

PRACTITIONER BRIEF

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



Creating a Culture of Justice
International Development Law Organization

To help realize Sustainable Development Goal 16, IDLO has produced a series titled **‘Navigating Complex Pathways to Justice: Engagement with Customary and Informal Justice Systems’** to advance policy dialogue and distill lessons from programming and research, to help strengthen customary and informal justice systems as an integral part of providing access to justice for all.

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1. INTRODUCTION

Research and practice have confirmed that international assistance in the justice sector must consider legitimacy and ‘what works’ for people within a spectrum of justice mechanisms.¹ Whether incorporated over time or newly imported, reforms succeed in enhancing the scope and quality of justice when located appropriately within different contexts and institutions.

It is broadly accepted that in developing, fragile and post-conflict states, many vulnerable groups – the poor, women, and remote, marginalized and minority populations²– rely on dispute resolution outside formal courts. This is especially true for women in the developing world, a majority of whom seek justice in a plural legal environment.³ Recurring estimates suggest non-state actors, including customary, traditional and religious leaders, address 80 to 90 per cent of legal disputes in developing, fragile and post-conflict states.⁴ To engage effectively in this paradigm requires understanding features, advantages and constraints of *customary and informal justice (CIJ) systems* at a granular level, as well as their relationship with state systems.

Over time, such thinking has gained traction and many donors and development actors, even without an official engagement policy, have begun to support projects in the CIJ sector, opening a programming space that –only a decade ago –sat on the fringe of development discourse. 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. Within this development framework, engagement with CIJ systems has an important role in strengthening justice, and programming engagement with CIJ systems can be

conceptualized in three main ways: (1) building from public legitimacy and acceptance; (2) providing a means of accessing justice; and (3) strengthening justice for inclusive development.

This *Practitioner Brief* presents resources drawn from IDLO research and programmatic experience, providing practical tools and good practice recommendations for development practitioners engaging with CIJ systems.

As with its work in the formal justice domain, IDLO approaches the customary and informal justice sector through inclusive, transparent, participatory processes, remaining non-prescriptive, sensitive to local context and supportive of legal pluralism. The ultimate beneficiaries of this work are justice seekers – the people, particularly those often overlooked and left behind, who claim justice and seek the protection of the rule of law. In this field, IDLO’s research and practice has focused on the relationship between customary and informal justice systems and the legal empowerment of women and marginalized populations.

IDLO’s programming efforts are grounded in international human rights principles and standards. This means a way of working premised on being open to holistic and pragmatic approaches where possible, but understanding systems’ potential to do harm, paradigmatic differences in how justice is conceptualized and practical difficulties of working in developing, fragile and post-conflict state contexts. The ability to access justice is multidimensional and contingent on many factors, but the pathway through complexity is principled. Through its work, IDLO will continue to help everyone, including women and marginalized populations achieve justice.

Examples from IDLO's country-level experience

Based on a context-specific and local ownership approach, examples of IDLO programming in different countries highlight the diversity in this field as well as the potential for linkages between formal and customary and informal justice systems to help fill capacity gaps, improve standards and ensure better access to justice for women and marginalized populations. IDLO's experience demonstrates that this is particularly important for stabilization efforts in developing, fragile, and post-conflict countries.

In Burundi, IDLO has worked to better protect women's rights in ongoing land registration programs. Embedded research showed that a mix of local capacity development, legal awareness-raising and community dialogue activities were effective in shaping the understandings, perceptions and norms regarding registration of women's land rights within the targeted population. In addition, in a clear break with customary law, a large proportion of parcels in the target area (over 50 per cent) were registered in co-ownership between husband and wife.

In Kyrgyzstan, IDLO has facilitated training for members of *aksakal* (elder) courts on legal jurisdiction and the mandate of the customary justice system in the Chui region. The elders who participated in the capacity enhancement activities proactively sought to improve their knowledge of the formal legal framework and viewed the training as an opportunity to strengthen collaboration with the formal courts and ensure compliance at the community level with legal and human rights standards.

In Mali, IDLO promotes platforms – *cadres de concertation* – that convene actors from the entire justice chain, including magistrates, police officers, court administrators, traditional leaders and civil society members, to strengthen local ownership of justice reforms. These platforms create a space for continuous dialogue between the formal and customary systems, allowing joint identification of justice problems and solutions.

In the San Martin district in Peru, IDLO's programming on intercultural justice was based on an agreement with the Ministry of Justice, the judiciary, the National Office of Justice for Peace and Intercultural Justice, and indigenous leaders. This collaboration enhanced access to justice for indigenous populations in the Amazonian regions of San Martin, Loreto and Ucayali, by strengthening the capacity of indigenous leaders and legal personnel to handle disputes on concerns of communal interest such as land-related conflicts.

In Somalia, IDLO supported the Somali Government to establish a Traditional Dispute Resolution Unit and develop and adopt a national policy in relation to the traditional *Xeer* justice system. Programming focuses on filling gaps that complement formal courts, curbing practices breaching human rights and responding to the immediate justice needs of the Somali people. These efforts provide a medium for alignment with the Constitution and other national and international laws, contributing to political stabilization efforts.

2. COMPLEXITIES IN ENGAGING WITH CUSTOMARY AND INFORMAL JUSTICE

Engaging with CIJ systems presents many opportunities as well as challenges for strengthening access to justice, due to their diversity and unique characteristics. 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. Engagement must consider risks – for justice seekers, for the advancement of human rights and for existing power structures affected by programming. For these reasons, engagement must be both principled and based on case-by-case assessments.

Potential to cause harm to justice seekers

There are visible and hidden dangers related to engagement and it is essential to assess the secondary implications and risks that reforms may have:

- a) **Creating justice vacuums and exacerbating negative consequences of pluralism:** while a CIJ system may be imperfect, destabilizing or warping the system without a viable and sustainable alternative can lead to justice vacuums, increased lawlessness and violating practices.⁵ For example, prohibiting customary chiefs from resolving criminal matters in the absence of a state alternative may promote a culture of impunity.⁶ Further, pluralism can result in a competing and overlapping set of laws and forums, which, while offering choice, can “impede effective handling of grievances”⁷ and lead to forum shopping or manipulation of the system by privileged disputants.⁸ Where the CIJ system plays a critical role in overall access to justice architecture, undermining it risks further marginalizing vulnerable groups.

b) Threatening the *raison d'être* and distinct value of CIJ systems:

a principal objective of many CIJ systems is to restore harmony by repairing relationships and facilitating reintegration, which can run counter to minimum criminal justice standards and human rights. However, attempts to eliminate such features may threaten the system's legitimacy or internal coherence. The flexibility, negotiability and partiality inherent in many CIJ systems are necessary to re-establishing social harmony and cannot be isolated from social context; the arbiter's knowledge of the parties, background and local power structures is essential to establishing a sustainable resolution.⁹ Reform can weaken or corrupt the internal integrity of the CIJ system, whose effectiveness depends on its social power to command user participation and respect. Further, reforms can morph CIJ systems into a replicative formal system that is adversarial and does not maintain many of the identified benefits of community-based justice – inclusive, timely, holistic, restorative and people-centered. If the functionality of the CIJ system is undermined, access to justice may be reduced.¹⁰

c) Placing undue pressure on justice seekers:

reform often creates the possibility for justice seekers to exercise their rights. However, stepping outside the established community sphere can be a risky proposition. Those who are perceived as rejecting local norms face a host of impediments: resistance by local leaders who have vested interests in maintaining monopoly over dispute resolution; non-cooperation by community members who prefer the status quo; and/or alienation and subsequent discrimination. To be effective, reforms need to be voluntarily accepted and utilized. A balance often needs to be struck between securing more acceptable outcomes for vulnerable groups and accounting for dominant norms to allow change to take root without dismantling communities or driving norms underground where justice seekers receive even less protection.

d) Arriving at sustainable reforms:

engaging with CIJ systems is not a panacea. The inequities and discrimination that isolate communities and persons from formal justice also leave them on the margins of CIJ systems. A successful intervention must therefore address the root issues of exclusion, discrimination and poverty.¹¹ From a programmatic point of view, it is important to avoid short-term reforms that create dependency or risk

damaging functioning systems without ensuring that an improved and sustainable mechanism is available.¹² Direct engagement with CIJ systems risks overwhelming small-scale actors with funding and reporting requirements, which can be counterproductive. Furthermore, creating competition through different justice mechanisms may lead to improvements in access to justice, but it can also result in state abdication of responsibility and an over-reliance on non-state actors. An outsourcing of access to justice risks creating a parallel track that dis-incentivizes or blocks women and marginalized groups from accessing the formal justice system.¹³ The principle of 'do no harm' in this sense also means not undermining state-building processes or the pre-eminence of the judiciary.

The principle of 'do no harm' is acted upon by taking into account at all times an understanding of the history and dynamics of power, gender, religion and ethnicity in relation to the state, while finding ways to overcome dysfunctional dispute resolution and introduce reforms that are both accepted socially and locally and sustainable under international law.¹⁴

Tension with human rights imperatives

The potentially negative implications of engaging with discriminatory or intolerant systems that fail to uphold international legal standards is a primary concern in CIJ programming. While rights-abrogating practices can be found across justice systems, in many CIJ systems, customs or practices exist which violate international human rights law and are unacceptable and harmful to the rights, health and dignity of human beings. These are practices which result in cruel or inhuman treatment and subordination of already vulnerable persons.

It is neither possible nor helpful to document a complete range of harmful practices, but examples can include: marrying a rape victim to her rapist; denial of wife/widow inheritance or widow maltreatment; 'honor crimes' in which a male is sanctioned to kill a female relative for bringing 'dishonor' to his family¹⁵ or a man is sanctioned to rape a woman or girl as retribution;¹⁶ female genital mutilation; witch burning or beheading;¹⁷ and stoning or flogging women in the name of social transgression or *fatwa*.¹⁸ As these examples show, many of the most harmful community practices are gendered – they aim towards preservation of patriarchal power of men over women.¹⁹ Such practices also disproportionately affect children.

Justice for women

The bias and discrimination against women often entrenched in CIJ systems adds complexity and difficulty to engagement, but also necessitates engagement to ensure the protection of women's rights.²⁰

Acknowledging that formal justice systems as well as CIJ systems may fail women and that, either by choice or out of necessity, most women in the developing world resolve disputes through CIJ systems,²¹ it is essential to look for innovative approaches to advance women's access to justice in contexts of legal pluralism. Innovative approaches neither reject CIJ systems as inherently inconsistent with women's rights, nor engage solely with the purpose of 'fixing' them by bringing them in compliance with international standards.²² Rather, approaches are developed from the perspective of women as justice seekers where women's participation is valued, supported and promoted and by understanding available justice options and maximizing opportunities to use plural justice orders.²³

Case studies show that legal empowerment approaches²⁴ may effectively enhance women's access to justice and increase positive outcomes for women in CIJ systems:

- » In the autonomous region of Bougainville in Papua New Guinea, training on conflict resolution skills in local communities with a specific focus on the empowerment of women resulted in important positive consequences. Over 90 per cent of participants agreed that men and women should have equal opportunities to take part in dispute resolution – a figure significantly higher than among those who did not participate in the training. Trained mediators also had far lower levels of support for the view that domestic violence is a private matter.²⁵
- » In six villages in north-west Rwanda, expansion of local mediation processes on land disputes to include representatives of the National Women's Council resulted in the acceptance of land claims under customary law brought by women. Prior to the intervention, women's rights to land were generally considered symbolic in nature.²⁶
- » Following an intensive awareness campaign, a series of dialogues with the population and the improved capacity of actors involved in land registration in Rurambira in Burundi, there was a considerable increase in the level of protection of women's customary land rights, either in the form of registration of the right in the woman's own name or through recognition of a derived right.²⁷

There are also unacceptable non-gendered practices that affect many other members of a community, such as 'untouchability' or 'hidden apartheid', in which socially influential community leaders ostracize segments of the community due to their social class or caste, race or ethnicity.²⁸ Other examples include corporal punishment and banishment. Respect for 'elders' is a strong underlying element which sustains the integrity of a CIJ system and supports its authority, with shaming often used to deter harmful behavior. At times, this practice can be outside human rights norms and standards.

