POLICY AND ISSUE BRIEF
NAVIGATING COMPLEX PATHWAYS TO JUSTICE: ENGAGEMENT WITH CUSTOMARY AND INFORMAL JUSTICE SYSTEMS

IDLO
Creating a Culture of Justice
International Development Law Organization

In a bid to make justice accessible for all, **IDLO has launched a series of Consultations on customary and informal justice systems. The global dialogue is informed by a series of publications** titled "Navigating Complex Pathways to Justice: Engagement with Customary and Informal Justice Systems" **that seeks** to advance policy dialogue and distil lessons from programming and research, **to help realize Sustainable Development Goal 16.**

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INTRODUCTION

Goal 16 of the United Nations 2030 Agenda for Sustainable Development recognizes the importance of access to justice for all in the development of peaceful and inclusive societies where effective, accountable and inclusive institutions govern at all levels. As an intergovernmental organization exclusively devoted to promoting the rule of law, IDLO 's Strategy 2020 draws inspiration from Agenda 2030 and rests on two pillars – (1) access to justice and (2) equality and inclusion - which infuse all aspects of IDLO 's work. In this formulation, the rule of law is both a means and an end to sustainable development, both a path to and a measure of progress.

Globally, there is great demand for the rule of law and justice, but pathways to justice are diverse and there are many complex challenges in the architecture and supply of justice. The values and standards of the rule of law are universal and must be universally respected, but there exists a plurality of legal systems, both formal and informal. To improve the scope and quality of justice systems, it is important to understand the variety of justice actors and mechanisms that exist and are used by individuals, including resolution of disputes outside formal courts. While precise data is difficult to discern, recurring estimates suggest 80 to 90 per cent of legal disputes in developing, fragile and post-conflict states are resolved using customary and informal justice (CIJ) systems.[1] Notably, users of these systems are disproportionately marginalized — the poor, women, and remote and minority populations.[2]

These fluid and dynamic systems frequently preceded the emergence of the modern state and have evolved separately either due to lack of access to or in response to disincentives embedded in the formal system.

CIJ systems exhibit different characteristics from their formal state counterparts, including an emphasis on restorative justice, flexible rules and procedures, and consent-based negotiated solutions, which can create tension with normative notions of justice and its delivery, including rule-based decision-making, consistency, and predictability in the application of the law, sentencing and due process standards, access to representation, substantive equality and procedural safeguards.

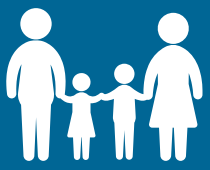
Over the past two decades, the engagement rationale and modalities of assistance provided with respect to justice sector development have undergone enormous transformation. A new wave of technical assistance has evolved that goes beyond the transplantation of Western legal precepts into developing economies and embraces holistic interpretations of justice grounded in the normative functions of the rule of law, which embodies human rights. This facet of modern justice sector development recognizes that the state is not the sole justice provider. Thus, the relevance and prevalence of CIJ systems require that they be included in any discussion on access to justice in order to realize effective, accountable and inclusive institutions at all levels.

This recognition accompanies trends in the delivery and administration of justice. First, there is an understanding that justice comprises far more than legislation and judgments, to include notions of equity and legitimacy. Second, the locus of engagement has shifted from institutions to individuals, with justice strategies rooted in the 'end needs of users' or justice seekers and service delivery rather than institutional capacity. Third, there is an increased sense of pragmatism; key donors and operational agencies have emphasized the importance of tangible wins, realistic objectives and strategic rule of law ends.

As this Policy / Issue Brief details, meaningful access to justice for all will not be achieved without engaging with both formal and CIJ systems. In many developing, fragile and post-conflict contexts, justice needs are simply too great vis-à-vis state capacity.

Moreover, in developed contexts, where Agenda 2030 is also relevant, out-of-court settlement or alternative forums and means of dispute resolution fulfil a large percentage of justice needs. In policy terms, the trend is towards sector-wide approaches that acknowledge common justice challenges and the need for quality justice, while striving for complementary engagement between formal and CIJ systems to ensure equitable access to justice for all.

POLICY RECOMMENDATIONS



Build from public legitimacy and acceptance

Customary and informal justice systems enjoy high levels of use and acceptance in their communities

It is well established that customary and informal systems are often the primary avenue to access justice in many societies. People often turn to these systems of justice because they are more accessible, affordable and familiar. Further, they function where the formal system is weak, non-existent or not trusted, offering a mechanism for dispute resolution.

Elements obstructing justice or influencing access to formal justice from a justice seeker's perspective are many, but customary and informal systems offer advantages including speed, cost-effectiveness, linguistic and geographical accessibility, cultural relevancy, non-adversarial approaches and more flexible solutions. Promoting access to justice for all necessitates engaging with both formal legal systems and, where relevant, also with customary and informal justice systems. However, it is important to bear in mind that these systems are also often skewed against disadvantaged populations, especially women and children, favoring patriarchy and resulting in powerfully unequal and discriminatory outcomes.

Recommendation: Capitalize on the public legitimacy of customary and informal justice systems.

Enhance means of accessing justice, especially for the marginalized

Justice for women and marginalized populations compels engagement with legal pluralism

As exemplified in Agenda 2030, at its core the rule of law is about ensuring equality: about equal protection and equal benefit for all. It is about effective, transparent and accountable institutions that provide just outcomes and protect rights. Not only is access to justice a fundamental right, it is also a bridge to upholding other rights. While legal frameworks and protections may exist, this does not mean that women and marginalized populations can access them.

From its work, IDLO has learned that there is limited belief that state institutions such as the police and courts can or will provide justice and security for all. It is broadly understood that in developing, fragile and post-conflict states, by choice or out of necessity, many women and marginalized populations rely on dispute resolution outside the formal courts. For women and marginalized populations, this means that significant issues are often administered and adjudicated in community-based justice systems, for instance issues related to land and family, including divorce, maintenance, custody and inheritance. Overlooking the role of customary and informal systems and excluding them from reform strategies is not a sustainable approach for enhancing access to justice and protecting rights. The large number of women and marginalized populations who select or have no choice but to rely on such systems makes the case for appropriate engagement compelling. Engaging with customary and informal systems can promote improved access to justice and help maintain stability, while tackling bias and discrimination.

