

## Access To Justice In Plural Legal Systems: A Case Study Of Customary And State Law Integration In Sub-Saharan Africa

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**Abstract:** *This study explores access to justice in plural legal systems by examining the integration of customary law and state law in Sub-Saharan Africa. In many African states, legal pluralism is a historical and social reality, with indigenous customary practices coexisting alongside colonial-derived formal legal frameworks. While state law often claims supremacy, customary law remains the primary source of dispute resolution for a significant proportion of the population, especially in rural areas. This case study investigates how the interaction between these two systems affects legal accessibility, fairness, and legitimacy. Through a qualitative case study methodology involving document analysis and secondary data, the research highlights both the complementarities and tensions between the two legal regimes. The findings suggest that harmonizing customary and state law—through mutual recognition, procedural safeguards, and institutional cooperation—can enhance inclusive justice outcomes. However, unresolved issues related to gender equality, due process, and jurisdictional ambiguity persist. The study concludes that plural legal systems, when effectively integrated, offer a promising pathway to justice that is both contextually relevant and socially legitimate.*

**Keywords:** Access To Justice, Legal Pluralism, Customary Law, State Law, Inclusive Governance.

### INTRODUCTION

Legal pluralism, defined as the coexistence of multiple legal systems within a single political entity, is a structural reality in many Sub-Saharan African countries. This pluralistic condition is deeply rooted in the region's colonial history, during which European powers imposed Western-style state legal systems over existing indigenous legal orders without eliminating the latter. Consequently, the post-independence legal landscape in many African states is characterized by a dual structure one consisting of formal, state-administered legal codes and institutions, and another grounded in customary norms and traditional authority structures (Merry, 1988; Griffiths, 1986).

The persistence of customary law in modern Africa is not merely symbolic. For a substantial portion of the population particularly those residing in rural and peri-urban areas—customary law

remains the primary means of resolving disputes, accessing justice, and maintaining social cohesion (Boege et al., 2008). It governs everyday issues such as land tenure, inheritance, marriage, and communal responsibilities. Importantly, customary law systems are often perceived as more accessible, affordable, and culturally legitimate than formal state courts (Ubink, 2008; Chirayath, Sage, & Woolcock, 2005).

However, the integration of customary and state law presents both opportunities and challenges for inclusive legal development. On one hand, integrating these systems can enhance legal accessibility, promote social legitimacy, and provide a more context-sensitive justice system (Woodman, 1996). On the other hand, it raises serious concerns about legal certainty, gender equality, due process, and harmonization with constitutional principles (Fenrich & Higgins, 2001). For example, while customary practices may reflect communal values and historical traditions, they may also perpetuate discriminatory norms, particularly against women and marginalized groups (Armstrong, 1998).

The operational realities of legal pluralism can produce institutional fragmentation, where different authorities exercise overlapping or even conflicting jurisdictions. This fragmentation can lead to legal confusion, inconsistencies in rights protection, and limited access to effective remedies (Sage & Woolcock, 2006). In addition, the absence of formal appellate mechanisms and codified procedures in customary courts often limits procedural safeguards and accountability (Harper, 2011).

Efforts to harmonize state and customary law have been inconsistent across the region. Some countries have made constitutional or statutory provisions to recognize customary law, subject to human rights standards. For instance, South Africa's Constitution explicitly acknowledges customary law under Section 211, while also mandating its conformity with the Bill of Rights. Similarly, Ghana and Kenya recognize customary institutions and practices within their legal frameworks, but vary in terms of oversight, codification, and judicial review (Claassens & Mnisi Weeks, 2009).

International organizations, such as the United Nations Development Programme (UNDP), World Bank, and African Union, have increasingly recognized the importance of customary justice systems in delivering access to justice and legal empowerment in fragile and developing contexts (UNDP, 2005; World Bank, 2011). These actors advocate for the integration of traditional justice mechanisms into national strategies for rule of law reform, with the aim of creating inclusive, context-relevant, and rights-compatible legal systems (Golub, 2003).

