

# ISSUE BRIEF

## NAVIGATING COMPLEX PATHWAYS TO JUSTICE: WOMEN AND CUSTOMARY AND INFORMAL JUSTICE SYSTEMS



Creating a Culture  
of Justice

International Development  
Law Organization

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

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# TABLE OF CONTENTS

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|  |           |
|--|-----------|
| <b>1. Introduction</b>   | <b>05</b> |
| <b>2. The evolution of legal and policy debates on women and customary and informal justice</b>                            | <b>07</b> |
| Understanding why women use customary and informal justice systems   | 09        |
| <b>3. Challenges women encounter in accessing justice through customary and informal justice systems</b>                   | <b>11</b> |
| Social expectations and fear for personal safety   | 11        |
| Lack of knowledge of rights and laws   | 12        |
| Gaps in protections and discriminatory content in legal frameworks   | 12        |
| Lack of access to economic opportunity   | 15        |
| Discriminatory or rights-abrogating participation, procedures and practices  | 15        |
| <b>4. Gender-focused engagement entry points, modalities and good practices for customary and informal justice systems</b> | <b>17</b> |
| Empower women to achieve justice   | 17        |
| Adopt and implement normative frameworks that benefit women and protect their rights                                       | 24        |
| Pursue gender-sensitive reforms of customary and informal justice systems  | 29        |
| Build and expand alliances and partnerships that support women's human rights in customary and informal justice systems    | 38        |
| Strengthen research on women's experiences with customary and informal justice systems                                     | 39        |
| <b>5. Policy recommendations on women and customary and informal justice systems</b>                                       | <b>41</b> |
| <b>6. Acknowledgments</b>  | <b>43</b> |





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# 1. INTRODUCTION

As the international community strives to achieve the 2030 Agenda for Sustainable Development, and in particular Sustainable Development Goals (SDGs) 5 and 16, engagement with customary and informal justice (CIJ) systems becomes increasingly important to realize access to justice for all and ensure that no one is left behind, especially the most vulnerable and marginalized.<sup>1</sup>

Recurring estimates show that globally, disputes are largely resolved outside formal courts. CIJ systems are often the primary mechanisms through which people, and especially disadvantaged groups – the poor, women and remote and minority populations – seek justice. In fragile and conflict-affected settings, it is routinely assessed that 80–90 per

cent of disputes are dealt with through CIJ systems.<sup>2</sup> In developed contexts where the 2030 Agenda is also relevant, out-of-court settlement and alternative forums and means of dispute resolution are also often utilized to fulfill widespread justice needs.

Internationally, it is recognized that, “when in accordance with international human rights law”, informal justice mechanisms “play a positive role in dispute resolution, and that everyone, particularly women and those belonging to vulnerable groups, should enjoy full and equal access to these justice mechanisms”.<sup>3</sup> The UN Secretary-General has noted that effective justice strategies must “give due attention to laws, processes (both formal and

informal) and institutions (both official and unofficial)”.<sup>4</sup> Most recently, this recognition has been reinforced by the inclusion of a specific indicator in the 2030 Agenda tracking both formal and informal dispute resolution mechanisms.<sup>5</sup>

The increased attention on pluralistic legal systems and the role of CIJ in achieving SDGs 5 and 16 is to be welcomed. However, it is essential that women’s access to justice remains in focus. As with all laws, customary law does not treat all people the same. Women’s experiences of justice are diverse and different to men’s and it is imperative that in leaving no one behind, women’s issues and concerns are centrally placed.

## In focus: Sustainable Development Goals and selected targets on gender equality and justice



### SDG 5: Achieve gender equality and empower all women and girls

- 5.1 End all forms of discrimination against all women and girls everywhere
- 5.2 Eliminate all forms of violence against all women and girls in the public and private spheres, including trafficking and sexual and other types of exploitation
- 5.3 Eliminate all harmful practices, such as child, early and forced marriage and female genital mutilation
- 5.A Undertake reforms to give women equal rights to economic resources, as well as access to ownership and control over land and other forms of property, financial services, inheritance and natural resources, in accordance with national laws



### SDG 16: Promote just, peaceful and inclusive societies

- 16.3: Promote the rule of law at the national and international levels and ensure equal access to justice for all
- 16.B Promote and enforce non-discriminatory laws and policies for sustainable development

### In focus: Customary and informal justice terminology<sup>6</sup>

While state recognition can vary,<sup>7</sup> numerous terms are used to describe justice and dispute resolution practices that operate outside the formal, regulatory or state-based legal system. These may include, but are not limited to: alternative, community, customary, grassroots, indigenous,<sup>8</sup> informal, local, non-state, people's, popular, religious, village and traditional law and justice forums.<sup>9</sup> No universal agreement on terminology exists, given contextual differences across time and place, as well as different disciplinary or theoretical approaches and engagement priorities.<sup>10</sup>

In practice, the justice mechanisms this terminology covers includes chiefs and elders, religious leaders or institutions, paralegals, mediators and local leaders providing dispute resolution services to individuals living within their communities. The nomenclature of CIJ thus refers to a broad spectrum, with authority and legitimacy deriving from a combination of custom, tradition, social and community norms, religion, as well as state law in some instances. Importantly, CIJ systems are not static and have also evolved or been adapted over time in response to colonization, conflict, globalization, as well as changing social norms.<sup>11</sup> Finally, as distinct from formal state courts, CIJ systems often exhibit a different approach, emphasizing restorative justice, flexible rules and procedures and consent-based negotiated solutions.<sup>12</sup>

Some of the most common justice concerns that women face – inheritance, family formation, divorce, property rights, land and debt disputes and even violence against women and girls – are issues of significance that are resolved or adjudicated through informal systems.<sup>13</sup> CIJ mechanisms are therefore uniquely placed to potentially play a pivotal role in ensuring that justice for women becomes a lived reality.

However, despite documented advantages, CIJ systems are often skewed against women and girls, favoring male-dominated structures, patriarchal values and discriminatory and harmful outcomes for women and girls.<sup>14</sup> While it is important to recognize the significant challenges of CIJ systems, there are also models, lessons and approaches that can be shared to pursue engagement – whether direct, indirect or strategic – with the aim of expanding women's access to justice and gender equality.<sup>15</sup>

This *Issue Brief* brings together current research, expert perspectives<sup>16</sup> and programmatic experience to focus on the relationship between women and CIJ systems, addressing: the evolution of legal and policy debates on women and CIJ engagement; challenges women encounter; entry points, modalities and good practices for engagement; and policy recommendations to improve women's rights and access to justice.



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## 2. THE EVOLUTION OF LEGAL AND POLICY DEBATES ON WOMEN AND CUSTOMARY AND INFORMAL JUSTICE

Significant strides have been made towards gender equality in recent decades that are transforming the lives of women and girls as well as societies. But despite this progress, the weight of patriarchy remains formidable. Discriminatory gender norms persist and are undergoing a resurgence in some contexts.<sup>17</sup> Efforts to enhance gender equality continue to face resistance at community, national and transnational levels.

The ongoing struggle for gender equality is clear in women's experiences of justice, where women's needs are particularly acute and require dedicated attention. In 2017, more than one billion women around the world lacked protection from sexual violence by an intimate partner.<sup>18</sup> In 2018, only 37 of 161 countries reviewed had specific laws protecting equal rights for men and women to own, use and control land.<sup>19</sup>

Whether by choice, necessity or coercion, CIJ systems are central to women's experiences of accessing justice. Over the past two decades, the international community has begun to recognize their importance and potential value in expanding access to justice. There has been a broad recognition of the importance of CIJ as part of the justice system

and increasing efforts by the international community to engage with CIJ actors.<sup>20</sup>

Nevertheless, this recognition has not always extended to international women's rights frameworks. A decade ago, engagement with CIJ systems as an entry point for enhancing women's rights and justice for women was considered off limits. CIJ and other mechanisms outside the formal justice system were seen to encourage lenient approaches to gender discrimination, especially gender-based violence against women (GBVAW), with customary systems particularly criticized for reinforcing patriarchal values and imposing harmful outcomes for women.

More recently, however, engagement with CIJ is viewed as a practical necessity, responding to the lived realities of women's experiences of justice, albeit with many caveats to ensure that women's human rights are upheld and advanced. This shift is noticeable in the work of the Committee on the Elimination of Discrimination against Women, the body of independent experts on women's rights that monitors implementation of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW).

In 2015, the CEDAW Committee's General Recommendation No. 33 on women's access to justice stipulated that cases of violence against women should, under no circumstances, be referred to alternative dispute resolution (ADR) processes.<sup>21</sup> This would include resolution through CIJ mechanisms, which often mediate GBVAW cases. However, General Recommendation No. 33 did also note that joint efforts were needed "to examine ways in which plural justice systems can work together to reinforce protection for women's rights".<sup>22</sup>

Two years later, in 2017, the CEDAW Committee's General Recommendation No. 35 on GBVAW allows GBVAW to be adjudicated through ADR processes in specific circumstances. In making this change, the CEDAW Committee followed the approach set out in Article 48 of the Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence (Istanbul Convention) that recognizes the validity of ADR processes for cases of violence against women, as long as such processes are not mandatory. More broadly, the shifting position of CEDAW brings into more focus other regional commitments on gender and customary laws.



## In focus: International and regional legal instruments on women's rights that provide guidance on customary law

*Convention on the Elimination of All Forms of Discrimination against Women (1979)*: Requires States Parties to “take all appropriate measures, including legislation, to modify or abolish existing laws, regulations, customs and practices which constitute discrimination against women” (Article 2). Furthermore, it requires States Parties to take all appropriate measures “to modify the social and cultural patterns of conduct of men and women, with a view to achieving the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women” (Article 5).

*CEDAW General Recommendation No. 33 on women's access to justice (2015)*: Notes the importance of plural justice systems and that “a range of models [exist] through which practices embedded in plural justice systems can be harmonized with the Convention in order to [...] guarantee that women have access to justice” (para. 63).

*CEDAW General Recommendation No. 35 on gender-based violence against women, updating 1992 General Recommendation No. 19 (2017)*: Allows GBVAW to be adjudicated through ADR processes in specific circumstances, where: the referral is not mandatory or prevents women accessing formal justice; there is free and informed consent by the affected victim/survivor; there are no indicators of further risks for the victim/survivor or their family members; and the ADR procedures empower victims/survivors and are provided by professionals trained to understand and adequately intervene in cases of GBVAW, ensuring protection of women's and children's rights, as well as an intervention with no stereotyping or re-victimization of women (para. 32).

### Regional

*Inter-American Convention on the Prevention, Punishment, and Eradication of Violence against Women (Convention of Belém do Pará) (1994)*: Establishes that women have the right to live free from violence and calls on Member States to establish mechanisms for protecting and defending women's rights in the public and private spheres. It also calls on states to take measures to amend or repeal existing law and modify customary practices that sustain GBVAW.

*Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (The Maputo Protocol) (2003)*: Recognizes the importance of tradition and customs, but notes that these can adapt to ensure they do not contravene women's rights. In this sense, the Protocol resolves the tension between custom and women's rights and encourages the maintenance of the former, as long as they do not contravene the latter.

*Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention) (2011)*: Requires State Parties to put in place legislation to criminalize GBVAW and domestic violence and that such legislation reject cultural, customary, religious or traditional justifications for violence.

The updated position of the CEDAW Committee reflects the concerns of many women's groups and movements in developing countries who have argued that prosecution of GBVAW and other cases involving women through formal courts does not always meet the needs or interests of all women in differing contexts. Some women may want to maintain their marriage, avoid community disharmony or stigma, or seek alternative remedies such as compensation or community-validated commitments to changed behavior, in keeping with local understandings of justice.<sup>23</sup> Others may not have the option

of choice to pursue a case through the formal system of justice.

The United Nations Office of the High Commissioner for Human Rights has stated that while there are limits to the jurisdiction of customary mechanisms when authorized to hand down binding judgments, there remains “considerable latitude for proceedings based on customary law that resemble more closely mediation or a negotiated settlement”.<sup>24</sup>

The policy shift on women and CIJ is grounded in increased knowledge of how women experience justice and the

place of CIJ in pathways to justice. Justice needs and satisfaction surveys, for instance, have shown that disputes related to family matters, land, housing, neighbors and money constitute 65 per cent of all legal problems in Bangladesh; 62 per cent in Uganda; 58 per cent in Mali; and 37.5 per cent in Indonesia.<sup>25</sup> The concentration of problems in these areas is even higher among women<sup>26</sup> and it is precisely for family, land, housing, neighbor and money problems that people most commonly rely on alternative justice mechanisms outside of the formal justice system, including CIJ systems.<sup>27</sup>



## UNDERSTANDING WHY WOMEN USE CUSTOMARY AND INFORMAL JUSTICE SYSTEMS

A range of reasons help to explain why women, by choice, necessity or coercion, rely on CIJ. Many of these reasons also explain why men and other groups may rely on CIJ. For women, however, each of these reasons is augmented by the multiple and intersecting discriminations that they face, which make their experiences unique. Gender gaps in relation to education and literacy, access to and management of resources and decision making in the household, social expectations of acceptable behavior and the burden of unpaid care work mean that the reasons set out below are especially relevant for women.

- › **Geographic accessibility:** In many cases, CIJ systems are more geographically accessible. This is especially relevant for women who often do not have the financial resources to travel longer distances to formal courts. Women are also time poor, due to limited support to assist with farming, childcare and other household responsibilities, making justice mechanisms close to home significantly more accessible.<sup>28</sup> Women may also be restricted by social norms that discourage them from travelling unaccompanied or without a male family member.
- › **Financial accessibility:** CIJ is often perceived to be more affordable than the formal justice system.<sup>29</sup> Given that women generally have less access to and control over household finances than men, cost is an especially pertinent consideration.<sup>30</sup>
- › **Expediency:** CIJ is seen to provide speedier resolution of matters than formal justice systems, which can be subject to many adjournments and delays. By contrast, CIJ systems will often resolve matters within just a few sittings over days or weeks. Given women's paucity of time, this can make CIJ more appealing.
- › **Linguistic accessibility:** The linguistic familiarity of CIJ can be appealing to women as they often complete fewer years of formal education than men. This can mean that women are less comfortable speaking national languages which formal justice systems tend to operate in.
- › **Familiarity:** The lack of familiarity with the procedures, laws and legal terminology can deter women from taking their cases to formal courts, preferring instead to bring matters to a CIJ mechanism whose procedures and laws are more easily understood.
- › **Legitimacy:** The law applied by CIJ systems can be perceived as more legitimate by some users, as it aligns with community norms about how crimes, disputes or grievances are dealt with. This can include a focus on reconciliation and restoring community harmony, rather than retributive or punitive justice, which can be perceived as further destabilizing relationships. CIJ mechanisms frequently rely on compensation as a remedy, rather than incarceration, which is often preferred by women, depending on the crime or grievance involved.<sup>31</sup> Moreover, women usually have less social capital and fewer networks than men to go against community norms by seeking out formal justice. Prevailing social norms usually favor the powerful – the wealthy, the land- and property-owning and men.
- › **Flexibility and tailored solutions:** Finally, in some cases, CIJ is seen to provide a flexibility that formal justice systems do not.<sup>32</sup> Women have thus been able to use the unwritten nature of customary law to their advantage to contest interpretations of the law and articulate alternative interpretations that offer greater rights protection than might be available under formal laws.<sup>33</sup>



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While the evidence base for engagement with CIJ systems to expand women’s access to justice is increasing, questions can and will still be raised about how compatible CIJ is with women’s rights and access to justice. Three primary considerations are important to highlight.