Recommendation: Harness the potential of customary and informal justice systems as a means to access justice for women and marginalized populations, while recognizing challenges.

Strengthen justice for inclusive development

Customary and informal justice systems offer opportunity to generate commitment to the rule of law

Injustice is a known conflict driver and well-functioning justice institutions play a key role in preventing conflicts from igniting and ensuring they do not relapse or escalate. Developing institutions at all levels to deliver justice services and resolve disputes is a priority to prevent instability and generate a level of trust and confidence in the state. Legitimate laws and credible enforcement mechanisms help states make progress in expanding opportunities for women and marginalized populations to participate in economic and political life and meet targets in health, education and other social services, all requisites to inclusive development and the rule of law.

Because of the costs and constraints of formal justice architecture, it can be strategic to build on the dynamic nature and adaptive potential of customary and informal justice systems while encouraging appropriate reforms. Against competing development imperatives and existing trends towards decentralization and making justice accessible, improving existing dispute resolution mechanisms and their human rights compliance may be a cost-effective approach. Customary and informal justice systems can complement the formal system and pre-eminence of the judiciary while offering a cost-efficient national resource allocation.

Recommendation: Enhance the capacity of customary and informal justice systems to advance the rule of law and inclusive development.

Root in context

The value added of customary and informal justice systems is specific to the context in which they operate

Engaging with customary and informal justice systems presents many challenges due to their widespread diversity and unique features. A key dilemma is how to harness the potential to increase access to justice with traditional approaches without causing harm or formalizing or legitimating rights-abrogating practices that have no place in modern and rights-based justice delivery.

Understanding the value added of customary and informal justice systems must be rooted in the context of advantages as well as constraints. Advantages include elements such as an emphasis on restorative justice, flexibility in rules and procedures and alternative ways forward such as consent-based negotiated solutions. However, these advantages can also elevate problems, creating tension with human rights, accountability and procedural safeguards such as due process. The challenge is to understand and respect local needs and legal pluralism, and understand the dynamic nature, differences and similarities that characterize the variety of customary and informal justice systems, and their important relationship with the formal justice system.

Recommendation: Analyze carefully the local context and assess specific advantages and risks.

Focus on justice needs and human rights

Engaging with customary and informal justice systems offers opportunity to enhance respect for human rights while addressing the needs of justice seekers

Engaging with customary and informal justice systems can be an enabler of trends such as decentralized solutions and a focus on end users when developing reforms. At the same time, such engagement needs to ensure that international human rights standards and principles are respected and upheld. It is important to carefully assess the risks and opportunities on a case-by-case basis, understand justice gaps, vested interests, existing discrimination and tensions with human rights standards, and identify suitable entry points.

Additionally, engagement must appreciate the complexity of supporting the distinct value of customary and informal justice systems while addressing negative consequences of pluralism or placing undue pressure on women and marginalized populations. Arriving at sustainable reforms that complement the formal justice system necessitates drawing from existing lessons and good practices in this field of programming.

Recommendation: Focus on end users / justice seekers and adopt a human rights lens.

CORE ISSUES

EXPLORING TERMINOLOGY AND CONCEPTS

Various terms are used to describe mechanisms of justice and conflict resolution that operate outside the formal, court and state-based legal system, although as explored below, state recognition can vary.[3] Terms may include, but are not limited to: alternative, community, customary, grass-roots, indigenous, informal, local, non-state, people's, popular, religious, village, and traditional law and justice forums. There is no definitive nor universally accepted terminology, given the nuanced use and understanding of concepts that in turn materialize as mechanisms of justice across countries and cultures. Governments, academics, development agencies and donors use different terms based on context, cultural sensitivity and engagement priorities.[4]

Customary law refers to the "system of customs, norms and practices that are repeated by members of a particular group" for a sufficient extent of time that they consider them to be binding and common practice.[5] It is a rule of conduct which attains a binding or obligatory character based on the assent of the community and is supported by sanctions, for example, ostracism, compensation, propitiation, restoration, or apology. It is the existence of sanctions which distinguishes customary law from a mere custom.[6] The rights and obligations encompassed by customary law apply to a particular community and context and generally exist outside the formal body of law created by the state.[7] Customary systems tend to draw their authority from cultural, social, customary or religious beliefs and ideas, rather than the political or legal authority of the state. And while customary law is largely unwritten, the qualification is not universal.[8]

Informal justice is often defined by its key attributes. It is described as "unofficial (dissociated from state power), non coercive (dependent on rhetoric rather than force), non bureaucratic, decentralized, relatively undifferentiated, and non-professional; its substantive and procedural rules are imprecise, unwritten, democratic, flexible, ad hoc, and particularistic". While no informal institution can be expected to embody all these attributes,"each will exhibit some".[9] Critically, informal justice should not be conflated with systems that are simplistic or lacking in authority. For instance, the *Pashtunwali* system in parts of Afghanistan is comprised of complex and developed rules and its decisions often carry greater weight than those of formal courts, particularly in rural areas.[10]

Traditional legal systems are, in one definition derived from an analysis of practices in sub-Saharan Africa, "non-state justice systems which have existed, although not without change, since pre-colonial times and are generally found in rural areas".[11] Although this definition emphasizes continuity with pre-colonial practices and imposes a geographical component to the term, other authors use traditional law synonymously with customary law.[12] Although the generally time-honored and long-established 'traditional' systems may be erroneously conflated with outdated or antiquated practices, customary justice systems can be modern institutions and receptive to contemporary influences.[13] In Somalia, for example, there is evidence that the traditional *Xeer* system is responding to forces of globalization, particularly in the urban economic sector where it has reinvented itself to accommodate modern crimes, business practices and trading patterns.[14]

Finally, the term *non-state justice system* is also commonly used. While this may reflect the sector targeted by donors, the relationship between the state and alternative systems is not necessarily one of exclusion. In many countries, customary, informal, and traditional systems are incorporated into and regulated by state law, regulations or jurisprudence either wholly or in part.[15]

Image: ©Afghanistan Ministry of Justice, Public Legal Awareness Unit

In focus: Interface of state and customary and informal justice systems[16]

A common assumption is that customary, informal and state systems operate in contestation or competition with each other. This is rarely the case and the relationship between systems can take a variety of forms, including recognition, formalization, harmonization or hybridization.[17] The principal modalities for state and customary and informal justice interfaces are described below.

