the Ministry of Local Government under the executive branch. The formal system has sole jurisdiction in Freetown and, in the Provinces, must be used for serious crimes punishable by lengthy jail terms or monetary disputes involving large sums of money. As a result, most business disputes – such as conflicts over large pieces of land, labour cases, adjudications involving diamond and other natural resource companies – are generally handled in the formal system as civil cases. This system is overseen by magistrates and judges, and cases are argued by lawyers trained in regular law schools. Criminal cases are governed by the Criminal Procedures Act of 1965.

The customary system is split into two types of general forums. The first, local courts, are a mix between the formal and customary; while they follow

customary laws, their setup and process mimics a magistrate's court in many ways. Local courts are run by local court chairmen, clerks, and chiefdom police. They are responsible for minor disputes such as marriages, divorces, hostile verbal exchanges, land, debt, and minor altercations. They can handle criminal disputes whose punishments are less than 6 months in jail or Le 250,000 (approximately US$50) in fines (now Le 50,000 after the passing of a new bill). Lawyers do not participate in the local court process, only court chairmen who hear cases and render judgements using customary law. Dissatisfied disputants can appeal their cases to a District Appeals Court or the Customary Law Officer, whose job it is to oversee local courts and act as a forum for judicial review. After a recent amendment to the Local Courts Act of 1963, the legislation which originally legalized local courts as a forum for dispute resolution, the Chief Justice will now appoint the chairmen.

The second type of forum in the customary system comprises a large range of actors who mediate and adjudicate cases. These include village chiefs, section chiefs and respected elders. Under the Local Courts Act (LCA) of 1963, they cannot advertise themselves as a court, and their decisions are not legally binding, but they can hear cases if the disputants voluntarily present them for intercession (GoSL 1963). Such cases might include family matters, domestic violence, debts, neighbourly disputes, or the minor thefts of crops or small animals. Dissatisfied disputants might then approach the local courts. Chiefs and elders come into their roles in a variety of ways – either by influence through secret societies, election, lineage, or respect for certain knowledge about tradition.

13.2.2 Origins

The foundation of Sierra Leone's current dual legal system was laid in 1896, when the colonial British government signed the Protectorate Declaration with local chiefs in what is now known as the Provinces. The 1896 Proclamation was the first attempt to unify the territory that is now Sierra Leone. Legal dualism had existed informally before 1896, but the Proclamation formalized the structure, leading to the official division of the justice system into two parts: a formal system instituting mostly British common law and statutes, and a customary system based on traditional law and courts run by paramount chiefs. The former was effective in the 'colony' – covering present-day Freetown and its rural environs, called the Western Area. The latter was used outside the 'colony', among locals in the Protectorate (now Sierra Leone's Provinces). As they traditionally had, chiefs continued to wield political, judicial, and legislative authority over their people. However, chiefs were no longer held accountable by their subjects, but rather by the British, who would increase or reduce a chief's territory 'in a bid to reward loyal chiefs and punish recalcitrant ones' (Koroma 2011). Chiefs were able to become more authoritarian and even rule for life (Abraham 1978).

13.2.3 Independence

After independence, the new government of Sierra Leone continued using British common law and statutory law, as the colonial government had. In 1963, two years after independence, the Local Courts Act of 1963 was passed, governing customary law in the Provinces. The LCA repealed the paramount chiefs' courts, now mandating that a paramount chief nominate a local court chairman to oversee the local courts. While the authority of village and section chiefs were not recognized by the government as legally binding, chiefs continued to adjudicate cases in their communities, as they had before colonialism and as they continue to do today. Similar systems exist in other African countries formerly ruled by the British, such as Ghana, Uganda, Kenya, and Zimbabwe.

13.2.4 Civil War

During the nation's civil war from 1991 to 2002, the rule of law in Sierra Leone crumbled, with the formal system almost ceasing to function (TRC 2007). Law enforcement personnel were targeted by rebel groups; over 900 members of the Sierra Leone police (SLP) were murdered during the war, 300 in the invasion of Freetown alone (Baker 2005). Though rural Sierra Leoneans had never relied on the formal system, now the customary system became even more important in dispensing with disputes. As a large percentage of the rural population became displaced or uprooted due to fighting, traditional justice in the Provinces also fell apart, leaving Sierra Leone without any kind of coherent justice system.

13.2.5 International Justice and the Special Court

Following the cessation of hostilities and the advent of peace, Sierra Leone, with the help of the international community, created two judicial bodies designed to process acts of atrocity committed during the conflict. The Truth and Reconciliation Commission (TRC), which had no authority to prosecute perpetrators, travelled to 12 districts in Sierra Leone hearing the testimonials of both victims and perpetrators and encouraging fractured communities to come together once more as a way of understanding the causes of the conflict, consolidating peace, and fostering democratic governance. The Special Court, a hybrid international court jointly set up by Sierra Leone and the United Nations (UN), indicted 13 men it deemed most responsible for the prolonged violence, including former Liberian President Charles Taylor, spending millions of dollars in the process. Both bodies were important in fighting impunity, symbolically restoring the rule of law to Sierra Leone, and bestowing a sense of closure to many citizens. However, it is beyond the capacity of both institutions to have any significant impact on the domestic justice sector. Yet, over US$22 million, not including defence attorneys, translators, investigations, or detention halls, was budgeted for the first operational year of the Special Court (Scharf 2000). By 2012, it had spent US$175 million on the trials in Freetown and US$250 million

on Charles Taylor's trial (Waugh 2012; Special Court 2012), while the Ministry of Finance only spends US$8–10 million each year on the police, prisons, and courts combined (MoFED 2011). While the TRC and Special Court has featured prominently in international media and policy discourse, the domestic justice sector, far more relevant to the life of the average Sierra Leonean, is rarely discussed, although some effort has been made by organizations such as the UK Department for International Development (DFID), the United Nations Development Programme (UNDP), and the Open Society Justice Initiative (OSJI) to support justice sector reform.

13.2.6 The TRC Report

One important legacy of the TRC was a report that highlighted deficiencies such as bad governance, an unfair justice system, and gross human rights violations in the prewar government, grievances commonly cited as the reason for the anger and disillusionment that drove Sierra Leoneans to violence. As part of the report, the TRC also listed key policy concerns for the now post-conflict nation. The TRC suggested drastic improvements in the justice sector, as corruption and injustice were cited as underlying causes for the war (TRC 2007). Since the advent of peace, the democratically elected government in Sierra Leone, with strong support from international donors, has strived to strengthen the rule of law by expanding the reach of the formal legal system and promulgating progressive new legislation. Partly as a result of the TRC's recommendations, vast resources were poured into the formal system by DFID, the UNDP, the World Bank, the International Rescue Committee (IRC), and other international organizations in an effort to create a more efficient, just, accessible, and accountable judicial system.

13.2.7 Recent Developments

In recent years, policymakers in the justice sector have been experimenting with a range of policy interventions designed to improve service delivery. The police service has been revamped – trained in crowd control, human rights, arrest procedure, and largely stripped of any weapons. Courthouses destroyed during the war were rebuilt. To increase access to the formal system for rural Sierra Leoneans, many up-country magistrates were made mobile, travelling to multiple towns to hear cases rather than sitting permanently in only one central location. In some areas, witness support funds facilitate witness appearances at trials. Special procedural rules were created for vulnerable groups, including juveniles. To disperse power, the World Bank pushed a decentralization initiative which gave authority to district and chiefdom governments. The country's first Anti-Corruption Commission was created in 2000, and in 2008, was granted the power to prosecute without prior approval from the Attorney General.