First, CIJ systems are diverse and include a wide range of actors.<sup>34</sup> Some CIJ systems are culpable of appalling treatment of women and marginalized groups. Some exclude women from decision making, rely on discriminatory social norms in determining cases or

impose rights-abrogating decisions, while others do not. It is important to treat CIJ mechanisms on a case-by-case basis, looking empirically at their own merits and shortcomings.

Second, the fact that some CIJ mechanisms violate women’s rights is not, in all cases, a reason not to engage. Rather, it may be the very reason to engage. There is frequent engagement with formal justice systems on the basis of their failure to uphold women’s human rights. The shortcomings of CIJ mechanisms can be viewed in a similar manner, where refusing to engage may mean that women receive sub-standard justice.

Third, CIJ systems are frequently presented as traditional and static, but this overlooks their changeable nature. CIJ mechanisms, like their formal counterparts, continue to evolve and renegotiate their legitimacy in the communities they serve. Their ways of working change over time in order to remain relevant, and claims to tradition may be tenuous or even invented.<sup>35</sup> Recognizing this adaptability is key to seeing the potential for delivery of improved justice outcomes for women.

### In focus: Customary adaptation

There are a growing number of examples that highlight how CIJ systems adapt and change. For instance, the *Bashingantaha* – a customary dispute resolution mechanism in Burundi – amended its governing charter to include more women in decision making, resulting in women constituting 40 per cent of their composition.<sup>36</sup> In Mozambique, chiefs began to make reference to statutory laws in their decision making as a way to invoke the legitimacy of the state, enforce compliance with their decisions and boost their power.<sup>37</sup> In South Sudan, chiefs in certain courts no longer utilize women and girls as compensation to resolve serious crimes, given changing social norms and exposure to alternatives.<sup>38</sup>

In sum, while CIJ systems can represent a genuine challenge given the discriminatory and harmful treatment they can condone or perpetrate, there is a need to focus

on their specific record as well as their capacity for change. While there is no model framework to guarantee engagement success to achieve justice goals, key considerations offer

guidance, and it is important to reflect on justice gaps and entry points, fundamental risks and vested interests, and whether women’s and marginalized voices are being heard.<sup>39</sup>

### 3. CHALLENGES WOMEN ENCOUNTER IN ACCESSING JUSTICE THROUGH CUSTOMARY AND INFORMAL JUSTICE SYSTEMS

Women face a range of challenges in accessing CIJ systems and achieving just outcomes. These challenges will vary depending on a range of factors including women's identities, nature of the CIJ system utilized and the nature of their dispute or grievance.

Women's identities are an important influence. For example, women who are poor, migrants, with limited education, living in rural or remote locations, from a minority group or living with HIV/AIDS face distinct challenges.<sup>40</sup> While some

challenges will be shared, intersectionality cannot be overlooked to generalize about women's experiences.

In addition, the challenges will vary depending on the CIJ mechanism in question, the broader socio-political context and the degree to which CIJ systems are recognized by formal law as legitimate justice services. Finally, the nature of the dispute or grievance for which a woman is seeking justice will also shape the challenges faced, with women's

recourse to justice considered more acceptable in relation to some matters than others. All of these factors complicate and nuance the challenges women encounter in seeking justice through CIJ systems.

A number of identified common challenges are set out below, related to social deterrents to seeking justice, limited awareness of rights and the law, discriminatory content of the law and rights-abrogating procedures and practices.

#### SOCIAL EXPECTATIONS AND FEAR FOR PERSONAL SAFETY

Women can face significant social pressure to not report disputes or grievances to any justice mechanism. Often involved are social expectations regarding what constitutes a 'good woman', interpreted as a woman who maintains the peace and does not make trouble or speak out, especially in relation to family matters. In Myanmar, for instance, women describe the importance of bearing their burdens to ensure good karma and respect within the community.<sup>41</sup> In other contexts, such as Afghanistan, it can be socially unacceptable for a woman to speak with a man without a male relative present, making reporting to male-dominated CIJ mechanisms in a confidential manner almost impossible.<sup>42</sup>

In addition, the social pressure and/or personal preference not to report is connected to the fact that CIJ hearings often operate in public, with no anonymity for parties involved, including children.<sup>43</sup> This is particularly pertinent in relation to violence against women and family disputes, such as intimate partner violence, child abuse, spousal neglect or inheritance disputes, where there is often a strong emphasis on resolution within the family and a perception of shame for these matters to be raised publicly. Reporting such crimes can be shameful for women who fear social stigma. In Uganda, for instance, issues of sex and sexuality

are taboo to speak about in public, constituting a barrier to women bringing up issues of sexual violence in CIJ forums.<sup>44</sup> It is also relevant for neighbor and debt disputes, which people may prefer to resolve privately to maintain relationships and reputation.

In other cases, particularly conflict- or violence-affected settings, women can face intimidation and violence if they pursue justice, as do those who are seen to support such women.<sup>45</sup> There are thus important social and personal safety consequences that challenge women's ability to enforce their rights through CIJ mechanisms.

## LACK OF KNOWLEDGE OF RIGHTS AND LAWS

Women's ability to obtain justice through CIJ mechanisms is limited by women's lack of knowledge of their rights and the law, both formal and customary. Years of formal education and literacy are lower among women than men in many countries, with barely 60 per cent of girls completing primary education and only 30 per cent enrolling in secondary education in the least developed

countries.<sup>46</sup> Women also tend to have less access to communication media, such as television or radio, meaning their knowledge of what they are entitled to under the law is often lacking.<sup>47</sup> This can manifest as limited demand for justice among women.

Women also face greater obstacles than men in knowing locally

relevant laws due to the fact that it is women who more frequently relocate to different communities as their family status changes, for instance, upon marriage, being widowed or the death of parents. When women are married into different communities, they may not speak the local dialect or be familiar with local customs.<sup>48</sup>

## GAPS IN PROTECTIONS AND DISCRIMINATORY CONTENT IN LEGAL FRAMEWORKS

Even where women do know about their rights and the law, the content of those laws can provide insufficient protections. While CIJ often operates according to its own laws and norms, where these mechanisms are recognized by the state, they are generally meant to operate in ways that do not contravene formal legislation.<sup>49</sup> For that reason, both formal laws and customary laws matter in terms of the quality of justice that women are able to access through CIJ systems.

In many cases, while legal protection for women's rights are generally covered in formal laws, such as constitutions, bills of rights or human rights or anti-discrimination legislation, specific areas of law can overlook these rights, creating challenges for women seeking justice, whether through formal or CIJ systems. The nature of the challenges in these areas is detailed further below. Many of these cross over multiple areas of law due to their interrelated nature. For instance, the challenges women face in relation to exercising their land rights are connected to their status under family law, which in turn impacts on how violence against women is understood and how women's economic opportunities are viewed.

### Constitutional tensions between protecting rights and custom

As indicated earlier, many countries protect the rights of citizens, including women, in national constitutions or other statutes such as human rights or anti-discrimination legislation. Yet these rights can also be subject to protections for culture, tradition, religion or custom, essentially providing ambiguity through which women's rights can be denied. A 2011 study of 190 national constitutions

found that "more than 60% ... provide at least some degree of recognition of customary law".<sup>50</sup> Data from the 2018 World Bank's *Women, Business and the Law* report shows 46 countries explicitly recognize customary law in their national constitutions and that, of those, 33 specify customary law to be invalid if it violates constitutional provisions on equality and non-discrimination.<sup>51</sup> The remaining leave open the possibility of custom being utilized to defend discriminatory practices, including against women.



Image: ©OHCHR



## Lack of laws criminalizing violence against women or weak enforcement

GBVAW is a global pandemic that affects more than one-third of the world's women and cuts across countries of all income levels.<sup>52</sup> Addressing GBVAW has moved to the top of many national agendas and legislation criminalizing GBVAW is increasingly common. While just one country criminalized domestic violence in 1976, by 2017, the number had risen to 76 per cent of countries.<sup>53</sup> Legislative gaps remain in some countries, also where certain forms of gender-based violence are still not criminalized, such as marital rape, intimate partner violence or female genital mutilation. Data from the World Bank identifies that 49 countries have no legislation on domestic violence; 45 countries have no specific legislation on sexual harassment; and 37 countries exempt rape perpetrators from prosecution if they are married to, or subsequently marry, the survivor.<sup>54</sup>

In addition, enforcement of GBVAW laws is weak in both formal and CIJ systems. Even where cases are brought, all justice systems – but particularly CIJ mechanisms – downplay the seriousness of GBVAW. Concerning issues commonly identified include: survivor-blaming; questioning that places the onus on women to justify exercising their rights rather than focusing on the actions of the accused;<sup>55</sup> the testimony of women holding less weight than men's; and light punishments that prioritize community harmony and the integrity of the family unit over the human rights of the woman.

The enforcement of women's rights can thus be a challenge where the legal framework (both formal and customary) does not provide adequate protections for women, or where the implementation of protective laws is weak. Moreover, where women know that issues of GBVAW will not be dealt with seriously, they can be discouraged from seeking justice at all.



Image: ©IDLO: IDLO supported a working session with Customary and Traditional Justice Leaders in Myanmar on child protection and sexual and gender-based violence

## Discrimination in family law

Discriminatory legislation or customary laws related to marriage, divorce, custody and child maintenance (or alimony) can mean that women's rights are not adequately protected within the home and that women have few avenues for pursuing justice. Early, forced or arranged marriage can mean that girls and women are coerced into marriages without their full consent. Divorce can be illegal, or hard to secure. Where divorce may be granted, custody of children can automatically be granted to the father, or, if custody is granted to the mother, child maintenance can be non-existent or difficult to enforce. This can lead women to remain in violent marriages.<sup>56</sup>

Moreover, within customary laws, it may be acceptable for women to be beaten by their husbands for going out without permission, burning a meal or refusing sexual relations.<sup>57</sup> Laws on paper or in practice can confine women to subordinate roles in the family, with limited decision-making authority. This lack of legal protection can go as far as women being considered minors under the law, or as 'chattel,' or property owned by their fathers and husbands, not deserving of the same rights as men.<sup>58</sup> Such laws – whether legislated or customary – mean that women may not be able to exercise their agency or choice, or in dire circumstances, protect themselves or their children from violence.



Image: ©IFAD

## Weak protection of women's land rights

Secure rights to land and property are critical to reducing poverty and achieving gender equality, providing the potential for both livelihood and food security. The improvement of women's land rights "can have transformative effects on social norms and women's status within the household and the community, as well as their economic opportunities".<sup>59</sup> The importance of accessing, using and owning property is underlined by the inclusion of these as fundamental rights in the Universal Declaration of Human Rights and CEDAW. Indeed, in 2008, the Commission for the Legal Empowerment of the Poor identified the right to property as one of the four pillars of legal empowerment.<sup>60</sup>

Yet in many cases, women are not entitled (in law or practice) to own land, their rights are contested, enforcement of those rights are weak or there are discrepancies between land, family and inheritance laws that create legal uncertainty. Where women do not have secure land rights, this can bring a range of injustices, such as non-inheritance or forced eviction upon the death of a spouse or male relative. This can also mean women's rights to land change over the course of their lives as their family situation changes, from marriage to divorce or being widowed, to being a female child or a mother to male children.<sup>61</sup>

While formal laws are often emphasized as the primary source of land and property rights, customary laws sit alongside these, particularly in relation to communal land. This is especially important as, in many

countries, customary land ownership is one of the predominant means of holding, managing or using land.<sup>62</sup>

Increasingly, there has been resistance to women's land rights as they come up against other rights claims. In Peru, for instance, greater recognition of indigenous collective land ownership has in some cases eroded the land rights of women.<sup>63</sup> In addition, resistance to women's land rights can grow as a result of land scarcity due to people's movements, environmental degradation and climate change, land grabs or land purchases by companies or foreign governments, or conflict.<sup>64</sup> Women who attempt to assert their land rights can be rebuffed violently, deterring them from seeking justice at all.

## LACK OF ACCESS TO ECONOMIC OPPORTUNITY

The ability of women to access equal employment and fair credit is critical for their economic empowerment and also helps to challenge wider norms that sustain inequality and GBVAW.<sup>65</sup> As women are able to take up employment and financial opportunities, their income, independence and status improves, challenging discriminatory gender norms and placing them in a better position to claim their rights and navigate both formal justice systems

and CIJ mechanisms when disputes or grievances arise.

However, data from the World Bank notes that 45 per cent of economies have laws that constrain women's decision to join and remain in the labor force, disadvantaging women and economies as a whole.<sup>66</sup> Women are often employed in lower paid, less secure jobs, with unsafe working conditions. Sexual harassment is not criminalized in certain

countries and women can be prevented from forming or joining workplace associations or trade unions to advocate for better conditions.

Similarly, women frequently struggle to access credit to support businesses, in part due to the fact that they often do not own property or hold the title for land to use as security. Discriminatory laws can make it difficult, or illegal, for women to sign contracts, register businesses or open bank accounts.<sup>67</sup> Indeed, the World Bank's Women, Business and the Law database shows that women cannot run a business in the same way as men in 115 countries.<sup>68</sup>

Additionally, informal loans, on which many people rely, depend on trust, with reputable social networks critical in vouching for a borrower. Community, customary and religious leaders are often key individuals, and if they are not supportive of women's access to credit, women can be limited in achieving their economic potential and not able to realize their full contribution to the economy.<sup>69</sup> These limitations in the legal and normative frameworks mean that women do not have the legal basis and tools to assert their rights.



Image: ©Phuong\_Adobe Stock

## DISCRIMINATORY OR RIGHTS-ABROGATING PARTICIPATION, PROCEDURES AND PRACTICES

The lack of women's participation in CIJ forums, discriminatory procedures and rights-abrogating practices or outcomes represent an additional challenge for women's access to justice.

In many CIJ forums, women have highly circumscribed participation resulting in disadvantage. This includes there being few or no women on CIJ decision-making panels, giving rise to women's interests

being less understood and taken account of in CIJ proceedings. It also includes women not being invited or allowed to speak in CIJ proceedings, undermining their ability to articulate their grievance or defense. In parts of eastern Uganda and northern Kenya, for instance, women must turn their backs when speaking to elders in the local customary court, undermining their ability to clearly express themselves.<sup>70</sup> In some cases, testimony

given by a woman, if it is allowed, does not hold the same weight as that of a man.

