

Policy brief

# Taking people-centred justice to scale: the role of customary and informal justice in advancing people-centred justice

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*Taking people-centred justice to scale: investing in what works to deliver SDG 16.3 in lower-income countries*

## Key messages

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Customary and informal justice (CIJ) mechanisms are the most utilised justice providers globally and especially by people living in poverty, women and other marginalised groups who are most at risk of being left behind in achieving access to justice for all. Understanding CIJ and how to engage with them is important as they are an unavoidable feature of the justice landscape.

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CIJ mechanisms are diverse. They include a wide range of justice and dispute-resolution providers, with differing normative foundations, varying degrees of recognition by the state, and they evolve over time. This means that making generalisations about CIJ are unhelpful. Categorising formal and informal justice systems as

essentially good or bad is inaccurate and can hinder progress on improving access to justice.

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Donors can find it difficult to engage with CIJ. This is especially due to sometimes very real human rights concerns about CIJs, domestic political concerns, and donor's bureaucratic challenges.

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This paper sets out how these challenges might be reframed in ways that open up possibilities of productive engagement by international actors through politically informed and context-sensitive approaches relating to people's experience of CIJ.

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Examples of donor engagement with CIJ, and the diversity of what this can entail, remain disparately documented. These examples are an important resource to compile, share amongst donors and learn from.

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Ultimately, a spectrum approach to international engagement will be helpful, with some CIJ actors leaning towards the direct engagement end, and others falling at the opposite end where such engagement may be inappropriate. At a minimum, donors must recognise the empirical reality of CIJ and how this should inform their programming on access to justice.

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There is a need for investment in further research to build the evidence base on the following: regarding the productive roles CIJ may play in providing people-centred justice; the evolutionary nature of CIJ; and innovative examples of donor engagement with CIJ.

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## About this publication

This is the third in a series of papers on ‘Taking people-centred justice to scale: investing in what works to deliver SDG 16.3 in lower-income countries’ (<https://odi.org/en/about/our-work/taking-people-centred-justice-to-scale-investing-in-what-works-to-deliver-sdg-163-in-lower-income-countries/>). The research project focuses on practical, cost-effective and realistic ways to provide sustainable justice services at scale, which offer lessons both for lower-income countries and for donor programming.

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# Acronyms

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CIJ	Customary and informal justice
CSO	Civil society organisation
NGO	Non-government organisation
SDG	Sustainable Development Goal

# 1 Introduction

The inclusion of justice in the Sustainable Development Goals (SDGs) as Goal 16.3 is an important acknowledgement of the centrality of justice to people's wellbeing globally. It has made more prominent efforts to improve equal access to quality justice for all and revitalised discussions of what this means and looks like in different contexts.

Absent from much of this discussion, however, has been the role of customary and informal justice (CIJ). This is a striking omission given the extent of reliance on CIJ mechanisms in many settings around the world – especially fragile and conflict-affected contexts where people are at greatest risk of being left behind. Underlying the neglect of the role of CIJ in achieving justice for all are concerns about human rights, gender equality, accountability, and principles of equality and non-discrimination. These issues are often underlined and interpreted to disqualify CIJ mechanisms from making a contribution to access to justice for all. Yet, when formal systems in transitional, conflict-affected or post-conflict contexts exhibit similar traits, donor agencies engage with them to strengthen and transform them. While the concerns are indeed valid and important to address, continuing to neglect the most utilised justice mechanisms does a great disservice to the people who rely on them, and to the global goal of achieving justice for all. A fresh approach is needed.

This paper aims to move forward a conversation amongst donor agencies and the justice community on the need to engage with CIJ in order to achieve justice for all. It does so by demonstrating in section 2 the diversity of CIJ and its centrality to many people's lives. Section 3 sets out key arguments for why it is important to engage with the empirical reality of CIJ, followed by addressing some of the concerns raised regarding donor engagement with CIJ in section 4. Section 5 suggests ways in which these concerns might be productively reframed, while section 6 offers some examples of productive engagement with CIJ actors and processes. Section 7 concludes and recommends ways for constructive engagement with CIJ, given their prevalence and potential contribution to justice for all.

## 2 What we mean by CIJ and its diversity

It is important to recognise that CIJ refers to a wide range of justice and dispute-resolution providers, with diverse normative foundations, varying degrees of recognition by the state, and that evolve over time (IDLO, 2020). Given this diversity, simplistic generalisations of CIJ are unhelpful.