Recognition of customary law and actors: States may recognize customary law or CIJ jurisdiction with varying conditions or levels of qualification. In the most liberal approach, a specific group is granted an autonomous legal space insulated from state interference, usually in the form of special jurisdiction. States may also recognize and regulate customary law in legislation, including the Constitution.[18] For example, in Sierra Leone common law comprises both customary law ("rules that by custom are applicable to particular communities of Sierra Leone") and legislation. Local courts have limited subject-matter jurisdiction over marriage, divorce, land disputes, and minor and limited criminal cases and administer justice based on the beliefs, customs and traditions of the local inhabitants.[19] In a similar vein, the Kyrgyz Republic's Constitution recognizes a right to *aksakals* (elder) traditional courts.[20]

Incorporation into state court jurisdiction: In other cases, customary law is recognized, but the state judicial apparatus is responsible for its application. Frequently, state courts (usually at the bottom rung of the judicial hierarchy) are granted authority to adjudicate customary cases and apply customary law. For example, courts in Ghana are authorized to apply both statutory and customary laws if the latter "meet the requirements of 'equity and good conscience' and they are not incompatible with any existing statutory law". Customary law is therefore recognized as legitimate and enforceable but subordinate to the Constitution and formal statues.[21]

Decentralization of state court authority to customary and informal courts: In this form, customary courts are substantially integrated or incorporated into the state court hierarchy[22] (lower-level courts are more likely to incorporate customary law while higher-level courts are likely to rely on common and legislated law), generally with some degree of reform or regulation. Usually, the state maintains its monopoly over serious matters while customary actors hear minor criminal and civil matters. The goal is to mediate conflicts which would otherwise become severe and to reduce the burden on higher-level courts. In some cases, formal and informal systems may be distinguished based on subject matter jurisdiction and procedures. Examples of a substantial integration framework include the chief's kgotlas (courts) in Botswana[23] and the village courts in Papua New Guinea and the island of Bougainville.

Finally, state and customary and informal systems may interact at the level of individual disputes through rules providing for appeal or review by formal courts of decisions and procedures of such systems.[24]

Image: ©IDLO: Capacity development training course conducted by IDLO for Kyrgyzstan's Aksakal courts (Elders courts) in 2017

Taking this diversity of views, the complexities both between and within systems, and evolving understanding based on programming experience, the nomenclature customary and informal justice (CIJ) systems is adopted, noting that these remain the most commonly used and explained terms.

CIJ systems take various shapes and function in different ways. A common feature of all CIJ formulations, however, is that they exist at the community level, closer to the lived reality of the general population compared to the formal state justice system. This proximity to justice seekers also helps explain characteristics of CIJ systems and why other terminology may be used and adopted:

- **Social and political orders:** CIJ systems can be as much social or political orders as they are legal, extending to all facets of life in a way that the formal justice system does not. For example, funerals, weddings and rites of passage are imbued with norms and practice that cannot necessarily be separated by customary 'law'. Rules generally comprise descriptions of what a community does as well as prescriptions as to what its members should do. These customary norms and rules are actively produced, enforced and recreated through processes of participation and contestation. CIJ can therefore be adaptable and flexible, and any written version can become outdated. These factors explain why the precepts of CIJ systems can differ greatly over small distances, and why there may be several versions co-existing in one place, in competition with each other as well as the state system.

- **Religious orders:** in many CIJ systems religion guides community practice. A 'religious justice system' commonly, but not exclusively, refers to courts based on or informed by written religious texts, such as sharia courts. For example, in the Indonesian province of Aceh, adat is heavily influenced by Islamic jurisprudence and norms.[25] Alternatively, 'traditional' justice systems may be "underpinned by spiritual values or influenced by a specific religion" without a unified, foundational legal text. In Timor-Leste, for instance, the reconciliation ceremony is believed to "[break] down the barriers separating the present life and the afterlife" and is legitimated by the ancestors' spiritual presence and agreement.[26]

- **Indigeneity:** indigenous justice systems may be considered a specialized segment of CIJ systems.[27] The distinctive feature of indigenous systems within the array of customary systems is their connection to indigenous communities, broadly defined as peoples who possess "historical continuity with pre-invasion and pre-colonial societies that developed on their territories" and who "consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them". These communities form "non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems".[28] The United Nations Declaration on the Rights of Indigenous Peoples (2007) explicitly grants indigenous peoples the right to maintain their legal institutions.[29] The United Nations has used 'indigenous law' to explicitly refer to the customary law of indigenous communities.[30] Others use 'indigenous' as an adjective to denote the customary law of recognized indigenous peoples,[31] and it has been also been used synonymously with customary to emphasize the localized nature of the law.[32]

Image: ©IDLO Access to justice program for indigenous people in Peru

Although CIJ systems are at times defined in opposition to formal ones, contemporary state justice systems have embraced *alternative dispute resolution* (ADR) mechanisms, a concept that draws from historical and customary roots. The United Nations Office on Drugs and Crime considers alternative dispute resolution mechanisms the 'modern version' of the historical practices typically associated with 'customary', 'informal', or 'traditional' forms of justice.[33] According to the World Bank, ADR includes any process for resolving a dispute other than adjudication by a judge in a statutory court.[34] The most commonly cited ADR methods are negotiation, mediation, conciliation, and arbitration (consensus-building and facilitation are also used but less common) and are distinguishable from conventional, court-based mechanisms by their reliance on collaborative, non-adversarial resolution. These methods trace back to practices and traditions from time immemorial in many societies, based on principles including honesty and fair play, such as Lok-Adalat adjudication applied in *panchayats* (people's courts) in India.[35]

