# The role of Informal justice Mechanisms in Deepening Access to Justice: Options and Opportunities for Legal Pluralism in Uganda

## 1. Introduction

This short paper on the role of informal justice mechanisms in deepening access to justice is not aimed so much at an exhaustive exploration of the various informal mechanisms that are available to the people of Uganda in order to achieve justice. Rather it aims at accessing the kind of solution informal mechanisms and legal pluralism offer to the crisis of the formal justice mechanisms and access to justice therein. For this purpose therefore the paper examines the nature and magnitude of the crisis in the formal justice system and then attempts to explore the meaning of legal pluralism, informal justice mechanisms and then finally discusses what is to be done.

## 2. The Crisis of the State and Crisis of the Formal justice Mechanisms and Access to justice

### The Formal justice System

The crisis of the formal justice system is reflected at many levels. At the administrative level, those who administer the judiciary recognize the growing case backlog inspite of many interventions, especially in the form of JLOS.

To appreciate the depth of this crisis the case backlog has to be put side by side with the HiiL report to the effect that:

> Courts and lawyers are marginal to the experience of the day-to-day justice of the people of Uganda: less than 5% dispute resolution takes place in a court of law and in less than 1% of cases is a lawyer involved.[1]

If the case backlog is rising when only 5% of legal disputes are handled by the formal system, what would be the magnitude of the problem if the formal justice system were to be the mainstream mechanism of the dispute resolution instead of the marginal role it plays today? What would the problem be like if the disputes handled were to creep to the level of 10%?

The Second aspect of the crisis, apart from the inefficiencies and ineffectiveness is the inaccessibility of the courts both physically and economically. [2]

[1] HILL P.4

[2] Ibid

Thirdly is the cultural and value distance between the formal system and communities; it bears on the legitimacy of the system.

Fourthly is the shortfall in legitimacy of the courts in the perception of the communities, in a different sense from the previous one. This has to do with perceptions of corruption, and the issue of cadre (rogue) judges; which has to do with the interference of the executive branch with the judicial arm.

Fifthly is the issue of the substantive law and its inability to deliver justice. In this case there are unjust laws, oppressive laws, exploitative laws; and the absence of laws that are beneficial to the people.

It is important before one begins to look for solutions to the crisis to realize that these problems are systemic, historical and are part of the larger state crisis.

At the level of the justice system, the present system was received at the beginning of the 20th century. The received law performed specific roles:

> "The most important function was the maintenance of law and order. The other was dispute settlement based on a regime of decision-making, which emphasized adherence to precedent over creativity in law making and dispute settlement."[3]

Thus the received law mainly ignored the beneficial aspects of English law, such as the fundamental democratic rights and social legislation or welfarism. Such laws as related to unemployment insurance, Old age Care, Factory Acts, Workmen's compensation Acts were not applied.[4]

In other words in terms of substantive law the new justice system emphasized the protection of commercial transactions for the new economy on the one hand, and law and order in the form of criminal law in order to protect private property and provide an atmosphere for the operation of capital. Natives would mostly understand the new legal system in its criminal character; and generally its oppressive rather than beneficial character.

That emphasis still exists today. Today the law still ignores the economic and social rights of Ugandans. These are mostly not justiciable. Hence for the most vulnerable sections of the population: the rights to health, education, food, housing etc cannot exactly be enforced in the present formal legal system. Indeed even the other civil and political rights are largely ignored.

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[3] Nabudere p.38

[4] Nabudere 47

Instead law reform and JLOS programmes have put a premium, emphasis, priotization and resources on commercial transactions (commercial law) and law and order (criminal law). Other areas such as family law have experienced little reform and where they have, it is from the point of view of effecting population control accruing from women rights so as to improve on economic formance. But there are also measures, including within the criminal law, aimed at cost recovery, effectively privatizing justice, rather than aiming at maximizing it.

The state

As pointed out earlier the crisis of justice is part of the larger crisis of state which should be set out here briefly.

