Article

The Peril of Imposing the Rule of Law: Lessons From Liberia

By Jonathan Compton[†]

INTRODUCTION

Deep in the jungle of Liberia, tribal elders have gathered to settle disputes. First is a man who accuses his neighbor of stealing his goat. The neighbor insists that he did not steal the animal and that it must have wandered off. The elders force the alleged thief to drink poison. If he is telling the truth he will live; if he is lying he will die.

Next is a woman who alleges that she was raped by another villager. Under the supervision of the elders, the parents of both parties discuss the situation. They determine that the alleged rapist's family should pay the victim's family forty-eight dollars. The families share a common meal and agree to put the matter behind them. The alleged rapist and victim continue to farm next to each other.

Miles away in the capital city Monrovia, a reform-minded government is considering how to strengthen the rule of law. While the nation has a Western justice system, it was devastated by a recent civil war and remains weak in rural areas where locals prefer traditional practices. The government and its international partners are eager to fix this problem. They pour money into the formal justice system, outlaw

[†] Jonathan Compton is an Assistant Professor of Law at the United States Air Force Academy and a Judge Advocate in the United States Air Force. This paper stems from the author's experience leading a research team to Liberia in 2012 to study post-civil war challenges to the rule of law. The views expressed here do not represent the views of the Judge Advocate General's Corps, the United States Air Force, or the Department of Defense. The author would like to thank the staff of the Minnesota Journal of International Law for their helpful edits, Lt Col Jeremy Marsh for his encouragement, and the author's family for their support as he conducted research at home and abroad.

traditional practices, and focus on promoting human rights. The rule of law is strengthened. Or is it?

The United States and the United Nations are regularly involved in post-conflict reconstruction and rule of law missions.[1] Often, this encompasses strengthening or even creating the justice system.[2] Those involved in reconstruction generally assume the inherent superiority of Western systems or international standards, and favor these over traditional practices.[3] While these systems and standards may be superior to certain customary practices, the imposition of a Western-style system will not always strengthen the rule of law. In fact, imposition may actually undermine the rule of law. Liberia provides an example.

The modern Republic of Liberia began with grand intentions — free African Americans immigrating to Africa to

1. *See* SHAWNA WILSON, FED. JUDICIAL CTR., U.S. RULE OF LAW ASSISTANCE: A GUIDE FOR JUDGES (2011), http://www.fjc.gov/public/pdf.nsf/lookup/RulLaw11.pdf/$file/RulLaw11.pdf (reviewing the U.S. government agencies supporting rule of law reform); *United Nations and the Rule of Law*, UNITED NATIONS, http://www.un.org/en/ruleoflaw (last visited Sept. 20, 2013) (explaining how over forty UN entities are engaged in rule of law work in over 110 countries, many of which are in "conflict and post-conflict situations").

2. *See, e.g.*, Bureau of International Narcotics and Law Enforcement Affairs, *Rule of Law Programs in Afghanistan Fact Sheet*, U.S. DEPARTMENT OF STATE (May 4, 2012), http://www.state.gov/j/inl/rls/fs/189320.htm (discussing U.S. efforts to help Afghanistan "develop a formal justice sector" and to "train and build capacity" for the Afghan system).

3. While the UN acknowledges the role of informal justice mechanisms, its approach is to further "the implementation of international norms and standards." *Informal Justice*, UNITED NATIONS RULE OF LAW, http://www.unrol.org/article.aspx?article_id=30 (last visited Sept. 20, 2013). Additionally, the U.S. definition of "rule of law" assumes a separation of powers and adherence to international human rights law. *See* U.S. AGENCY FOR INT'L DEV., U.S. DEP'T OF DEF., U.S. DEP'T OF STATE, SECURITY SECTOR REFORM 4 (2009) (*available at* http://www.state.gov/documents/organization/115810.pdf) ("Rule of [l]aw is a principle under which all persons, institutions, and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced, and independently adjudicated, and which are consistent with international human rights law.") (footnote omitted). The UN definition is the same. *See* U.N. Secretary-General, *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Rep. of the Secretary-General*, ¶ 6, U.N. Doc. S/2004/616 (Aug. 23, 2004) ("[The rule of law] refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards.").

create their own community.[4] The settlers brought with them a Western adversarial justice system and patterned their constitution and laws after those found in the United States.[5] This type of justice system, however, was foreign to the indigenous population who had well-established customary justice practices.[6] A dual justice system emerged as the indigenous population continued to use traditional practices despite disapproval by the national government.[7] The different views of how the justice system should work contributed to the growing tensions between the groups. The heightened tensions between the groups ultimately led to a horrific civil war from 1989 to 2003.[8]

After the war, Liberia's new government began to rebuild with the assistance of the international community.[9] Concerned that customary justice practices violated international standards, the government and its partners attempted to strengthen Liberia's formal justice system.[10] The majority of

4. *See* JOHN-PETER PHAM, LIBERIA: PORTRAIT OF A FAILED STATE, 5–11 (2004).

5. *See* Jim Dube, *Resurrecting the Rule of Law in Liberia*, 60 ME. L. REV. 575, 576–77 (2008) (explaining how Liberia's legal system, first constitution, and laws were all patterned after those found in the United States).

6. *See* EZEKIEL PAJIBO, INT'L INST. FOR DEMOCRACY AND ELECTORAL ASSISTANCE, TRADITIONAL JUSTICE MECHANISMS: THE LIBERIAN CASE 16–22 (2008) (describing customary justice methods in "pre-settler Liberia"); Dube, *supra* note 5, at 577. *Cf.* Pewee Flomoku & Lemuel Reeves, *Formal and Informal Justice in Liberia*, ACCORD, Mar. 2012, at 44, 45, *available at* http://www.c-r.org/sites/c-r.org/files/CON1222_Accord_23_9.pdf (explaining how "evidence-based due process is largely alien" to rural Liberians today).

7. *See e.g.*, Amanda C. Rawls, *Policy Proposals for Justice Reform in Liberia: Opportunities Under the Current Legal Framework to Expand Access to Justice*, *in* CUSTOMARY JUSTICE: PERSPECTIVES ON LEGAL EMPOWERMENT 91, 104 (Janine Ubink & Thomas McInerney eds., 2011), *available at* http://www.idlo.org/Publications/CustomaryJustice3.pdf (explaining how the Liberian Supreme Court declared all forms of trial by ordeal, one such traditional practice, to be unconstitutional in 1940, yet "[i]rrespective of the law, many forms of trial by ordeal continue to be practiced throughout the country."). For a further discussion of trial by ordeal, see the section titled "The Customary Justice System" below. For a further discussion of the emergence of the dual justice system, see the section titled "Historical Background" below.

8. Pajibo, *supra* note 6, at 8–11 (discussing the rift between the settlers and the indigenous people, how that rift led to a coup, and the years of subsequent violence).

9. *See UNMIL Background,* UNITED NATIONS, http://www.un.org/en /peacekeeping/missions/unmil/background.shtml (last visited Sept. 22, 2013) (explaining the background of the United Nations Mission in Liberia).

10. *See* Flomoku & Reeves, *supra* note 6, at 44 (describing the work and

Liberians, however, did not use the formal system and continued to prefer customary practices.[11] Recently, the Liberian government has moved away from their policy of imposition and began to discuss justice reform with traditional leaders.[12] While not approving of all traditional practices, the government is listening to the reasons and values behind onerous customs rather than focusing merely on their elimination.[13] This dialogue is ongoing and has great potential to strengthen the rule of law without compromising human rights standards.[14]

This article contends that the imposition of a Western justice system has been a source of conflict in Liberia and has not strengthened the rule of law.[15] In fact, imposition has been the enemy of the rule of law. However, recent efforts to consider the reasons and values behind the customary system, rather than merely focusing on regulating or eliminating it, have eased tensions and shown great potential for strengthening the rule of law in Liberia. This provides important lessons for future rule of law missions in other nations.

This article uses the definition of "the rule of law" adopted by both the United States and the United Nations: "Rule of [l]aw is a principle under which all persons, institutions, and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally

international support directed at strengthening the formal system); Rawls, *supra* note 7, at 96 (explaining how the emphasis on the formal system stems from the priorities of, and financing from, the United Nations, United States, and other international partners who have a specific justice paradigm and "routinely express concern over the protection of human rights").

11. *See* DEBORAH H. ISSER ET AL., LOOKING FOR JUSTICE: LIBERIAN EXPERIENCES WITH AND PERCEPTIONS OF LOCAL JUSTICE OPTIONS, 3–4 (2009).

12. *See* Tim Luccaro, *Navigating Liberia's Justice Landscape*, U.S. INSTITUTE OF PEACE, (Jan. 22, 2010), http://www.usip.org/in-the-field/navigating-liberias-justice-landscape (discussing the work of the Liberian Legal Working Group and its discussions with the Traditional Leadership Council).

