



United Nations Development Programme  
Oslo Governance Centre  
**The Democratic Governance  
Fellowship Programme**

## **Doing Justice:** How informal justice systems can contribute

**Ewa Wojkowska, December 2006**



# Contents

**Contents** *page 2*

**Acknowledgements** *page 3*

**List of Acronyms and Abbreviations** *page 4*

**Research Methods** *page 4*

**Executive Summary** *page 5*

**Chapter 1: Introduction** *page 7*

**Key Definitions:** *page 9*

**Chapter 2: Why are informal justice systems important?** *page 11*

**UNDP's Support to the Justice Sector 2000-2005** *page 11*

**Chapter 3: Characteristics of Informal Justice Systems** *page 16*

**Strengths** *page 16*

**Weaknesses** *page 20*

**Chapter 4: Linkages between informal and formal justice systems** *page 25*

**Chapter 5: Recommendations for how to engage with informal justice systems** *page 30*

**Examples of Indicators** *page 45*

**Key features of selected informal justice systems** *page 47*

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### **The OGC Fellowship Programme**

The UNDP Oslo Governance Centre (OGC) was established in 2002 as a centre of excellence designed to provide support to the work of UNDP in democratic governance. The OGC is a unit of the Democratic Governance Group in the Bureau for Development Policy. The major purpose of the work of the OGC is to help position UNDP as a champion of democratic governance.

The OGC Fellowship Programme is intended to contribute to the OGC objectives by focused reflection and innovative thinking on specific governance issues, and addressing specific gaps in the application of existing knowledge. Fellows are selected on a competitive basis from among UNDP practitioners and undertake their fellowship at the Oslo Governance Centre for a period of up to two months. For further information please refer to <http://www.undp.org/oslocentre/dgfelpro.htm>

## List of Acronyms and Abbreviations

ADR	Alternative Dispute Resolution
CSO	Civil Society Organization
DfID	UK Department for International Development
HURITALK	Human Rights Knowledge Network
IDLO	International Development Law Organization
ILO	International Labour Organization
IDP	Internally Displaced Person
MDGs	Millenium Development Goals
MYFF	Multi-year Funding Framework
NGO	Non-Government Organisation
NORAD	Norwegian Agency for Development Cooperation
OGC	Oslo Governance Centre
PRIO	International Peace Research Institute Oslo
ROAR	Results-Oriented Annual Report
SRF	Strategic Results Framework
UNDP	United Nations Development Programme
USAID	United States Agency for International Development

### Research Methods

- A query was submitted to HURITALK, Asia Pacific Rights and Justice, and the Democratic Knowledge Networks requesting documents and information regarding experience of working with informal justice systems. Eighteen contributions were received from inside and outside of UNDP;
- A review of ROAR/MYFF outputs and result reporting from 2000-2005.
- Email and telephone interviews with UNDP Country Office staff;
- Email, telephone and face to face interviews with organisations working in this area (IDLO, World Bank, NORAD, Norwegian Refugee Council, USAID, Norwegian Centre for Human Rights, PRIO);
- Review of extensive DfID commissioned work on informal justice systems and policy guidance notes;
- Literature review;
- Review of documents on work with informal justice systems (project and evaluation documents – UNDP and other organizations);
- Author’s personal experiences with regard to this issue from working in Indonesia and East Timor.

## Executive Summary



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This paper is for practitioners working on access to justice. It presents a case for UNDP to increase its engagement with informal justice systems so that we can better strengthen access to justice for poor and disadvantaged people.

The *formal justice system* for the purposes of this paper involves civil and criminal justice and includes formal state-based justice institutions and procedures, such as police, prosecution, courts and custodial measures. The term *informal justice systems* is used when referring to dispute resolution mechanisms falling outside the scope of the formal justice system.

Consistent with UNDP's strong commitment to the Millenium Declaration and the fulfillment of the Millenium Development Goals, access to justice is a vital part of UNDP's mandate. Access to justice is essential for human development, establishing democratic governance, reducing poverty and conflict prevention.

Justice sector reform is a rapidly expanding area, however informal justice systems still remain largely neglected by UNDP and most multi-lateral and bi-lateral development assistance. This is somewhat surprising as the poor and disadvantaged are infrequent users of the formal justice system and UNDP's specific niche lies in ensuring access to justice for those who are poor and disadvantaged.

Informal justice systems are often more accessible to poor and disadvantaged people and may have the potential to provide quick, cheap and culturally relevant remedies. Informal justice systems are prevalent throughout the world, especially in developing countries. They are the cornerstone of dispute resolution and access to justice for the majority of populations, especially the poor and disadvantaged in many countries, where informal justice systems usually resolve between 80 and 90 percent of disputes.

Given the prevalence of these systems and the fact that so many people access them for their justice needs, the support to informal justice systems is very limited. Most development assistance is channelled to what is referred to as the 'rule of law' approach. This type of approach has generally not focused on issues of accessibility, has tended to focus on institutions rather than people, has been top-down, has generally not been successful in improving access to justice for poor and disadvantaged populations, and has not been cognisant of where people actually go to seek justice.

UNDP's support to the justice sector has almost doubled over the past six years, from 53 countries reporting programming on human rights or the justice sector in 2000 to 95 in 2005. Support to informal justice systems has increased slightly, but remains minimal in comparison to formal justice systems.

There is no denying that support to enhance the rule of law and improve the functioning of the formal justice institutions is crucial, however given the slow pace of reform, it is increasingly recognized that technical top-down fixes alone will not suffice to improve access to justice in many countries.

In post-conflict countries, where formal mechanisms may have completely disappeared or been discredited, informal systems of dispute resolution may be crucial to restoring some degree of law and order, and they may be all that is available for many years.

If there are no viable means of resolving societal disputes, the alternatives are either violence or conflict avoidance – which in itself is likely to lead to violence later. Informal systems are usually the primary means of resolving disputes in many countries, as such their effectiveness determines whether they can be resolved in a peaceful way or whether they will descend into violence.

However, informal justice systems are no panacea. Despite informal justice systems being widely viewed by many as the most likely way of achieving an outcome that satisfies their sense of justice, there are situations in which it falls well short of realising that ideal. Informal justice systems are often discriminatory towards women and disadvantaged groups, do not always adhere to international human rights standards, are susceptible to elite capture and the quality of the justice is often dependent on the skills and moral values of the individual operator.

Despite the challenges, this paper concludes that engaging with informal justice systems is necessary for enhancing access to justice for the poor and disadvantaged. Ignoring such systems will not change problematic practices present in the operations of informal justice systems. It is of course very important to take all concerns seriously. Any initiatives undertaken should work towards gradually enhancing the quality of dispute resolution and addressing the weaknesses faced by informal justice systems. Such initiatives should be part of a broader, holistic access to justice strategy, which focuses on achieving the broader goal of enhancing access to justice by working with both formal institutions and informal justice systems.

It is important to remember that situations vary from country to country, therefore there are no templates that identify generic entry points for access to justice programming. In order to choose an entry point, we must analyze the situation in relevant sectors and identify catalytic actors and institutions. Needs assessments are a good entry point. The challenge is to learn from other experiences (in particular, those from developing countries that have overcome similar challenges) but also to provide customized solutions for particular situations. A review of existing initiatives and potential recommendations for engagement with informal justice systems are provided in the final chapter of this paper.

## Chapter 1: Introduction

This paper is for practitioners working on access to justice. It presents a case for UNDP to increase its engagement with informal justice systems so that we can better strengthen access to justice for poor and disadvantaged people. The paper provides an introduction to the main issues regarding informal justice systems, describes some experiences of engaging with informal justice systems and presents some recommended entry points for enhancing access to justice through these mechanisms.

1 See bibliography.

The subject matter is a complex one, and one which has generated significant research and debate. As such the paper only provides an overview of some of the main issues which need to be taken into consideration when developing strategies to improve access to justice through informal justice systems. A significant volume of literature has been generated over the years about such systems and how they operate in many countries around the world.<sup>1</sup> This paper draws on and reviews some of this literature, with the objective of translating this into a practical approach, as the paper is intended to enhance programming capacities in this area. The paper reviews the strengths and weaknesses of informal justice systems and concludes that despite the challenges, engaging with these systems is necessary for UNDP to effectively enhance access to justice for poor and disadvantaged people.

The paper is structured as follows:

- Chapter one sets out and reviews the UNDP mandate on access to justice in relation to working with informal justice systems;
- Chapter two reviews the importance of informal justice systems, it also discusses some of the reasons why poor and disadvantaged people are unable or unwilling to access formal justice systems, and provides some statistics on usage of informal justice systems. The chapter reviews UNDP's support to the justice sector across the world and shows that insufficient attention is being paid to informal justice systems;
- Chapter three provides an overview of the characteristics of informal justice systems, and highlights some of their key strengths and weaknesses;
- Chapter four reviews the various models of state recognition of informal justice systems;
- The paper argues that UNDP should do much more to strengthen access to justice for poor and disadvantaged people by working with informal justice systems and in chapter five provides a review of experiences in this regard. The chapter concludes with a series of recommendations of how UNDP can engage better with informal justice systems in its efforts to enhance access to justice for the poor and disadvantaged groups.
- Annex 1 provides an overview of some of the key features of selected informal justice systems.

2 UNDP (2005), Programming for Justice: Access for All, A practitioner's guide to a human rights-based approach to access to justice.

3 For example, at its peak, large scale social conflict broke out in seven of Indonesia's thirty-three provinces, creating over two million Internally Displaced Persons (IDPs) and leading to growth rates of negative four per cent in conflict-affected areas. Although the causes of the conflict are manifold, most research shows that violence occurs when an accumulation of small disputes not effectively managed either at the local level or by the formal justice sector explode into violent responses (See for example World Bank Indonesia (2006), Local, not traditional justice: The case for change in non-state justice in Indonesia. Also (2006) Memorandum of Understanding between the Government of Indonesia, National Development Planning Agency, The World Bank and the United Nations Development Programme on Strengthening Access to Justice in Indonesia.

4 UNDP (2005), Programming for Justice: Access for All, A practitioner's guide to a human rights-based approach to access to justice.

5 UNDP, *ibid.* UNDP (2004), Access to Justice Practice Note.

6 For example Chirayath et al conclude that given the prevalence of these systems in most developing countries, the relative lack of attention to them by development practitioners is striking, even if not surprising. Leila Chirayath, Caroline Sage and Michael Woolcock (2005), Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems. Fuandez makes a similar observation in Julio Faundez (2006), Should Justice reform projects take non-state justice systems seriously? Perspectives from Latin America.

### Access to Justice: Part of UNDP's Mandate

Consistent with UNDP's strong commitment to the Millenium Declaration and the fulfillment of the Millenium Development Goals (MDGs), access to justice is a vital part of UNDP's mandate. Access to justice is essential for human development, establishing democratic governance, reducing poverty and conflict prevention for the following reasons:<sup>2</sup>

- Democratic governance is undermined where access to justice for all citizens (irrespective of gender, race, religion, age, class or creed) is absent.
- The poor and disadvantaged, due to their vulnerability are more likely to be victims of criminal and illegal acts, including human rights violations.
- Crime and illegality are likely to have a greater impact on poor and disadvantaged people's lives as it is harder for them to obtain redress. As a result, they may fall further into poverty. Justice systems can provide remedies which will minimize or redress the impact of this.
- Fair and effective justice systems are the best way to reduce the risks associated with violent conflict. The elimination of impunity can deter people from committing further injustices, or from taking justice into their own hands through illegal or violent means. In many countries, the reduction of violence is critical for achieving the MDGs.<sup>3</sup>

UNDP defines 'access to justice' as:

***The ability of people to seek and obtain a remedy through formal or informal institutions of justice, and in conformity with human rights standards.***<sup>4</sup>

### Access to Justice for Who?

UNDP's specific niche within the broad context of justice sector reform is in promoting access to justice *for those who are poor and disadvantaged*.<sup>5</sup>

### Justice Sector Reform Tends to Focus on Formal Institutions of Justice

Justice sector reform attracts a lot of donor support, with most initiatives focussing on top-down formal justice sector mechanisms and institutions. There is no denying that support to enhance the rule of law and improve the functioning of the formal justice institutions is crucial, however given the slow pace of reform it is increasingly recognized that technical top-down fixes alone will not suffice to improve access to justice in many countries. As will be discussed below, given that a majority of disputes are resolved at the local level, any comprehensive access to justice strategy also needs to take greater account of informal justice systems and actors.

### We Must Work with a Variety of Institutions and Actors

This includes community leaders, traditional councils and other local arbitrators. Informal justice systems are often more accessible to poor and disadvantaged people and may have the potential to provide quick, cheap and culturally relevant remedies. Informal justice systems are present throughout the world, especially in developing countries. Despite their prevalence they have been largely neglected.<sup>6</sup>



7 Open Society Justice Initiative, National Criminal Justice Reform, Donor Assistance to Justice Sector Reform in Africa: Living up to the new agenda?.

An Open Society Justice Initiative review of donor assistance to justice sector reform in Africa, states that “any examination of the experience of poor and excluded persons accessing justice in Africa must conclude that formal state institutions may not be the most relevant”.<sup>7</sup>

Lesson-learning exercises, including comparative research by the International Council on Human Rights Policy, highlights the failings of donor approaches to date. The report of the council has set out a strategic approach which includes (among others) the need to:

- Start from the beneficiary perspective;
- Adopt a rights based approach;
- Give priority to the needs of poor, vulnerable and marginalized groups by enhancing their access to justice;
- Recognize indigenous systems.<sup>8</sup>

8 Open Society Justice Initiative, *ibid.*

### Key Definitions:

#### Formal Justice System

The *formal justice system* for the purposes of this paper involves civil and criminal justice and includes formal state-based justice institutions and procedures, such as police, prosecution, courts (religious<sup>9</sup> and secular) and custodial measures.

9 Only when stated in law.

#### Informal justice systems

The term informal justice systems will be used throughout this paper when referring to dispute resolution mechanisms falling outside the scope of the formal justice system. The term does not fit every circumstance as many terms exist to describe such systems (traditional, indigenous, customary, restorative, popular), and it is difficult to use a common term to denote the various processes, mechanisms and norms around the world. The term informal justice system is used here to draw a distinction between state-administered formal justice systems and non-state administered informal justice systems.

