



# INFORMAL JUSTICE SYSTEMS

CHARTING A COURSE FOR HUMAN RIGHTS-BASED ENGAGEMENT



A SUMMARY

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## A SUMMARY

This Publication is a Summary of *The Study, Informal Justice Systems:  
Charting a Course for Human Rights-Based Engagement*.

The full version of the study is available at: [www.unicef.org/protection/INFORMAL\\_JUSTICE\\_SYSTEMS.pdf](http://www.unicef.org/protection/INFORMAL_JUSTICE_SYSTEMS.pdf)  
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## LIST OF ABBREVIATIONS

<b>ADR</b>	Alternative Dispute Resolution	<b>KSOL</b>	Kathmandu School of Law (Nepal)
<b>AusAID</b>	Australian Agency for International Development	<b>LADA</b>	Law and Development Association (Zambia)
<b>BLAST</b>	Bangladesh Legal Aid and Services Trust	<b>LC</b>	Local Council
<b>CBO</b>	Community-Based Organisation	<b>MHRC</b>	Malawi Human Rights Commission
<b>CCJP</b>	Catholic Commission for Justice and Peace (Malawi)	<b>MGEP</b>	Mainstreaming Gender Equity Programme (Nepal)
<b>CEDAW</b>	Convention on the Elimination of All Forms of Discrimination Against Women	<b>MLAA</b>	Madaripur Legal Aid Association (Bangladesh)
<b>CIDTP</b>	Cruel, Inhuman and Degrading Treatment or Punishment (see UNCAT)	<b>NEB</b>	National Equality Body
<b>CRC</b>	Convention on the Rights of the Child	<b>NGO</b>	Non-Governmental Organization
<b>CS</b>	Civil Society	<b>NHRI</b>	National Human Rights Institution
<b>CVICT</b>	Centre for Victims of Torture (Nepal)	<b>NRM</b>	National Resistance Movement
<b>DANIDA</b>	Danish International Development Agency	<b>NSJS</b>	Non-State Justice Systems
<b>DFID</b>	United Kingdom Department for International Development	<b>OECD</b>	Organisation for Economic Co-operation and Development
<b>ECHR</b>	European Convention on Human Rights	<b>PASI</b>	Paralegal Advisor Service Institute (PASI)
<b>EPWDA</b>	Eastern Province Woman Development Association (Zambia)	<b>PNG</b>	Papua New Guinea
<b>FGM</b>	Female Genital Mutilation	<b>PRI</b>	Penal Reform International
<b>FJS</b>	Formal Justice System	<b>PRSP</b>	Poverty Reduction Strategy Papers
<b>FRELIMO</b>	The Liberation Front of Mozambique (Frente de Libertação de Moçambique)	<b>SALRC</b>	South African Law Reform Commission
<b>GBV</b>	Gender-Based Violence	<b>SWAP</b>	Sector Wide Approach
<b>GJLOS</b>	Kenya Governance Justice Law and Order Sector (reform programme)	<b>ToR</b>	Terms of Reference
<b>GTZ</b>	German Society for Technical Cooperation (Deutsche Gesellschaft für Technische Zusammenarbeit)	<b>UAE</b>	United Arab Emirates
<b>HRBA</b>	Human Rights-Based Approach	<b>UDHR</b>	The Universal Declaration of Human Rights
<b>HRC</b>	Human Rights Council	<b>UK</b>	The United Kingdom
<b>HUR�PEC</b>	Human Rights and Peace Centre (Uganda)	<b>UN</b>	The United Nations
<b>ICC</b>	International Criminal Court	<b>UNAIDS</b>	Joint United Nations Programme on HIV/AIDS
<b>ICCPR</b>	International Covenant on Civil and Political Rights	<b>UNCAT</b>	United Nations Convention Against Torture
<b>ICESCR</b>	International Covenant on Economic, Social and Cultural Rights	<b>UNDAF</b>	United Nations Development Assistance Framework
<b>ICHRP</b>	International Council on Human Rights Policy	<b>UNDP</b>	United Nations Development Programme
<b>ICTJ</b>	International Center for Transitional Justice	<b>UNESCO</b>	United Nations Educational, Scientific and Cultural Organization
<b>ICTR</b>	International Criminal Tribunal for Rwanda	<b>UN HABITAT</b>	The United Nations Human Settlements Programme
<b>ICTY</b>	International Criminal Tribunal for the former Yugoslavia	<b>UNICEF</b>	United Nations Children's Fund
<b>IJS</b>	Informal Justice Systems	<b>UNIFEM</b>	United Nations Development Fund for Women
<b>INGO</b>	International Non-Governmental Organisation	<b>UNODC</b>	United Nations Office on Drugs and Crime
<b>ILO</b>	International Labour Organisation	<b>UP</b>	Union Parishad (Bangladesh)
<b>JSC</b>	Judicial Service Commission	<b>UPR</b>	Universal Periodic Review
<b>JLOS</b>	Justice Law and Order Sector	<b>USIP</b>	United States Institute of Peace
<b>JSDP</b>	Justice Sector Development Programme (Sierra Leone)	<b>VAW</b>	Violence Against Women
		<b>VMP</b>	Village Mediation Project (Malawi)
		<b>WLUML</b>	Women Living Under Muslim Laws
		<b>VSU</b>	Victim Support Unit
		<b>YWCA</b>	Young Women's Christian Association

## SUMMARY

### A. PLACING INFORMAL JUSTICE SYSTEMS IN CONTEXT

Until recently, informal justice systems (IJS) were relatively invisible in development partner-assisted justice interventions. Yet, IJS form a key part of individuals' and communities' experience of justice and the rule of law, with over 80 percent of disputes resolved through informal justice mechanisms in some countries.<sup>1</sup> IJS may be more accessible than formal mechanisms and may have the potential to provide quick, relatively inexpensive and culturally relevant remedies. Given this central role and increasing government and partnering donor interest in IJS, it is key to build an understanding of IJS and how best to engage with them for the strengthening of human rights, the rule of law and access to justice.

In many countries, there is a prevalence of IJS, which demands that governments and development partners take these systems more seriously, especially with regard to IJS and women's and children's rights. This does not mean that development organizations should promote IJS at the expense of a functioning unitary legal order or that they should oppose the existence of IJS. Rather, it is recognition that IJS are an empirical reality, albeit a complicated one.

At the same time, growing numbers of countries are requesting UN assistance to engage with IJS and strengthen their ability to provide justice and legal protection. The UN's approach to engagement on rule of law and access to justice is as an effort to ensure international norms and standards for all who come into contact with the formal and informal justice system, including victims, witnesses or alleged offenders. IJS are complex and deeply varied; many drawing their normative structures and legitimacy from the local communities and society in which they operate. The UN does not presume that engagement with IJS can adopt a 'one-size-fits-all' approach. Like all legal mechanisms, IJS function within changing societies and communities and can be responsive to the particular individual circumstances of a case in the application of cultural norms.

The obligation to respect, protect and fulfil human rights, including through the provision of justice and legal remedies, extends to formal and informal systems alike. Both types of justice systems can violate human rights, reinforce discrimination, and neglect principles of procedural fairness. IJS in many contexts deal with issues that have a direct bearing on the best interests of women and children, such as issues of customary marriage, custody, dissolution of marriage, inheritance and property rights. The operative questions surrounding IJS and the rights of women and children are significant. While it is especially important to note that the structures, procedures and substantive decisions of some IJS neither safeguard nor promote women's rights and children's rights, the existence of IJS does not of itself contravene international human rights principles. Indeed, IJS can provide avenues for the delivery of justice and the protection of human rights, particularly where formal justice systems lack capacity, and IJS can enjoy widespread community legitimacy and support.

The study seeks to identify how engagement with IJS can build greater respect and protection for human rights. It highlights the considerations that development partners should have when assessing whether to implement programmes involving IJS, the primary consideration being that engagement with the IJS neither directly nor inadvertently reinforces existing societal or structural discrimination – a consideration that applies to working with formal justice systems as well. The study also examines the value of IJS in offering, in certain contexts, flexible structures and processes, cost-effectiveness and outreach to grassroots communities.

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<sup>1</sup> Wojkowska, Ewa 2006: *How Informal Justice Systems can contribute*, Oslo: United Nations Development Programme, Oslo Governance Centre.

In structure, this summary of the study, first describes IJS across the range of degrees of formality and informality and interaction with the state. It identifies the combination of factors that influence individuals' or communities' preferences and pressures to bring matters before IJS rather than before formal justice systems. These factors influencing preferences for IJS vary from geographical isolation, economic concerns, familiarity, trust and the perception that IJS better reflect local values. It then places IJS in the context of human rights, with particular attention to the rights of women and children. Finally, it frames the principles of programming engagement with IJS and suggests possible entry points for engagement with IJS, so that strategic engagement can strengthen IJS to better deliver justice and human rights.