There is still no universal agreement on terminology and a wide range of terms have been used to try to capture this diversity of CIJ – including non-state, customary, informal, traditional, religious, community-based, or hybrid, among others. All of these concepts have been criticised for failing adequately to capture diverse empirical realities – with some highlighting that ‘informal’ justice actors in fact exhibit high degrees of formality (Sage and Woolcock, 2012); that ‘non-state’ justice actors are often connected into state justice systems through referral pathways and formal recognition of the fact of legal pluralism (Sieder and McNeish, 2012: Introduction; Cuskelly, 2011); and that community-based justice actors are representative of only particular parts of communities, and usually the most powerful (Sieder and McNeish, 2012: Introduction). The confusing array of concepts underlines the many forms that CIJ take and the limits of language in capturing this diversity.

For definitional purposes, CIJ is used here as an increasingly recognised term that captures the broad spectrum of alternative systems that people seeking justice use to access justice or resolve disputes (Working Group on CIJ and SDG16+, 2021). This means that customary chiefs and elders mediating disputes are an example of CIJ, as are community paralegals, Indigenous community-reconciliation practices, workplace associations and community officers who connect customary and state justice systems – to name but a few.

These multiple dispute-resolution and justice actors operate on the basis of diverse normative orders, and political and institutional histories. CIJ mechanisms often exhibit ‘an emphasis on restorative justice, flexible rules and procedures, and consent-based negotiated solutions’ (IDLO, 2019: 5), and may also be rooted in various community-based values. To the extent that they are non-adversarial, and may focus on restoring intra-community harmony, such mechanisms may contribute to integrated solutions by which



relationships are repaired and recurrence of the dispute prevented (IDLO, 2019). Some CIJ draw from custom – either written or oral; others may be based on religious doctrine or beliefs; others may be driven by commitments to international human rights norms, or community-specific normative frameworks.

In practice, all societies are characterised to varying degrees by different and diverse forms of rules, and systems for applying these rules. There are different labels used to characterise the messy fact of ‘legal pluralism’ (von Benda-Beckmann and Turner, 2019; Sieder and McNeish, 2012: Introduction; Tamanaha, 2007). But the key point is that societies are organised around overlapping legal and normative orders. These include statutory law, custom, international norms, and different forms of informal rules (Hellum, 2012; Sieder and McNeish, 2012: Introduction). To varying degrees, these are in tension with one another or are complementary. Moreover, the interlinkages between different normative orders means that they evolve over time, including as a result of these interactions (de Sousa Santos, 1987). Over time, there have also been different governance histories of how legal pluralism plays out. These include different political or constitutional projects that may aim to integrate plural norm systems, or deny and even outlaw them. In the case of Latin America, the mobilisation by Indigenous groups in the 1980s and 1990s to secure constitutional recognition of Indigenous rights and customary norms constituted a progressive movement in opposition to racial and ethnicity-based discrimination, and to secure a degree of autonomous self-governance for Indigenous peoples (Sieder, 2016). At the same time, Indigenous communities, as is true of all social groupings, reproduce power hierarchies and inequalities which may be reflected in customary norms, but may also be the object of contestation and change, for instance by Indigenous women’s movements.

In working with this normative diversity, it is thus especially important to recognise the definitional challenges of using a term like CIJ in developing recommendations of how to work with them. But this complexity should not deter us from engaging with the empirical fact of pluralism in how justice is provided, and disputes settled.

Complicating this diversity further is the fact that CIJ actors are themselves evolving all the time. Just like state justice systems, CIJ is not static but adapts through contestation and change both in terms of normative content and in terms of who is leading on adjudication and dispute resolution (Divon and Bøås, 2017: 1386). Of course, such evolutions can be both progressive and regressive – more progressive, rights-respecting justice systems are not a given trajectory for either CIJ or state justice systems in any jurisdiction. Thus, there have been promising evolutions in CIJ systems towards greater inclusion of women in leadership positions, and declining use of retrograde punishments such as human compensation, for instance (Denney and Laws, 2019). But there have also been

regressions in terms of protections for women's rights in both formal and informal justice systems, for instance in the United States, as well as in Iran (see, for instance, Goldblatt Hyatt et al., 2022; Alikarimi, 2019). CIJ systems and the actors that are involved in them are thus malleable, not fixed – as is also true of statutory justice and the decision-makers in court-centred systems. This also means that CIJ systems cannot accurately be regarded as outdated institutions that are a remnant of the past. They are contemporary justice processes and actors dealing with everyday justice problems (Tamanaha, 2015; Sieder and McNeish, 2012). As living systems, they also innovate and adapt to evolving local and global issues, including for instance, on gender equity.

Given this diversity, when considering how to engage with CIJ, binary conceptualisations of 'formal justice as good', and 'CIJ as bad' are therefore both inaccurate and an unhelpful way for domestic and international actors to engage with advancing access to justice for all that is in keeping with inclusive and rights-based governance. Moreover, as is true of all justice systems, CIJ systems need to be considered in terms of their context-specific social, political and economic histories, to better understand what patterns of marginalisation and exclusion they may reproduce, or whether they can contribute to changing these.

