




Working with informal justice

Key considerations for confident engagement

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engagement

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SPEED READ

BACKGROUND

This policy brief is inspired by the Interactive Brainstorm on Understanding and Engaging with Informal Justice Systems, where experts gathered to discuss their experiences in carrying out informal justice interventions.

AUDIENCE

This policy brief provides recommendations for policymakers, researchers, academics and practitioners who focus on the area of informal justice, or more broadly in the area of justice reform.

KEY RECOMMENDATIONS

The author provides ten recommendations to help these actors more securely make decisions regarding informal justice interventions, and to ensure that any interventions made are in line with the cutting edge thinking and experience in this area:

- 1 Consider the entire justice ecology, without being concerned about making clear distinctions between the formal and informal justice systems, and look for the justice gaps and optimal entry points.
 - 2 Take a context specific approach to every intervention that includes political economy analysis as part of the program design. And even in the case of redlines, it is best to take every case as it comes to create a strategy in line with the ultimate goal.
 - 3 Be clear on the intention of the intervention and create programming tailored to that, including by focusing on spoilers if the intent is to increase inclusivity.
 - 4 A cross-section of a community needs to be surveyed as to how they view their dispute resolution mechanisms rather than relying only on community leaders to inform programming.
 - 5 Keep in mind that informal justice systems in a development context are not necessarily any more exotic than the ones found in the home states of most donor states.
 - 6 Informal justice interventions should be centered on generally accepted best practices for change processes. Introducing quotas, promoting inclusivity and stimulating competition are all tactics that have found success, as well as building on positive norms, creating space to debate whether contested norms are in line with the core values of the systems they are connected to, and supporting communities where there is momentum for change. Interventions should also have modest, achievable goals that acknowledge that change processes are incremental and require long-term involvement.
 - 7 Determine whether the targeted issue of the informal justice intervention may be a direct result of broader problems in the community, and if so consider looking toward a more sector-wide approach.
 - 8 More knowledge about the impact of specific informal justice interventions would enable more effective programming.
 - 9 Create as realistic a safe space for experimentation and failure as possible within donor constraints.
 - 10 Promote more interdisciplinary and cross-cultural partnerships and knowledge sharing.
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Introduction

In recent years, international actors interested in supporting rule of law and access to justice such as UNDP, IDLO, and various bilateral donors have increasingly acknowledged the importance of informal justice systems. This increased interest has led them to take actions such as thoroughly canvassing the advantages and disadvantages of these systems, supporting programming that connects informal and formal systems, and training informal justice service providers in international human rights law. However, the international community is still on a steep learning curve as to how to best go about engaging with informal justice systems, and in some cases is still wary about whether to engage at all. This policy brief provides key considerations to enable international actors to securely make decisions about their involvement - or lack thereof - with the informal justice sector.

The umbrella term of “informal justice systems” can be hard to grasp. It can generally be understood to refer to customary, indigenous or religious based systems, as well as western-introduced mechanisms such as arbitration or paralegal programs that function separately from the formal system. However, in many ways this label can be distracting and misleading.¹ For example, religious based systems can be relatively formalized.² In many cases these systems are incorporated into the state’s law and are seen by locals as being part of the formal system, such as in the case of property rights. In areas of a state where the formal justice system tends to be strong, such as in cities, there can also be a strong presence of informal justice systems whose actors intermingle with each other. Moving outside urban centers, one can find individuals who take on roles in both systems simultaneously.³

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¹ See also Geoffrey Swenson, “[Understanding and Engaging Informal Justice](#),” *Knowledge Platform Security & Rule of Law*, 2016 (which provides a good overview of the different categories of informal justice systems and shows how the label can be misleading.).

² For instance, in Mali locals often describe the *cadi* system, which is based off of the Koran and has clear lines of succession and training processes, as being more formalized than the state justice system in the north. See also David Dalgleish, “Pre-Colonial Criminal Justice in West Africa: Eurocentric Thought Versus Africentric Evidence,” in *African Journal of Criminology and Justice Studies*, Vol. 1, No. 1, April 2005.

³ For example, in Mali a mayor in one of the outer regions reportedly tried to stop a murder trial from going ahead so that he could handle the matter privately under his authority as a traditional leader.

Over a decade of focus by development circles on informal justice mechanisms has led to the creation of a large body of work that explains in great detail how these mechanisms operate and the different types of interventions that international actors have made.⁴ This policy brief is not an attempt to summarize or rehash what has already been written on this topic. Instead this piece endeavors to highlight key considerations on international engagement with informal justice systems in order to enable a more confident decision-making process by actors who are considering such engagement. These considerations are in large part informed by a recent expert meeting⁵ at the Knowledge Platform Security & Rule of Law (the Platform), which was convened in an attempt to capture the cutting edge thinking on engagement with informal justice.