13. *See Findings of the Legal Working Group as Adopted on December 10, 2009*, at III.A.3, U.S. INST. FOR PEACE (Jan. 22, 2010), http://www.usip.org/in-the-field/navigating-liberias-justice-landscape (follow "document" hyperlink).

14. The details of the government's new approach, the ongoing dialogue, and the potential it creates are discussed in detail in Part III below.

15. This article uses the U.S./UN definition of rule of law, which encompasses the following principles: universal accountability, public promulgation, equal enforcement, independent adjudication, and consistency with international human rights law. *See* U.S. AGENCY FOR INT'L DEV., *supra* note 3; *The Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies: Rep. of the Secretary-General*, *supra* note 3, at ¶ 6.

enforced, and independently adjudicated, and which are consistent with international human rights law."[16] Relevant international human rights laws include the Universal Declaration of Human Rights Articles 7 through 11 and the International Covenant on Civil and Political Rights Article 14.[17]

This article begins with a brief historical background in Part I. Part II explains the components of Liberia's formal and customary justice systems, their strengths and weaknesses, and which system Liberians prefer. Part III examines how Liberia has approached rule of law reform after the civil war and its recent shift in perspective. Part IV explains how the imposition of the formal system has not strengthened the rule of law in Liberia and how Liberia's new approach shows great promise for strengthening the rule of law and reaching international standards. Finally, Part V draws some lessons from Liberia that can be applied to future rule of law missions.

I. HISTORICAL BACKGROUND

Modern Liberia began in 1821 when the American Colonization Society (ACS) purchased land on Africa's Atlantic coast for a settlement of free African Americans.[18] The ACS financed the settlement and the transportation of the settlers.[19] By 1843, the group had sent 4,571 African American settlers to Liberia.[20] Three years later, the ACS called on the settlers to

16. U.S. AGENCY FOR INT'L DEV., *supra* note 3. *See* U.N. Secretary-General, *supra* note 3, at ¶ 6.

17. Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948); International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

18. *See* PHAM, *supra* note 4, at 5–11. The ACS was a group of American religious, government, and business leaders, including Supreme Court Justice Bushrod Washington, Speaker of the House Henry Clay, Congressman Daniel Webster, and future president Andrew Jackson. The member's motives for forming Liberia ranged from encouraging emancipation to keeping freed slaves from inciting a slave revolt. *Id.* at 7.

19. *Id.* at 5–11.

20. *Id.* at 12. However, more than half of these died, resettled elsewhere, or returned to the United States. *See id.* at 12–13. African Americans were soon eclipsed by other groups. From 1827 to 1847, the majority of people arriving in Liberia were "recaptured" Africans, who had been taken as slaves but never made it to another continent. *See id.* at 52–53. After the slave trade was abolished in the United Kingdom and the United States, these nations would routinely intercept slave ships and return them to Africa. *Id.* Large numbers of these recaptured Africans were dropped off in Liberia, regardless

govern and defend themselves.[21] The settlers declared their independence on July 26, 1847 and subsequently ratified a constitution.[22]

The 1847 Constitution was heavily influenced by the U.S. Constitution[23] and clearly favored the settlers or "Americo-Liberians."[24] Only "Negroes" could be citizens, only citizens could own property, and only property owners could vote.[25] Despite constituting a majority of the population,[26] indigenous people were classified as "Aborigines," rather than "Negroes," and were ineligible for citizenship.[27] Most Liberians were "excluded from participation in their government and in their court system."[28]

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of their country of origin. *See id.* at 53. Liberians referred to these people as "Congos." *Id.* Many "Congos" were able to assimilate into the American Liberian culture and most were granted citizenship in the later Republic of Liberia. *Id.* at 54. The distinction between the two groups has lessened with time. *Id.*

21. *See id.* at 17. This was prompted by the difficulties Liberia had defending its interests. Other nations had viewed Liberia as a privately owned settlement with no claim to sovereignty. Therefore, they refused to submit to Liberian customs and taxes. The United States did not consider Liberia a colony and declined to intervene in its disputes. *See id.* at 14–17.

22. *Id.* at 17–20. There were several "constitutions" prior to 1847; however, these were often organizational frameworks promulgated by the ACS. *See id.* at 14–16. Even the Constitution of 1839, an improvement over its predecessors with regard to democratic participation, gave the ACS authority to appoint the president. *Id.* at 16.

23. *See id.* at 19. A Harvard law professor wrote the draft Constitution that the ACS forwarded to the convention. It established three branches of government patterned after those found in the United States.

24. *Id.* at 20.

25. *Id.* "Negros" included Americo-Liberians and Congos. *See id.* at 54.

26. Dube, *supra* note 5, at 577 (explaining that indigenous groups accounted for more than ninety percent of the population).

27. PHAM, *supra* note 4, at 20. Indigenous Liberians did not receive the right to vote until 1946. Abdul Rahman Lamin, *Truth, Justice and Reconciliation: Analysis of the Prospects and Challenges of the Truth and Reconciliation Commission in Liberia*, *in* A TORTUOUS ROAD TO PEACE: THE DYNAMICS OF REGIONAL, UN AND INTERNATIONAL HUMANITARIAN INTERVENTIONS IN LIBERIA, 229, 232 (Festus Abogye & Alhaji M S Bah eds., 2005), *available at* http://www.issafrica.org/uploads/TORTUOUSCHAP10.PDF. Even then, indigenous Liberians did not necessarily have full property rights. The 1956 Code of Laws made clear that indigenous tribes' land was public land used with the permission of the central government. The land could convert to private ownership only when the tribe became "sufficiently advanced in civilization". PHAM, *supra* note 4, at 63.

28. Dube, *supra* note 5, at 577. The Monrovia ruling class generally ignored the indigenous population until European colonial powers threatened Liberia's territory. The government then began to think about how to effectively occupy the indigenous areas. *See* PHAM, *supra* note 4, at 59.

From 1847 to 1980, the Americo-Liberians tightly controlled the government and monopolized political power.[29] Their political party, the True Whig Party, maintained its control through a powerful system of political patronage.[30] During this time, the government provided little access to formal justice for most of the population.[31] In the early twentieth century, Liberia began to recognize the authority of tribal chiefs; however, that recognition was often dependent on the chiefs implementing the policy of Monrovia.[32] In 1905, Liberia established the Hinterland Regulations — statutory law created to govern the "uncivilized" indigenous population.[33] The Hinterland Regulations gave traditional chiefs limited authority to interpret and enforce the regulations as local laws.[34] This essentially created two justice systems: one for Americo-Liberians, and the other for indigenous Liberians.[35] Monrovia not only established the regulations, it controlled their enforcement. Corporal punishments ordered by tribal courts would not be enforced unless approved by government officials, and fines imposed by tribal courts would go to the Board of Revenues for all cases except those involving a breach of local custom.[36] The government also began to regulate customary practices, requiring some practitioners of traditional justice to be licensed.[37] Eventually, Monrovia transitioned from

29. Dube, *supra* note 5, at 577; *see also* Jamie O'Connell, *Here Interest Meets Humanity: How to End the War and Support Reconstruction in Liberia, and the Case for Modest American Leadership*, 17 HARD. HUM. RTS. J. 207, 210 (2004).

30. Lamin, *supra* note 27, at 231.

31. *See* Pajibo, *supra* note 6, at 16.

32. PHAM, *supra* note 4, at 59–60. Monrovia is the capitol of Liberia and is used synonymously with the ruling class. Monrovia had been the center of power from the beginning of Liberia. Outlying settlements complained that the 1847 Constitution concentrated power in Monrovia and made no provision for local government. *Id.* at 19.

33. Rawls, *supra* note 7, at 106.

34. *See id.*

35. *See id.*

36. Gerald H. Zarr, *Liberia*, *in* AFRICAN PENAL SYSTEMS 191, 197 (Alan Milner ed., 1969).

37. *See id.* at 196. Trial by ordeal of a "minor nature" that did not endanger life was allowed for a period of time; however, the Department of the Interior regulated the process. An "ordeal doctor" would have to pass tests given by the Department of Interior to confirm his "competence and skill." After passing the tests, he would be given a certificate allowing him to practice. Eventually, "minor" trial by ordeal was illegal. *See also* Rawls, *supra* note 7, at 103 (discussing how, in 1940, the Supreme Court declared all forms of trial by ordeal unconstitutional). For a further discussion of trial by ordeal,

regulating tribal justice to supplanting it. By 1963, Liberia had abolished the concurrent criminal jurisdiction of the tribal courts, seeking to avoid a dual justice system.[38]

Despite Monrovia's attempt to regulate and then eliminate them, tribal justice systems continued. Indigenous Liberians sought justice from customary leaders and continued with traditional justice practices that predated the arrival of the Americo-Liberians.[39] The Liberian government undermined traditional justice practices by intervening in the selection of traditional leaders, removing communities from their traditional lands, and maintaining the formal justice system.[40] All of this contributed to the growing unrest.