### 3 Why is it important to engage with CIJ

Efforts to achieve justice for all must begin with understanding the ways in which people seek justice in practice. There is little point in developing institutional forms based on what works in other contexts and ignoring empirical realities. This has been demonstrated to usually result in ‘isomorphic mimicry’ – the replication of institutional *forms* that fail to perform the intended *function* (Andrews et al., 2017). The realities of court houses not used, legislation unimplemented and online records systems not utilised all occur in the formal justice sector. If domestic and international actors seeking to reform the justice sector begin with understanding how and why people access justice in the ways they do, then engaging with CIJ is unavoidable.

The majority of the world’s population resolve disputes and claim their rights outside of formal justice systems, and their first resort is overwhelmingly to CIJ systems. The *World Justice Project* (2019) finds that across 101 countries analysed, the vast majority of legal issues are not resolved through the formal justice system. In fragile and conflict-affected settings in particular it is routinely estimated that 80-90% of disputes are dealt with through informal or non-state justice, or CIJ (IDLO, 2020: 5; see also UNDP, 2009: 9; OECD, 2007:6; and Chirayath et al., 2005: 2-3).

Users of these systems are disproportionately marginalised groups, such as people living in poverty, women, and remote and minority groups (IDLO, 2019: 5). For many people, CIJ systems regulate some of the most fundamental issues in their lives, such as access to land, water and other natural resources, and their family relations (World Justice Project, 2019). CIJ are thus indisputably central to most people’s experience of justice. Moreover, because of the matters that CIJ systems tend to deal with – divorce, inheritance, family disputes and violence, land and debt disputes – they are disproportionately relevant to women’s experiences of justice in particular (IDLO, 2013: 15).

In some cases, CIJ providers may be the only option available to people seeking justice and thus be used due to a lack of alternatives. This is especially relevant where there is insufficient reach of formal dispute-resolution services. In institutionally fragile or conflict-affected contexts, where formal state systems may be especially susceptible to capture, are distrusted by communities, have limited territorial

reach or are unable to deliver services to people, CIJ systems may be ‘the only game in town’. In many cases, however, CIJ providers are accepted, or even preferred, by justice seekers as more legitimate, relevant and capable than formal justice systems. As the Working Group on CIJ and SDG 16+<sup>1</sup> summarises:

CIJ systems are often more grounded in the communities they serve, more accessible, affordable, and proximate than formal systems; they tend to emphasise restorative justice, flexible rules and procedures, and consent-based negotiated solutions that are culturally resonant (Working Group on CIJ and SDG16+ (2021).

They are then frequently considered to be more geographically accessible, linguistically and culturally familiar, affordable and timely than formal justice services (Denney and Laws, 2019). In some cases, it has also been suggested that CIJ can provide important flexibility that formal laws do not, enabling women, for instance, to use the unwritten and evolving nature of customary law to contest conventional interpretations and advocate alternatives that afford greater protection of rights (Chopra and Isser, 2011: 32; Harper, 2011: 43-44).

CIJ mechanisms have also proved to be highly resilient and adaptive, evolving to remain relevant in the face of conflict, globalisation, climate change and other changes. This is an important corrective to the idea – popular among the international development community during the ‘fragile’ or ‘weak’ states discourse of the early 2000s – that CIJ was merely an interim transition point on the way towards more consolidated statehood. That is, CIJ was seen as a necessary step on the road to formalisation of justice services and would become redundant as states strengthened and development ensued (Scharf, 2003: 14). This assumption that the state as it looks in high-income countries was the natural end point of the development process now appears mistaken. In fact, what has been seen is that conflict- and crisis-affected countries – as well as states emerging from democratisation and other change processes – are developing their own versions of statehood that may well see a continuation of hybrid forms of authority, or ongoing contestation about the prevailing normative order. As a result, it would be unwise to assume that CIJ actors will simply wither away.

Significantly, the inherent flexibility of CIJ processes may be well placed to respond to emerging challenges and issues, including those relating to climate justice. CIJ is not only about community-based justice internal to the community. It may also be an important entry-point to thinking about using broader conceptualisations of justice and redistribution of resources in the context of climate change. There is an emerging research agenda on the interlinkages

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<sup>1</sup> The Working Group on CIJ and SDG16+ was established in December 2021. It is global alliance that draws together over 60 organisations working to accelerate action on achieving access to justice for all and build consensus about what it will take to close the SDG16+ implementation gap in the lead-up to the second SDG Summit in 2023.

between CIJ, Indigenous rights, and which justice mechanisms decide (and should decide) on disputes associated with land and natural resource governance and ownership affected by climate change (IDLO, 2022). In Latin America and elsewhere there is recent history of strategic coalitions between Indigenous groups and environmental organisations to establish a dialogue between state law, and indigenous norms, including through recourse to the legal right of *Free, Prior and Informed Consent (FPIC)* by which Indigenous communities seek resolve disputes over the use of natural resources on community lands (Brinks, 2019). This remains a hugely under-researched issue.