The patriarchal attitudes that underlie these deficiencies in participation are also found in procedures and are perpetuated by the dominance of men who preside over CIJ systems – those who adjudicate cases are also often those who are upholding problematic attitudes and practices.<sup>71</sup>

In relation to procedures, the patriarchal values embedded within many CIJ mechanisms mean that women frequently face unfair treatment in terms of how hearings are conducted, evidence is used and laws are applied. Jurisdictional limitations are often ignored, resulting in serious criminal matters such as GBVAW being heard in CIJ forums, even when expressly illegal according to national legislation.<sup>72</sup>

As previously noted, CIJ mechanisms frequently conduct their hearings in public, even for sensitive cases such as GBVAW, providing no anonymity for those involved. Moreover, the evidence that CIJ mechanisms rely on can be discriminatory and in contravention of women's human rights. This is demonstrated, for instance, in questioning in cases of GBVAW about women's clothing, behavior and sexual history in ways that blame survivors, rather than questioning the accused about their conduct. This is in clear violation of the international community's commitment to procedural standards that uphold women's rights and adopt a survivor-centric approach.<sup>73</sup> Sometimes, the means of discerning evidence can rely on brutal practices, such as trial by ordeal, where those accused of crimes are tested to prove their innocence by enduring painful or demoralizing

treatment.<sup>74</sup> Such trials are most common in relation to witchcraft cases in parts of Africa and the Pacific, where women, along with children, the elderly and people living with a disability or albinism, are disproportionately the accused.<sup>75</sup>

The lack of written laws in CIJ systems can mean that laws are applied inconsistently on a case-by-case basis, according to the facts of the case, but also "the power, status and wealth differentials and relations between disputants, discriminatory social norms, and leaders' perceptions of group cohesion".<sup>76</sup> Women are often disadvantaged given their generally weaker power and lesser wealth than men. However, this lack of fixedness in customary law has also been used creatively by women to contest earlier interpretations of laws and find ways to articulate their rights within the flexibility of their unwritten nature.<sup>77</sup>

Where CIJ systems are recognized and legally sanctioned by the formal justice system, women should, in theory, have available a means of redress for unfair or discriminatory treatment by CIJ mechanisms – provided that the formal legal framework affords the appropriate legal protections. In practice, however, even in settings

where women do have the right of appeal to the formal justice system from CIJ systems, these are so rarely used that they are almost irrelevant.<sup>78</sup>

These issues of CIJ procedures and participation impact the outcomes that CIJ mechanisms deliver. Outcomes can include practices such as requiring a widow to marry her brother-in-law, or the use of a girl child as compensation for serious crimes such as rape and murder. These harmful practices clearly violate the rights of women, rather than protect them. And even where outcomes are in line with women's human rights, there are concerns about the ability of CIJ systems to enforce decisions.

The extent to which the challenges discussed in this section represent obstacles to women's access to justice will depend on the social and gender norms active within a given context. Where these are more restrictive, it is likely that CIJ systems will similarly reflect limited recognition of women's rights and equality. Where society is more permissive, CIJ systems are more likely to afford women greater protections as per the prevailing norms. Experiences will also vary among women, with some finding these challenges more or less of an obstacle than others.



## 4. GENDER-FOCUSED ENGAGEMENT ENTRY POINTS, MODALITIES AND GOOD PRACTICES FOR CUSTOMARY AND INFORMAL JUSTICE SYSTEMS

The relationship between women's rights and CIJ is complex. CIJ systems are widely used by women, as they routinely deal with common justice concerns that women face, yet women are confronted with a range of challenges in obtaining justice through CIJ systems. These challenges must remain in focus when considering how to expand and strengthen women's access to justice based on the growing range of models, lessons and approaches that can be utilized to identify opportunities for engagement, whether direct, indirect or strategic.<sup>79</sup>

It is important to recognize that CIJ systems encompass an "enormous range of practices, institutions and traditions", highlighting "the dangers

of deriving general conclusions from specific regional and historical contexts".<sup>80</sup> The appropriateness and manner of engagement must thus be rooted in context and characteristics of a particular CIJ system, identifying optimal entry points that respond to justice needs while protecting and promoting human rights.<sup>81</sup>

Importantly, all justice systems are reflective of the socio-political context in which they are situated.<sup>82</sup> Detailed below are a range of entry points and good practices for designing and implementing programs that engage with CIJ systems to promote justice for all. 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.<sup>83</sup> At times, this may mean non-engagement, or engagement through supplementary or indirect routes.

Identified entry points are clustered around five main engagement areas: (i) empowering women to achieve justice; (ii) adopting and implementing normative frameworks that benefit women and protect their rights; (iii) pursuing gender-sensitive reform of CIJ systems; (iv) building and expanding alliances and partnerships that support women's rights; and (v) strengthening research on women's experiences with CIJ systems. These are complemented by specific engagement modalities to ensure women's rights are central and indispensable.

### EMPOWER WOMEN TO ACHIEVE JUSTICE

Empowering women to achieve justice through CIJ systems requires enhancing women's knowledge of their rights and the law, addressing access challenges, facilitating women's mobilization within CIJ systems and providing support to navigate the range of justice mechanisms available. Customary legal empowerment "requires paying attention to issues of representation and participation of marginalized community members in [customary justice systems]... and their ability to make use of these systems to uphold their rights and obtain outcomes that are fair and equitable".<sup>84</sup>

#### Strengthen women's knowledge of the law and their rights

Knowledge about their rights and content of existing laws, both formal and customary, and the pathways to seek redress in instances of rights violations can assist women in making more informed choices about when to take legal action, and through which avenues. There are several ways in which this knowledge can provide assistance.

First, knowing the rights that women are entitled to under international human rights frameworks can help to build demand for improvements in women's position and solidarity with other women. Although optimal, this need not always be framed in the language of human rights, where this may be sensitive or trigger resistance. It is important to speak to the shared challenges women face within a particular context to help build the collective consciousness of women in ways that support contestation of dominant power relations.



Image: ©IDLO: IDLO facilitated community discussions on women's customary rights to land in Burundi in 2015

Second, women's knowledge of formal laws can also be important in CIJ settings. In contexts where customary laws are subsidiary to a country's formal laws, knowledge of the formal law can provide women with the legal tools to challenge local customary laws or norms where these contravene formal laws or international human rights.

Third, having good knowledge of local customary law, norms and practices is key to understanding how women's disputes and grievances are likely to be resolved within CIJ systems and whether these contravene either formal laws or women's human rights. Building

concrete knowledge of customary laws can be difficult given that they are frequently unwritten and not fixed, but adapt to particular circumstances.

One approach that has been identified to give greater clarity and consistency to CIJ proceedings is to introduce codifications of customary law. However, codification can also carry challenges and risks, including for women.<sup>85</sup> For instance, it can fix customary law, making it more rigid and less open to adaptation over time as attitudes shift, or as women navigate the intricacies of the application of customary law in ways

that enhance equality.<sup>86</sup> Any codification must therefore be approached cautiously, recognizing it may be unsuitable or not appropriate in all contexts.

Alternative ways of building knowledge and consistency of customary law can include facilitating regular dialogues with CIJ leaders or female elders on the content of customary law or recording and publicizing the decisions of CIJ proceedings, rather than the laws. These approaches can share knowledge about the content of customary law without fixing it in potentially unhelpful ways.

## Engagement modality: Strengthen women's knowledge of the law and their rights

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|-----------------------------|--|
| Entry points                | <ul style="list-style-type: none"> <li>» <b>Campaigns</b> that raise awareness or provide training for women.</li> <li>» <b>Dialogues</b> between women and CIJ actors on the content of customary law.</li> <li>» <b>Recording and publicizing decisions</b> from CIJ proceedings in print or other forms to assist women in knowing the content and application of the law.</li> </ul>   |
| Important considerations    | <ul style="list-style-type: none"> <li>» <b>Choose a familiar forum:</b> awareness-raising activities can be built into spaces that women already frequent in their daily lives. Where it may be difficult to target women specifically, broader outreach may be necessary to ensure that women access information.</li> <li>» <b>Consider the messenger and the medium:</b> a trusted community member, such as a woman leader from the same region or a popular local personality, may be most effective in informing women about their rights and the law. Similarly, consider whether print media, radio, television, billboards, mobile phone messages or other communication means are most likely to reach women and gain traction.</li> <li>» <b>Assess timeframes realistically:</b> knowledge is not a product that can be delivered in a singular training. Learning is a process that needs to be strengthened over time through discussion and reflection.</li> <li>» <b>Plan for broader engagement to achieve change:</b> knowledge is rarely sufficient on its own to achieve change. While it is necessary for women to know and assert their rights, realizing women's rights is constrained by other factors. Awareness raising is best paired with other engagement modalities to catalyze meaningful change.</li> </ul> |
| Examples and good practices | <ul style="list-style-type: none"> <li>» In South Africa, a legal empowerment program for women living with or affected by HIV sought to improve their knowledge and awareness of their rights and legal options (both formal and customary) regarding property and inheritance. It was assessed that where knowledge was improved, women more proactively pursued redress for violations of their rights when paired with greater access to legal aid.<sup>87</sup></li> <li>» In Myanmar, a media campaign overcame a difficult political environment for discussing rights.<sup>88</sup> The campaign was developed based on significant background research and invited people to talk about justice issues and solutions across both formal and CIJ systems. It utilized multiple platforms – community sensitization and role plays, a television drama, radio talk shows, billboards, social media, as well as a rock concert – and drew heavily on local celebrities to spread messages. Monitoring revealed the campaign reached 22 million people and that those exposed to the campaign were more likely to have higher levels of rights awareness than those who were not.<sup>89</sup></li> </ul>   |

## Amplify women’s voices and provide platforms for expression and action

The voices of women, especially women living with multiple forms of discrimination, are often sidelined. Spaces are needed to enable women to express their views and in turn for these views to influence broader discussions on access to justice. This may occur by bringing groups of women together to share experiences and develop advocacy messages and strategies. Alternatively, it may involve bringing women and CIJ leaders together to provide the opportunity for women to be heard.

In addition, connecting women so that they know about others who are seeking to challenge customary laws or discrimination can be important to



Image: ©IDLO: IDLO-supported Alternative Dispute Resolution Centers in Somalia hold local dialogues for women Center users and community representatives

build solidarity. This is particularly important in relation to CIJ systems because impacted women are more likely to be located in rural settings and disconnected from women’s

networks that are often urban-centric. Different platforms are therefore needed to amplify and connect all women’s voices.

### Engagement modality: Amplify women’s voices and provide platforms for expression and action

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|-----------------------------|--|
| Entry points                | <ul style="list-style-type: none"> <li>» <b>Providing safe spaces</b> for women to express their views on CIJ, in closed or public venues, as appropriate.</li> <li>» <b>Consulting and involving</b> diverse groups of women in developing and supporting engagement strategies, including through coalitions.</li> <li>» <b>Developing or strengthening inclusive platforms</b> that represent women’s diverse experiences.</li> <li>» <b>Building alliances</b> that connect women across communities with others seeking to use the law (formal or customary) to assert their rights, seek protection or contest customary laws.</li> </ul>  |
| Important considerations    | <ul style="list-style-type: none"> <li>» <b>Recognize women’s varied sources of power:</b> strategies for change should look at how women acquire or exercise power and ways to capitalize on these.<sup>90</sup></li> <li>» <b>Consider inequalities between women:</b> bringing women together can mask important differences such as intersectional discrimination. Consider how diverse women can best contribute their experiences in ways that give them voice without marginalization.</li> <li>» <b>Assess risk of backlash and harm:</b> amplifying the voices of women can risk exposure to backlash and harm. It is important to talk with local women about the best ways to avoid or manage this.</li> </ul>  |
| Examples and good practices | <ul style="list-style-type: none"> <li>» In Peru, Andean and Amazonian indigenous women came together to establish a national organization (ONAMIAP)<sup>91</sup> working for the full exercise of their individual rights as women and for their collective rights as indigenous peoples. Based on principles of respect and recognition of diversity, ONAMIAP implements actions aimed at strengthening grassroots organizations, raising awareness of their demands and influencing the public agenda in order to gain representative spaces at local, regional, national and international levels. ONAMIAP has participated in different national consultation processes and made proposals on laws and health policy.</li> <li>» At the global level, Musawah (meaning ‘equality’ in Arabic), a movement of Islamic women’s organizations advocating for equality and justice in the Muslim family, has endorsed a Framework for Action to encourage the re-interpretation of the Qur’an in response to the lived realities of Muslim women and their families.<sup>92</sup> The Framework for Action was developed in 2009 through a series of meetings with Islamic scholars, academics, activists and legal practitioners from 30 countries.<sup>93</sup> Musawah argues that aspects of current laws in Muslim societies are unjust, and breach both Islamic principles of justice and international human rights. The Framework for Action encourages Islamic interpretation to create space for change in Islamic laws and practices.<sup>94</sup></li> </ul> |



## Facilitate and build on the work of local women's organizations

Local and community-based women's organizations are often at the forefront of efforts to ensure the protection of women's rights through CIJ systems. Facilitating and building on the work of local women's organizations can bring a number of advantages.

Their knowledge of the local context enables programming that is more relevant to women and takes into account the realities of women's lives. Local women's organizations also have the benefit of local networks within a country – be they downwards to grassroots women's groups, or upwards to political elites. These advantages mean that support channeled through women's organizations is likely to be better



Image: ©IDLO\_Lorelei Taylor French: A lawyer from the Ugandan Association of Women Lawyers (FIDA), walks with a woman who is representing herself in a sharia court to win back her property

tailored to context and attuned to political and cultural currents and opportunities. Moreover, research shows that there is a correlation between the presence of a strong, autonomous local women's movement

and the presence of legislation criminalizing GBVAW.<sup>95</sup> Supporting local women's organizations can thus be catalytic in supporting broader changes beyond just facilitating the activities of a particular organization.