The Uganda state was created in 1894 by the colonialists. Colonialism by definition is not only anti-democratic. It is dehumanizing. The colonialist must dehumanize the colonized. He must assume that he is not his equal and has no capacity to govern himself. So he must create a state structure ignoring the structures that has hitherto governed the colonized. It is in this way that the Westphalian Treaty after the 30 years war (1618 – 1648) was introduced in Uganda. While the Westphalian state was organic to Europe and had linguistic – cultural links, (making it possible to be responsive to demands of the people; so that inspite of class differences there was a degree of reciprocity between the ruler and ruled – the social contract), the replicated state in Africa was not organic to Africa; it violated the integrity of African communities, split them into various states and ignored any cultural linguistic attributes. This state was an imposition and it was oppressive. Its legal structure emphasized that aspect – as we have already stated. There has therefore never been any reciprocity between the rulers and the ruled.

It is this state that was inherited by the nationalists at independence hoping to embark on the national building project. However they soon discovered that no national building was occurring and that Uganda, like other African states was not a nation. Instead of nation-building the nationalists began to emphasize the repressive state machinery to suppress the population. It has not ever been possible to build a democratic state over the period of 50 years of our independence – (this has a direct bearing on separation of powers and on the courts).

This crisis of the state grew to unprecedented levels beginning with the 1980s with the neo-liberalism that characterized the state as bloated. Soon measures such as SAPs: liberalization, deregulation, privatization, retrenchment and the abandonment of the provision of social services such as health and education occurred in the form of privatization and cost sharing. The idea of public goods disappeared and instead market fundamentalism has prevailed in Uganda. State enterprises were privatized, health and education experienced the same thing. As the role of the state dwindled the emphasis was on the private sector on the one hand and on NGOs on the other as agents of service delivery amongst other things.

It is in the context of this Washington Consensus that Sector – Wide Approaches – under PEAP were introduced. This is the context in which JLOS was created and exists – to try and address this crisis.[5]

State Failure

The crisis of state has led to the phenomenon of state failure. There are failed and failing states in Africa and elsewhere.

Since 2005 Fund for Peace has produced, annually the Failed State Index, which has since been renamed the Fragile State Index. [6]

"A fragile state has several attributes. Common indicators include a state whose central government is so weak or ineffective that it has little practical control over much of its territory; non– provision of public services, widespread corruption and criminality; refugees and involuntary movements of populations; and sharp economic decline. [7]

Fund for Peace has developed indicators or fragile state which include;

(a) Social indicators of which include demographic pressures, refugees and internally displaced persons, group grievances and human flight and brain drain.

[5] See Frederick W. Jjuuko Law and Access to justice and the Legal systems in contemporary Uganda. Chapter 4 in Maria Nassali (Ed) Reforming justice in East Africa. A comparative Review of Legal Sector Processes. (2008).

[6] https://reliefweb. Int/sites/reliefweb.int

[7] https://en Wikipedia.org wiki/List of countries.

(b) Economic indicators which include uneven economic development and poverty and economic decline.

(c) Political indicators which include state legitimacy: corruption and lack of representativeness undermine the social contract, as citizens lose confidence in state institutions and processes. Measurements include corruption or profiteering by ruling elites resistance to transparency, level of democracy, illicit economy, and protests and demonstrations; and Public Services: Disappearance, or lack of basic state functions indicate a state's inability to perform one of its roles. Measurements include essential services such as healthcare, education, sanitation, public transport, police and infrastructure.

(d) Human Rights and rule of law:

The violation or uneven protection of basic rights mark a failure of state to execute its primary responsibility. Measurements include press freedom and civil liberties as well as any widespread abuse of legal, political and social rights for individuals, groups or cultural institutions (e.g harassment of the press, politicization of the judiciary, internal use of military for political ends, public repression of political opponents, religious or cultural persecution.

(e) Security apparatus: An emergence of elite or praectorian guards that operate with impunity challenges the security apparatus's monopoly on the use of force weakening the social contract.

(f) Factionalised elites.

(g) External intervention.

It is significant that the 2017 Fragile State Index for the whole world ranks Uganda 24th out of 178 countries. The most fragile state for 2017 is indicated as South sudan with a score of 113.9, next is Somalia with 112.6 score; Uganda Scored 96.0. The least fragile state is Finland with a score of 18.7.

The crisis of the state in Uganda therefore has a dual character. There is the aspect that stems from the very nature of this state from its inception in 1894 stemming from its rootlessness and oppressive character, and the other aspect of state failure arising in the context of neo-liberalism and globalization.