The tension between the Americo and indigenous Liberians ultimately led to a violent uprising in the late twentieth century that sparked years of violence and civil war.[41] On April 12, 1980, Master Sergeant Samuel Doe came to power in a military coup.[42] Doe, a member of the Krahn ethnic group, became the first indigenous leader of Liberia.[43] However, instead of ending the system of patronage, Doe continued it, with Krahns replacing the Americo-Liberians.[44] Doe not only promoted Krahns to important government positions, he also

see the section titled "The Customary Justice System" below.

38. Zarr, *supra* note 36, at 196. In 1969, Liberian Law Professor Gerald H. Zarr predicted that the chiefs would "continue to exercise jurisdiction in minor criminal cases for a few years until the legislation [ending the concurrent jurisdiction] [could] be strictly enforced." *Id.* However, tribal court jurisdiction did not easily go away. The law that repealed the Hinterland Regulations was itself repealed in 1973. The Ministry of Internal Affairs has republished the Hinterland Regulations since then, as late as 2001. However, the regulations violate multiple provisions of the Liberian constitution, and multiple Supreme Court decisions and acts of the legislature have declared most of the Regulations illegal or obsolete. It remains unclear whether the Regulations are the law. Rawls, *supra* note 7, at 106–107.

39. Pajibo, *supra* note 6, at 16 (describing the justice mechanisms in "pre-settler Liberia" and explaining how Liberians continued to use them). Pajibo goes on to describe the role of customary leaders in these processes. *Id.* at 16–22. For a further discussion of traditional justice mechanisms, see the section titled "The Customary Justice System" below.

40. *Id.* at 16. The components of the "dual justice system" Pajibo refers to are the formal and customary systems. *Id.* at 23. The components are discussed in detail in the section titled "Overview of the Dual Justice System" below.

41. *Id.* at 8–11.

42. Dube, *supra* note 5, at 577.

43. Lamin, *supra* note 27, at 233.

44. *See id.*

brutalized civilians from other indigenous ethnic groups.[45] His actions ultimately precipitated civil war.

In 1989, rebel forces led by Charles Taylor invaded Liberia from Cote d'Ivoire.[46] The rebels, primarily composed of ethnic Grios and Manos who had been targeted by Doe,[47] "tapped into popular anger at Doe's repression and ethnic discrimination" and began to slaughter Krahns.[48] The rebels splintered into various factions.[49] One group captured Doe, and a Palestinian journalist filmed them torturing Doe to death.[50] After Doe's death, rebel groups continued to vie for power.[51] Despite repeated peace talks and the presence of a regional African peacekeeping force, the nation descended into violence.[52] At least seven major Liberian factions fought a civil war, which spread through at least eighty percent of the nation's territory.[53]

In 1995, the most powerful Liberian warlords signed a treaty and agreed to form a transitional government.[54] The transitional government arranged for elections, and in 1997 Charles Taylor was elected president.[55] As President Taylor consolidated power and violently silenced dissent, Liberia crumbled.[56] In 2000, Liberian exiles in Guinea attacked Liberia

45. O'Connell, *supra* note 29, at 211 ("Doe gave political meaning to ethnic differences within the indigenous population for the first time, creating ethnic rivalries that would contribute to the later war."). Even though Krahns constituted less than five percent of the population, under Doe they held one-third of government posts and commanded every infantry battalion in the army. PHAM, *supra* note 4, at 83.

46. O'Connell, *supra* note 29, at 212. Taylor was a former official in Doe's government who had fled to the United States after being accused of stealing public funds. PHAM, *supra* note 4, at 94–95. He spent fifteen months in a U.S. prison but escaped before he could be extradited to Liberia. *Id.* at 95. He eventually returned to Africa, built a base of support, and launched his invasion. *Id.* at 95–98.

47. Pajibo, *supra* note 6, at 9.

48. O'Connell, *supra* note 29, at 212.

49. *Id.*

50. PHAM, *supra* note 4, at 104–08.

51. *See id.* at 109–16 (explaining continued conflicts among Liberian armed factions such as the NPFL, AFL, and ULIMO).

52. *Id.*

53. *Id.* at 116.

54. *See id.* at 124–27 (explaining the process of the Abuja agreement and the faction leaders who participated in the agreement).

55. *Id.* at 131–34.

56. *See id.* at 177–80 (explaining how the Taylor government turned Liberia's military into a private army, tortured and killed political opponents and critics, and silenced independent media outlets, and suggesting that, at

in an attempt to overthrow Taylor, and the second phase of the civil war began.[57] The fighting continued until Taylor, surrounded by his enemies, fled the country in 2003.[58]

In August of 2003, the major parties to the conflict signed a peace agreement.[59] Two months later, the United Nations established a peacekeeping force: the United Nations Mission in Liberia (UNMIL).[60] National elections were held two years later, and Ellen Johnson Sirleaf was elected president.[61] President Sirleaf faced the challenge of rebuilding a formal justice system, which had been decimated by fourteen years of war, and strengthening the anemic rule of law in rural areas.[62] The rebuilding of the formal justice system was a continuation of Liberia's longstanding desire to unite the nation under a Western formal justice system; it was not a direct response to the abuses committed during the civil war, which were addressed by Liberia's Truth and Reconciliation Commission.[63]

The vast majority of Liberians had little access to justice during Doe's rule and the subsequent civil war.[64] This lack of access, however, existed before Doe.[65] Historically, Liberia failed to provide access to formal justice to most Liberians; therefore, the majority of Liberians have sought justice through traditional mechanisms.[66] Liberians continued to seek traditional justice despite the government's efforts to regulate and eliminate tribal justice practices.[67] This has resulted in the entrenched dual justice system that still exists today.

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the same time, Liberia's economy shrank in real terms and crime was rampant).

57. O'Connell, *supra* note 29, at 216–17.

58. *Id.* at 217–18.

59. Pajibo, *supra* note 6, at 11.

60. *Id.*

61. *Id.*

62. *See* Flomoku & Reeves, *supra* note 6, at 44 ("The justice system that President Ellen Johnson Sirleaf inherited when she came to office in 2006 was in tatters. Particularly in rural areas, police and magistrates were largely unpaid and unregulated, and were often operating in their own interests.").

63. *See* Pajibo, *supra* note 6, at 12–13 (discussing the formation and purposes of the Truth and Reconciliation Commission). This and other transitional justice issues are outside the scope of this paper.

64. *Id.* at 16.

65. *See id.* (explaining Liberians' lack of access to justice and how military dictatorship exacerbated it).

66. *Id.*

67. *See id.* at 16–24.

II. OVERVIEW OF THE DUAL JUSTICE SYSTEM

Liberia has two systems of justice that operate simultaneously: the formal system and the customary system.[68] The formal system is a Western-style adversarial justice system that prioritizes individual rights and punitive sanctions.[69] Nevertheless, it is often inaccessible, time consuming, expensive, backlogged, and too combative for most Liberians.[70] The customary system uses traditional methods and prioritizes restorative justice and social reconciliation.[71] While the majority of Liberians prefer the customary system,[72] it raises concerns among legal scholars about separation of powers, due process, human rights, and gender equality.[73]

A. THE FORMAL JUSTICE SYSTEM

The formal justice system consists of state-sanctioned courts, prosecutors, and other legal actors.[74] Its authority stems from the Liberian Constitution, statutes, and common law,[75] and it is based on the U.S. justice system.[76]

The formal system has its strengths. There are clear crimes and punishments,[77] as well as procedures to protect due

68. Luccaro, *supra* note 12. Dividing the justice system into two pieces, formal and customary, is an oversimplification. The reality is complex. Certain chiefs and customary actors are sponsored by the state. Other customary actors are informal leaders whose power comes through community recognition. Liberians can also seek justice through elected representatives, government officials, NGOs, former military commanders, and persons of influence. ISSER ET AL., *supra* note 11, at 76. However, understanding this reality, the entire justice system can generally be divided into formal (based on the constitution, operated by the government, and consistent with the Americo-Liberian approach) and customary (based on traditional sources of authority and practices, and consistent with the indigenous Liberian approach) elements. That approach will be used in this paper.