While these challenges may discourage engagement, there are also implications for not engaging. Moreover, it is important to take into account that even programming specifically targeting rights-

abrogating norms may have a slow impact on the realized protections of human rights. The transition can be unpredictable and complex, requiring long-term processes of socioeconomic transformation.

From a programming perspective, it is important to identify where systems and practices demonstrate the possibility to alter or overcome structures and relationships that deny human dignity. Rights-abrogating practices are generally not purely legal problems, but a complex array of interlinked challenges related to sustainable human development. Whether a system or practice can transform itself from within or bring about social or political transformation can be assessed from various dimensions to locate pathways to justice. As explored in the next part, different tools and methodologies for assessment can be adopted.

3. PLANNING ENGAGEMENT WITH CUSTOMARY AND INFORMAL JUSTICE

There is no ‘model’ or ‘standard’ framework to guarantee engagement success to achieve access to justice goals. Engagement comes with a myriad of opportunities and constraints that require actors to continually assess their functional and ideal roles. This cyclical exercise helps to determine if, when, where and how to engage. Assessing engagement requires a nuanced, context-specific and case-by-case analysis that considers the availability of formal justice systems, social norms, the balance of political power and socioeconomic factors.

In the complex task of navigating through options and determining situations of engagement, key considerations can offer guidance:

- » What are the justice gaps and where do they exist?
- » What are the fundamental risks and vested interests?
- » Are women’s and marginalized voices being heard?
- » What are the possible entry points?

Assessing justice gaps

It is important to gauge what the justice gaps are and where those gaps exist. The term ‘justice gap’ is used to denote the difference between the civil, legal or other justice needs of justice seekers and the resources (including structures and processes) available to meet those needs.

One framework for analysis is modeled by the Pathfinders Initiative and provides steps to estimate the size of the justice gap: (1) assessing needs/wants in the justice system and what is received; (2) capturing actual experiences; (3) categorizing and presenting data to encourage understanding of priorities and opportunities; and (4) linking data on the justice gap to social, economic and environmental outcomes.³⁰

Additionally, a 2011 United Nations-commissioned report identified three dimensions of justice, which can be applied to a justice gap analysis: structural, procedural, and normative.³¹

Figure 1: Key considerations to plan engagement ²⁹

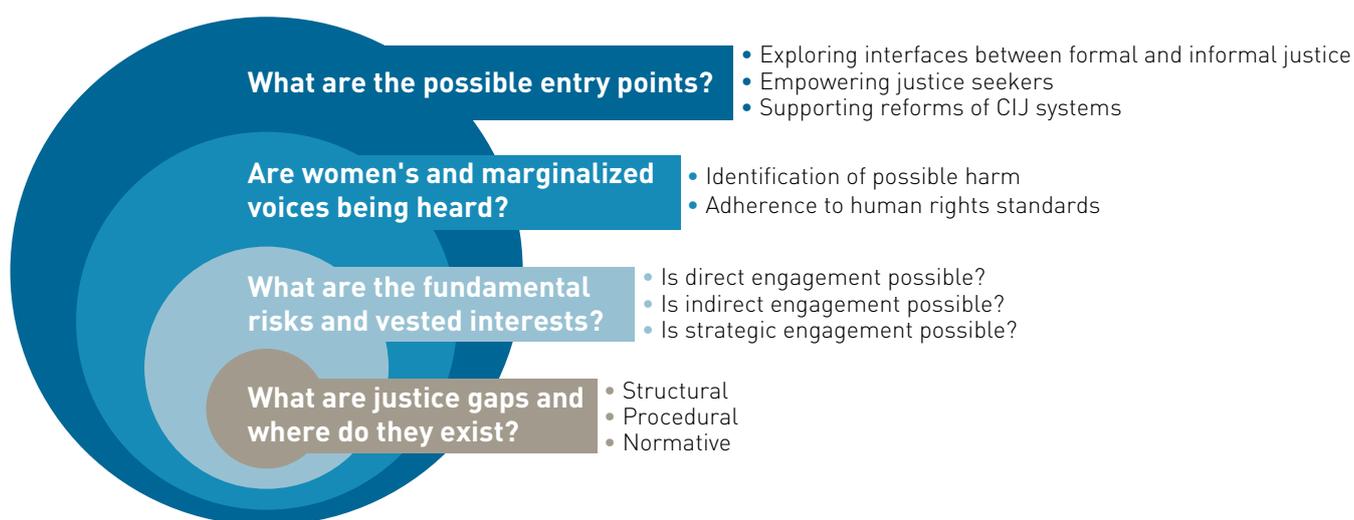
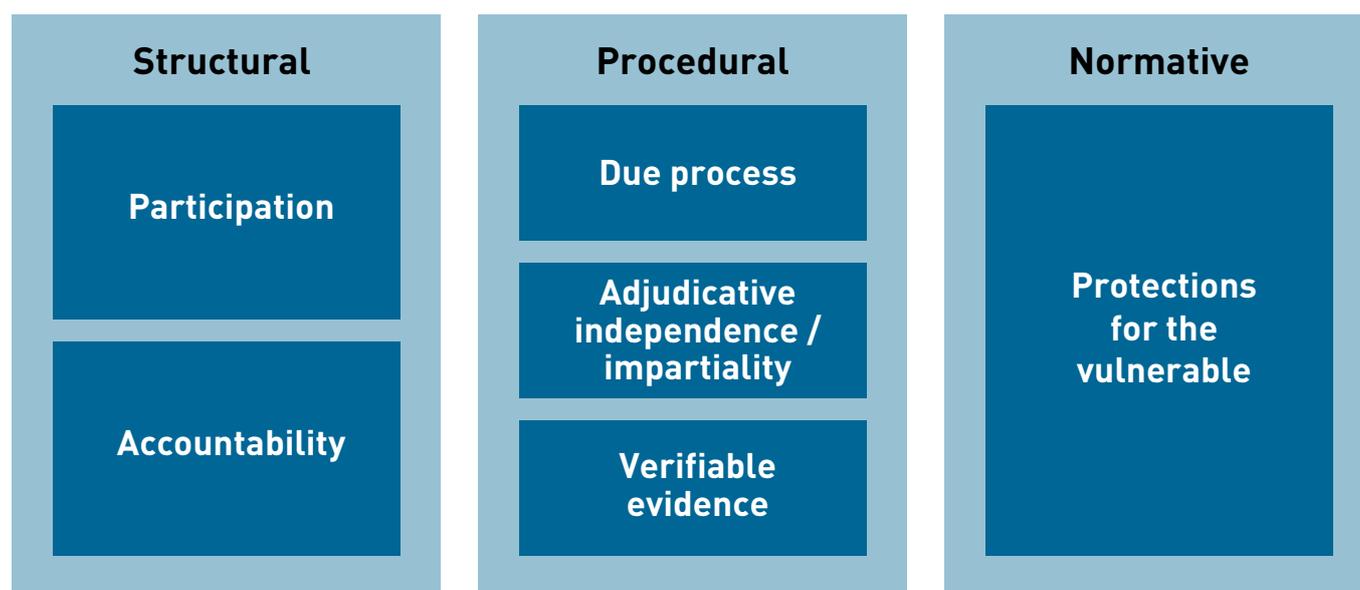


Figure 2: Three dimensions of justice³²

The *structural dimension* “consists of participation and accountability”. The *procedural dimension* “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 personal interest in the case who is obliged to render a decision solely based on facts and objective rules rather than on personal preferences, and that anyone making an assertion or accusation must provide verifiable evidence to support it”. The *normative dimension* “consists of substantive rules that protect the vulnerable”.³³

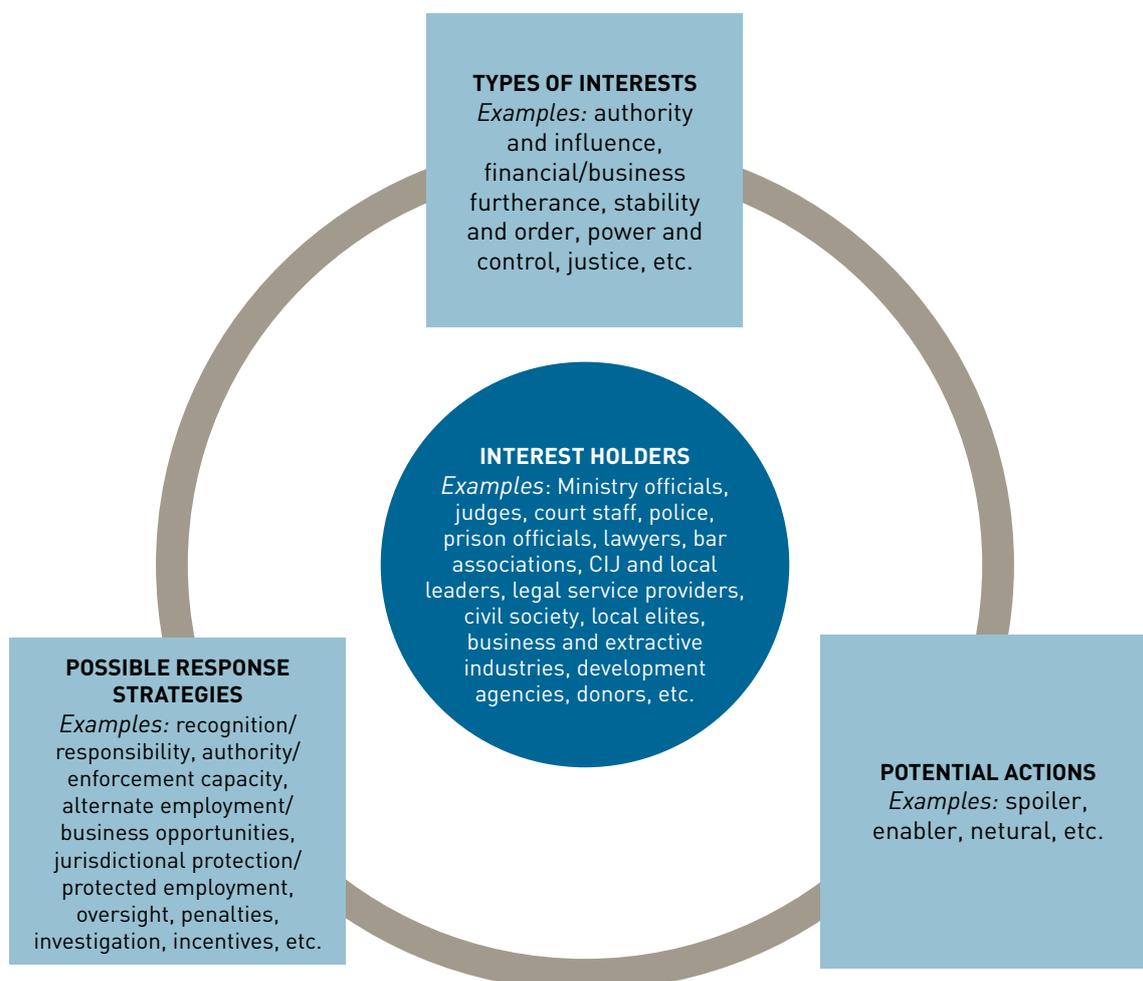
Justice gaps may exist in one or all dimensions of the justice ecology of each system under examination. Once the location of the deficiency has been identified, the next step is to analyze and determine whether it is deeply rooted and intractable or flexible enough to respond to engagement.

Understanding vested interests and fundamental risks

One of the major complexities of rule of law and justice sector programming is navigating political and power structures at all levels –

local, national and international. In developing, fragile and post-conflict contexts, *both* state and customary justice systems are often constructed and operate to maintain the interests of the rich, powerful and elite.³⁴ Reforms that move towards a more transparent and rule-based system to better protect the rights of women and marginalized populations require that power holders give up some of the benefits they enjoy under the status quo. Any modification in the system will interrupt these structures. A litmus test to gauge transformative potential is to see whether the power brokers who benefit from the status quo of a system or practice demonstrate the political will to support reform activities.