But still, the pace of reform since the end of the war has been slow, especially for areas of the justice sector not directly related to security. This can be attributed to the ollowing.

Urgency

After the war, the government, the international community, and Sierra Leoneans themselves largely focused on urgent issues of security and resettlement. People's primary concerns were for their personal safety and food security, and justice reform was a secondary, if not tertiary, goal. Now that Sierra Leone has enjoyed peace and stability for a number of years, there is a greater push for justice sector reform, especially given how institutional failure in the past had helped lead to war.

But though the pace of reform is faster now and the country's priority has reorientated more toward development rather than immediate conflict recovery and prevention, there is still a greater focus on topics such as roads, schools, health, and drug trafficking. While some reforms receive international support and other proposed laws are dealt with in a timely manner because they have economic implications, swift legal reform is generally not considered imperative to the immediate needs of the nation. The Ministry of Finance awards the justice sector – including police, prisons, and courts – well below 1% of its annual budget, with one employee stating that justice was far from one of the ministry's top priorities (MoFED 2011). In comparison, the world average from 1988 to 2000 for policing alone was almost 1%, with Malawi spending about 1.1% and South Africa 1.9% (Shaw *et al.* 2003). Sierra Leone's former colonial power, the United Kingdom, allocates about 5% of public spending to its justice sector each year (NGRF 2010).

Pressure

Without domestic or international political pressure, bills can take years to pass into law. Of bills that have been pushed into law relatively quickly in recent years, most, if not all, of them have been pushed through parliament by an outside influence. The creation of the Anti-Corruption Commission was aided by DFID and supported heavily by the then-president; an anti-trafficking bill was strongly supported by the United States; the creation of the Special Court and a child rights bill was supported by the United Nations; and after cocaine consignments were discovered in 2009 there was huge international interest in the passing of a drug bill. Other laws such as gender bills and the registration of customary marriage also had a great amount of international support.

While justice sector reform is certainly supported by international organizations – the Justice Sector Development Programme (JSDP), the UNDP – as well as domestic organizations such as Timap for Justice, the same political pressure does not exist as it does for human trafficking or drugs. While the active participation of these organizations likely abets the speed at which reforms

are passed, more international pressure and domestic interest, especially from parliamentarians, would probably achieve faster results.

Capacity

Sierra Leone is still a post-conflict state. Given that most institutions were destroyed during the war, Sierra Leone has had to build capacity and recreate structures that allow processes to move smoothly. This means allowing for missteps and time to work out the most efficient ways of doing things. There are a series of steps involved in passing a law through parliament. The bill needs to be drafted, made into a cabinet paper, and then passed through a parliamentary committee. This requires manpower. Currently there is a shortage of draftsmen in the Ministry of Justice, and a slew of people are required to create the cabinet paper. Once the law is passed, it requires further manpower to broadcast the changes in law around the country, to train officials, and to ensure the law is being followed.

Moreover, many of those in government do not have the desire to focus on the justice sector either because they have no background in it, they consider it of secondary importance, they have not been briefed on its importance, or they have political or economic interests in not passing reforms. For instance, the Ministry of Local Government stood to lose a lot in the recent passing of a new Local Courts Bill, which considerably reduced its authority over the local courts.

13.3 Structural Deficiencies in Formal and Customary Justice

13.3.1 The Formal System

Figure 13.3 is a simple representation of the causes, outcomes, and effects of problems in the formal justice sector. The middle column, 'Outcomes', lists the main types of issues found in the formal system: delays, corruption, and poor implementation of laws, procedures, and public services. The column on the right, 'Effects', lists the social, political and economic effects of these problems. The column on the left, 'Causes', lists the causes of the outcomes in the middle column. Policies targeted at the issues listed in the 'Causes' column would have a domino effect, reducing the negative effects listed in the 'Effects' column by improving 'Outcomes'. For instance, a new policy addressing inadequate monitoring of officials, a 'Cause', could reduce corruption, an 'Outcome', and therefore reduce money wasted by individuals utilizing the formal system, an 'Effect'.

The flowchart is broadly representative of negative aspects of the formal system, namely, that it is slow, rigid, expensive, at times outdated, and difficult to access for most citizens, especially the rural poor – all concerns the customary system purports to address. At the same time the formal sector provides a set

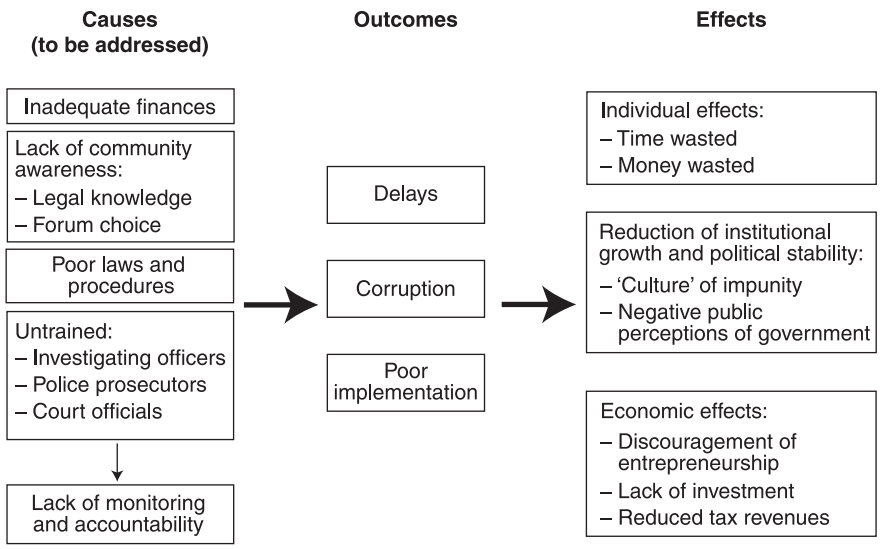

FIGURE 13.3. Causes, outcomes and effects of problems in the formal justice sector. *Source*: authors.

of written procedures to follow which, if they were created and implemented properly, could form the base for a justice system that equalizes each individual regardless of gender, age, or status. The following section illustrates how to ameliorate the problems in the formal justice system by describing in detail the middle and right columns of the flowchart and then suggesting policy changes based on the left column.

Delays

One of the principal problems facing the formal justice system is the excessive delays that occur in case processing. Delays in case processing occur both at police stations and in courts, but court delays tend to be more extensive and ubiquitous. They also have larger ramifications for involved parties and the efficiency of the system as a whole.

Delays in the police. When a person is arrested, by law he or she can only be held for 3 days for minor crimes and 10 days for major crimes before being officially charged and sent to court. In the police, this '3–10 day rule' is often ignored for a variety of reasons:

1. court delays or weekends, during which the courts do not sit;
2. cautionary reasons such as a concern for public safety, evidentiary integrity, or to wait for the completion of a police investigation;
3. petty extortion.

TABLE 13.1. Detention times.

	Non-felonious		Felonious	
Days	Number	%	Number	%
0–3	2,728	77	—	—
3–10	814	23	1,130	99
+10	20	1	16	1
Total	3,562	—	1,146	—

Source: CSAE 2010b. The first column presents detention times, while the remaining columns present the number of interview respondents falling into each category of crime.