Modern interest and general acceptance of these practices has been spurred by the desire to revive traditional justice mechanisms and to improve access to justice, which is a challenge everywhere.[36] As a term that covers a variety of non-judicial or quasi-judicial mechanisms for resolving conflict, ADR can be a means to reduce the costs, delays and adversarial nature of the formal justice system and create an efficient and effective alternative to formal litigation.[37]

However, ADR mechanisms cannot be understood as true alternatives in all contexts. Rather, where the formal justice system is not functioning and is unable to adequately protect human rights, these mechanisms may be the primary or only means of dispute resolution.[38] For example, although most constitutions in Latin American countries guarantee the right to access justice, mechanisms do not match this aspiration. Disputes can take 7 to 10 years to litigate through formal courts. Backlogs in the region frequently force parties to choose extra-judicial agreements as the only practical dispute resolution mechanism, but arbitration and mediation can disadvantage already vulnerable groups.[39]

The phrase *appropriate dispute resolution* was introduced as a modification of ADR to embody the need to choose the correct mechanism based on the context of the conflict.[40] The United Nations Institute for Training and Research suggests 'appropriate' captures the dispute resolution methods' capacity to address the inherent difficulties in disputes between parties from different countries and/or legal traditions.[41] Finally, use of 'appropriate' may address the contention that many ADR processes were not 'alternatives' in indigenous African and Asian justice systems, but "an integral part of institutional justice".[42]

In focus: International recognition

The Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies (2004) stated that "Effective strategies for building domestic justice systems will give due attention to laws, processes (both formal and informal) and institutions (both official and unofficial)".[43] In the 2012 Declaration of the High-Level Meeting on the Rule of Law, Member States acknowledged that "informal justice mechanisms, when in accordance with international human rights law, play a positive role in dispute resolution, and that everyone, particularly women and those belonging to vulnerable groups, should enjoy full and equal access to these justice mechanisms".[44]

UNDERSTANDING CUSTOMARY AND INFORMAL JUSTICE SYSTEMS

The formal justice system refers to legal controls organized by the state and enforced by specific institutions such as courts, the police, prosecution offices, correctional facilities, and legal aid. As customary norms and rules are actively generated, applied and regenerated through processes of participation and contestation, CIJ systems evolve or remain stagnant depending on prevailing societal norms, values and power structures. The latter often reinforces traditional power structures causing disenfranchisement for women and marginalized populations. While CIJ systems often build on public legitimacy and acceptance, in many instances the system of justice is not a choice, but rather the only available option.

Public use and legitimacy and acceptance

It was once commonly believed that the high levels of public use of CIJ systems was symptomatic of poor access to the formal legal system, however it is now accepted that these systems often exhibit many advantages over their formal counterparts and may hold broad public legitimacy. That using a CIJ system is often a reasoned choice has been echoed by UN Women,[45] UNDP[46] and the World Bank.[47] Characteristics that make CIJ systems particularly attractive to justice seekers have previously been documented by IDLO:[48]

- **Familiarity:** CIJ processes are usually led by persons familiar to the disputants, who enjoy social authority, and have insight into matters that may be important to the dispute's resolution, such as a transgressor's capacity to pay damages. In contrast, judges at state courts may be vested with ostensible authority but tend to be regarded as detached and foreign to disputants. Further, lack of familiarity with court proceedings and the formal atmosphere of the courts can intimidate users.

- **Cultural imperatives:** There can be paradigmatic differences between the formal and CIJ systems in terms of core legal values, such as what constitutes misconduct, notions of responsibility and perceptions of fairness. Distinctions between criminal, civil or administrative matters and differences in burden of proof may appear illogical, and the dismissal of a case on the grounds of a technicality may be perceived as arbitrary. Likewise, in legal cultures where justice is associated with speedy resolutions, the practice of granting bail, for instance, can be viewed as equating to impunity.[49]

Image: ©World Bank

- **Financial accessibility:** Resolving disputes at the CIJ level is generally affordable in terms of transaction costs; customary norms rarely impose dispute resolution fees and the system is structured in such a way as to limit the costs that disputants would otherwise need to absorb. For example, CIJ forums are usually within walking distance of users' homes and flexible operating procedures mean that dispute resolution can occur at times that do not interrupt income-earning activities. The cost-effectiveness of the CIJ system is often contrasted to the cost of accessing the formal state justice system. In weighing up the added value of referring a dispute to the courts, parties must consider both direct costs (such as case filing fees and the costs of representation), indirect costs (such as those associated with bribery, travel), and the opportunity cost of being absent from employment.

- **Geographic and linguistic accessibility:** CIJ systems are usually situated in or close to the communities in which disputants live, and adjudication takes place in local languages. Courts, by contrast, are usually located in district and state capitals, may operate only in national languages, and can impose administrative requirements that exclude those with little education or who lack literacy.

- **Expedience:** CIJ is usually considered more expedient than resorting to the courts. This is not to say that CIJ is always speedy and in fact it can be similarly time-consuming and may involve"a complex series of events, comprising many sessions over several months".[50] However, when this is the case, the implications are usually less harmful. At a state court, disputants may need to travel several times to the place where the court is sitting, each appearance generating travel, time and opportunity costs, whereas CIJ processes are localized.

- **Non-adversarial:** Justice seekers may wish to avoid the adversarial nature of court proceedings. A 'winner-takes-all' approach can create tension and estrangement and breed revenge, threatening group cohesion. Proponents of CIJ argue that the formal system's focus on individual responsibility and pre-determined rules fails to appreciate that disputes are often multifaceted and have complex histories. Such prescription prevents adjudicators from isolating and responding to the underlying cause of the dispute. CIJ, by contrast, is often viewed as a more effective approach for resolving disputes that take place in multiplex societies where members share mutually dependent social and economic links and need to continue living together. CIJ systems facilitate this by focusing on the future relationship between the parties and situating dispute resolution in the broader social context.