Power interests need to be closely mapped and understood to assess viability or take preventive or mitigating action. A first step is to understand how the state — and individual actors within the state system — perceive CIJ systems.

Figure 3: Identifying clusters of interests and risk assessment

As an illustration, the state may view a CIJ system as a complementing partner with valuable contributions to justice interests, such as reducing court backlogs, reducing the cost of maintaining prisons or maintaining local law and order. In such cases, the state may be a strong advocate of CIJ engagement and reforms can be achieved for the benefit of women and marginalized groups, including fulfilling human rights. In other situations, the state may view the CIJ system as a threat to its authority, political sovereignty or control over law and order, and may resist any measures that empower or engage the CIJ system, irrespective of its capacity to enhance access to justice. On the other hand, government officials, court officers, judges, lawyers, bar associations, police, civil society and CIJ leaders can all benefit from how justice is currently administered.

In societies with weak rule of law and few procedural safeguards, elites often benefit from the justice 'rules of the game'. Dispute adjudicators may exact bribes, decision makers may use their power to realize other aims and violating norms can operate to maintain power hierarchies and wealth holdings.³⁵ Lawyers and bar associations may see a viable CIJ system as a threat to their incomes, while governments may fear a threat to their budget allocations. Elites will also have an interest insofar as changes impact their ability to manipulate the state or CIJ system (or use both) to protect their interests, exact bribes, access resources or wield power. According to the OECD: "Nowhere is there more struggle within a state than over the evolution of its legal system and efforts to extend rights usually first enjoyed by elites to the wider population."³⁶

When deciding to work *directly* in contexts where recognized justice gaps exist, it is important to analyze what the potential effects of transformational changes could be and whether there may be unintended consequences in terms of conflict and grievances. In tailoring engagement and programs, it is essential to articulate explicit intentions and corresponding theories of change: “if the intention is to increase inclusiveness, there will also need to be a decision made about whether and how to include perceived spoilers” but “if the intention is to end a cultural practice, such as requiring widows to marry the brother of their deceased husband, then there would likely need to be broader programming to address the socioeconomic and security concerns that led to the creation of this practice”.³⁷ Programming needs to be tailored such that it: (a) builds on existing positive norms; (b) allows debate on contested norms; and (c) supports communities with a momentum for change.³⁸

Listening to marginalized voices

There may be instances where engagement could be of value to bring about effective change, but it is impossible or unlikely to succeed for one or more reasons. At all times, it is important to account for the history and dynamics of power, gender, religion and ethnicity in relation to the state. The aim is to find ways to overcome dysfunctional dispute resolution and introduce reforms that are both accepted socially and locally and sustainable under international law.³⁹ At times, this may mean non-engagement or engagement through supplementary or *indirect* routes. Options may include work with local and international partners for broader interventions and at *strategic* points across the programming sector or justice chain. This engagement could take the form of literacy training to record proceedings, increasing legal awareness in women and marginalized populations to increase their social standing or

supporting community-based paralegal programs, ADR mechanisms or mobile courts in updating themselves on good practices on human rights, gender issues and decision-making processes. Finally, even when all or most of these criteria are assessed, the relative utility and context-specificity of each CIJ system must be evaluated, accounting for all factors in favor of engagement as well as those that restrict access to justice at the state and non-state level, and traditional mores and socioeconomic realities. Each assessment will help determine which pathway will best realize access to justice goals.

Identifying optimal entry points

The overarching challenge of engagement with CIJ systems is to achieve meaningful access to justice while acknowledging the plentiful risks. Effective programming requires conceptualizing engagement as more than just a ‘fix it’ approach and can take several forms.⁴⁰ First, the interface between the formal and CIJ systems can be considered in the context of how states can modify, regulate or use this interface to influence how justice is dispensed to achieve overarching justice aims. Second, engagement can support legal empowerment and the creation of new institutions that offer alternative forms of dispute resolution which can operate in parallel to CIJ systems, complementing or supplementing them, with a view to promoting access to equitable outcomes and improving the operation of the customary system through heightened competition. Third, engagement can support reform of CIJ systems from the inside with the aim of increasing procedural and substantive protections as recognized under international human rights law.⁴¹ In all its forms, engagement needs to be smart and discerning, to respond to justice seekers’ needs and to remain true to international standards for the protection and promotion of human rights.

4. DESIGNING AND IMPLEMENTING PROGRAMS THAT ENGAGE WITH CUSTOMARY AND INFORMAL JUSTICE

As there are many unique CIJ systems, planning engagement involves understanding their key characteristics and on this basis identifying appropriate modalities and entry points – whether at the level of systems, actors or practices—to work

with local partners in executing impactful programming in support of justice goals. Some guiding questions can help draw an accurate identikit reflecting the unique features of the CIJ system at hand.

Guiding questions to identify the key characteristics of a CIJ system

Scope	<ul style="list-style-type: none"> » What is the principal aim of the CIJ system? » What jurisdiction is exercised (taking note of serious criminal offenses and matters of personal status that can have the consequence of vesting different groups with different rights)?
Procedures	<ul style="list-style-type: none"> » What is the procedure for bringing disputes to CIJ leaders and appealing unsatisfactory decisions, including to the state system? » What is the process of resolving disputes, taking account of the importance attached to precedent and the consistent application of rules? » How are CIJ rules known to the wider group, taking note of how such rules differ from state laws and how such rules affect the rights of vulnerable groups? » To what extent is there flexibility in the application of rules and what norms are operable regarding continuity and consistency? » To what extent do disputants enjoy due process rights including a presumption of innocence? » What procedures and protocols are in place for the receipt and evaluation of evidence? » What protocols are in place for record-keeping, and are measures in place to protect the privacy of disputants? » What range of sanctions can be applied for different offenses, taking note of compatibility with the state system and human rights standards? » How are decisions enforced? » What role does a reconciliation ceremony play in the resolution of disputes?
Actors and accountability	<ul style="list-style-type: none"> » How are CIJ leaders selected and what accountability measures are in place (formal or sociocultural)? » Who is involved in the customary adjudication process, taking note of the role of women and other marginalized groups? » To what extent are dispute resolution actors susceptible to corruption and nepotism? » To what extent do power, status and wealth differentials impact customary decision-making? » To what extent are the rights of marginalized groups such as women and children protected?
Status vis-à-vis the state	<ul style="list-style-type: none"> » Is the relationship between the state and customary community one of partnership and cooperation, or polarization, marginalization and contestation? » Is the state system geographically, linguistically and financially accessible by communities? » What is the linkage between outcomes offered at the community level and the absence of social safety nets such as security, insurance, unemployment benefits, etc? » Is the state or the community the principal provider of security? » To what extent is resort to court considered disrespectful of community harmony, or an affront to the customary leader? » Are court outcomes sufficient to resolve the socio-communal dimensions of a dispute? » To what extent do paradigmatic differences exist between the formal and CIJ systems regarding, for example, notions of misconduct, responsibility, burden of proof and rules of evidence?

A broadly understood goal may be for CIJ systems to integrate with and complement a system of justice that upholds rights for all, meaning that CIJ systems:

- » enjoy a legitimate relationship with the formal justice system wherein their role and value added is recognized;
- » serve justice seekers' needs; and
- » provide quality justice that upholds human rights and minimum standards.

To work towards these outcomes, specific practical tools, actions and activities have been identified, with corresponding advantages, deficits and enabling conditions. These can be categorized as follows:

- » **Exploring interfaces:** creating a context-informed and clearly defined interface between formal and CIJ systems;

- » **Empowering justice seekers:** enhancing the demand for justice through knowledge, legal tools and improved options to access justice; and

- » **Identifying reforms:** strengthening the supply of justice through reforms of CIJ systems, including strengthening the capacity of such systems at individual and organizational levels, as well as within the enabling environment.⁴²

Understanding and defining interfaces

It is important to appreciate the relationship between CIJ systems vis-à-vis the formal state system, with several possibilities for state recognition identified: full; limited; not clear or not present (i.e. proscription). The state has the ultimate responsibility for ensuring access to justice and must not abdicate this duty.

Figure 4: State recognition towards CIJ systems⁴³



The relationship between systems can take a variety of forms, including recognition, formalization, harmonization, or hybridization.⁴⁴ The principal modalities for state and customary and informal justice interfaces have been described as:⁴⁵

- » **Recognition of customary law/actors:** states may recognize customary law or CIJ jurisdiction with varying conditions or levels of qualification which may include special jurisdiction or recognition and regulation in the Constitution or legislation.
- » **Incorporation into state court jurisdiction:** states may recognize customary law but delegate responsibility for application to the state judicial apparatus who are granted authority to adjudicate customary cases and apply customary law.

- » **Decentralization of state court authority to customary and informal courts:** states may substantially integrate or incorporate customary courts into the state court hierarchy⁴⁶ with differentiation between material competencies.

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.

Decisions on recognition and interface ultimately rest with national governments and decision makers can be motivated by political or security objectives. It is also important to understand underlying dynamics and interests, which can be influential.

Engagement modality: Raising awareness and promoting dialogue

Opinions and beliefs about both state and CIJ systems may not have a solid basis. Dispelling prevalent but

erroneous myths about various systems may be beneficial, helping to raise awareness and depth of understanding towards the importance of justice goals.

Engagement modality	Raising awareness and promoting dialogue
Opportunities and advantages	This engagement is an essential precondition to many other engagement modalities and can help dispel prevalent misconceptions, clarify interfaces, explore existing norms and identify needed reforms.
Entry points	Dialogues, training, print media and popular literacy mediums.
Challenges and risks	<ul style="list-style-type: none"> » Assess functionality: consider whether and to what extent activities should promote engagement with systems that are not fully functional from the perspective of reasonable accessibility, impartiality in decision-making, anti-corruption and non-discrimination. » Assess consequences: evaluate possible consequences and consider alternatives where disenfranchisement, and cynicism from unsuccessful dialogues or approaching justice services with expectations that can't be met, are high.
Good practices	<ul style="list-style-type: none"> » Focus on relevance and practical value: ensure that dialogues and messages are relevant and address practical issues such as the jurisdiction of CIJ actors; minimum rights standards and provisions relating to topics such as equality, non-discrimination, landownership, marriage, inheritance and guardianship; and modalities for accessing the state legal system and legal aid. » Consider special needs: women and other marginalized groups may face constraints on when or how they are able to participate or receive information. » Target all stakeholders: especially if activities seek to address deeply entrenched social attitudes, such as perceptions of women as landowners, tolerance for gender-based violence, the rights of children of single parents or the seriousness of violations against minority status groups. » Consider the medium: ensure the chosen medium will be accessible and appropriate for the audience, including gender/ethnicity considerations as well as literacy, linguistic and educational constraints.

A more constructive space for programming opens when a common goal is to promote access to justice without compromising legitimate state interests and the pre-eminence of an independent judiciary. Programming can help and provide support in different ways: encourage policy dialogue towards a healthy interface that enhances access to justice; provide technical assistance on different interface options; identify relevant modalities for engagement and priority areas for reform; and develop an evidence base of the cost and other outcomes associated with deficit areas, such as case backlogs, pre-trial detention, prison overcrowding, community

security, compliance with international obligations, or other justice concerns.

Once parameters are established, the interface between state and CIJ systems should be clear for all. Vague jurisdictional boundaries and/or wide discretion being vested in decision makers creates opportunities for corruption and abuse. By contrast, where the interface is strong, predictable and reliable, injustices can be reviewed, strengthening the position of the women and marginalized populations and enhancing their capacity to assert their rights.