Diana Goff & Erwin van Veen, "A Crisis of Confidence, Competence, and Capacity: Programming Advice for Strengthening Mali's Penal Chain," *International Development Law Organization*, November 2015.

⁴ E.g. Geoffrey Swenson, "Understanding and Engaging Informal Justice," *Knowledge Platform Security & Rule of Law*, 2016; Diana Goff & Erwin van Veen, "A Crisis of Confidence, Competence, and Capacity: Programming Advice for Strengthening Mali's Penal Chain," *International Development Law Organization*, November 2015; Erwin van Veen, Diana Goff & Thibault van Damme, "Beyond dichotomy: recognizing and reconciling legal pluralism in Mali," *Netherlands Institute of International Relations Clingendael*, October 2015; Stephen Golub, "The Political Economy of Improving Traditional Justice Systems: A Case Study of NGO Engagement with Shalish in Bangladesh," in *World Bank Legal Review: Legal Innovation and Empowerment for Development, Volume 4* (Washington: World Bank, 2013); Erica Harper, *Customary Justice: From Program Design to Impact Evaluation* (Rome, Italy: International Development Law Organization, 2011); Janine Ubink & Thomas McInerney, eds. (Rome, Italy: International Development Law Organization, 2011); Peter Albrecht, Helene Maria Kyed, Deborah Isser, & Erica Harper, eds., *Perspectives Involving Non-State and Customary Actors in Justice and Security Reform* (Rome, Italy: International Law Development Organization, 2011); Deborah Isser, ed., *Customary Justice and the Rule of Law in War-Torn Societies* (Washington DC: United States Institute for Peace Book Press, 2011); Ewa Wojcikowska, *Doing Justice: How informal justice systems can contribute* (Oslo, Norway: United Nations Development Programme - Oslo Governance Center, 2006); Department for International Development Briefing, "Non-state Justice and Security Systems," May 2004.

⁵ *Understanding and Engaging Informal Justice*, October 20, 2016, <http://www.kpsrl.org/browse/browse-item/t/understanding-and-engaging-informal-justice>.

What we have already learned?

First of all, it may be helpful for international actors to put less emphasis on trying to separate formal and informal justice systems in a black and white way. Rather, more attention could be put toward identifying the justice ecology of the targeted area, including how different actors or systems are interconnected and how they work together. International actors should also have lower expectations of being able to put the pieces together into a coherent jigsaw puzzle, but should instead expect to find a puzzle where pieces fit together in a disjointed way, with the odd piece off to the side or on top of another one.

Another clear and related lesson that has emerged is that each community will need its own individual approach. Often in beneficiary countries, many of which are fragile states, communities tend to be dispersed and unconnected from one another. Assuming that the more informal mechanisms are targeted for intervention, it is important to determine on a case to case basis what each community would like to see improved, as well as how the mechanisms work, and what sorts of conflicts they most often resolve.

Depending on the context, modifications to a system may not be needed so much as help in identifying a fair and just individual who is empowered to handle the dispute. For example, a 2016 study of Syrian refugees in Lebanon revealed that the “key actors helping Syrians resolve their problems come from their immediate social circles: people who are trusted and willing to interfere like Syrian or Lebanese friends, employers, renowned fellow Syrians, and others.” These persons were described as being “ordinary people” who “rarely stand out as known mediators in a specific community that Syrians reach out to.”⁶ In this case the best intervention was simply to create networking opportunities for disconnected refugees, enabling them to enlarge their social circles and increase the number of people who they could go to for help.

Moreover, especially in environments of high inequality where international actors tend to operate, justice systems can be used more to enforce power dynamics rather than to solve disputes. Therefore interventions will need to be informed by a thorough understanding of the power relationships that form the basis of the justice sector, even if the intent is to focus on the more technical aspects of the systems. For international actors this means ensuring that political economy analysis is a part of the program design. And since changing justice

⁶ Muzna Al-Maasri, Marianna Altabaa and Zeina Abla, “Informal Justice Mechanisms Used by Syrian Refugees in Lebanon,” International Alert, 2016.

systems means changing power dynamics, interventions in this space will meet resistance. Therefore international actors should analyze what the potential effects of these changes are, and be aware that they may have unintended consequences in terms of conflict and grievances.

It is also important for international actors to be clear in their intentions for intervening in these systems to ensure their programs are properly tailored. For example, if the intention is to increase inclusiveness, there will also need to be a decision made about whether and how to include perceived spoilers. If the intention is to end a cultural practice, such as requiring widows to marry the brother of their deceased husband, then there would likely need to be broader programming to address the socio-economic and security concerns that led to the creation of this practice.