10 Julio Faundez (2006), Should Justice reform projects take non-state justice systems seriously? Perspectives from Latin America.

However a disclaimer is necessary here, as the term informal justice system may in some cases not capture the extent to which the state is involved in a particular justice system as this line may often be blurred.<sup>10</sup> In many countries, communities that apply customary law are recognized and regulated by the state either by law, regulations or by jurisprudence, and are therefore ‘semi-formal’. Finally, describing a traditional or indigenous system as ‘informal’ may imply that it is simplistic or inferior when in fact it may apply a highly developed system of rules and be quite formal in procedure.<sup>11</sup>

11 UNDP Indonesia (2006), Justice for All? An Assessment of Access to Justice in Five Indonesian Provinces.

Vigilantes, private armies, private policing, street gangs and organized crime groups are not covered in this paper. The paper also does not explicitly cover the range of religious dispute resolution systems and state sanctioned Alternative Dispute Resolution (ADR) processes present throughout the world although some examples of such are provided.

### **An Important Clarification: The Position of This Paper**

It is important to clarify at the outset that informal systems are not flawless. Some of the weaknesses of informal justice systems are outlined in subsequent chapters. It is the position of this paper that all informal justice systems should meet the following criteria and that any interventions or initiatives undertaken should work towards gradually enhancing the quality of dispute resolution and getting the informal justice systems to adhere to the following human rights based principles:

#### **Participation**

- Be voluntary and not compel people to use them
- Be accepted by the community
- Be open to public participation in the decision-making process

#### **Accountability**

- Be open to some form of regulation and review

#### **Non-discrimination**

- Be non-discriminatory on the basis of sex or any other status

#### **Empowerment**

- Communities need to be empowered to hold informal justice systems accountable

#### **Link to human rights standards**

- Apply humane sanctions that are consistent with constitutional and human rights provisions. Physical punishments should be prohibited as they amount to inhuman or degrading treatment
- Not try persons for serious offences such as rape or murder
- Establish linkages between the formal and informal systems

## Chapter 2: Why are informal justice systems important?

12 This trend does appear to be slowly shifting. For example, DfID has a specific policy on working with non-state justice systems (DFID (2004), Briefing: Non-state justice and security systems). The Norwegian Refugee Council has legal assistance programmes in 20 countries and support to informal justice systems is featured in most of these programmes. World Bank Justice for the Poor programme also works with informal justice systems through their Justice for the Poor programme.

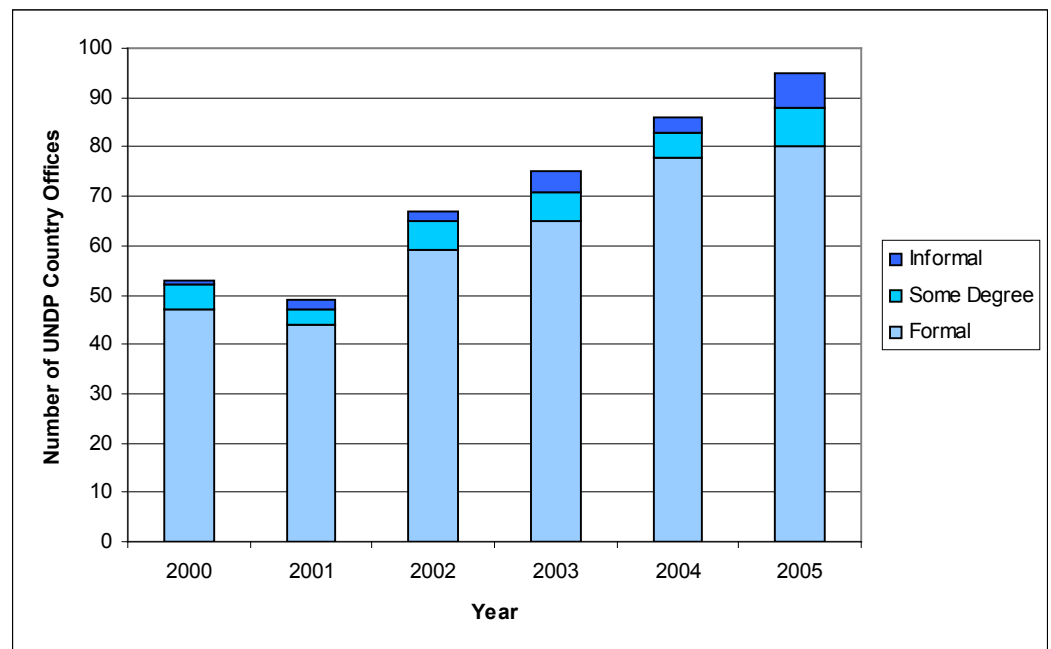
13 Although the number of outputs/results reported by any given country office may be one or more, each country office is only reflected once - unless a country office reports both support to formal AND informal justice systems, in which case they are counted once for formal and once for informal assistance. The 'some degree' category refers to reported support to mediation or ADR mechanisms, but the reports do not explicitly state that they work with informal or informal justice systems. This analysis relies only on what was reported through ROAR and the Results Database, it is possible that there are additional activities which were undertaken but are not counted here as they were not reported on.

Justice sector reform is a rapidly expanding area, however informal justice systems still remain largely neglected by UNDP and most multi-lateral and bi-lateral development assistance.<sup>12</sup> This is somewhat surprising as the poor and disadvantaged are infrequent users of the formal justice system and UNDP's specific niche lies in ensuring access to justice for those who are poor and disadvantaged.

### Insufficient support from development actors, including UNDP

UNDP's support to the justice sector has almost doubled over the past six years, from 53 countries reporting programming on human rights or the justice sector in 2000 to 95 in 2005. Support to informal justice systems has increased slightly, but remains minimal in comparison to formal justice systems; in 2005, 80 countries reported support to the formal justice system, seven reported support to informal justice systems and eight reported support to some type of alternative dispute resolution or mediation mechanisms.

UNDP's Support to the Justice Sector 2000-2005<sup>13</sup>



Source: Review of reported outputs and results through SRF/ROAR 2000 – 2003 Justice and Human Rights SAS/ Management Area; 2004 and 2005 Results Database, Justice and Human Rights Service Line

The scenario is similar at the World Bank. In the past decade, the World Bank has increased its efforts in promoting justice sector reform in the countries where it is working, yet none of these projects deal explicitly with informal justice systems, despite their predominance in many of the countries involved. Of the 78 assessments of legal and justice systems undertaken by the Bank since 1994, many mention informal justice systems in the countries looked at, but none explore the systems in detail or examine links between local level systems and state regimes.<sup>14</sup>

14 Leila Chirayath, Caroline Sage and Michael Woolcock (2005), Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems.

15 Chirayath, Leila, Caroline Sage and Michael Woolcock (2005), Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems.

16 See for example Stephen Golub (2003), Beyond the rule of law orthodoxy: The legal empowerment alternative, Carnegie Endowment for International Peace, Rule of Law Series, Democracy and Rule of Law Project, Number 41. Golub raises the following questions about the assumptions often made of such an approach: ROL's impact on poverty alleviation: a lack of evidence; ROL Promotion's weak track record; Altar of institutionalization; Supposed centrality of the judiciary; Judicial reform as an end in itself; Underestimating the obstacles, overestimating the potential; Myths of sustainability.

17 It is important to note the possibility that were many of these cases to be channelled to the formal justice system they may not be accepted as there may be a minimum monetary value for acceptance of a case set by the formal justice system. Thus many of the civil disputes under discussion may not in fact be accepted as they do not reach this minimum value. As such the informal justice system is the only possible avenue in these cases.

18 Wilfried Scharf, Informal justice systems in Southern Africa: How should Governments Respond?, Institute of Criminology, University of Cape Town, South Africa.

19 UNDP (2005), Programming for Justice: Access for All, A practitioner's guide to a human rights-based approach to access to justice.

20 Leila Chirayath, Caroline Sage and Michael Woolcock (2005), Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems.

21 Chirayath et al, *ibid*.

22 Centre for Humanitarian Dialogue, Rule of Law through imperfect bodies? The informal justice systems of Burundi and Somalia.

### Justice reform is slow: Focussing on the formal sector alone is not enough

Justice reform generally concentrates primarily on providing support to the formal institutions of the justice sector. However, reform is slow, and problems exist within the institutions that in some cases may take many years or generations to resolve. Moreover, reform efforts have usually consisted of top-down technocratic initiatives and many have not taken into account the social and cultural specificity of the particular context in which they operate – although this trend does appear to be changing.<sup>15</sup>

Given the prevalence of these systems and the fact that so many people access them for their justice needs, the support to informal justice systems is very limited. Even though most people access informal justice systems, most development assistance is channelled to what is referred to as the 'rule of law' approach. This type of approach has generally not focused on issues of accessibility, has tended to focus on institutions rather than people, has been top-down, has generally not been successful in improving access to justice for poor and disadvantaged populations, and has not been cognisant of where people actually go to seek justice.<sup>16</sup> Informal justice systems are the cornerstone of accessing justice for the majority of the population in many countries, and recourse to the formal system is only contemplated, if at all, as a last resort.

### Some statistics<sup>17</sup>

- In **Malawi** between **80 and 90%** of all disputes are processed through customary justice forums;<sup>18</sup>
- In **Bangladesh** an estimated **60-70%** of local disputes are solved through the *Salish*;<sup>19</sup>
- In **Sierra Leone**, approximately **85%** of the population falls under the jurisdiction of customary law, defined under the Constitution as 'the rules of law, which, by custom, are applicable to particular communities in Sierra Leone';<sup>20</sup>
- Customary tenure covers 75% of land in most African countries, affecting **90%** of land transactions in countries like **Mozambique** and **Ghana**;<sup>21</sup>
- There are estimates claiming that up to **80%** of **Burundians** take their cases to the *Bashingantahe* institution as a first or sometimes only instance;<sup>22</sup>

23 See for example: DFID (2004), Briefing: Non-state justice and security systems. Julio Fuandez (2006), Should Justice reform projects take non-state justice systems seriously? Perspectives from Latin America. Penal Reform International (2000), Access to justice in sub-Saharan Africa: the role of traditional and informal justice systems. The Asia Foundation (2004), Survey of Citizen Knowledge: Law and Justice in East Timor. UNDP Cambodia (2005), Pathways to Justice. UNDP Indonesia (2006), Justice for All? An Assessment of Access to Justice in Five Indonesian Provinces. UNDP Indonesia, BAPPENAS, IDLO, University of Syiah Kuala, The World Bank (2006), Access to Justice in Aceh, Making the Transition to Sustainable Peace and Development. World Bank Indonesia (2004), Interim Report, Justice for the Poor Project: Research Paper on Community Access to Justice and Village Judicial Autonomy. World Bank Indonesia (2006), Justice for the Poor Program, "Local, not traditional justice: The case for change in non-state justice in Indonesia, Draft.

24 UNDP (2005), Programming for Justice: Access for All, A practitioner's guide to a human rights-based approach to access to justice. UNDP (2004), Access to Justice Practice Note.

25 There is now recognition amongst the development assistance community that a human rights based approach to development will lead to better and more sustainable human development outcomes.

26 Leila Chirayath, Caroline Sage and Michael Woolcock (2005), Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems.

27 Jan Arno Hessbruegge and Carolos Fredy Ochoa Garcia (2005), Mayan Law in Post-Conflict Guatemala, Draft. ILO Convention 169, Article 8 "1. In applying national laws and regulations to the peoples concerned, due regard shall be had to their customs or customary laws. 2. These peoples shall have the right to... continued on following page

### Why don't the poor use formal justice systems?<sup>23</sup>

- Mistrust of the law, fear, intimidation;
- Lack of understanding – language issues, unfamiliarity of formal procedures and court atmosphere, low legal literacy;
- Unequal power relations;
- Physical and financial inaccessibility;
- Formal systems are culturally 'uncomfortable';
- Formal system lacks legitimacy – can be complicit in conflict and past oppression, corruption;
- It usually takes a long time to process cases, opportunity costs;
- Going through the formal system may lead to more problems between the disputing parties.

### We cannot ignore informal justice systems if we are true to our human rights-based approach

Ignoring informal justice systems will not change the problematic practices, which may be present in their operations. Existence of these systems cannot be overlooked. We need to develop strategies to take advantage of the benefits of informal systems while encouraging appropriate reforms.

UNDP is committed to using a human rights-based approach in its programming, guided by international human rights standards and principles.<sup>24</sup> If we apply the human rights based approach to the development<sup>25</sup> of an access to justice strategy in a given country, we will likely find that poor people and disadvantaged communities show ambivalence towards the formal institutions and put their trust into the informal institutions.

In many cases, informal systems not only reflect prevailing community norms and values, but the state systems lack legitimacy; they are seen as mechanisms of control and coercion used by oppressive regimes.<sup>26</sup>

To become efficient in overcoming barriers for people to access justice, strategies and reforms need to be designed in and for the specific local contexts and the process must be driven by national actors – both claim holders and duty bearers. Therefore, UNDP in particular, and the broader development community in general, needs, as a first step, to assess the existing capacity gaps for the claim holders (in this case ordinary citizens) to be able to claim their rights, and duty bearers (state and non-state officials bearing responsibility for delivering justice services) to be able to meet their obligations - this includes working with informal justice actors.

From another perspective, the failure to recognize such systems may in itself be discriminatory. In many cases these systems are a central component of the individual and collective identity and dignity of the indigenous populations to which they apply. Here human rights need to be considered as crucial to the recognition of the informal justice system in question. Indigenous people have a collective right to a certain degree of normative and institutional autonomy, which is specifically elaborated in ILO convention 169.<sup>27</sup>

... retain their own customs and institutions, where these are not incompatible with fundamental rights defined by the national legal system and with internationally recognized human rights. Procedures shall be established, whenever necessary, to resolve conflicts which may arise in the application of this principle. Article 9“1. To the extent compatible with the national legal system and internationally recognised human rights, the methods customarily practised by the peoples concerned for dealing with offences committed by their members shall be respected. 2. The customs of these peoples in regard to penal matters shall be taken into consideration by the authorities and courts dealing with such cases.