Twenty-four percent of people arrested for non-felonious crimes are kept longer than the 3-day rule, as shown in Table 13.1, taken from a Centre for the Study of African Economies (CSAE) 2010 survey (CSAE 2010b). The survey involved a two-month daily roll call in 18 up-country police stations, during which researchers tracked the time each detainee spent in police detention.

Case overload in courts. Due to a lack of finances for building new courthouses and for salaries for new magistrates and judges, magistrates' courts only sit permanently in some major towns. In the rest of Sierra Leone's 12 districts, the magistrates' courts are circuit courts, meaning they are mobile and travel from a central town – usually a provincial or district headquarter – to smaller surrounding towns which do not have their own courts. The High Court is also a circuit court. These trips rarely go according to a schedule due to logistical constraints.

Because civil matters, business disputes, minor criminal matters and High Court referrals for major crimes are heard in magistrate's courts, there is an overload of cases in both sitting and circuit courts. Even one day's delay can create a backlog of cases that continues for months. The High Court, which hears major crimes, is also overburdened, as it is a circuit court. When logistical problems with circuit courts are combined with already busy case schedules, the case overload problem is exacerbated. Any delay in one town visited by a circuit court can cause delays in the next town, which in turn causes a delay in the next.

Adjournments. Another key reason for case delay is the high frequency of adjournments due to the unavailability of witnesses, lawyers or prosecutors being absent, the accused or the complainant failing to appear, magistrates arbitrarily refusing to hear a case, or incorrect charges levied by the police.

More often than not, magistrates adjourn such incomplete cases rather than dismiss them. In a CSAE court survey conducted from August to October 2010 in 10 up-country magistrates' courts, 89% of criminal cases were adjourned for the reasons listed in Table 13.2. Importantly, these statistics are only for criminal cases – a number of civil cases were heard or adjourned as well, for which survey data is not available.

TABLE 13.2. Reasons for court cases being adjourned, August–October 2012.

Primary reason	Adjournments	
	Number	%
Accused absent	506	11
Complainant absent	632	14
Complainant dropped	2	0
Insufficient evidence	307	7
Judgement given	19	0
Magistrate refuses case	315	7
Prosecution absent	23	1
Representation absent	52	1
Too many previous adjournments	10	0
Witness absent, exhibit absent	1,512	33
Other	1,174	26
Total	4,553	

Source: CSAE 2010a; Sandefur *et al.* 2011b.

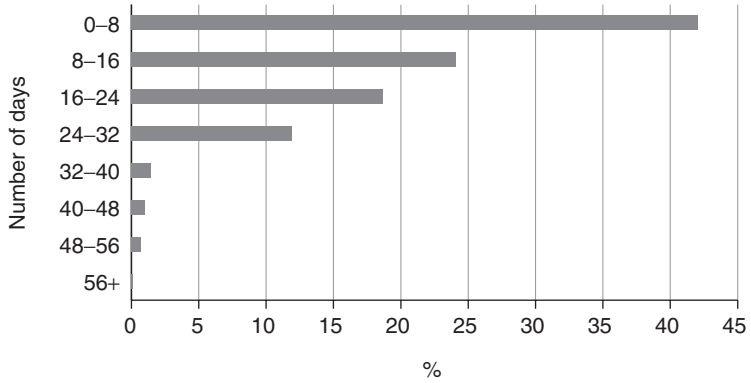

FIGURE 13.4. Days between adjournments.
Source: CSAE 2010a; Sandefur *et al.* 2011b.

While many cases are heard again within a week, Figure 13.4 indicates that, for the majority of cases, more than eight days go by before a case is called again.

A CSAE survey of prisoners in six up-country prisons showed that 6.7% of the total sample of 890 inmates on remand had had more than eleven adjournments (Figure 13.5). Given the average number of days between adjournments of 13.5, taken from Figure 13.4, such remand inmates can be in prison for months awaiting a decision for even minor crimes such as petty theft or loitering. Civil cases can also take months to be resolved, although the rate of adjournment is likely lower due to a more lenient burden of proof.

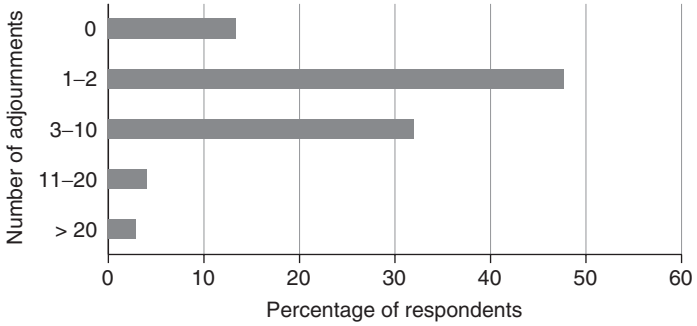

FIGURE 13.5. Court adjournments. *Source*: CSAE 2010a; Sandefur *et al.* 2011b.

TABLE 13.3. Bribes paid to police.

	Percentage who paid a bribe	Amount range	Average	Observations
Complainant	36	10,000–85,000	21,736	957
Detainee (in cells)	62	2,000–6,000,000	28,667	3,349

Source: CSAE 2010b,d. *Note*: Le 4,000 = US$1.

Corruption

Police. Corruption is rampant within the formal system, especially simple bribe-seeking by police and court officials. As shown in Table 13.3, CSAE surveys indicate that 62% of those in police detention in 18 sampled sites across Sierra Leone had to pay a bribe to the police, ranging from Le 2,000 (US$0.50) to Le 6,000,000 (US$1,500). Moreover, these figures are likely an underestimate due to fears of reporting corruption. The bribes were for many reasons: favourable statement-taking, food, contacting family members or sureties, bail, or even release. The CSAE survey evidence suggests that complainants, too, must pay money to the police when they report a case, with 36% of respondents reporting bribes paid in the range of Le 10,000 (US$2.50) to Le 85,000 (US$21.25).

Researchers at CSAE also note several instances where a person has been arrested and threatened with detention or being charged to court regardless of whether that person has committed a crime. In these cases, the written reason for arrest is most often 'loitering' or some sort of traffic offence. While there is no clear evidence that such charges are fabricated, the low burden of proof required for arrest and detention for such 'minor' crimes allows for an arbitrary and selective application of the law, with bribe-seeking as an obvious objective.

Courts. CSAE qualitative interviews of police, prison, and court officials revealed that court clerks often accept bribes to move a person's case to the top of a magistrate's daily case list, and can even prevent a case from being

heard until a kind of ransom has been paid. The Anti-Corruption Commission has recently prosecuted a magistrate on charges of corruption, and a small number of judges have been suspended pending an investigation into alleged corrupt activities.

Poor Implementation

Capacity. Many investigating officers do not fully understand evidentiary burdens or how to assign an official charge to a case. Cases are sometimes charged to court with little evidence to back them up. In other examples, cases are charged to court with the wrong charge attached to them, which makes them difficult to prosecute. Both instances take up valuable time in a magistrate's court. Police prosecutors, who are generally not lawyers but who prosecute cases for the state in court, also end up delaying cases by being unprepared, not ensuring the appearance of witnesses or complainants, or by not understanding which cases should be pressed for prosecution and which should just be dropped. These misunderstandings are exacerbated by poor communication between police prosecutors and the Director of Public Prosecutions Office (DPP), which oversees prosecutions around the country.