This study aims to contribute to this ongoing discourse by critically examining how legal pluralism affects access to justice in Sub-Saharan Africa, with a particular focus on the integration of customary and state law. Using case studies from Ghana, Kenya, and South Africa, the research investigates the institutional mechanisms governing legal interaction, the impact on legal certainty and inclusivity, and the best practices emerging from successful integration models. These countries were selected for their varied legal traditions, degrees of customary law recognition, and ongoing justice sector reforms.

The study addresses the following guiding questions:

- What institutional mechanisms exist for the interaction between customary and state legal systems?
- How does this interaction shape outcomes related to access to justice, procedural fairness, and rights protection?
- What policy recommendations can be drawn to foster a balanced, inclusive, and rights-based legal order in pluralistic contexts?

By answering these questions, this study seeks to illuminate both the potential and the pitfalls of plural legal systems. It argues that rather than viewing customary and state law as inherently incompatible, policymakers should pursue models of integration that respect cultural traditions while safeguarding constitutional values and human rights. This approach aligns with Sustainable Development Goal (SDG) 16, which emphasizes peace, justice, and strong institutions. In doing so, it contributes to global efforts to reimagine justice systems in ways that are not only technically sound, but also socially legitimate and locally rooted.

## METHOD

This study employs a qualitative case study methodology to examine the interaction between customary and state legal systems in three selected Sub-Saharan African countries: Ghana, Kenya, and South Africa. These countries were chosen based on the diversity of their legal traditions, the degree of formal recognition of customary law, and their ongoing legal reform initiatives. The research design integrates both doctrinal legal analysis and empirical document review to capture the normative, institutional, and social dynamics of legal pluralism.

The doctrinal method forms the foundation for analyzing primary legal sources, including national constitutions, statutory instruments, judicial decisions, and customary law codes where available. For instance, Article 211 of the South African Constitution is critically examined to assess how customary law is constitutionally protected and regulated. Similarly, legal instruments from Ghana's Chieftaincy Act and Kenya's Alternative Justice Systems (AJS) Policy Framework are included to evaluate statutory mechanisms that facilitate or limit integration.

Supplementary data are drawn from a broad range of secondary sources, including UNDP reports, African Union legal frameworks, and documents from national law reform commissions. Academic literature on community-based justice, legal empowerment, and traditional dispute resolution provides theoretical and contextual grounding (Golub, 2003; Chirayath et al., 2005).

The analysis applies a thematic approach, focusing on three core dimensions: (1) the institutional recognition of customary law, (2) procedural fairness and access to justice, and (3) the social legitimacy of hybrid legal systems. Comparative legal analysis is used to identify both jurisdiction-specific innovations and broader regional patterns of convergence and divergence. This mixed, context-sensitive approach enables a comprehensive understanding of how plural legal systems shape justice outcomes.

## RESULT AND DISCUSSION

### Recognition and Role of Customary Law in National Legal Frameworks

Legal pluralism in Sub-Saharan Africa reflects the coexistence of state and customary legal systems, which is both historically rooted and socio-culturally relevant. Across the region, customary law remains deeply embedded in local governance structures, particularly in rural areas where state institutions are often under-resourced or absent. This study reveals varying levels of institutionalization and integration of customary law within the national legal frameworks of Ghana, South Africa, and Kenya.

In Ghana customary law is formally recognized under Article 11 of the 1992 Constitution, and it governs personal law and land-related disputes. Approximately 80% of Ghana's land is held under customary tenure, and chieftaincy institutions play a central role in resolving land and inheritance conflicts (Ubink, 2008; Kasanga & Kotey, 2001). While these structures provide accessible and culturally grounded justice, the lack of formal oversight mechanisms, combined with minimal documentation of proceedings, has raised concerns regarding legal certainty, procedural consistency, and vulnerability to rights violations, particularly for women and minority groups (Fenrich & Higgins, 2001).