28 Thomas Zitelmann in World Bank Indonesia (2006), Justice for the Poor Program, “Local, not traditional justice: The case for change in non-state justice in Indonesia, Draft. Conflict avoidance over access to natural resources during the New Order regime is one acknowledged cause of the wider-scale social violence which struck parts of Maluku, Kalimantan, Sulawesi and elsewhere during the post-reform era.

29 Stephen Golub (2003), Beyond the rule of law orthodoxy: The legal empowerment alternative, Carnegie Endowment for International Peace, Rule of Law Series, Democracy and Rule of Law Project, Number 41.

30 Buscaglia in Leila Chirayath, Caroline Sage and Michael Woolcock (2005), Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems.

31 Samuels points out it is increasingly clear that a realistic timeframe for re-creating a working criminal justice system following serious armed conflict with formal courts, trained judges and a retrained police force is close to twenty-years. This is all the more true where the criminal justice system was never particularly strong or effective before the conflict, and is even worse if new legal norms are sought to be introduced, or if there is little political will or weak local constituency support for the reforms. Kirsti Samuels (2006), Rule of Law Reform in Post-Conflict Countries: Operational Initiatives and Lessons Learnt, World Bank Social Development Papers, Conflict Prevention & Reconstruction, Paper No. 37.

### **Informal justice systems are important for conflict prevention and may be crucial in post-conflict countries**

If there are no viable means of resolving societal disputes, the alternatives are either violence or conflict avoidance – which in itself is likely to lead to violence later.<sup>28</sup> Informal systems are usually the primary means of resolving disputes in many countries, as such their effectiveness determines whether they can be resolved in a peaceful way or whether they will descend into violence.<sup>29</sup> For example, in a study of formal and informal dispute resolution systems amongst poor segments of rural Colombia, the incidence of communities taking matters into their own hands through vigilantism, “mob justice” or lynching is more than five times greater in communities where informal mechanisms are no longer functioning effectively and state presence remains limited.<sup>30</sup>

In post-conflict countries, where formal mechanisms may have completely disappeared or been discredited, informal systems of dispute resolution may be crucial to restoring some degree of law and order, and they may be all that is available for many years.<sup>31</sup>

### **Challenges of informal justice systems**

The weaknesses of informal justice systems are well known and documented. The following chapter will discuss some of these challenges as well as the strengths in more detail. Generally speaking however, informal justice systems are sometimes seen by development partners and governments themselves as backward, undemocratic, ‘traditional’ practices, which are not in line with broader development goals. There are fears that acceptance of such systems poses the risk of institutionalization of low quality justice for the poor.

### **Going forward**

Reform strategies should take advantage of the informal structures and at the same time encourage appropriate reforms. Interventions with informal justice systems should be part of any holistic reform strategy aimed at increasing access to justice, where support to informal institutions complements reform on the formal justice sector. A review of existing initiatives and recommendations for engagement are provided in the final chapter.

Where do we find informal justice systems?<sup>32</sup>



32 Adapted primarily from information obtained at <http://www.droitcivil.uottawa.ca/world-legal-systems/eng-coutum.php> University of Ottawa, Faculty of Law, Canada (accessed 11.11.2006) and Jennifer Corrin Care, "Status of Customary Law in Pacific Island Countries", Journal of South Pacific Law, Volume 4, 2000, [http://www.vanuatu.usp.ac.fj/journal\\_splaw/articles/Corrin1.htm](http://www.vanuatu.usp.ac.fj/journal_splaw/articles/Corrin1.htm) (accessed 7.12.2006). The information contained in this map is not exhaustive.

## Chapter 3: Characteristics of Informal Justice Systems

There are many informal justice systems within one country and it is often not possible to give a characterisation of a system that can be safely generalized across one country, let alone the world. They do however often share many common features.

This chapter will provide an overview of some of the common characteristics of informal justice systems and highlight some of their strengths and weaknesses. Key features of selected informal dispute resolution mechanisms are provided in Annex 1.

33 Drawn from Julio Faundez (2006), Should Justice reform projects take non-state justice systems seriously? Perspectives from Latin America. DFID (2004), Briefing: Non-state justice and security systems. Penal Reform International (2000), Access to justice in sub-Saharan Africa: the role of traditional and informal justice systems.

### Common characteristics of informal justice systems<sup>33</sup>

- The problem is viewed as relating to the whole community as a group – there is strong consideration for the collective interests at stake in disputes;
- Decisions are based on a process of consultation;
- There is an emphasis on reconciliation and restoring social harmony;
- Arbitrators are appointed from within the community on the basis of status or lineage;
- There is often a high degree of public participation;
- The rules of evidence and procedure are flexible;
- There is no professional legal representation;
- The process is voluntary and the decision is based on agreement;
- They have a high level of acceptance and legitimacy;
- There is no distinction between criminal and civil cases, informal justice systems often deal with both;
- Often there is no separation between informal justice systems and local governance structures – a person who exercises judicial authority through an informal justice system may also have executive authority over the same property or territory;
- Enforcement of decisions is secured through social pressure.

The following section will discuss the strengths and weaknesses identified with informal justice systems.

### Strengths

#### Understandable and culturally 'comfortable'

Proceedings are usually conducted in the local language and follow local customs, therefore people are less likely to be intimidated in these settings. The informal process is usually much simpler than formal legal proceedings.

For example in East Timor there are around 17 different languages. The lack of sufficient translation facilities in the formal justice system continues to create problems during hearings. **The informal systems proceedings, on the other hand, are always heard in the local language of the area.**

In countries that were colonized, customary laws and practices were subordinated to roman or common law systems, or a combination of both. Therefore **in many of the countries where such systems are prevalent the majority of the population may see the formal justice system as something foreign to them as compared to the customs with which they are familiar.**<sup>34</sup>

34 International Council on Human Rights Policy (2004), Enhancing Access to Human Rights.



#### Focus on consensus, reconciliation and social harmony

The goal often is not just to punish the perpetrator, but to compensate the victim for their loss, to prevent the accused from committing the crime again, and to reintegrate both the victim and offender back into the community. The type of justice promoted by these systems may be the most appropriate option for people living in a close-knit community whose members must rely on continued social and economic cooperation with their neighbours.

#### Informal justice systems can be good partners with the formal justice system

State justice systems often operate with an extremely limited infrastructure with limited resources. In cases which do not involve serious offences, informal justice systems can provide a very cost effective means by which people can voluntarily choose to settle their disputes, thereby reducing court congestion. The non-custodial nature of sanctions can also reduce the burden on the penal system.

For example in Burundi the *Bashingantahe* institutions are relied upon for land disputes by communities and courts. **In determining land boundaries, the courts rely on the *bashingantahe* as they have been present at the making or changing of the boundaries.** They are also reliable witnesses and legitimate officials in the event of a subsequent dispute. They are there to enforce the provisions of the court decisions and to ensure their validity from one generation to the other.<sup>35</sup>

35 Tracy Dexter, and Philippe Ntahombaye, Centre for Humanitarian Dialogue (2005), The role of informal justice systems in fostering the rule of law in post-conflict situations: The Case of Burundi.

#### Swift solutions

In line with the old adage that justice delayed is justice denied, citizens show a natural preference for the reasonably swift informal justice system processes, rather than the delays and drawn-out procedures that so often characterise the formal justice system. The process of informal dispute resolution is usually much faster than formal systems.<sup>36</sup>

For example, in Indonesia villagers value the fact that informal penalties and sanctions are usually enforceable immediately after a decision has been made, enabling the quick resolution of cases. In simple cases, **resolution may be achieved on the spot**, often within one to three days, and occasionally requires up to a week. This is favourable to the weeks, months or even years involved in obtaining a remedy through the formal justice system.<sup>37</sup>

36 However, this may not always be the case. In Bangladesh for example, a *shalish* may be a complex series of events, comprising many sessions over several months, (Golub in DFID (2004), Briefing: Non-state justice and security systems).

37 UNDP Indonesia (2006), Justice for All? An Assessment of Access to Justice in Five Indonesian Provinces.

### Social legitimacy, trust and understanding of local problems

Informal justice systems often reflect local social norms and are closely linked to the local community. Community members often have a sense of ownership towards their respective system. Informal justice actors have local legitimacy and authority that is not always afforded to formal operators. Informal justice systems tend to work well where the community is relatively homogenous, linguistically, culturally and is bound by ties of mutual dependency. In this setting one often defines one's identity as being inextricably part of networks: familial networks, cultural networks, religious networks and a strong sense of bounded communities.

Informal justice actors often understand local problems and are capable of finding practical solutions to their problems. They are sometimes regarded to have supernatural powers, enhancing their capacity to resolve local disputes and ensure enforcement.

For example, **many people in rural communities in Maluku, Indonesia believe that breaching *adat*-based sanctions relating to protection of the environment, known as *sasi*, can lead to illness or even death.**<sup>38</sup>

More than nine out of ten East Timorese (94 percent) are confident in the fairness of the traditional *adat* process (including 63 percent who are very confident).<sup>39</sup>

In Indonesia, only 28 percent of respondents thought that the formal justice system treats everyone fairly, as opposed to a much greater 69 percent of respondents for the informal system. **50 percent of respondents felt that the formal justice system favoured the rich and powerful**, whereas only 15 percent held this view about the informal system.<sup>40</sup>

**77 percent of East Timorese feel that *adat* reflects their values.** 8 out of 10 East Timorese recognize community leaders – not the police – as responsible for maintaining law and order. More than nine out of ten East Timorese are comfortable bringing a problem to either the *chefe* or to the traditional *adat* process.<sup>41</sup>

38 World Bank Indonesia (2006), Justice for the Poor Program, "Local, not traditional justice: The case for change in non-state justice in Indonesia, Draft.

39 The Asia Foundation (2004), Survey of Citizen Knowledge: Law and Justice in East Timor.

40 UNDP Indonesia (2006), Justice for All? An Assessment of Access to Justice in Five Indonesian Provinces.

41 The Asia Foundation (2004), Survey of Citizen Knowledge: Law and Justice in East Timor.

### Informal justice systems often survive violent conflict

Informal justice systems may also provide order and non-violent resolution of disputes during the post-conflict stage.

For example, **in Afghanistan court officials regularly refer cases to the informal sector** or accept and record their decisions to end pending cases. Part of this is the result of more than two decades of war in which alternative forms of dispute resolution became the norm. During this period without formal government institutions it was often necessary to seek solutions based on consensus and this tradition has remained strong even as government institutions have reappeared.<sup>42</sup>

**After September 1999 in the villages in East Timor, it was the informal justice systems that asserted themselves quickly.** "This was natural and not surprising because – though everything had been destroyed – through tradition and culture the local law lived on in strength inside people's heads".<sup>43</sup>

42 Thomas Barfield (2006), Informal Dispute Resolution and the Formal Legal System in Contemporary Northern Afghanistan, for The Rule of Law Program, The United States Institute of Peace, Draft.

43 Priest, Oecusse District, November 2002 in Tanja Hohe and Rod Nixon (2003), Reconciling Justice: 'Traditional' Law and State Judiciary in East Timor.

**Geographical and financial accessibility**

Informal justice systems are usually close to the homes of the people who fall within their jurisdiction. They are usually free or affordable.

For example, **for most villagers in Indonesia, the informal justice system is within walking distance of their homes.** Seventy-two percent of respondents felt that the informal justice system was easily accessible from home – twice as many as for the formal justice system.<sup>44</sup>

**Expense was the problem survey respondents most frequently associated with the police and lawyers in Indonesia** – bribes and other costs for the police (36 percent of respondents) and high fees and bribes for the lawyers (89 percent of respondents). In comparison, only 12 percent of respondents cited cost or bribes as a problem when dealing with the informal system (with responses equally split between the two categories).

**Some citizens believed that in many situations there was little point in resorting to the formal justice system, because the cost of processing a case would exceed the cost of whatever was at stake.** Moreover, before even setting foot inside a police station or lawyer's office, villagers must calculate not only the cost of transportation but also the opportunity cost, or the amount of productive income-earning time that must be sacrificed to make a complaint and pursue the case. For people whose savings are minimal or non-existent, a single day of lost income can result in serious hardship.<sup>45</sup>

44 UNDP Indonesia (2006), Justice for All? An Assessment of Access to Justice in Five Indonesian Provinces.

45 UNDP Indonesia (2006), Justice for All? An Assessment of Access to Justice in Five Indonesian Provinces.

### Weaknesses

But informal justice systems are no panacea. Despite informal justice systems being widely viewed by many communities as the most likely way of achieving an outcome that satisfies their sense of justice, there are situations in which it falls well short of realising that ideal.

#### Unequal Power Relations and Susceptibility to Elite Capture

Informal justice systems may reinforce existing power hierarchies and social structures at the expense of disadvantaged groups. Informal justice systems are not immune from the same political influence or elite domination evident in the courts of some countries.

Where power imbalances exist between disputing parties the weaker party is vulnerable to exploitation. Informal justice systems generally **do not work in the resolution of disputes between parties who possess very different levels of power or authority.**

For example, in Indonesia *Musyawah*, or consensus deliberations, is often an elite-dominated process where law and/or *adat* is rarely considered. The weak are pushed into accepting an outcome which favours the powerful and are then coerced into not complaining about the decision. Research by the World Bank based on 18 separate case studies of disputes at village level also concluded that **'in all cases where [such] power imbalances existed, informal negotiations failed.'**<sup>46</sup>

A four country study concluded that mediation is generally backed by coercion in the shape of either social sanction or threats of violence. **Mediated settlements can reflect "what the stronger is willing to concede and the weaker can successfully demand".**<sup>47</sup>

In Somalia, for example, a militarily strong clan may openly refuse to comply with a judgement that favours a militarily weak clan. As a result minority groups are heavily discriminated against through *xeer* decision making.

**The search for consensus can prevent effective resolution.** The language of consensus, when not reached democratically, becomes a means for suppressing dissent. This ideal of consensus and social harmony frequently translate into the imposition of decisions that are far from consensual.