Innovation in focus: Building stronger justice institutions through legal recognition and judicial notice

In Indonesia, courts are legally obligated to account for customary processes, local values and customs, and outcomes of customary law tribunals when deciding cases. The following exemplar court judgment highlights this approach: “[This] matter has previously been peacefully resolved in the *adat* way between the families of the victim and the accused. The accused has fulfilled all the requirements of the *Dayak adat* resolution. The values which exist in the community should be observed and respected because besides the juridical and philosophical aspects of the case, this Judicial Panel must also look at the social [ones].”⁴⁷

In Nigeria, the judiciary has adopted a process of relying on local customary laws as meaningful facts in a case. The Evidence Act allows courts to take judicial notice of customary laws which have “been acted upon by a court of superior or co-ordinate jurisdiction in the same area to an extent which justifies the court ... assuming that the persons or the class of persons concerned in that area look upon the same as binding”.⁴⁸ While the adoption of customary law by formal courts still faces challenges, it represents a meaningful attempt to unite state and customary systems.⁴⁹

Finally, it is important to appreciate that whatever form the interface takes, an integrated state-CIJ system model is not a complete solution. Models of recognition, integration or decentralization provide frameworks which require other substantive reforms to fully achieve justice goals.

Empowering justice seekers through options to access justice

Engagement modality: Supporting paralegal or NGO-led dispute resolution

Both legal and non-legal empowerment strategies are critical in helping people to access justice and claim their rights. Legal empowerment strategies can include: rights awareness, legal literacy, legal aid and

other legal services such as mobile courts. Strategies can also include developing the capacity of legal service providers and facilitating civil society networks, and other innovative ways of building local capacity and collaboration among groups representing justice seekers. In some instances, while noting possible risks, it may be desirable to create new mechanisms that represent a better alignment of justice interests.⁵⁰

Engagement modality	Supporting paralegal or NGO-led dispute resolution
Opportunities and advantages	This engagement can help when both state and CIJ systems have strong deficits. Entry points may be welcomed by the state in comparison to concerted efforts to strengthen a CIJ system. And where strong civil society networks are in place, engagement can be relatively fast and cost-effective.
Entry points	<ul style="list-style-type: none"> » Training of mediators/paralegals in customary and statutory law and associated skills, such as mediation, investigation, negotiation, advocacy and community education. Training might also include other services such as information on government schemes and subsidies. » Developing protocols and procedural safeguards for elements such as which matters are appropriate for mediation, representative participation, record-keeping, notice of hearings and decisions (with consideration for the confidentiality of disputants). Further, protocols can also include developing rules preventing mediators or paralegals from receiving financial compensation from disputants (or where this is necessary for the viability of the model, establishing remuneration in advance). » Establishing oversight programs to monitor the work of mediators/paralegals and provide ongoing or follow-up training. » Integrating mediation services into community service organizations or expanding to offer additional services for outreach and income generation. » Embedding paralegals in established community-based NGOs, or identifying trainee paralegals from established NGOs, such as women’s advocacy groups. » Establishing linkages between mediation/paralegal services, courts and the police, with clear referral protocols. Additionally, linkages can be established with legal aid services to undertake public interest litigation and assist with complex cases or cases where an agreement is breached. » Providing orientation and follow-up for the police and other local justice providers on the role and services of paralegals or NGOs, as well as periodic meetings with state judicial actors and the police to discuss ongoing matters of mutual concern.
Challenges and risks	<ul style="list-style-type: none"> » Similar constraints: NGOs and paralegals can share many of the same constraints and disadvantages of CIJ systems, including lack of regulation and procedural safeguards, lack of enforcement capacity, etc. » Reproducing the status quo: to be voluntarily accepted and utilized, dispute resolution mechanisms and outcomes cannot be radically different from CIJ systems. » Reproducing power inequalities: without addressing underlying issues, NGOs and paralegals may also reproduce power inequalities and their capacity to develop fair outcomes may be limited. » Superficial understanding: customary law is often oral and highly nuanced and understanding by those who come from outside a customary context may be superficial or inconsistent with actual values and practice. » Replicating challenges: equipping NGOs and paralegals involves its own challenges such as language and the possibility for paradigm shifts.

Engagement modality	Supporting paralegal or NGO-led dispute resolution
Good practices	<ul style="list-style-type: none"> » Consult and involve: closely consult community members and leadership and maintain an active dialogue and information exchange that directly involves experts living in the customary context for any training activities. » Build from, not over: base models on existing customary norms and processes where they are rights-protective. » Representative and empowering: form committees that are representative and inclusive of different groups (e.g. women, youth, minorities, poor people, local leaders, religious leaders, the police, teachers, other community members) and train and empower community members, especially women, to become paralegals and support access to justice for others. » Sustainability: give priority to supporting local over international NGOs for sustainability as well as legitimacy. » Share information: inform parties of their rights vis-à-vis the formal justice system at all stages of proceedings. » Take care: ensure coercive measures are not used to enforce mediated agreements.

Innovation in focus: Paralegals and justice centers

Community-based paralegals can serve important justice functions⁵¹ as they:

- » are familiar with community power dynamics and may be more accessible and approachable than non-local dispute resolution actors;
- » operate between the CIJ and formal systems, using the advantages of both strategically and contextually;
- » may be able to overcome problems of elite capture in the CIJ system because they have the option of litigation and high-level advocacy;
- » adopt a flexible and creative approach to solving problems using a range of tools not limited to adversarial techniques, including mediation and conciliation, but can also facilitate court adjudication as needed;
- » have a greater appreciation of the context to disputes and are well placed to craft workable, socially legitimate and enforceable solutions; and
- » integrate reconciliation practices into dispute resolution and evoke the centrality of community harmony.

In Kalimantan, south Sumatra and Riau in Indonesia, IDLO programming trains community members as paralegals to help promote the correct enforcement of regulations relating to licenses and permits for forest and peat lands. This has proved effective in helping to ensure that overlapping permits don't result in farmers being displaced from their own lands and in resolving tenure conflicts.⁵² Further, in South Sudan, paralegals have acted as conduits for advocacy on rule of law and human rights issues, helping to ensure equal protection for women and minorities in specific instances.⁵³

Additionally, 'justice centers' can bring together a cross-section of traditional leaders, police, court representatives, government administrators and interest groups to resolve disputes according to local values. In Guatemala, these centers may exhibit features of the formal system, such as case recording and procedural rules, as well as CIJ systems, such as user-friendly processes, streamlined case processing and mediation techniques.⁵⁴

Engagement modality: Extending state legal services to communities

Steps can also be taken to strengthen the formal court system to increase viable options for justice seekers. This can include making courts more user-friendly and promoting decision-making that is more likely to address the needs and perspectives of parties. Examples include: using plain language; reducing and simplifying filing procedures;

streamlining case processing to reduce the number of times that justice seekers need to appear in court; eliminating or reducing case filing costs (particularly for poor persons); providing free legal aid services; employing translators or multilingual court staff; and allowing cases to be heard in local dialects. Further, reforms can focus on extending formal justice services to communities directly.

Engagement modality	Extending state legal services to communities
Opportunities and advantages	This type of engagement is most likely to be acceptable to the state and where the resulting access to justice is meaningful, CIJ systems are more likely to self-reform to remain relevant for justice seekers.
Entry points	<ul style="list-style-type: none"> » Expanding legal aid services by establishing branch offices in rural areas and holding 'legal aid days' where staff of legal aid services travel to communities to undertake legal education and/or provide legal services. » Establishing mobile courts which can be particularly effective in conflict and post-conflict situations and where displaced persons may be unable to travel to access state services. » Establishing court-annexed services such as mediation. » Providing incentives to judges and magistrates to work in rural areas, including through financial and career advancement possibilities. » Establishing 'justice houses' to co-locate complementary justice services such as a magistrate's court, the police, legal aid services and mediation services. » Establishing new mediating institutions that bring together a cross-section of officials including traditional leaders, police, court representatives, government administrators and interest groups to resolve disputes according to customary law. » Adjusting university clinic models to offer services to rural communities, for example, by organizing groups of students to take on work placements in rural areas or providing incentives to students to commit to legal aid work following graduation. » Training magistrates in customary law norms and principles to encourage judgments that better respond to community needs and perceptions of justice.
Challenges and risks	<ul style="list-style-type: none"> » Plausibility: in many places where CIJ systems are widely used or preferred, it not possible to extend state services due to security or other complex problems. » Legitimacy: where the state does not have legitimacy, engagement may ultimately reduce access to justice for the most vulnerable or entrench further traditional norms and values. » Sustainability: when the state lacks credibility or legitimacy, questions of capacity and sustainability in the allocation and administration of state resources arise.
Good practices	<ul style="list-style-type: none"> » Enhancing appeal: making the formal justice sector more appealing to justice seekers. » Strengthening representation: making the formal justice sector more representative of the entire population, such as by including language skills or a knowledge of customary law in recruitment criteria. » Importing modalities, principles or features of CIJ systems into the operation of formal state courts.

As identified, there can also be empowering solutions that bring elements of CIJ systems into the formal court system, such as:

- » adopting techniques “aimed at mediated rather than adjudicated outcomes”;
- » facilitating greater participation of CIJ actors “by inviting them to provide their views on appropriate sanctions (particularly on punishments already or likely to be applied at the community level), the background to the dispute, or customary law”;
- » encouraging “greater procedural flexibility, such as incorporating customary rules of evidence”;
- » promoting “restorative sanctions consistent with customary law norms, such as compensation, restitution, community service work and sentencing that takes into account the future relationship between the parties and punishments already or likely to be applied at the community level”; and
- » training magistrates in customary law norms “to encourage judgments that better respond to community needs and conceptions of justice, and in laws that allow them to take customary or social context into account”.⁵⁵

Innovation in focus: Strengthening justice institutions through consultation

The northern part of Mali has traditionally experienced barriers to justice, with a further decrease in access following the outbreak of conflict in 2012. An estimated 90 per cent of the nation’s poor populations live in rural areas, and within those regions 80 per cent of family and land conflicts are determined in CIJ systems. These traditional systems are favored for their speed, accessibility and perceived efficiency.⁵⁶ In one study, 84 per cent of people surveyed reported satisfaction with the CIJ system.⁵⁷

While CIJ systems are essential to delivering justice in northern Mali, practices are not always consistent with human rights. IDLO programming has convened *cadres de concentration* or employed a consultative framework approach which engages formal and informal actors at local, regional and national levels. The goal is to strengthen Malian institutions to ensure the fundamental rights of persons and communities are respected while maintaining the accessibility, legitimacy and adaptability of CIJ systems so that they continue to be useful to their communities. To ensure ongoing collaboration with CIJ systems, decisions made within formal justice institutions are not executed without consultation with traditional leaders.⁵⁸

Engagement modality: Expanding participation in CIJ systems

To drive sustainable change, it is often necessary to empower local actors who are best placed to bring about change. The evidence suggests that when norms do change, timing and preparation are critical. Moments of pivotal change are often preceded by a

series of enabling movements that catalyze around a key event. Preparing and being ready to offer support to key local stakeholders at the right moment can be crucial. Programming might include convening support, skills and knowledge-building, technical assistance and promoting an active and strong civil society proficient in key rights issues.⁵⁹

Engagement modality	Expanding participation in CIJ systems
Opportunities and advantages	This engagement aims to strengthen the enabling environment, promoting downward accountability and enhancing the protection of women and marginalized groups. Participatory and inclusive processes may have positive spin-off effects in other development areas and roles for women and youth are particularly advantageous. Female interpretation and application of customary law often accounts for the needs of and protections required by all groups. Youth may be more inclined to challenge traditional norms and embrace modern notions.
Entry points	<ul style="list-style-type: none"> » Elevating women and marginalized populations to leadership positions or expanding the dispute resolution ‘circle’ to include women, youth or other traditionally excluded groups. » Establishing quotas or rules for participation by women and marginalized populations, for instance, through elections. » Facilitating open debate at the community level on issues of participation to drive greater understanding, including through role-playing exercises that simulate dispute resolution.
Challenges and risks	<ul style="list-style-type: none"> » Resistance: powerholders often resist giving up their monopoly over dispute resolution and coercive change to leadership structures is rarely an effective means of promoting the substantive participation of women and marginalized groups. » Legitimacy: CIJ systems function based on the legitimacy of decision makers; if leaders lack legitimacy, the integrity of the system may be compromised. » Responsibility: newly empowered individuals may not have sufficient skills to wield power responsibly, generating new problems. » Efficacy: elections or quotas may not alter the profile of the leadership, either due to interference in the election or the strength of support for the existing power hierarchy. Further, placing representatives from marginalized populations in leadership roles is not necessarily followed by meaningful participation; those selected can be chosen specifically because they are unlikely to question dominant norms, or prevailing social attitudes constrain appointees’ freedom to act independently. » Legitimate authorities: care should be taken with ‘elections’, which could be interpreted as unwelcome interference in local governance or contradict local ideas on how legitimate authorities are selected. » Enabling environment: the inclusion of women and other marginalized populations in CIJs will not deliver positive justice outcomes unless the social discourse and norms that inform CIJs also change.
Good practices	<ul style="list-style-type: none"> » Deep reflection: it is critical to think deeply about how to incentivize local leaders to devolve or share their authority. » Showcase successes: link changes pursued to success stories (such as the appointment of women and members of marginalized groups to leadership positions in other communities). » Incremental reform: installing, for example, women and youth in advisory roles rather than as decision makers as a first step may have greater impact over the longer term. » Harness momentum: achievements in other domains such as political changes or legal developments on gender equality at the national or regional level can reinforce localized change.