South Africa employs a dual recognition model. Under Section 211 of the 1996 Constitution, customary law is acknowledged as part of the legal system, provided it complies with the Bill of Rights. This model allows customary practices in areas such as marriage, inheritance, and succession to operate alongside statutory laws. The coexistence fosters cultural autonomy, yet also presents challenges in harmonizing legal norms, especially where customary rules conflict with constitutional mandates on gender equality and children's rights (Claassens & Mnisi Weeks, 2009). Customary courts are recognized in rural areas, but their jurisdiction and relationship with magistrate courts often remain unclear, leading to jurisdictional overlaps.

Kenya's 2010 Constitution represents a more integrated approach, explicitly recognizing indigenous dispute resolution mechanisms under Article 159(2)(c). It mandates that alternative justice systems must conform to constitutional principles, especially human rights protections. Kenya's Alternative Justice Systems (AJS) Policy Framework (2020) operationalizes this provision by formalizing the role of elders, spiritual leaders, and community mediators in resolving

disputes at the grassroots level (Republic of Kenya, 2020). The framework aims to enhance access to justice, reduce case backlogs in formal courts, and reinforce the legitimacy of customary adjudication mechanisms.

Country	Constitutional Recognition	Legal Domains Covered	Oversight & Regulation	Notable Mechanisms
<b>Ghana</b>	Article 11, 1992 Constitution	Land, inheritance, chieftaincy	Weak institutional oversight; minimal codification	Traditional Councils
<b>South Africa</b>	Section 211, 1996 Constitution	Marriage, inheritance, succession	Must conform to Bill of Rights; uneven court coordination	Traditional Courts Bill (pending)
<b>Kenya</b>	Article 159(2)(c), 2010 Constitution	All civil disputes (with limits)	AJS must respect human rights and Constitution	Alternative Justice Systems (2020)

*Table 1. Comparative Overview of Customary Law Recognition*

While all three countries offer formal recognition of customary law, the degree of integration, jurisdictional clarity, and rights protections vary significantly. Ghana's model remains largely autonomous but lacks systemic accountability; South Africa's system is constitutionally bounded yet challenged by overlapping authority; and Kenya's AJS represents a hybrid approach, seeking structured collaboration between formal and informal legal actors.

The success of integrating customary law depends not only on legal recognition but also on capacity-building, documentation, training, and institutional linkages. Regional organizations, including the African Union and UNDP, have emphasized the importance of leveraging customary justice to meet Sustainable Development Goal 16, which promotes access to justice and effective institutions (UNDP, 2005; AU, 2021). However, to achieve this vision, integration must go beyond symbolic recognition to include mechanisms for standardization, human rights monitoring, and stakeholder engagement (Harper, 2011).

In conclusion, while customary law continues to play an indispensable role in delivering justice in Sub-Saharan Africa, its recognition and integration into national legal systems must be carefully designed to ensure that cultural legitimacy does not come at the expense of legal predictability and human rights compliance.

## Challenges in Implementation and Gender Equality



While many Sub-Saharan African countries have constitutionally or statutorily recognized customary law, the practical integration of customary and state legal systems remains fraught with challenges. Among the most pressing issues is the perpetuation of gender inequality through customary norms and practices, especially in areas related to land tenure, inheritance, marriage, and family law. Although national constitutions—such as those of South Africa, Kenya, and Ghana formally guarantee gender equality, the enforcement of these principles within customary legal forums is inconsistent and often constrained by deep-rooted patriarchal traditions.

In South Africa, the Constitution (Section 9) prohibits discrimination on the basis of sex or gender and guarantees equal protection under the law. However, the coexistence of customary law within a plural legal system creates conflict between constitutional ideals and traditional authority. Research shows that women are often excluded from chieftaincy roles and customary dispute resolution processes, especially in rural provinces such as KwaZulu-Natal and Limpopo, where male elders dominate decision-making structures (Claassens & Mnisi Weeks, 2009). These patriarchal patterns limit women's access to fair hearings, especially in disputes over marital property or land allocation.