46 World Bank Indonesia (2006), Justice for the Poor Program, "Local, not traditional justice: The case for change in non-state justice in Indonesia", Draft.

47 Merry in World Bank Indonesia (2006), Justice for the Poor Program, "Local, not traditional justice: The case for change in non-state justice in Indonesia", Draft.

48 While few women preside over such forums it needs to be remembered that women tend to be grossly under-represented in the formal justice system in many parts of the world.

49 But this is not always the case. In Lesotho, traditional chiefs have been delegating their authority to their wives or sisters due to male labour migration and low pay. As a result, decisions on inheritance issues have largely favoured women (Sharf in DFID (2004), Briefing: Non-state justice and security systems).

50 World Bank Indonesia (2004), Interim Report, Justice for the Poor Project: Research Paper on Community Access to Justice and Village Judicial Autonomy.

51 Adapted from: Centre for Humanitarian Dialogue (2005), Stateless Justice in Somalia: Formal and Informal Rule of Law Initiatives.

### Unfair and unequal treatment of women and disadvantaged groups

These systems are often dominated by men of high status and tend to exclude women<sup>48</sup>, minorities, young people and disadvantaged groups. As a result, existing social hierarchies and inequalities are often reflected and reinforced in the dispute resolution system. Informal systems generally reflect the thinking of a cross section of the population and their decisions for example do not recognize the equal rights of both genders to inherit.<sup>49</sup>

**Preservation of 'harmony' can take preference over the protection of individual rights.** The goal of harmony can be used to force weaker parties to accept agreements and local norms, which in turn can result in discrimination against minorities and women.<sup>50</sup>

For example **in Somalia, a woman who is raped is often forced to marry her attacker.** This is ostensibly to protect the woman's honour, and serves to ensure full payment of her dowry by the attacker's clan to the victim's clan. As marriage also solidifies a bond between the clans of the man and woman involved, further violence is also prevented. Women are also traditionally 'denied the right to inherit capital assets such as camels, horses, buildings, seagoing vessels and frankincense plantations' and domestic abuse by a husband against his wife is generally tolerated unless the harm becomes so physically damaging or persistent that it is socially disruptive'.<sup>51</sup>

**The customary practices of wife inheritance and ritual cleansing continue in parts of Kenya.** The original practice of wife inheritance was a communal way of providing widows economic and social protection. Since widows were not entitled to inherit property in their own right, being inherited was a way to access land. An inheritor was supposed to support the widow and her children. Although the terms "wife inheritance" and "cleansing" are sometimes used interchangeably, **wife inheritance generally refers to the long-term union of a widow and a male relative of the deceased, and cleansing typically refers to a short-term or one-time sexual encounter with a man paid to have sex with the widow.** These practices reflect the common belief that women cannot be trusted to own property and the belief that widows are contaminated with evil spirits when their husbands die.

Wife inheritance and cleansing practices take a number of different forms depending on the clan. First, there is non-sexual wife inheritance, whereby the coat of an inheritor is placed in a widow's house overnight to symbolically cleanse her. This generally applies to widows beyond childbearing age. Second, there is inheritance involving long-term sexual relations, typically with a brother of the deceased, in what amounts to a marriage. Third, there is a combination of cleansing and inheritance, whereby a widow first has sex with a social outcast (known as a jater in Dholuo) who is paid to have sex with her to cleanse her of her dead husband's spirits, and is then inherited by a male relative of the dead husband. Fourth, there is cleansing alone, where a widow has sex with a jater to cleanse her but is not inherited permanently. Women's property rights closely relate to wife inheritance and cleansing rituals in that **many women cannot stay in their homes or on their land unless they are inherited or cleansed.** According to one women's rights advocate, "Women have to be inherited to keep any property after their husbands die. They have access to property because of their husbands and lose that right when the husband dies."

52 Adapted from: Human Rights Watch (2003), *Double Standards: Women's Property Rights Violations in Kenya*.

**Wife inheritance and cleansing practices also pose frightening health risks.** Condom use has lagged, in part because cleansing is not considered complete unless semen enters the widow and because women's inequality makes it difficult to demand condom use. **A jater who has 'cleansed' at least seventy-five widows in the two years he has worked as a jater has not been tested for HIV.** The jater, who is paid in cash (approximately USD 63) or livestock (cows, goats, and hens) by widows' in-laws, confirmed that he **does not use condoms with the women.**<sup>52</sup>

#### Lack of accountability

In general, informal justice systems are not accountable (although they are usually conducted in public view). The right to appeal is integral to an accountable and transparent legal system but is not always present in informal dispute resolution mechanisms.

Because traditional systems do not have specific enforcement measures to back their decisions, they are often non-binding and rely primarily on social pressure.

Often the rulings depend on the knowledge and moral values of the individual mediator/arbitrator. Generally there are no minimum standards that have to be followed. As such the fairness of proceedings is up to the person conducting them.

The village elders are generally not elected, but are rather appointed or take their office based on descent. Thus there are no checks or balances in place as generally exist in the formal system for the selection and appointment of judges.

Informal justice actors with the authority to resolve disputes **may abuse their power to benefit those who they know or who are able to pay bribes.** They are often insufficiently paid, or not paid at all and may rely on gifts and bribes for an income, influencing the outcome of the hearing. Nepotism is also a problem – informal justice actors are often selected on the basis of who they know or who they are related to.

For example, in Burundi, particularly since the crisis, the traditional 'gift' of beer or other things is asked for before any hearing takes place – in view of the traditional ethics of the institution, this is payment, and thus corruption.

Leaders may favour certain parties depending on their political allegiance or power in terms of wealth, education or status, where not to do so might pose a threat to their own authority. However, the same can sometimes be said of the courts.

#### Opaque interface between informal and formal justice

In terms of jurisdictional authority this can create legal ambiguity. Due to informal justice actors' lack of knowledge of the written law, they may make their decisions without taking the formal state law into consideration, thus depriving someone of their lawful rights.

In Sierra Leone for example, customary law is supposed to comply with the national constitution and it should not contradict "enactments of parliament" or "principles of natural justice and equity". However, these nominal limitations are seldom if ever enforced."

53 Julio Faundez (2006), Should Justice reform projects take non-state justice systems seriously? Perspectives from Latin America.

#### Non-adherence to international human rights standards

**Informal justice systems sometimes do not give the accused the chance to be heard or adequately represented.** In substantive terms informal justice systems sometimes take decisions that are inconsistent with basic principles of human rights, such as **cruel and inhuman forms of punishment**, such as flogging and banishment, or decisions that perpetuate the **subordination of women** or the **exploitation of children**.<sup>53</sup> Informal justice systems often hold individuals accountable to social collectivities and broader social interests. Younger generations question restrictions on freedoms, such as their inability to choose a spouse.

For example, the collective responsibility imposed on *diya* groups by *xeer* in Somalia is seen as removing responsibility from individual perpetrators of crimes.

#### Unsuitable for certain disputes that are important for security and sustainable development

Informal justice systems **do not work well** in some cases, such as dealings with **government service delivery, companies**, complex cases such as **serious crimes** and inter-village, inter-community and third party disputes as the authority of the informal justice actors rarely extends beyond their own sphere of influence.

The informality of the procedure which may be a strength in dealing with small scale civil and criminal cases makes these systems inappropriate for cases in which formality is needed to protect the rights of both the victim and the offender.

For example, **villagers in Indonesia stated that they would choose the informal justice system as their initial point of complaint, except for serious criminal cases, which they would report directly to the police.** Examples of serious cases included murder, rape, robbery, drug possession or trafficking, and other 'serious violations of citizens' rights'. Complex issues, like land title disputes, are often viewed as being better resolved in court, although parties would usually first attempt to settle the case informally. Complaints about the provision of public services and development programs are usually taken to the service provider directly, such as the village midwife for health services, or to the village head.<sup>54</sup>

**While Mayan authorities in Guatemala proved superior to the state in solving disputes within their community, they are not in a position to address land issues and organized crime**, the two crucial justice issues that need to be resolved to consolidate the peace. Mayan authorities cannot broker solutions to the major land disputes between the big landowners and the Mayan communities since they are the representatives of the latter.<sup>55</sup>

**8 out of 10 east Timorese believe the formal legal system is the best way to handle problems with a government agency (80 percent) and incidents where police misuse their power (81 percent).**<sup>56</sup>

54 UNDP Indonesia (2006), Justice for All? An Assessment of Access to Justice in Five Indonesian Provinces.

55 Arno Hessbruegge and Carolos Fredy Ochoa Garcia (2005), Mayan Law in Post-Conflict Guatemala, Draft.

56 The Asia Foundation (2004), Survey of Citizen Knowledge: Law and Justice in East Timor.

In this chapter, the characteristics of informal justice systems have been highlighted and some of their main strengths and weaknesses have been reviewed. Despite their many challenges, this paper concludes that engaging with informal justice systems is nevertheless necessary for enhancing access to justice for the poor and disadvantaged.

It is of course very important to take all the concerns seriously. Any interventions/ initiatives undertaken should work towards gradually enhancing the quality of dispute resolution and addressing the weaknesses faced by informal justice systems. Such initiatives should be part of a broader, holistic access to justice strategy which focuses on achieving the broader goal of enhancing access to justice by working with both formal institutions and informal justice systems.

Chapter 5 provides some examples of initiatives and some recommendations for action. However, these are only meant as a guide as all initiatives must be specifically developed for the context in which they will be implemented.



## Chapter 4: Linkages between informal and formal justice systems<sup>57</sup>

The following is an overview of the different models of state recognition of informal justice systems. The table provides a typology of the response, some examples of where the model has been applied, and advantages and disadvantages identified with each model.

Model	Definition	Examples	Pros/Cons
<b>Abolition</b>	The state explicitly abolishes informal justice systems by legislation.	<p><b>Ethiopia:</b> Ethiopian Civil Code of 1960, Article 3347 (1) : Unless otherwise expressly provided, all rules whether written or customary previously in force concerning matters provided for in this Code shall be replaced by this code and hereby repealed.</p> <p><b>Sierra Leone:</b> Local Court Act of 1963 bars chiefs from adjudicating cases (though the practice is widespread).</p>	<p>-</p> <p>The effect is that dispute settlement that is widely accepted and resorted to by many people in the provinces falls outside the law.</p>

<sup>57</sup> The contents of this chapter are primarily drawn and adapted from: Christian Ranheim (2005), *Legal Pluralism in East Timor: The formal judicial system and community based customary law*, Prepared for the United States Institute of Peace. Brynna Connolly (2004), *Non-state justice systems and the State: Proposals for a recognition typology*. DFID (2004), *Briefing: Non-state justice and security systems*.

<p><b>Full incorporation</b></p>	<p>The informal justice system is given a formal role within the formal state justice system.</p> <p>The formal state system may codify or incorporate as common law the informal or customary rules or norms of decision into its decision making process.</p> <p>The informal structures may also comprise one section of the lowest tier of courts within the entire formal state structure.</p> <p>Specialized formal courts may be established to hear only disputes arising under customary law.</p>	<p><b>Shalish in Bangladesh:</b> there are 3 distinct versions of <i>Shalish</i>: traditional <i>shalish</i>, government-administered ‘village courts’ and NGO modified <i>shalish</i>. It is the government administered <i>shalish</i> which falls clearly into this full incorporation model. Government officials apply ‘traditional’ norms, thus fully incorporating the informal justice system and the state.</p> <p><b>Katarungang Pambarangay in the Philippines:</b> The <i>Barangay</i> justice system is a government-run dispute resolution system operating in the country’s 42,000 bangarays, or local government units. The BJS is based on traditional mediation mechanisms.</p> <p><b>Uganda’s</b> Local Council Courts (LCCs), initially set up where official judicial institutions were absent, are now officially incorporated into the lower court system with a right to appeal to a Magistrate’s Court. They also carry out local government functions. The Ministry of Justice and the Ministry of Local Government jointly supervise the LCCs.</p> <p>In <b>Sierra Leone</b> the Local Court Act gives a dominant role to the ministers of justice, local government and chiefs in the appointment and dismissal of Local Court officials. The tenure of customary law officers in Sierra Leone depends on the executive branch.</p>	<ul style="list-style-type: none"> <li>+ Provides for judicial supervision over informal courts.</li> <li>- Codification is an oft debated subject. Customary law is often defined by its fluidity. This allows customary law to change with the community. The codification process would freeze the laws in place and may not allow them to develop and change over time.</li> <li>+ Incorporation facilitates linkages between customary and statutory law, and may clarify jurisdiction over different types of disputes.</li> <li>- Lengthy appeals and referrals between formal and informal systems may increase opportunities for exploiting the weaker party to a dispute.</li> <li>- Harmonisation with statutory law may cause problems if it results in the suppression of cultural diversity and practices.</li> <li>- Inadequate salaries for lawyers to undertake oversight functions of informal systems can result in no lawyers willing to take on such appointments.</li> </ul>
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<p><b>Full incorporation</b></p>		<p><b>Sierra Leone:</b> The Local Courts Act makes provision for customary law officers (lawyers) to supervise and advise local courts in matters of law; train local court personnel and exercise the right of judicial review over decisions of local courts.</p> <p>Gacaca - The government of <b>Rwanda</b> has adapted the <i>Gacaca</i>, a traditional dispute resolution mechanism, to process the backlog of genocide related cases.<sup>58</sup></p>	<p>- The top-down imposition of informal systems, rather than building up from the community level, can be a fatal flaw in the operations of informal systems.</p>
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58 According to some observers, the new gacaca system bears little resemblance to the traditional practice of gacaca.