Identifying areas for reform

As an illustration, the CEDAW Committee, the human rights body monitoring the application of the Convention on the Elimination of All Forms of Discrimination against Women, in its General Recommendation 33 on Women's Access to Justice (2015) recognized that "a range of models [exists] through which practices embedded in plural justice systems can be harmonized with the Convention in order to minimize conflicts of laws and guarantee that women have access to justice", including the:

» "adoption of legislation that clearly defines the relationship between existing plural justice systems";

» "creation of state review mechanisms"; and

» "formal recognition and codification of religious, customary, indigenous, community and other systems".⁶⁰

This recognition highlights the importance of cooperation to reinforce efforts to strengthen justice, focusing on enhancing individual and organizational capacities, as well as the surrounding enabling environment.

Engagement modality: Introducing codifications of customary law

Codification is a means of documenting customary law to enhance predictability and reduce the elasticity inherent in CIJ systems. It is often used as a tool when harmonizing or linking formal and CIJ systems. The key risk is that codification can limit the capacity of CIJ systems to facilitate negotiated solutions. Moreover, custom can be contested and written codes lock communities into singular interpretation of norms.⁶¹ Codification is most suitable where there is a formal linkage between customary and statutory courts, where large population shifts have brought unfamiliar groups into proximity, and where communities are no longer homogenous and

traditional means of communicating knowledge have broken down.⁶²

Codification may also be successful in contexts where customary rules lend themselves naturally to codification, for example where rules are not disputed and have remained constant over long periods. Where this is not the case, an alternative is self-statements of customary law –written documents that describe (but not prescribe) key customary principles to guide dispute resolution. Safeguards, such as participatory processes and mechanisms for endorsing self-statements, can be used to prevent crystalizing discriminatory norms or power imbalances.⁶³

Engagement modality	Introducing codifications of customary law
Opportunities and advantages	This engagement represents a modality for all community members to gain better knowledge about customary law and participate in its evolution. It also offers improved predictability in decision-making. When viewed as an evolving process, it can avoid crystallization of laws and the associated loss in flexibility, creating space for reforms and inclusiveness.
Entry points	<ul style="list-style-type: none"> » Enumeration of core elements such as offenses, sanctions and procedural issues. » Self-statements by communities or written documents that describe (but not prescribe) key customary law principles to guide dispute resolution. » Participatory reassessments of existing codifications or self-statements to better respond to problems or accord with minimum rights standards. » Intra-community discussion on whether codification or self-statement could address problems or rights-violating practices.
Challenges and risks	<ul style="list-style-type: none"> » Unsuitable: CIJ systems set a framework and principles for dispute resolution which may not be codifiable. » Ineffective: codification may detract from the effectiveness of CIJ systems which depend on facilitated negotiated solutions. » Practically difficult: CIJ systems are dynamic and exhibit wide variation over small areas. » Too rigid: codification can lock diverse groups into a single interpretation of norms. » Entrench discrimination: codification can solidify discriminatory or rights-abrogating practices, narrowing the space for interpretation and negotiation of CIJ norms and principles and reforms towards greater equality. » Limited utility: codification may be of limited utility where literacy is low. » Confusion and resistance: replacing oral, non-codified systems with a system based on written rules can cause confusion and disruption (possibly triggering resistance) during transition.
Good practices	<ul style="list-style-type: none"> » Promoting participatory processes and mechanisms to ensure a level of group consensus or endorsement of principles adopted. » Facilitating periodic (participatory) reassessments of codes to allow reflection and adaptation to changing needs, circumstances and expectations. » Complementing processes of codification with literacy training, awareness-raising through low-literacy forms of mass media to ensure that women and marginalized populations are not excluded, and advocacy.

Engagement modality: Introducing procedural safeguards into CIJ systems

Procedural safeguards in a CIJ system can ameliorate power imbalances, level the playing field to account for asymmetries in wealth, influence and knowledge, and protect the rights of those who are vulnerable. Safeguards can include elements such as jurisdictional boundaries, minimum standards of rights protections, rules on evidence admissibility, and sentencing guidelines. Another common modality is introducing record-keeping, making

decisions publicly available, or registering them with local authorities. Measures to stem corruption are particularly important and can include introducing or strengthening codes of conduct, complaints bodies, public adjudication, dissemination of written decisions, and/or widening access to alternate dispute resolution forums. In some contexts, providing leaders with stipends or regulated community contributions is a modality to address a root cause of corruption.

Engagement modality	Introducing procedural safeguards in CIJ systems
Opportunities and advantages	This engagement can lessen the impact of power imbalances and help women and marginalized groups account for asymmetries in wealth, influence and knowledge. Safeguards offer rights protections for weaker or vulnerable parties.
Entry points	<ul style="list-style-type: none"> » Develop tools and supportive safeguarding elements such as: codes of conduct; sentencing protocols; rules on admissibility of evidence; guidance on jurisdictional boundaries and minimum standards for human rights protections; and protocols for case recording, making outcomes publicly available, and registering decisions with local courts or the police. » Establish a written record with basic details sufficient for a reviewer or appellate magistrate/judge to determine whether the decision should be upheld. » Introduce complaints bodies or other feedback mechanisms. » Establish an oversight/appeal process based on records of matters (disputants, decision maker(s), cause of action or substance of dispute, decision made). » Respond to factors giving rise to corruption such as introducing stipends/salaries, small business opportunities or regulated community contributions. » Revise rules of procedure or substantive laws to provide a link between CIJ and formal justice systems. » Provide dialogue opportunities for CIJ leaders to meet with formal justice sector representatives, including police, prison and court staff, and discuss topical issues with them.
Challenges and risks	<ul style="list-style-type: none"> » Feasibility: some activities such as recording (i.e. generating a transcript of) a customary case on a routine basis require technology, training and resources which may be logistically difficult or impossible in many settings. » Sustainability: some activities may be difficult to introduce and sustain without dedicated resources and linkages with the formal system.
Good practices	<ul style="list-style-type: none"> » Privacy: any protocols around case review, recording and registration should ensure that the privacy of disputants (particularly vulnerable groups) is protected to avoid revictimization. » Realism: supportive elements should be structured around real-life community problems, be informed by literacy levels and culture, gender and conflict sensitivities, and be based on active learning techniques. » Accountability: where activities introduce salaries (from government or donors), safeguards should be adopted to ensure their (actual or perceived) accountability to the community is not diluted or displaced.

Engagement modality: Introducing oversight of CIJ processes

Oversight can involve a range of processes, including, at the state level, court review of cases resolved by CIJ systems, specialist bodies that receive and investigate complaints such as ombudspersons, or mechanisms that monitor the enforcement of outcomes. Court review of CIJ outcomes on gender equality, for example, might be an effective means of

enhancing the protection of women. A second approach is monitoring dispute resolution in situ. Akin to trial observation and monitoring, this can be done by local NGOs or trained community-based paralegals. Importantly, both substantive and procedural aspects of dispute resolution need to be monitored and data should be validated and can be used to inform a variety of activities ranging from education campaigns to strategic litigation.

Engagement modality	Introducing oversight of CIJ processes
Opportunities and advantages	This engagement aims to provide recourse for appeal/complaints and improve the operation of CIJ systems through oversight and monitoring mechanisms that address known concerns such as compliance with minimum rights standards.
Entry points	<ul style="list-style-type: none"> » Ensuring (appellate) review by courts of cases resolved customarily. » Introducing review by specialist bodies such as ombudspersons that receive and investigate complaints. » Developing community-level observation or monitoring of CIJ processes by international staff, local human rights organizations or trained community-based paralegals. » Introducing mechanisms that monitor the enforcement of outcomes.
Challenges and risks	<ul style="list-style-type: none"> » Gaining access: it can be difficult to obtain access to observe CIJ sessions as observation may be viewed negatively by some stakeholders and sessions can occur on an ad hoc basis. » Appreciating standards: where access is possible, ensuring that processes are indicative of ordinary practice can be difficult to ascertain. » Minimum requirements: oversight and appeal require a record of at least the basic information of any matter, which may be lacking in many contexts.
Good practices	<ul style="list-style-type: none"> » Complementary approaches: establishing complaints mechanisms and appeal processes should complement access to the formal system. » People-centered: adopt an approach focused on justice seekers’ needs for review of decisions. » Articulate criteria: appeals must be balanced and fair and not result in the appeal of every case by a ‘losing’ party or culminate in unrealistic barriers (e.g. cost, remoteness, etc.) which restrict access in deserving cases. Criteria can include types of decisions, amount of compensation, deprivation of human rights (either in process or outcome), breach of customary norms, etc. » Comprehensive: monitoring should address both the substantive and procedural aspects of dispute resolution, from the beginning of cases (reporting of an incident) to their conclusion (including enforcement). » Participatory validation: any data needs to be validated to account for gratuitous concurrence and to eliminate the possibility that norms observed were otherwise not indicative of common practice. Validation should be participatory and ensure that women and marginalized populations are provided comfortable spaces for participation. » Properly inform: clearly inform communities about monitoring – why, how, with whom shared and possible outcomes.

Engagement modality: Supporting skills-building for CIJ leaders

Skills-building aims to work directly with CIJ leaders to help enhance their capacities within their leadership roles. This might include training on legal elements such as evidence assessment, relevant statutory and constitutional law including the place of customary law within the state legal system, and jurisdictional matters. Training and skills-building through a variety of capacity enhancement

techniques can also focus on elements like gender-sensitive approaches, mediation techniques and leadership skills, including associated skills that can assist leaders to avoid or resolve conflict, negotiate fairly, or effectively manage common resources. In some instances, this might also involve encouraging leaders to act as protection agents of women and marginalized populations through greater sensitization.

Engagement modality	Supporting skills-building for CIJ leaders
Opportunities and advantages	This engagement aim is often seen as less conflictual and has been welcomed by CIJ leaders in some contexts.
Entry points	<ul style="list-style-type: none"> » Training and capacity enhancement techniques for legal, leadership and other identified needs, creating a sense of professionalism. » Producing supportive materials such as simplified versions of statutory codes and guides.
Challenges and risks	<ul style="list-style-type: none"> » Masks underlying problems: a lack of skills is not always the root of certain problems such as discrimination, which often relate to beliefs or attitudes. » Resistance to change: it is common to resist new information and practices that challenge deeply ingrained ideas and culture. » Generates desire for compensation: while skills-building can create a sense of professionalism, this can also prompt expectations of compensation.
Good practices	<ul style="list-style-type: none"> » Integration: training programs can be integrated with other skills-building programs such as training in literacy or record-keeping. Alternatively, legal skills can be integrated into other training. » Inclusion: it is important to address issues and include women and marginalized populations in appropriate ways. » Enlisting support: efforts are more likely to succeed if respected local figures such as religious leaders endorse and encourage training. » Sensitivity: training should be conducted in local languages led by persons who are culturally acceptable and recognized as having sufficient authority. » Realism: training should be structured around real-life community problems, be informed by literacy levels and culture, gender and conflict sensitivities, and be based on active learning techniques.