CIJ is thus a dominant fact in dispute-resolution needs for many people around the world and is deeply resilient. If development agencies and the justice community are to provide support that is relevant and connects with people's lived experience, then they must engage with this reality.

## 4 Concerns of investing and risks of engagement

Despite people's overwhelming reliance on CIJ systems, development agencies have tended not to engage with them, preferring instead to focus rule of law or justice support on the formal justice sector. This section sets out three main concerns regarding investing in or engaging with CIJ. While these are valid concerns, we suggest they can nonetheless be reframed in ways that are both more empirically accurate and also more productive in terms of improving people's access to quality justice.

### 4.1 Human rights concerns

In some instances, CIJ systems are discriminatory, lack due process and victim protection, use violence and abuse human rights. This can have especially serious impacts on marginalised groups that tend to be more vulnerable to abuses of power, such as women and girls, lesbian, gay, bisexual, transsexual and intersex (LGBTI) persons, ethnic or religious minorities and people with disabilities (Harper, 2011). In some cases, the proceedings that CIJ systems use are not compliant with human rights – for instance, there may be no confidentiality for victims, violence may be used to make determinations of innocence or guilt, and there may be no possibility of victim testimony, in instances where women are not allowed to speak on their own behalf, for instance (Tamanaha, 2012).

In other cases, the justice outcomes that result from CIJ proceedings may be detrimental to human rights (Harper, 2011). For instance, punishments may reinforce discriminatory social norms, with particular ethnic or religious groups or women punished for social ills. In other cases, the prescribed punishment may involve violence or even death. These human rights abuses are real and nobody should idealise CIJ or shy away from these challenges. For many development agencies, association with such human rights concerns is ethically and politically difficult. Seeking to improve justice outcomes by working with entities that themselves abuse human rights is counterintuitive.

## 4.2 Political challenges and risks

Given the human rights concerns above, development agencies face political challenges engaging with CIJ, particularly in relation to women and girls and marginalised groups. Reputationally, it is challenging for agencies with an explicit purpose of assisting the poor and vulnerable to work with actors that can deny their rights. This political challenge goes beyond just reputational risk, to include issues of accountability of donor agencies to their domestic authorities and home public; and for international non-government organisations (NGOs) to their board and funders (Yanguas, 2018). The need to ensure that public spending on aid meets political and public expectations is a political challenge for working with CIJ. The public outcry that attends media attention to the misuse of aid can be significant – particularly in a period of economic austerity in donor countries and increased scepticism regarding the justification for foreign aid (Denney, 2013a). Development agencies are thus understandably concerned about the political challenges of engaging with CIJ, given these lines of accountability and potential fallout.

## 4.3 Bureaucratic challenges and risks

Finally, development agencies face bureaucratic difficulties in partnering with CIJ actors – which may not have an overarching peak or representative body. They are mostly not membership-based organisations organised by a higher authority, nor are they government counterparts. They may also lack the capacities that are usually required for partnerships with or grants from development agencies. They do not set key performance indicators, use log-frames or report on development outcomes. CIJ actors are often wholly unsuited to fit into the programme management logic of development assistance. This makes for significant bureaucratic challenges in forging engagement with entities that have none of the usual characteristics of a development partner (Denney, 2013b). It can, of course, be done, but requires significant effort to make the systems and requirements of development agencies work – to say nothing of the fiduciary risk, given a lack of historic financial records. For these seemingly mundane bureaucratic reasons, development agencies may decide it is too difficult to engage with CIJ actors.

In combination, these human rights, political and bureaucratic challenges have meant that engagement with CIJ actors by development agencies – and in particular by donors – has been quite limited. Indeed, it has been astonishingly limited in view of the dominant role CIJ actors play in determining the quality of justice to which most people around the world have access.

## 5 How challenges and risks might be reframed

The challenges and risks of engagement with CIJ set out in the previous section pose significant obstacles. But they are not insurmountable and indeed can be reframed in ways that might open up the possibilities of productive engagement, and different channels of engagement.

The concern with human rights abuses is a key reason to engage rather than a reason to ignore CIJ. Such engagement should clearly not entail playing down human rights concerns. Rather, these should be seen as central to justifying the need for engagement with CIJ. Thus, the dialogue between human rights principles and the practice of CIJ should be an important feature of how international actors engage. Donors regularly work with formal justice and security systems that also present human rights challenges, and where these challenges are seen as a reason to engage. This includes training police, prosecution services and the judiciary precisely to advance their adherence to human rights standards and due process.