This state crisis will in all likelihood continue and presents an existential threat to Uganda. The crisis in the formal justice system is part and parcel of it.

3. Legal Pluralism

Legal pluralism recognizes a plurality of legal systems within a given society, a "fragmented spectrum the law".

"Legal pluralism has become a major theme in socio-legal studies. However under this very broad denomination one can identify many different trends which share, little but the very basic idea that law is much more than state law. Despite their eclectic character, these many conceptions of legal pluralism also share some common fundamental premises concerning the nature of law, its function and its relationship with its cultural milieu"[8]

The idea is that within a society there can be many legal systems interacting with each other.[9]

Legal pluralism challenges an exclusively state centered law. State centralism of law has only historically existed under certain historical and political conditions. Instead of the state monopoly of law, strands of legal pluralism have produced various dichotomies.:

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|---|---|
| Official law | -Unofficial law |
| State law | - Non-state law |
| Transplanted law | - Indigenous law |
| State centered law | - Living law [Eugene Ehrlich] |

There are also other concepts associated with legal pluralism: folk law, nature law, primitive law and people's law.

However, there are both what is described as the 'weak' and 'strong' definitions of legal pluralism.

The weak version describes;

> "Legal systems in which the sovereign commands or validates or recognizes different bodies of law for different groups in the population."[10]

[8] Baudouin Dupret
@cadmnus.eui.eu/handle/1814/6852

[9] Marcel Mauss

[10] John Griffiths – cited in
Dupret op. cit

This weak version of legal pluralism would easily apply to societies with colonial experiences as well as to diversified countries. In the weak version therefore the plurality is based on and is sanctioned by the state.

Some legal pluralists deny that the weak version is legal pluralism. Thus Georges Gurvitch makes the important distinction between the plurality of the sources of law [as in Uganda] and legal pluralism.[11]

The strong version of legal pluralism is that which concerns itself with an empirical state of affairs in society were you have distinct systems – as a reality.

Massafi Chiba suggests that instead of opposing state law and people's law – one should identify many legal levels: "The legal systems authorized by the legitimate authority of a country; unofficial law i.e. the legal system which is not officially authorized by the official authorities, but authorized in practice by the general consensus of a certain circle of people – and having a distinctive influence upon the effectiveness of the official law, the legal postulates i.e "the system of values and ideals specifically relevant to both official and unofficial law in founding and orienting the latter". [12]

The stronger version of legal pluralism is probably best expressed by Sally Engle Merry's statement which has a strong postmodernist tone to it:

> "The intellectual odyssey of the concept of legal pluralism moves from the discovery of indigenous forms of law among remote African villagers and New Guinea tribesmen to debates concerning the pluralistic qualities of law under advanced capitalism. After a long spell of modernity and its emphasis on uniformity, homogenization, certainty, it appears that the academic world cannot ignore any longer that every society is legally plural, whether or not is has a colonial past."[13]

Legal pluralism has been criticized on many counts. These are linked to the functionalist approach to legal pluralism. Law is seen as serving the social function of ordering which is performed by social institutions.

Hence it is claimed legal pluralists see law as being synonymous with social norms. In this way legal normativity is confused with other normativities for example, morality or good manners.

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[11] Cited in Dupret op.cit

[12] Ibid

[13] See Christoph Eberhard and
Nidhi Gupta, Legal Pluralism in India – An Introduction.

It is pointed out "lived norms" are qualitatively different from norms that are recognized and applied by legal institutions, because legal norms are "positivised" and are recognized as such by legal actors.

Confounding legal norms with other norms simply because the others also carry out the function of social ordering creates ambiguity.

There are also criticisms emanating from positivist theories that emphasize law-making by the sovereign.

Inspite of these criticisms and the fact that there exist the weak and strong versions of legal pluralism, legal pluralism does describe some reality in society and serves a useful purpose.

The other issue is the nature of co-existence of the plural systems – are they mutually exclusive; do they interact only externally?

Rodevick Macdonald is critical of the traditional conception of legal pluralism – of neatly defined official and unofficial normative orders interacting;

> "The normative regimes sought to be identified in a legal pluralistic approach are not stable, unambiguous and self-contained regimes interacting along clear boundaries – the sites of normative interaction are on several levels at once, often taking the form of a broad zone of adjustment in dynamic evolution and redefinition. These levels include the individual, the group and the society."