69. ISSER ET AL., *supra* note 11, at 3–4.

70. U.S. INST. FOR PEACE, *supra* note 13, at I.D.

71. ISSER ET AL., *supra* note 11, at 3–4.

72. *Id.*

73. U.S. INST. FOR PEACE, *supra* note 13, at I.C.1.

74. Luccaro, *supra* note 12.

75. Rawls, *supra* note 7, at 109, n.2.

76. Dube, *supra* note 5, at 577 (explaining how the source of Liberia's codified law was American common law); Rawls, *supra* note 7, at 110, n.30 (explaining how Liberia's 1986 Constitution, the current constitution, is loosely patterned on the U.S. Constitution).

77. *See, e.g.*, *An Act to Amend the New Penal Code Chapter 14 Sections*

process.[78] Its protections for human rights, children's rights, and gender equality are consistent with the Universal Declaration of Human Rights and the Declaration of the Rights of the Child.[79] At times, the consequences meted out by the formal system can be more effective than traditional approaches. For example, in "The Case of the Unreturned Goat," Professor Peter Sevareid describes a case where the formal system was able to stop a plaintiff's overly litigious behavior.[80] The formal court used its coercive power, including the threat of confinement, to stop the plaintiff and force him to pay his court fees.[81] In this case, a formal court better served the defendant than a traditional justice practice.[82]

However, the formal system also has pronounced weaknesses. The system has a "bewildering array of fees," lacks transparency and impartiality, and is ineffective at enforcing judgments.[83] It is "plagued by rampant corruption and inaccessibility" and is chronically slow: ninety-six percent of detainees in the formal system are in pretrial confinement,[84] which can last years.[85] A 2009 study by the United States

14.70 and 14.71 to Provide for Gang Rape, LIBERIAN MINISTRY OF FOREIGN AFFAIRS (Jan. 17, 2006), *available at* http://www.ilo.org/dyn/natlex/docs/ELECTRONIC/85440/95667/F367499794/LBR85440.pdf (demonstrating the specificity with which a crime is defined under the Liberian Penal Code).

78. *See, e.g.*, CONSTITUTION OF LIBERIA Oct. 19, 1983, ch. III, art. 20a ("No person shall be deprived of life, liberty, security of the person, property, privilege or any other right except as the outcome of a hearing judgment consistent with the provisions laid down in this Constitution and in accordance with due process of law.").

79. *See, e.g.*, International Development Law Organization, Women's NGO Secretariat of Liberia, *Strengthening the Legal Protection Framework for Girls in India, Bangladesh, Kenya and Liberia -- Liberia Country Report* 23-45 (2010) (explaining how formal Liberian law has taken progressive steps towards protecting women's property rights and against child labor, slavery, human trafficking, and child sexual exploitation). These protections are consistent with international human rights standards. *See* Universal Declaration of Human Rights, G.A. Res. 217 (III) A, ¶¶ 2, 4, 17, U.N. Doc. A/RES/217(III) (Dec. 10, 1948), http://www.un.org/en/documents/udhr/; Declaration of the Rights of the Child, G.A. Res. 1386 (XIV) A, ¶ 9, U.N. Doc. A/RES/1386(XIV) (Dec. 10, 1959), http://www.un.org/cyberschoolbus/humanrights/resources/child.asp.

80. Peter Sevareid, *The Case of the Unreturned Goat: Dispute Resolution by a Mano Court in Liberia*, 7 TEMP. INT'L & COMP. L.J. 61, 75 (1993).

81. *Id.* at 72–75.

82. *Id.* at 75.

83. ISSER ET AL., *supra* note 11, at 3, 46.

84. Luccaro, *supra* note 12.

85. While in Liberia, this author attended formal court hearings in three rape cases and observed firsthand the slow speed of the formal system.

Institute for Peace (USIP) and George Washington University (GWU) found that "the formal system is seen almost universally by Liberians as falling abysmally short of their expectations in [affordability, accessibility, and timeliness]."[86]

Even the formal system's basic structure is a weakness in Liberia. Formal courts are adversarial with a clear winner and loser, creating bitterness and ongoing hostility among Liberians.[87] The defendant's right to appear before a Circuit Court judge often allows a defendant to escape liability unless the plaintiff is wealthy.[88] Additionally, the concept of "evidence-based due process" is foreign to rural leaders, who often rely on traditional methods such as trial by ordeal to determine guilt or innocence.[89]

B. THE CUSTOMARY JUSTICE SYSTEM

The customary justice system is based on the norms and values of traditional Liberian culture.[90] It "often operates without state sanctioned authority."[91] However, the state

Defendant One had been in pretrial confinement for three years. The government was unable to produce sufficient evidence to indict him and the court released him on bail. Defendant Two had been in pretrial confinement for two years. The government was unable to produce sufficient evidence to indict him; the court dismissed the charges and released him. Defendant Three had been in pretrial confinement for eleven months. As part of a plea agreement, he pled guilty to a four count indictment and was sentenced to an additional seven months of confinement. Observations of Circuit Court, in Monrovia Liberia (June 28, 2012).

86. ISSER ET AL., *supra* note 11, at 3.

87. Sevareid, *supra* note 80, at 75 (discussing how "[i]t is unlikely that good feelings between the parties will easily be renewed" after formal litigation.). This is problematic in Liberia where harmonious community relations are often more important than the vindication of individual rights.

88. Magistrate Court is often the court of first instance for minor cases. However, defendants have the absolute right to have their case heard before a Circuit Court judge, even in minor cases. Some defendants strategically exercise this right and force plaintiffs to continue their suit in Circuit Court where the court and lawyers' fees are higher. Many plaintiffs cannot afford the higher fees and are unable to continue with their suit. Interview with James Cooper, Magistrate Judge of West Point, in Monrovia, Liberia (July 9, 2012).

89. Flomoku & Reeves, *supra* note 6 at 45. Trial by ordeal is a method of justice that uses a physical process, often a dangerous act, to determine guilt or innocence. Pajibo, *supra* note 6, at 17. For a further discussion of trial by ordeal, see the section titled "The Customary Justice System" below.

90. Luccaro, *supra* note 12.

91. *Id.*

recognizes and occasionally sponsors certain elements.[92] While specifics vary throughout the country, there are some common practices including the kola nut, palava hut, and trial by ordeal.[93]

The kola nut is a justice method focused on forgiveness.[94] To resolve a dispute, the guilty party provides kola nuts to the wronged party as atonement.[95] Cash, animals, and other commodities may be used in place of kola nuts.[96] The exact payment is determined by local elders.[97]

The palava hut process is a justice method rooted in mediation and dialogue.[98] The individual parties to a dispute, often with and sometimes represented by their families, meet under the supervision of community elders.[99] Depending upon the accusation and the result of the mediation, the elders may require restitution, payment of medical expenses, or even banishment from the community.[100] There is often a period of

92. *See* UNITED NATIONS MISSION IN LIBERIA — LEGAL AND JUDICIAL SYSTEM SUPPORT DIVISION, CASE PROGRESSION: ASSESSMENT / CAPACITY DEVELOPMENT OF TRIBAL GOVERNORS' COURT 9-19 (2011) [hereinafter UNMIL CASE PROGRESSION] (discussing the role and functioning of the Tribal Governors Court). Liberian law recognizes Tribal Governors as representatives who may investigate tribal matters and resolve disputes. *Id.* at 9. Of the Tribal Governors interviewed by UNMIL, 62% reported being on the government's payroll. *Id.* at 13. Additionally, the Liberian Constitution creates a place for customary law and values. *See* CONSTITUTION OF LIBERIA Oct. 19, 1983, ch. VII, art. 65 ("The courts shall apply both statutory and customary laws in accordance with the standards enacted by the Legislature."); ch. II, art. 5 ("The Republic shall . . . preserve, protect and promote positive Liberian culture, ensuring that traditional values which are compatible with public policy and national progress are adopted and developed as an integral part of the growing needs of the Liberian society.") Notably, the Constitution makes those laws and values subservient to legislation, public policy, and national progress.

93. Pajibo, *supra* note 6, at 16–23. Pajibo points out that forcible displacement and government involvement may have undermined the legitimacy and appeal of these processes. Nevertheless, these customary processes are still used.

94. *Id.* at 16.

95. *Id.* at 16–17. Kola nuts are chestnut-size nuts that are grown in the forests of West Africa. They have been a commodity for centuries, and are a sign of hospitality and affluence for the wealthy. Paul E. Lovejoy, *Kola in the History of West Africa*, 20 CAHIERS D'ÉTUDES AFRICAINES 97, 97 (1980).

96. Pajibo, *supra* note 6, at 16–17.

97. *See id.* at 17.

98. While the palava hut process is used throughout Liberia, the specifics vary between linguistic and ethnic groups. *Id.* at 18–22.