Importantly, working with CIJ does not always require working directly with those culpable of human rights abuses. Engagement can include, for instance, supporting normative change in both state law and customary norms. This may include investing in law reform or constitutional reforms to recognise legal pluralism, to advance human rights principles across *all* norm systems in plural legal settings and in how these interact. This can also mean a focus on supporting civil society or activists involved in legal or constitutional reform and facilitating dialogue between gatekeepers of norm systems in the community, religious groups, and legislative branches or constitutional assemblies. Moreover, CIJ actors may be hard to fund. Thus, in keeping with a people-centred approach to legal empowerment it is important to explore ways in which resources can help support justice seekers and not only or primarily the institutions that provide justice. Even in the most rights-abrogating CIJ systems, justice seekers may be supported creatively to demand better outcomes and accountability – as with formal justice systems.

International engagement could also include working directly with justice seekers or supporting organisations, such as civil society organisations (CSOs), paralegals and women's groups, including in their strategic approaches to navigating, negotiating and changing



normative content within CIJs, or through constructive engagement with community leaders and justice providers (Sieder and McNeish, 2012). Importantly, these processes are politically fraught and there is often no clear pathway to advancing justice for all. For instance, Indigenous women's organisations in Mexico navigate efforts to overcome discriminatory practices within the formal court and justice system at the same time as contesting gender-discriminatory practices and norms within their communities. Constitutional and political reforms which recognised legal pluralism in the 1990s created opportunity structures precisely for voice and agency by Indigenous women's organisations to challenge discrimination across all justice systems (Sierra, 2012).

Thus, not all efforts to work with CIJ require direct engagement, either because they may be too difficult to work with or are assessed to be unlikely to be susceptible to change. A spectrum approach might be adopted, with some CIJ actors leaning more towards the direct engagement end of the spectrum and others at the opposite end where engagement may not be appropriate.

There is still a lack of tools enabling donors and other external actors to assess where specific CIJ actors fall on that spectrum, and what kinds of interventions can be tailored on that basis. Nonetheless, even where donors decide not to engage directly with CIJ actors, it is essential to be aware of their existence in practice, and how this might affect and shape their programming choices. In other words, the design and implementation of justice programmes, even where they engage only with the formal justice system, should actively plan for how the presence of CIJ might affect or shape programming.

This wider range of programming approaches – also as illustrated in examples presented in section 6 – can help donors to address the bureaucratic challenges of engagement. The starting point for donors in managing their internal organisational constraints is to find entry points for engaging with CIJ that grapple with the political and social obstacles to ensuring access to justice in ways that take account of context-specific challenges to advancing people-centred justice. Entry points may be most appropriate in the form of working with local organisations and civil society groups that can act as partners. In some cases, engagement may include working directly with parts of government or justice sector actors, for instance ministries of justice, ministries of decentralisation, local government authorities, or judicial officers. Critically, such choices need to be informed by deep understanding of the context, including to identify which actors among these groups are widely trusted. As donors increasingly acknowledge, working with CIJ (as with all justice systems and actors) is likely to require some flexibility and adaptive capacity in their own processes in order to ensure a 'best fit' approach, in keeping with the local political economy – and not expecting the local political economy to adapt to their bureaucratic processes.

Finally, donors are understandably concerned about their domestic constituencies, given widely held views that CIJ are inevitably bad for women's rights, gender equality and human rights. The response should not be to shut down the discussion about CIJ. Rather, political concerns about accountability to sceptical parliaments or other authorities and the general public requires and would benefit from more honest engagement and communication that breaks down stereotyped ideas about CIJ. This also calls for public discussion about the possibility that human rights may be best served precisely by engaging with CIJ. There is also a need for more honest and open debate about the ethical challenges of engaging with governance and political contexts within which (plural) justice systems are located, and which affect all aspects of access to justice and rule of law. Taking the political context seriously will help ensure from the outset that the human rights challenges in a given context are confronted, for instance where civic space is limited, where there may be democratic backsliding, or where there are autocratic structures in place. All support to improving access to justice needs to grapple with the context-specific risks of contributing to harmful practices *and*, more positively, finding constructive entry-points, including working, as relevant, with CIJ. Take, for example, Myanmar, where donors focused on engaging with the judiciary, police and lawyers (formal system) without giving much attention to informal and non-state systems in a context where people did not trust the formal system. The 2021 military coup has shown that investment in both systems may have benefited people.