## METHODOLOGY

Commissioned by UNDP, UNICEF and UN Women, the study involved a comprehensive literature review and country-specific case studies. Qualitative and quantitative data collection was carried out in Bangladesh, Ecuador, Malawi, Niger, Papua New Guinea and Uganda. The country studies were selected in consultation with the three UN agencies and the methodology was developed through a pilot case study in Malawi. The country studies employed a uniform methodology, and all of the country studies use identical or very similar categories of analysis. Interviews were conducted with individuals and groups representing various stakeholders at the local and national levels on the basis of an interview guide developed for each of the target categories. The quantitative part of the country studies included surveys for users of informal justice and informal justice providers, following a generic questionnaire format that allowed comparison across countries.

Desk studies of 12 countries were also conducted on the basis of literature from academia, UN agencies, NGOs, governments, websites and conferences. Wherever possible, they were developed in consultation with national experts on the informal and the formal justice systems, including scholars and human rights experts. The desk studies assessed the nature and characteristics of IJS (composition, decision-making, procedures), linkages among the different justice providers (particularly with formal justice systems), legal frameworks, human rights aspects and efforts made to date in programming by governments, national and international NGOs, the UN and other development partners.

## DEFINITIONS OF INFORMAL JUSTICE SYSTEMS

Any attempt to define IJS must acknowledge that no definition can be both very precise and sufficiently broad to encompass the range of systems and mechanisms that play a role in delivering rule of law and access to justice. IJS vary considerably, encompassing many mechanisms of differing degrees and forms of formality. Degrees of formality vary with respect to legal or normative framework, state recognition, appointment and interaction, control and accountability mechanisms, and systems of monitoring and supervision, including the maintenance of case records and the implementation of referral procedures. IJS also encompass systems that might have formal state recognition, such as alternative dispute resolution that operate at the community level, either facilitated by traditional mechanisms or facilitated by NGOs.

The study employs a relatively broad definition of 'informal justice system' encompassing the resolution of disputes and the regulation of conduct by adjudication or the assistance of a neutral third party that is not a part of the judiciary as established by law and/or whose substantive, procedural or structural foundation is not primarily based on statutory law.

In some settings, the word 'informal' may carry value-laden assessments, according to which a system may be held in lower esteem because of the 'informal' label. The study uses the word with no such value judgments. It is used rather than the term 'non-state' justice systems, as there are many forms of IJS that are tolerated, partially

state-linked or recognized along the formal-informal continuum. For example, customary courts or local courts are categorized as IJS, but are regulated under specific legislation, have a state-determined procedure for appointments, and may be attached to the judiciary.<sup>2</sup> Such courts seek to gain community legitimacy through their roots in a history of justice provision prior to the existence of the modern state or through their claim to draw on the local norms and customs of a specific locality of the country. The study looks at a wide range of systems outside classic state structures that include hybrid models of customary, religious and state-run ‘parajudicial’ systems. However, the study does not consider systems for the maintenance of law and order and local security nor the administration of rules by commercial or professional organizations.

The study distinguishes among informal justice mechanisms anchored in (i) customary and tribal/clan social structures, (ii) religious authorities, (iii) local administrative authorities, (iv) specially constituted state customary courts, and (v) community forums specially trained in conflict resolution, particularly in mediation. Types (iii) and (iv) often present a hybrid (parajudicial) model where officials of a state system apply customary norms. Nevertheless, these rough distinctions do not fully capture reality, which contains varying mixtures of these elements in which, for example, customary and administrative authority are combined.

This typology is used as a framework to examine IJS, looking at the composition of dispute resolution bodies, their relationship to the state, the jurisdictional limits and substantive norms applied, typical processes used to resolve disputes and the binding or voluntary nature of outcomes.

## LINKAGES BETWEEN FORMAL AND INFORMAL JUSTICE SYSTEMS

The nature of IJS and the extent to which they are incorporated into formal systems largely depends on the historical circumstances of each country. The legal system inherited from a colonial power and the new legal and state system established during decolonization influenced the role and status of customary law and IJS as well as the interaction between the IJS and the formal justice system.

In most countries, there are functional linkages between state justice providers and IJS’ providers. State law may define such linkages and provide for official forms of collaboration (including appeal procedures, referrals, division of labour, advice, assistance and so forth), but, even where this is not the case, there are often various forms of unofficial collaboration. There may also be the possibility of appeal to a court in the formal system and, in some circumstances, this could be precisely what renders it possible for people to trust informal mechanisms of justice. Thus, the formal system can exert influence even where its mechanisms are not directly invoked. Linkages may also be negative, with competition over jurisdiction including overt opposition or even hostility. Aside from functional linkages, there are instances of overlaps or ‘borrowing’ of norms, rules and procedures between IJS and state providers. Such norm and rule-based linkages may derive from long histories of interaction and coexistence. They point to the changeability and adaptability of different primary justice providers and/or to their interdependency.

The origins of the existence and tolerance of IJS are many and varied. Tolerating IJS or incorporating traditional, customary or religious law into formal systems may be a way for the state to accommodate different religious or ethnic traditions in a single state. It may also allow the state to regulate non-state or customary justice providers by, for example, limiting their scope of jurisdiction by defining tradition or custom as applying only to certain domains. The concept may also be invoked by IJS’ providers claiming knowledge of custom as a source of authority and spaces of power as compared to state officials.

<sup>2</sup> Examples of such structures are local courts in Sierra Leone and Zambia, the Village Courts in Papua New Guinea and the Community Courts in Mozambique

IJS deal with many cases that could have been brought to formal court. The study surveyed users' preferences and choices of system (preference between IJS or formal system), as well as the profiles of the individuals in the IJS who adjudicate, mediate and make decisions in the IJS. In the analysis of the data gathered, gender was included as a variable in all cross tabulations.

Explanations for individual preferences of system combine a number of factors, ranging from the in/effectiveness and popular il/legitimacy of the formal justice system, to power relations and social pressure. The study posits eight significant, partly interrelated aspects that can influence people's choices and uses of IJS. (See box 1)

### **BOX 1: FACTORS INFLUENCING PEOPLE'S CHOICES AND USES OF INFORMAL JUSTICE SYSTEMS**

1. In/effectiveness and popular il/legitimacy of the formal justice system: This could include the geographical distance and costs of access to the system as well as outcomes inappropriate for local preferences. There could also be a perception of corruption or of discrimination in the formal system against a particular community, causing people to question the legitimacy of the formal system itself.
2. IJS case settlement procedures: This involves a preference for less formalized settlement procedures, such as voluntary participation and the reaching of decisions on the basis of mutual consent.
3. IJS case settlement outcomes: The emphasis by many IJS on reconciliation, restoration, compensation and reintegration is preferred over the custodial sanctions that dominate many formal criminal justice systems.
4. Economic concerns: The emphasis of IJS on compensation as a symbol of reconciliation ensures that the victims' and offenders' families do not become economically destitute. IJS are not always preferred as the least expensive option; this depends on the context as some IJS charge fees.
5. Cultural, religious and/or customary beliefs and practices: The perception that IJS' procedures and substantive norms, compared to those of formal justice systems, are more in accordance with the local cultures and the social relations of people. This is particularly so where the formal justice system is an inheritance from the colonial past.
6. Habits or routines: A preference is based on individuals' or communities' long interaction with IJS for dispute resolution.
7. Power relations and social pressure: Preferences might be based on community, structural or societal pressures and on the view that certain systems support specific power relations associated with social status and identities (age, gender, ethnicity, class).
8. Legitimacy and authority of IJS' justice providers: Preference might be based on the individual or community perception that a justice provider, such as a traditional leader or religious leader, has the legitimate authority to adjudicate, decide or mediate a case.



## B. FRAMING INFORMAL JUSTICE SYSTEMS IN HUMAN RIGHTS TERMS

Providing accessible justice is a state obligation under international human rights standards, but this obligation does not require that all justice be provided through formal justice systems. If done in ways to respect and uphold human rights, the provision of justice through IJS is not against human rights standards and IJS can be a mechanism to enhance the fulfilment of human rights obligations by delivering accessible justice to individuals and communities where the formal justice system does not have the capacity or geographical reach.

Human rights obligations apply to IJS and states have an obligation to ensure the respect, protection and fulfilment of human rights, including where IJS are the main provider of justice. Analysing IJS for human rights compliance is complex. Both IJS and formal systems need to be analysed together in terms of their ability to deliver human rights-compliant structures, procedures and outcomes. In some circumstances, the human rights deficiencies will be common to the formal system and the IJS alike; in others, the IJS might show benefits over the formal justice system. For example, IJS could be a positive tool to divert juveniles from the more retributive aspects of formal criminal justice systems. Where there is limited or no access to formal juvenile justice mechanisms, IJS can emphasize restorative justice that, seeking harmony in the local community, attempts to reintegrate young offenders into the community.