99. *Id.*

100. *Id.*

grieving, a shared meal, a public apology, and an acknowledgement of forgiveness.[101] The palava hut process is used to settle conflicts ranging from land disputes to murders.[102]

Trial by ordeal is a method of justice that uses a physical process, often a dangerous act, to determine guilt or innocence.[103] A community may force the accused to drink a poisonous mixture, touch red-hot metal, or simply wear straw tied around his neck.[104] The result of the ordeal (whether the accused regurgitates the drink, gets burned by the metal, or the straw spontaneously tightens around the accused's neck) indicates guilt or innocence.[105] Trial by ordeal can also be used as a pledge to tell the truth. *Kafu* is a trial by ordeal process where the parties to a dispute share a common meal or drink of water.[106] It is believed that if a person later lies during the proceeding, the food or water will sicken him.[107] Liberians often refer to trial by ordeal as "sassywood" after the tree they have historically used for poison.[108]

The customary system has noticeable strengths. It provides "an accessible, affordable and efficient means of resolving disputes"[109] rooted in restorative justice and social reconciliation.[110] Customary processes are accessible to most Liberians and their judgments are respected.[111] Settlements in the customary system are more likely to produce "harmony" and lasting peace between parties.[112] Customary methods are generally cheaper; even though processes like the kola nut require the party at fault to make a payment, there are no attorney's fees.[113]

101. *Id.*

102. *Id.*

103. *Id.* at 17.

104. *Id.* at 17. *See also* ISSER ET AL., *supra* note 11, at 60 (describing a variety of trial by ordeal techniques).

105. Pajibo, *supra* note 6, at 17.

106. Rawls, *supra* note 7, at 105.

107. *Id.*

108. *Id.*; P.T. Leeson & C.J. Coyne, *Sassywood*, 40 J. COMP. ECON. 608, 612 (2012).

109. U.S. INST. FOR PEACE, *supra* note 13, at I.B.2.

110. ISSER ET AL., *supra* note 11, at 4.

111. Pajibo, *supra* note 6, at 23-24 (identifying these as strengths of the palava hut process). Even sassywood, which is illegal, is widespread. *Id.*at 17–18.

112. Sevareid, *supra* note 80, at 75.

113. Pajibo, *supra* note 6, at 16–17.

However, the customary system also has clear weaknesses.[114] Customary courts have difficulty resolving egregious cases.[115] They are often ineffective or unfair when the parties are from different communities, ethnic groups, or religions.[116] Justice for the victim is important but is not the primary concern, and social reconciliation often takes precedent over individual compensation.[117] This can lead to troubling results. UNMIL's 2011 report on the Tribal Governors' Courts was sparked by a report of a Tribal Governor fining a man $48 USD for "deflowering" a woman.[118] In the formal system the man could have been charged with rape and sentenced to ten years in prison.[119] Some customary processes are illegal, limiting appellate and state enforcement options.[120] Further, trial by ordeal raises significant concerns about self-incrimination, legal representation, and due process.[121]

The customary system also raises concerns about gender equality. Many tribes have customary laws that make distinctions between men and women.[122] These laws often treat adult women as minors, and do not allow women to inherit property from their fathers or their husbands.[123] These customary practices deviate from the formal system's

114. ISSER ET AL., *supra* note 11, at 4.

115. *Id.* at 5.

116. *Id.*

117. *Id.* at 4.

118. UNMIL CASE PROGRESSION, *supra* note 92, at 7. In this case, both parties agreed to have the case heard in the customary system by the Tribal Governor.

119. *Id.* In Liberia, the maximum sentence for second degree rape is ten years. The maximum sentence for first degree rape is life imprisonment. First degree rape requires a minor victim, gang rape, serious or lasting injuries, or the use of a deadly weapon. An Act to Amend the New Penal Code Chapter 14 Sections 14.70 and 14.71 and to Provide for Gang Rape (Dec. 29, 2005), Paragraph 4, *available at* http://sgdatabase.unwomen.org/uploads/Liberia%20-%20Rape%20Amendment%20Act.pdf. The facts surrounding the allegation in the UNMIL report are brief, but do not appear to support a first degree charge.

120. *See e.g.* Rawls, *supra* note 7, at 104–105 (tracing the legality of trial by ordeal and noting that the Liberian Supreme Court reiterated in 2005 that all forms of trial by ordeal are unconstitutional).

121. *Id.* at 104 (quoting the Liberian Justice Minister's explanation of the judiciary's position on trial by ordeal).

122. Susan H. Williams, *Democracy, Gender Equality, and Customary Law: Constitutionalizing Internal Cultural Disruption*, 18 IND. J. GLOBAL LEGAL. STUD. 65, 81 (2011).

123. *Id.*

constitutional and statutory rights to equality.[124]

Finally, the customary system's structure raises concerns about the separation of powers. Tribal chiefs are overseen by the Ministry of Internal Affairs**,** which is part of the executive branch.[125] Therefore, chiefs who adjudicate cases are arguably executive officers taking on a judicial role.[126] This is especially problematic when the tribal chiefs' decisions are not subject to judicial review.[127] Unfortunately, the Liberian Constitution, legislation, and Supreme Court decisions provide inconsistent guidance on this issue.[128]

C. LIBERIANS' VIEWS OF THE TWO JUSTICE SYSTEMS

Liberia's elite legal practitioners prefer the formal system.[129] These are most often Americo-Liberians; however, the group also includes indigenous Liberians who were educated in the United States.[130] Generally speaking, Liberians who have the ability to shape legal policy have a strong sense of respect for the formal system and courts.[131] They believe that the formal system has the power to change the beliefs and behaviors of Liberians, and that it will inevitably surpass the customary system.[132] As a practical matter, many Liberians choose the formal system when they believe their wealth, connections, or status will give them an advantage over their opponent.[133]

However, even if the formal system worked smoothly for all classes of Liberians, most say they would still be unsatisfied with it.[134] Most Liberians value reconciliation, believing that bad behavior stems from damaged social relationships.[135] To them, adjudication through the formal justice system, an adversarial system that focuses on winners and losers, will only

124. U.S. INST. FOR PEACE, *supra* note 13, at I.C.1.
125. Rawls, *supra* note 7, at 96–97.
126. *See* U.S. INST. FOR PEACE, *supra* note 13, at I.C.1.
127. *Id.*
128. Rawls, *supra* note 7, at 100–02.
129. *See id.* at 95.
130. *Id.*
131. *Id.*
132. *Id.*
133. U.S. INST. FOR PEACE, *supra* note 13, at I.D.3.
134. ISSER ET AL., *supra* note 11, at 3.
135. *Id.* at 3–4.

further damage these relationships.[136] This emphasis on repairing relationships is not always a mere preference; it is often a matter of necessity in rural agrarian communities where neighbors are economically dependent on one another.[137] While the formal system is focused on individual rights, many Liberians view the term "human rights" negatively.[138] They connect the term with the rights of children and defendants, and perceive those rights as "undermining the social order."[139] Many view formal courts as "inherently more coercive and authoritarian"[140] and much more susceptible to corruption than traditional methods.[141] They see the formal system as merely a way for the wealthy and powerful to promote their interests.[142] Even traditional leaders who see value in the formal system believe the customary system is their only practical choice.[143]

Because of these opinions, most Liberians choose not to have their cases heard in the formal justice system.[144] In fact, as few as three percent of civil cases and two percent of criminal cases are heard in a formal court.[145] Liberians generally believe that expanding the jurisdiction of tribal chiefs would reduce crime, even if the tribal chiefs were prohibited from using trial by ordeal.[146] Liberians' confidence in the tribal chiefs stems from the belief that chiefs would look for the "root

136. *Id.* at 4.

137. *See id.*

138. *Id.* at 5.

139. *Id.* ("Children's rights are understood as encouraging children to sue their parents and preventing them from working, which to rural Liberians is an affront to social values and has serious economic implications. To Liberians, whose conception of justice is about truth and reconciliation, rather than an adversarial process, defendants' rights are seen as giving an unfair advantage to perpetrators at the expense of the victims.").

140. Sevareid, *supra* note 80, at 74–75.

141. U.S. INST. FOR PEACE, *supra* note 13, at I.D.3.

142. ISSER ET AL., *supra* note 11, at 3.

143. *See* Luccaro, *supra* note 12 (explaining that traditional leaders are open to change and appreciate the many advantages of a formal justice system. However, they believe that policymakers do not listen to them and do not appreciate their position. According to the traditional leaders, traditional methods of justice, including trial by ordeal, are "the product of a rational effort to make the most of the economic and social positions they inhabit.").

144. ISSER ET AL., *supra* note 11, at 4.

145. *Id.* at 4, app. (discussing a study conducted in 2008 and 2009 by the Centre for the Study of African Economies at Oxford University). The study concluded that 38 percent of civil cases and 45 percent of criminal cases were heard in informal forums; the remaining cases were heard in no forum at all. *Id.* at 4.