Lost in the system. Few Sierra Leoneans know their basic rights under the Constitution or the Criminal Procedures Act (CPA) of 1965, much less the intricacies of sureties, bail, and pre-trial detention. Sixty-five percent of detainees from a 2009 CSAE Detainee Survey said they did not know how long they could be held before being charged to court, while 40% did not know if their charge was bailable (CSAE 2009a). In a 2010 Public Perception Survey on Bail, 75% of respondents either did not know what bail was or could not correctly describe nor understand it (JSCO 2010a).

Only 10.2% of detainees surveyed by CSAE from August–December 2009 stated that they even spoke and understood English – vital to those without lawyers since most proceedings in the formal system are conducted in English, from witness statements to court hearings (CSAE 2009a). This leaves the proper and just implementation of the law to officials, making it easy for such officials to take advantage of arrestees, or simply to ignore their rights if they are not explicitly demanded.

13.3.2 Effects

Individual

These delays in case processing have several ramifications on the time and personal resources wasted by individual parties involved in a criminal or civil dispute. Because of excessive court adjournments, detainees accused of minor crimes can be held on remand for several months, in some instances longer than their sentence would have been if they had been tried immediately. Detainees

tend to be poor, so withstanding the opportunity cost of lost income due to excessive jail time is difficult.

Complainants and witnesses also face an opportunity cost of lost income for repeatedly coming to court without resolving a case, as well as the transport costs associated with travel. Complainants are often asked to pay to have their cases investigated. The overall cost of taking a case to the formal system is thus often prohibitively high, causing some victims not to report crimes.

Finally, the formal system is stacked against poor defendants. Although a police prosecutor is assigned to almost every case, defendants are not entitled to lawyers unless they can pay for one themselves, which most cannot. Without adequate representation to build and fight a case for them, most defendants end up being convicted, although most cases that come before a magistrate are adjourned. Out of 4,625 cases in the CSAE court survey, 4,188 were adjourned for another court date. Of those that were not adjourned, 137 cases were dismissed and 3 defendants were acquitted. In total, 297 defendants, or 68% of the total, were convicted. Of cases that were not dismissed and were ultimately adjudicated, the conviction rate was between 98–100% for all 6 sites (CSAE 2010a; Sandefur *et al.* 2011b).

Institutional Growth and Political Stability

Corruption and impunity. Petty corruption affects people on a personal economic level, but there are larger ramifications. When people know interacting with the police costs money, they are less likely to report crimes, even serious ones, to the police, and more likely to report them to local authorities, or not at all. Tankebe (2010) finds that vicarious experiences of police corruption in Ghana affect a person's assessment of procedural effectiveness and trustworthiness.

Constant bribery tilts the system toward those with money, or at least toward those willing to pay, further eroding public confidence in the police and formal courts. Perhaps more seriously, it also creates a 'culture of impunity' (Azfar 2006), where corruption can become an accepted, even desired, alternative to adhering to the law. Countless interactions between the citizenry and the police that an outsider may see as corruption are to an insider normal or even welcome as opposed to harsh legal fines for minor violations such as traffic offences. A 2010 National Public Perception on Corruption Survey found that though 70.8% of people found corruption and bribery to be a 'serious offence', 10.3% found it to be only a 'minor offence', 6.4% to be 'no offence', and 10.5% that bribery was an 'acceptable way of life' (JSCO 2010b). If a significant portion of the public do not see petty bribery as a serious problem, then it is unlikely corrupt officials will ever be punished.

Trust. As displayed in Table 13.4 (taken from the 2007 IRCBP National Public Services (NPS) survey data set), the percentage of people who said they 'trusted' chiefdom officials, central government officials, police, local court officials, or magistrate court officials was all below 50% (IRCBP 2007). But respondents

TABLE 13.4. Trust in various groups over time.

Group	Percentage of respondents trusting 2007	2008
Justice sector officials		
Police	36	38
Local court officials	41	***45***
Magistrate court officials	34	***37***
Other groups		
People from own community	75	74
People from outside community	36	38
Chiefdom officials	47	***51***
Local councillors	33	***49***
Central government officials	42	45
NGOs/donor projects	57	59

Source: IRCBP 2008. *Note*: figures in italics indicate significant changes since 2007.

tended to trust customary bodies more than formal bodies, specifically chiefdom officials more than central government officials ($t = 8.04$), and local court officials more than magistrate court officials ($t = 13.1$).

By the 2008 NPS survey, the numbers had somewhat changed. Figures for the police, central government officials, and NGOs increased, but only increases for local court officials, magistrate court officials, local councillors, and chiefdom officials were statistically significant.

In a country still rebuilding from a war brought about by a failure of central government, trust in formal government officials and systems is important for maintaining stability, increasing citizen involvement, collecting taxes, and delivering public services effectively. Subpar justice provision can erode trust in the government's ability to deliver in any sector, including health, education, and finance.

Business, Investment, and Tax Revenue

Negative public perceptions of the formal system also have consequences for business. With judicial slowness, the security of property rights is threatened, loan possibilities are reduced, and law and order situations threaten productivity. Chemin (2007) found that 875 civil and criminal judges in Pakistan were able to adjudicate 25% more cases due to a new reform, resulting in legal conditions conducive to business. The reform led people to uphold their contracts more often, eased access to finance, expanded rental markets, and fostered incentives for investment. When entrepreneurs believe legal issues with their businesses will be resolved quickly and fairly, they are more likely

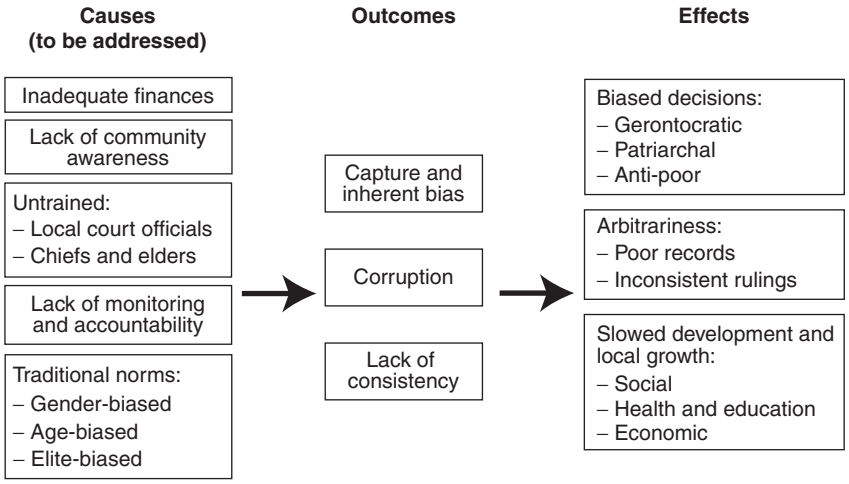

FIGURE 13.6. Causes, outcomes and effects of problems in the customary system. *Source*: authors.

to take the risk of launching a business. Chemin found that the proportion of people attempting to buy land, machinery, or other capital and applying for business permits almost tripled due to the reform. This led to a one-third increase in the number of people who went from unemployed to self-employed or employed to self-employed.

Such findings have implications for Sierra Leone, where civil and business matters can last for months with no results, or are resolved through corrupt means. Bayley (2006) finds that a legal institution's ability to control corruption can trigger higher confidence in the police or the courts. Higher confidence means a greater willingness to interact with those institutions on a daily basis, and, by extension, a greater willingness to take on the legal risks of business.

An inefficient formal legal system also has consequences for tax revenue. Business owners who know they can avoid paying hefty taxes through corrupt means without being held accountable in court have the incentive to do so, affecting the central government's ability to deliver public services. For that reason, many businesses resisted the introduction of the 2010 Goods and Services Tax, which makes it easier to pursue businesses that evade tax.