### Engagement modality: Facilitate and build on the work of local women's organizations

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|-----------------------------|---|
| Entry points                | <ul style="list-style-type: none"> <li>» <b>Providing support</b> such as funding or training to local women's organizations.</li> <li>» <b>Opening spaces</b> for women's organizations or groups to come together to share experiences, pool resources and brainstorm joint advocacy messages.</li> <li>» <b>Seeking the views</b> of diverse local women's organizations to ensure plans are not duplicative and benefit from the insights of existing women-led work in country.</li> </ul>   |
| Important considerations    | <ul style="list-style-type: none"> <li>» <b>Support local ownership:</b> ensure any support to women's organizations is demand-driven and meets their needs in locally appropriate ways.</li> <li>» <b>Acknowledge the diversity of women's experiences:</b> ensure that funds support women's organizations that are representative of women's diverse experiences and intersectional identities, so that elite views and privileges are not reinforced to the detriment of others.</li> <li>» <b>Consider the availability of core funding to strengthen organizational capacity:</b> support for core funding rather than programs or activities can drive reduced donor dependence and financial fragility. Consider ways of contributing to core costs of women's organizations, including through pooled donor resources.</li> <li>» <b>Assess the risk of undermining cooperation through funding modalities:</b> with limited donor resources, unhelpful competition can be sparked between local women's organizations, discouraging collaboration. Consider balancing distribution of resources across multiple women's organizations.</li> </ul> |
| Examples and good practices | <ul style="list-style-type: none"> <li>» In India, Women's Courts (Nari Adalats/Mahila Panch) were created in several states through a government program to develop women's collectives in villages.<sup>96</sup> These courts were also shaped by a long tradition of a local women's movement addressing violence against women. The parent program, called Mahila Samakhya, is a national-level rural women's empowerment program started by the Department of Education. The system of Nari Adalats/Mahila Panch emerged as informal courts intended to handle women's issues, overwhelmingly domestic violence, divorce and other family conflicts. Self-identifying as "for women, by women, and of women", these courts offer arbitration for cases of violence under the authority of a large group of trained women, who have established legitimacy in their community through decades of persistence. This example of a women-led customary justice process has been assessed as having the potential to "change broader cultures of gender and violence and perhaps even the legal culture itself".<sup>97</sup></li> </ul>                    |



Image: ©IDLO\_Lorelei Taylor French: An advocate at the Jinja Justice Centre in Uganda mediates a dispute between a married couple

### Support women to navigate justice mechanisms, formal and informal

When women experience a dispute or grievance, they may lack the appropriate social networks to navigate the available justice mechanisms and may need specific support and accompaniment to access justice. Support may be provided through paralegals, intermediaries, justice centers, women's advisors or

citizen's advice services. Programming can facilitate such services, if they already exist in the country, or play a role in their creation.

It is important that paralegals and citizen's advice services are connected to locally relevant women's organizations to help them fulfill their roles. Regardless of their institutional form, these services act as resources for women, providing them with confidential information on justice

options and what these entail, both pros and cons, and how to take forward a case. In some instances, paralegals or intermediaries may even go beyond providing assistance to navigate existing justice mechanisms and themselves offer mediation for minor disputes. The addition of paralegal or intermediary mediation can expand women's justice options, but can also provoke backlash from CIJ leaders who may see such cases as their domain.<sup>98</sup>

## Engagement modality: Support women to navigate justice mechanisms, formal and informal

|                             |  |
|-----------------------------|--|
| Entry points                | <ul style="list-style-type: none"> <li>» <b>Supporting existing services</b> such as paralegal, intermediary, citizen’s advice, women’s advice or justice center services to provide women with accurate information about their justice options.<sup>99</sup></li> <li>» <b>Training or mentoring paralegals</b> about women’s human rights, customary and formal laws, referral and appeal pathways, mediation skills and gendered experiences of justice.</li> <li>» <b>Facilitating interaction</b> between CIJ leaders and existing support services to build productive relationships.</li> <li>» <b>Supporting women’s leaders or organizations</b> to provide or facilitate justice assistance in their communities.</li> <li>» <b>Developing referral pathways</b> to help women navigate not only legal aspects, but also access support and related services for ensuring justice, especially for GBVAW matters.</li> <li>» <b>Supporting programs that engage women as active participants</b> in the justice process, rather than only as service recipients. Women should receive information about both CIJ and formal systems, so they may make informed choices and participate accordingly.</li> <li>» <b>Training women on self-representation</b> in CIJ systems or, if they are unable to self-represent, providing them with information on what good representation entails.</li> <li>» <b>Developing graphic guides</b> that depict women’s potential justice journeys.</li> </ul> |
| Important considerations    | <ul style="list-style-type: none"> <li>» <b>Consider impact on the wider justice sector:</b> efforts to create or strengthen specific justice actors must consider the impact on the broader justice system. Consultations with CIJ leaders and other justice actors are critical to foster complementary relationships.</li> <li>» <b>Assess risk of reproducing cultural biases and inequalities:</b> new or strengthened legal aid services, paralegals or justice centers may exhibit the same biases and inequalities that characterize wider society. To expand justice for women, it is important to challenge inequalities and handle cases with gender sensitivity.</li> <li>» <b>Adopt an intersectional gender lens:</b> in supporting women paralegals or advisors, consider ways to ensure representativeness and avoid elite capture.</li> <li>» <b>Determine jurisdictional and procedural standards:</b> in supporting advisory services it is necessary to establish clear protocols and procedural safeguards.</li> <li>» <b>Support accessibility:</b> consider how to ensure services are accessible from multiple standpoints – physical location, hours of operation, staffing, affordability, as well as cultural and social acceptability.</li> <li>» <b>Plan for sustainability:</b> continuity of service is an important consideration, particularly if services are to be free of charge.</li> </ul>   |
| Examples and good practices | <ul style="list-style-type: none"> <li>» In Balkh and Badakhshan provinces in Afghanistan, 22 Gender Focal Points were trained to support and advise women on their rights, formal and customary law, available support and appropriate referral pathways. Focal Points are locally respected women who receive basic legal training. This has been welcomed by the Ministry of Women’s Affairs as they are not able to provide support services country-wide. In addition, a legal information center was opened in the courtyard of the Blue Mosque in Mazar-e Sharif, Balkh Province. The center hands out leaflets to the community, providing information on rights and the law, including women’s property and inheritance rights.<sup>100</sup></li> <li>» In Afghanistan, the development of a paralegal manual and training program reportedly led to increased legal assistance and knowledge of women’s rights in rural areas.<sup>101</sup></li> <li>» In Port Moresby, Papua New Guinea, human rights defenders have been identified by the National Capital District GBV Secretariat and trained to be part of the referral pathway. Human rights defenders in Port Moresby work within local communities and alongside CIJ mechanisms such as village courts.<sup>102</sup></li> </ul>  |

## ADOPT AND IMPLEMENT NORMATIVE FRAMEWORKS THAT BENEFIT WOMEN AND PROTECT THEIR RIGHTS

Regardless of their chosen venue for redress, women should have supportive normative frameworks available. In the formal system, this means the Constitution, statutes and regulations, and in CIJ systems, this can mean customary and religious laws, norms and practices. These frameworks should protect women's rights and reinforce gender-responsiveness within all justice systems, but also be effectively implemented in practice.

### Address gaps in the legal protection of women's rights

Ensuring that laws do not discriminate on the basis of sex or gender is an essential step towards ensuring justice for women. Where there is an absence of legal provisions on specific areas of concern, efforts to address these gaps should be prioritized. Areas of concern may include domestic violence, marital rape, sexual harassment, land or property, and employment, or where women's rights are not adequately addressed or protected more broadly, such as in constitutions, bills of rights or human rights and anti-discrimination legislation.

Addressing discriminatory laws can have transformative impact. For instance, reform of discriminatory economic laws – including in the areas of employment and access to finance – can enable women to achieve greater financial inclusion and independence, improving their economic well-being, their decision-making power within the household and their status within the community. Similarly, reforming discriminatory land laws helps women attain land ownership and control that affords them greater food and financial security, also contributing to their independence and equality. The importance of formal legislation is

apparent also in relation to GBVAW. Systematic regression analysis for 84 countries suggests that, on average, the existence of legislation criminalizing domestic violence is associated with a 3.7 percent lower rate of physical intimate partner violence than countries without such legislation.<sup>103</sup>

While the formal legal framework may seem beyond the immediate purview of women and CIJ systems, it can be an important tool in pushing for change within these systems, and society more broadly. Statutory legal protections enable women to rely on them to claim their rights or contest harmful practices, including within CIJ systems. In some African countries, for example, formal and customary laws have been introduced to eliminate female genital mutilation for girls under 18 years of age, leading several customary and religious leaders to sign commitments to ban the practice in their communities.<sup>104</sup>

Changing the law is not a simple process and has taken different paths in different contexts. In many cases, enacting legislation that secures women's rights has been possible due to the involvement of women in the drafting process. This is notable in relation to land, for instance, where legislative changes in countries as diverse as Brazil, Cambodia and Uganda have all found women's participation – including through special measures, such as quotas – to be essential in arriving at legislation that addresses women's concerns.<sup>105</sup> By contrast, in Vanuatu, legislation securing temporary reserved seats for women in municipal councils was achieved through an elite process of negotiation with male politicians. The female political leader who spearheaded the process drew on diverse sources of power to lobby male politicians who would ultimately vote on the proposed legislative change.<sup>106</sup>



Image: ©creativefamily\_Adobe Stock



| Engagement modality: Address gaps in the legal protection of women's rights |  |
|---|--|
| Entry points  | <ul style="list-style-type: none"> <li>» <b>Conducting legal reviews and consultations</b> to identify discriminatory laws.</li> <li>» <b>Organizing media and other campaigns</b> to raise awareness of discriminatory laws.</li> <li>» <b>Supporting women's movements</b> and groups to lobby for legal change.</li> <li>» <b>Supporting advocacy campaigns</b> bringing together relevant stakeholders around issues of legal discrimination.</li> <li>» <b>Enlisting changemakers</b> such as women's caucuses, parliamentary groups or politicians (male and female).</li> <li>» <b>Organizing exchange visits</b> of national lawmakers to countries where discriminatory laws have been changed.</li> <li>» <b>Providing technical assistance</b> to support legal drafting, including drawing on or facilitating interpretations of locally relevant religious or customary texts that support women's rights.</li> </ul>                                       |
| Important considerations  | <ul style="list-style-type: none"> <li>» <b>Select change pathways strategically:</b> there is no single way to achieve legislative change and it is important to remain open to different strategies that may be most effective in different settings.</li> <li>» <b>Understand contextual relevance:</b> there is a long history of legal drafting support that is criticized for replicating best practice template laws. While sharing experiences is useful, laws need to be drafted with a deep awareness of what will be most effective in a given context, which requires valuing local voices as much as technical expertise.</li> <li>» <b>Embed legal reforms in broader strategies:</b> legal changes are important in setting clear standards and providing women with tools for claiming rights, but do not equate to enforcement or behavior change on their own. Additional efforts and entry points are required to ensure laws are applied.</li> </ul> |
| Examples and good practices   | <p>» In Kenya, the 2010 Constitution included wide-ranging recognition and protection of women's rights. The women's movement and feminist activists were among some of the most effective constituencies in contributing to the development of the new Constitution through a range of strategies in previous decades. These strategies included: continuously pushing for a participatory process; taking advantage of political openings; using personal and professional networks to lobby male politicians and other stakeholders; using legal knowledge strategically to engage lawmakers; localizing international human rights frameworks; and engaging across political parties through the women's parliamentary associations. These strategies were locally led but benefited from international funding, which in some instances was also sufficiently flexible for allocations in locally determined ways.<sup>107</sup></p>                                |

## Advocate for gender-responsive normative reforms

Comprehensive gender-responsive reforms are needed to ensure all normative frameworks, whether formal, customary or informal, benefit women, thus providing protection of their rights in all contexts. While national legislation sets an important standard, customary, informal or religious norms and laws can be more influential and popular at the local level as they respond to dominant understandings of what is right and wrong and how transgressions should be dealt with. Ensuring these normative frameworks also protect women's rights is thus key to sustainable change. This is especially important as CIJ actors may resolve matters on the basis of community norms, rather than in accordance with national laws, even where the latter may be legally required.

Where conflict arises between and among formal and customary and informal laws, those that benefit women the most should be supported. This may mean building on progressive interpretations of custom that are ahead of formal laws; or it may mean drawing on the legitimacy of formal laws to push for broader normative change or vice versa. However, imposing wholesale change is unlikely to work. Rather, gender-responsive reforms need to be supported in a manner that retains some degree of complementarity with community norms, while also creating space for contestation of those norms by women.

Changing gender norms is a long-term, iterative process that is rarely linear and is likely to attract resistance as existing power relations are challenged.<sup>108</sup> While legal change focuses on reforming laws, normative change requires changing mindsets. Gender norms are often difficult to pinpoint, particularly by those who hold them (including women) because they are so embedded as to seem to be the natural state of things. The first challenge, therefore, is getting people to identify gender norms that shape their behavior. Once gender norms are out in the open, they can be sensitively discussed and problematized.

Challenging gender norms, particularly in customary settings, can involve a range of strategies and "is likely to be associated with various factors, including women's education, breaking the isolation of communities, and encouraging participation in ways that represent a natural development rather than an abrupt intrusion".<sup>109</sup> Platforms and space can be created for the many women and girls who already challenge gender norms in subtle but important ways by working in traditionally 'male' employment, playing leadership roles in the community, or staying in school. These examples can be drawn upon or profiled, with due consideration to potential backlash in highlighting non-traditional behavior. For instance, increasing the visibility of women judges, police officers and women in other leadership positions can provide female role models and help to dislodge inequitable gender stereotypes. These female justice actors can be supported to engage with CIJ actors

specifically to discuss gender-sensitive approaches to CIJ.

Alternatively, gender norms can be sensitively challenged by drawing on locally resonant articulations of women's rights. This can help to ensure that women's rights are not presented as a foreign imposition, but as identified by local women themselves in ways relevant to their own experience. Indeed, it may not be useful to speak of human rights at all, if that language is sensitive and likely to trigger resistance.<sup>110</sup>

Alternative approaches include articulating women's rights through customary laws or religious texts. For example, the engagement of the local women's organization *Nisa Ul Haqq Fi Bangsamoro* with religious leaders in the Autonomous Region of Muslim Mindanao in the Philippines has led to the development of 15 *khutbas* (Friday sermons) on women's rights by the religious leaders.<sup>111</sup> They are now used as a guide to other religious and community leaders in legitimizing and explaining gender equality. The *khutbas* cover, for instance, early and arranged marriage, violence against women and Islamic inheritance. The *khutbas* have been published and translated into different languages to spread throughout Mindanao and have received important backing from senior Islamic clerics – although, of course, challenges remain in getting all religious leaders to agree with the more progressive interpretations.<sup>112</sup>

Support for changing gender norms conventionally has worked with women and girls. While clearly important, it is increasingly recognized that changing patriarchal attitudes that underlie women's inequality requires working also with

men and boys.<sup>113</sup> Where CIJ leaders are respected, they can play a leading role in supporting men's engagement on issues of women's empowerment, or act as champions or role models. CIJ actors may also be supported to conduct community outreach and

awareness raising about issues such as child marriage or harmful traditional practices. CIJ leaders can thus play a role in changing wider social norms, including but not limited to their role in resolving disputes.