**Human rights standards offer the possibility of fairness in three dimensions of justice:** structural, procedural and normative. The structural dimension consists of participation and accountability. Particular attention must be paid to the rights of groups not strongly represented in IJS, which include women, minorities and children. Procedural justice consists of guidance for adjudication processes that ensure that the parties to a dispute are treated equally, that their case is decided by a person with no interest in the case, who is obliged to render a decision solely on the basis of facts and objective rules rather than on personal preferences, and that anyone making an assertion or accusation must provide verifiable evidence to support it. Finally, normative justice consists of substantive rules that protect the vulnerable. Examples include the prohibition against marrying off children for the economic benefit of parents or guardians or the guarantee of the right of widows to inherit.

The human rights issues with respect to operation of IJS commonly involve decisions that are inconsistent with basic human rights, such as cruel and inhuman forms of punishment, or decisions that perpetuate the subordination of women or the exploitation of children. Weaknesses in procedural justice also mean that IJS do not always give the accused the chance to be heard or to be adequately represented. IJS can hold individuals accountable to social collectivities and broader social interests.

The key question for engagement with IJS must be the provision of effective rights protection in the particular context. In some countries formal justice mechanisms are inoperative or inaccessible to ordinary people, and are unlikely to be able to fill the gap in the short and medium terms. In such contexts, IJS may be better placed to achieve the principles of impartiality, accountability, participation and protection of substantive human rights.

It can be concluded that, in many contexts, the best access to justice and protection of human rights will be afforded when the different systems and mechanisms, formal and informal, are allowed (a) to exchange with and learn from one another, (b) to cooperate with one another, (c) to determine the best division of labour, guided by user preferences as well as state policy imperatives, and (d) to develop in order to meet new challenges.

## WOMEN'S RIGHTS

Discussion of respect for women's rights often remains tethered to the notion of 'balancing' these rights with culture and custom rather than taking a more dynamic and process-oriented view of culture. On the one hand, deeply embedded attitudes are often linked to patterns of economic survival and ethnic, religious or social identity. Consequently, IJS, especially custom and religion-based IJS, are likely to uphold rather than to challenge the values of the society around them, including attitudes and patterns of discrimination. On the other hand, the flexible and adaptable approach of customary law can allow it to change in ways that reflect changing values in society. The Human Rights Committee (HRC) notes that states should ensure that "traditional, historical, religious or cultural attitudes are not used to justify violations of women's rights to equality before the law and to equal enjoyment of all Covenant rights."<sup>3</sup> Even if there is no clear state recognition of IJS or other delegation of state functions to traditional chiefs, or enforcement or consideration of settlements reached through informal justice, the state remains obliged under Article 2 of the CEDAW to extend protection.<sup>4</sup> The HRC notes that inequality in the enjoyment of rights by women is often deeply embedded in tradition, culture and religion, so that many frequently occurring violations of women's human rights originate from social custom, belief or practice rather than (or as well as) from state law, and are perpetrated by individuals and social groups rather than by the state.

**IJS affect the rights of women in diverse and context-specific ways. The study identified various ones that include:**

### BOX 2. ADDRESSING BARRIERS TO WOMEN'S ACCESS TO JUSTICE

There are many social, economic or procedural factors that prevent women from bringing a matter before IJS. The Malawi country study describes how women were more likely to bring certain cases to village mediators (IJS facilitated by NGOs) rather than to traditional chiefs because mediation process offered confidentiality, whereas the traditional IJS offered by local chiefs involved public discussion of personal and intimate matters. The prominence (or absence) of women among the village mediators was also an important factor.

**Access and procedure:** This includes legal capacity and women's right to a remedy as well as barriers to women as witnesses or litigants. Many of the hindrances to women's access to formal justice systems also apply to IJS, such as the lack of access to economic and other resources, persistent fear of intimidation, and victimization by officials such as members of the IJS or community members. While the paucity or absence of procedural rules in IJS may facilitate women's access and participation, this may also disadvantage women by permitting prejudice and creating conditions for the abuse of power. An additional procedural barrier in IJS can be the potential lack of privacy and confidentiality, making women less willing to litigate personal and intimate rights violations such as those related to domestic violence.

**Women's rights in the area of family life, including dissolution of marriage separation and/or divorce:**

Some communities consider separation and divorce to be similar to the destruction of the social fabric and consequently these matters are not administered by some IJS. Marital problems are resolved, if at all, through family and community intervention. Several social pressures coerce women to remain silent about abuse in the family rather than to seek the protection of any legal system. The study notes that, since the practice of polygamy or polygyny is widespread in most regions where IJS also play a critical role in regulating family and marriage relations, there is not always community recognition of the practice's harmful economic and emotional consequences for women and their children and its violation of women's right to equality. Indirect ways to reduce the prevalence of this practice,

3 Human Rights Committee, General Comment 28, Equality of rights between men and women (article 3), U.N. Doc. CCPR/C/21/Rev.1/Add.10 (2000).

4 In the Americas, the Article 4 j) of the Belem do Para Convention stipulates that every woman has the right to equal access to the public service of her country and to take part in the conduct of public affairs, including decision-making. In Africa, Article 9 of the Maputo Protocol deals with the equal right to participation, including through affirmative action. Thus, Article 9.2 provides that States Parties shall "ensure increased and effective representation and participation of women at all levels of decision-making."

such as measures to tackle child marriage, forced marriage, teenage pregnancy and discontinued schooling which are likely to affect rates of polygamy may produce the most positive results.

**Women’s rights to property, including owning real property:** Women’s access to land – often the most important economic resource – is in many contexts through marriage or a woman’s father. Traditional mechanisms of land allocation may involve a purely male hierarchy and a traditional legal system that reinforces this arrangement. In some contexts inequalities arise out of the failure of the formal justice system to protect women’s property rights where jurisdiction over land is not under customary laws. In many contexts, both formal justice systems and IJS fail to protect women from discrimination in regard to property rights. While custom may not be in favour of practices such as property-grabbing (often committed against widows), IJS in many contexts have not been able to protect vulnerable women against such practices.

### BOX 3. INFORMAL JUSTICE SYSTEMS AND DOWRY OR BRIDE PRICES

Many social, economic or procedural factors prevent women from bringing a matter before IJS. The payment of dowry and bride price is widely practiced and may be considered necessary for the validity of customary marriages. Although the practice of dowry payments by the wife’s family has been legally abolished in some countries, including India and Bangladesh, dowry disputes reportedly still frequently arise in IJS in these and other countries. The Ugandan non-governmental organization MIFUMI has made bride price a campaign issue, having worked on the question for a decade or more using advocacy and strategic litigation (see <http://www.mifumi.org/>). A legal petition to have the custom declared unconstitutional (on grounds that it leads to violence against women and treatment of women as chattels) was defeated in the Constitutional Court of Uganda in March 2010. The Court criticized the lack of a factual foundation for the petitioners’ assertions, possibly indicating that the petition may have stood a better chance if the factual basis for the petition had been made clearer. The case has been appealed to Uganda’s Supreme Court and judgment was pending at the time of writing.

**Women’s rights to personal integrity and physical security:** The study finds that women have little faith in the capabilities of either formal or informal systems to protect them and to prosecute offenders. The widespread practice of ‘payment of dowry’ and ‘bride price’, which in some countries may be considered necessary for the validity of a customary marriage, may be closely connected to extreme forms of violence against women. Many issues can complicate how both formal systems and IJS handle gender-based violence. National law may not recognize a criminal offence of rape within marriage, for example. While recognizing the various factors that limit women’s access to justice in the formal system, as well as the importance of women’s participation in IJS, the study finds that rape and sexual violence should not be dealt with in IJS, but referred to ordinary courts. This principle must be known and accepted within IJS in order to be enforced. It is important that the key challenges of women’s own aversion to taking what society might consider ‘family matters’ before formal justice institutions and the barriers and societal pressures against turning to formal justice systems must be addressed.

Patterns of discrimination against women can be reflected in low levels of participation by women as adjudicators in IJS and, in some contexts, in the barriers to access and participation as parties and witnesses that women face. Provisions of the CEDAW and regional declarations and protocols obligate states to ensure representation of women in bodies exercising public authority.<sup>5</sup> The participation of women as adjudicators or justice officials is vital to ensuring that women can bring sensitive matters to the attention of justice providers. In the same way that women’s participation as police officers and in victims service units is a key part of dealing effectively with domestic violence and rape, it is equally important to foster their participation in IJS.