<p><b>Limited incorporation/ Co-existence</b></p>	<p>This model allows the informal mechanisms to exist independently of the formal state structures while embedding them in low-level surveillance and accountability mechanisms and allowing for cross-referrals.</p> <p>Here the two (or more) systems may retain their distinct jurisdictions (most commonly with the formal state courts retaining general jurisdiction while the informal justice system retain limited jurisdiction over cases arising in specified areas). One common method of establishing surveillance of the informal justice system is to provide for a process of appeal to the formal state system.</p> <p>The state may require informal justice systems to comply with human rights standards or constitutional provisions. State accountability institutions, such as Human Rights Commissions, may play a role in monitoring compliance.</p> <p>Governments may enact legislation to define and regulate informal justice systems. Self-regulation may be initiated by the systems themselves. Minimum regulations may be put in place, for example by making it an offence to order physically coercive punishments, to try a person under duress or in absentia or to try a person for serious offences such as murder or rape.</p>	<p><b>East Timor's</b> Commission for Reception, Truth and Reconciliation drew heavily on informal dispute resolution structures.</p> <p>The customary court system in <b>Botswana</b> is significantly more independent from the state than many incorporated informal justice systems in other states, however, chiefs' courts must be granted official warrants by the local government, and appeals may ultimately be taken to the formal state courts. As a result, the state retains substantial control over the customary courts.</p> <p>The constitutions of <b>Ghana, South Africa and Uganda</b> include broad statements to the effect that cultural practices that injure mental and physical well-being and dignity will be judged unconstitutional. In contrast, the constitutions of <b>Kenya, Zimbabwe and Zambia</b> exempt certain areas of customary and religious law (family and personal law) from the non-discrimination provision.</p> <p>The Rondas Campesinas in <b>Peru</b> have become an effective crime control measure and the state has attempted to regulate their powers and to co-opt them. Various laws subordinate them to police and judicial authorities. The 1993 constitution did not allow Rondas that were not linked to an indigenous community to administer justice, and members have been imprisoned for usurping the power of the police and judiciary.</p>	<ul style="list-style-type: none"> <li>+ Improving compliance of informal justice systems with human rights standards can have a significant impact on realising the rights of poor people and other marginalised groups.</li> <li>+ Linking the values underlying informal justice systems with human rights standards can improve dialogue on rights issues at the local level.</li> <li>+ The domestic constitutional and legal framework may itself be inconsistent with international human rights standards.</li> <li>+ Legislation may clarify the powers of informal justice systems and their relations with the state. It may also set standards for informal justice practices.</li> <li>+ Self-regulation may be preferable in order to preserve those aspects of informal justice systems that are the most effective.</li> <li>+ Regulation by the state may undermine the legitimacy of informal justice systems that are managed and regulated by communities themselves.</li> <li>- Informal alternatives can reduce the pressures on the formal system.</li> </ul>
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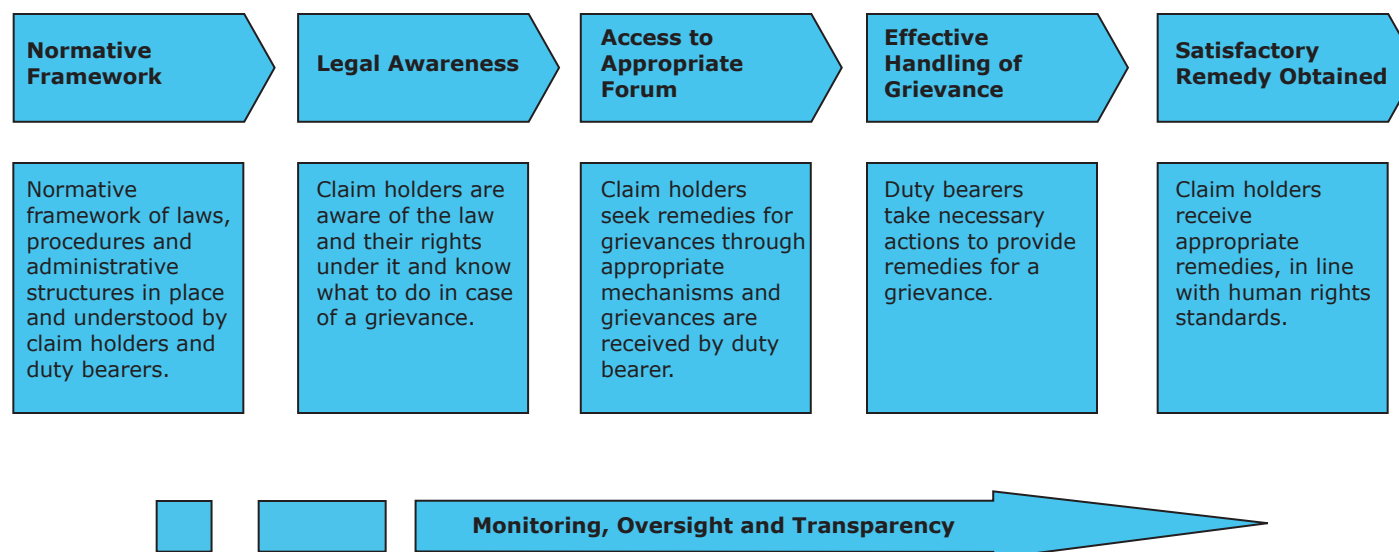
<p><b>Limited incorporation/ Co-existence</b></p>	<p>The state may assist or work with NSJS systems, including by providing funds.</p> <p>Informal courts may coexist with the formal state system, but without incorporation of the former structures in to the latter. Jurisdictions are divided along clearly defined boundaries and neither system may assume jurisdiction over the matters within the jurisdiction of the other system.</p>	<p>At the same time, in areas such as Cajamarca, the Rondas have formed a federation with a set of regulations governing their own operations, and have set up committees to deal with specific cases.</p> <p>In <b>Tanzania's</b> Serengeti region, representatives of <i>sungusungu</i> groups (local neighbourhood watches) collaborate with the state, and are permitted to monitor the work of the police, prosecution and courts, to ensure that suspects handed over are not subsequently released through corruption.</p> <p>The government in <b>Mozambique</b> withdrew the formal judicial system from the local level by abolishing the locality level of Tribunais Populares (Popular Tribunals) (TP's). While these local level tribunals had only lay, non-law professionals as judges, they were still administratively and financially part of the formal judicial system. The Tribunais Populares were replaced with Tribunais Comunitarios (Community Tribunals) (TCs) which are not part of the hierarchy of the formal judicial system in either administrative or financial budgetary terms. In practical terms (membership for example) these TCs are simply the old community level TPs. They have continued to operate in a context characterized by resurgent Traditional Authority (TA) power and involvement in local conflict resolution, even as the former TPs have lost the funding, technical support, and the place in the formal legal system that they enjoyed prior to 1992.<sup>59</sup></p>	<ul style="list-style-type: none"> <li>- Informal alternatives may also be cheaper, more efficient and accessible, and closer to cultural norms.</li> <li>+ Using informal alternatives to substitute for the formal justice system may be viewed as offering a form of "second-class justice", and as a breach of the state's human rights obligations.</li> <li>+ Mutual co-operation and learning between informal and state systems can improve the effectiveness of both sets of institutions.</li> <li>- There is a danger that even simple administrative measures – such as officially recording who was designated as an informal leader at particular time by a local community may serve to constrain the social mechanisms that enable communities to challenge the authority of informal leaders if these prove abusive of power or unresponsive to local concerns.</li> </ul>
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59 Lubkemann and Garvey (2005), Rule of Law in Mozambique, USIP.

## Chapter 5: Recommendations for how to engage with informal justice systems

### A Conceptual Framework for Access to Justice

Any provision of support to the formal or informal justice sector should have the overall aim of improving access to justice for the poor and disadvantaged. Rather than simply constituting a state of affairs, 'access to justice' is perhaps better envisioned as a process by which a range of different inter-related factors combine to enable citizens to obtain a satisfactory remedy for a grievance. Such factors include, but are not limited to, an adequate legislative framework, basic community legal awareness and functioning formal and informal institutions of justice that are accessible in physical, economic and intellectual terms. The conceptual framework shown below illustrates this process in simple terms. It also outlines the structure of the following section, which focusses on the mapping of existing interventions and recommendations for engaging with informal justice systems.



The Normative Framework can be either formal or informal in nature. Norms can be either formal or informal in nature. Formal norms are reflected in the Constitution, national legislation, regional regulations and jurisprudence issued by the courts. Informal norms evolve through social interaction and reflect customs and accepted behaviours within a particular group or community. The normative framework has the capacity to both protect and defend the interests of the poor, or in fact perpetuate injustices and inequities.

Legal awareness is critical to securing access to justice. Poor and disadvantaged groups often fail to make use of laws and rights precisely because they are not aware of them. Poor communities need to be aware of the law, of available remedies and how to access those remedies.

**Access to Appropriate Forum:** Once equipped with legal knowledge, the poor and disadvantaged require adequate access to both informal and formal justice systems to seek remedies. Informal justice systems account for the majority of disputes in many countries in which UNDP works. Consequently, reform strategies must focus on these institutions as well as the courts.

Although physically more accessible, informal systems often reflect the social and political inequities which define many poor, rural communities. The poor, women and ethnic minorities face challenges in accessing informal justice due to a lack of neutrality, unclear standards and guidelines and sometimes a lack of capacity on the part of informal justice actors. Building access to these systems includes establishing oversight mechanisms; ensuring representation for disadvantaged groups in local-level institutions; capacity building for informal actors; and building bridges between formal and informal systems.

**Effective Grievance Handling and Enforcement:** Public confidence in legal institutions is dependent on timely, independent and consistent application of applicable norms, free of political intervention and corruption. It also requires accountability to the public for performance against agreed service standards.

**Monitoring, Oversight and Transparency:** Public monitoring and scrutiny of formal and informal justice systems is fundamental to achieve the goals articulated above.

### **Initiatives and Recommendations**

The following are designed to give practitioners some concrete examples of initiatives which have engaged with informal justice systems, and provide some recommendations for developing the capacities of informal justice systems. These examples have been drawn from numerous interviews, project documents, and publications listed in the bibliography of this paper.

Some principles for action:

- Identify the claim holders – those who are most vulnerable. Policies and programmes need to ensure an explicit focus on the poor and disadvantaged. People's perceptions of justice, the obstacles they face and the ways they address them need to be understood;
- Identify the duty bearers – the ones accountable for addressing the issues (including institutions, groups, community leaders);
- Assess and analyse the capacity gaps of claim holders to be able to claim their rights and duty bearers to be able to meet their obligations and use analysis to focus capacity development strategies;
- Capacity development for access to justice requires building on existing strengths and solutions. Programmes that seek to work with informal justice systems should attempt to promote the positive aspects of the informal systems and reform the negative aspects;<sup>60</sup>
- Find solutions for problems instead of imitating models. In countries with legal traditions inherited from the colonial past, discussions about general legal models can divert attention from real problems and deficits in the sector. Focus on identifying and solving problems rather than trying to match one or another model;
- Work together with a truly representative section of the national community to as great an extent as possible;
- Recognize that it is impossible to remedy at once all the shortcomings of informal justice systems;

<sup>60</sup> UNDP (2004), Access to Justice Practice Note.

Situations vary from country to country, therefore there are no templates that identify generic entry points for access to justice programming. In order to choose an entry point, we must analyze the situation in relevant sectors and identify catalytic actors and institutions. Needs assessments are a good entry point. The challenge is to learn from other experiences (in particular, those from developing countries that have overcome similar challenges) but also to provide customized solutions for particular situations.



#### Examples of initiatives: Normative Framework

Initiative	What worked/What didn't
<p>In <b>Somalia</b>, the Danish Refugee Council held a series of dialogues with over 100 elders and community leaders from five different clans living in the region, which focused on aspects of traditional <i>xeer</i> that were perceived as ineffective in conflict management and contradictory to basic concepts of justice and fairness, as enshrined in both <i>sharia</i> and international human rights standards. Community interests expressed during the dialogue included ensuring the protection of the accused, fair treatment of women, orphans and minority groups, problems associated with <i>diya</i> payment and collective punishment and property rights.</p>	<p>+ The participants issued a declaration modifying the local <i>xeer</i> and travelled throughout the region to disseminate the new laws. The declaration made particularly important changes to the <i>xeer</i> governing revenge killing and forced marriages of a widow to her dead husband's brother. According to a monitoring study, after five months the region experienced a 90% reduction in murder cases.</p>

The various models of integration and recognition of informal justice systems by the state are provided in Chapter 4.





#### Examples of initiatives: Legal Awareness

Initiative		What Worked/What Didn't
The women's organization Banchte Shekha in <b>Bangladesh</b> integrates its support for <i>shalish</i> with programmes such as literacy training, livelihood development and group formation, with the objective of altering the bias of <i>shalish</i> against women and disadvantaged groups by addressing underlying power imbalances.	+	Evidence shows a positive impact on dowry and women's status.
In Malawi, the Centre for Advice, Research and Education on Rights, the Centre for Human Rights Rehabilitation, Women in Law in Southern Africa and Malawi Human Rights Resource Centre run information groups and training sessions with both the chiefs and local residents about customary law and human rights issues.	+	Engaging with informal systems may be an entry point to addressing human rights issues within communities.
Centro Feto, a local NGO in Oecusse <b>East Timor</b> conduct education campaigns in the villages on issues such as rape, domestic violence and marriage. The group is also concerned with lobbying for compensation through informal systems paid in relation to sexual crimes and domestic violence to be paid directly to the victims instead of to the families.	+	The emphasis of the group is working with informal systems on 'finding good solutions for women'.
In <b>Cambodia</b> over 400,000 residents of remote rural communities across the country attended live performances of a travelling street theatre play on domestic violence, based on a traditional form of improvisational comedy familiar to all Cambodians.	+	Radio, television, the performing arts, and popular culture offer excellent opportunities to deliver information to large sectors of the population. They appeal to a broad audience in serving a combined entertainment and educational function. In addition, they reach audiences with varying levels of education, unconstrained by the literacy factors that may narrow the impact of printed materials.

Initiative		What Worked/What Didn't
A group of women in West Sumatra, <b>Indonesia</b> , supported by an NGO have been active in mediating disputes such as domestic violence and civil disputes, as well as mobilising community support to lobby the local government. NGOs have empowered women in the <i>Adat</i> Women's Organization and facilitated training so the local members can stand up to the male-dominated <i>Adat</i> Council.	+	Empowerment by NGOs has resulted in better access to justice for women confronting male opponents in land cases.
IDLO in Aceh, Indonesia has published guidebooks which detail the legal principles, processes and institutions relevant to the resolution of land, inheritance and guardianship disputes in post-tsunami Aceh. The guidebooks are designed to promote awareness and understanding regarding the applicable law, how to access the legal system, and the rights of women and children in the judicial process.	+	The books cover key Indonesian laws, customary <i>adat</i> laws and Islamic legal opinion relating to inheritance in an easily digestible manner.