13.3.3 The Customary System

The flowchart on the customary system (see Figure 13.6) is similar in structure to the flowchart based on the formal system. The middle column displays the three main problems, or 'outcomes', in the customary system: capture, corruption, and lack of consistency. The right column represents the negative impact of the problems, while the left lists the causes and policy targets.

The flowchart is only illustrative of problems, and does not list the positive aspects of the customary system, such as that it is cheaper because of a lack of

lawyers and other expenses, easier to access because it is local, less intimidating, and everything is conducted in the the language of the immediate area (Kane *et al.* 2005; Zombo 2006). Despite being based in tradition, customary law can actually be more modern and flexible, since its interpretation tends to evolve with the community's norms and beliefs as well as current economic circumstances, while statutory laws tend to evolve slowly and to be rigidly applied. For instance, some colonial laws created in 1677 are still in effect today in Sierra Leone (Kane *et al.* 2005).

But this ability to adapt and evolve is also one of the customary system's greatest weaknesses, as it leads to uncertainty, elite capture, and a certain arbitrariness when it comes to case decisions. The following section describes the flowchart on the customary system in detail in much the same way as the previous section on the formal system.

Capture and Inherent Bias

Elitism. Due to traditional customs, chiefs and elders are seen as the most respected individuals in small communities. The orders and edicts of chiefs are rarely questioned, and in this hierarchical atmosphere nepotism and favouritism are common. Maru (2006) describes a case in which a man was fined an exorbitant amount of money for trivial reasons such as 'speaking out of turn' and his case thrown out because he was bringing his case against relatives of the paramount chief. Local court chairmen are also subject to direct political pressure by the Paramount Chief, who has the power to recommend them for appointment.

Neither customary officials nor local court chairmen can be held legally responsible for decisions rendered during their tenure. Moreover, local courts hear local cases, so it is likely that the chairman, elder, or other staff have close ties to the community, which can bias them in cases where friends, family, or influential persons are involved. Without connections, money, or both, it can be difficult to win a case if the adjudicating chief, elder, or local court chairman is not fair. Since most people do not have knowledge of avenues for appeal, the word of a local court official, elder, or chief is often final.

Women and youth. Customary law in Sierra Leone is often interpreted through the lens of traditions characterized by ageism and patriarchy (Kane *et al.* 2005; Manning 2009a,b). People become more respected the older they become, and men are more respected than women. In many areas it is accepted that men beat their wives, that women can only inherit property if they marry a relative of their deceased husband, or that special favour should be given to the party who is older (Kane *et al.* 2005). Manning (2009a,b) writes that the power balance is shifting, albeit slowly.

Corruption

Local court officials (chairmen, clerks, chiefdom police, and bailiffs) are currently being paid from the chiefdom administration coffers, not on a monthly

basis but upon availability of funds, leaving them either to work as volunteers or raise their own funds. The local courts thus often rely on revenue generation from fines or informal taxation to survive. Likewise, village and section chiefs who take on cases receive nothing from the government since they are not officially recognized, leaving them to work as volunteers or raise their own funds through donations. Since both groups have complete power over the cases they adjudicate, they often end up illegally levying fines for purposes of revenue generation or personal enrichment.

Local court clerks are also involved in corrupt activities. Since clerks in the local courts are in charge of case intake the same way clerks in the formal system are, this can incentivize them to solicit bribes from accusers or defendants. Their added advantage is that most clerks can read and write, while many chairmen cannot, giving them complete control of record-keeping.

Lack of Consistency

Law. Part of what enables customary law to be more flexible and to evolve is because it is unwritten, varies from locality to locality, and is open to interpretation by the adjudicating official. But this flexibility has negative aspects to it. Customary officials have generally only been trained in formal law on an irregular basis, and they have no obligation to set down their own laws in writing or even their own interpretations of existing laws. Thus their opinions can change from case to case, leaving community members uncertain about various issues. Unless the chairman makes a concerted effort to be consistent, any known legal precedent is not necessarily followed and often not recorded. Village and section chiefs, especially since they are not recognized as official adjudicators, are likewise not bound to previous decisions.

Consistency. The tenure of a local court chairman is three years, so he or she is always new and rarely receives training. With no training in mediation and adjudication and no explanation of the Local Courts Act, the chairman rarely knows how to sentence effectively, consistently, and fairly. Village and section chiefs, not recognized by the government, receive no training unless it is through an NGO programme.

Poor record-keeping adds to the inconsistency. Since records are not properly kept – a 2007 Local Courts Records Analysis Survey called them 'incomplete, untidy, illegible, disorderly and above all not dated' – a chairman cannot be held to previous decisions made on similar matters (Koroma 2007).

13.3.4 Effects

Biased Decisions

Because of elite capture, gerontocracy, and patriarchy, decisions rendered in the customary system are often biased toward the rich, the old, and men (Kane *et al.* 2005). Since most people in Sierra Leone use the customary system

and do not have easy access to formal courts, this means that effectively the only outlet for women, youth, and the very poor to access just judgements is fundamentally biased against them. Such decisions alienate youth, fail to narrow the opportunity gap between rich and poor, and reinforce gender imbalances.

The effect of such biased decisions is perhaps the greatest on gender relations. While men are generally favoured, Kane *et al.* (2005) write that this is especially the case with marital disputes – disputes over property, beatings, or other domestic problems – in an attempt to save a man from 'losing face'. Since the authority of customary leaders is generally undisputed, constant public reinforcement of the dominance of men over women hinders social development initiatives seeking to empower women.

Arbitrariness

Since customary law is unwritten and legal precedent is rare, the law that is applied to each individual case can be borderline arbitrary. Since each case is at the discretion of the court chairman or other traditional leader, law can technically change day to day, week to week, or month to month, making it difficult to abide by. Without published records, it is difficult to keep chairmen accountable for their decisions, which helps reinforce their power and their ability to play favourites during mediations and adjudications.

Moreover, since there is no written law there are also no set fines for each offence, which is again left up to the court chairman or to the adjudicating leader, who can fine accusers and defendants at will. As described in Maru (2006), this can be used as a weapon against a disfavoured disputant, or as a method of personal enrichment. This erodes a community's trust in its leaders as people lose confidence in their leaders' ability to deliver a judgement fairly. It is also an easy way for policymakers who prefer the formal system to discredit the customary system as arbitrary and inconsistent.

Impact on Development Initiatives

Because customary leaders and chiefs exert a great deal of influence over their communities, they can greatly aid or diminish the impact of local development initiatives. As described at the beginning of this chapter, no local project will be successful without buy-in from local and Paramount Chiefs. Their actions can harm social initiatives by reinforcing gender stereotypes. Their biased decisions can reinforce individuals' perceptions of the elite as special or privileged, or leadership as corrupt and unfair. Allowing such bias and inconsistency creates a culture of impunity and favouritism, two characteristics post-conflict countries seek to avoid. Such an atmosphere makes potential entrepreneurs and investors hesitant to work closely with customary officials, to the economic detriment of labourers from the community. Development projects are often hindered by 'gift-giving' to traditional leaders, or hampered by leaders who do not seek

to punish those guilty of corruption, who may feel their power threatened by certain projects, or who view some programmes as going against traditional norms. To maintain good relations with local elites, chiefs can allocate jobs or resources based on convenience rather than merit, similar to the way in which cases are often adjudicated.