<sup>5</sup> CEDAW Article 9.2.

#### BOX 4. PARTICIPATION OF WOMEN AS ADJUDICATORS IN INFORMAL JUSTICE SYSTEMS

In many countries, customary authorities play a role in the nomination of candidates for office in parajudicial systems, with a judicial service system commission or government ministry making or approving the final appointment. It is possible to introduce affirmative action measures, particularly in parajudicial systems, as have been done with the Local Council Courts in Uganda and the Village Courts in Bangladesh and Papua New Guinea, where quotas for female representation have been set.

Although IJS do not fully respect and protect women's rights in many contexts, the study finds that women creatively seek a just resolution and the protection of their rights. While women may fare better in formal or parajudicial systems, they are often acutely aware of the necessity of maintaining collective structures that benefit communities as a whole. They also face social pressure and logistical and economic difficulties preventing them from accessing the formal justice system. Thus, they often seek to change IJS structures from the inside rather than to discard them outright. Engagement with IJS should therefore also be tied to raising awareness within IJS of women's rights and of the range of choices and access available to women to seek justice, remedy and protection.

### CHILDREN'S RIGHTS

There is little literature and research on children and IJS, although important issues arise regarding the rights of children in relation to IJS. Children have the same basic rights as any other person in proceedings before IJS, including the right to be heard, the right to a fair and impartial hearing, and the right to protection from arbitrary, cruel or inhumane punishment. In practice, however, these rights are often poorly respected and are more likely to be violated.

**The Convention on the Rights of the Child (CRC) recognises four principles that should guide the interpretation of the other articles, and must be taken into account in all matters concerning the rights of children. They are:** 1) the primacy of the best interests of the child, 2) the prohibition of discrimination, 3) the survival and development of the child, and 4) the right to be heard and to have one's views taken into account.

A number of instruments have been adopted that provide guidance on how these fundamental international standards about children and justice should be implemented. These instruments were designed mainly for application in formal legal systems, but much of the guidance they contain is also relevant to IJS. The most relevant are the Standard Minimum Rules on the Administration of Juvenile Justice and Guidelines on Justice in matters involving Child Victims and Witnesses of Crime.

Recognition of and respect for the principles of the CRC is linked, to some extent, to the type of IJS, and to the nature of the linkages to the formal justice system. IJS that are linked to the formal system such as parajudicial IJS often have an obligation to apply legislation as well as traditional law. Such IJS including those to which cases of juvenile offenders are diverted to avoid formal prosecution tend to have a better understanding of the rights of children and are more likely to respect them. However, links with the formal legal system and an obligation to respect the legislation does not of itself guarantee full respect for the rights of children.

In many societies, traditional values attribute little or no importance to the opinions and wishes of children, and many IJS ignore the right of children to be heard in matters that affect them. In addition, in many systems the extended family or the village community, rather than the nuclear family, has the responsibility for protecting the child. While this often serves to protect children, problems may arise when issues are brought before IJS. If the group responsible for protecting the child is also a party to the dispute, or participates as decision maker, the child's views and interests may not receive a fair and impartial hearing and the outcome might not be in the best interests of the child.

IJS could also enforce norms that are incompatible with rights recognised by the CRC. The application of norms regarding custody based on the child's sex and/or age, that fail to take into account the views and best interests of the individual, is another example. Norms regarding guardianship that perpetuate the practice of child marriages are yet another. Some IJS discriminate against children born outside of marriage, who have been orphaned or who have lost their father. Some fail to protect orphans against abuse of property rights by guardians, or fail to protect the property rights of widows, which, of course, has an adverse impact on dependent children. The failure of IJS to protect such property rights effectively can have profound consequences for the child's right to development, to protection against exploitation and even survival.

Reconciling the procedures followed by IJS with notions of procedural due process recognised by international human rights law often poses difficult challenges. In the criminal domain, the right of persons accused of a crime to legal representation and the confidentiality of proceedings involving children are not always recognised in IJS. Some IJS apply collective punishments, leading to the punishment of children for the acts of parents or other relatives.

#### **BOX 5. THE RIGHT TO BE HEARD AND INFORMAL JUSTICE SYSTEMS**

IJS can contain recognition and elements of children's right to be heard, which can provide the basis for dialogue on the issue. In Ecuador, in IJS cases within the family, the child would be represented by someone – generally another family member – to speak for the child's interests.

Deeply held attitudes regarding the role of children can present a major challenge for engaging with IJS. In some communities, children are viewed as property under customary norms, and child marriages can be seen as matters for the family or local community rather than a crime. Some IJS tolerate honour killings and killings related to sorcery. The limited reach of the formal justice system and strength of traditions authorising such violent enforcement of customary norms may lead IJS to tolerate such practices, even when the IJS do not directly enforce them. Equally, however, IJS can be more responsive to changing cultural attitudes, such as in Uganda where there is a preference for taking "defilement" cases before IJS because the formal system does not distinguish between sexual exploitation of a minor by an adult and consensual sexual relations between adolescents.

States have an obligation to make efforts to ensure that IJS respect the rights of children, and the study found some examples of such efforts. In South Africa, the Law Reform Commission carried out research on the compatibility of customary law with the rights of children before deciding the extent to which legislation would recognise customary law. In Bangladesh, legislation bans the application of corporal punishment by IJS.

It is clear that no single approach will be appropriate for every country, or society. The kinds of measures that may help to bring IJS into greater harmony with the rights of children will depend on the nature of the IJS and other circumstances, including the interaction between the formal system and the IJS. The most difficult and enduring barriers to children's access to justice are likely to be social and cultural, not formal, such as perceptions of the role of the child. Familiarity with the attitudes of young people to IJS is also important to understanding children's experience of justice in formal and informal mechanisms. In certain contexts, young people may be aware of the real power of IJS, but could feel alienated from the customs or society that the IJS represents. Social perceptions of children and young people are not static and IJS' flexibility to adapt to these changes is an important element to take into account when engaging with IJS to advance the rights of children.

## BOX 6. INFORMAL JUSTICE SYSTEMS AND CHILD PROTECTION

In Papua New Guinea, UNICEF has been working together with the Village Courts Secretariat within the Ministry of Justice to establish national training documentation, referral, monitoring and evaluation systems for village court judges and officers. This encompasses children's, women's and other constitutionally guaranteed rights and juvenile justice instruments. The study found this to be a positive example where IJS providers were incorporated into a child protection system, became familiar with international and constitutional child rights standards, and were placed in a network where they could seek external assistance or refer particular cases.

### C. PROGRAMMING IN INFORMAL JUSTICE SYSTEMS – PRINCIPLES OF ENGAGEMENT

Until recently, engagement with IJS was not a part of development interventions in justice systems. Consequently, there is relatively little documentation on the outcomes and impact of programmatic interventions, although there is now more consideration of IJS in sector-wide approaches to justice programming. The study found that, despite some overall similarities, a chief characteristic of IJS is their degree of adaptation to their socio-economic, political and cultural contexts. Consequently, programming for IJS needs to take its outset in the context in which they operate, including how they interact with formal systems. In addition, recognition of value of IJS to a society or a community and of their flexibility to individual circumstances can help avoid programming that would distort the positive elements of the IJS. Rigorous analysis of official and unofficial linkages, and explicit policy and operational choices based on these realities, are thus a prerequisite to programming. What is likely to work or succeed is highly context-specific and programmes should be open to a wide range of tools.

Attempting to engage with the cultural practices that are expressed in IJS demands a multi-pronged and long-term approach that is sensitive to local communities' own priorities for development and survival. As IJS' programming does not occur in isolation to wider justice and human rights engagement, IJS' engagement should incorporate other justice, human rights and development interventions. Engagement with IJS may have limited impact unless it is part of broader efforts to build dialogue on values and beliefs, for example acceptance of the right of children to be heard. Thus, the holistic thinking behind sector approaches to formal justice systems, involving complementary interventions with a number of institutions, needs to be adapted and applied to IJS as players in the provision of primary justice.

## PRINCIPLES OF PROGRAMMING

### 1. Whether to Engage with Informal Justice Systems

At the level of official policy, development organizations have little difficulty in agreeing that all engagement with IJS should promote compliance with human rights. Strictly applying a criterion not to engage with IJS that violate human rights excludes many IJS from potential support, and applying the same criterion to formal systems would produce similar difficulties. In particular, the choice of whether to engage with IJS that discriminate against women and children is an unavoidable dilemma for development partners wishing to engage with IJS. The question should rather be one of openness to adapt to international obligations and changing societal norms. Targeting or affecting IJS must evidently be premised on realistic prospects of sustainable improvement in the fulfilment of human rights, particularly women and children's rights, underpinned by the principles of 'do no harm'.