### **Recommendations for Capacity Development: Legal Awareness**

**Clarify and socialize dispute resolution procedures.** Clear and transparent procedures and norms reduce arbitrariness and lower importance on societal relations with informal justice actors, enhance access and understanding for marginalized groups, improve application in courts and increases transparency.

**Support legal empowerment programs.** Work with progressive civil society to strengthen capacities of communities. Communities and local governments need to be empowered to hold village institutions accountable if for instance women and ethnic minorities were denied representation, and if processes and constitutional safeguards were not followed.

**Support legal awareness activities.** Support activities by both state and informal actors that are aimed at building general community legal awareness. Campaigns should focus on tangible legal issues that are of relevance to the target population, such as workers rights in the case of factory workers, but also provide information about the administration of government schemes that are often perceived as being a source of injustice. The provision of information regarding restrictions on citizen's rights or entitlements is equally important, in order to reduce the occurrence of disputes or perceived discrimination that are based on misunderstandings of rights.

**Develop the capacities of informal justice actors to provide information** to members of their communities about legal rights and legal and other services that may be available to them. Informal justice actors are often the person to whom citizens first report when they need assistance or have a grievance. They are therefore a potentially effective means of channelling information to the community. However, alternative sources of information (and community awareness of such sources) nevertheless remain important.

**Employ popular education** methods in awareness campaigns to ensure legal awareness-building programs achieve maximum impact.



### Examples of Initiatives: Access to Appropriate Forum

Initiative	What Worked/What Didn't
<p>Paralegals are lay people working directly with the poor and disadvantaged to find solutions for problems through both formal and informal justice systems.</p> <p>Paralegals in <b>Sierra Leone</b> have been able to achieve impressive results to justice problems because of:</p> <ul style="list-style-type: none"> <li>- Ongoing advocacy, which takes place within individual mediations, with powerful people like police officers and chiefs, in community education efforts and other interactions.</li> <li>- knowledge of and interaction with formal law and government, combined with knowledge of the community and use of more community oriented, social movement-type tools.</li> <li>- Expertise in customary law and institutions in their own localities and understanding of clients' needs and limitations.</li> </ul> <p>Paralegals can straddle dualist legal systems and can engage both with formal and customary institutions.</p>	<ul style="list-style-type: none"> <li>+ The paralegals come from the communities in which they work.</li> <li>+ Community oversight boards are an effective way to monitor the paralegals' work.</li> <li>+ The background threat of, and the sparing but strategic use of litigation and high level advocacy is crucial. These are often the teeth behind paralegals' ongoing advocacy on the ground.</li> <li>+ For the designation of paralegal to have meaning and for their association with the law not to be empty it is paramount that the paralegals receive continuous supervision and training.</li> <li>- Turning laypersons into sophisticated paralegals can be a very intensive process. It took the Women's studies centre at Chiang Mai university in Thailand over two years to train 25 to 30 competent women paralegal workers to assist their own communities on legal and social issues.</li> </ul>

<p>The Asia Foundation's programme in <b>East Timor</b> provides legal aid. It supports a network of lawyers in the district. They can act as mediators themselves, along the lines of the formal law – because the courts do not hear civil cases yet. At the same time, they can support the informal process and therefore act as a bridge between the two paradigms.</p>	+	<p>There is frequent use of those lawyers by people who feel that the informal system is against them. As the informal system can be biased, success depending on a person's or family's social position, people who feel disadvantaged seek help from the formal law.</p>
<p>A dispute clearing house in <b>Puerto Rico</b> provides advice to users and referrals to other agencies and courts, as well as mediation services for appropriate disputes.</p>		
<p>The Community Legal Education Center in <b>Cambodia</b> has been working to improve the dispute resolution process at the local level. Some of their activities include:</p> <ul style="list-style-type: none"> <li>- Training in ADR and basic legal concepts for commune officials;</li> <li>- Technical assistance to the set-up of Dispute Resolution Panels and provision of legal documents to commune offices;</li> <li>- Exchange group tours whereby members of dispute resolution panels visited each others' commune to share experiences and discuss problems;</li> <li>- Advocacy on the basis of results for semi-formal dispute resolution mechanisms to be institutionalized as part of the decentralization process.</li> </ul>	+	<p>By formalizing the dispute resolution process, training in techniques and substantive law, and providing follow-up monitoring, the dispute resolution panels have attained a level of credibility and recognition in their respective communities.</p> <p style="margin-left: 20px;">+</p> <p>Capacity building in terms of training in substantive law and procedure has further improved the final resolution of disputes.</p> <p style="margin-left: 20px;">+</p> <p>Increased effectiveness of the dispute resolution panels has taken some of the burden off district authorities and law enforcement agencies in conflict resolution.</p> <p style="margin-left: 20px;">+</p> <p>Almost all dispute resolution panels acknowledged an increased level of capacity, self confidence and respect from citizens with whom they came into contact.<sup>61</sup></p>

61 Community Legal Education Centre (2006), Community Justice Project on Decentralized Dispute Resolution: Evaluation.

**Recommendations for Capacity Development: Access to Appropriate Forum**

**Support paralegalism.** Donors should support paralegal work that emerges from the ground (for the most part paralegal efforts seem to have developed organically and independently), without crushing local autonomy by operating like foundations rather than implementers. The exception to this rule might be situations in which civil society is so damaged that sparks from outside are necessary.

**Professionalize paralegal work.** Some countries such as South Africa and Zimbabwe, have already worked to professionalize paralegal work, establishing courses, exams and certification. Other possibilities include requiring a minimum number of hours spent under the supervision of lawyers per month, or asking paralegal programs to go through a certification process which evaluates whether they are capable of ensuring the competence of its paralegal staff. Although paralegal standards should probably be country specific given the diversity of socio-legal contexts, paralegal movements could benefit from comparative dialogue with their counterparts in other places. Dialogue could be useful is the setting of appropriate standards for how and whether one should qualify to work as a paralegal.

**Introduce law students to informal justice systems.** One long term approach to productive work with informal justice systems could involve introducing law students to such systems. Classroom instruction that focuses on such systems could enhance the ability of a country's future legal profession to work productively with informal justice systems down the line.

**Increase the availability of information about legal services and dispute resolution methods beyond the informal justice systems.** Although many people indicate a preference for the informal justice system, some issues faced by people are of a nature that renders them incapable of resolution via such forums. Certain issues arise not in the context of a dispute between citizens, but in the context of a dispute with parties external to a village such as government agencies or corporations. People are often unaware of all of the available options for pursuing a remedy for their grievance.

**Support capacity development of civil society organisations engaged in the provision of legal and quasi-legal services.** Assistance with building technical, managerial, financial and administrative skills, has the potential to greatly enhance the ability of these organisations to provide services that will in turn increase access to justice for the poor and disadvantaged communities with which they work. Potential activities are not necessarily limited to the provision of formal training – equal or greater results may be achieved by supporting programs such as staff exchanges between NGOs to facilitate the sharing of knowledge by those who have achieved successes in other districts or provinces. Where an organisation shows sufficient promise, the provision of core funding support to cover expenses such as staff salaries and overheads may be another effective means of building capacity.



### Examples of Initiatives: Effective Handling of Grievance and Obtaining Satisfactory Remedy

Initiative		What Worked/What Didn't
UNDP <b>Burundi</b> supported technical and operational capacity building of the <i>bashingantahe</i> institution.	-	There were criticisms that the more ceremonial aspects of the institution were built up at the expense of building capacity at the grass roots level.
UNHCR in <b>Burundi</b> selected <i>bashingantahe</i> as members of refugee and IDP reception committees and trained them in conflict resolution and land law.	+	The <i>bashingantahe</i> were able to play a crucial role in the reception, reinsertion and reconciliation of displaced persons or returning refugees.
The new structuring of the <i>bashingantahe</i> institution in <b>Burundi</b> to some extent takes gender equality into account as at least 30% of the seats on the various councils are held by women.	- +	- An imposition of quotas for the short term could break down family cohesion and create unnecessary conflicts. + Continued and deliberate sensitization can speed up attitudinal change
In <b>Sierra Leone</b> , Conciliation Resources organized conflict resolution meetings for community members and returnees, where conflict issues specific to the chiefdom were examined. Peace monitors were appointed, who were mainly respected Islamic teachers. They worked 10 days every month and covered between 10 and 15 villages. The peace monitors were given a small monthly stipend and bicycles to facilitate their movement.	-/+	They did not charge fees for their services and personnel of the other dispute resolution mechanism saw them as destroying their source of income for dispute resolution, and were generally hostile.
UNDP supported the Truth, Reception and Reconciliation Commission (CAVR) in <b>East Timor</b> . The support was intended to contribute to the promotion and development of reconciliation and sustainable peacemaking with a view to prevent future violence and human rights violations in East Timor. CAVR incorporated tradition and custom into the community reconciliation process. This was regarded both as necessary and useful.	+ -	+ The involvement of traditional leaders endorses the process and its outcome, and without it, many are convinced the validity of the process would have been undermined. - The emphasis on reconciliation did not necessarily satisfy all parties. The CAVR process requested only very mild fines, which were sometimes not in accordance with local systems.

UNDP <b>Rwanda</b> supports the National Services for Gacaca Jurisdictions (NSGJ) focussing on increasing the capacities of the NSGJ to improve the effectiveness and efficiency of their guidance of the Gacaca Jurisdictions and to support them in training the <i>Inyangamugayo</i> Judges.	+	23,826 Gacaca Inyangamugayo judges have been trained.
An NGO in <b>Peru</b> , IPAZ, provides an alternative dispute resolution mechanism and has established Rural Centres for the Administration of Justice. The Centres are composed of delegates from local associations, peasants, women, the Mayor, the Justice of the Peace and the local police. Decisions are taken on the basis of a compromise, without reference to customary law, and proceedings are conducted in the local language.	+  -  -	CSOs can help reform or create informal institutions in contexts where existing formal or informal mechanisms are not operating effectively.  CSO intervention may perpetuate the absence of formal institutions  CSO interventions may not be sustainable without external funding.
In <b>Bangladesh</b> the Maduripur Legal Aid Association mediation program seeks to improve access to justice by providing a substitute for the courts and for traditional dispute resolution systems which are biased against women. The initiative builds on the traditional <i>shalish</i> system which has much greater legitimacy than the court system. The MLAA program reduces the <i>Shalish</i> system's cultural bias against women through legal education for local mediators and disputants, and through the selection of women as mediators.	-  +  +  -	Although highly cost effective compared to the courts, the program is not financially self-sustaining. To ensure sustainability, it must continue to secure grants, begin charging user fees or both.  MLAA reports that disputes are successfully resolved in 80% of its <i>shalish</i> cases.  CSOs are likely to be closer to NSJS systems than formal institutions, and can act as a bridge with the state and international norms.  CSO interventions may be seen as “externally” imposed, particularly if they are reliant on external donor funding.

The Improving Women's Access to Justice program of Nagorik Uddyog (NU) in **Bangladesh** recognizes the potential of the indigenous mediation system and is working towards its transformation. NU applies a two-pronged strategy to reaching the objective that *shalish* rulings are consistent with state laws. First, NU assists in the formation of alternative *shalish* committees, on which one third of the members are women. Second, *Shalish* committee members also attend intensive workshops on a broad spectrum of laws related to subjects that account for the majority of disputes at the local level. The objective is to ensure that *shalish* rulings are consistent with state laws.

Individuals are not paid to attend workshops, training sessions or *shalish* meetings. NU is ideologically committed to the idea of empowering citizens through building up their own resources rather than simply providing intervention services.

- + The program emphasises transformation of *shalish* so that it meets the needs of poor women.
- + Developing women's leadership at grassroots level mobilizes women as active agents of change.
- + Due to NU's work, illegal *shalish* verdicts have been eliminated in project areas. The vigilance of NU staff and legal aid committee members ensure that all *shalish* rulings conform to the existing legal framework. Persons presiding over traditional *shalish* are aware that extra-legal verdicts can and will be challenged by NU. This also reflects a heightened awareness of human rights and women's rights issues in local communities.
- + There is an increased willingness on the part of men to attend *shalish* hearings. In the past many men would simply ignore summons to appear before a *shalish*. Women's leverage in this respect has increased considerably. Since NU provides legal assistance where mediation fails, the potential threat of legal action by women encourages men not only to show up for *shalish* hearings but also to accept rulings of the alternative *shalish*.
- + Women have more negotiating power and confidence during negotiations because they know they have institutional support of NU backing them.



### **Recommendations for Capacity Development: Effective Handling of Grievance and Obtaining Satisfactory Remedy**

***Provide summarized and simplified versions of key legislation to informal justice actors.*** This should be accompanied by campaigns to increase informal justice actors' awareness of citizens' rights. This can promote the slow process of attitudinal change that must take place if the informal justice system is to more adequately fill the gap in the provision of formal justice services that will inevitably continue for the foreseeable future.

***Provide literacy training to informal justice actors where necessary.*** However, it is important to note that many operators are older and therefore may not be able to develop sufficient skills in the short or medium term.

***Means of representation for women and marginalized groups must be developed.*** However, simply stipulating minimum levels of representation will not guarantee impact on the ground. Even if quotas are imposed, participation in decision making may not necessarily follow. Representation needs to be made meaningful and efforts must be made to alter power relations by ensuring certain groups are represented. Achieving an increased role for women will not be easy, as it effectively involves swimming upstream against a steady current of ingrained stereotypes of gender roles and established patterns of exclusion that have existed for generations. It is however extremely important, in order to reduce gender bias in decision-making at the village level and ensure that women's interests are not overlooked or discounted.

***Provide support to development of policies to improve practices of informal justice systems*** so that they comply with human rights standards, that they do not engage in discrimination and that they do not resort to physical punishment. Codes of ethics or complaints mechanisms may also be useful means towards improving undesirable practices.