146. *Id.* at 87.

causes" of problems, bring social pressure to enforce decisions, and focus on reconciliation and reducing social conflict.[147] However, many Liberians believe that trial by ordeal should be allowed in some form, and see its ban as an attack on their culture and the reason for increased lawlessness.[148]

D. UNDERSCORING THE DIFFERENCES BY EXAMINING RAPE

The differences between the two justice systems, as well as Liberians' differing perceptions of each, may be underscored by examining rape. Liberians view rape as a serious issue.[149] However, the two systems of justice address rape in dramatically different ways. The formal system identifies rape as a crime and focuses on punishing the rapist.[150] However, the customary system often views rape as a problem between families, not simply individuals.[151] The families may "talk through" the rape and resolve the matter with payment, marriage, or some other settlement designed to make the victim's family whole.[152]

Currently, Liberian law gives the formal system exclusive jurisdiction over rape cases,[153] and most Liberians agree that certain forms of rape, such as violent rape or the rape of a child, are best addressed in a punitive fashion by formal courts.[154] However, Liberians prefer customary remedies for "less egregious" forms of rape and continue to turn to tribal chiefs to adjudicate rape cases.[155] This broad preference appears to be

147. *Id.*

148. *Id.* at 5 ("The vast majority of Liberians we interviewed believe strongly that at least some forms of trial by ordeal . . . should be allowed, and raised very serious concerns that the ban on its use is causing significant societal problems -- most particularly the inability to control crime and a rise in witchcraft.").

149. *Id.* at 66 (explaining that "women and men both identify rape as a significant local problem.").

150. Flomoku & Reeves, *supra* note 6, at 44. Such rape laws are relatively new in Liberia. *See* Sara K. Cummings, Comment, *Liberia's "New War": Post-Conflict Strategies for Confronting Rape and Sexual Violence*, 43 ARIZ. ST. L.J. 223, 236 (2011) (explaining that rape, other than gang rape, was not criminalized in Liberia until 2005).

151. Flomoku & Reeves, *supra* note 6, at 44.

152. *Id.*

153. ISSER ET AL., *supra* note 11, at 66.

154. *Id.* at 6, 46. Additionally, repeat offenses may be seen as "beyond social repair" and deserving of referral to the formal system. *Id.* at 30.

155. *See id.* at 6, 70.

shared by Liberian women as well. The 2009 USIP and GWU study found "no evidence that when chiefs do intervene to resolve [rape] cases they [do] so in ways . . . that are unsatisfying to women."[156] That finding "stands in rather marked contrast to the very vociferous and explicit statements of dissatisfaction with the outcomes for rape cases produced by the formal system."[157] While acknowledging the need for further research into whether customary solutions to rape are effective for Liberian women, the study's authors observe:

> While the [formal] rape law may reflect the way policymakers believe Liberian women should think about rape, its consequences, and its remedy, our data at the very least casts some doubt on assumptions that it actually strikes a balance that local Liberian women believe to be the right one for realizing a sense of justice for rape victims.[158]

One potential reason for Liberians' preference for customary resolutions to rape cases is the dysfunctional state of the formal justice system. Both men and women believe that the formal system does not adequately address rape cases, formal rape laws are not effective deterrents, and that rapists "generally get off with impunity."[159] There is also a perception that formal justice system officials commit sex crimes themselves.[160] Additionally, the formal system's fees are often prohibitively high. Victim "fees" include paying for police transportation costs, the accused's prison food, a variety of police and court administrative expenses, and even the paper used for depositions.[161] Even violent rapes which result in death do not progress through the formal courts unless someone continues to pay the "fees."[162]

This combination of dysfunction and corruption is dramatically illustrated in the USIP and GWU's report of the

156. *Id.* at 88.

157. *Id.*

158. Certain social realities may influence these views, including the survival-based need for interactions with the perpetrator's family and the community, the likelihood of successful prosecution in a formal court, and the costs of using the formal court system. *Id.* at 88–89.

159. *Id.* at 66–67.

160. *Id.*

161. *Id.* at 40.

162. *Id.*

case of an eighty-three year old woman named Lofa:

> A man raped an eighty-three-year-old woman. The woman was taken to the hospital where the rape was confirmed, and the suspect was arrested and jailed. The victim's daughter went to the magistrate court to pursue the case, but she was told that she had to pay five hundred Liberian dollars. After she did, she was told to get a second medical report. The case was then referred to the circuit court. After traveling a second time to the circuit court in Voinjama, they were told that it was the end of the term and they would need to come back the next term. The next term, there was no transportation available and it was the rainy season. The victim was put in a wheelbarrow for transport, but as her health was failing, her daughter decided to bring her mother home and to go to the court herself. Once there she was told that unless her mother was present the court would not hear the case. The next day she was told by the court that the suspect had broken out of jail. In the meantime, while she was at the court, her mother died.[163]

Another potential reason Liberians prefer customary resolutions to rape is the adversarial nature of the formal justice system. Even in rape cases, Liberians often view social reconciliation as more important than punishment per se.[164] They fault the formal system for narrowly focusing on the criminal act without considering broader social factors.[165] In rural Liberian life, reconciliation is more than a mere preference. Continuing interaction with the perpetrator's family and the broader community can be a matter of survival.[166] For rural Liberian women, "a greater emphasis on social reconciliation and restoration may prove to be quite rational calculations."[167]

III. POST-WAR RULE OF LAW REFORMS

163. *Id.*
164. *Id.* at 48.
165. *Id.* at 70.
166. *Id.* at 89.
167. *Id.*

Since the civil war, a large amount of work and international support has gone into strengthening the formal justice system.[168] However, the average citizen has benefited little from these reforms, especially outside of Monrovia.[169] Policymakers in Liberia and nations around the world often assume that a uniform justice system will strengthen the rule of law and avoid the past injustice.[170] Some seek to abolish the customary system and have only a formal system.[171] Ironically, reforms which have limited the customary courts' jurisdiction may have inadvertently decreased justice on the local level.[172] Furthermore, most rural Liberians reject the idea that the laws of Monrovia or the international community should replace or override their customary practices, and see such reform efforts as a power grab by the Monrovian elite.[173] Interestingly, they reject these reforms without rejecting the ultimate authority of the national government or the need for the formal system in their community.[174]

Recently, Liberian policy makers changed their approach and began seeking ways to ease the tension between the two justice systems. In 2008, reform-minded lawyers and scholars created the Liberian Legal Working Group (LWG).[175] The LWG met multiple times during 2009 to discuss justice reform and Liberia's dual justice system.[176] In addition to internal

168. Flomoku & Reeves, *supra* note 6, at 44 (describing the work as including "training judges, magistrates, prosecutors and public defenders; renovating court buildings; and regularising salaries.").

169. *Id.*

170. ISSER ET AL., *supra* note 11, at 71.

171. *Id.*

172. When the formal system is not a credible alternative, many Liberians believe that restrictions on the customary system lead to injustice. *Id.* at 5. ("Our data suggests that to the extent that local Liberians view the formal system as less comprehensible and more susceptible to corrupt influence than customary alternatives, the limitation of the customary courts' jurisdiction is seen as actually diminishing the degree of transparency, accountability, and integrity of local justice.") *Id.* at 85.

173. *Id.* at 71–72.

174. As discussed above, most Liberians believe that the formal system is the appropriate forum to address certain crimes, such as the rape of a child. However, they reject the idea that the formal system, as a rule, should replace or override their customary practices. *Id.*

175. The LWG was convened by UNMIL, USIP, and the Carter Center, at the request of individuals from various organizations including the Ministries of Justice and Internal Affairs, the judiciary, the Liberian bar, a Liberian law school, and a variety of nongovernmental organizations. *See* Luccaro, *supra* note 12.

176. *See id.*

discussion, the group met with the Traditional Leadership Council, which represents and promotes the interests of traditional leaders.[177] The LWG formally adopted findings on December 10, 2009.[178] It found that the dual justice system remained a reality for Liberians years after the civil war.[179] The customary system continued largely the same as before the war and was common in rural communities.[180] Additionally, the strengths and weaknesses of the two justices systems remained the same.[181]

However, the LWG went beyond restating the tensions in the dual justice system: it established guiding principles for reform.[182] The group stated that future reforms should focus on improving the quality of justice for all Liberians rather than merely the structure of the legal system.[183] Policies should be realistic, not just in terms of available resources but also in light of the social realities of how Liberians view justice.[184] Policy makers should consider the impact of justice reforms on broader nation-building goals and encourage more local participation.[185] The group proposed reevaluating jurisdiction laws, potentially allowing traditional courts to resolve more civil and criminal cases.[186] They also concluded that justice should be broader than penal sanctions and should incorporate restorative remedies.[187] Finally, the LWG declared that the government should work to understand the purposes and local perceptions of "onerous practices," such as trial by ordeal, before imposing a ban.[188]

177. *See id.*

178. *See id.*

179. U.S. INST. FOR PEACE, *supra* note 13, at I.A.1.

180. *Id.* at I.B.1.