While pragmatism is unavoidable in engagement on the ground, there can be no concessions in principle regarding the minimum international norms against which justice provision is measured. What some may consider the best or only choice in one context might be unacceptable in another. In extreme circumstances, programmers may

face a choice between supporting informal justice mechanisms that occasionally allow plainly abusive outcomes or countenancing trends that are even worse. A key consideration would be whether the engagement with IJS would directly or indirectly promote structural discrimination or other human rights violations. Engagement with IJS would best be based on mutual acceptance of core human rights principles, including gender equality and children's rights, and on a willingness to work to achieve goals that are themselves compatible with human rights.

Engagement with IJS should always consider alternatives and should not be a substitute for strengthening national justice systems. Alternatives to IJS' engagement could produce stronger justice and human rights outcomes. Such alternatives could include improving community policing, improving access to first instance and small claims courts, increasing community involvement in the formal court system through the employment of lay assessors, increasing the use of restorative and non-custodial punishment in criminal cases, and reducing the formality and adversarial nature of proceedings in the formal system. The consideration of whether to engage in IJS or in the formal system should be based on an understanding of why people do not choose the formal system in the first place; there may be engagements with the formal system that could address these barriers far better than working with IJS.

### BOX 7. EXAMPLES OF BASELINE STUDIES

In Niger, UNICEF and national agencies carried out a study on the protection of women's and children's rights that included analysis of IJS. In 2009, Timor-Leste conducted an independent needs assessment that showed that the formal system suffered from low capacity and outreach (despite important recent improvements) and that the informal system enjoyed familiarity, trust and accessibility.

## 2. Inclusion of Informal Justice Systems in Sector-Level Programming

After deciding that engagement with IJS should be included in justice-sector strategies and programmes, the central question concerns the combination and sequencing of various kinds of interventions. To date, however, there are few reviews of IJS' programming to draw upon to assess progress and pitfalls.

Many of the lessons that have been learned about justice-sector programming can and should also be applied to IJS, including the need to holistically combine various forms of interventions and to coordinate the work of different actors and approaches. In a similar way to planning for sector interventions generally, a thorough baseline analysis is a necessary starting point if wishing to work with IJS. While planning for support of justice sector institutions requires information on caseloads, resources and linkages as well as needs, programming for informal justice demands greater understanding of people's legal preferences, needs and choices, as well as the cultural, social and economic realities that condition these needs. The assessment therefore should consider the whole justice system, not IJS in isolation, to encourage an understanding of the boundaries between the justice systems present.

Baseline studies should not only assess the capacities, resources, strengths and weaknesses of the formal and IJS, but also explicitly begin by identifying social realities, including the barriers to access to the formal justice system and IJS, each systems' responsiveness to the justice needs of ordinary people, and by disaggregating according to social and economic status. The studies would reveal why people choose IJS instead of the formal systems and would discuss the attitudes of young people to IJS and whether young people acknowledge the role of the system to administer justice that affects them.

It is also important to understand why a state or 'polity' chooses to permit or encourage IJS as part of justice provision. State leaders may have the same or different motivations than users for favouring or allowing IJS. They may favour one model over another to achieve political goals, such as to allow a particular group or community a degree of autonomy. Clarity on national goals and an explicit consideration of these goals by development partners are

important for programming. Development organisations and governments should guard against simply finding a cheap solution to the problem of satisfying the obligation to provide justice ('poor justice for the poor'), in engaging with both formal systems and IJS. While pragmatic solutions, such as strengthening IJS in communities that are geographically isolated from the formal justice system, may be necessary in the medium term, these measures should be consistent with a value-based long-term vision of a human rights-based justice system. Thus, baseline studies should provide the contextual analysis so that any intervention is based on an understanding of the power dynamics at play, particularly where certain communities are excluded from access to formal justice systems.

As human rights are a state obligation, the human rights dimension would be a clear part of the analysis at every stage of the programming cycle, including at the baseline study and planning phases. Principles of a human rights-based approach such as participation, accountability and empowerment can apply equally to the baseline study as to the programme of engagement with IJS. The baseline study should involve the participation of representatives of grassroots organizations, community groups, national human rights institutions, and gender equality bodies where they have the capacity to contribute to the analysis. It can help to determine which issues, wrongs or offences the IJS is capable of addressing, as well as the consequences of intervention or non-intervention. Preliminary assessments of human rights compliance must critically examine IJS' willingness and ability to change; in some contexts, the advancement of human rights would be better achieved through change in the formal justice system. Just as IJS are dynamic, formal justice systems can be too, as can the public attitudes to both of them. A popular mistrust of the formal justice system, for example, may be grounded in recent experiences of conflict or authoritarian or corrupt governance and can be addressed directly.

**While the study looks primarily at how IJS can be harnessed to improve access to justice, policy will occasionally go in the opposite direction:** towards the scaling-down of the role and reach of IJS and the creation of a more integrated formal court system. For example, social barriers may either prevent women and children from taking any steps at all to formally resolve legal problems or from using particular avenues or remedies. This information may be vital in determining the best programming approach. If social custom or pressure is discouraging women and children from availing themselves of – otherwise available – formal systems, support to IJS may have to balance very carefully between the palliative of attempting to improve IJS' procedures and remedies and the danger of reinforcing the social norms that make it 'unacceptable' for women and children to seek justice in the formal system.

### 3. Programming in Different Types of Informal Justice Systems

The possible modes and means of intervention with IJS will differ significantly, depending on the kind of system under consideration. Each kind of system is likely to have weaknesses and strengths for programming. Governments are often likely to favour systems linked to state structures, such as state customary courts (community, local, traditional) or those linked to administrative systems (e.g., Local Council Courts in Uganda), which may have the advantages of having administrative procedures and some infrastructure in place, of being easily reachable for large integrated programming, and of being somewhat amenable to change and regulation, particularly the building of stronger links to formal systems. There may be political considerations or implications inherent in the adjudicative and other functions of such bodies. In some cases, these parajudicial systems are based on voluntarism and are not always able to deliver on the large expectations placed on them. Large-scale programming might place further burdens on such IJS.



### BOX 8. PROGRAMMING IN CUSTOM-BASED JUSTICE SYSTEMS

The Malawi Primary Justice Programme of the faith-based organization, Catholic Commission for Justice and Peace, is the largest programme with a custom-based IJS in the countries reviewed in this study. The programme trained headmen and chiefs in all districts of Malawi, and was implemented at the local level through local government and NGOs. The programme developed a manual for the training (in English and Chichewa) and a case record book for use by traditional adjudicators. The programme also seeks to increase knowledge of legal rights among individual men, women and children in the targeted communities by means of semi-monthly meetings, facilitated by community-based educators. The Primary Justice Programme likewise facilitates opportunities for cooperation and coordination between chiefs and other primary justice actors, including through interaction with court users' committees.

Custom-based mechanisms would appear to present the advantages of sustainability and legitimacy, having stood the test of time and being solidly anchored in communities. They may, however, have difficulties in extending their reach beyond tightly knit communities that may be small and local. Changes in structures, procedures and the substantive standards applied by these bodies stand the chance of being adopted by the community and thus becoming sustainable. As with all programming, an influx of funds to such mechanisms could create dependency. At first sight, customary or traditional mechanisms are more difficult to reach by development partners, as there may be few obvious structures through which programming can be carried out.

Like custom-based mechanisms, religious IJS are likely to be relatively sustainable and legitimate within their communities. They may offer outcomes that will be respected because of strongly held values, although these values may not, or only partly, accord with principles in international human rights law, and religious doctrine may be resistant to change. In some countries, there may be either a high degree of state involvement in religious affairs or the presence of large and complex organizational structures – often with close links to the state – that would make some form of centralized programming initiative possible.

Working with religious IJS could raise sensitivities, but not necessarily more sensitivities than working with other IJS. For example, while the issue of women's right to own land may be a stumbling block with traditional leaders, it is rather uncontroversial to many religious authorities. Religiously sensitive themes, including women's reproductive rights, women's rights upon dissolution of marriage and women's inheritance rights, may be difficult to address at the beginning of a partnership, but issues of procedural equality, children's rights or improved participation may be easier to approach. It is important to remember that religion is only one influencing factor of IJS and that the application of religious doctrine differs according to social, economic and political factors.

NGO-based village or community mediation schemes, where NGOs are able to work in communities to assist them in devising new ways of solving disputes based on taught mediation schemes, can be freer of social pressure and the interests of powerful groups in the community. The schemes range from confidential forums to open public mechanisms adopting elements of traditional mechanisms or of learned mediation practice. These diverse NGO mechanisms all have in common that they are in principle based on volunteerism and are free of charge. Experience shows that much work, outreach and time is necessary to build acceptance of such schemes among local leaders, including traditional and religious leaders, as well as police and district officials. Where this has been done sensitively and carefully, these leaders have usually been well-disposed to the schemes.