- **Dissatisfaction with state solutions:** There are several reasons why formal justice solutions may be insufficient or unappealing to resolve a dispute, especially in relation to criminal matters. Crimes of rape, homicide or physical assault, for example, can have a temporary or permanent impact on the victim's income which is unaccounted for in the formal criminal justice system. Imprisonment of the perpetrator is complicated as it: (1) ignores the victim's needs; (2) may not be seen as an appropriate punishment if the perpetrator is provided with accommodation, food and protection in a setting of general poverty; and (3) does not address the perpetrator's debt to society. CIJ systems typically account for the social and logistical consequences of crime through compensation-based solutions; this is particularly important where social security benefits or other services for victims of crime are not routinely provided.[51]

- **Lack of access or avoiding the state system:** In other cases, the CIJ system may be the only option for resolving a dispute where state justice is inaccessible, dysfunctional or not available. While in most such cases informal justice is the only option, there are also cases when resort to CIJ stems from a desire to avoid the formal system. In such cases, preference for the CIJ system can say more about a user's dissatisfaction with the state alternative than their satisfaction with customary norms. The state system may be avoided or bypassed because of real or perceived threats of mistreatment by justice sector actors, including intimidation, physical abuse or bribery. Particularly in pluralistic situations or where corruption is rife, the courts may be regarded as a mechanism through which the powerful exploit or perpetrate injustice against the weak, the poor or their enemies.

Image: ©CIFOR

Common characteristics and features

Like in any cultural context, the rules operative in a CIJ system can evolve in response to cultural and demographic shifts, socioeconomics and political processes, although practices can also remain unchanged for long periods of time. Unlike a state legal framework, there may be several customary systems operating simultaneously in one area. For example, in South Sudan, there are at least 50 tribes each with their own customary law, while in Indonesia, there may be as many as 300 distinct legal orders.[52] Despite this diversity, as documented previously by IDLO, there are common characteristics of CIJ systems that apply in varying degrees in specific country and social contexts:[53]

- **A focus on the restoration of social harmony:** CIJ systems generally exist in communities dominated by multiplex relationships — that is, relationships where there is a high degree of economic or social interdependence.[54] Conflict can threaten these relationships. Thus, unlike Western legal cultures, where dispute resolution is often adversarial, a primary goal of CIJ systems is to restore intra-community harmony by repairing relationships between disputing parties and creating a framework for reintegration.

- **Part of a broader governance model:** Since wrongdoing is perceived principally in terms of its disruption to social cohesion, CIJ systems often do not distinguish between criminal and civil matters in the same way as the formal system. In many countries, cases adjudicated involve personal matters such as marriage, divorce, adultery, child custody and succession, and matters deemed 'private' in nature or of small gravity according to local norms, which may also include sexual assault or domestic violence.

- **A hierarchy of problem-solving forums:** CIJ systems generally comprise a hierarchy of problem-solving forums. Small disputes may be adjudicated by extended family, while more complicated disputes may be referred to a village-level forum, and sometimes all the way through to the state system. At lower levels, respected elders within the family may be responsible for resolving disputes, whereas at higher levels, adjudicators might include traditional leaders, religious leaders, or CIJ experts. Leaders are generally male and enjoy high social standing and moral authority within their communities.

- **Flexible (and oral) operating modality:** CIJ systems generally apply flexible rules and procedures, allowing leaders to craft pragmatic solutions that suit local conditions and respond to the underlying causes of disputes. Rules are often unwritten and are passed down through generations orally. Likewise, proceedings are usually oral, and there is rarely systematic record-keeping.[55]

- **Divergent forms of participation:** In some CIJ systems, participation in dispute resolution is restricted based on gender, social status and/or ethnicity. In others, dispute resolution is public and participatory, with the disputants, witnesses and other persons actively involved in providing evidence and opining as to possible outcomes. This discourse often forms an integral part of the dispute resolution process by satisfying the community's need to discuss the action and for the offending party to accept responsibility. Community engagement can also be important because compliance relies principally on social pressure, making it important that the decision satisfies both the community's and disputants' prevailing sense of justice.[56]

- **Consensus-based decision-making:** Because the principal goal of CIJ systems is restoring social harmony and preventing recurrence, outcomes are usually compromises, made on a case-by-case basis through a process of 'light arbitration'. As IDLO has noted previously, it may be appropriate to consider interpersonal relations, previous transgressions, and the power, status and wealth of the disputants in developing a solution.[57] These factors mean that precepts, such as treating like cases alike or having pre-determined sanctions for wrongdoing, rarely feature in CIJ processes.[58] Further, because a CIJ system is structured more around consensus than the strict application of rules, disputants are rarely represented by lawyers or advocates as these roles are not as relevant in informal processes.[59]

- **Restorative solutions:** CIJ systems generally use restorative penalties, such as restitution (e.g. the return of stolen goods, apologies or community service) or compensation (e.g. fines or monetized damages) that may not reflect the actual monetary value of loss or damage. Retributive punishments, while less common, might include social or physical sanctions. The preference for restorative solutions often has a social or economic rationale. In developing country contexts where insurance, unemployment benefits, and/or state services may be unavailable, compensation provides a financial safety net for a victim. Compensation, for example, may replace the income-earning potential of a deceased or injured family member. Importantly, some types of compensatory solutions can be very harmful, particularly to women and girls.

- **Compliance and enforcement of decisions:** Compliance with decisions usually relies on social pressure linked to the authority of the local customary leader, and the shame associated with rejecting a fair decision and jeopardizing group harmony, or spiritual beliefs. For example, an individual who rejects a judgment may be stigmatized or it may be believed that disregarding a solution will result in disapproval by the disputants' ancestors, bringing bad luck upon the entire community.