In approaching legal pluralism, and in determining the nature of interaction, and how the official legal system should relate to other systems this has to be kept in mind.

Uganda is a legal-pluralist country. This is certainly so in respect of the weaker version of pluralism. It is also the case given that the majority of cases are not handled by the formal justice system and therefore Uganda is pluralist in the stronger version as well.

4. <u>Informal justice Systems</u>

At one level the informal justice systems in Uganda result from the failure and marginal nature of the formal justice system. In this sense it is part and parcel of the whole alternative movement in the world; in Latin America, Asia, Africa and elsewhere in the world. This alternative movement arises from marginalization. This applies to all professional services. Hence there is alternative medicine, alternative law (justice), alternative journalism etc.

Professional services are urban – based, expensive and not accessible to the majority of people not only in the rural areas but also for the urban poor. Today in Uganda, the majority of dwellings and other structures are not the product of architectural professionals; the majority of people are not treated by professional doctors, the majority of business undertakings are not catered for by professional accountants. Likewise the vertical professional media, is hardly affordable by the majority and does not provide relevant information and the right to answer back. Alternative democratic non- professional media i.e participatory, horizontal patterns of communication based in communities and committed to causes keeps on growing as alternative journalism, including citizen journalism.

The position of alternative or informal justice is therefore not unique at all. What compounds the issue with the justice system is that apart from the fact that professional legal services are urban (Kampala) – based and prohibitively expensive, they are so closely connected to the state that the impacts of the state failure more directly bear on it than on other professions that may not be so closely linked to the state.

Informal justice systems also arise from the alienation that arises from the application of western justice systems that do not take into account the differences in the value and epistemological systems of Africans. This relates both to substantive law, broad legal postulates and to procedural aspects.

Many African justice systems tend to apply restorative justice. These tend to be participatory and restorative and non adversarial and society focused. They are informed by a different world view. This is best exemplified by the debate about Mato Oput when issues of transitional justice arose in the aftermath of the war and its atrocities in Northern Uganda and secondly on the rendering issues on customary law.

In regard to Mato Oput there were those of the view that Western justice, particularly in the form of the ICC would have a negative impact on the peace process and showed, preference to traditional justice.

> "The traditional Acholi culture views justice as a means of restoring social relations. In other words, justice in the traditional Acholi culture should be considered as restorative.
>
> Forgiveness and reconciliation are said to be at the centre of the traditional Acholi culture. Traditionally the Acholi believe in the world of the "living dead" and divine spirits. Their belief in this world plays a significant role in shaping how they see justice and reconciliation. Jok (Gods or divine spirits) and ancestors guide the Acholi moral order, and when a wrong is committed they send misfortune and illness (cen) until appropriate actions are taken by Elders and the offender.

> As a result, the Acholi discourage an individual from being a troublemaker since the individual's actions can have grave consequences for his/her whole clan. This phenomenon of cen illustrates the centrality of relationships between the natural and supernatural worlds of the Acholi and the dead, the normative continuity between an individual and the community." [14]

From this one can see why justice is viewed as a means of restoring social relations. This also explains why there is insistence on respect, sincerity, reconciliation, harmony, forgiveness, problem solving and discussion.

This purpose then also goes a long way to explain the procedures that may be adopted. As an Acholi Bishop once pointed out to me – the point of departure in western justice is denial and then you leave it to the victim to establish the case. This is not the case with Mato Oput.

> "Mato Oput is both a process and ritual ceremony that aims at restoring relationships between clans that would have been affected by either intentional murder or accidental killing

Patrick Tom is of the view that the Acholi traditional justice and Western justice are not incompatible but complementary. That may be so to a degree and to that extent there would be a basis for interaction of the two systems; and in aspects in which they are incompatible the plurality would not take the form of complementarity.

The Acholi justice conception is perhaps much more deeply embedded in African societies.

Today's symbol of justice – the scale, is several millenia old and derives from Ancient black Egypt. Maat was the goddess of justice who played a role in the creation of the world from the original chaos. She continued to actively prevent the world from falling back into chaos.

She regulated the cosmos: the stars, the seasons but also the activities of mortals (humans) and gods. Then she regulated both nature and society.