## SPECIFIC PROGRAMMING INTERVENTIONS

**Under the framework of justice sector programming, the study identified specific interventions, which include support in<sup>6</sup>:**

1. State law reform processes to enhance compliance with international human rights guarantees
2. Selection and mandate of adjudicators
3. Education of adjudicators
4. Education of users
5. Procedural regulation and self-regulation
6. Accountability mechanisms: transparency, monitoring and oversight
7. Linkages among primary justice providers
8. Linkages to paralegals and legal aid providers
9. Linkages to wider development programming

It is important to emphasize that the programming initiatives described here are in no way exhaustive. One important caveat relates to the limited scope of the study, which focuses mainly on IJS rather than on formal justice systems, which frequently need greater understanding of IJS and customary law and governance. The country studies reveal that formal justice actors often know little about the informal systems that most people use and law school curricula, for example, pay little attention to customary law. Agents of formal justice systems often attempt to fill this gap by gathering knowledge of customary law in *ad hoc* ways, such as by consulting court personnel or others in their immediate circle. Supplementing formal justice providers' knowledge about IJS is a necessary element of an overall strategy of engagement on IJS.

### 1. State Law Reform Processes to Enhance Compliance with International Human Rights Guarantees

#### BOX 9. LAW REFORM AND INTERNATIONAL TREATY BODIES

When Zambia underwent the Universal Periodic Review process of the UN Human Rights Council, one of the recommendations made concerned the country's constitution. The constitution exempts customary law from the guarantees for equal treatment for women. Zambia supported the recommendation of the Universal Periodic Review to strengthen the prohibition of discrimination in the constitution as part of the constitutional review process in Zambia.

There are synergies between IJS' programming interventions and broader human rights engagement, such as encouraging the ratification, domestication and implementation of international human rights instruments, as well as the implementation of recommendations of international treaty bodies. Programmatic interventions to enhance compliance with international human rights guarantees may seek to bring IJS more clearly within the ambit of legislative and constitutional standards. Law reform is one – perhaps limited – way to influence structural, normative and procedural standards and practices surrounding IJS. As the study reveals widespread failure of IJS to comply with formal law, the impact of legislation should not be overestimated. Success may be more likely where an IJS is directly dependent on the state, as in the case of parajudicial IJS' mechanisms. Even so, change is dependent on IJS' adjudicators' knowledge and understanding of the law, as the literature on IJS as well as the findings of the study confirm. Second, the study found that the question of any possibility of oversight would influence the degree and prevalence of respect for the law by IJS.

<sup>6</sup> The study's approach was not to provide an exhaustive list rather a range of options.

### BOX 10. EXAMPLE OF SELF-STATEMENT METHOD

In Namibia, the process of ascertaining and recording customary law took place within the community itself and resulted in a product created within the community and binding upon it. It consisted of ten steps:

1. Identify the target community/ies
2. Conduct legal background research with respect to the communities
3. Draft policy on ascertainment of customary law
4. Develop a comprehensive enquiry guide
5. Agree with the community on the ascertainment process and structures
6. Recruit and train ascertainment assistants
7. Conduct and supervise the ascertainment project
8. Conduct complementary research on identified communities
9. Promote the compilation of the ascertainment texts
10. Prepare publications in at least two languages (the vernacular and the official languages)

While the process might not be immune to the power of local elite to control the outcome and procedures, it contains important participatory mechanisms that can empower community members.

Linked to law reform is the tool of strategic litigation, which activist organizations can use to bring about change in legal standards. Where the legal environment is favourable, strategic litigation can help to change the law, raise awareness and build coalitions. National and regional courts as well as global UN treaty bodies can be relevant here.<sup>7</sup> Depending on context, strategic litigation may be an effective strategy to advance the protection of rights. In states where the rule of law remains relatively weak, expectations should be realistic as to results.

**The process of law reform in IJS does not differ from law reform in other areas, except that it needs to take particular account of stakeholder groups that are often far from the policy-making process:** the rural poor, indigenous communities and women. Any attempt at law reform should recognize that norms drawing from religion and/or custom are woven into the fabric of cultural, social and economic life, and are often not written down. Some sections of the population, including some justice officials, would resist the implementation of the required new laws. Legal change is not likely to succeed without parallel public outreach and awareness-raising and, in some circumstances, change must be incremental. Transitional measures would be required to regulate the situation and status of people who have organized their lives according to existing laws and rules.

Law reform or other programming can also attempt to intervene directly in the rules, customs or law applied by IJS. This can happen in various ways, although not always successfully. One intervention is laws that limit the application of customary laws to certain domains. Another is the attempts of the colonial (and the immediate post-colonial) era at 'codification' of custom. In numerous efforts at codification during the immediate post-colonial period, governments were quite explicit in their aims of not merely codifying or restating custom, but in actively modifying it to suit their values and purposes. This often contributed to rejection of the new codes. There are few recent examples of successful codification of customary law, especially across ethnic or tribal groups. Thus, legislation aiming at codification across the board has lost its appeal as a policy option in most contexts.

<sup>7</sup> The inter-American and African human rights systems as well as the increasing human rights role of regional judicial organs (under the Regional Economic Commissions) are relevant.

Ascertainment of customary law has also been attempted through the recording of decisions and precedents. Ascertainment methods that engage communities as a whole accord more with democratic principles and with the human rights-based principle of participation. Where the resulting norms and standards are to be applied by community-based structures, the 'self-statement' method seems to be a good starting point.<sup>8</sup> The ascertainment process should be open to facilitating any debates about the IJS' norms and processes for adjudicating disputes and whether more open, participatory and accountable processes should be adopted. Where the exercise seeks to assist parajudicial systems in ascertaining and applying custom, the human rights-based approach would still require consultation of more than tribal elders and local chiefs and would aim at including all members of the community, or at least a representative sample of them.

## 2. Selection of Adjudicators

### BOX 11. SELECTION OF ADJUDICATORS

In some countries, the state has exercised some leverage over the selection of traditional leaders. In South Africa, legislation demands that 40 percent of the membership of traditional councils must be democratically elected and 33.3 percent be female (Traditional Governance and Leadership Framework Act, 2003).

Village or community mediation schemes that are initiated by NGOs, such as the Village Mediation Project in Malawi, may be able to have some influence in relation to the qualifications and profiles of community mediators, including in gender balance. In the Malawian project, gender balanced selection was done in consultation with village headmen and chiefs.

A productive area for programming is to increase transparency and equality in the selection of adjudicators. The study confirms that measures to encourage gender equality in the selection of adjudicators are critical and will strongly influence women's preferences and access to justice. The approach will necessarily differ according to the type of IJS concerned. A state body such as a judicial service commission that plays a role in the selection of IJS' adjudicators for parajudicial mechanisms may be free to rewrite qualification rules and modernize selection procedures, making them more transparent and gender-equal. Similarly, it may be able to improve the enforcement of rules on disqualification and discipline (including removal) of adjudicators.

Village or community mediation schemes that are initiated by NGOs may be able to significantly influence the formulation of requirements concerning the qualifications and profiles of community mediators, including requirements for gender balance. Required qualifications could include educational attainment (both general education and specific courses and requirements concerning the function of adjudicators). Specialized courses could typically include elements and examinations on issues of national law, judicial organization and ethics as well as human rights standards.

Where local elders choose traditional leaders and adjudicators, it is difficult to influence selection rules and procedures. Nevertheless, these bodies generally do need to be legitimate in the eyes of the communities they serve. In some countries, government authorities finally appoint or approve traditional leaders, an arrangement that provides state leverage. Village headmen may also be upwardly accountable to a chief or a hierarchy of chiefs. In some contexts, women play a key role in choosing traditional leaders. In such contexts, programmatic interventions

8 For the description of the self-statement method in Namibia, the authors are indebted to the paper by Professor Hinz and his references to the restatement project of the School of Oriental and African Studies (SOAS) of the University of London under Anthony Allott. Hinz, Manfred O., 2009, The Ascertainment of Customary Law: What is it and what is it for?, paper presented at Conference at USIP, Washington D.C., 18 November 2009.

could attempt to engage with the criteria that women use in choosing a leader and to build on structures to enhance accountability through voluntary codes. Such engagement will be possible only on the basis of trusting relationships with the communities or hierarchies concerned.