***Support capacity development for informal justice actors in the areas of mediation techniques and citizens' rights.*** Citizens' preference for the informal justice system should not be interpreted as meaning that the system always produces fair and appropriate outcomes, or protects the rights of women or minority groups. Although in some cases informal actors already have considerable practical mediation skills built-up over years of experience serving their communities, additional training in mediation principles and techniques may assist them to provide fairer and more effective dispute resolution services that are more sensitive to the needs of women and other marginalised groups. A useful method may be peer-training of informal justice actors by already trained and more experienced informal justice actors.

***Support to civil society organizations working to improve access to justice through informal mechanisms.*** CSOs may train informal systems' personnel on procedural or substantive issues. They can also conduct or help establish alternative informal dispute resolution mechanisms where the existing ones are not accessible to certain groups such as women or minority groups.



#### Examples of initiatives: Monitoring, Oversight and Transparency

Initiative		What Worked/What Didn't
<p>A legal services CSO in <b>Bangladesh</b> <i>Ain O Salish Kendra</i> has helped to organise and train local committees, sometimes entirely composed of women, to monitor <i>shalish</i> and indirectly educate those responsible for the proceedings.</p>	<p>+</p> <p>+</p> <p>-</p>	<p>CSOs can assess whether practice is respectful of rights, and their interventions can make informal systems fairer and more inclusive.</p> <p>Local CSOs may have the ability to translate human rights norms into local values and concepts.</p> <p>Monitoring may be rejected if it is seen as a form of policing or as a threat to existing practices.</p>

#### Recommendations for Capacity Development: Monitoring, Oversight and Transparency

**Empower community members** to be more assertive, and capable of protesting in case they consider an outcome or process unjust. If people are aware of rights, they may protest in case those rights are infringed upon. Strengthen the ability of the community to hold informal justice systems accountable to the interests of community members.

**Support monitoring of informal justice mechanisms by government and civil society organisations.** In a sense, the decisions of informal justice mechanisms and the conduct of informal justice actors are already subject to some degree of 'informal' monitoring by the local communities to whom they are morally (and in some cases politically) accountable. However, there are often limits as to what can be done to expose or take action against an unfair or inappropriate decision where the successful party, or indeed the decision-maker, is a powerful figure in political, social or economic terms. Any oversight mechanisms need to forward to the formal system those cases which are against natural justice, corrupt, politically motivated or breach international standards of human rights. The media should be strengthened to cover justice related issues.

**Advocate for the production of written records of informal decisions.** This will make monitoring easier and has the potential of simultaneously increasing accountability of informal justice mechanisms within communities and facilitate their monitoring by external parties. Elaborate or computerised systems are probably not appropriate.

**Examples of research and other relevant initiatives:**

**United States Institute for Peace, Fletcher School of Law and Diplomacy**, in collaboration with the **Centre for Humanitarian Dialogue**, have studied the extent to which informal justice systems can play a role in post-conflict reconstruction of the rule of law, and the extent to which, and how, international and national policy makers can engage them. (Burundi, East Timor, Mozambique, Guatemala, Somalia, Afghanistan, Liberia, Papua New Guinea, Sierra Leone, and Sudan)

**PDRC** in **Somalia** has published two volumes entitled Pastoral Justice and Somali Customary Law and has identified the main tenets of *xeer*, *sharia* and secular Somali state law which are in conflict with one another and proposed a regional process to integrate the laws into a single system.

**UNDP Sudan** has commissioned a study of the nature of customary law and its relevance to the present situation, and the viability and value of its revitalization and the measures needed to revitalize customary law and its implementing institutions.

**UNDP Cambodia** conducted a major study of the social demand for justice and the supply of justice services. This report also provided recommendations for improving access to justice, especially local justice.

**World Vision International** conducted a study of customary law in **Southern Sudan** which provided a series of options for assisting future capacity building of southern Sudanese legal institutions in respect to customary law.

**Norwegian People's Aid** has been documenting customary law on land tenure systems in **South Sudan**.

**IRC East Timor** conducted a study on local justice systems and how these systems handle cases of gender based violence. Recommendations were made to assist in the protection and promotion of women's rights in the context of these systems.

**UNDP Rwanda** commissioned a study to form a basis for future in depth research, evaluation, analysis and dissemination of Gacaca as a best practice.

The **World Bank** Justice for the Poor program in **Indonesia** was established to develop strategies for an approach to justice reform which builds popular constituencies to demand justice. The program commenced with research, which focused on success stories rather than a problem analysis – what allowed poor people to defend their interests successfully in an unfavorable institutional environment? For example, the village judicial autonomy research project aims to strengthen informal dispute resolution mechanisms at the local level. It is tracking dispute resolution processes, norms and actors with a specific focus on the experiences of poor and marginalized members of the community. The Justice for the Poor program subsequently evolved into an experimental stage where research and analytical findings are trialed through operational programs. Outcomes from the experimental phase of the Justice for the Poor program are informing a scaling-up of activities. This includes both stand alone justice sector reform projects and the mainstreaming of legal empowerment through World Bank community development programs.

In 2004 **UNDP Indonesia** and the National Development Planning Agency's Directorate of Law and Human Rights initiated an eighteen-month assessment of access to justice for the most disadvantaged populations in selected provinces. The assessment included over 700 interviews, 200 Focus Group Discussions and surveys of nearly 5,000 persons from those populations; an examination of their justice problems and priorities; and a review of the justice-oriented services available to them (with a major focus on informal justice systems). The assessment particularly focused on such groups as internally displaced persons, women heads of households and landless farmers. The findings have been published and are available from UNDP Indonesia.

**UNDP Indonesia** Access to Justice for Peace and Development in Aceh Project's overall objective is to support the implementation of the Memorandum of Understanding (MoU) signed between the Government of Indonesia and the Free Aceh Movement and to consolidate the peace and development processes in Aceh, in line with the relevant provisions of the MoU. The project was developed on the basis of needs identified during the Aceh justice assessment. One of the activities of the project involves working with the **Majelis Adat Aceh (MAA; Acehese Adat Council)**, which acts as the custodian of *adat* in Aceh, to develop guidelines and parameters of jurisdiction and procedural safeguards for *adat* law in Aceh that builds upon the system's internal strengths but that are also consistent with international human rights law. Once endorsed by the MAA, the guidelines and parameters will be disseminated.

An assessment of access to justice in post-tsunami Aceh was undertaken by **UNDP, the World Bank and IDLO in Indonesia** between January and March 2006. The assessment examined citizens' access to justice through both the formal (*Syariah* and General Courts) and informal (*adat*) systems, as well as the administration or dispensation of justice in four districts and a municipality of Aceh. The findings of the assessment have been published and are available from UNDP Indonesia.

The **UNDP Indonesia** Legal Empowerment and Assistance for the Disadvantaged (LEAD) project was developed on the basis of the findings of the access to justice assessment. The project features a grant making facility primarily to civil society organizations. Grants will be provided to organizations seeking to improve access to justice through informal mechanisms. The project is employing the following approach:

- On the most basic level, LEAD seeks to raise the legal awareness, power and assistance available at the grassroots village or community level.
- It seeks to build up paralegal capacities for specific villages or NGO members who will develop greater levels of legal knowledge and skills.
- It supports legal services provided by lawyers and related services by NGOs and other professionals.
- Analyses of the problems and progress LEAD and its partners make will contribute to policy and legal reform advocacy.

**Examples of Indicators<sup>62</sup>****Issues to consider:**

- It is important to collect data before, during and after the intervention.
- Data must be disaggregated by gender, ethnicity, age, and other minority status.
- There are challenges in collecting data as informal justice systems take a seemingly infinite number of forms, and they keep almost no records.
- Data collection should be carried out by local people, who understand the language and culture of the target community. Training in participatory research and other assessment techniques should be provided, particularly in relation to the collection of gender sensitive data.

Indicator
<b>Increased safety, security and access to justice in the area covered by the informal justice system</b>
Decrease in crime rate in target community.
Increase in agreements reached in the informal justice forums that are honoured.
Improvement in perceptions about safety, security and access to justice in the community.
<b>Increasing the transparency of informal justice systems</b>
Increase in number of informal institutions that have systems for recording actions and documenting decisions.
Increase in the number of informal justice system proceedings to resolve disputes where information about the parties, claims, and resolution is recorded.
Increased capacity to manage disputes efficiently and to implement improvements on the basis of self assessment.
A code of ethics and procedural guidelines developed.
Regularisation of procedure for electing informal justice actors (where applicable).
Regular public meetings to review and discuss how the forum is progressing and any changes to be made or action to be taken in relation to safety, security and justice.
<b>Increased awareness</b>
Increase in the number of people who understand how to access services.
<b>Improved grievance handling processes</b>
Increase in number of women who express confidence in informal institutions.
Increase in perceived consistency of decisions and actions.

62 Adapted from DFID (2004), Briefing: Non-state justice and security systems. Penal Reform International (2000), Access to justice in sub-Saharan Africa: the role of traditional and informal justice systems. Vera Institute of Justice (2003), Measuring Progress towards Safety and Justice: A Global Guide to the Design of Performance Indicators across the Justice Sector.

<b>Improving the protection of rights</b>
Change in number of disputes received or arrests made by informal institutions that are referred to state institutions.
Reduction in or the elimination of the use of physical punishment.
A positive change in attitude towards the non-use of physical punishment.
Instances where the formal system has intervened to strengthen human rights, for example in relation to the illicit use of physical punishment.
Increase in levels of awareness that no person should be forced physically to appear or to abide by any decision of the informal forum.
A positive change in attitudes towards the rights of women, children and other minority status groups.
Increase in awareness and acceptance of the principle of 'equality before the law'.
The adoption of a code of ethics which recognizes the equal rights of women and children and other minority groups.
Greater participation of women, children and other minority status groups either as arbitrators or as members of the public contributing to discussions during dispute resolution meetings.
Greater availability of alternatives such as NGO ADR forums and legal aid.
Increase in levels of awareness of women, children and disadvantaged groups of these alternative resources.
The increased use of these alternatives by women children and disadvantaged groups.
Positive changes in the amount of dowry demanded and the age of children married by informal institutions.
<b>Enhancing cooperation between state and informal institutions</b>
Proportion of informal decisions that are appealed to state courts and other agencies (including ombudsmen).
An enhanced relationship between formal and informal sectors.
Greater awareness by local magistrates, police and relevant officials of the informal forums.
Greater recognition by these people of informal forums as lawful, legitimate and worthwhile institutions.
An increased number of referrals from the formal courts to the informal forum and from the informal forum to the police and formal courts.
Instances of other forms of cooperation such as community service orders being supervised by the informal structure.

#### Means of data collection/sources of data:

- Before and after surveys
- Control group surveys
- Baseline surveys
- Qualitative interviews and focus group discussions
- Qualitative verification through third-party interviews
- Review of written records, case tracking mechanism
- Direct observation
- Administrative data

## Annex 1

63 This is a very rudimentary overview of some of the features of selected systems for illustrative purposes only.

### Key features of selected informal justice systems<sup>63</sup>

#### Afghanistan

**While not based on Islamic *sharia* per se, customary law in Afghanistan is steeped in what are perceived as deeply Islamic norms and practices.** The primary means of informal dispute resolution is the *shura* or *jirga*, an ad hoc council of village notables and elders, almost always exclusively men, who are gathered to resolve a specific dispute between individuals, families, villages or tribes.

These bodies are most often engaged as mediators, using their knowledge of custom, Islam, and the parties – as well as social and financial pressure – to establish a consensual settlement. The fundamental goal of a *shura* or *jirga* process is to restore community harmony, which is generally achieved by arriving at an equitable settlement that corrects harm done to honor and/or property.<sup>64</sup>

64 Adapted from: United States Institute of Peace, *The Clash of Two Goods: State and Non-state Dispute Resolution in Afghanistan*.

#### Bangladesh

**Typically, *shalish* involves consent based arbitration or mediation procedures, which may extend through numerous sessions over several months, while disputants pursue negotiations both within and outside the *shalish* setting.**

The involvement of the government and NGOs has brought about three distinct models of the *shalish*: Traditional *shalish*, government-administered ‘village courts’ and NGO-modified *shalish*.

In the **traditional** form, village elders gather with concerned parties to resolve local disputes. *Shalish* members have the option of choosing between mediation and arbitration.

In the **government-administered *shalish***, the *union parishad* (lowest unit of electoral government) is empowered by law to arbitrate family disputes and to settle civil disputes and minor criminal offences.

The **NGO-facilitated *shalish*** process has an increased focus on mediation rather than arbitration. NGOs are involved in the selection and training of panels, encourage increased participation of women and document proceedings.<sup>65</sup>

65 Adapted from: Brynna Connolly (2004), *Non-state justice systems and the State: Proposals for a recognition typology*.

### Burundi

**The *Bashingantahe* institution represents two of the three ethnic groups of Burundi.** The chief *Mushingantahe* hears the disputing parties and attempts to discover the truth, the elders then meet to deliberate in private. After reaching a consensus they return to the public forum. Once the verdict is pronounced, the spokesman exhorts the two parties to reconcile. They accept the verdict and as a sign of sealing the pact, the two parties, the *Bashingantahe* and other persons who assisted in the process take part in a ceremonial drinking session. If one of the parties is not satisfied with the decision, they declare so; and an appeal is submitted to a higher judicial elder council.

The *bashingantahe* have the moral authority to summon any person residing in their area of influence to appear. This appearance is voluntary but anyone not cooperating is looked down upon by the community, and will not be received by the *bashingantahe* if they later have a case to be decided. A council or college of *bashingantahe* sits for a case, and usually the most experienced presides.

Women have traditionally been excluded from the institution. They are invested with their husbands as *bapfasoni*, person of wisdom and integrity, but do not have the right to deliberate with the men nor render judgement.<sup>66</sup>

66 Adapted from Denise Holland, The rejuvenation of the Bashingantahe Institution.

### China

**In China, there are more than one million village-based People's Mediation Courts (PMCs) which were created by the 1982 Constitution.** Participation in mediation is voluntary in principle, and disputants can take their cases to court if mediation fails. The PMCs handle more than seven million civil cases per year, including family disputes, inheritance issues, land claims, business disputes, and neighbour conflicts. These institutions have evolved as an outgrowth of traditional local institutions that have long functioned as alternatives to the civil courts.<sup>67</sup>

67 Adapted from: USAID (1998), Alternative Dispute Resolution Practitioners' Guide.



### East Timor

**The *adat* dispute resolution process usually starts with a report of the issue to the village or hamlet chiefs by the heads of the families involved in the dispute, or the family of the victim.** A helper takes note and reports to the local legal authorities such as the *lian nain* (the owner of the words).