Maat as a principle meant justice, truth, morality, balance and harmony and order Virtuous living meant living according to Maat.

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[14] Patrick Tom, The Acholi Traditional Approach to justice and the War in Northern Uganda. https://www.beyondintractibility.org

The Egyptian Pharaoh was also the Lord of Maat and gave expression to the principles of Maat. If the Pharaoh acted in an evil way this would result in disasters; drought, floods, famine, pestilences etc.

The viziers – those who administered the law were known as priests of Maat and administered justice in the name of the goddess.

There were at least 42 principles of Maat. They had to do with relations among humans, between humans and their environment and between humans and gods. It is against these principles that the goddess Maat weighed the heart of the departed on a scale. If the heart weighed as much as or lighter than the feather of Maat then the individual had lived a righteous life and he would proceed to paradise ( Aaru )

If the heart weighed heavier then the individual had not been virtuous and his heart would be devoured in the underworld.

It is the depiction of the goddess weighing the heart with the feather on a scale that we have inherited as the symbol of justice today and it is the principles of Maat that were passed on the Greeks by the Egyptians that the West today calls natural law. Clearly the conception of justice was of cosmic proportions in which human relations were just a part. Many African systems reflect this conception.

With regard to customary law its application, on the basis of indirect rule was based on the breaching of its integrity. In the first place the criminal aspect was removed and the law was subjected to the repugnance clause; finally, as is the case today, the formal justice system applies customary substantive without its institutions and procedures.

This neo-traditional customary law at the service of colonialism and today is different from the customary law known by Africans and was appropriated by the colonialists for purposes of control. It was frozen and tended to be rigid and its dynamism in response to social change was removed from it. [15]

Also its real meaning often eluded its administrators as the famous Amkeyo case on 'wife purchase' clearly demonstrates. The judge in ignorance reduced the whole reciprocal marriage relationship to purchase, just like today one may determine that under English law, marriage is a commercial transaction simply because marriage is referred to as a marriage contract.

[15] See Nabudere Dani Law, the Social Sciences and the Crisis of Relevance Heinrich Boll Foundation Nawobi 2001.

Deprived of its dynamic aspects, the institutions that administered it as well as its procedures, that law becomes alien to the population and can not be a means to deliver justice by the formal justice system.

Customary law and the other such practices are based on certain world views. A practice like taboo as a means of social regulation in traditional society was clearly based on the absence of a state structure of enforcement; so taboos characteristically are self – enforcing. They are also based on collective rather than individualised liability. Outside these premises they will not be understood.

Customary law systems in order to be viable as informal effective justice systems, must be unfrozen, their institutions and procedures restored so that they become post – traditional (not neo-traditional) institutions with the capacity to respond to changing circumstances but at the same time appreciated by the people they serve and even having the capacity to interact beneficially with the formal justice system.

There are therefore many informal justice systems with the potential to deliver effective justice. These include amongst others.

a) <u>LC courts</u>

The HiiL report clearly attests to these courts providing informal justice. The report's particular emphasis on LCI courts is significant.

The lowest court is most significant precisely because it is the furthest away from the state and therefore it has the greatest popular character. The higher the institution the more it assumes the attributes of the state and therefore its potential for oppression, irrelevance and ineffectiveness.

The LC I itself because the population has not elected them for sometime will increasingly lose their popular and democratic character and increasingly turn into state security institutions. This will affect the LC I courts also as instruments of informal justice. The formal courts have declared them unconstitutional and therefore illegal because they have not been elected. The more important point is that they are increasingly becoming illegitimate as instruments of justice.

b) Clan and family courts of councils.

c) Elders and their institutions.

d) Traditional Institutions courts such as the Kisekwa Court in Buganda. This would include those traditional adjudicatory institutions that were suppressed by colonial and post colonial governments.

e) Associational and Commercial institutions.

There are practices and dispute resolutions mechanism adopted by business people at various levels. We need to remember that the modern commercial law in the common law system was in fact created by the Kings courts, which being feudal knew nothing about commercial transactions. What these courts did was to absorp the law merchant (lex mercatoria) a law practiced continent – wide in Europe by itinerant merchants. The common law courts absorbed this law wholesale from the "dust" and "fair" courts.

f) Qadhi's courts and church courts

In the case of all these, the discussion so far should reveal that it is not possible to deliver justice to people whose world view, epistemology or knowledge systems and even psyche one does not understand. Such an attempt would result in oppression. Justice done, must also be seen to be done; and in this case that would not be possible.