Engagement modality: Supporting the elimination of harmful CIJ practices

To achieve lasting change that addresses harmful and rights-abrogating practices in CIJ systems, effective pathways must be developed to both address harmful practices and increase the participation and empowerment of those most affected by them. Neither is easy as beliefs are often fundamentally held, reinforced by power structures, and change can be difficult and slow.

However, change is possible and in situations where the unequal or unfair application of a customary rule causes acknowledged harm, modification can be a means of restoring the internal logic and coherence of a CIJ system.⁶⁴ Additionally, programming can look within custom and draw out positive norms. For instance, in Somalia, the customary law containing basic behavioral prescriptions (*Xeerdhagan*) includes protections for women, children, the elderly and guests.⁶⁵ In Afghanistan, *Pashtunwali* custom includes

requirements for chivalry, hospitality and personal integrity. Such norms can be advanced to enhance the protection of women and marginalized populations.⁶⁶ It may also be possible to draw on other sources of social influence to prevent harmful practices, such as religious scholarship. Women’s groups in Somalia have condemned female genital mutilation and patriarchal inheritance practices as violations of Islamic law. Also in Somalia, elders were empowered to improve the customary system of *Xeer* and committed to refer serious criminal acts to formal justice institutions. In doing so, these community leaders were successful in “breaking the cycle of impunity inherent in the functioning of *Xeer* and group compensation mechanisms” which had undermined the protection of vulnerable groups.⁶⁷ Similarly, some religious leaders in Afghanistan oppose the practice of forced marriage on the grounds it is inconsistent with sharia.⁶⁸ These examples demonstrate the potential of internal norms to eliminate or revise customary practices.

Engagement modality	Supporting the elimination of harmful CIJ practices
Opportunities and advantages	This engagement can be a way to reinforce beneficial elements of CIJ systems while addressing and eliminating those that are rights abrogating and introduce harm, especially to women and marginalized populations.
Entry points	<ul style="list-style-type: none"> » Legislative or regulatory reforms proscribing harmful CIJ practices or introducing specific rights for vulnerable groups, which might include avenues for appeal/redress. » Developing clear jurisdictional guidelines for serious crimes. » Adopting specific protections and protocols for specific marginalized groups (e.g. women, children, minorities, etc.). » Declarations or ascertainment of customary law repealing harmful practices. » Revision or reinterpretation of CIJ norms through community dialogues and sensitization of the effect of harmful practices. » Facilitation of open and participatory debate at the community level on harmful norms and their consequences, particularly drawing out internal contradictions within customary law.

Engagement modality	Supporting the elimination of harmful CIJ practices
Challenges and risks	<ul style="list-style-type: none"> » Unintended consequences: proscribing negative practices can drive behaviors underground where vulnerable groups can lose limited protections they may have previously enjoyed. » Capacity: consider whether the state and others will have capacity to put change into practice. For instance, where access to the courts and enforcement capacity is low, introducing legislative reforms as a means of responding to real-life problems may have negative implications for popular perceptions regarding the protective capacity of the state and the rule of law. » Timing: gradual improvements may be more durable as they are facilitated by a continuation of dominant norms. » Feasibility: proscription is unlikely to work where norms are deeply entrenched, or where 'negative' customary practices have important social, economic or security rationales. » (Non-)cooperation: introducing protections can necessitate a range of different actors being involved, including policy makers, the legislature and the judiciary.
Good practices	<ul style="list-style-type: none"> » Complementary reforms: reforms focused on one avenue are often more effective if combined with other reforms. For instance, legislative reforms should consider debates, advocacy and implementation measures and can't be disassociated from social, economic or security rationales driving harmful CIJ practices. » Draw from existing (or historic) interpretations: CIJ norms or other sources of social influence can provide firm ground for rights protections or the denunciation of harmful practices. For instance, it can be effective to focus not on the elimination of customary practices, but rather on the manipulation of norms in ways that "contravene their original and accepted purpose" to the detriment of women and marginalized populations. » Provide appropriate incentives: to eliminate or modify certain practices, incentives might be introduced to change behaviors. » Perform risk assessments: to safeguard against unintended consequences of reforms, ensure risk assessments are undertaken regularly. » Locally owned: change is most likely to be accepted and sustainable when solutions are devised or driven by community members themselves.

Overall, for design and implementation of programs that engage with customary and informal justice, research has identified that solely focusing on institutions and prohibiting existing practices which violate human rights is unlikely to prove successful as this ignores the "continuous processes of political contestation and social change".⁶⁹

A combination of approaches and entry points is more likely to achieve results. Engagement must be approached carefully and within a principled and strong framework for analysis.

5. GOOD PRACTICES

As with programming in the formal justice domain, work in the CIJ sector should be approached through inclusive, transparent, participatory processes, remaining non-prescriptive, sensitive to local context and supportive of legal pluralism. What follows is a set of identified good practices from relevant programming.

1. NO AWARENESS-RAISING WITHOUT ACCESS, AND NO ACCESS WITHOUT AWARENESS-RAISING

A level of mutual understanding is a pre-requisite to programming that is effective. When expanding access to dispute resolution forums, sequencing is very important. Unless access is meaningful and obtainable, sensitizing users about their options will be at best ineffectual and at worst counterproductive. Therefore, if disputants are offered the possibility of stepping outside the CIJ sphere, it is imperative that the outcomes and procedural safeguards offered can be delivered. Otherwise, rightsholders may be exposed to new levels of exploitation or social sanctions, and confidence in the state and its ability to uphold the rule of law may be diminished. Similarly, new forums that offer better protections will not be utilized unless they are known. This requires comprehensive awareness-raising and tools to enable access, such as interpreters, assistance in filing claims or transport.

2. ACKNOWLEDGING THE LIMITATIONS OF TRAINING AND AWARENESS-RAISING VIS-A-VIS STRONG VESTED INTERESTS

The programming landscape reveals a preference towards activities that seek to bring CIJ systems into alignment with formal justice sector norms and human rights standards. These include training CIJ leaders, imposing jurisdictional limits, and referral mechanisms. Certainly, such programming is more attractive to donors and more linked to state-level support; it eases concerns about engaging with systems that fail to uphold human rights standards and it reinforces long-standing ideas about the centrality of the state in development processes. Such

approaches, however, tend to overlook important structural and political dynamics that are often in play in contexts where CIJ systems are found, principally the political economy of justice administration. Indeed, the key factor impeding access to justice for the disadvantaged is that those with decision- and change-making power have very little to gain and much to lose from a more inclusive, egalitarian and rule-based system. It is important to acknowledge the limitations of training and awareness in overcoming such interests, and to devise more strategic solutions that directly cater to political context and power relations. Programs should be crafted against the reality that any change will disrupt power structures and that incentives will generally be needed to modify behaviors. Adopting incentive-based solutions should not be regarded as a concession, but more as an expedient and pragmatic approach to advancing sustainable justice outcomes.

3. AVOIDING PROSCRIPTION

Proscribing customary norms that are harmful or discriminatory is usually difficult where such practices serve powerful sets of interests, or where they have important social, economic or security rationales. Indeed, proscription may also drive norms underground where vulnerable groups have even less protection. In such contexts, programmatic interventions may adopt a 'long game' approach: to develop an enabling framework over the long term through incremental change. If such an approach is taken, local resource endowments, levels of economic development, community expectations and entrenched cultural mores should be accounted for. It is also critical to look inside the CIJ practice to understand the causal factors in play. Where the practice is rooted in the broader culture and socioeconomic context, a legal solution alone will be insufficient. In such cases, changes in CIJ practice will be coupled with broader interventions such as better access to state services, unemployment benefits, anti-corruption measures or security reforms.

4. INCENTIVIZING REFORM

CIJ leaders are diverse and while some are conservative and self-serving, others are progressive proponents of social change. Clearly, where leaders are motivated to lead reforms, this should be capitalized upon. Where this is not the case, time and space should be allocated to develop strategies to encourage powerholders to buy into reforms where this will limit or eliminate the benefits they enjoy. Such strategies include working with, rather than against, the political economy. Specifically, where the obstacle is the lack of incentives to support progressive change, the most effective entry point may be to promote self-reform. Incentives can be positive or negative, empowerment-based or top-down in nature. Top-down incentives might include policies of recognizing CIJ leaders or providing them with stipends or remuneration in return for the introduction of practices that meet certain standards (note that there is the risk, however, that greater association or alignment with the state or 'monetizing' their cooperation can sometimes impact the legitimacy of CIJ actors). As discussed above, self-reform might be encouraged by extending the options available to disputants, either through the state or NGOs, coupled with empowering users of the CIJ system with a better knowledge of their rights. Such heightened competition for justice services can lead to positive modifications in CIJ processes as leaders strive to remain relevant and influential in their communities.

5. INTEGRATING STRATEGIES TO OVERCOME RESISTANCE AND VESTED INTERESTS

CIJ leaders often have strong vested interests in holding onto their dispute resolution power and may thus attempt to dissuade or obstruct users from referring matters to NGOs or the formal legal system. Users of CIJ systems will generally need to weigh the benefit of approaching an alternate forum with the potential negative consequences. Informed disputants make rational decisions and the value of upholding one's rights may not surpass maintaining one's place in the community structure or relations with close kin. Such dynamics and consequences need to be thoroughly understood and responses integrated into any intervention. For example, to gain their acceptance

or support, local justice leaders might be given roles or opportunities to participate in the alternate justice mechanism. If the intervention concerns paralegals, a first step might be bonding them to leaders as assistants, or 'marketing' them as the holders of a range of useful skills and information about the state system, including legal information. In the case of NGOs offering legal services, opposition may be mollified by involving leaders in decision-making or vesting them with oversight responsibilities.

6. RESOURCING THROUGH SPECIALISTS AND STAFFING CHOICES

CIJ engagement must be nuanced and politically sensitive and requires local staff with experience in legal programming, preferably in the targeted geographic location, and who are informed about local power structures, tribal networks and the relationship between informal and formal frameworks. As a result, successful programming teams are multifaceted: legal anthropologists, specialists in marginalized groups such as women and youth, experts in political economy analyses, and locals with connections to leaders in CIJ and formal justice systems are important to design and implementation.

7. ADOPTING MULTI-SECTORIAL APPROACHES

In developing, fragile and post-conflict environments, rights issues are multifaceted. Justice administration often reflects broader development problems such as widely held discriminatory attitudes, weaknesses in the state security framework, or the absence of basic social safety nets that protect people from falling into poverty. Program designers need to tease out these causal drivers and resist engaging in activities that lack the teeth to meaningfully alter the status quo. Where there is a level of disconnect between the rights discourse and the practicality of upholding rights, model outcomes should be avoided and substituted for modest changes that improve the level of protection and quality of outcomes received. This should sit alongside approaches that partner with economic development, social service and civic rights organizations and NGOs to roll out multi-sectorial responses.

6. CONCLUSION

Engagement with CIJ systems has the potential to play an important role in strengthening justice: building from public legitimacy and acceptance; providing a means of accessing justice; and strengthening justice for inclusive development. Effective engagement with CIJ systems requires a thorough understanding of their features and their relationship with the state system.

A principled approach needs to take into consideration the numerous dilemmas that may exist within CIJ systems, 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; discriminatory and harmful practices, far-reaching human rights violations; limited ability to enforce decisions; and the possibility of abuse and corruption. Yet, programming must also consider secondary consequences that can arise when trying to radically alter CIJ systems: justice vacuums that formal structures are unable or unwilling to fill, undermining the distinct benefit of CIJ as a flexible and familiar system, risks for justice seekers who reject local norms and practice, etc.

The complexity, nuance and unicity of each CIJ system mean that no standard model is available. Designing and implementing programs that engage with CIJ systems requires a careful assessment phase that considers the specific justice gaps, existing power structures and elite interests, needs of women and marginalized populations, and relations between formal and informal institutions.