### **BOX 12. PROGRAMMING TO ADDRESS HARMFUL TRADITIONAL PRACTICES**

The Malawi Human Rights Commission's report of 2006 on cultural practices highlighted some key recommendations on programming, such as:

1. Changing harmful traditional practices is a complex process that must involve all stakeholders, including traditional leaders, community members and religious groups that may be reluctant to speak out about the practice, and the government.
2. It is important to understand the details of a practice and its cultural underpinnings. Offering substitute activities or a modified version of a practice is constructive, since the abolition or the practice would leave a vacuum.
3. The balance of power must be understood. Women and children may be especially vulnerable because of their lower social and economic status. Outreach programmes on gender equality targeting all sectors of society need to create public awareness through information.
4. Ministries of health should take a leading role in promoting healthy cultural practices by giving advice to all participants in cultural practices, such as circumcision, and discouraging the unhygienic practices.
5. Education for women is vital to the realization of their rights. Unless girls' education is promoted so that they realize their full potential, the status of women in Malawi will remain low and women's rights will likely continue to be violated.

### **3. Education of Adjudicators**

Education interventions can target training of current, practicing adjudicators. The content of training can, of course, encompass a range of subjects, from guidance on the law in relevant domains, to techniques of documentation, dispute resolution, legal procedure, as well as professional ethics, human rights and judicial organization. Training could be specific to build the awareness and capacity of adjudicators in relation to children's and women's rights. Training could also be provided to other participants in the proceedings, such as those who represent and assist children, fulfilling the right to be heard.

It may be perceived as easier to programme for the education and training of parajudicial adjudicators who are recruited, regulated and paid in state structures, than for the IJS' providers who are not part of the state structure and whose jurisdiction, functions and powers are not uniform and regulated. Sets of rules, practice guides and manuals already exist for adjudicators in many parajudicial systems, and education and training can be matched to these functional tools. However, the possibility of working with traditional justice systems should not be discounted. The study confirmed that traditional adjudicators are often eager to attend education and training courses. It is also notable that where women have succeeded in becoming traditional leaders, they have often been chosen because they are among the most successful and well-educated members of their communities.

Human rights training is often at the centre of educational efforts in the engagement with IJS. Training that is contextualized to fit the circumstances and mandate within which adjudication of disputes takes place is more effective. For example, training should not focus on abstract principles of constitutional or international law, but rather on the rights aspects of the kind of cases that adjudicators encounter. It should be recognized that human rights training for IJS' adjudicators is but one engagement and where IJS is upholding customs or beliefs that violate human rights, a broader approach would be more appropriate to address societal attitudes underpinning these customs and beliefs. An attempt to modify practices that are deeply culturally embedded may require that

matters of education, health, protection and justice all be addressed in an integrated manner through interventions that extend far beyond the justice sector.

#### 4. Education of Users – Legal Awareness-Raising

##### **BOX 13. AWARENESS-RAISING ABOUT VILLAGE COURTS IN BANGLADESH**

In Bangladesh, the Ministry of Local Government Division, UNDP and the European Commission are jointly undertaking a programme entitled, Activating Village Courts in Bangladesh, which supports the justice system in 500 selected Union Parishads. One key component is a comprehensive community awareness programme at the local and national levels on legal rights. Using several communication methods, it aims to raise awareness about the roles and functions of village courts among potential users, among community-based organizations, schoolteachers and religious leaders.

The raising of legal awareness and public information outreach efforts targeting the general population can usefully be developed in conjunction with the training of adjudicators. Strengthening legal awareness extends knowledge of rights, provides an important foundation for the community to demand the protection of those rights, and offers remedies where those rights have been violated. A lack of awareness and understanding of their rights often disproportionately affects the most disadvantaged groups in society, including women, the poor and geographically isolated communities. Community empowerment through the heightening of legal awareness is vital to encouraging IJS to be responsive to the community and mitigates the risk that the IJS could be captured by an elite.

Many programming initiatives include a legal awareness component, often focusing on educating the community on human rights and providing information about the institutions, mechanisms and procedures available to the community. Partnership with government or local authorities through the development of communication strategies to promote legal awareness is a useful entry point. NGOs also have considerable experience in undertaking initiatives to raise legal awareness. Such communication strategies should respond to the needs of disadvantaged groups by, for example, adopting user-friendly formats in local languages and informing those who face substantial physical, cultural or economic barriers to access.

In some contexts, the use of media, radio and television campaigns are effective. Among the other means of educating people are street theatre, information kits or flyers on how to initiate legal action or bring a dispute to IJS. Legal information kiosks or mobile legal clinics can also travel particularly to remote areas to conduct community education initiatives on legal rights. Trusted and familiar social networks, such as teachers, religious leaders, community groups or others with non-legal specialty skills, can substantially contribute to public awareness of the law and legal rights. In summary, a legally aware community translates into increased demand and higher expectation that IJS will deliver justice and be more accountable.

#### 5. Procedural Regulation and Self-Regulation

Emphasizing international human rights standards in IJS' procedures offers avenues for interventions. This is particularly important for meeting the obligation under the Convention on the Rights of the Child to respect the views and interests of children. IJS address many issues, such as ones involving land, custody and guardianship, directly relevant to children, so hearing and respecting the views of children is a critical procedural and substantive

consideration. Programming can influence IJS' procedures to better incorporate international guidelines on child victims and witnesses, and to all situations where the interests of the child are affected.<sup>9</sup> The challenge is to do so in such a way that places child rights firmly on the IJS' agenda without overwhelming and thereby alienating IJS' providers.

Practice manuals and guidelines promote adherence to procedures and are relatively common among parajudicial IJS (though they are often out of date and not always available to all adjudicators), which are generally obliged to follow a defined set of procedural, jurisdictional and substantive rules. NGO-sponsored mediation schemes may also use manuals and schematic guidelines. Improving, updating and distributing such tools are worthwhile programming activities and provide greater procedural transparency, consistency and fairness in IJS. Such guides can be extremely useful, but literacy levels and language proficiency must be taken into account. While it is less likely that manuals and guidelines will be used in custom and religion-based IJS, with sufficient time and engagement in education at the community level, good practice and procedures can be transmitted without written guides.

Many countries have national organizations or a state organ where traditional leaders are represented. These structures could play constructive roles in setting standards for the structures, substantive norms and procedures of IJS, for example, through voluntary codes or charters or through advice for and debate with the legislature. Encouraging the elaboration and adoption of an easily understandable text for IJS with fundamental substantive and procedural standards to which IJS' providers could declare their adherence, could be an initiative capable of broad societal reach through national organizations.

## 6. Accountability Mechanisms: Transparency, Monitoring and Oversight

Accountability in IJS can be strengthened through mechanisms that build greater transparency, oversight and monitoring of IJS. Requiring or promoting the recording of case outcomes is one measure that can promote transparency, enhance oversight, strengthen enforcement mechanisms and, in some circumstances, promote legal certainty. Recording is generally useful if the parties obtain copies, and the adjudicator safeguards a record for possible future reference. Recognizing that legal certainty is a value of formal systems and that IJS will typically be more concerned with flexibility and the circumstances of each individual case, it should be noted that the intervention could in some circumstances distort the nature of IJS.

Avenues of appeal are effective mechanisms to promote accountability of IJS' decision makers. The recording of decisions can facilitate an appeal or the registration or approval of these decisions by other structures, including a formal court. The outcomes of most parajudicial mechanisms are generally subject to appeal to the ordinary courts, though, in some instances, cases have to recommence *ab initio*. Tradition- or religion-based systems also often have hierarchies of authority through which cases can be appealed.

Other than appeal, accountability can involve the monitoring of decisions by outside parties, be they members of the public, organizations representing stakeholders, hierarchically superior adjudicators or official inspectors. Engagement with monitoring systems could be a valuable entry point for programming. The study found that parajudicial IJS and NGO-sponsored mediation schemes are most likely to have established mechanisms of inspection or monitoring. Systems that are subject to a defined set of rules and procedures and are directly subordinate to state authorities can naturally be more readily inspected than ones that are anchored in community structures and operate according to tradition.

<sup>9</sup> UN Guidelines on Justice Matters involving Child Victims and Witnesses of Crime, 2005.

#### BOX 14. MONITORING BY NGOS

Unless it is developed in careful dialogue with IJS and the community, outside monitoring may be seen as an unwelcome intrusion into a traditional structure. In Bangladesh and Malawi, NGOs were able to gain access to traditional IJS by providing support and obtaining the trust of the leaders and communities.

Parajudicial systems generally have regulations providing for an official inspection and supervision framework, but they are often ineffective because supervisory organs lack resources. In some countries, supervision of parajudicial systems is also difficult because of unclear and overlapping supervisory mandates and the various monitoring frameworks are sometimes not coordinated with one another. Supervision by executive agencies also raises issues of the independence of the judiciary. Monitoring should take its point of departure in the mutually supportive role of IJS and (other) organs of the state. It should thus afford providers with an opportunity to voice their concerns. A monitoring system that is purely top-down and seen by the IJS' providers as an instrument that only serves to criticize them is unlikely to be successful.