5. <u>What is to be done:</u>

The marginal status of the formal justice system in delivering justice to the majority of Ugandans is now clearly established. The HiiL report, amongst many others has elaborated on important aspects of this phenomenon. This applies to accessibility of the system but also as importantly to the limited fairness in both the <u>processes</u> and <u>outcomes</u> of formal justice.

On the other hand there are concerted efforts on the part of the formal justice system to change the situation.

Over the years it has been attempted to realize in practice the principles embedded in Article 126 of the constitution: justice not to be delayed, justice for all irrespective of social or economic status, the promotion of reconciliation and the delivery of substantive justice without undue emphasis on technicalities, procedural reforms, the encouragement of mediation and similar processes, the introduction of plea bargaining, attempts to deal with case backlog etc.

In the same vein the provision of legal aid by the state, NGOs, the Uganda Law Society and the establishment of Justice Centers also in a limited way contribute to making formal justice available especially to the most vulnerable sections of society.

There have also been efforts at legal reform in Uganda of substantive law both through legislation as well as the courts.

All these measures however, will not change the essential character of the formal justice system. Above everything else its weakness is tied up with the weaknesses and fate of the state at this juncture in our history. This context may even result in the reform efforts making the situation worse. An example of this is what on the face of it may appear as just a question of language. In a number of reforms there is an allusion to the demand and supply sides. The language of the market in relation to justice exacerbates the commodification of justice, not just at the level of conceptualisation but also in practice.

That commodification displaces the conception of justice as a public good to be delivered by the state. The biggest victims of that shift are, once again, the most vulnerable. Soon issues of cost- recovery will increasingly affect the delivery of justice, including such issues as sentencing etc. The mindset that commodification of justice creates cannot be a basis for useful engagement with informal justice systems.

There is no doubt that Uganda is legally plural. There exist a variety of justice systems besides the formal justice system both in the strong and weak sense. Through these systems the majority of the population attempt to access justice.

The starting point in order to engage usefully with these systems is to identify and study them.

This includes appreciating the philosophies, world views, knowledge systems and values that underpin them.

It is hoped in this way we can begin to understand them and determine areas of possible collaboration, interaction etc.

When for example today land is increasingly being put on the global market and the people are facing massive evictions one may appreciate the seriousness of the implications when one realizes that to the people the land is not simply a piece of ground from which they eke a livelihood, but its also their home after life and links generations of the past, present and future; and that there are spiritual dimensions especially with specific spiritual sites. A threat of eviction therefore in the circumstances would be an existential, threat and a threat to the identity of a people – a matter that would require more serious handling than the handling of a simple piece of physical ground.

Such study of the systems would also aim at identifying the legal postulates (as opposed to specific legal rules) that the systems share with the formal systems pointing to potential areas

of interaction. The identification of areas of interaction and collaboration, would be an important aspect of the study.

Because we are not without history before the introduction of the western legal system, it is important that the systems developed by our own societies be studied, even if they have been suppressed and are not functional today. In this regard therefore it is important to consult traditional institutions, whether formally recognized or not. These include kingdoms, chiefdoms, clans and institutions at other levels.

There are many aspects of the formal legal systems, that would positively contribute to access to justice either within, the system itself or by sharing and availing those aspects to the informal systems.

One of the biggest drawbacks of the formal system is that it is driven by professionals. Professionalism has obvious advantages. But professions are also built on exclusion. The area of theory and knowledge around which a profession is built is made the exclusive turf of the initiated.

Professions be they medicine or law are built on the basis of exclusion. This exclusion is based on encoding the knowledge and requiring long periods of study. These are then followed by certification and licensing. In this way access to important knowledge and information is prevented.

In today's knowledge and information society it is increasingly difficult to prevent access to information and knowledge. Therefore one of the measures that can be taken is to make knowledge and information available across systems through ICT, so that the profession is largely focused on core skills. In this way the beneficial aspects of the formal legal system can be availed to systems not based on the profession model of justice.

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