- **Reconciliation:** Customary justice often incorporates rituals of reconciliation or reintegration. This is because wrongs are not only seen in terms of the actual injury or loss sustained, but also the offender's lack of respect for the social norms. As such, simply compensating a victim, or 'righting the wrong' may be insufficient to resolve a conflict; the societal balance must also be restored. In one typical arrangement, the complainant, the respondent, their families, the adjudicators, and sometimes the wider community come together and share food or drink (often provided by the wrongdoer).[60]

Image: ©IDLO: Community discussions on women's land rights conducted by IDLO in Burundi in 2015

Image: ©UN Women

Notable challenges and risks

CIJ systems may operate outside state regulation and without formal accountability mechanisms, meaning that users are more vulnerable to nepotism, discrimination and sanctions that violate accepted human rights standards. It is well established that women and marginalized populations are among those most disadvantaged and least protected under CIJ systems.[61]

States are obliged under international law to provide justice and remedies for rights violations. Importantly, there is nothing in either human rights or international law that requires a state to exercise its obligations only through the formal court system. Indeed, the United Nations Office of the High Commissioner on Human Rights affirmed that "international human rights law recognizes legal pluralism within states, provided that the legal system conforms with international human rights standards".[62]

According to UNDP, while customary practices that violate human rights need to be considered, where CIJ systems are compatible with basic considerations of justice "allowing diversity and customary practices to flourish is a way to improve the quality of governance and to democratize both the form and the content of legal regulation".[63]
Others have noted the unequal standards applied when engaging CIJ and state systems. As stated in a joint study commissioned by UN Women, UNDP, and UNICEF:

> *"strictly applying a criterion not to engage with [informal justice systems] that violate human rights excludes many [informal justice systems] from potential support and applying the same criterion to formal systems would produce similar difficulties".*[64]

Engaging with CIJ systems without causing harm and without formalizing or legitimating rights-abrogating practices is critical. While analogous difficulties also exist in the formal justice sector, central to understanding how CIJ engagement poses particular risks is recognition that women and marginalized populations predominantly rely on these systems, which often entrench bias and discrimination. Although not universal, harmful patriarchal norms and practices include female genital mutilation, bride sales, denial of widow inheritance, and discriminatory sanctions including the forced marriage or exchange of women and young girls as resolution for a crime or as compensation.[65] While common features such as legitimacy based on tradition, flexibility of procedures and a focus on restoring social harmony of CIJ systems can be advantageous, these same characteristics also present significant challenges and risks for women and marginalized populations, including:[66]

- **Lack of procedural safeguards:** problematic practices include the use of non-evidentiary methods to determine facts and lack of rights such as the presumption of innocence, legal assistance, participation or due process.
- **Lack of accountability:** CIJ leaders, who are often unaccountable to authorities, can be prone to corruption and nepotism meaning decisions may reflect power and wealth asymmetries rather than work to uphold rights.
- **Entrenched discriminatory practices:** justice seekers can be pressured into decisions influenced by power, status and wealth differentials, which is of particular concern for women and marginalized populations.
- **Far-reaching human rights violations:** both adopted procedures and sanctions imposed may have local rationales, but fundamentally abrogate human rights and disregard standard justice norms. For instance, crimes such as murder, rape and other forms of sexual violence should not be 'compensated' or reduced to financial terms, with no protection from violence or upholding of rights.

CONCLUSION

This Policy / Issue Brief coalesces current knowledge to support understanding of the terminology, use, historical and cultural relevance in local contexts, features and challenges of CIJ systems. The modern state is not the sole provider of justice and the relevance and prevalence of CIJ systems require that they be included in any discussion on access to justice. To realize Sustainable Development Goal 16's emphasis on effective, accountable and inclusive institutions at all levels and justice for all, engagement with CIJ systems has an important role. However, effective engagement requires a thorough understanding of their unique features, advantages and constraints and their relationship to the state system. While complex and diverse, these systems benefit from high levels of public use and legitimacy in their communities. A principled approach needs to take into consideration the numerous advantages but also the dilemmas that can arise and need to be addressed, such as: exclusionary norms and practices; unfair processes of decision-making and lack of procedural safeguards; fluidity affecting legal certainty and protection of women and marginalized populations; limited ability to enforce decisions; and the possibility for abuse and corruption. The following policy recommendations support further engagement with CIJ systems:

- *Capitalize on the public legitimacy of customary and informal justice systems;*
- *Harness the potential of customary and informal justice systems as a means to access justice for women and marginalized populations, while recognizing challenges;*
- *Enhance the capacity of customary and informal justice systems to advance the rule of law and inclusive development;*
- *Analyze carefully the local context and assess specific advantages and risks; and*
- *Focus on end users (justice seekers) and adopt a human rights lens.*

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NOTES

1 Precise data is difficult to discern; this estimate appears in most policy-related literature on informal or non-state justice, see for example, Organization for Economic Co-operation and Development (OECD), "Enhancing Security and Justice Service Delivery", Governance, Peace and Security (2007), p. 6; and United Nations Development Programme (UNDP), *Community Security and Social Cohesion: Towards a UNDP Approach* (2009), p. 9. See also Leila Chirayath, Caroline Sage and Michael Woolcock, "Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems", Working Paper (World Bank, July 2005), pp. 2–3. Legal disputes encompass a wide variety of conflicts or disagreements that involve a legal duty or right.

2 For simplicity, the phrase 'women and marginalized populations' will be used to denote all justice seekers who are individuals and groups who cannot or do not access justice through the formal judicial structure due to various factors which can include: poverty, gender, ethnicity, sexual orientation, caste, geographic distance, illiteracy, or distance from power, resources or services.

3 In some cases, systems are fully or quasi state-recognized.

4 For instance, the United Kingdom's Department for International Development (DFID) uses the term 'non-state justice systems' (United Kingdom, DFID, *Briefing Note: Non-state Justice and Security Systems* (2004), p. 9. Available at http://www.gsdrc.org/docs/open/ssaj101.pdf)); the Danish Development Agency (Danida) adopts the term 'informal justice' (Denmark, Ministry of Foreign Affairs of Denmark, *How to Note: Informal Justice Systems* (June 2010)); the Swedish Development Agency (Sida) refers to 'customary', 'traditional' and 'informal' systems (Henrik Alffram, *Equal Access to Justice: A Mapping of Experiences* (Sida, 2011)); and the Swiss Agency for Development and Cooperation (SDC) refers to 'customary practices (Switzerland, SDC, *Annual Progress Report September 2016–August 2017*. Available at https://info.undp.org/docs/pdc/Documents/PAK/SDC%20Annual%20Report%202016-17%20-%20Final%2017.08.2017.pdf). See also Sian Herbert, "Policy Approaches and Lessons from Working with Non-State Actors in Security and Justice", GSDRC Help desk Research Report 1190 (2015). Available at https://www.gov.uk/dfid-research-outputs/policy-approaches-and-lessons-from-working-with-non-state-actors-in-security-and-justice-gsdrc-helpdesk-research-report-1190.