## 6 Examples of international engagement with CIJ

To demonstrate that productive donor engagement with CIJ is indeed possible – and to show what this can look like – this section briefly presents five examples of existing or historical forms of engagement with CIJs. These cut across different geographies, types of CIJ and development agency and approach. Of course, these are not presented as templates to replicate, but rather to illustrate what can be done to improve people’s real-world experiences of justice. In these examples, the challenges to engagement were overcome or circumvented in ways that enabled creative alternatives to improving justice for all.

### 6.1 Ending human compensation in customary courts in South Sudan<sup>2</sup>

In South Sudan, the Dutch NGO Cordaid, with funding from the Dutch Foreign Ministry, supports local partners STEWARDWOMEN, the South Sudan Law Society and the Justice and Peace Commission to facilitate exchanges of chiefs to facilitate learning across communities. Chiefs from one community are taken to another, especially when cases are settled differently between communities. This enables chiefs to witness how their peers resolve similar issues, presenting ideas for how to do things differently. The chiefs then take these ideas back to their own community and discuss how their own approaches could change. As a South Sudanese Cordaid staff member explained: ‘Each community learns from the other – every community has its weakness in different parts of justice’.

The exchange programme was used to address the issue of human compensation in Torit County, where, in some communities, punishment for serious crimes, such as murder, could involve a girl from the perpetrator’s family being given as compensation to the victim’s family. This form of compensation is formally illegal in South Sudan and most communities have abandoned the practice. Its persistence in Torit County led Cordaid’s partners to facilitate the exchange of chiefs from Torit to other communities where the practice had been replaced with other forms of punishment and compensation. When the Torit chiefs realised that only their

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<sup>2</sup> Adapted from Denney and Laws (2019: 29).

community was still practising human compensation, they were motivated to change this practice. Reportedly, human compensation has now ceased in Torit. Seeing the possibility for change within their own cultural context was important, as this was not imposed by outsiders but shown by their peers providing justice in similar contexts.

## 6.2 Connecting community justice and the state in Solomon Islands<sup>3</sup>

In Solomon Islands, the World Bank Justice for the Poor (J4P) programme has supported the Justice Delivered Locally initiative of the Ministry of Justice and Legal Affairs since 2010. It aims to reinvigorate local-level justice systems following the 1998-2003 violent conflict, recognising that most international assistance has focused on state justice institutions that struggle to serve the population (Allen et al., 2013: 1). Extensive research at the subnational level was undertaken to understand how people resolve disputes and conflict and the relationships between communities, local governance and the state.

Multiple, overlapping dispute-resolution processes were identified, including state police and courts, as well as non-state systems such as the customary *kastom* system and church groups (Allen et al., 2013: xi). The effectiveness and legitimacy of providers varied but where the *kastom* system was functional, it was generally the most commonly relied on, with churches also much used. In some communities, the *kastom* system was fragile and unable to respond to issues such as land disputes and substance abuse, and some chiefs that preside over the *kastom* system were viewed as being embroiled in personal power struggles.

On this basis, the Community Governance and Grievance Management (CGGM) Project was established in 2014, and sought to strengthen community grievance-management capabilities and build stronger linkages between communities, police and government (Porter et al., 2015: 13). Two Community Officers (COs) were appointed by community members in each community and employed by the Provincial Government to resolve disputes, refer serious matters to the police/courts and act as a channel for government service providers into communities. The COs have helped to rebuild trust in the Royal Solomon Islands Police Service – which is now more responsive, rather than being overwhelmed by minor complaints (World Bank, 2018). The COs provide a focal point for other Solomon Island government services, so that information from provincial and national governments is better communicated to communities and improves connections between government and citizens (World Bank, 2018). The Provincial Government has paid COs' salaries since the start of the project to build sustainability from the outset, and the World Bank is now supporting the Ministry of

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<sup>3</sup> Adapted from Denney and Rocha Menocal (forthcoming).

Provincial Government and Institutional Strengthening to increasingly take over management.

### **6.3 Supporting access to customary justice through the Village Mediation Programme in Malawi, Paralegal Advisory Services Institute (PASI)**

In Malawi, PASI has been working to improve the quality of and access to CIJ since the early 2000s, with a range of donors – most recently the European Union (EU) and the United Nations Development Programme (UNDP) under the Chilungamo (Justice and Accountability) Programme (2018-2022). PASI identifies and trains volunteer village mediators from within the community to undertake alternative dispute resolution, diverting minor cases from the over-burdened formal justice system, and keeping people out of pre-trial detention (UNDP, 2022). Serious cases are referred to the police. The training includes a strong focus on gender and human rights, with targets for women mediators and measuring the number of women bringing matters to the mediators (Matinde and Chingaïpe, 2022; Inclusive Cities Observatory, 2011:4; UNDP, 2011).