While international actors could still choose to apply redlines against particularly abhorrent practices, lack of engagement for this reason would also take away the opportunity for them to create space for those practices to be debated among the affected communities, compared against the community's own core values, and possibly changed. On the other hand, if international actors shun communities that enforce redline crossing practices, those communities might be more open to change in order to be able to access the withheld support. Therefore, even in the case of redlines, international actors can take each case as it comes in order to create a strategy that would be more in line with their ultimate goal. This could also require communicating with parliaments or funding bodies at home in order to explain that while engagement will likely only mitigate and not put an end to the unfavorable practices, no engagement at all may only serve to maintain the status quo.

Further, at the recent Platform gathering of informal justice experts, the recommendations for interventions that worked were in line with general theories about how to best bring about institutional change.⁷ Specifically, there were recommendations made to build on norms that are seen as positive, creating space to debate whether contested norms are in line with the core principles of the systems they are connected to, and supporting communities where there is momentum for change.

This expert group also strongly recommended strengthening informal justice systems through programming in other sectors indirectly connected to them. For example, literacy training may be needed before trainings on how to record proceedings will be effective. It was also noted that broader interventions, such as working to increase the standing of marginalized groups, in some cases could do more to increase inclusive decision-making within informal justice systems, and thereby have a stronger impact than direct interventions that challenge the leadership of those systems.⁸ Generally recognized change inducing methods such as

⁷ See also Caroline Sage, Nicholas Menzies and Michael Woolcock, "Taking the Rules of the Game Seriously: mainstreaming justice in development, The World Bank's justice for the poor program," in Steven Golub, ed. and Thomas McInerney, series ed., *Legal Empowerment: Practitioners Perspective* (Rome, Italy: International Development Law Organization, 2010), p. 21.

⁸ See also Mark Tran, "Why we need to make customary laws work for women," *The Guardian*, 6 February 2013, <https://www.theguardian.com/global-development/poverty-matters/2013/feb/06/make-customary-laws-work-for-women>.

utilizing quotas,⁹ promoting inclusivity,¹⁰ and stimulating competition through introducing alternative informal mechanisms to targeted communities also work in this context.¹¹

⁹ An example of the effectiveness of quotas is in the Community Courts in Eritrea, where a mandate that each panel have at least one women judge led to a 29% increase in female judges. Janine Ubink & Benjamin van Rooij, "Towards Customary Legal Empowerment: An Introduction," in Janine Ubink & Thomas McInerney, eds., *Customary Justice: Perspectives on Legal Empowerment* (Rome, Italy: International Development Law Organization, 2011), p. 19. A note of caution is exercised here however that if the current power structure is opposed to the quotas, they will make attempts to ensure that the positions be filled by persons unlikely to do much to challenge the status quo. Erica Harper, *Customary Justice: From Program Design to Impact Evaluation* (Rome, Italy: International Development Law Organization, 2011), p. 42.

¹⁰ An intervention that shows the power of inclusivity is when the Owambo Traditional Authorities in northern Namibia created a self-statement of their most significant customary procedures and rules, rather than opting for the traditional interventions of a codification or restatement. This self-statement deeply impacted the community by creating a higher degree of certainty in the rulings of the courts, without also taking away too much of their flexibility by attempting to create a comprehensive recording of the laws. This was seen as particularly helpful in terms of reducing the wide amount of discretion given to sentencing, while still allowing for flexibility to take into account the unique circumstances of each case. The Owambo community also used the self-statement to announce new norms that, for example, protected the land rights of widows. Notably, this new rule was found to be better adhered to than statutory attempts to ban this behavior in other African countries. Janine Ubink, "Stating the Customary: An Innovative Approach to the Locally Legitimate Recording of Customary Law in Namibia," in Janine Ubink & Thomas McInerney, eds., *Customary Justice: Perspectives on Legal Empowerment* (Rome, Italy: International Development Law Organization, 2011), pp. 131-146.

¹¹ Competing mechanisms could be community based paralegal programs, the introduction of ADR mechanisms such as arbitration, or mobile courts. Experts gathered at the recent Platform event on engagement with informal justice have found that adding competition that better serves the needs of wider community can lead to established leaders asking for trainings in, for example, human rights, gender issues and decision-making processes. This is a similar dynamic that is also currently happening in formal systems where the introduction of competition in the legal field by tech based start-ups is forcing lawyers to revise their fee structures and update their practices, something that without competition they were unwilling to do. A caution here however is that in order to stimulate lasting change, these competing mechanisms must have sustainable funding, or any gains risk being short-term.