### Engagement modality: Advocate for gender-responsive normative reforms

|                             |  |
|-----------------------------|--|
| Entry points                | <ul style="list-style-type: none"> <li>» <b>Assessing interaction between customary and formal laws</b> and their impact on and protection afforded to women's rights.</li> <li>» <b>Facilitating or drawing on interpretation</b> of locally relevant religious or customary texts that support women's rights.</li> <li>» <b>Identifying pervasive gender norms</b> among communities and CIJ actors to dialogue and problematize norms.</li> <li>» <b>Supporting norm-challenging initiatives</b> that confront traditional gender norms and can include credit and employment opportunities for women; staying in school and delaying initiation for girls; and non-traditional skills training.</li> <li>» <b>Promoting female role models</b> from among individual women and girls who are already challenging gender norms.</li> <li>» <b>Engaging community leaders</b> including men and boys to address patriarchal social norms.</li> </ul>  |
| Important considerations    | <ul style="list-style-type: none"> <li>» <b>Utilize non-judgmental dialogue:</b> challenging normative frameworks is sensitive work that engages with deeply held individual and societal beliefs. Dialogues identifying and problematizing gender norms should be conducted non-judgmentally to avoid defensiveness.</li> <li>» <b>Engage local norm entrepreneurs:</b><sup>114</sup> a facilitator who is locally respected and not perceived as imposing foreign ideas is less likely to provoke a defensive response within communities.</li> <li>» <b>Take care with unintended consequences:</b> skills training and other activities such as micro-credit can unhelpfully reinforce gender stereotypes where these replicate ideas of women being suited to a limited range of 'feminine' economic opportunities.</li> <li>» <b>Be open to diverse articulations of women's rights:</b> women's rights can be protected through different norms and language that need not adhere strictly to the language of international human rights, as long as the intent is consistent.</li> </ul>   |
| Examples and good practices | <ul style="list-style-type: none"> <li>» Across South Asia, the We Can campaign works to promote social norm change among men and women, including community leaders. The focus is first on understanding and changing personal attitudes and beliefs about gender, then expanding these to the wider community. The campaign is implemented by diverse alliances throughout South Asia to ensure local ownership and context relevance.<sup>115</sup></li> <li>» In Uganda, Raising Voices' SASA! emerged as a model to reduce intimate partner violence and HIV prevalence among women in target communities by changing gender norms. The SASA! model takes an ecological approach to violence and engages with the wide range of actors that have influence, including police, traditional leaders, health workers and community members. The program resulted in lower rates of intimate partner violence for trial communities as compared to control communities.<sup>116</sup></li> <li>» In Sierra Leone, FINE Salone works through Muslim and Christian leaders in communities to run 'husband schools' that change gender norms by teaching men about the importance of respecting their wives and children, anger management, women's health, laws and norms around GBVAW, and keeping girls in school.<sup>117</sup></li> <li>» In the Highlands of Papua New Guinea, local community-based rights organizations such as Kafe Women's Association (KUSWA) have worked extensively to address gender-based violence. Their approach is inclusive and bottom-up, involving awareness and capacity building for both CIJ actors such as Village Courts and peace mediators as well as police. A Communicating the Law Toolkit is utilized, which was developed participatorily with partners.<sup>118</sup></li> </ul> |

## Address challenges that arise in implementation

Even where legal frameworks do not explicitly discriminate, practices that routinely flout the law mean that women struggle to assert their rights and achieve equality. Changing laws is by no means a sure path to their enforcement. The abolition of the practice of dowry payments from a wife’s family to her future husband’s family in Bangladesh, for instance, has been illegal since 1980 and yet continues to be common practice.<sup>119</sup>

There is therefore a need to address challenges that arise in implementation.

This can include a range of entry points, focused first on addressing knowledge and understanding of new laws, particularly amongst CIJ actors. Given the role CIJ mechanisms play in administering justice at the community level, providing CIJ actors with guidance or training on how to implement new and existing laws in ways that uphold women’s rights is important in ensuring laws are meaningfully applied.

Effective implementation of laws also means supporting the systems and infrastructure necessary to realize their intent. For instance, the impact of criminalizing GBVAW is likely to be limited if the systems for reporting, investigating

and prosecuting GBVAW cases are not adequately supported. This challenge was apparent in Sierra Leone, for instance, where the 2012 Sexual Offences Act relies heavily on women reporting GBVAW through Family Support Units, the dedicated police stations for crimes involving women and children. But in 2015, the annual budget was a mere US\$500 per quarter to support the 68 Family Support Units across the country.<sup>120</sup> Without adequately funded systems in place to support implementation, laws are unlikely to be enforced. This can, in turn, lead to disillusionment among those the laws were intended to protect and undermine the rule of law.

### Engagement modality: Address challenges that arise in implementation

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| Entry points                | <ul style="list-style-type: none"> <li>» <b>Awareness-raising campaigns and community dialogues</b> of sufficient intensity and duration to extend knowledge of new or existing laws.</li> <li>» <b>Training</b> CIJ leaders and other justice sector actors on how to implement new or existing laws to ensure they are meaningfully applied.</li> <li>» <b>Developing simplified guides</b> on new laws to assist justice sector actors, including CIJ leaders.</li> <li>» <b>Enhancing systems</b> by having in place and adequately supporting infrastructure and secondary laws necessary to enforce new and existing laws.</li> </ul>   |
| Important considerations    | <ul style="list-style-type: none"> <li>» <b>Simplify legal terminology:</b> awareness-raising campaigns should use simple and locally relevant language to communicate the content of new or existing laws. Stories and examples may be particularly useful to demonstrate the intention of the law to a lay audience.</li> <li>» <b>Understand and strategize around sticking points:</b> develop an understanding of the key sticking points in new laws that may pose challenges for implementation, developing context-relevant strategies to address these.</li> <li>» <b>Identify long-term commitment:</b> the systems and infrastructure required to meaningfully implement new laws can be expensive and may not attract sufficient public funding. Identify long-term commitments to fill such gaps, including from development partners or donors, while encouraging government scale-up.</li> <li>» <b>Work across the justice chain:</b> recognize that supporting implementation may require working across the justice chain– from police to justice mechanisms to support services and corrections.</li> </ul>  |
| Examples and good practices | <ul style="list-style-type: none"> <li>» In Indonesia, the lack of legal identity documents – including birth, marriage and divorce certificates – means that women face a range of family law problems which can include child marriage, an inability to claim child custody and maintenance upon divorce and difficulty leaving violent relationships. It has been estimated that 32 million of Indonesia’s 85 million children do not have a birth certificate. To address this problem, local women’s organizations and a 16-year court-to-court partnership between the religious courts of Indonesia and the Family Court of Australia have sought to improve the accessibility of the religious courts to women. This has included setting up free legal advisory services, waiver of court fees for the poor, introduction of circuit courts and the establishment of an integrated mobile service for issuing registration documents. These efforts have improved the implementation of laws to ensure they are meaningful for women. Data collected by the religious courts shows significant improvements in women’s access to the courts, with marriage legalization cases the fastest growing category of case, increasing six-fold between 2007 and 2017; and the number of women court users more than doubling from 124,000 in 2007 to 288,000 in 2016. This support to implementation has been enabled by an ongoing exchange of ideas between the religious courts, the Australian Family Court, and respected Indonesian women’s CSOs. It has also been made possible by Indonesian court leadership, including substantial increases in the budget for the religious courts, as well as modest but flexible donor support from the Australian Aid Program.<sup>121</sup></li> </ul> |



## PURSUE GENDER-SENSITIVE REFORMS OF CUSTOMARY AND INFORMAL JUSTICE SYSTEMS

Improving women's access to justice means enhancing the capacity of CIJ systems to respond to women's justice needs. This may be by strengthening gender-sensitive approaches, increasing women's representation and participation in decision making, improving accountability and oversight or by challenging harmful practices. These reforms can be delicate, as they are fundamentally about changing the way that justice is understood and delivered. This type of change cannot be achieved through external top-down reforms, but must be approached sensitively, working through local advocates of change and incremental improvements over time, rather than immediate wholesale reform.

### Improve gender sensitivity and responsiveness of CIJ actors

Building gender awareness and sensitivity of CIJ actors enables them not only to understand women's justice needs better, but also to address these needs and related challenges more effectively. Providing capacity-building activities including peer learning, coaching and mentoring on good practices can provide committed CIJ actors with concrete steps to protect women's rights. Furthermore, when CIJ actors are gender-sensitive, they are better able to apply or contribute to good practice or prevent practices that undermine women's rights.

However, gender sensitivity activities for CIJ leaders may trigger resistance. Programs need to plan for how this will be dealt with, including introducing

sensitive information incrementally and in combination with less controversial materials. For instance, gender awareness might be built into a wider training curriculum focused on skills development, which might be more valued by CIJ leaders themselves. This can help to build greater interest in training or capacity-building material and respond to a perceived need on the part of CIJ leaders.

Where the formal justice system provides gender-sensitive protections and procedural standards such as in camera sessions and confidentiality guarantees that CIJ mechanisms do not, there can be a benefit to demonstrating the experience of gender-sensitive formal courts for the CIJ system. Where openness to

such exchange exists, there can be informal visits, exchanges of personnel, a memorandum of understanding to facilitate cross-system learning or even oversight and accountability of CIJ forums by the formal justice system.

Bringing well-respected or connected women's rights champions, such as women community leaders, women government officials from within the women's ministry or state gender operations, or even female magistrates and judges from the formal justice system, to meet or advise CIJ leaders can help advance women's rights. However, these types of reforms should only be pursued where locally appropriate and unlikely to trigger backlash against women.



Image: ©Flickr\_Elisa Finocchiaro

| Engagement modality: Improve gender sensitivity and responsiveness of CIJ actors |   |
|--|---|
| Entry points   | <ul style="list-style-type: none"> <li>» <b>Collaborating</b> with local women’s organizations and leaders to understand existing efforts and issues of concern.</li> <li>» <b>Community dialogues</b> on women’s rights and access to justice for women between CIJ leaders, women and other community members.</li> <li>» <b>Training or building capacity of CIJ leaders</b> in women’s rights and gender-sensitive approaches to justice or in wider justice skills, such as gender-responsive decision making, mediation, evidence assessment and record-keeping.</li> <li>» <b>Producing simplified statutory codes or guides</b> on relevant formal laws on the rights of women.</li> <li>» <b>Exchange visits</b> between gender-responsive formal courts and CIJ forums to build mutual understanding and facilitate cross-system learning on how to be more gender-sensitive. Include visits by women champions, community leaders, magistrates or judges to CIJ forums.</li> </ul>   |
| Important considerations   | <ul style="list-style-type: none"> <li>» <b>Understand relevance of formal justice:</b> entry points that focus on exchange between CIJ and formal actors assume learning can be passed from the formal justice system to CIJ systems. This is relevant where the formal justice system provides better protections for women’s rights. It is not likely to be useful in contexts where there is low state legitimacy, or where formal justice systems are culpable of poor treatment of women.</li> <li>» <b>Engage in mutual learning:</b> it is important to underline the potential learning for the formal justice system from CIJ mechanisms, even where formal justice actors may be skeptical about the benefits of such mutual learning.</li> <li>» <b>Use available entry points strategically:</b> CIJ leaders may be uninterested in programming on gender sensitivity but eager for other forms of support. Such entry points can be strategically used to build relationships and open the door to including gender in indirect ways.</li> <li>» <b>Consider risks of reinforcing state control over CIJ:</b> bringing together CIJ leaders and formal justice actors may strengthen the state’s power or control in potentially rights-abrogating ways.</li> </ul>   |
| Examples and good practices  | <p>» In Zimbabwe, a Violence against Women and Girls and GBV project that sought to strengthen community gender-based violence service delivery also achieved improvements in the gender sensitivity of CIJ actors. While it involved a range of interventions, a key component was strategic involvement of traditional leaders in initiatives geared towards improving their knowledge of women’s and children’s rights, and their role in and approach to dealing with GBV cases in their communities. The Traditional Leaders Act governs the role, responsibilities and jurisdiction of traditional leaders in Zimbabwe. This includes an obligation to ensure children are protected from harmful traditional practices and to refer criminal cases, including sexual violence, to the formal justice system. Nevertheless, justice seekers approach and utilize the traditional courts for GBV issues and child marriage despite laws prohibiting the practice. Recognizing this reality, traditional leaders were supported and empowered with knowledge and skills related to women’s rights, child protection, knowledge of national laws and traditional court procedures and jurisdiction. Traditional leaders were supported to reform harmful traditional practices by designing specific action plans for their communities and acting as ambassadors for the project. They also organized community dialogues in collaboration with project volunteers. The active engagement and participation of traditional leaders was identified as instrumental to the success of the project’s initiatives and has assisted in going some way to shifting community norms.<sup>122</sup></p> |

## Engagement modality: Improve gender sensitivity and responsiveness of CIJ actors

### Examples and good practices

- » In Kenya, a project to enhance customary justice systems in the Mau Forest was able to achieve improvements in the gender sensitivity of local dispute resolution mechanisms after one year of pilot implementation.<sup>123</sup> Improvements included: (i) a new election process for the Council of Elders, resulting in women being elected as members of the Council;<sup>124</sup> (ii) agreement that all rape cases be referred to the police rather than continuing the prior practice of apologizing to the survivor's family; (iii) requirement of spousal consent for land transactions by elders and chiefs before approving the sale or lease of land, rather than the prior practice of husbands selling family land without consulting their wives; and (iv) women being able to seek justice from the elders independently, without requiring a male relative to represent them. The one-year pilot was implemented in a community in Narok County, in Kenya's Rift Valley, and comprised a wide range of interventions including: legal literacy training delivered to chiefs, elders, women and youth; skills training and mentoring, including public speaking for women to advocate for themselves; facilitated community dialogues on constitutional changes and peer training on constitutional rights; and public information and educational activities. The project responded to a particular opportunity that opened with the adoption of the 2010 Constitution in Kenya, which guaranteed equal rights for women and men, and also recognized the role of traditional justice actors in resolving disputes, to the extent that they complied with constitutional principles.<sup>125</sup> Cognizant of the reality that most Kenyan women live in rural areas governed by CIJ systems, the project ultimately aimed to ensure that the promises of the rights and freedoms enshrined in the Constitution resulted in tangible changes for them.<sup>126</sup>

## Strengthen representation and participation of women in CIJ decision making

Increasing the effective representation and participation (both in quantity and quality) of women in CIJ systems is a matter of right. Women have the right to participate in the political and public life of their country, from the lowest to the highest levels.<sup>127</sup> Furthermore, women's representation in CIJ systems also contributes to the realization of the rights of women in customary settings and in turn, improves the quality of justice outcomes overall.

While it is commonly assumed that if there are more women adjudicating CIJ cases, there will be better justice outcomes for women, this is not always straightforward.<sup>128</sup> There is, however, evidence that greater diversity and representation can improve service

delivery for women and marginalized groups and that female customary leaders can play a productive role in advancing women's rights.

