

How to Note



Informal Justice Systems

1. PREFACE

The promotion of freedom, democracy and respect for human rights are key priorities in Danish development cooperation. Denmark's strategic priorities for support to democratisation and human rights identify the deepening of democracy and the realisation of human rights, as the two thematic focus areas for Danish engagement.

The purpose of this How to Note is to provide hands-on guidance and inspiration on how to put these strategic priorities into practice in Danish development cooperation.

This How to Note focuses one particular aspect of the support to the realisation of human rights – enabling access to justice for the poor and marginalised through an increased focus on infor-

mal justice systems. Danish support for informal justice systems should preferably be provided as an integrated part of support to justice sector reform. Further guidance on how to promote justice and rule of law through justice sector reform is provided in a separate How to Note.

This Note introduces the purpose of Danish support to informal justice systems (section 2); identifies key questions to consider prior to initiating such support (section 3); suggests a number of possible entry points for support to informal justice systems (section 4); identifies possible elements in such support (section 5); provides guidance on how to monitor and evaluate support for informal justice systems (section 6); and concludes with suggestions for further reading (section 7).

Danida's How to Notes provide brief technical guidance and inspiration for programming choices in Danish development cooperation. This and other How to Notes are available at www.danidadevforum.um.dk.

Contributions aimed at enhancing the content of this Note can be sent by email to the Technical Advisory Service of the Ministry of Foreign Affairs of Denmark at devforum@um.dk.

Key Messages

Denmark will only support informal systems of justice that respect human rights, or that are willing and able to change norms and practices that infringe on human rights. Support should:

- Promote equal access to justice for all by improving the quality of dispute resolution within the available systems and their compliance with international human rights norms and standards.
- Be provided as an integrated part of support to broader, nationally owned justice sector reform that encompasses both state and non-state institutions and actors.
- Build on the strengths of the systems and seek to reform their weaknesses by, for example:
 - Building positive linkages between formal and informal justice systems.
 - Empower the users of both formal and informal systems to know and claim their rights and to demand accountability from the different justice systems.

2. THE PURPOSE OF SUPPORT

The purpose of support to informal justice systems is to promote equal access to justice for all by improving the quality of dispute resolution within these systems and their compliance with international human rights norms and standards.

Support to informal justice systems should not replace support to the development and strengthening of the legal and justice system of the state. However, it must be recognised that informal justice systems deal with an estimated 70-90 per cent of all disputes in developing countries. Ignoring these systems may therefore exclude large segments of society from access to justice.

The rural and urban poor tend to turn to these systems because they are more accessible culturally, financially and geographically than the formal justice system; they handle issues of primary concern such as land, property, and family matters and they apply procedures and

outcomes based on reconciliation, restoration and reparation that are attuned to local community norms and notions of justice. Informal justice systems are, however, also often associated with a number of weaknesses: corruption, abuse of power, lack of accountability, and non-compliance with international human rights standards leading to inhuman punishments, unfair trials and discrimination against women, children and minorities.

Support to informal justice systems therefore often poses real dilemmas for development partners. Identifying these dilemmas, as well as the opportunities for overcoming them, is the first step towards deciding whether and how to provide support to informal justice systems.

What are informal justice systems?

Informal justice systems refer to forms of disputes resolution that take place outside of formal court systems and that have a certain degree of stability, institutionalisation, and legitimacy within a designated constituency. There is, however, no authoritative definition of such systems. A range of terms are used to refer to them, such as non-state, traditional, customary and primary – terms that have different meanings in different places and contexts. The scale from formal to informal and from state to non-state is, furthermore, gradual.

Informal justice systems often apply normative frameworks based on custom and religion, but some also draw on elements of the national legal framework or international human rights norms and standards. Some systems are endorsed by the state and recognised as part of the formal justice system.

Although terminology differs, the following ‘types’ of systems are usually included in the definition of informal justice systems:

Traditional, indigenous and religious systems. These systems and mechanisms have typically existed since pre-colonial times and are conducted by hereditary or religious authorities. Examples include traditional authorities (Mozambique), traditional Shalish (Bangladesh), traditional courts (Zambia and Ghana), religious courts (Kenya), traditional dispute resolution (Nepal).