What can we do to further improve informal justice interventions?

Many international actors choose to work with informal justice because they want to take a bottom-up approach to justice reform. They realize that focusing only on the formal system can be too narrow, especially in fragile states where the state's justice systems tend to lack legitimacy. However, engaging only with the leaders of these informal systems can still make it a top-down intervention, as influential members of the communities tend to dominate these systems. In order for it to be a truly bottom-up approach, care must be taken to engage with the vulnerable populations and to create programming that addresses their needs. For example, one popular donor intervention is to link the informal and state systems. However, doing this can unintentionally strengthen the dominant group, especially those who are seen as the administrators of these systems, and leave the marginalized members of the community worse off. These elites may also subvert any interventions that would weaken their power base, and instead use greater recognition of their authority to further entrench existing inequalities.¹² Further, even within small communities there may not be one dominant view of any particular informal justice system. Rather, one perspective may be favored by elites, while others are favored by less powerful community members. Therefore, it is important for international actors to canvas a cross-section of members of the community about their views on the dispute resolution models they use, rather than relying on community leaders to inform them.

Moreover, when foreigners encounter informal justice systems abroad the initial impression tends to be that they are more exotic, spiritual, and inaccessible than practices in their own countries. However, at the core, societies worldwide have similar ways of handling conflict, and upon closer examination informal mechanisms abroad are likely to be similar to the ones in home states. For a highly personal or family matter international actors may first seek the advice of a parent, or for a vexing moral quandary they may decide to approach a religious figure such as a priest or a rabbi. For an issue that affects the neighborhood, they may first approach the leadership of a neighborhood council. If international actors feel unsafe in their home countries, they may ask for the protection of someone with the power to shield them. If they want to avoid lawyers' fees, they may approach a mediator or a paralegal, and to avoid the court system, they may agree to arbitration. While people are more likely to ask for the help of the state in the case of a violent crime, there are still many examples of people who

¹² Janine Ubink & Benjamin van Rooij, "Towards Customary Legal Empowerment: An Introduction," in Janine Ubink & Thomas McInerney, eds. (Rome, Italy: International Development Law Organization, 2011), pp. 16-17, 24.

try to handle such matters without the interference of authorities in order to maintain family bonds or social cohesion.¹³

In order to truly understand these foreign informal justice systems, international actors could ask their local partners to reflect upon the informal systems in typical donor states. By holding up a mirror to their own systems, international actors would be more understanding of the limitations and possibilities of interventions in this sector. This type of research would also enable the beginning of a two-way discussion about informal justice mechanisms and could have an energizing effect on the participation of beneficiary communities in reform in their own communities.¹⁴ International actors could also take the time to reflect on whether any lessons from the programming they carry out abroad could apply to their own justice systems, which increasingly are challenged in terms of access to justice and skyrocketing incarceration rates.¹⁵

Further, international actors may be adverse to engaging with informal systems due to concerns of not being able to show strong results to their funding bodies. They may also have misgivings about engaging with a mechanism that is seen as corrupt or not abiding by human rights. However, if the intention is to identify the best entry point, in a comparison of the formal and informal system, the latter one may be the better option to build upon. For example, in Liberia there is better enforcement of customary judgments than formal ones, and in Indonesia the customary justice system is seen as less arbitrary than the state system.¹⁶ Also, in places where the formal systems over-employ potentially rights violating pre-trial detention,¹⁷ local informal systems that do not take suspects into custody could be seen as a better alternative in some cases.

¹³ Malfunctioning informal justice systems may not even have problems too dissimilar from the ones in the international actors' home countries. For example, a 2006 expose of the New York State Town and Village Courts system discovered that almost 75% of the judges did not have law degrees, and that many did not have advanced education at all. Judges who were interviewed described their decision-making process as following their own common sense, with one declaring in a domestic abuse case that, "Every woman needs a good pounding every now and then." William Glaberson, "In Tiny Courts of N.Y., Abuses of Law and Power," *New York Times*, 25 September 2006, <http://www.nytimes.com/2006/09/25/nyregion/25courts.html>.

¹⁴ Sustainable Development Goal 16 provides a nice opportunity for this sort of two-way dialogue, as it brings the discussion on access to justice outside of just a development context to a more globally inclusive one.

¹⁵ For example, the Department of Justice Canada funded report on reconsidering whether Canada should take a more restorative approach to crimes, which is more akin the principles underlying most informal justice systems that prioritize healing societal fabric over harsh punitive measures. Patricia Hughes and Mary Jane Mossman, "Re-Thinking Access to Criminal Justice in Canada: a Critical Review of Needs, Responses and Restorative Justice Initiatives", 2001, http://www.justice.gc.ca/eng/rp-pr/csj-sjc/jsp-sjp/rr03_2/rr03_2.pdf.