Key to PASI's approach are community sensitisation meetings to build understanding and acceptance of the village mediator approach in the community, as well as by traditional authorities. Chiefs and elders oversee customary courts in Malawi that similarly provide a form of CIJ, and PASI respects the value of traditional dispute resolution (Inclusive Cities Observatory, 2011: 3-4). The village mediators thus complement, rather than compete with, traditional authorities, alleviating the chiefs' heavy workload, and also retain the option of matters being taken to the customary courts where they cannot be resolved by the mediators (Inclusive Cities Observatory, 2011).

The Village Mediator Programme now operates in 11 of Malawi's 28 districts, and mediators dealt with over 27,000 cases in 2021; 97-99% of respondents in annual surveys regard the village mediators as a viable justice alternative (Matinde and Chingaïpe, 2022). This impressive reach and uptake can be attributed to the fact that mediators provide justice to people 'in their own language, in their own village, and on their own terms ... [and] empowers them to resolve minor criminal and civil issues, free of charge and in a participatory and culturally appropriate manner, in a process which is founded on strict human rights principles' (Inclusive Cities Observatory, 2011: 3). Further, there are high numbers of referrals of cases from traditional authorities, police and magistrates to the village mediators, underlining the extent of trust that has been built with other justice providers.

## 6.4 Working with the *Shalish* system in Bangladesh to contribute to social norm change and legal empowerment of marginalised groups

In Bangladesh, in which a majority of the population live in rural communities, it is estimated that two out of three disputes are resolved through community-based justice systems outside the formal judiciary (Hoque and Zarif, 2020). These include traditional *Shalish*, NGO-led *Shalish*, village courts and arbitration councils. While there is significant subnational variation across these systems, they involve largely informal processes of dispute resolution, where decisions are made by small panels of influential figures in the local community. The process aims to reach a peaceful resolution between parties through mediation or compromise (Hoque and Zarif, 2020). In traditional *Shalish* important power imbalances are often reflected in decision-making processes, notably relating to gender-based inequalities that disadvantage women. At the same time, this is the channel through which most disputes are resolved and is considered the most accessible and affordable – it is the empirical reality of justice in Bangladesh.

Over time donors have invested in efforts to increase the presence and influence of women in the NGO-led and traditional *Shalish*, and to alter the participatory dynamics of these forums. This has included working with NGO-led *Shalish*, which have explicitly taken on the aim of addressing gender-based inequalities in both process and outcome, ensuring women take part in the decision-making bodies (Valters and Jahan, 2016). Support has included activities aimed at improving gender-equal outcomes. Studies indicate that investing in women's mediation skills contributed to women's mobilisation to demand representation on traditional *Shalish* (UNDP, UN Women and UNICEF, 2015). NGO interventions aimed at building women's voice and leadership in dispute-resolution processes have involved creating *Shalish* led by women mediators (Valters and Jahan, 2016). Working with local women's organisations has reinforced demands that systems be more women-friendly, including through constructive dialogue and engagement with male community and religious leaders, as well as the involvement of established NGOs such as the Bangladesh Legal Aid and Services Trust (BLAST).

There have been important successes. More women are involved in dispute-resolution processes, and women have more influence in shaping justice outcomes in CIJ. At the same time, there is a need for caution in celebrating change given the ongoing challenges and limitations and the persistence of discriminatory norms in CIJ in Bangladesh. For instance, women-run *Shalish* tend to focus on so-called 'women's issues', which mostly appear to exclude, for instance, disputes relating to property and land. Donor efforts to improve CIJ systems for women in Bangladesh demonstrate that change is indeed possible, but it is hard-won, long-term work that

involves directly challenging power asymmetries and patterns of exclusion (Valters and Jahan, 2016).

### **6.5 Supporting Latin American Indigenous women's organisations to defend Indigenous rights and contest gender-based discrimination**

Since the 1980s in Latin America there have been important legal and constitutional developments resulting in various forms of recognition of Indigenous rights and legal pluralism. International engagement has been especially relevant in supporting Indigenous movements, and Indigenous women's organisations in securing these gains. Importantly, these have been locally led political and legal change processes.

Indigenous women have mobilised to both advance political processes aimed at asserting autonomy and self-determination and the cultural values of community for Indigenous groups, and to confront gender-based discrimination within Indigenous (and wider) socio-normative practices. Legal and political change has included, to varying degrees, recognition of Indigenous rules of governance and dispute resolution following customary norms that are grounded in their own cultures. In several contexts there have been interesting cases of Indigenous women mobilising to advance dual agendas through which to affirm rights to Indigenous identity, and rights as women. This has variably involved strategic alliances within and outside their community, and mobilisation at the regional and international levels. Importantly, international actors have been involved in supporting Indigenous women's organisations on these issues.