181. The LWG found the customary justice system to be focused on the concerns of Liberians, accessible, affordable, effective, based on social reconciliation, and preferred. See *id.* at I.B. However, the customary justice system raised concerns about separation of powers, due process, human rights, and gender equality. *Id.* at I.C.1. The formal justice system lacked resources and was inaccessible, time consuming, expensive, and severely backlogged. See *id.* at I.D. Liberians viewed the formal system as susceptible to corruption, favoring the elite, and too adversarial. *Id.* at I.D.3, I.D.5.

182. *See id.* at II.

183. *Id.* at II.A.

184. *Id.* at II.B.

185. *Id.* at II.D.

186. *Id.* at III.A.1.

187. *Id.* at III.A.2.

188. *Id.* at III.A.3.

The LWG findings were given to the Justice Minister and four regional meetings were convened to discuss further reform.[189] Representatives of all fifteen counties in Liberia were present, including members of the government, judiciary, and traditional leaders.[190] Similar issues were identified at all four meetings, including the need to give traditional leaders an official role in the formal justice system.[191] These meetings laid the groundwork for the National Conference held in April of 2010—"Enhancing Access to Justice: A Review of Our Customary and Statutory Systems."[192] The purpose of the National Conference was to create recommendations on how the two justice systems could work together and both be strengthened.[193] Participants, including government officials, civil society representatives, and traditional leaders, discussed a variety of topics including trial by ordeal and women's rights.[194] Participants created a long list of recommendations, including giving traditional chiefs an official role in the formal justice system as advisors to prosecutors on customary resolutions for criminal cases, allowing alternative forms of oath-taking that were consistent with traditional beliefs and constitutional rights, and writing down customary law so it can be evaluated and even applied by formal courts.[195] A Post-Conference Review Committee summarized the conference's recommendations for use by the Law Reform Commission (LRC).[196] As of 2012, discussions on linking the formal and customary justice systems were on-going in the LRC and the Committee on the Role of Non-Lawyers (CRNL).[197]

189. Rawls, *supra* note 7, at 92–93.

190. *Id.* at 93.

191. *Id.* at 94.

192. *See id.* at 97. The conference was co-hosted by the Ministry of Justice, Ministry of Internal Affairs, and the Supreme Court. *Id.*

193. *Id.*

194. *Id.* at 97–98.

195. Rawls, *supra* note 7, at 98–100.

196. *Id.* at 97–99. The LRC is responsible for "streamlining the law reform and review process in Liberia, ensuring that the process is participatory and responsive to the needs of Liberia." Criminal Law and Judicial Advisory Service, United Nations Department of Peacekeeping Operations, *The Liberia Law Reform Commission, Five Year Strategic Plan and Its Impact*, JUST. REV., June 2012, at 22, 22.

197. Flomoku & Reeves, *supra* note 6, at 46. The CRNL, with the assistance of international and non-governmental organizations, is examining the laws and regulations that govern rural areas with an eye towards eventual constitutional reform. *Liberia: Policy Dialogue and Reform*, THE CARTER CENTER, http://www.cartercenter.org/peace/conflict_resolution/liberia-policy-

The work of the LWG, regional meetings, National Conference, LRC, and CRNL is more than bureaucratic window-dressing; the discussions of these groups demonstrate a fundamental change in mindset. As she opened the National Conference, Liberia's Justice Minister stated:

> [L]aws are rooted in the values and beliefs of a people and therefore the enactment of any legislation must take into account socio-cultural realities; we cannot continue to ignore the desire of our people to have customs and traditions recognized by the formal justice system, but we must do so being mindful that it is imperative to apply rules and principles that are fair and just, and show respect for human dignity.[198]

Several traditional leaders participating at the National Conference remarked that they felt as though they were being listened to for the first time.[199] Notably, participants did not "simply present a list of grievances, but engaged in brainstorming possible concrete policy solutions."[200]

Trial by ordeal highlights the differences in this new approach. Liberia's formal justice system has opposed trial by ordeal for almost a century.[201] Traditional leaders, however, continue to view trial by ordeal as the only effective tool for combating witchcraft, which they perceive to be an underlying source of the wrongdoing in their communities.[202] While well-intentioned, the government's ban on trial by ordeal actually "deteriorated the state's legitimacy in the minds of many

dialogue-reform.html (last visited Nov. 5, 2013). According to an associate director of the Carter Center, a non-governmental organization working with the CRNL, such reforms "help ensure that any new laws stand a better chance of being both consistent with Liberia's reform agenda, existing laws—including Liberia's international human rights obligations—and the realities of community traditions and practices, as far as this is possible." *Id.*

198. Rawls, *supra* note 7, at 96 (quoting Justice Minister C P Tah's speech delivered at the opening of the National Conference).

199. *Id.* at 97.

200. *Id.*

201. In 1916, the Supreme Court outlawed trial by ordeal that results in death. In 1940, the Court declared all forms of trial by ordeal unconstitutional. While, the Hinterland Regulations of 2001 permit non-dangerous trial by ordeal, the Supreme Court again declared all trial by ordeal to be unconstitutional in 2005. *Id.* at 104.

202. Luccaro, *supra* note 12.

Liberians."[203] Many concluded from the ban that the state protected or even participated in witchcraft.[204] To combat this perception, the National Conference recommended distinguishing "good sassywood" from "bad sassywood."[205] Some forms of trial by ordeal, such as *Kafu*, where the parties pledge to tell the truth by sharing a common meal or a drink of water, are physically harmless and resemble oaths.[206] Officially recognizing these methods could increase the public's faith in the formal judicial system.[207]

IV. ANALYSIS: FROM IMPOSITION TO CONSIDERATION

Liberia's history and experience with rule of law reform lead to two key conclusions. First, the imposition of a Western justice system has been a source of conflict in Liberia and has not strengthened the rule of law. Second, recent efforts to consider the reasons and values behind the customary system, rather than merely focusing on its elimination, have eased tensions and shown great potential for strengthening the rule of law in Liberia.

A. IMPOSING A WESTERN JUSTICE SYSTEM HAS BEEN A SOURCE OF CONFLICT IN LIBERIA AND HAS NOT STRENGTHENED THE RULE OF LAW

The history of Liberia's justice system has been one of imposition. The Americo-Liberian settlers initially created a formal justice system only for themselves.[208] As the indigenous population became part of the nation, the ruling class did not seek their perspective on justice. Rather, the government regulated customary courts and practices in an attempt to

203. *Id.*

204. *See id.*

205. Rawls, *supra* note 7, at 105. The LWG also discussed this. *See* Luccaro, *supra* note 12 (explaining that one member of the LWG noted that "[w]hile there are certainly onerous methods of trial by ordeal that deserve restriction, they are not necessarily representative of the entire spectrum of traditional behaviors.").

206. Rawls, *supra* note 7, at 105. National Conference participants wondered if *Kafu* was any different than taking an oath in court. However, Rawls emphasizes that such truth-telling rituals must be balanced with due process. *Id.* at 105, 108.

207. *Id.* at 105.

208. *See* Dube, *supra* note 5, at 577.

bring them in line with formal standards. Eventually, the government banned customary courts and practices all together.[209] This imposition of the formal system reinforced the differences between the Americo-Liberian ruling class and the indigenous population and directly contributed to the growing social unrest that eventually led Liberia to civil war.

After the civil war, the imposition continued. The Liberian government, along with the United Nations, United States, and other international partners, focused on strengthening the formal justice system and eliminating customary practices that they deemed onerous. While their focus on due process and human rights was commendable, their actions created more tension. Indigenous Liberians, having experienced 150 years of imposition from Monrovia, viewed the elimination of customary practices as another power grab by the central government and its foreign allies.

Some may argue that tension is a price worth paying to strengthen the rule of law; because if the formal system strengthens rule of law in the long run, it is worth imposing even if the transition is difficult. However, while the formal system has strengths, its imposition has not strengthened the rule of law in Liberia.[210]

First, the formal system does not function effectively enough to strengthen the rule of law. All members of society are not held accountable to the law because the system is corrupt. Courts are not transparent as to why litigants are charged fees, and parties use their wealth and power to influence judges.[211] Laws are not equally enforced because the system lacks the resources to function in many parts of the country. A system in which ninety-six percent of detainees are in pretrial confinement[212] is not consistent with international human rights standards. Forcing Liberians to use such a dysfunctional justice system does not strengthen the rule of law.

Second, even if the formal system functioned efficiently, its

209. *See supra* notes 33–38 and accompanying text.