Female customary leaders have the benefit of combining high levels of citizen trust in traditional authorities with their perceived competence on gender issues. In Malawi, for example, an Afrobarometer survey showed that while 47 per cent of men and 53 per cent of women trusted parliament, 66 per cent of men and 73 per cent of women trusted 'traditional leaders'.<sup>129</sup> Recognizing this, the impact of different messengers delivering messages to reduce child marriage in communities was tested. Male and female parliamentarians and customary leaders were all sampled, with the female customary leaders' message being the most effective in changing mindsets, followed by female parliamentarians,

male parliamentarians and male traditional authorities.<sup>130</sup>

Women's rights advocates often see CIJ systems as entirely male-dominated, but in some countries female customary leaders are almost as common as female elected representatives.<sup>131</sup> Also in Malawi, for instance, 10 per cent of customary leaders are women.<sup>132</sup> Seeing more women involved in CIJ is likely to help demonstrate that CIJ is indeed an appropriate forum for women and thus encourage more women to seek justice through these systems. As more women are routinely included in CIJ systems, it is also likely that these systems will better cater to the needs and interests of women, with stronger downward accountability.<sup>133</sup> Moreover, there is a broader importance of women taking on a range of leadership roles in society that contribute to challenging gender stereotypes and inequitable power relations over time.<sup>134</sup>

However, there is a danger in essentializing women and assuming that more women in decision-making roles will automatically lead to better outcomes for women overall. Women are a diverse group who hold a wide range of views and commitments. Elite women may replicate discriminatory views of poor women; women from particular ethnic or religious groups may discriminate against other groups; heterosexual women may hold discriminatory views of women who identify as lesbian, gay, bisexual, transsexual or intersex; and so on.<sup>135</sup> Moreover, CIJ operates on the basis of community legitimacy, so installing CIJ leaders who are not viewed as legitimate authorities within their communities may erode confidence in CIJ systems. In such situations, women who do become CIJ leaders may be limited in terms of how progressive they are able to be.<sup>136</sup> Finding the balance between retaining the basis of

legitimacy while also pushing boundaries is thus a challenge.

A strong case can be made for including more women on CIJ decision-making bodies. However, it is important not to instrumentalize women's participation as a means to achieve other outcomes. Public participation, including at the community level, is a right and ensuring that women can claim customary spaces of decision making is part of achieving justice in CIJ.

For these reasons, women's participation in CIJ can also extend beyond decision makers or adjudicators, with gender experts and women's organizations also acting as advisors or experts on gender quality and women's empowerment to CIJ mechanisms. This might be a better approach where it is not politically possible to include women as CIJ leaders themselves. For instance, women might be included as

paralegals who advise CIJ mechanisms on the content of formal laws, or a women's advisory role may be possible in relation to cases involving women. The intention in such cases is to demonstrate women's ability to fill these positions, as role models to other women and examples to men; as well as to integrate a gender perspective in CIJ procedures that can better account for women's needs and interests. This could build on existing CIJ practices, such as in Mali, where male CIJ leaders note that they often take decisions overnight on cases involving women, so as to consult with their wives for a woman's perspective.<sup>137</sup> Alternatively, a more limited approach might be to facilitate women's regular attendance at CIJ proceedings. This can make women more visible and, over time, a more common feature of CIJ proceedings, as well as to help build women's understanding of CIJ proceedings and customary law.



Image: ©IDLO: IDLO conducted a capacity development training course for Kyrgyzstan's Aksakal courts (Elders courts)



## Engagement modality: Strengthen representation of women in CIJ decision making

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| Entry points                | <ul style="list-style-type: none"> <li>» <b>Working with local women’s organizations</b> to identify the best opportunities for improving women’s representation in CIJ decision making.</li> <li>» <b>Facilitating open debate</b> at the community level on issues of women’s participation to build understanding.</li> <li>» <b>Sensitizing CIJ actors</b> to the inclusion of women in CIJ decision making.</li> <li>» <b>Exploring establishment of quotas</b> or reserved seats for women in CIJ decision-making forums.</li> <li>» <b>Including female paralegals or women’s advisors</b> in all CIJ cases involving women.</li> <li>» <b>Supporting an empowering environment</b> for women representatives in CIJ systems.</li> </ul>  |
| Important considerations    | <ul style="list-style-type: none"> <li>» <b>Plan for dealing with resistance:</b> consider how resistance of existing CIJ authorities, who may be unwilling to give up their power, will be dealt with.</li> <li>» <b>Do no harm:</b> consider the potential risk to women who (seek to) attend or participate in CIJ proceedings as well as women CIJ decision makers themselves.</li> <li>» <b>Support women leaders to succeed:</b> new women CIJ leaders may require training or other support to enable them to fulfill their roles appropriately and be taken seriously in the community.</li> <li>» <b>Combine activities and entry points:</b> to enable change, efforts need to be multi-directional, targeting CIJ leadership as well as challenging inequitable power relations and gender norms.</li> </ul>  |
| Examples and good practices | <ul style="list-style-type: none"> <li>» In northern Namibia, the Uukwambi Traditional Authority has undertaken efforts to improve women’s participation in CIJ and increase the number of female traditional leaders, led by a progressive chief, Herman lipumbu. This has resulted in positive changes. For example, new female traditional leaders have been well accepted by their communities; traditional court meetings now include more women who actively participate; the majority of court users are satisfied with the performance of the court and feel that men and women are treated equally; and a new norm prohibiting relatives laying claim to a widow’s property on the death of her husband is widely known and the practice has declined. Women’s improved participation has thus been key to improvements in access to justice for women. These changes have occurred gradually, indicating that meaningfully improving women’s participation in CIJ is a long-term process. The changes were also locally led, with strong leadership from traditional leaders themselves.<sup>138</sup></li> <li>» In the Swat Valley in northwest Pakistan, the country’s first all-female customary dispute resolution assembly (<i>jirga</i>)<sup>139</sup> was set up in 2013.<sup>140</sup> The <i>jirgas</i> are traditionally all male, with no women involved in decisions or present at proceedings. In this conservative region, the justice that the <i>jirgas</i> dispense frequently fails to protect women’s rights. Women are routinely forced into underage marriages, abused and even murdered by their husbands and their families, victims of acid attacks and honor crimes, and often used as a form of compensation for other crimes (a practice known as <i>swara</i>).<sup>141</sup> The first all-female <i>jirga</i> was born out of women’s dissatisfaction with the poor quality of justice they were able to access through either the (male) <i>jirgas</i> or Pakistan’s formal justice system. Made up of 25 local women, the <i>jirga</i> is known as Khwaindo Tolana, meaning “sister’s group”.<sup>142</sup> The all-female <i>jirga</i> has involved approximately 1,000 women across the Swat Valley through participation in its dispute resolution and outreach activities. It has also successfully stopped several cases of <i>swara</i> and violence against women perpetrated by husbands and their families.<sup>143</sup> The all-female <i>jirga</i> is an example of how empowering women to play a stronger role in CIJ decision making can be transformative in even the direst of situations, albeit at a small scale and not without resistance. The collective strength of the women’s <i>jirga</i> is key to this.<sup>144</sup> Now, if a woman wants to pursue justice for a crime against her in the Swat Valley, she has the backing of a growing women’s network around her, including some very senior, respected local women. This means that her case is less likely to be thrown out by the formal courts than if she went as a sole woman. In this way, the all-female <i>jirga</i> is using CIJ processes to expand and improve women’s access to rights protection and justice.</li> </ul> |

## Locate and eliminate processes, procedures and practices that restrict or nullify women's human rights

In some instances, CIJ systems condone or enforce practices, processes and procedures that are discriminatory and harmful to women and girls. Often, the procedures used within CIJ mechanisms have weak or arbitrary standards of evidence that discriminate against women, for instance by not allowing women to speak in proceedings, valuing their evidence less than men's or taking into account irrelevant circumstances such as what a woman was wearing, what time and where an incident occurred.<sup>145</sup>

In addition to such procedural discrimination, the outcomes that CIJ mechanisms deliver can also be harmful to women.<sup>146</sup> Examples of such harmful outcomes include CIJ authorities sanctioning child marriage, honor killings (frequently due to accusations of adultery), widow inheritance (the practice of marrying a widow to her brother-in-law on the death of her husband) or using women and girls as a form of compensation for serious crimes such as murder. These practices clearly contravene the rights of women and represent significant obstacles to efforts to expand justice for women through CIJ. There is therefore a need to take stock and review existing practices, with a view to eliminating those that are discriminatory and harmful.

Supporting review and elimination of discriminatory CIJ processes,

procedures and practices can be helpful in providing better access to justice for women. This should be achieved in dialogues and consultation especially with women about their experience of exclusion and discrimination.

Addressing discriminatory CIJ procedures is a critical part of access to justice. It can improve the treatment women receive under these mechanisms and sometimes has the benefit of not directly confronting the outcomes CIJ mechanisms deliver, where a more direct approach is not advisable. This can be a softer entry point, before broaching more sensitive reforms. For instance, strengthening the procedural standards used within CIJ proceedings can be framed as helping deliver greater professionalism and consistency of decisions. This might involve guidance or rules on how evidence is handled, reasoning undertaken, testimony given, the law applied and sentencing guidelines. Such support might be delivered through training or mentoring CIJ actors or providing guidance to them. It may also be paired with reviews of CIJ procedures, for instance by women's groups recording or monitoring cases in CIJ forums and then discussing with CIJ actors ways to improve procedural fairness.

There is also growing work around reviewing processes, including processes to elicit more female representation in CIJ mechanisms. In Malawi, for example, a female senior chief has actively lobbied ruling houses (from which chiefs are drawn)

to increasingly nominate women. This led to 55 female chiefs being appointed during her term of chieftaincy.<sup>147</sup> The same chief set up a monitoring process at the community level, involving a 'Mother's Group,' to support investigation when needed.<sup>148</sup>

Confronting harmful practices and outcomes used in CIJ mechanisms can be more challenging, as these are often deeply tied to local norms about appropriate ways of dealing with disputes and transgressions. It is important to consider whether outright objection of harmful practices is the most strategic way to achieve change, or whether more covert approaches are likely to gain greater traction. The most effective means will vary by time and place. It should be noted though that while strategies such as using statutory law or even customary laws to ban practices make an important statement and set an expected standard, they can also push harmful practices underground. Alternative strategies should always be considered to ensure compliance with women's rights in practice.

Whatever approach is adopted, it is important to develop entry points in close consultation with the women and girls who are affected by rights-abrogating practices so that their needs and priorities are at the center and their safety assured. This is key to ensuring that well-intentioned support does not have unintended negative consequences and expose women and girls to further harm.

## Engagement modality: Locate and eliminate processes, practices and procedures that restrict or nullify women's human rights

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| Entry points                | <ul style="list-style-type: none"> <li>» <b>Supporting local women's organizations</b> to document discriminatory and harmful practices, their impact and processes of contestation to end them.</li> <li>» <b>Community dialogues</b> bringing together CIJ leaders, women and community members to highlight discriminatory processes, practices and procedures, with a view to eliminating them.</li> <li>» <b>Protocols or guides for good practice</b> on handling gender-based crimes, grievances or disputes (such as GBVAW) and other procedural standards.</li> <li>» <b>Exchange visits by CIJ authorities and women leaders</b> from one community to another to learn about how discriminatory processes and practices can be ended.</li> <li>» <b>Identifying and supporting progressive CIJ leaders</b> to push for improved treatment of women and girls.</li> <li>» <b>Training</b> for CIJ leaders on the value of procedural matters.</li> </ul>   |
| Important considerations    | <ul style="list-style-type: none"> <li>» <b>Consider unintended consequences:</b> banning rights-abrogating practices outright can drive them underground and lead to even fewer protections for women.</li> <li>» <b>Identify and incentivize 'spoilers':</b> think about who may lose out from ending harmful practices and how to incentivize them to change.</li> <li>» <b>Ensure relevance of learning:</b> exchange visits can be helpful when they bring together participants who share enough in common to view each other's contexts as legitimate sites of learning. Where the community visited is too different, relevance of learning is likely to be lower.</li> </ul>  |
| Examples and good practices | <ul style="list-style-type: none"> <li>» In South Sudan, exchanges were supported between chiefs who preside over the customary courts in Torit County, where human compensation of women and girls continued to be used for some serious crimes, and those in other South Sudanese communities where the practice had ended. The exchanges enabled the chiefs from Torit to see that relying on alternatives (such as money or livestock) retained the important principle of compensation within customary law. The chiefs have since reportedly abandoned the practice in Torit.<sup>149</sup></li> <li>» In Afghanistan, the Liaison Office provides the opportunity for CIJ leaders who have completed their human rights training to draft and sign pledges outlining the standards that they will apply when issuing rulings. While the pledges are not legally binding, some elders have framed and displayed them in the venues where <i>jirgas</i> take place.<sup>150</sup></li> <li>» In the central region of Malawi, one female chief is showing the value of supporting female traditional authorities who are working towards change. Senior chief Theresa Kachindamoto, a Ngoni traditional leader in Dedza district, came to power through a ruling family in 2003 and made ending child marriage a priority. In a context in which child marriage is pervasive – with half of Malawi's girls married before the age of 18<sup>151</sup> – Chief Kachindamoto took decisive steps to end the practice in the communities she governs. These included banning child marriages, ordering sub-chiefs to annul existing child marriages and requiring them to sign a declaration not to authorize any further such marriages. Four sub-chiefs who refused were dismissed.<sup>152</sup> To monitor enforcement of her ban on child marriage, Chief Kachindamoto set up 'Mother's Groups' at the community level that monitor girls within their communities and report those not in school so that traditional authorities can investigate.<sup>153</sup> In 2015, Malawi introduced the Marriage, Divorce, and Family Relations Act (The Marriage Act), banning child marriage. In 2017, a constitutional amendment raised the legal age of marriage to 18 for both sexes. Now, Chief Kachindamoto draws support for her efforts from these formal laws and requires her sub-chiefs to enforce national law. In her 16 years in power thus far, Chief Kachindamoto has reportedly annulled more than 2,500 child marriages, encouraging the girls to return to school and connecting them with sponsors to enable this so they are not left without opportunities.<sup>154</sup> She is also supporting women's small business development to provide alternative opportunities to girls who might otherwise be married. While she has faced significant resistance and even received death threats from male chiefs and community members, Chief Kachindamoto is actively encouraging the appointment of more female chiefs in Malawi to help push for change and achieve better gender outcomes. She has lobbied ruling houses to increasingly nominate women, with 55 female chiefs appointed during her term of chieftaincy.<sup>155</sup></li> </ul> |

## Strengthen gender-sensitive accountability and oversight mechanisms

Accountability and oversight mechanisms for CIJ systems should specifically monitor how women's rights are protected or hindered. They should ensure that continuous feedback from women and women's organizations is taken into consideration for improving these systems. Oversight and accountability frequently span appeals processes, independent oversight, complaints mechanisms and monitoring of dispute resolution. Importantly, the mechanisms cover both substantive and procedural aspects of dispute resolution to ensure that both the outcomes and law applied, as well as the process involved in the resolution, are rights compliant.