¹⁶ Erica Harper, *Customary Justice: From Program Design to Impact Evaluation* (Rome, Italy: International Development Law Organization, 2011), p. 25.

¹⁷ This is particularly a problem in African states, where "[o]f the world's ten prison systems with the highest proportion of pretrial detainees, half are in Africa. In places such as the Benin, DRC, Liberia, Libya and Nigeria, 70 percent or more of all prisoners have not been convicted." Marina Ilminska & Martin Schoenteich, "Raising the Profile of Pretrial Detention in Africa," Open Society Foundations, April 21, 2016, <https://www.opensocietyfoundations.org/voices/raising-profile-pretrial-detention-africa>

Another issue highlighted at the recent Platform expert meeting is that there is little evidence regarding the impact of customary justice interventions. This means that, although well-intentioned, international actors could be flying blind while setting up programming. For example, one of the meeting participants is currently leading an ongoing meta-evaluation of informal justice interventions targeting rights violating practices that are the result of serious security, economic or cultural concerns. So far the study has found that these interventions have fairly low impact when held against typical project timelines. Without more evidence on what would make these sorts of interventions more impactful, it may be better for international actors to focus on interventions that have already proven to be successful. Further, justice interventions in general should be based on evidence of what works, and if that sort of evidence does not exist, it should be created.

Other issues highlighted were typical items on many development practitioners' wish lists: a safe space in which to experiment and make mistakes; more interdisciplinary and cross-cultural research efforts; and an understanding that change processes need long-term involvement, so ambitions should remain modest. A question that lingers here is whether funding bodies can be convinced to give the resources and leeway needed to meet these stated needs.

A final issue noted is the need for interventions to focus on categories of grievances that are not already being addressed in any given community (the "justice gap"), even if that means wading into the area of violent crime. Violent crimes are arguably better dealt with by the state system, which has access to the means that can better address the security concerns of victims. However, where the state is unavailable, supporting informal systems in implementing restorative processes may be the only alternative.¹⁸

This also becomes more relevant considering that not every culture makes such black and white distinctions between civil and criminal violations. For example, domestic abuse may be considered a family or civil matter to be dealt with informally. This is also relevant to the realm of transitional justice, where strengthening the capacity of informal justice sector may in some cases be the only option available at a given time to close the justice gap.

¹⁸ There are also arguments that justice systems in developed states could also take a more restorative approach to violent crime. E.g. The Vera Institute based in New York City runs a program called *Common Justice* that "develops and advances solutions to violent crime that transform the lives of victims and foster racial equity without relying on incarceration" at <https://www.vera.org/centers/common-justice/overview>; Marty Price, "Punishment-What's in it for the Victim? A Restorative Justice Discussion for Crime Victims and their Advocates", *Victim Offender Reconciliation Program Information and Resource Center*, 1997, <http://www.vorp.com/articles/punish.html>.

Key considerations on engaging with informal justice

Now, with over a decade of experience in engaging informal justice systems from which to draw, the following key considerations can help ensure that international actors are comfortable in their decision-making about engaging with informal justice, and that they align their programming more toward the cutting edge than the past:

- 1 Consider the entire justice ecology, without being concerned about making clear distinctions between the formal and informal justice systems, and look for the justice gaps and optimal entry points.
- 2 Take a context specific approach to every intervention, and include political economy analysis as part of the program design. Even in the case of redlines, it is best to take every case as it comes to create a strategy in line with the ultimate goal.
- 3 Be clear on the intention of the intervention and create programming tailored to that, including by focusing on spoilers if the intent is to increase inclusivity.
- 4 When surveying a community as to how they view their dispute resolution mechanisms, interview a cross-section of the population rather than relying only on community leaders to inform programming.
- 5 Keep in mind that informal justice systems in a development context are not necessarily any more exotic than the ones found in the home states of most donor states.
- 6 Informal justice interventions should be centered on generally accepted best practices for change processes. Interventions should also have modest, achievable goals that acknowledge that change processes are incremental and require long-term involvement.
- 7 Determine whether the targeted issue of the informal justice intervention may be a direct result of broader problems in the community and, if so, consider looking toward a more sector-wide approach.
- 8 More knowledge about the impact of specific informal justice interventions would enable more effective programming.
- 9 Create as realistic a safe space for experimentation and failure as possible while also being realistic in terms of donor constraints.
- 10 Promote more interdisciplinary and cross-cultural partnerships and knowledge sharing.



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