5 Erica Harper, *Customary Justice: From Program Design to Impact Evaluation* (Rome, Italy, IDLO, 2011), p. 17.

6 Remigius N. Nwabueze, "The Dynamics and Genius of Nigeria's Indigenous Legal Order", *Indigenous Law Journal* Vol. 1 (Spring 2002), p. 158. For a similar definition, see Mattias Ahren, "Indigenous Peoples' Culture, Customs, and Traditions and Customary Law – The Saami People's Perspective", *Arizona Journal of International & Comparative Law* Vol. 21, No. 1 (2004), pp. 63–64.

7 Muradu Abdo and Gebreyesus Abegaz, *Customary Law: Teaching Material* (Justice and Legal System Research Institute, 2009), p. 9. Available at https://chilot.me/wp-content/uploads/2011/06/customary-law.pdf.

8 For an example, see Alexander P. Danne, "Customary and Indigenous Law in Transitional Post-Conflict States: A South Sudanese Case Study", *Monash University Law Review* Vol. 30, No. 2 (2004), p. 202.

9 Peacebuilding Initiative, "Traditional & Informal Justice Systems: Definitions & Conceptual Issues". Available at http://www.peacebuildinginitiative.org/indexb645.html?pageId=1875.

10 Thomas Barfield, Neamat Nojumi and J. Alexander Thier, "The Clash of Two Goods: State and Non-State Dispute Resolution in Afghanistan", Conference Paper (USIP, 2011), pp. 1–3, 7–8, 11. Available at https://www.usip.org/sites/default/files/file/clash_two_goods.pdf. In 2017, of the Afghan respondents who report using a dispute resolution mechanism, 43.2 per cent said that they used a village/neighborhood-based shura/jirga, 39.5 per cent used state courts, and 21.4 per cent used the Huquq Department within the Ministry of Justice. See The Asia Foundation, "Survey of the Afghan People" (2017). Available at https://asiafoundation.org/where-we-work/afghanistan/survey/.

11 Penal Reform International, *Access to Justice in Sub-Saharan Africa: The Role of Traditional and Informal Justice Systems* (London, UK, November 2000), p. vi.

12 See, for example, Erica Harper, *Customary Justice: From Program Design to Impact Evaluation* (Rome, Italy, IDLO, 2011), p. 17.

13 International Council on Human Rights, *When Legal Worlds Overlap: Human Rights, State and Non-State Law* (Vernier, Switzerland, 2009), p. 44.

14 See, for example, Joakim Gundel, "The Predicament of the 'Oday': The Role of Traditional Structures in Security, Rights, Law and Development in Somalia", Final Report (Danish Refugee Council, November 2006), pp.25–26. See also Natasha Leite, "Reinvigoration of Somali Traditional Justice through Inclusive Conflict Resolution Approaches" (ACCORD, 12 October 2017). Available at http://www.accord.org.za/conflict-trends/reinvigoration-somali-traditional-justice-inclusive-conflict-resolution-approaches/.

15 One study found that more than 60 per cent of the 190 constitutions reviewed provide at least some degree of recognition of customary law. See Katrina Cuskelly, *Customs and Constitutions: State Recognition of Customary Law Around the World* (Bangkok, Thailand, International Union for Conservation of Nature and Natural Resources, 2011), p. v.

16 Outlined at length in Erica Harper, *Customary Justice: From Program Design to Impact Evaluation*, (Rome, Italy, IDLO, 2011), pp. 79–91.

17 See also Geoffrey Swenson, "Legal Pluralism in Theory and Practice", *International Studies Review* (2018). Available at https://ssrn.com/abstract=3211304. The article "proposes a new typological framework for conceptualizing legal pluralism through four distinct archetypes – combative, competitive, cooperative, and complementary – to help clarify the range of relationships between state and non-state actors. It posits five main strategies used by domestic and international actors in attempts to influence the relationship between state and non-state justice systems: bridging, harmonization, incorporation, subsidization, and repression."

18 Katrina Cuskelly, *Customs and Constitutions: State Recognition of Customary Law Around the World* (Bangkok, International Union for Conservation of Nature and Natural Resources, 2011), pp. 6–15, 16–17. African constitutions offer the highest level of recognition of customary laws in terms of the number of countries and the breadth of topics. Fifteen of twenty Meso and South American constitutions include provisions on customary law, predominantly focused on land tenure. The degree of recognition in South and East Asia is also high (15of the 22 constitutions considered include relevant provisions), but the majority of these provisions are limited to recognition of a broad right to culture.

19 Simon Robins, "A Place for Tradition in an Effective Criminal Justice System: Customary Justice in Sierra Leone, Tanzania and Zambia", Policy Brief, No. 17 (Institute for Security Studies, October 2009), p. 1.

20 Kyrgyz Republic, Constitution of the Kyrgyz Republic of 2010, art. 59.

21 See Jeanmarie Fenrich and Mary McEvoy, "Promoting Rule of Law in Customary Tribunals in Ghana", *Harvard Human Rights Journal* (November 2014), p. 4. Available at http://harvardhrj.com/2014/11/promoting-rule-of-law-in-customary-tribunals-in-ghana/.

22 Such as the *Gacaca* courts in Rwanda. *Gacaca* can be loosely translated as 'justice among the grass'.

23 Danish Institute for Human Rights, *Informal Justice Systems: Charting a Course for Human Rights-Based Engagement* (2013), p. 67.