Semi-formal systems. These systems have been created or endorsed by the state and are often integrated into the formal justice system but apply customary norms. Examples include: Community courts (Mozambique), local council courts (Uganda), local courts using informal procedures (Zambia), government administered Shalish

(Bangladesh), Juntas Vecinales (Bolivia), justice of the peace courts (Guatemala).

Alternative community-based systems. These are often initiated by the state or non-governmental organisations (NGOs). Many draw on community norms, adapted to include human rights, and use modern alternative dispute resolution procedures (such as negotiation and mediation). Examples include: community mediation centres (Nepal), paralegals, justice committees, neighbourhood watch committees and community policing councils (Mozambique, Ghana, Uganda, Zambia).

3. KEY QUESTIONS TO CONSIDER

Support to informal justice systems must be context-driven and designed to be specific to different types of systems. Prior context and multiple stakeholder analyses based on participatory dialogue are therefore crucial. The questions below should, as a minimum, be considered in the process of determining whether and how to design support to informal justice systems.

What is the legal and socio-political context? It is important to understand the legal, regulatory and institutional framework for the operation of informal justice systems. Key questions include whether the constitution recognises legal pluralism or not, and what the mandate, jurisdiction and requirements of the informal justice systems may be.¹

When assessing whether to support informal justice systems it is also important to understand the short- medium- and long-term vision of the state in relation to them. For example, if legal pluralism is embraced, will it be a strategic and lasting decision founded in considerations of a religious, social, political or cultural character? Or is it more a short-term response to a capacity constraint of the formal justice system? Answers to these questions may have implications for where development partners concentrate their support and how it should be designed.

What are the links between the informal and formal justice systems?

Formal links between informal justice systems and the state range from partial state recognition of traditional, customary or religious systems as alternative dispute resolution mechanisms for specific matters – but without legal procedures that link them to formal institutions – to extensive state integration, with formal appeal procedures, cross-referrals, and legal regulation.

Some informal justice systems are not recognised at all (even though people continue to use them), while others are only indirectly recognised in specific laws dealing with customary practices – for example, succession or land allocation and use.

Irrespective of the legal framework, there are also often informal links in practice – both between informal justice systems and formal courts, and between informal systems and the local police, administrators and service providers. Informal links can take the form of collaboration, competition and efforts by local state officials to control the informal justice systems. Such informal practices can enhance access to justice and be used to inspire support to improve or establish formal links. However, in some situations such links may lead to human rights violations.

Who are the key stakeholders and what are the power relations underpinning the informal justice system? Stakeholder analyses can create an understanding of the power interests that are involved in the provision of justice by formal as well as informal systems; and identify openings for reform and key drivers of change – including from within the informal systems themselves. Support to informal justice systems is not a neutral technical activity and is likely to impact on existing power relations. Justice institutions are involved in distributing power and resources, either directly or through links with local and national power structures. Traditional leaders in particular may exercise both judicial and executive authority, and some may have been used for political control by colonial and post-colonial regimes.

Care must be taken that support to informal justice systems does not reinforce possible power structures and corrupt practices that sustain discrimination.

Stakeholder analyses should involve multiple-stakeholder dialogue and include the perspectives of the users of the system, those that control the informal justice systems, formal state and government institutions (including central and local government), national human rights institutions and justice sector institutions and non-state actors engaging with informal justice systems – such as paralegals, lawyers and civil society organisations.

To what extent is there openness for change? Traditional and religious justice systems commonly have strong roots, anchored in local cultural beliefs and norms. Reform requires long-term investments that are sensitive to local cultural, social, and economic structures.

¹ 'Legal pluralism' refers to legal systems in which pre-colonial traditional, indigenous, customary or religious systems are formally recognised (to varying degrees) and continue to operate side-by-side with the common-law or civil-law based systems introduced later.

Strong resistance to change can be anticipated. For example, simply changing procedures to allow women greater access may have much wider, deep-rooted customary or religious implications. Because custom and religion are so deeply ingrained in men and women's lives, such changes may be resisted by both men and women.

However, 'local culture' is usually dynamically evolving and experience shows that there are sometimes real openings for change. Local power-holders may claim that discriminatory practices are legitimate because they are part of the local culture, but this opinion may not be shared by everyone in society and can well reflect attempts to sustain local power relations.

Community-based systems and state regulation of practices within informal justice systems may also be seen as a threat to the authority and client-base of existing adjudicators and other powerful members of society.

How do the informal justice systems operate?