13.3.5 System-Specific Policy Recommendations

This section outlines several 'micro-policies' that, if implemented, would aid in reforming Sierra Leone's justice sector and might lead to further growth and social development. While these policies suggest important reforms for both the formal and customary systems, they are also by no means comprehensive or exhaustive. Additionally, because few of the interventions below have been rigorously evaluated in Sierra Leone, we do not prioritize the recommendations. Rather we suggest that the recommendations be considered by policymakers and civil society in their entirety, and further evidence-based research be conducted to establish the efficacy of each intervention on Sierra Leonean social and economic development.

While the policies below are meant to be Sierra Leone-specific, some are informed by reforms implemented in other countries. Many of the policies below also have applications in other countries with similar problems; for instance, Uganda's customary system is also typified by geographically divergent traditions and norms (Kane *et al.* 2005). However, we caution against extrapolating policy changes for other African countries from the section below without careful historical and political analysis of that country. For instance, Sierra Leone is not characterized by instances of extrajudicial killings the way that Zimbabwe or Kenya are; political repression the way Malawi and Uganda are; or widespread violent crime the way South Africa and Nigeria are.

Decongesting the Formal System

Financial resources. Inadequate resources greatly hinder case processing in Sierra Leone, beginning with police investigations. The police are often unable to travel anywhere to investigate crimes or to call sureties or witnesses, and have no ability to conduct forensic analysis. Once a case gets to court, it is only heard if an unlikely confluence of events occurs, i.e. the magistrate, police prosecutor, all witnesses, and the defendant are present. If one is missing the case is most likely adjourned. Providing reimbursement for witnesses, hiring more magistrates to work outside of Freetown, and providing sufficient incentives for those magistrates to live in rural areas away from Freetown would help to grease the wheel of the magistrates' court system and quicken case processing.

A separate court for commercial disputes. Movements have been made toward separating out commercial disputes by establishing a 'fast track commercial court', supported by DFID and officially opened in December 2010.

Such a court would hear only economic claims, so that business and investment cases are not subject to delays due to case backlog in the overburdened magistrates' courts. It has received generally positive feedback thus far.

Changes to procedures. Establishing a limit on the number of adjournments a case can collect would reduce time on remand and the time taken to complete a case, helping to rid the courts of frivolous cases. Eliminating the requirement that a felonious case be referred to High Court before first going through a 'preliminary investigation' (PI) in a magistrates' court would also help unclog the courts. Revisions to the Criminal Procedures Act of 1965, including legislation dropping 'preliminary investigations' and ensuring a case's committal to High Court within seven weeks, are also expected to pass in the next few months.

Training. Better training for police prosecutors and court officials, including legal training for police investigators and prosecutors, could help avoid the following several problems.

(a) Crimes being charged incorrectly or on the basis of little evidence.

(b) Cases being thrown out of court due to incorrect procedures being followed.

(c) Ineffective and slow witnesses. Since physical evidence is rare, testimony is usually what sways a magistrate for or against the accused. Often a witness's story is choppy or muddled, or s/he is intimidated by the court, which also causes delay.

Tackling Corruption and Arbitrariness in the Application of the Law

Higher salaries for all police, prisons, and court officials. The average policeman's salary is around Le 250,000, or US$60, per month (SLP 2010), making a low-level policeman's simple bribe-seeking understandable, if not necessary. Local court officials are currently paid out of chiefdom coffers, not on a monthly basis but only when money is available, though new legislation passed recently seeks to restructure this system. Chiefs and elders receive no resources.

Better monitoring of police and court officials. Anti-corruption monitors within the police or courts could potentially reduce bribery and extortion within the formal system. Since little research has been done on this subject in Sierra Leone, however, it is unclear whether the monitors should ideally be civil servants or NGO workers.

For the customary system, the presence of community-based paralegals could have an impact on extortion and bribe-seeking by local court officials, elders, and chiefs. Though the local courts are supervised by a local court supervisor at the district level, the supervisor is not paid and not supported in any way with resources or training. Local courts are also accountable to customary law officers, who provide the link between the formal and customary

systems. Their role is to provide training and supervision to local courts in a certain region, and can also serve as a forum for judicial review. But customary law officers also have obligations to the formal system and are stretched thin.

Better procedures with more checks and balances. The police have been known in the past to make arbitrary arrests without due cause or prior permission, damaging the public perception of the police as being there to protect and serve. Raising the evidentiary requirements necessary for the issuance of warrants would assist in lessening such occurrences.

Alternative sentencing. The amended Criminal Procedures Act, expected to pass in the next few months, aims to ensure that those arrested for minor crimes do not serve undue time in prison, through alternative, deferred, and suspended sentencing, as well as a community service. This would allow judges to put non-violent inmates on probation, saving already overcrowded prisons for violent or repeat offenders.

Improve record-keeping in both systems. One of the greatest opportunities for corrupt practices comes from a hallmark of customary law – that it is unwritten, constantly evolving, and varies slightly from province to province and even within provinces. Fully codifying all of customary law would probably prove to be extremely difficult and expensive, but providing local courts with the means to record all aspects of the proceedings would improve accountability. With all decisions and fines recorded, precedents would be systematically built up, and a kind of case law would be created. And while the law can evolve, the chairman could be held to task for a blatantly divergent ruling. Without published records, it is difficult to keep chairmen accountable for their decisions, making the creation of a systematic recording system imperative.

The same issue exists in the formal system. Though decisions are recorded, since there is no central database it is difficult for lawyers and magistrates to refer to previous cases, especially if those cases were heard in another part of the country. In the formal system, strides should be made to create a computerized database which could collate case rulings from around the country and provide written precedent.

Training for local court chairmen, elders, and chiefs. Local court chairmen, elders, and chiefs need training in making consistent decisions independent of political influence, in mediation and negotiation, and in women's and children's rights. Gauri (2009) writes that the combination of social and political power in the customary system can make leaders more authoritarian, but Kane *et al.* (2005) write that community organizations, counsellors, and social workers, can influence the application of customary laws. Counsellors and NGOs thus have the ability to influence customary officials. Locally trusted and respected NGOs such as Timap for Justice and JSDP have already had some success in such training.

If elders and chiefs were given some legal authority, then it would be easier to hold them accountable. Local court chairmen, elders, and chiefs should have to

pass an exam to gain an adjudicating position. Additionally, while the passing of a new Local Courts Act means that the Chief Justice will now appoint local court chairmen, a more democratic election may be beneficial. To increase public participation in community courts in Eritrea, for instance, judges are directly elected from the communities they preside over. Furthermore, it is expected that at least one judge on the court will be a woman (Andemariam 2011). While Sierra Leone and Eritrea have differing histories regarding gender roles – women were schooled, trained, and used as soldiers alongside men in Eritrea's fight for independence from Ethiopia – a similar norm, if applied in Sierra Leone, could help to increase female influence over local courts.

Providing Justice 'On the Cheap'

Paralegals. A new Legal Aid Act seeks to establish paralegal programmes nationwide and to allow paralegals to operate in a more representative capacity. There are only about 200 lawyers in the country, so the bill will enable many defendants to have legal aid who otherwise could not have had it, hopefully reducing excessive pre-trial detention and the country's high conviction rate. Some stakeholders (JSDP and UNDP) are attempting to create a National Legal Aid programme, which will hire public defenders and paralegals to take on cases *pro bono*, including representation in court. Such initiatives are vital. Gauri and Brinks (2008) find that the legal intervention of NGOs and civil society on behalf of disadvantaged groups, such as the poor, are critical for ensuring their legal claims are upheld, which leads to positive engagement. Community-based paralegals can also operate in the customary system, since they are not lawyers trained in formal law. Timap for Justice has had success in creating a nationwide community-based paralegal programme.