In the context of the constitutional reform process in Ecuador, resulting in the plurinational Constitution of 2008, for instance, the Kichwa women of the Women's Network of Chimborazo province played important role in the Constituent Assembly to advance an agenda which combined recognition of Indigenous rights, and gender equity within their communities. 'Indigenous women's demands in Ecuador have focused on two elements: first, gender violence and exclusion within their communities and organizations, and second, legitimating their rights as women and their rights to political participation within the framework of the collective rights of indigenous peoples' (Sieder and Sierra, 2011: 29). This has involved taking on and navigating structures of patriarchy, exclusion and discrimination both in the wider Ecuadorian society and in their own communities. Strategic mobilisation has involved activism and negotiation within their communities, organisation at the national level, including through engaging with the National Council of Ecuadorian Women, and mobilisation at the regional and international levels. The results of their activism are evident both in gains in the constitutional text of 2008, and in changing rules at the community level. The Constitution reflects important gains for

Indigenous women both in their contribution to securing recognition of Indigenous rights and rights their as women free from violence and to gender equity. In at least two communities, there continues to be activism to advance community-based regulations which address issues of intra-familial violence and gender exclusion, and is the fruit of Indigenous women strategically engaging in advocacy, and debating the issues within Indigenous assemblies and community-level meetings (Sierra and Sieder, 2011).

International actors have been involved in different ways to support these dual agendas of Ecuadorian Indigenous women. The key lesson from Latin America lies in the value of supporting locally led change processes in recognising (and changing) CIJ through support to civil society and social movements.

Like all processes of political and normative change and realignment, these are politically complex processes which require activism on multiple fronts and for which success is not guaranteed. Power relations, including across intersecting inequalities, require critical reflection and engagement with locally grounded agendas for change, which are driven by many stakeholders who may agree on some objectives but not others.



# 7 Conclusions and recommendations

CIJ is a feature of the justice landscape in most societies worldwide, given how many (especially marginalised) people have recourse to it. Supporting more equal access to justice for all necessarily involves accepting CIJ as part of how societies find ways to resolve their differences and disputes. Since it cannot be ignored, the question then is how to engage with its continued active role in people's experiences of justice. There is a need for care in navigating CIJ (as is equally true of statutory law and court-centred justice) in order to remain clear-sighted about the ways in which they may either perpetuate structures of inequality, discrimination and marginalisation (including violently so), or how they can contribute to people-centred justice that advances substantive justice for all in ways that align with human rights principles.

Donors and other development agencies have long debated the merits of CIJ but have often struggled to practically engage with CIJ justice systems or providers. This paper has set out some of the challenges that impede such engagement, but also some potential reframing of those challenges that might allow for greater engagement, where appropriate. The following recommendations may assist in working with CIJ to advance people's access to justice as part of efforts to achieve SDG16.3.

- 1 Keep CIJ on the access to justice agenda:** Continue to build awareness about the productive roles CIJ may play in delivering people-centred justice and feed this into SDG 16.3 discussions. This includes sharing lessons on *how* those roles can be supported and funded by external donors and other agencies. And principally it includes underlining the empirical fact of CIJ in global experiences of access to justice.
- 2 Demonstrate and document the evolutionary nature of CIJ:** Undertake an analytical review of the evidence to uncover how CIJ systems change in different localities, countries and regions, and that recognises the diverse nature of this political history. All justice systems evolve, especially since they are embedded in wider governance systems and political settlements which also evolve. Such a review should consider what is known about the politics of change of CIJ, how rights and other distributional issues

feature in these processes of change, who is involved and how this contestation is expressed.

- 3 **Invest in documenting donor practice:** This includes, reviewing, documenting and sharing donors' examples of innovative practice in how they and NGOs work on issues of CIJ and facilitate learning across organisations to expand good practice. This includes research which addresses how donors navigate their organisational and bureaucratic constraints to facilitate engagement with CIJ
- 4 **Start small and innovate:** Donors may wish to start small and identify where and how they may be able to pilot projects that take account of CIJ. This may involve working with CIJ actors directly, with justice facilitators (such as community-based paralegals or CSOs) that interface with CIJ, or in ways that take account of the role CIJ plays in providing justice. It may also involve working directly with social movements and end users.
- 5 **Think globally:** At the same time, in a globalised world there is a need to ask wider questions of how in some contexts CIJ may help to protect communities from the global challenges of climate change, and predatory practices of the extractives sector and natural resource exploitation. There is a need to build up the evidence base on such issues as many Indigenous communities continue to mobilise around protecting the sustainable use of natural resources, as evidenced in COP27. This may contribute to advancing critical goals as such as climate justice, but is rarely connected with CIJ discussions.

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