#### BOX 15. PUBLIC HEARINGS IN BANGLADESH

Public hearings can be an effective way to promote enforcement of IJS decisions, including through ensuring publicity for the hearings. The *Shalish* courts in Bangladesh use a highly public forum for decision-making and publicizing case outcomes. The recording of the decision takes place in the minds of community members rather than on paper and the collective conscience of the community is committed to enforcement.

Requirements of public hearings and open admission to the court or adjudication forum, including for the general public and observers from civil society organizations and the media, provide clear transparency measures. Where recording of decisions is not possible (perhaps due to literacy levels) or not accepted in IJS, public hearings can provide an accountability and transparency mechanism between IJS and the community. Community groups, such as grassroots women's groups,

can develop their own records of the proceedings and monitor the pattern of the decisions as well as procedures followed in IJS. Although not appropriate for sensitive cases (possibly where children are involved), public hearings can also strengthen the likelihood of enforcement of IJS' decisions, as such decisions will be more widely known and therefore accepted in the community. A further step would be to involve community groups in the decision-making; this could be done through consultation or jury-type assemblies. Such mechanisms could allow for women's participation, particularly where women are not represented among IJS' adjudicators.

Monitoring and oversight often require record keeping (and thus literacy) among providers and a clear structure that takes account of a set of standards (structural, procedural and normative) against which IJS are to be assessed. IJS providers may be working for no or very little compensation, and the imposition of additional work burdens may be unwelcome or unrealistic. Adjudicators and monitors may need to be trained in the reporting and monitoring methodology. These interventions can be costly and must be weighed against the benefits of using similar resources for other institutions.

### 7. Linkages among Primary Justice Providers

IJS should be seen as operating in conjunction with other avenues of primary justice. In many contexts, there could be several kinds of IJS operating in addition to formal systems. The numerous linkages in many countries between different primary justice providers, be they functional or norm-/rule-based, official or unofficial, ultimately challenge any notion of entirely separate and distinct legal systems. The propriety of programming aimed at better alignment between formal and informal systems will depend on the context of national justice policy, the jurisdictional division between formal and IJS, and an analysis of the desired and factual links between the two. In certain circumstances, the value of promoting linkages will consist of fostering better understanding between the systems and allowing for a discussion about division of labour, respective jurisdictions and better mechanisms for referral.



Programming should look at the totality of actors, preferences and patterns of justice provision at the local level. Addressing jurisdictional limits, *de facto* divisions of workload, and patterns of interaction may assist in developing useful synergies across different forms of IJS, law enforcement, administrative and political structures, statutory courts and legal service providers. For example, programming would not want to encourage IJS to handle serious criminal cases, but cooperation between IJS and the formal system may be precisely what is needed to ensure that these cases are transferred to the formal system and such referral could quite easily be a ‘goal’ to be achieved through the course of an intervention rather than a prerequisite to engagement.<sup>10</sup>

### BOX 16. INTERACTION AMONG DIFFERENT INFORMAL JUSTICE SYSTEMS

In Malawi, interaction was promoted among the custom-based IJS and the NGO-sponsored Village Mediation Project. In the areas where both are present, the NGO worked to build relationships between the mediation system and traditional cases. There are indications that an understanding of the division of the case burden has arisen; traditional leaders retain land cases, leaving family disputes to the mediators. Linkages to the police and the formal justice system are also a key part of the Village Mediation Project.

In some situations, the linkages required are not between IJS and formal justice systems, but between different forms of IJS. Such linkages would address similar issues such as jurisdictional limits, division of case burden, and building greater mutual understanding. Programming can work to build dialogue and mutual understanding between different types of IJS that could lead to a smoother relationship allowing for referral of cases. These programming initiatives can serve as a forum for learning and for improvement. The study illustrates that such initiatives also promote an interesting spillover effect between different systems, as when women who are educated and empowered in relation to one mechanism feel emboldened to work for their rights in relation to others.

Ensuring that programmes affect outlying and isolated communities is also an important factor for strengthening the provision of justice. Many programmes building linkages are in or close to provincial capitals because they are close to institutional and political hubs. However, community justice programmes may be especially needed in communities where there are no formal mechanisms, particularly if communal violence is an issue. While it might be more difficult to achieve results for programming, the establishment or strengthening of IJS in such communities can have long-term benefits in the form of peace, stability and legal empowerment. In some instances, though, the strengthening of IJS would be a temporary measure while formal justice systems develop the capacity to reach out and provide appropriate justice services to these communities.

## 8. Linkages to Paralegals and Legal Aid Providers

Programming that fosters closer relations between IJS and local legal aid providers, such as paralegals, has had some positive results. Not all IJS will allow legal aid providers to act as representatives in proceedings, but even where this is not possible, such providers can advise individuals involved in those proceedings. Paralegals can also assume observation roles where proceedings are public. Government and non-government actors can be involved in making provision for legal aid and paralegal service.<sup>11</sup> Strategies can include institutionalization of community services to draw on law graduates and retired professionals in legal clinics. Paralegals and legal aid providers can offer particular services such as advice and assistance about whether a matter needs to be taken before a justice system or can be settled in another way. Paralegals can also coordinate referrals to non-legal expertise; for example, some matters might require health care intervention or financial assistance.

<sup>10</sup> Wojkowska cites a reduction in forced marriage of widows as the successful outcome of a project in Somalia. Wojkowska, Ewa 2006: *How Informal Justice Systems Can Contribute*, Oslo: United Nations Development Programme, Oslo Governance Centre

<sup>11</sup> Carried out with the judiciary section responsible for local courts and two NGOs that provide legal services to rural women. From an unpublished paper entitled ‘Summary of Reports on Monitoring the Impact of Training Local Court Justices and Paralegals in the Southern and Eastern Provinces of Zambia’, under a GTZ-supported project ‘Improvement of the Legal Status of Women and Girls in Zambia’, by Tina Hofstaetter, GTZ, Lusaka, July 2006.

**BOX 17. PARALEGALS AND INFORMAL JUSTICE SYSTEMS**

In Zambia, a GTZ training programme of local court justices with the assistance of NGOs and together with community paralegals helped break down barriers between the two groups. Consequently, it became possible for paralegals to enter into and observe proceedings in local courts and monitor how the justices and court personnel treated women. The success indicators measured the degree to which intimidating language was used against women and whether women were allowed to speak before the court without being accompanied by a male relative, as these were problems observable in the baseline data.

Programming in linking IJS to legal aid and paralegal mechanisms requires particular efforts to ensure sustainability and cost-effectiveness. Legal aid schemes are usually expensive and governments often do not accord them priority. This is where university clinics and the participation of bar associations, paralegals, legal aid providers and other public advocates can play a key role and also be a lobby to ensure the continued provision of resources.

**BOX 18. COMMUNITY JUSTICE AND CONFLICT RESOLUTION**

In Eastern Highlands and Simbu provinces of Papua New Guinea, there are a number of communities that have successfully resolved communal conflict through the establishment of their own peace-restoring and dispute resolution forums. In Kup District of Simbu Province, the organization Kup Women for Peace (KWP) was founded by a group of women in the village who wanted to fight back against the communal violence that was killing their husbands and sons and causing women and girls to live in fear of physical or sexual assault. KWP have also provided training on victim's rights, on the CRC and CEDAW to village leaders and to village court officials. KWP together with village leaders decided to appoint 'community police officers' who could be a link between the community and the nearest police station in Kundiawa.

**9. Linkages to Wider Development Initiatives**

Attention to the proper sequencing of development initiatives, as well as respect for the human rights-based approach principles of participation and empowerment of local communities and individuals, require that IJS not be treated in isolation from other aspects of life and development. The entry point for discussion of justice issues can be through vital health, education or livelihood issues, rather than through treating justice as an isolated sector.

Phenomena that are visible in IJS, including discriminatory practices regarding marital and family relations, property ownership and inheritance, or superstitious practices and punishments, are not simply expressions of justice standards, but are expressions of how societies are structured. The best ways to change this may include broader development initiatives in education, livelihoods and public health. Broader development initiatives are also key to creating an environment where human rights can be respected and fulfilled. Consequently, it is important that IJS be included in child protection programmes that work to build protective environments for children. Similarly, national strategies and action plans to implement CRC or CEDAW should include a specific component on engaging with IJS for the implementation of these conventions.

Engagement with IJS therefore must be integrated as a component of broader development initiatives. This is an oft-ignored area of justice programming, but the efficacy of working with IJS requires that it be complemented by engagement with the formal justice system and with development programming that addresses the broader social, cultural, political and economic context of IJS.





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