Broad-based civic education. Broad-based civic education should provide information-giving sessions to communities so that Sierra Leoneans are more aware of how legal dualism works in their country and what their legal rights are. Participants in cases in either system are more likely to be taken advantage of or denied justice when they are uninformed. Empowering communities through knowledge is a 'cheap' way of increasing access to justice, especially with the proliferation of nationwide community radios. It should be noted that an information campaign about the formal system cannot be viewed as a substitute for investment in the customary system, and that any information campaign needs to be carefully planned so it is not misconstrued as a promotion for one system over the other. Rather, civic education surrounding the justice sector should inform citizens of their options.

13.4 Investing in the Customary System

13.4.1 Historical Focus

Since independence, policymakers have avoided fully dealing with the customary system in a decisive manner. After all, the issues are complicated. While

Freetown and the Western Area rely more heavily on the formal system, the Provinces rely more heavily on the customary system. It is difficult to formulate policies that recognize the importance of the customary sector without elevating it to the level of the central government, and to create a balance between a formal justice system wielding power and money and a customary system wielding popular support and immediate community access.

The common policy response has been to superficially touch on these issues without resolving them permanently. There is a tendency for legal practitioners and government officials to look down on the customary system not as irrelevant, but as inferior, or even as a kind of kangaroo court, and for foreign donors to fail to understand it because it is not familiar to them (Dale and Manning 2007). This attitude also has roots in legislation arising from colonial mindsets. Section 170 of the Constitution of Sierra Leone (1991) puts it at the bottom of the hierarchy of laws, and Section 2 of the Local Courts Act of 1963 defines customary law as

> any rule, other than a rule of general law, having the force of law in any chiefdom of the Provinces whereby rights and correlative duties have been acquired or imposed which is applicable in any particular case and conforms with natural justice and equity and not incompatible, either directly or indirectly, with any enactment applying to the Provinces.
>
> GoSL 1991; 1963

This has had an adverse effect on rural development projects, as aid initiatives fail to catch on permanently in rural communities because their implementers do not understand the social, political, and judicial dynamics at the root of local life.

13.4.2 Post-conflict Focus

In the postwar push for justice sector reform, work on the customary system has largely been ignored in favour of promoting the formal system. With resources for justice sector reform pouring in, the traditional system that had sustained many Sierra Leoneans through colonialism and war has largely been neglected. The local courts are given a fraction of the budget allocated to the Ministry of Internal Affairs, which itself is a fraction of that granted to the formal system, and left to raise much of their funds on their own (see Figure 13.7). Training and monitoring of local court officials is minimal at best, while village and section chiefs are given no training, venues, or funding whatsoever for their role in dispute resolution.

13.4.3 The Mistake Made

Social and Political Capital of Chiefs

Traditional dispute resolution has existed in Sierra Leone for hundreds of years, through colonialism, the war, and through to the present day. While

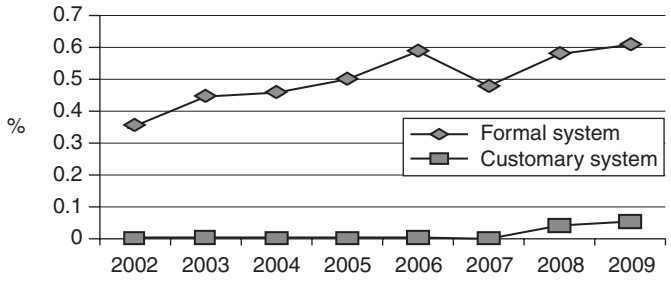

FIGURE 13.7. Actual expenditure on justice sector as a percentage of total expenditure. *Source*: authors, using the Ministry of Finance 2011 fiscal table look-up (MoFED 2011).

chiefs technically have no legal power to adjudicate, over generations they have amassed immense social and political power. Chiefs are also involved in the formal government system at the local government level, and even in parliament – Sierra Leone is one of the only countries in the world that reserves and allocates seats in parliament for Paramount chiefs. They have the same voting rights as parliamentarians, which means they participate in passing national legislation. Sierra Leone can no more ignore the customary system and hope for an adequate rule of law and nationwide access to justice as it can the formal system.

Access to justice and the rule of law are not only legal issues, but rather extend to all sectors. They are issues of accountability, growth, and development in general. Sierra Leoneans, especially in the rural areas, are unlikely to gain knowledge of the law and their rights solely from the formal system. Local chiefs, the Local Court chairman, paramount chiefs, and other leaders are responsible for much of the information filtered through to the populace. Many Sierra Leoneans still view the formal system as new, intimidating, or foreign, and take comfort from tradition.

Though chiefs have no right of adjudication, many people prefer to go to town chiefs over local courts or the police. In a recent decentralization survey, 85% of respondents indicated that the first forums to which they take their disputes are local chiefs or elders (Manning *et al.* 2006). Policymakers have failed to appreciate that even without official sanction, citizens still respect a chief's decisions. Policymakers should provide chiefs with recognition in their efforts to mediate disputes. Strategic public recognition would pressure chiefs to deliver, or face losing credibility and the respect of their subjects. It is thus imperative not to ignore the training of village and section chiefs in dispute resolution and human rights.

Development Initiatives and Community Growth

Sierra Leone's dualistic legal structure is at the base of any development project, since a nation's legal system is at the base of any activity going on within

it. Because of respect for local leaders, no outside development initiative – agriculture, education, health, sanitation, food security, structural growth – can be implemented without the tacit approval of local chiefs. No programme can be effective without their positive engagement. Many programmes are new to rural residents. The sight of a police post is strange, new technology that is difficult to grasp, and the idea of standing up to a locally influential family or individual incomprehensible. People do not immediately trust visiting government officials or NGO workers, or do not understand why they are there or how their programmes will benefit the community. Local leaders are essential to communication. Custom is not just legal, but social and economic as well.

The local courts cannot fulfill this role entirely. Though 'customary', they mimic formal courts in their structure and politics. Moreover, members of the formal government in the Ministry of Internal Affairs, sometimes along with Paramount Chiefs, decide on the tenure of local court officials, putting a customary court directly under the jurisdiction of a formal government body (Kane *et al.* 2005). With the recent passing of a new Local Courts Bill, the Chief Justice is now in charge of appointing local court chairmen. Due to issues of accountability, this is not necessarily a faulty policy; but local courts are, in a sense, midway between the formal system and the adjudications of customary chiefs because of it. The opinions and statements of local leaders are worth far more than those of a government minister, and even more than local court officials. 'Put another way, custom has a formidable sphere of social legitimacy by which it is buttressed' (Kane *et al.* 2005).

In that sense, the customary system is far more powerful than the formal. People listen to local leaders, meaning that those leaders have the chance to expatiate on virtually any subject and be assured of an audience: the police force, corruption, user fees at the hospital, school attendance rates, women's rights, child neglect, farming, electricity, or taxes. Knowledge is power; if local leaders are engaged and participate in relaying information to the populace, they commit both themselves and the institutions in their immediate areas to accountable practices.