Experience indicates a range of possible programming modalities to increase access to justice while engaging with CIJ systems. These engagement modalities encompass: increasing awareness through dialogue and training, expanding the geographic accessibility of formal dispute resolution mechanisms, encouraging reforms of CIJ procedures, supporting capacity development of CIJ leaders, and adopting measures to eliminate harmful practices. Notably, all forms of engagement must be a 'living exercise' – one that is adaptive and responsive to justice seekers while being true to the fundamental principles of human rights which underlie every rationale for programming in this area.

Importantly, a combination of approaches and entry points is more likely to achieve results. Identified good practices for engagement with CIJ systems include:

- » pairing initiatives with awareness campaigns in careful sequence to ensure justice seekers benefit from improvements but are not encouraged to use ineffective systems;
- » acknowledging the limitations of training and awareness campaigns in addressing deeply rooted structural and political dynamics;
- » adopting context-specific holistic approaches that take into account causal factors in play (local resource endowments, community expectations, cultural mores, etc.);
- » incentivizing community-led reform through top-down recognition or stipends for leaders or bottom-up pressure from community groups;
- » integrating strategies to overcome social resistance to change;
- » creating multifaceted programming teams with members experienced in local dynamics and custom and those specialized in working with women and marginalized populations; and
- » designing multi-sectorial approaches which consider and address the broader context in which justice systems operate.

Finally, a broad-based and inclusive process is needed to ensure genuine and meaningful participation, particularly for women and marginalized populations. While complex and challenging, this type of engagement can provide a positive contribution to development and foster and forge necessary partnerships to achieve justice for all.

This *Practitioner Brief* provides practical entry points and modalities for engagement with CIJ systems, acknowledging the prevalence of these structures in the political, social and economic dynamics of many national contexts, and the importance for engagement with CIJ structures as a means of improving justice delivery, particularly for women and marginalized populations. To contribute to the realization of SDG 16, the aim is to continue to strengthen justice systems for the benefit of justice seekers within a plurality of legal systems.

7. ACKNOWLEDGEMENTS

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NOTES

1. INTRODUCTION

- 1 Peter Albrecht and others, eds., *Perspectives on Involving Non-State and Customary Actors in Justice and Security Reform* (Rome, Italy, IDLO; Danish Institute for International Studies, 2013), p. 3.
- 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 IDLO, *Accessing Justice: Models, Strategies and Best Practices on Women's Empowerment* (2013), p. 12.
- 4 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. COMPLEXITIES IN ENGAGING WITH CUSTOMARY AND INFORMAL JUSTICE

- 5 Deborah Isser and others, "Looking for Justice: Liberian Experiences with and Perceptions of Local Justice Options", *Peaceworks*, No. 63 (Washington, D.C., USIP, 2009), pp.55, 85. Limiting customary adjudication, particularly where state courts are weak, may have further harmful impacts; accumulated unresolved disputes can manifest in increased criminality and violence, and the imposition of one system may result in conflict and instability. Alternatively, prohibiting customary resolution may simply push it underground where less regulation leaves women and marginalized groups even more vulnerable to exploitation and unsatisfactory outcomes.
- 6 As occurred in Burundi when bashingantaha were not empowered to consider criminal matters. Tracy Dexter and Philippe Ntahombaye, "The Role of Informal Justice Systems in Fostering the Rule of Law in Post-Conflict Situations: The Case of Burundi", Report(Centre for Humanitarian Dialogue, July 2005), pp. 17–18.
- 7 United Nations Development Programme (UNDP), *Access to Justice in Aceh: Making the Transition to Sustainable Peace and Development in Aceh* (UNDP; IDLO; Badan Rehabilitasi dan Rekonstruksi Agency for Rehabilitation and Reconstruction, 2006), p. 11.
- 8 International Council on Human Rights, *When Legal Worlds Overlap: Human Rights, State and Non-State Law* (Vernier, Switzerland, 2009), p. 82.
- 9 Erica Harper, *Customary Justice: From Program Design to Impact Evaluation* (Rome, Italy, IDLO, 2011), p. 25.
- 10 For an example of poor reconciliation of customary and formal justice systems, see Judy Adoko and Simon Levine, "How Can We Turn Legal Anarchy into Harmonious Pluralism? Why Integration is the Key to Legal Pluralism in Northern Uganda", in *Conference Packet: Customary Justice and Legal Pluralism in Post-Conflict and Fragile Societies* (USIP; George Washington University; World Bank, 2009), pp. 80–81, 83–84.
- 11 Erica Harper, *Customary Justice: From Program Design to Impact Evaluation* (Rome, Italy, IDLO, 2011), p. 36.
- 12 Maria Derks, "Improving Security and Justice Through Local/Non-State Actors: The Challenges of Donor Support to Local/Non-State Security and Justice Providers" (Clingendael Institute, April 2012), p. 22. Available at https://www.clingendael.org/sites/default/files/pdfs/20120400_derks_improving_security.pdf.
- 13 For a discussion of the relative roles of state and non-governmental actors in Bangladesh, see Faustina Pereira, "Legal Empowerment and the Rule of Law in Bangladesh", 13 August 2013. Available at <http://news.trust.org/item/20130813133907-dp09z/>.
- 14 See generally Mary B. Anderson, *Do No Harm: How Aid Can Support Peace – Or War* (Boulder, Colorado, Lynne Rienner Publishers, 1999); and Marshall Wallace, *From Principle to Practice: A User's Guide to Do No Harm* (Cambridge, CDA Collaborative Learning Projects, 2015), p. 7. See also Rama Mani, "Exploring the Rule of Law in Theory and Practice", in *Civil War and the Rule of Law: Security, Development, and Human Rights*, Agnès Hurwitz, ed. (Boulder, Colorado, Lynne Rienner, 2008), p. 29; Rama Mani, *Beyond Retribution: Seeking Justice in the Shadows of War* (Cambridge, UK, Polity Press; Malden, MA, Blackwell, 2002), p. 84. See also United Kingdom, Department for International Development (DFID), *Briefing on Non-State Justice and Security Systems* (2004). Available at <http://www.gsdc.org/docs/open/ssaj101.pdf>.
- 15 Lynn Welchman and Sara Hossain, "Introduction: 'Honour', Rights and Wrongs", in *Honour: Crimes, Paradigms and Violence Against Women*, Lynn Welchman and Sara Hossain, eds. (London, Zed, 2005), pp. 6–8.
- 16 For example, Richard Hartley-Parkinson, "Girl raped in revenge after her brother raped a 13-year-old two days earlier", *Metro*, 28 July 2017. Available at <http://metro.co.uk/2017/07/28/girl-raped-in-revenge-after-her-brother-raped-a-12-year-old-two-days-earlier-6811906/>.
- 17 The Advocates for Human Rights, "Witch Burning & Beheading", June 2010. Available at http://www.stopvaw.org/harmful_practices_witch_burning_beheading.html.
- 18 The Advocates for Human Rights, "Stoning or Flogging of Women", June 2010. Available at http://www.stopvaw.org/harmful_practices_stoning_flogging.html. See also Faustina Pereira, "Fatwa in Bangladesh: Patriarchy's Latest Sport", in *Women and International Human Rights Law*, Kelly D. Askin and Dorean M. Koenig, eds. (Ardstley, N.Y., Transnational, 2001).
- 19 When discussing the discriminatory and gendered nature of justice mechanisms, it is important to acknowledge the diversity of CIJ systems. While many observers assume all traditional systems are patriarchal (dominated by men and biased against women), as communities in Lesotho have experienced high male labor migration and low pay, traditional chiefs have chosen to delegate authority to their wives or sisters. Subsequent inheritance decisions were more likely to favor women. United Kingdom, DFID, *Briefing Note: Non-state Justice and Security Systems* (2004), p. 9. Available at <http://www.gsdc.org/docs/open/ssaj101.pdf>.
- 20 Tanja Chopra and Deborah Isser, "Access to Justice and Legal Pluralism in Fragile States: The Case of Women's Rights", *Hague Journal on the Rule of Law* Vol. 4, No. 2 (2012), p. 352.
- 21 Danish Institute for Human Rights, *Informal Justice Systems: Charting a Course for Human Rights-Based Engagement* (2013), p. 7.
- 22 Tanja Chopra and Deborah Isser, "Access to Justice and Legal Pluralism in Fragile States: The Case of Women's Rights", *Hague Journal on the Rule of Law* Vol. 4, No. 2 (2012), p. 337.
- 23 For a summary of one such innovation in the context of a previously all-male Bangladeshi shalish and a discussion of how interventions must go beyond merely placing women in positions within the legal system, see Fauzia Erfan Ahmed, "The Compassionate Courtroom: Feminist Governance, Discourse, and Islam in a Bangladeshi *Shalish*", *Feminist Formations* Vol. 25, No. 1 (2013).

- ²⁴ These approaches usually target the provision of justice services at the local level and feature activities such as legal education, the provision of legal and paralegal aid services, support for non-discriminatory alternative dispute resolution forums and the training of legal and paralegal local counselors.
- ²⁵ IDLO, *Accessing Justice: Models, Strategies and Best Practices on Women's Empowerment* (2013), pp. 34–39. Notably, the intervention did not address substantive legal asymmetries.
- ²⁶ IDLO, *Accessing Justice: Models, Strategies and Best Practices on Women's Empowerment* (2013), pp. 40–43.
- ²⁷ IDLO, *Women, Food, Land: Exploring Rule of Law Linkages – Using Law to Strengthen Food Security and Land Rights for Women* (October 2016), p. 31; and IDLO, “Strengthening Women’s Customary Rights to Land”, 7 March 2017. Available at <https://www.idlo.int/news/highlights/strengthening-womens-customary-rights-land>.
- ²⁸ Human Rights Watch, “Hidden Apartheid: Caste Discrimination Against India’s ‘Untouchables’”. Available at <https://www.hrw.org/report/2007/02/12/hidden-apartheid/caste-discrimination-against-indias-untouchables>.