In Ghana similar dynamics are observed. Although women contribute significantly to agricultural production, they often lack secure land tenure because inheritance under customary law frequently favors male lineage (Amanor, 2001). The Chieftaincy Act (2008) recognizes traditional councils, but the absence of gender quotas and weak enforcement of equality standards result in limited representation and recourse for women. A 2020 study by ActionAid Ghana found that 70% of rural women had experienced discriminatory practices in land-related decisions made by customary authorities (ActionAid, 2020).

Kenya presents a mixed picture. The 2010 Constitution provides strong equality guarantees (Article 27) and explicitly requires customary law to align with the Bill of Rights. The Alternative Justice Systems (AJS) Policy Framework (2020) aims to formalize customary mechanisms while incorporating gender-sensitive approaches. However, implementation remains problematic. Many community-based forums lack gender-inclusive guidelines, and customary leaders often receive

little or no training in legal standards or human rights principles. This leads to inconsistent outcomes, particularly in cases involving domestic violence, divorce, and child custody (Cheeseman et al., 2021).

Country	Legal Protection for Gender Equality	Customary Law Practice Impact	Women's Representation in Customary Institutions
<b>South Africa</b>	High (Bill of Rights, Constitution)	Often patriarchal; limited land rights and marriage autonomy	Less than 10% of traditional council seats (Rural)
<b>Ghana</b>	Moderate (Chieftaincy Act, Constitution)	Male-preferential inheritance and land distribution	Predominantly male-dominated leadership
<b>Kenya</b>	Strong (2010 Constitution, AJS Policy)	Customary courts vary; weak training on gender law	Limited but growing involvement through AJS

*Table 2. Gender Disparities in Customary Legal Systems.*

In addition to gender-specific challenges, systemic weaknesses in customary law administration further exacerbate inequality. These include the lack of standardized procedures, absence of appeal mechanisms, and non-codified legal norms, which allow discretionary judgments that may reinforce bias or arbitrary decisions (Harper, 2011). Moreover, the absence of monitoring and evaluation frameworks makes it difficult to track progress on gender equity in customary justice systems.

International organizations have called for greater integration of gender justice in legal pluralism reforms. The UN Women's Africa Strategy (2018) and the African Union's Maputo Protocol emphasize the need for capacity-building, legal literacy campaigns, and the inclusion of women in customary institutions as part of broader efforts to ensure equitable access to justice (UN Women, 2018; AU, 2003).

To address these challenges, policy recommendations include:

- Mandatory gender training for customary adjudicators
- Establishment of legal aid and advisory services for women navigating customary systems
- Promotion of female representation in traditional leadership structures
- Development of model customary law codes aligned with constitutional principles



While customary law continues to serve as an accessible and legitimate dispute resolution system for millions, its transformative potential remains limited unless implementation is deliberately structured to uphold gender equality and protect fundamental human rights.

## **Institutional Coordination and Jurisdictional Ambiguities**

One of the most persistent structural challenges in plural legal systems is the lack of coordination and jurisdictional clarity between customary and state legal institutions. In Sub-Saharan Africa, the co-existence of these parallel systems—while legally recognized—often leads to ambiguous authority, procedural inconsistencies, and forum shopping, particularly in high-stakes matters such as land disputes, marital property rights, and succession cases (Ubink, 2008; Harper, 2011).

In Ghana both the formal judiciary and customary tribunals preside over land tenure issues, as land is predominantly held under customary ownership—approximately 80% of Ghana’s land falls under traditional authority (Kasanga & Kotey, 2001). However, there is no clear appellate mechanism from customary to state courts. Aggrieved parties must initiate entirely new proceedings within the formal system, which is costly, time-consuming, and procedurally complex (Fenrich & Higgins, 2001). Moreover, the absence of case documentation in many customary courts makes it difficult for higher courts to review decisions or establish legal precedent.