Local leaders can ensure pregnant women and children are not charged user fees at local clinics, or can push parents to send their children to school. They can ensure the maintenance of community water sources, roads, and other infrastructure. The severity of local leaders' punishment of abusive husbands or their rulings on female inheritance sends a strong signal to the community, and either promotes or represses women's rights. Local courts and chiefs do not merely distribute legal justice, but economic and social justice as well. Because of their influence, local leaders can be either the drivers of development or its greatest opponent. This is also a practical issue. The government does not have the resources to support a parallel structure that has the potential to drive development in the same way a chief can. Furthermore, chiefs often take these initiatives themselves, having a personal investment in the areas they come from. In Somalia in 2003, a group of traditional leaders approached the Danish

TABLE 13.5. Common disputes in local communities.

	Frequency	
Dispute type	Number	%
Loan/money	337	47
Theft	93	13
Child support	47	7
Inheritance	16	2
Land dispute	131	18
Physical attack	94	13
Total	718	

Source: IRCBP 2007.

Refugee Council (DRC) looking for help revising their customary law to bring it in line with both international human rights norms and sharia law (Simojoki 2011).

Gauri (2009) argues that customary legal institutions, because they are based on community rules, can to some extent enforce contracts because of a community's respect for social norms. He also notes that customary institutions are every bit as important as formal ones for fostering economic activity. In a 2007 National Public Services survey (see Table 13.5), 78% of reported disputes had to do with land, theft, loans, or other money-related problems (IRCBP 2007). The people using the customary system are the poorest in Sierra Leone, and its decisions greatly affect their personal economic situations.

13.4.4 Achieving Complementarity

Freedom of Choice

Investing in both the formal and customary system, or 'achieving complementarity', would aid Sierra Leone's development and growth. In addition to the policy options already discussed in this chapter, a push to create two justice systems that operate in a symbiotic relationship enhances the country's social, judicial, political, and economic potential.

Building up both the formal and customary systems gives people a choice over which forum they want to take their cases to, for those cases whose nature does not require that the formal system handle it. This also creates checks and balances within the systems and between them. If citizens find that their cases move through the customary system quickly, with fair results free of corruption or influence, they are more likely to take cases to the local courts. On one hand, this may take some minor cases off the hands of the overburdened magistrates' courts, as well as encouraging businesses to use mediation rather than litigation. On the other, it may push the formal system to improve through competition. When people can identify different avenues

of resolution for various types of cases, it leads to an increase in quality of life. Less time is spent resolving disputes and bribing officials, and more time at work.

There has been some concern that strengthening both systems would increase the regional divergence between Freetown and the provinces, given that the former focuses on the formal system and the latter on the customary. If it did, but both the customary and formal systems were accountable, fair, and effective, regional divergence might be a non-issue. But the possibility that the formal system would become a focus while the customary system is ignored is serious, because that would lead to further access to justice issues for those living in rural areas, since their options would remain limited.

However, strengthening both systems would not necessarily highlight that divergence, rather generating more opportunities for individuals to choose the forum to which they want to take a dispute. With the post-conflict influx of NGOs and foreign organizations, a national human rights rhetoric has begun to take shape that transcends whether a forum is formal or customary. Investment in the customary system, and specifically training in human rights and mediation for chiefs, would allow that rhetoric to be internalized by those living in rural areas. This again gives individuals choices over where to take their disputes, especially if a human rights campaign is accompanied by an information campaign. If the formal system is also strengthened, many may end up choosing to access the formal courts, which would actually decrease Sierra Leone's regional divergence.

Defining Roles

It is important, however, that the roles and jurisdiction of the formal courts, the local courts, and village leaders are clearly defined. Though a natural competition would arise with complementarity, that competition will stop short of conflict if roles are defined. Chiefs can mediate, but not adjudicate. Local courts can adjudicate, but serious crimes are sent to the formal system. Defining the roles of the different bodies empowers both the bodies and the people who use them, making all three more efficient, and forcing them to compete for clients by improving service delivery.

These distinct roles should be permanent. While the formal system is perceived to be more adversarial and focused on retributive justice, the customary system is more reconciliatory and focused on restorative justice. Over time, the formal and customary systems have naturally taken on some of the strengths of the other. For instance, policemen are often called on to mediate disputes rather than overload the courts with minor cases, and chiefs often give verdicts rather than mediating. But weaknesses in each system should not be addressed by attempting to transform each system's identifying characteristics. Gauri (2009) argues that local-level legal institutions can act as a stepping stone to a formal process, instilling formal characteristics in an informal setting by absorbing it into the process. Likewise, many can go to the formal system first and then

revert back to the customary system because of corruption or other obstacles. The result can be that each system begins to lose the characteristics that make it unique and desirable. For complementarity to be effective, both systems need to rectify their weaknesses while maintaining their strengths.

Though new, it is hoped that the recent passing of an amended Local Courts Act (2011) will be beneficial to complementarity in several ways. First, appointment of local court chairmen will now come from the Chief Justice, allowing checks and balances by the formal justice system (GoSL 2011). The Chief Justice may also mandate that certain forms or records be kept. The negative side is that as the local courts become more 'formal', they lose their 'customary' bent. In the future, direct election as described in the above policy section might be considered. Local courts can also now hear cases involving the land titles of Paramount Chiefs and Chiefdom Councils, allowing checks to be performed by the local courts on other customary officials. Finally, the new bill mandates that any fees collected by a local court should go into a Consolidated Fund, which will be used to pay the salaries of local court officials, hopefully diminishing corruption (GoSL 2011).

Finally, because every country with both formal and customary laws has a different colonial history, it is important to study the ways other nations' customary systems and formal systems interact without assuming direct relevance to the situation in Sierra Leone. To each country, the role and purpose of the customary system is different (Harper 2011). In considering the customary system in Indonesia, Clark and Stephens (2011) write that for every country, it is important to take five steps in analysing the right balance between formal and customary: to understand the history and current context of formal and customary systems, to analyse the individual strengths and weaknesses of both, to identify 'entry points' for reforming hybrid systems, to 'realistically assess' those entry points, and to ensure a sustainable commitment to those reforms. Otherwise, Sierra Leone might default to a formal system which may not be best suited for the needs of the entire population. Without a strong focus on the customary system in Peru, for instance, formal legislation and regulation has rendered those traditions nearly powerless (Desmet 2011).

13.5 Conclusions

While an overhaul of both systems is unrealistic in the short term, a clear commitment to improving access to justice would increase the credibility of the legal system in the eyes of the populace. When the police solicit bribes, a witness does not know which day to appear in court, a family's case drags on for months for a petty larceny charge, or the village chief or local court chairman is politically or socially biased towards one party in a dispute, the Sierra Leonean citizen's first thought is not to chalk it up to under-capacity or a lack of funding. Blame, disillusionment, and distrust are more common responses.

This chapter has argued that Sierra Leone needs to consolidate the gains and improvement it has made over the years in reforming the justice sector by doing the following.

Paying attention to policies specific to the formal or customary systems. While both the formal and customary systems in Sierra Leone are far from efficient or unbiased, new interventions targeting corruption, delays in case processing, and access to justice will not only mitigate those injustices and improve quality of life for the poor, but may foster growth and development in the country as a whole.

Ensuring an equal focus is given to the customary system. Policymakers and NGO workers should make a conscious effort to devote equal time and resources to reforming the customary system. Ignoring it will hinder growth and development and produce an unequal and uneasy relationship between formal and customary bodies that does not necessarily reflect the will of Sierra Leoneans.

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