24 See Daniel Evans, Michael Goddard and Don Paterson, "The Hybrid Courts of Melanesia: A Comparative Analysis of Village Courts in Papua New Guinea, Island Courts of Vanuatu and Local Courts of Solomon Islands", Justice & Development Working Paper Series, No. 13 (World Bank, 2011), pp. 3–4. The village courts were established "out of a recognition that the indigenous population was failing to engage with the introduced legal system" and as of 2011, there were more than 1,000 village courts in operation with approximately 12,000 officials operating alongside existing local and district courts with a mix of mandatory, customary mediation and jurisprudence. Their jurisdiction is formally limited to more minor disputes, although a common criticism of the village courts is that they tend to exceed their subject-matter jurisdiction. See also Melissa Demian, "Innovation in Papua New Guinea's Village Courts: Exceeding Jurisdiction or Meeting Local Needs? Legal Innovation: Part 1", In Brief No. 24 (Australian National University, 2014); and Sinclair Dinnen, "Building Bridges – Law and Justice Reform in Papua New Guinea", Working Paper, No. 3 (State, Society and Governance in Melanesia Project, 2015), pp. 12–13.

25 Human Rights Watch, "Policing Morality: Abuses in the Application of Sharia in Aceh, Indonesia", 30 November 2010. Available at https://www.hrw.org/report/2010/11/30/policing-morality/abuses-application-sharia-aceh-indonesia.

26 Erica Harper, *Customary Justice: From Program Design to Impact Evaluation* (Rome, Italy, IDLO, 2011), p.22. See also United Nations Office of the High Commissioner on Human Rights (OHCHR), *Human Rights and Traditional Justice Systems in Africa* (2016), p.10.

27 For example, Nilupuli Ariyaratne, "Can Indigenous Customary Law be Used and Recognised in International Commercial Contracts?", LLM Research Paper (University of Wellington, 2016), p. 11; and Erica Harper, *Customary Justice: From Program Design to Impact Evaluation* (Rome, Italy, IDLO, 2011), p. 18.

28 Definition of 'indigenous peoples' as developed by José Martinez Cobo, as United Nations Special Rapporteur to study the discrimination suffered by indigenous peoples. See Study of the Problem of Discrimination Against Indigenous Populations, UN Doc NE/CN.4/Sub.2/ 1986/7 and Add. 1–4. See also Raja Devasish Roy,"Traditional Customary Laws and Indigenous Peoples in Asia", Report, (Minority Rights Group International, March 2005). Available at http://minorityrights.org/wp-content/uploads/old-site-downloads/download-131-Traditional-Customary-Laws-and-Indigenous-Peoples-in-Asia.pdf.

29 UN Doc A/RES/61/295, art. 5.

30 See, for example, the Permanent Forum on Indigenous Issues' Analysis on the Duty of the State to Protect Indigenous Peoples Affected by Transnational Corporations and Other Business Enterprises, UN Doc E/C.19/2012/3, p. 7. Available at http://www.un.org/esa/socdev/unpfii/documents/2012/session-11-e-c19-2012-3.pdf.

31 See, for examples, Raja Devasish Roy, "Traditional Customary Laws and Indigenous Peoples in Asia", Report (Minority Rights Group International, March 2005). Available at http://www.refworld.org/pdfid/469cbfb70.pdf; Government of Australia, "7. The Scope of the Report: The Definition of Aboriginal Customary Laws". Available at https://www.alrc.gov.au/publications/7.%20The%20Scope%20of%20the%20Report/definition-aboriginal-customary-laws; and Mattias Ahren, "Indigenous Peoples' Culture, Customs, and Traditions and Customary Law – The Saami People's Perspective", *Arizona Journal of International & Comparative Law* Vol. 21, No. 1 (2004).

32 See, for examples, Remigius N. Nwabueze, "The Dynamics and Genius of Nigeria's Indigenous Legal Order", *Indigenous Law Journal* Vol. 1 (Spring 2002), p. 155; and Alexander P. Danne, "Customary and Indigenous Law in Transitional Post-Conflict States: A South Sudanese Case Study", *Monash University Law Review* Vol. 30, No. 2 (2004).

33 United Nations Office on Drugs and Crime (UNODC), *Training Manual on Alternative Dispute Resolution and Restorative Justice* (October 2007), p. 16. Available at http://www.unodc.org/documents/corruption/publications_adr.pdf. The most commonly cited ADR methods are negotiation, mediation, conciliation, and arbitration. Consensus-building and facilitation are also used.

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35 S. Sajisivan, "People's Court: Historical Antecedence of Lok-Adalat", *International Journal of Legal Developments and Allied Issues* Vol. 2, No. 2 (March 2016), p. 81.

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37 Yona Shamir, "Alternative Dispute Resolution Approaches and their Application", UNESCO Technical Documents in Hydrology, No. 7 (2003), pp. 4–5. Available at http://unesdoc.unesco.org/images/0013/001332/133287e.pdf,

38 Mariana Hernandez Crespo, "A Systemic Perspective of ADR in Latin America: Enhancing the Shadow of the Law Through Citizen Participation", *Cardozo Journal of Conflict Resolution* Vol. 10, No. 91 (2008), p. 94.

39 Mariana Hernandez Crespo, "A Systemic Perspective of ADR in Latin America: Enhancing the Shadow of the Law Through Citizen Participation", *Cardozo Journal of Conflict Resolution* Vol. 10, No. 91 (2008), pp. 92–93, 98–100.

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41 United Nations Institute for Training and Research, "Alternative Dispute Resolution Methods", Document Series, No. 14. (Geneva, March 2001), p. 3. Available at https://www.unitar.org/pft/sites/unitar.org.pft/files/DocSeries14.pdf.

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53 Reproduced from Erica Harper, Customary Justice: From Program Design to Impact Evaluation (Rome, Italy, IDLO, 2011), pp. 18–22. See also Geoffrey Swenson, "Understanding and Engaging Informal Justice"(Knowledge Platform Security & Rule of Law, 2016). Available at https://www.kpsrl.org/understanding-and-engaging-informal-justice.

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56 Penal Reform International, *Access to Justice in Sub-Saharan Africa: The Role of Traditional and Informal Justice Systems* (London, UK, November 2000), p. 26.

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