210. In addition to the two arguments below, it may be argued that the conflict created by imposition itself undermined the rule of law. The violent coups, public executions, and ethnic violence of the civil war are the antithesis of the rule of law.

211. *See* Rawls, *supra* note 7, at 94 (discussing corruption as a key finding in the four regional pre-conference meetings).

212. Luccaro, *supra* note 12.

imposition would not strengthen the rule of law because many Liberians would lose their only practical source of justice as they understand the term. Most Liberians who seek justice use the customary system.[213] It provides a reconciliation-based approach that is consistent with their values and practically meets their needs. The government's bans on customary practices and imposition of the formal system have not changed this. Rather, bans and imposition have taken away the only practical justice option for a majority of Liberians. Without a customary system, these Liberians turn to underground customary practices or give up on seeking justice altogether.[214] This is why trial by ordeal continues in the shadows despite the government ban, why Liberians still seek customary resolutions to rape despite laws giving formal courts exclusive jurisdiction, and why over half of Liberian civil and criminal cases are never heard in any kind of forum.[215] A policy of imposition does not promote international human rights standards, but rather incentivizes injustice. By acknowledging these realities, Liberia's new approach strives to avoid this danger.

B. RECENT EFFORTS TO CONSIDER THE REASONS AND VALUES BEHIND THE CUSTOMARY SYSTEM, RATHER THAN MERELY REGULATING OR ELIMINATING IT, HAVE EASED TENSIONS AND SHOWN GREAT POTENTIAL FOR STRENGTHENING THE RULE OF LAW IN LIBERIA

As demonstrated by the work of the LWG, National Conference, LRC, and CRNL, Liberia has changed its approach to rule of law reform. The government is listening to the perspectives of traditional leaders and considering the socio-cultural realities that have shaped the customary system.[216] This stands in clear contrast to the government's pre-LWG approach which merely considered the customary system's regulation or elimination. This new approach has not changed

213. ISSER ET AL., *supra* note 11, at 4, 97 (discussing a Centre for the Study of African Economies at Oxford University study which found that three percent of civil cases and two percent of criminal cases were heard in formal courts, thirty-eight percent of civil cases and forty-five percent of criminal cases were heard in informal forums, and the remaining cases were heard in no forum at all). The study was conducted in 2008 and 2009. *Id.* app. at 97.

214. *Id.* at 4–6.

215. *Id.* at 4–6, 70.

216. *See supra*, notes 197–200 and accompanying text.

Liberia's desire for a Western formal system that meets international standards; the nation is not condoning all traditional practices or incorporating them into the formal system. However, the new approach of integrating the opinions of local leaders and some traditional customs has eased tensions and has great potential for strengthening the rule of law in Liberia.[217]

First, Liberia's new approach is easing tensions because it breaks from the nation's history of imposition. For indigenous Liberians, rule of law reform has historically meant that they are on the receiving end of decisions from the central government. Liberia's new approach breaks from this past by giving indigenous Liberians a role in the reform process and truly listening to what they are saying.[218] Now that the indigenous Liberians participating in the reform process feel listened to, they view Monrovia as a partner rather than an opponent. Differences can now be acknowledged and openly discussed, rather than feeding resentment and escalating into ethnic conflict.

Second, Liberia's new approach focuses on the underlying values and needs of Liberians. The majority of Liberians have long preferred the customary system because it is consistent with their values of social reconciliation and truth telling. It also practically meets the needs of rural agrarian communities. When customary practices were banned, many Liberians felt as if their values and way of life were under attack. However, when Monrovia looked at the customary system it did not see those values and needs. Rather, it saw a system devoid of due process that used superstitious ideas to reach arbitrary results in violation of basic human rights.[219] This difference in perspective was a source of continual tension. Now, the government is meeting with traditional leaders, listening to their values, and considering the socio-cultural realities of rural Liberia. The emphasis has shifted from whether a particular custom, such as trial by ordeal, should be banned, to how the value behind that custom (the need for a public, unequivocal commitment to telling the truth) can be respected in the formal system in way that is consistent with international human rights standards.[220] Further, rather than

217. *See supra*, notes 197–200 and accompanying text.

218. *See* Rawls, *supra* note 7, at 97.

219. *See* U.S. INST. FOR PEACE *supra* note 13, at I.C.1.

220. *See* Rawls, *supra* note 7, at 104–05 (discussing Liberia's past efforts to

merely criticizing the results of customary processes (a rapist being fined 48 dollars), the government is considering how the formal system can better function in the reality of tribal life (the victim and perpetrator's families must continue to farm together to survive). This new approach eases tensions because the government is now considering what is truly important to most Liberians.

Finally, Liberia's new approach has great potential for strengthening the rule of law because it unites the entire population behind a single effort to establish a functional and modern justice system. As the government listens to their perspective, indigenous Liberians are increasingly open to cooperation.[221] Additionally, now that underlying values are openly discussed, the government is better able to explain how the formal system upholds those values. Further, the cooperation of both sides will allow the government to address the formal system's structural weaknesses. As discussions continue and reforms are enacted, indigenous Liberians will become progressively more comfortable with and invested in the formal system. Ultimately, this will facilitate Liberia's transition to a unified formal system that upholds its population's values in a way that is consistent with international human rights standards. Such a system, which all Liberians respect and to which all Liberians are accountable, will significantly strengthen the rule of law.

Imposing a Western justice system has been a source of conflict in Liberia and has not strengthened the rule of law. However, recent efforts to consider the reasons and values behind the customary system, rather than merely regulating or eliminating it, have eased tensions and shown great potential for strengthening the rule of law. Beyond these conclusions, Liberia's history and experience with rule of law reform provide valuable lessons for future rule of law missions in other nations.

V. LESSONS FROM LIBERIA FOR FUTURE RULE OF LAW MISSIONS

ban trial by ordeal and recent discussions as to how some physically harmless forms of trial by ordeal, such as *Kafu*, are similar to oaths and could have a place in the formal justice system).

221. *See id.* at 97 (discussing how the National Conference led to the parties "brainstorming possible concrete solutions.").

Liberia's history and experience with rule of law reform provide valuable lessons for reformers in other nations. While each situation is different, Liberia's journey illustrates the importance of understanding a nation's history, the potential for rule of law imposition to be counterproductive, and the value in avoiding the either/or approach. The United States and its partners should consider these lessons when planning future rule of law missions.

A. THE IMPORTANCE OF HISTORY

A population's view of rule of law reform may be shaped by centuries old conflicts. Populations that have endured colonization may be suspicious of Western justice systems. Further, nations with a history of civil conflict or coups may view reformers as simply the latest strongman to take control. These perceptions will impact the willingness of a population to accept rule of law reforms. To overcome this, reformers need to effectively demonstrate that "rule of law" is not a buzzword used to justify a power grab; rather, it is a commitment to holding *everyone* accountable to the same rules.

B. IMPOSITION CAN BE COUNTERPRODUCTIVE

Strengthening the rule of law takes time and concerted effort. It is tempting for a reform-minded government to simply ban old practices and mandate a modern system, or for international partners to condition their support on immediate reforms. While this may work in certain circumstances, it may prove counterproductive in others. Populations with deeply ingrained justice traditions may resist reform, especially if the new system is dysfunctional, misunderstood, or ill-suited for their needs. Mandating the new system will not lessen this resistance. Rather, it may encourage people to ignore the law and seek underground traditional practices, or give up on seeking justice altogether. This does not strengthen the rule of law. To overcome this, reformers should consider socio-cultural realities as they design and implement reforms. This may mean a longer reform process; however, successful reform may be impossible without it.

C. AVOIDING THE EITHER/OR APPROACH

Often, reform minded governments and their international partners approach the rule of law with an either/or mindset. Either the nation will continue with outdated practices or it will embrace modern standards. With an eye to due process and human rights, the reformers understandably want to ban the old and mandate the new. However, this approach results in imposition which may be counterproductive to the reformers' goals.

Rule of law reform does not have to take the either/or approach. Certainly, some traditional practices are incompatible with international standards. However, even onerous practices may be rooted in values that are consistent with due process and human rights. Reformers should seek to understand traditional values, link those values to the modern system's values, and, when possible, structure the modern system in a way that respects traditional beliefs. A population will be more inclined to give up its traditional practices when the new justice system supports its underlying values.

CONCLUSION

The United States, along with the United Nations and other international partners, will almost certainly be involved in future rule of law missions. What approach will they take? How can they realistically encourage reform while maintaining their commitment to the rule of law and human rights? Liberia's experience provides some helpful lessons. While there are onerous customary practices that rightly deserve to be eliminated, mandating their elimination and imposing a modern system may lead to conflict and ultimately undermine rule of law reform. Alternatively, seeking the values behind customary practices is a good way to encourage a unified effort towards a justice system which all respect and to which all are accountable.