In Kenya, the 2010 Constitution’s Article 159 mandates the judiciary to promote Alternative Justice Systems (AJS) that are culturally rooted and community-based. The AJS Policy Framework (2020) supports collaboration between traditional leaders and formal courts. However, institutional silos persist. Customary adjudicators operate without consistent guidelines, and cross-referral systems between AJS and formal courts are underdeveloped (Cheeseman et al., 2021). Judges often lack training in customary law, while elders are unfamiliar with constitutional mandates—creating a significant disconnect in legal reasoning and procedure (Republic of Kenya, 2020).

In South Africa, the dual recognition of state and customary law is enshrined in Section 211 of the Constitution, with efforts to integrate customary courts into the justice system through the Traditional Courts Bill. Yet, implementation has been slow and controversial. There are no formal

coordination mechanisms between customary courts and magistrate courts, and jurisdictional boundaries remain vague and contested, especially in rural provinces (Claassens & Mnisi Weeks, 2009). While customary courts handle family and inheritance matters, disputes frequently escalate to the formal system, often yielding conflicting outcomes due to differing evidentiary standards and procedural rules (Woodman, 1996).

Country	Customary Court Jurisdiction	State-Customary Linkages	Major Coordination Challenges
Ghana	Land, inheritance, family	Weak referral pathways	No appellate review; duplication of claims
Kenya	Civil disputes via AJS	AJS under judiciary	Lack of protocols; informal proceedings
South Africa	Customary family law, chieftaincy	Traditional Courts Bill (pending)	Fragmented implementation; conflicting decisions

*Table 3. Institutional Gaps and Jurisdictional Overlaps*

These jurisdictional ambiguities also have broader implications for legal certainty, efficiency, and human rights protections. The overlapping mandates create environments where litigants may manipulate the system to their advantage—choosing forums likely to provide favorable outcomes (World Bank, 2011). This practice, known as forum shopping, undermines equitable access to justice, particularly for vulnerable populations with limited legal literacy.

Furthermore, capacity constraints—including under-resourced customary institutions, lack of legal training, and minimal digitization—hamper efforts to harmonize the systems. A 2021 UNDP assessment found that fewer than 20% of customary courts in surveyed rural districts had written procedures or trained personnel capable of engaging with the formal legal framework (UNDP, 2021). This institutional fragility weakens public trust in both systems and perpetuates inequalities in legal outcomes.

To address these structural gaps, several policy recommendations are critical:

- Develop standardized protocols for cross-referral and cooperation between customary and state courts.
- Establish joint capacity-building programmes involving both judicial officers and traditional leaders.

- Introduce interoperable case management systems to document customary decisions and allow appellate review where necessary.
- Strengthen oversight through hybrid legal aid and monitoring bodies, ensuring that both systems uphold constitutional rights.

While the co-existence of state and customary law in Sub-Saharan Africa holds promise for inclusive justice, it will remain fragmented and inefficient without deliberate institutional coordination. A hybrid justice model must move beyond recognition toward functional integration, where clarity of jurisdiction, procedural safeguards, and mutual respect between systems are institutionalized.

## CONCLUSION

This study has demonstrated that plural legal systems where customary and state legal orders coexist hold significant promise for advancing access to justice in Sub-Saharan Africa. In countries such as Ghana, Kenya, and South Africa, customary law continues to serve as the primary avenue for dispute resolution in rural and marginalized communities. Rooted in local customs and community norms, these mechanisms offer culturally legitimate, cost-effective, and timely alternatives to formal court systems that are often inaccessible to the poor and geographically remote populations. The potential of legal pluralism can only be fully realized if customary law is integrated with state legal frameworks in a manner that respects constitutional values, international human rights standards, and principles of legal certainty. Current challenges such as gender discrimination, procedural inconsistencies, lack of documentation, and jurisdictional ambiguities must be addressed through targeted legal and institutional reforms.