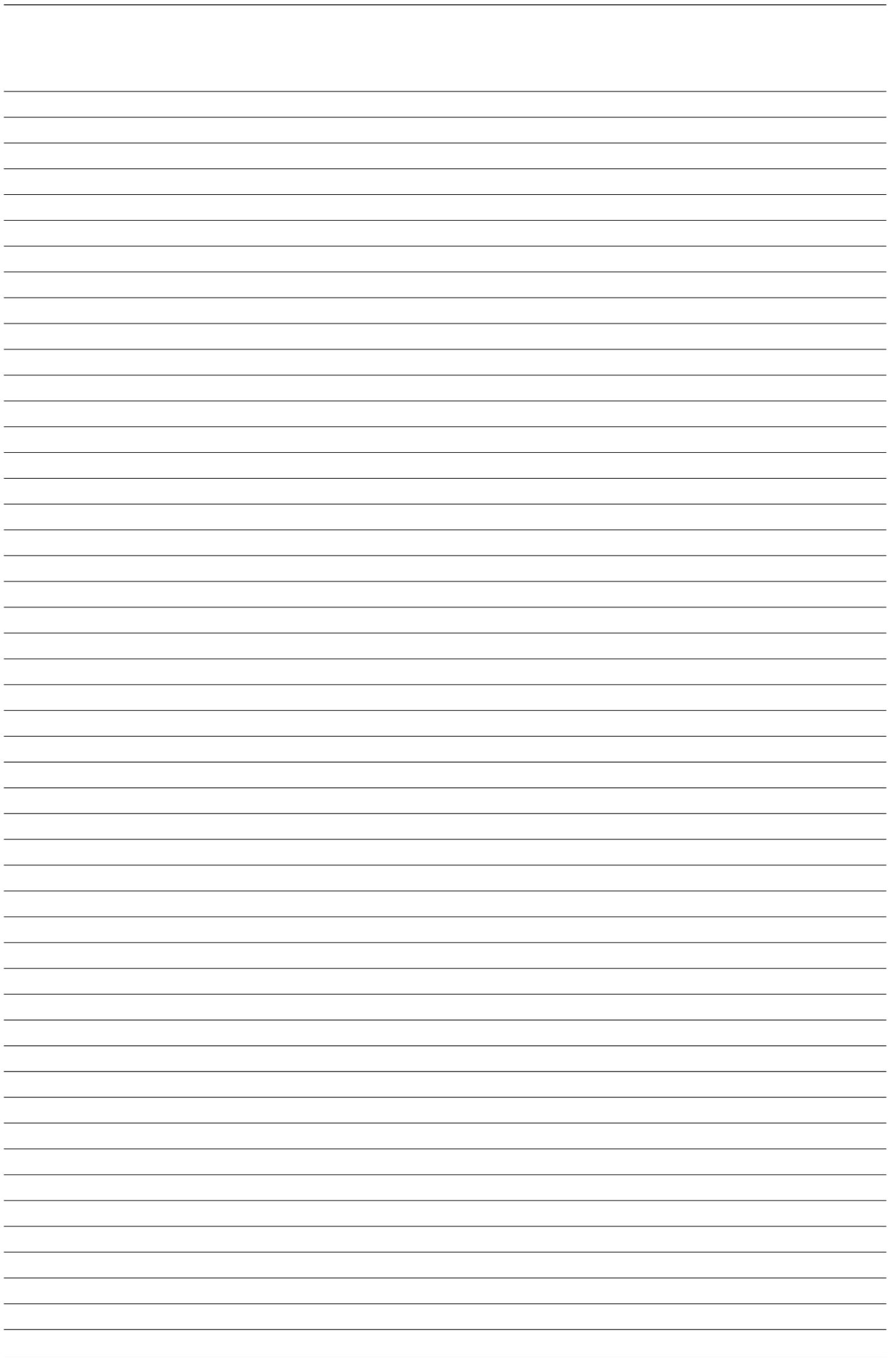
3. PLANNING ENGAGEMENT WITH CUSTOMARY AND INFORMAL JUSTICE

- ²⁹ ‘What are justice gaps’ is based on the framework introduced in Danish Institute for Human Rights, *Informal Justice Systems: Charting a Course for Human Rights-Based Engagement* (2013), p. 11.
- ³⁰ Developed based on Task Force on Justice, “Justice for All: Challenge Paper for the First Meeting of the Task Force on Justice” (NYU, Center on International Cooperation, April 2018), p. 4. Available at https://cic.nyu.edu/sites/default/files/challenge_paper_on_justice_6apr18.pdf.
- ³¹ Danish Institute for Human Rights, *Informal Justice Systems: Charting a Course for Human Rights-Based Engagement* (2013), p. 11.
- ³² Created based on the three dimensions of justice found in Danish Institute for Human Rights, *Informal Justice Systems: Charting a Course for Human Rights-Based Engagement* (2013), p. 11.
- ³³ Danish Institute for Human Rights, *Informal Justice Systems: Charting a Course for Human Rights-Based Engagement* (2013), p. 11.
- ³⁴ This can also be true in developed settings.
- ³⁵ For instance, see Congo Research Group, “Crisis in Kasai: The Manipulation of Customary Power and the Instrumentalization of Disorder” (2018). Available at <http://congoreserchgroup.org/wp-content/uploads/2018/07/Setting-Fire-to-your-Own-House-CRG-FINAL.pdf>.
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- ³⁷ Diana Goff, “Working with Informal Justice: Key Considerations for Confident Engagement”, Policy Brief (Knowledge Platform Security & Rule of Law, December 2016), p. 7. Available at <http://www.kpsrl.org/browse/browse-item/t/working-with-informal-justice-key-considerations-for-confident-engagement>.
- ³⁸ Diana Goff, “Working with Informal Justice: Key Considerations for Confident Engagement”, Policy Brief (Knowledge Platform Security & Rule of Law, December 2016), p. 3. Available at <http://www.kpsrl.org/browse/browse-item/t/working-with-informal-justice-key-considerations-for-confident-engagement>.
- ³⁹ Rama Mani, “Exploring the Rule of Law in Theory and Practice”, in *Civil War and the Rule of Law: Security, Development, Human Rights*, Agnès Hurwitz, ed. (Boulder, Colorado, Lynne Rienner, 2008), pp. 39–40.
- ⁴⁰ Erica Harper, *Customary Justice: From Program Design to Impact Evaluation* (Rome, Italy, IDLO, 2011), pp. 118–123.

4. DESIGNING AND IMPLEMENTING PROGRAMS THAT ENGAGE WITH CUSTOMARY AND INFORMAL JUSTICE

- ⁴¹ Erica Harper, *Customary Justice: From Program Design to Impact Evaluation* (Rome, Italy, IDLO, 2011), pp. 14–15.
- ⁴² The engagement modalities in the proceeding sections are adapted and updated from Erica Harper, *Customary Justice: From Program Design to Impact Evaluation* (Rome, Italy, IDLO, 2011).
- ⁴³ Developed from Erica Harper, *Customary Justice: From Program Design to Impact Evaluation* (Rome, Italy, IDLO, 2011), pp. 79–83.
- ⁴⁴ 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.”
- ⁴⁵ Outlined at length in Erica Harper, *Customary Justice: From Program Design to Impact Evaluation*, (Rome, Italy, IDLO, 2011), pp. 79–91.
- ⁴⁶ Such as the *Gacaca* courts in Rwanda. *Gacaca* can be loosely translated as ‘justice among the grass’.
- ⁴⁷ Erica Harper, *Customary Justice: From Program Design to Impact Evaluation* (Rome, Italy, IDLO, 2011), p. 68. See also Peri Umar Farouk and others, “Back to the Future: Regional Autonomy and An Uncertain Adat Revival”, Draft Report (World Bank, February 2005), p. 13. Available at <http://documents.worldbank.org/curated/en/211781468772741683/pdf/400750Back0to0the0Future1PUBLIC1.pdf>.
- ⁴⁸ Remigius Nwabueze, “The Dynamics and Genius of Nigeria’s Indigenous Legal Order”, *Indigenous Law Journal* Vol. 1 (Spring 2002), p. 171.
- ⁴⁹ The jurisprudence thus far has been inconsistent in determining which customs are sufficiently established to be noticed. Moreover, there is concern among African scholars that adopting custom as precedent will rigidify the law and ignore the evolutions that occur within traditional practice. Finally, the demand that customary law meet requirements of proof while English law is accepted can be understood as assigning an inferior status to traditional law. Remigius Nwabueze, “The Dynamics and Genius of Nigeria’s Indigenous Legal Order”, *Indigenous Law Journal* Vol. 1 (Spring 2002), pp. 167–174.
- ⁵⁰ As noted earlier, when assessing the value added of expanding the number of dispute resolution forums, it is essential to assess the secondary implications. The main risk is that multiple systems can result in competing laws that can be manipulated by the powerful or more informed disputants. See International Council on Human Rights, *When Legal Worlds Overlap: Human Rights, State and Non-State Law* (Vernier, Switzerland, 2009), p. 82.
- ⁵¹ As IDLO has previously described, “Paralegals are laypersons that have legal literacy skills; they usually have knowledge of substantive laws as well as skills in how to negotiate the court system. Their function is to provide a bridge between the formal legal system and society, thus demystifying the law and making justice more accessible. Paralegals can offer a range of legal services that do not necessarily need to be provided by a lawyer, such as advice on if a rights violation has occurred, knowledge of an individual’s legal rights in a particular situation, guidance on how to access government or NGO legal aid, and advice on how to file a claim in court or at an administrative tribunal. In some contexts, they also provide complementary or quasi-legal services such as mediation.” Erica Harper, “Traditional Justice: Practitioners’ Perspectives”, Working Paper, No. 7, (Rome, Italy, IDLO, 2011), p. 11. For more information on the characteristics and roles of paralegals in access to justice, see Vivek Maru, *Between Law and Society: Paralegals and the Provision of Primary Justice Services in Sierra Leone* (New York, NY, Open Society Institute Justice Initiative, 2006), pp. 31–35; and Mary McClymont and Stephen Golub, eds., *Many Roads to Justice: The Law Related Work of the Ford Foundation Grantees Around the World* (USA, The Ford Foundation, 2000).
- ⁵² IDLO, “Empowering Village Paralegals to Protect Indonesia’s Peat Lands”, 31 October 2017. Available at <http://www.idlo.int/news/highlights/empowering-village-paralegals-protect-indonesia%E2%80%99s-peat-lands>.

- ⁵³ IDLO, "Collection of Papers on Human Rights in South Sudan", 12 January 2017. Available at <http://www.idlo.int/news/highlights/towards-people-centered-human-rights-state-south-sudan>.
- ⁵⁴ Steven E. Hendrix, "Guatemalan 'Justice Centers': The Centerpiece for Advancing Transparency, Efficiency, Due Process, and Access to Justice", *American University International Law Review* Vol. 15, No. 4 (2000), pp. 814, 820–822, 825, 850. For a description of similar centers in Peru, see Julio Faundez, "Non-Justice Systems in Latin America: Case Studies: Peru and Colombia", Working Paper (World Bank, January 2003), pp. 30–34.
- ⁵⁵ Erica Harper, *Customary Justice: From Program Design to Impact Evaluation* (Rome, Italy, IDLO, 2011), p. 68.
- ⁵⁶ IDLO, "Journeys to Justice: Exploring Customary Systems in Mali", 20 April 2018. Available at <http://www.idlo.int/news/highlights/journeys-justice-exploring-customary-systems-mali>.
- ⁵⁷ Diana Goff, Madina Diallo and Anca-Elena Ursu, *Under the Microscope: Customary Justice Systems in Northern Mali* (Clingendael Institute, July 2017), p. 3.
- ⁵⁸ IDLO, "Journeys to Justice: Exploring Customary Systems in Mali", 20 April 2018. Available at <http://www.idlo.int/news/highlights/journeys-justice-exploring-customary-systems-mali>.
- ⁵⁹ For a general overview of the processes of change from the point of view of activism and programming, see Duncan Green, *How Change Happens* (Oxford, Oxford University Press, 2016).
- ⁶⁰ General Recommendations on Women's Access to Justice, UN Doc CEDAW/C/GC/33, paragraph 63.
- ⁶¹ UNDP, *Programming for Justice: Access for All – A Practitioner's Guide to a Human Rights-Based Approach to Access to Justice* (UNDP, 2005), p. 103.
- ⁶² Manfred O. Hinz, "The Ascertainment of Customary Law: What is it and What is it For?", in *Conference Packet: Customary Justice and Legal Pluralism in Post-Conflict and Fragile Societies* (USIP; George Washington University; World Bank, 2009), p. 136.
- ⁶³ See generally Manfred O. Hinz, "The Ascertainment of Customary Law: What is it and What is it For?", in *Conference Packet: Customary Justice and Legal Pluralism in Post-Conflict and Fragile Societies* (USIP; George Washington University; World Bank, 2009), pp. 134–136.
- ⁶⁴ 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), pp. 217–221.
- ⁶⁵ Erica Harper, "Traditional Justice: Practitioners' Perspectives", Working Paper, No. 7, (Rome, Italy, IDLO, 2011), p. 15.
- ⁶⁶ USAID, *Afghanistan Rule of Law Project: Field Study of Informal and Customary Justice in Afghanistan and Recommendations on Improving Access to Justice and Relations Between Formal Courts and Informal Bodies* (2005), p. 5.
- ⁶⁷ Erica Harper, *Customary Justice: From Program Design to Impact Evaluation* (Rome, Italy, IDLO, 2011), p. 49.
- ⁶⁸ Erica Harper, "Traditional Justice: Practitioners' Perspectives", Working Paper, No. 7, (Rome, Italy, IDLO, 2011), p. 15. For more information on resistance through religious doctrines, see Thomas Barfield, "Informal Dispute Resolution and the Formal Legal System in Contemporary Northern Afghanistan", Draft Report (United States Institute of Peace Rule of Law Program, 21 April 2006); and 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. 43–44.
- ⁶⁹ Peter Albrecht and others, eds., *Perspectives on Involving Non-State and Customary Actors in Justice and Security Reform* (Rome, Italy, IDLO; Danish Institute for International Studies, 2013), p. 21.



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