The authorities set up a date and the helper or the village chief organizes the meeting and makes sure all conflicting parties and the appropriate authorities are invited. The meetings take place in a communal area where a symbolic woven mat is unfolded, the place where discussions and negotiations have to take place. The persons who gather in such a meeting are the heads of the families involved, and the *lian nain*. Other authorities also come together, such as ritual leaders, warriors, the local priest, the hamlet and village chief.

The agenda of such a meeting is to negotiate the compensation. The actual negotiating is mainly done by the traditional legal experts – only they have the competence to finally take decisions and determine fines. Most of the other authorities have to make sure that the decisions taken are in accordance with their authority. The hamlet or village chief has to make sure that the decision is not against regulations of the government.<sup>68</sup>

68 Adapted from: Tanja Hohe, Christian Ranheim and Rod Nixon, Community Justice in Post-Conflict East Timor.

### Guatemala

**The Mayan conflict resolution process can be initiated by the parties to the conflict themselves or by other persons that are directly affected by the conflict such as family members or neighbours.** The circumstances of the specific case determine who will be called upon to mediate between the parties. If the parties to the conflict cannot agree on a community authority trusted by both they will turn to the *alcalde communal* (communal mayor).

Once the process is initiated and the mediators selected, the process is flexible and dynamic. It is characterized by consultation, dialogue and consensus. The mediators will thoroughly question both parties. Witnesses and community members may be questioned. The mediators will also seek to initiate a direct dialogue between the parties and attempt to build a consensus between the parties. In principle, a case can only be resolved if both parties agree on a solution.

Because both parties depend on the solidarity and support of the community more or less subtle forms of pressure may be applied so that the parties can come to an agreement and the community's social peace is restored.<sup>69</sup>

69 Adapted from: Arno Hessbruegge and Carolos Fredy Ochoa Garcia (2005), Mayan Law in Post-Conflict Guatemala, Draft.

### Indonesia

**The types of informal justice mechanisms operating in Indonesia are many and varied – a reflection of the ethnic diversity that characterises the country.** However, most informal justice mechanisms fall within two main categories and employ processes that share many common features.

The basic distinction lies between communities in which cases are heard by traditional **adat** leaders according to *adat* or customary law, and those which disputes are resolved through mediation or ‘soft’ arbitration by village authorities – in most cases the village head. However, the division is not nearly so clear cut in practice, as resolution according to *adat* law often involves elements of both mediation and ‘soft’ arbitration, and in certain places the *adat* leader may simultaneously hold the position of village head. Meanwhile, in ethnically heterogeneous communities, the two processes may exist side by side, with the selection of forum depending on the ethnicity of the parties to the dispute.

Where *adat* does not form the basis of informal dispute resolution, mediation or ‘soft’ arbitration is employed in a process whereby an influential community figure (usually the village head) assists the parties to a dispute to reach a mutually acceptable agreement, or proposes a settlement by reference to ‘common sense’ and local conceptions of what is fair and just in the circumstances. Where the process more closely approximates arbitration, it is described as ‘soft’ in the sense that any decision made is generally only binding if both parties agree, and in most cases there remains scope for negotiation over the nature and size of any sanctions or settlement.<sup>70</sup>

70 Adapted from: UNDP Indonesia (2006), *Justice for All? An Assessment of Access to Justice in Five Indonesian Provinces*.

### Malawi

**Chiefs, assisted by their *ndunas* (advisors, all men) preside over customary justice forums.** The system is characterized by its relaxed yet respectful atmosphere, an outdoor rural setting (often under a tree), informality of dress, common-sense language and a natural flow of story-telling and questioning. The dispute is dealt with in a holistic manner, taking into account interpersonal relationships, community status, local values and community perceptions. A participatory or consensual approach to decision-making is adopted. Victim, offender and family members or relatives are called to appear before the chief or elders.

The aim is first to ascertain the facts, thereafter, the forum will reach a decision that satisfies the victim, and is considered reasonable by the chief and the wider community. Factors at play include the interests of the chief to promote his authority and prestige, political influences and pressure, and the current human rights and democratic changes that have influenced some members of certain communities. Additional factors are the respective status of the disputants, and the likelihood of the case being taken to the formal state courts.<sup>71</sup>

71 Adapted from Wilfried Scharf, *Non-state justice systems in Southern Africa: How should governments respond?* and Wilfried Scharf, Chikosa Banda, Ricky Rontsch, Desmond Kaunda, Rosemary Shapiro, *Access to justice for the poor of Malawi? An appraisal of access to justice provided to the poor of Malawi by the lower subordinate courts and the customary justice forums*.

### Philippines

**The *Katarungang Pambarangay* or the Barangay Justice System (BJS) is a government-run dispute resolution system operating in the country's 42,000 bangarays, or local government units.** The BJS is based on traditional mediation mechanisms.

Under the local government code of 1991, the ten to twenty member *Lupong Tagapamayapa* (council of mediators), selected from among residents of the village is responsible for supervising conciliation panels, and for providing a monthly forum for exchange of ideas regarding the amicable settlement of disputes.

By law, the results of mediation proceedings are recorded and submitted to the municipal court by the *lupon* secretary, who is also responsible for keeping records of proceedings of the conciliation panels. Conciliation panels are composed of three members of the *lupon* selected by the disputants.

In resolving disputes among members of indigenous cultural communities the substantive law to be applied is comprised of the customs and norms of the community. Submission of a dispute to the conciliation panel is a prerequisite to filing in court, with limited exceptions for detainees and *habeas* proceedings, among others. Agreements reached are binding and ultimately enforceable by the courts.<sup>72</sup>

72 Adapted from: Brynna Connolly (2004), *Non-state justice systems and the State: Proposals for a recognition typology*.

### Rwanda

***Gacaca*: In order to meet the massive challenge of hearing tens of thousands of genocide-related cases, Rwanda has adapted *Gacaca*, a traditional dispute resolution mechanism to deal with the suspects.**

The government categorized suspects by crimes for which they were accused, reserving the 2,133 individuals accused of the Category 1 crimes of planning and instigating the genocide for trial in the conventional courts. The *Gacaca* tribunals try those falling within the remaining categories.

According to observers, modern *Gacaca* institutions are radically different in jurisdiction and practice from traditional systems that did exist. The *Gacaca* traditionally handled issues regarding marriage, divorce, succession, parental authority, injury, and land disputes. The new *Gacaca* design adopts many of the core aims of the traditional proceedings, incorporating the values of community participation and reconciliation, as well as the restoration of harmony. However, in severe contrast to the older community-based system of resolving conflicts, the modern *Gacaca* represents a hierarchical state-directed initiative. The top-down imposition of the new *Gacaca* model, rather than building it up from the community level, has been criticized as a fatal flaw in the system.

***Abunzi*: “*Abunzi*” committees handle cases such as land and family disputes, robbery, destruction, damage of crops, adultery, assault and injury.** Cases must be submitted to a mediation committee prior to filing with the court of first instance. The committee members are expected to handle both civil and criminal cases, which would normally attract fines not exceeding USD 5,200 in the national courts. They serve renewable two-year terms of office. The *Abunzi* comprise twelve residents of a sector and must be persons of integrity and acknowledged for their mediating skills.<sup>73</sup>

<sup>73</sup> Institute for justice and reconciliation (2005), Evaluation and Impact Assessment of the National Unity and Reconciliation Commission (NURC), [http://www.irinnews.org/report.asp?ReportID=42130&SelectRegion=Great\\_Lakes&SelectCountry=RWANDA](http://www.irinnews.org/report.asp?ReportID=42130&SelectRegion=Great_Lakes&SelectCountry=RWANDA), (accessed 10 December, 2006).

### Sierra Leone

**Chief's Barray:** Chiefdoms are headed by traditional rulers referred to as **Paramount Chiefs**. They are elected for life, but could be suspended or removed from office by the President. Chiefdoms are divided into sections, towns and villages run by Section Chiefs, Town Chiefs and Village Chiefs. The chiefs are custodians of the customs and traditions of their peoples and responsible for the maintenance of law and order. The 1963 local court act bars chiefs from presiding over court cases. The chiefs have, however, continued to preside over matters of a customary nature, also imposing fines and other penalties. The chief's barray has the chief as its head and he is assisted by elders in settling disputes.

**Tribal Headmen:** Most big towns have tribal headmen for ethnic groups that are considered migrants to, or non-indigenes of that particular town. The institution of tribal headmen originated as attempts by migrant ethnic groups to organize their affairs in a strange town. These include sheltering new arrivals, marriage ceremonies, burial rites and resolution of disputes among members of the ethnic group.

The institution of tribal headmen became enshrined in law when an ordinance in 1905 was passed. In 1932 a subsequent ordinance took away their judicial functions. Although they were barred from setting up courts or adjudicating cases, tribal heads continue to adjudicate cases. Cases mainly concern marital disputes between husband and wife, or wife and co-wife, family disputes, witchcraft, abusive language, debts and assault.

**Local Courts:** Established by the Local Courts Act of 1963, **these courts are the most formalized structure in customary justice system**. They are presided over by chairmen appointed for three years by the Minister of Interior, who could also remove them. No formal qualification is required for the position. Other local court officials include a panel of elders, court clerk and chiefdom police.

There is no provision for lawyers' presence. However, the 1963 Local Courts Act makes provision for the work of the court to be supervised by customary law officers who are lawyers employed by the state and are empowered to advise local courts in matters of law, train local court personnel and exercise judicial review over decisions of local courts. Provision is also made for appeal from local courts to magistrate courts.<sup>74</sup>

74 Adapted from: Abdun Tejan Cole, and Mohamed Gibril Sesay (2005), Justice Systems and the Rule of Law in Post Conflict Sierra Leone.

### Somalia

**Xeer is a set of rules and obligations developed between traditional elders to mediate peaceful relations between Somalia's competitive clans and sub-clans.** There are some generally accepted principles of *Xeer – xissi adkaaday* - which include:

- Collective payment of *diya* (blood compensation, usually paid with camels or other livestock) for death, physical harm, theft, rape and defamation, as well as the provision of assistance to relatives;
- Maintenance of inter-clan related harmony by sparing the lives of 'socially respected groups' (including the elderly, the religious, women, children, poets and guests), and treating women fairly without abuse;
- Family obligations including payment of dowry, the inheritance of a widow by a dead husband's brother, a widower's rights to marry a deceased wife's sister, and penalties for eloping;
- Resource-utilization rules regarding the use of water, pasture and other natural resources; provision of financial support to newlyweds and married female relatives; and the temporary or permanent donation of livestock and other assets to the poor.

Once an incident has occurred, a delegation of elders known as an *ergo* is despatched by one or both of the concerned clans or by a neutral third party clan, to begin mediating the dispute and preventing it from spreading. According to *xeer* it is incumbent upon the aggrieved clan to make the necessary investigations into an incident and determine the harm committed before presenting their case to other clans.

Clan *xeer* cases have a traditional, ceremonial procedure. During the case's oral presentations, they are open to the public and usually outdoors under a tree. Pleas of guilt and innocence, oral presentations of the case, the use of witnesses and evidence, and cross-examination are employed as in any secular court case. After a decision is reached, the case's protagonists and their clans hear the elder's decisions, take a few minutes to discuss, and give their reply as a clan group. It is possible to agree, or to disagree and seek a new hearing. If a group rejects the decision of the elders, they call for an appeal or new hearing, a total of three hearings can exist using different *xeer beegti* (a group of elders acting as judges).

**Xeer cases prevent four different types of individuals from participating in dispute adjudication:** Persons who have close family relations with the parties; Persons who have personal grievances against either party; persons who have previously sat in judgment of the same case; and women.<sup>75</sup>

75 Adapted from: Centre for Humanitarian Dialogue (2005), *Stateless Justice in Somalia: Formal and Informal Rule of Law Initiatives*.

## Sudan

**Beja customary law and penal code are primarily derived from the *Salif*. *Salif* is the unwritten code of conduct,** which for the Beja is a penal code for personal and criminal law, a diplomatic institution for good neighbourly relations with other tribes, a democratic platform, and a mechanism for environmental protection.

A negotiation process is initiated following a conflict between two parties or an offence or misconduct by an individual or a group against another. Resolution is arrived at through negotiations that involve the conflicting parties and the mediators. A number of measures are usually taken to ensure the success of negotiations and resolution of the conflict: Firstly, arranging for an immediate truce between the conflicting parties (*Galad*). This is a temporary non-aggression agreement for a defined period of time (normally 1-3 months) to reduce anger and tensions, cool tempers and allow mediators to prepare for negotiations. Secondly, working on further reducing tension by visiting the injured or grieved party and providing presents and assistance (by mediators and representatives of the other party).

The *nazir* presides over the case and manages the meeting, however, the process is actually directed by the parties concerned, assisted by the mediators *Adils*. The *agrima* or *majlis* is where the most important issues, particularly conflicts, are discussed and resolved both between clans within the same tribe and/or between two or more different tribes. The *majlis* can be classified in three types:

- The *Salif* or Customary *Majlis* is basically a mediation meeting
- The *Sharia'a Majlis* is headed by a religious person called upon to advise on or to issue a *fatwa* (Islamic ruling) on a specific issue or for supervising the swearing on the Koran (oath) when no material evidence or witnesses exist and the *Salif* system fails to arrive at a resolution.
- The Closed *Majlis* is also based on *Salif* but is not open and is usually within one group, presided over by the *omda* or *sheikh* of the particular tribe. The proceedings are kept secret because they are meant to deal with issues that should not be made public because of their sensitivity or stigmatic nature for the persons and tribe involved, such as those relating to prostitution, gambling and drinking of alcohol.<sup>76</sup>

76 Adapted from: UNDP Sudan (2006), Traditional Tribal Systems and Customary Law in Eastern Sudan.

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