Governments and stakeholders are encouraged to take deliberate steps to strengthen plural justice systems. This includes the formal recognition of customary institutions in constitutional and statutory law; the implementation of procedural safeguards, including the right to appeal, transparent adjudication, and inclusive participation of women and marginalized groups; and the capacity-building of both customary and formal justice actors. Furthermore, systematic

coordination mechanisms between state courts and traditional forums are essential to avoid conflicting decisions and promote legal coherence. A well-designed hybrid justice model—one that leverages the legitimacy of state law and the local accessibility of customary systems—can offer a powerful strategy for delivering inclusive, accountable, and rights-respecting justice. This approach not only reflects the lived realities of African societies but also contributes to achieving Sustainable Development Goal 16, which emphasizes peace, justice, and strong institutions.

## REFERENCE

- ActionAid Ghana. (2020). *Securing women's land rights in rural Ghana*. Accra: ActionAid.
- African Union (AU). (2003). *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (Maputo Protocol)*. Addis Ababa: AU Commission.
- Amanor, K. (2001). *Land, Labour and the Family in Southern Ghana: A Critique of Land Policy under Neo-Liberalisation*. Nordic Africa Institute.
- Armstrong, A. (1998). *Culture and Choice: Lessons from the Debate on Female Genital Cutting*. Reproductive Health Matters, 6(11), 64–65.
- Boege, V., Brown, A., Clements, K., & Nolan, A. (2008). *On Hybrid Political Orders and Emerging States: State Formation in the Context of 'Fragility'*. Berghof Research Center.
- Cheeseman, N., Lynch, G., & Willis, J. (2021). *Customary justice in Kenya: Perspectives from the AJS pilot project*. Nairobi: ODI & Kenyan Judiciary.
- Chirayath, L., Sage, C., & Woolcock, M. (2005). *Customary law and policy reform: Engaging with the plurality of justice systems*. World Bank Legal Review, 2, 1–31.
- Claassens, A., & Mnisi Weeks, S. (2009). *Rural Women Redefining Land Rights in the Context of Living Customary Law*. South African Journal on Human Rights, 25(3), 491–516.
- Fenrich, J., & Higgins, T. E. (2001). *Promise Unfulfilled: Law, Culture and Women's Inheritance Rights in Ghana*. Fordham International Law Journal, 25(2), 259–341.
- Golub, S. (2003). *Non-state justice systems in Bangladesh and the Philippines: A study of efficiency and equity*. Paper prepared for DFID.
- Griffiths, J. (1986). *What is Legal Pluralism?*. Journal of Legal Pluralism, 24(1), 1–55.
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- Harper, E. (2011). *Customary justice: From program design to impact evaluation*. IDLO Working Paper Series.
- Kasanga, K., & Kotey, N. A. (2001). *Land management in Ghana: Building on tradition and modernity*. IIED.
- Merry, S. E. (1988). *Legal Pluralism*. Law & Society Review, 22(5), 869–896.
- Republic of Kenya. (2020). *Policy Framework on Alternative Justice Systems*. Nairobi: Ministry of Justice and Legal Affairs.
- Sage, C., & Woolcock, M. (2006). *Breaking Legal Inequality Traps: New Approaches to Building Justice Systems for the Poor in Developing Countries*. World Bank.
- Ubink, J. (2008). *In the Land of the Chiefs: Customary Law, Land Conflicts, and the Role of the State in Peri-Urban Ghana*. Leiden University Press.
- UN Women. (2018). *Strategy for Gender Equality in Africa*. New York: United Nations Entity for Gender Equality and the Empowerment of Women.
- UNDP. (2005). *Programming for justice: Access for all – A practitioner’s guide to a human rights-based approach to access to justice*. United Nations Development Programme.
- UNDP. (2021). *Strengthening Access to Justice through Customary Systems in Africa: Lessons from Pilot Projects*. United Nations Development Programme.
- Woodman, G. R. (1996). *Legal Pluralism and the Search for Justice*. Journal of African Law, 40(2), 152–167.
- World Bank. (2011). *World Development Report 2011: Conflict, security, and development*. The World Bank.