Lines of accountability can be pursued either upwards to higher justice authorities (such as the formal justice system) or downwards to women users of CIJ.<sup>156</sup> Both can play an important role but require different forms of engagement. Upwards accountability may involve connecting CIJ mechanisms with formal justice sector actors through a review or appeals process, such as registration of cases from CIJ forums with the formal justice system or local government, which are then accessible should appeal or review be pursued.

Alternatively, even if formal appeals from CIJ mechanisms to the formal justice system are not possible, ombuds or human rights/anti-corruption bodies at the national level may provide oversight and receive complaints or intervene where they have concerns. Any such connections need to be meaningful in practice for enhancing access to justice, rather than merely pursued for structure. Also, too often, the possibility of appeals from CIJ mechanisms exists in theory, but is virtually never used.<sup>157</sup> Fostering connections between CIJ mechanisms and the formal justice system can assist in holding the former to account for the treatment of women, thus ensuring the state does not relinquish its responsibilities to provide all citizens with justice and rights protection.

However, potential impacts and unintended consequences of connecting CIJ mechanisms with the state must also be considered. Formal justice systems and state oversight bodies are not always benign. Extending their authority or putting CIJ mechanisms under their oversight augments power relations, giving the state an upper hand.<sup>158</sup> Especially where the state represents elite or particular interests, this can have unintended and harmful consequences, especially for minority groups, indigenous communities, or persecuted religious or ethnic groups. Moreover, state bodies and the formal justice system do not necessarily have a

better record of gender equality than CIJ mechanisms, so if the intention is for oversight and accountability to improve the treatment of women in CIJ, then it is important to be clear about whether upwards accountability is the best strategy to deliver this.

In more democratic settings, or where power is more dispersed, downwards accountability might be more effective. This focuses on holding CIJ mechanisms accountable to justice seekers themselves – including women. It can involve a range of feedback and complaints mechanisms that enable citizens to voice their concerns and call out poor practice on the part of CIJ actors. The challenge is that downwards accountability often lacks teeth to hold leaders to account, so strategies are required to ensure feedback and complaints are taken seriously. This might involve, for instance, publicizing complaints (although it is important here to consider potential harm that individual complainants may face) or using technology to compile and publicize complaints anonymously, resulting in pressure on CIJ actors to change. Legal empowerment and social accountability strategies applied together may also be useful to explore. Women's organizations might also play a role in monitoring CIJ proceedings and reporting on their adherence to procedures and outcomes that uphold women's rights.



| Engagement modality: Strengthen gender-sensitive accountability and oversight mechanisms |  |
|--|--|
| Entry points   | <ul style="list-style-type: none"> <li>» <b>Facilitating dialogue</b> between CIJ mechanisms and the formal justice system to establish or ease modes of interaction, oversight or appeals processes and discuss topical issues.</li> <li>» <b>Engaging with independent bodies</b> such as ombuds or human rights institutions to familiarize them with the challenges posed by CIJ and encourage collaboration.</li> <li>» <b>Introducing complaints or feedback mechanisms for women</b> to safely provide information on their experience of CIJ and recommendations, including through technological formats where appropriate.</li> <li>» <b>Supporting local women’s organizations</b> or paralegals to monitor CIJ proceedings where possible.</li> </ul>  |
| Important considerations   | <ul style="list-style-type: none"> <li>» <b>Consider lack of written records:</b> using case review or appeals as a form of oversight and accountability requires written documentation, which may be lacking in many cases.</li> <li>» <b>Identify standards for appeal:</b> appeals must be balanced and fair. They should not be pursued in every case by a ‘losing’ party, but also should not be hampered by unrealistic barriers that restrict access. Criteria for appeal might include compensation thresholds, deprivation of human rights (either in process or outcome), breach of customary norms or formal law, etc.</li> <li>» <b>Report complaints and feedback:</b> complaints or feedback mechanisms might report directly to CIJ authorities, or may be sent to a local women’s organization, formal justice sector or government body for action. Complaints and feedback should be directed where they are likely to trigger appropriate action.</li> <li>» <b>Ensure productive relationships:</b> if monitoring CIJ proceedings, it is important to ensure a good and respectful relationship exists between CIJ actors and those undertaking the monitoring.</li> </ul>   |
| Examples and good practices  | <ul style="list-style-type: none"> <li>» In Eswatini, the Supreme Court upheld the appeal of a widow against her brother-in-law and granted an interim interdict pending the determination of a dispute by traditional structures. The widow filed a complaint against her brother-in-law alleging he was trying to drive her out of her homestead. She complained he had claimed ownership of one of her fields, destroyed the fence that was surrounding her property, and impeded her from building new toilets, the old one being unsanitary. Facing this harassment, she lodged a complaint against her brother-in-law with the regional administrator. The quarrel needed to be decided by the traditional structures according to prevailing customary law, although it was not yet clear when the decision was to be delivered. In the meantime, she went to the High Court and, when her application was dismissed, to the Supreme Court. While the outcome of the regional administrator was awaited, she was being “forced to live in unsanitary and degrading conditions” and had been deprived “in an apparent arbitrary fashion” of the fields given to her by her father-in-law. The Supreme Court upheld her appeal, noting the applicant was “an elderly widow living on her own in a rural homestead” and it appeared her health and safety were at stake, as well as significant infringements of her dignity. Her brother-in-law was ordered not to prevent her from building a new toilet at the old homestead and to restore the field he took from her and re-install the barbed wire fence around it.<sup>159</sup></li> </ul> |

## BUILD AND EXPAND ALLIANCES AND PARTNERSHIPS THAT SUPPORT WOMEN’S HUMAN RIGHTS IN CUSTOMARY AND INFORMAL JUSTICE SYSTEMS

Ensuring protection of women’s rights and transforming women’s access to justice in CIJ systems requires working with a range of actors and allies. This can include building alliances across women’s groups, and working with CIJ actors, with community, customary and religious leaders, human rights actors and community-based organizations, among others.

Building relationships between women’s organizations and movements, in all their diversity, can assist in sharing learning, amplifying advocacy and strengthening alliances to advance women’s rights. This involves accepting that different organizations may adopt

contrasting approaches and perspectives, but with a shared interest in expanding protections for women’s rights. Constructive engagement to expand common ground can be fostered between the international women’s rights movement and women’s groups pushing for greater acknowledgement of and engagement with CIJ systems. This can include examining how international human rights frameworks can deliver relevant guidance for CIJ systems to ensure these critical justice mechanisms are not left out.

Promising results are emerging from women leaders and women’s groups working with ‘unusual allies’ in efforts to

advance women’s rights. This can include work, if strategic opportunities exist, with some of those often thought to undermine women’s rights, including CIJ, religious and customary leaders (such as *soweis*<sup>160</sup> in Sierra Leone). Winning over those who might otherwise be considered spoilers offers an important avenue for expanding the protection of women’s rights. Such potential allies may need to be approached cautiously. Unusual allies can also extend to less controversial but often overlooked partners, such as market women’s associations and mothers who hold significant soft power that is rarely utilized.

### Engagement modality: Build and expand alliances and partnerships that support women’s human rights in CIJ systems

|                             |   |
|-----------------------------|---|
| Entry points                | <ul style="list-style-type: none"> <li>» <b>Convening spaces</b> for women’s organizations working with CIJ and international women’s rights movement to meet and build common ground.</li> <li>» <b>Supporting engagement</b> with unusual allies, including building bridges with potential spoilers to facilitate change.</li> </ul>   |
| Important considerations    | <ul style="list-style-type: none"> <li>» <b>Avoid duplication:</b> many women’s organizations at the national level may already have personal and institutional relationships as well as regional or international linkages in place.</li> <li>» <b>Do no harm:</b> working with unusual allies can present an important opportunity to press forward change, but care needs to be taken to select and engage cautiously to do no harm.</li> <li>» <b>Recognize diverse forms of power:</b> when thinking about potential allies, consider the different forms of power that stakeholders wield and pay attention to soft forms of ‘power with’ or ‘power to’.</li> </ul> |
| Examples and good practices | <ul style="list-style-type: none"> <li>» Globally, there are increased efforts to convene consultations on women’s rights and CIJ, bringing together women’s organizations and experts from diverse settings to share experiences and advocate for greater engagement on issues of women and CIJ. These have been both high-profile public events as well as closed door roundtables to enable frank exchange, resulting in policy and programming guidance.<sup>161</sup></li> </ul>   |

## STRENGTHEN RESEARCH ON WOMEN'S EXPERIENCES WITH CUSTOMARY AND INFORMAL JUSTICE SYSTEMS

A deeper understanding of women's diverse experiences when seeking justice through CIJ is required. In particular, gaining a nuanced grasp of what women value about CIJ processes and what their concerns are can assist in designing programming that better meets the needs and interests of women. Research is one way of gaining this deeper understanding and analysis.

Research should be participatory and collaborative, with a focus on ensuring that women's voices and choices, in all their diversity, are heard and not marginalized. This may be done through commissioned research projects, consultations or community dialogues with women. It may also include producing data from CIJ forums, for instance through recording of cases to enable analysis of the treatment of women within those settings. Similarly, it could involve surveys or other data

collection from women and their communities to understand how women experience justice through CIJ systems.

Where speaking with women is not possible or too sensitive, collecting existing data that can assist in building a picture of women's experiences – such as how many cases are brought by women to local CIJ mechanisms, the outcomes of those cases, whether women are allowed to speak in proceedings, whether women are involved as CIJ leaders, and so on – may be pursued. In addition to focusing on challenges in securing justice, research should also focus on lessons learned and potential good practices and entry points for protecting women's human rights within CIJ systems.

To inject a more sustained gender perspective on CIJ, such research and consultations should not just inform

engagement interventions, but also raise awareness more broadly of women's particular experiences of CIJ as well as influence specific programming on women in this area. It can also support the continued development of policy and legal frameworks and narratives that are moving towards an appreciation of the importance of engaging with issues of women and CIJ.

More research is needed to understand when and how women make judgments about how best to pursue justice and protection in the contexts they live within. In some circumstances, women have little choice but to rely on CIJ mechanisms, with no access to alternatives. In others, women decide to pursue justice through CIJ systems. These judgments will vary depending on other factors – such as ethnicity, religion, gender and class, among others – that mean different women are influenced by uniquely intersecting discriminations. Women's decisions will also vary based on the nature of the dispute/crime experienced. Very often, women choose not to pursue justice at all.<sup>162</sup>

Research is especially needed in relation to under-explored areas such as individuals living in refugee camps where multiple legal orders can apply. These include the formal laws of the host country, camp bylaws, rules stipulated by international organizations, as well as CIJ mechanisms, which tend to be more accessible and used.<sup>163</sup> This points to the relevance of CIJ in refugee settings, just as in other contexts – a topic that remains under-explored given the growing magnitude of the problem, and an important example of the kind of research that could usefully drive programming.



Image: ©UN Women

| Engagement modality: Strengthen research on women's experiences with CIJ systems |   |
|--|---|
| Entry points   | <ul style="list-style-type: none"> <li>» <b>Researching CIJ and women</b> to improve understanding of gendered experiences. Research may include consultations or surveys with women to document experiences with CIJ or case analysis, where cases are recorded to enable the study of treatment of women and gender bias. Where engaging with women directly is not possible, too sensitive or risks doing harm, research may collect or collate data related to women's access to and experience with CIJ, including the number of cases appearing before CIJ forums, outcomes of cases and the number of women making up CIJ leadership.</li> </ul>   |
| Important considerations   | <ul style="list-style-type: none"> <li>» <b>Implement ethical research standards:</b> <ul style="list-style-type: none"> <li>» <i>Safety and confidentiality:</i> Interviews, focus groups and surveys should ensure privacy of respondents and confidentiality of responses. As CIJ leaders exercise significant influence over women's lives, safe spaces are needed for women to contribute freely.</li> <li>» <i>Gender of research team:</i> female researchers should conduct interviews, focus groups or surveys with women to ensure respondents feel comfortable and to increase disclosure of harmful experiences.</li> <li>» <i>Support and referral protocols:</i> research on topics such as GBVAW or post-conflict justice will be especially sensitive, and researchers should plan how women will be supported or connected with support services should their participation surface trauma.</li> <li>» <i>Timeliness:</i> research should be timed to ensure there is opportunity to meaningfully integrate and act on findings.</li> </ul> </li> <li>» <b>Plan for research dissemination and use:</b> for research to improve women's experience with CIJ, planning is needed for how findings will be disseminated and used. Dissemination products should be developed according to who is being targeted and the formats should be accessible to them. Messages and recommendations should be practically focused so those being targeted know what to do.</li> </ul> |
| Examples and good practices  | <ul style="list-style-type: none"> <li>» In Myanmar, a four-year research program is currently undertaking a longitudinal ethnographic study of dispute resolution processes to follow how crimes, disputes and grievances are dealt with in practice, including by women. A strong focus of the project is on the plurality of justice mechanisms that people rely on, including hybrid ones. The program seeks to also build research capacity in Myanmar through training, joint field research, publications and international conference participation.<sup>164</sup></li> </ul>   |



## 5. POLICY RECOMMENDATIONS ON WOMEN AND CUSTOMARY AND INFORMAL JUSTICE SYSTEMS

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This *Issue Brief* has focused on the relationship between women and CIJ systems, demonstrating the importance of CIJ systems in realizing access to justice for all and ensuring no one is left behind as the 2030 Agenda for Sustainable Development advances. There is increased willingness from stakeholders to grapple with how CIJ systems can expand justice for women and advance their rights.

Engagement with CIJ systems to promote and protect women's rights is a necessary but complex undertaking, requiring a deep understanding of the context and strategically designed entry points that capitalize on productive aspects of CIJ and avoid doing harm. The following recommendations inform the engagement considerations, modalities and entry points detailed and provide policy guidance on how to strategically engage with CIJ systems to expand women's access to justice and advance their rights:

### 1. Ensure that women's human rights are recognized as central and indispensable to engagement with CIJ systems

Any and all engagement with CIJ systems must focus on improving women's human rights and ensuring their practical realization. This means also thinking about the diverse groups of women that access these systems, their justice needs and the range of contexts they are situated in.

### 2. Focus on empowering women to make informed decisions when seeking justice and to participate in and benefit from CIJ decision-making processes

Empowering women is critical to engaging with CIJ systems. This means building women's capacity to make informed decisions on how best to protect their rights and pursue justice, in a safe and supportive environment. This also means supporting women as leaders within CIJ systems. More importantly, women should also participate in decision-making processes involving the justice sector, including with respect to CIJ systems.

### 3. Deepen efforts to support CIJ systems that are committed to improving women's rights and their access to justice

Investment should be placed in CIJ systems that expand viable options for women to seek justice. Women should not be held hostage to any justice system that delivers discriminatory and harmful justice outcomes.

#### **4. Facilitate safe environments for women to enjoy their rights and pursue justice**

Whether or not CIJ systems are in fragile and conflict-affected states, there is a duty to ensure that women are supported in their quest for justice. Engagement, whether short- or long-term, should ensure the principle of do not harm is respected at all stages. Where women and girls are likely to be exposed to stigma, gender-based violence, harmful traditional practices or other forms of discrimination when seeking justice through CIJ systems, it is necessary that adequate, effective and survivor-centered responses are in place to minimize risks.

#### **5. Ensure that women's voices at local, national, regional and international levels are heard and constitute a critical part of reform strategies**

Women's organizations enable us to hear women's voices and concerns relating to accessing justice through CIJ systems. Invest in strengthening these organizations to advance women's access to justice and convene spaces for them to build alliances and be heard in a range of forums.

#### **6. Strengthen investment in participatory and collaborative research that informs policy and programming on CIJ**

Building evidence on women's experiences with CIJ is critical to understand how women utilize and benefit from or are harmed by CIJ. In particular, supporting collaborative research that ensures broad participation of local women and other groups of women is especially important so as to better analyze context and identify more concrete and productive ways of engaging CIJ actors on women's rights.

#### **7. Explore partnerships and strengthen alliances to build momentum for transformative change for justice for women and girls**

This includes support for building stronger alliances across women's groups, and working with CIJ actors, community, customary and religious leaders, human rights actors, community-based organizations as well as international and regional actors and organizations to enable fair justice outcomes for women.

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# NOTES

- <sup>1</sup> IDLO, *Policy and Issue Brief: Engagement with Customary and Informal Justice Systems* (Rome, IDLO, 2019); and IDLO, *Practitioner Brief: Navigating Complex Pathways to Justice: Engagement with Customary and Informal Justice Systems* (Rome, IDLO, 2019).
- <sup>2</sup> Precise data is difficult to discern; this estimate appears in most policy-related literature on informal or non-state justice. See OECD, 'Enhancing Security and Justice Service Delivery,' Governance, Peace and Security (Paris, OECD, 2007), p. 6; UNDP, *Community Security and Social Cohesion: Towards a UNDP Approach* (New York, NY, UNDP, 2009), p. 9; and L. Chirayath, C. Sage and M. Woolcock, "Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems", Working Paper, (Washington, DC, World Bank, 2005), pp. 2–3.
- <sup>3</sup> Declaration of the High-Level Meeting on the Rule of Law, 2012, UN Doc A/Res/67/1, para. 15.
- <sup>4</sup> Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, UN Doc S/2004/616, para. 35. This was further reinforced in the 2011 Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, UN Doc S/2011/634, paras. 37 and 39.
- <sup>5</sup> See Indicator 16.3.3, Global indicator framework for the Sustainable Development Goals and targets of the 2030 Agenda for Sustainable Development, E/CN.3/2020/2, available at: [https://unstats.un.org/sdgs/indicators/Global%20Indicator%20Framework%20after%202020%20review\\_Eng.pdf](https://unstats.un.org/sdgs/indicators/Global%20Indicator%20Framework%20after%202020%20review_Eng.pdf).
- <sup>6</sup> For further discussion, see IDLO, *Policy and Issue Brief: Engagement with Customary and Informal Justice Systems* (Rome, IDLO, 2019), p. 6.
- <sup>7</sup> CIJ and state systems are often thought to be in contestation or competition with each other, but this is often not the case. The relationship between systems can take a variety of forms, including recognition, formalization, harmonization or hybridization. See *ibid.*, p. 9.
- <sup>8</sup> Importantly, indigenous customary justice is recognized as an integral component of indigenous peoples' rights to self-governance, self-determination and access to justice under international human rights instruments. Article 5 of the United Nations Declaration on the Rights of Indigenous Peoples (2007) explicitly grants indigenous peoples the right to maintain their legal institutions (UN Doc A/RES/61/295) and Articles 8 and 9 of the International Labor Organization Indigenous and Tribal Peoples Convention, 1989 (No. 169) also provides for the recognition of indigenous justice systems. At the regional level, the American Declaration on the Rights of Indigenous Peoples (2016) contains relevant provisions on the law and jurisdiction of indigenous peoples (AG/RES. 2888 (XLVI-O/16)). See also Special Rapporteur on the rights of indigenous peoples, "Report of the Special Rapporteur on the Rights of Indigenous Peoples – Access to Justice in Ordinary and Indigenous Justice Systems", Human Rights Council, A/HRC/42/37(2019); and IDLO, *Policy and Issue Brief: Engagement with Customary and Informal Justice Systems*(Rome, IDLO, 2019), p. 10.
- <sup>9</sup> IDLO, *Policy and Issue Brief: Engagement with Customary and Informal Justice Systems* (Rome, IDLO, 2019), p. 8.
- <sup>10</sup> Literature has also emerged critiquing different terminologies used. See L. Denney and E. Laws, *Diverse Pathways to Justice for all: Supporting Everyday Justice Providers to Achieve SDG16.3* (The Hague, Cordaid and Overseas Development Institute, 2019), p. 9.
- <sup>11</sup> S.A. Divon and M. Bøås, "Negotiating Justice: Legal Pluralism and Gender-based Violence in Liberia", *Third World Quarterly*, vol. 38, No. 6 (2017), p. 1386.
- <sup>12</sup> IDLO, *Policy and Issue Brief: Engagement with Customary and Informal Justice Systems* (Rome, IDLO, 2019), p. 5.
- <sup>13</sup> IDLO, *Accessing Justice: Models, Strategies and Best Practices on Women's Empowerment* (Rome, IDLO, 2013), p. 15.
- <sup>14</sup> IDLO, *Policy and Issue Brief: Engagement with Customary and Informal Justice Systems* (Rome, IDLO, 2019).
- <sup>15</sup> IDLO, *Practitioner Brief: Navigating Complex Pathways to Justice: Engagement with Customary and Informal Justice Systems* (Rome, IDLO, 2019), pp. 8–11.
- <sup>16</sup> Complementing a Global Consultation, on 15 March 2019, a panel discussion took place in New York, organized by IDLO in cooperation with the Federation of Women Lawyers (FIDA-Kenya), Landesa, Uganda Women's Network (UWONET) and Rights + Resources (RRI), as a side-event to the 63rd session of the Commission on the Status of Women. Additionally, on 8–9 October 2019, an Expert Group Meeting took place in The Hague, gathering 17 external experts from around the world as well as IDLO representatives. Over the course of the two-day workshop, a diverse group of policymakers and practitioners considered obstacles and pathways to ensure justice for women. Representing national and international nongovernmental organizations, academia, women's groups, national governments and CIJ systems, the Meeting gathered participants from East, West and Central Africa, Europe, the Americas, South, Southeast and Central Asia and Oceania.
- <sup>17</sup> C. Enloe, A. Graff, R. Kapur and S. Danuta Walters, "Ask a Feminist: Gender and the Rise of the Global Right", *Signs: Journal of Women in Culture and Society*, vol. 44, No. 3(2019), pp. 823–844; S.B. Ortner, "Too Soon for Post-feminism: The Ongoing Life of Patriarchy in Neoliberal America", in T. Oren and A. Press, eds, *Routledge Handbook of Contemporary Feminism* (Abingdon, Routledge, 2019); S. Pantuliano et al., *Gender Equality and Women and Girls' Empowerment: Our Approach and Priorities* (London, Overseas Development Institute, 2019).
- <sup>18</sup> High-level Group on Justice for Women, *Justice for Women: High-level Group Report* (New York, NY, UN Women, IDLO, World Bank and Task Force on Justice, 2019), p. 9.
- <sup>19</sup> United Nations, "Gender Equality in Land Rights, Ownership Vital to Realizing 2030 Agenda, Women's Commission Hears amid Calls for Data Collection on Tenure Security", 62nd Session of the Commission on the Status of Women, WOM/2143 (16 March 2018).



- <sup>20</sup> An influential early report identifying how informal justice systems can contribute was the UNDP *Doing Justice* report (2006), which made the case for working with informal justice providers and formulated recommendations on how to engage. Around the same time, in 2005, OECD published its *Guidelines on Security System Reform and Governance* recognizing “customary and traditional justice systems” as part of the justice and law enforcement institutions that security and justice sector reform initiatives might engage with (p. 21). The Department for International Development (DFID)’s 2004 *Briefing on Non-State Justice and Security Systems* noted that non-state justice systems were “critically important in the context of DFID’s pro-poor approach to security and justice” and made the case for how to engage (p. 1). The World Bank’s *World Development Report 2011: Conflict, Security and Development* (2011) recognized the central role of legal pluralism in many countries and how engagement with “traditional justice systems” can be an innovative best-fit approach (p. 155) building on work by the Bank’s Justice for the Poor Program. Also in 2011, IDLO released a series of publications focused on customary justice program design and impact evaluation as well as legal empowerment.
- <sup>21</sup> CEDAW General Recommendation 33 on women’s access to justice, para. 58(c)(2015).
- <sup>22</sup> *Ibid.*, para. 63.
- <sup>23</sup> R.A. Chiongson, D. Desai, T. Marchiori and Michael Woolcock, “Role of Law and Justice in Achieving Gender Equality”, Background Paper, World Bank, *World Development Report 2012: Gender Equality and Development* (Washington, DC, World Bank, 2012), p. 28.
- <sup>24</sup> Office of the High Commissioner for Human Rights (OHCHR), *Justice Systems Based on Customary Law* (October 2019).
- <sup>25</sup> HiiL, “Justice Dashboard” (2019), available at: <https://justice-dashboard.com/>, accessed 1 October 2019.
- <sup>26</sup> Surveys ask randomly selected adults about personal experiences of legal problems across civil, criminal, administrative and family law in the last four years. It is likely that respondents under-report family and land disputes due to their sensitivity. Sample sizes include 2,400 respondents in Indonesia; 6,000 in Bangladesh; 8,391 in Mali; and 6,202 in Uganda. To ensure the sample is representative of the wider population, quotas for gender, age and rural/urban status are used. HiiL, “About the Methodology of Justice Needs and Satisfaction Surveys” (2019), available at: <https://justice-dashboard.com/methodology/>, accessed 2 December 2019.
- <sup>27</sup> See HiiL, Justice Database data on ‘process’ of justice journeys by country, 2019.
- <sup>28</sup> O.I. Abdourahman, “Time Poverty: A Contributor to Women’s Poverty? Analysis of Time-Use Data in Africa”, in I. Hirway, ed., *Mainstreaming Unpaid Work: Time-use Data in Developing Policies* (Oxford, Oxford University Press, 2017); UN Women, *2011–2012 Progress of the World’s Women: In Pursuit of Justice* (New York, NY, UN Women, 2011); UN Women, *Turning Promises into Reality: Gender Equality in the 2030 Agenda for Sustainable Development* (New York, UN Women, 2018).
- <sup>29</sup> In practice, there is some debate on whether this is always the case, and it often depends on the outcome of the CIJ process, which can result in harsher punishments, including higher fines.
- <sup>30</sup> UN Women, *Turning Promises into Reality: Gender Equality in the 2030 Agenda for Sustainable Development* (New York, UN Women, 2018).
- <sup>31</sup> IDLO, *Accessing Justice: Models, Strategies and Best Practices on Women’s Empowerment* (Rome, IDLO, 2013), p. 14.
- <sup>32</sup> E. Harper, *Customary Justice: From Program Design to Impact Evaluation* (Rome, IDLO, 2011), pp. 43–44.
- <sup>33</sup> T. Chopra and D. Isser, “Women’s Access to Justice, Legal Pluralism and Fragile States”, in P. Albrecht, H.M. Kyed, D. Isser and E. Harper, eds, *Perspectives on Involving Non-State and Customary Actors in Justice and Security Reform* (Rome, IDLO and DIIS, 2011), p. 32.
- <sup>34</sup> See, for instance, R. Sieder, “Legal Pluralism and Indigenous Women’s Rights in Mexico: The Ambiguities of Recognition”, *NYU Journal of International Law and Politics*, vol.4, No. 4 (2016), pp. 1125–1126.
- <sup>35</sup> See, for instance, T. Ranger, “The Invention of Tradition in Colonial Africa”, in E. Hobsbawm and R. Ranger, eds, *The Invention of Tradition* (Cambridge, Cambridge University Press, 1983), pp. 211–261.
- <sup>36</sup> UN Women, *Progress of the World’s Women: In Pursuit of Justice* (New York, UN Women, 2011), p. 77.
- <sup>37</sup> H.M. Kyed, “On the Politics of Legal Pluralism: The Case of Post-war Mozambique”, in Customary Justice and Legal Pluralism in Post-Conflict and Fragile Societies Conference: Conference packet, Washington, DC, George Washington University, 17–18 November 2009, pp. 157; 164.
- <sup>38</sup> L. Denney and E. Laws, *Diverse Pathways to Justice for All: Supporting Everyday Justice Providers to Achieve SDG16.3* (The Hague, Cordaid and the Overseas Development Institute, 2019), p. 29.
- <sup>39</sup> IDLO, *Practitioner Brief: Navigating Complex Pathways to Justice: Engagement with Customary and Informal Justice Systems* (Rome, IDLO, 2019), pp. 8–11.
- <sup>40</sup> See, for instance, Imkaan, “The Value of Intersectionality in Understanding Violence Against Women and Girls (VAWG)” (2019), p. 3, available at: <https://www2.unwomen.org/-/media/field%20office%20eca/attachments/publications/2019/10/the%20value%20of%20intersectionality%20in%20understanding%20violence%20against%20women%20and%20girls.pdf?la=en&vs=3339>, accessed 3 December 2019.
- <sup>41</sup> L. Denney, W. Bennett and Khin Thet San, *Making Big Cases Small and Small Cases Disappear: Experiences of Local Justice in Myanmar* (London, British Council, Overseas Development Institute and Saferworld, 2016).
- <sup>42</sup> T. Luccaro and E. Gaston, *Women’s Access to Justice in Afghanistan: Individual Versus Community Barriers to Justice* (Washington, DC, United States Institute of Peace, 2014), p. 33.
- <sup>43</sup> Danish Institute for Human Rights, *Informal Justice Systems: Charting a Course for Human Rights-based Engagement* (New York, NY, UN Women, UNICEF and UNDP, 2013), p. 107.

- <sup>44</sup> IDLO, FIDA Kenya, Landesa, UWONET and Rights Resource, "Women and Customary and Informal Justice Systems: A Global Consultation on Navigating Complex Pathways to Justice", Internal Summary Report (UN Headquarters, New York, NY, 15 March 2019), p. 4.
- <sup>45</sup> Danish Institute for Human Rights, *Informal Justice Systems: Charting a Course for Human Rights-based Engagement* (New York, NY, UN Women, UNICEF and UNDP, 2013), p. 107.
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