- **Procedures:** Are rules clear and coherent? What value systems and norms are they based on (for example, custom, religion, and/or state law)? Are the procedures used accessible to everyone or are some people, such as women, excluded from participating? What is the level of fairness in trials? Are the norms and rules enforced in a discriminatory or non-discriminatory manner? Is the use of the systems voluntary or compulsory?
- **Enforcement:** What types of punishments are allowed? What mechanisms are there to enforce decisions? Are these effective and timely? Are there possibilities for appeal?
- **Accountability:** How are adjudicators chosen (inheritance, election or appointment) and by whom? What is the gender, age, class, religious, ethnicity, race, or political affiliation profile of adjudicators? Are there standards for the performance of adjudicators (such as laws or codes of conduct) and monitoring mechanisms? To whom are adjudicators answerable and accountable?
- **Sustainability:** What are the financial, human and other resources that ensure the operation of the system? Are adjudicators paid a salary, subsidy or fee, or is it entirely voluntary?

Are there human rights concerns? Potential or actual human rights concerns need to be identified prior to deciding whether and how to support informal justice systems. Challenges may be related to the accountability of the systems; the extent to which they are fair; the extent to which they respect the physical integrity of all individuals; and the extent to which they discriminate against women, children and others.

A specific area of concern with informal justice systems is gender discrimination. Informal justice systems handle the majority of disputes that directly affect poor women's physical and economic security. Examples include domestic violence, inheritance, child custody, allowances and access to, and ownership of, land and natural and productive resources. However, many informal systems are gender-biased, male-dominated, and apply customary and religious rules and laws that are themselves discriminatory.

Could external support undermine the strengths of informal justice systems and their self-sustainability? Great care has to be taken not to undermine the self-sustainability of informal justice systems. Support aimed at improving the quality of dispute resolution and the human rights compliance of these systems should therefore not necessarily involve the provision of direct financial support to them. Care also has to be taken that support to state integration of informal justice systems does not affect the informality and ease-of-use that makes these systems so appealing.

4. POSSIBLE ENTRY POINTS FOR SUPPORT

Context and stakeholder analyses should provide the basis for deciding whether and how to include support for informal justice systems in Danish support programmes aimed at strengthening justice, the rule of law and equal access to justice. Possible entry points for such support include:

Support to the development or implementation of sector-wide strategies and development plans for justice sector reform. The development of a national vision and strategy for the justice sector provides an important entry point for addressing the challenges of the justice sector from the perspective of its users. It also provides an entry point for addressing specific knowledge, legal reform and capacity development needs associated with clarifying and improving of links between informal justice systems and the state – although experience with such an explicit integration of formal and informal reform processes is still rather limited.

Sector-wide strategies and development plans could include several of the specific entry points below (although support to civil society is usually provided directly to organisations), which will also be helpful where no sector-wide strategies or plans exist.

Support for constitutional and legal reform. Constitutional and legal reform processes provide an entry point for promoting compliance by informal justice systems with international human rights norms and standards and the rights in the constitution. Legal reform is also key for clarifying and improving the links between informal justice systems and the state – including clarifying the types of cases that the informal justice systems can deal with and their powers in relation to these.

Improving the knowledge base. Systematised and documented qualitative and quantitative information on the informal justice system and its linkages with the state are often not available. Such knowledge is crucial for the state to appreciate the justice needs of the users of the system and to incorporate these needs in overall justice sector reform processes. An improved knowledge base may, for example, serve to identify specific needs for legal reform and training, and it may also contribute to establishing baselines and indicators for subsequent monitoring.

Supporting capacity development. Support to capacity development must address the individual, institutional and organisational levels to have a lasting effect. The institutional level may be catered for through legal reform processes that clarify and improve the links between the formal and informal justice systems. Addressing the organisational level may include the introduction or improvement of structures, processes and procedures that enable better supervision and monitoring of informal justice systems. The individual level may be addressed through training activities for formal justice sector personnel (judges, prosecutors, court clerks, registrars and lawyers) to better understand informal justice systems, and for leaders and adjudicators of informal justice systems on basic law, human rights and available justice options (including how to approach formal courts).

Supporting civil society to empower individuals to claim their rights and improve their equal access to justice. Civil society plays an important role in bridging the informal and formal justice systems. The roles they potentially perform include: monitoring and reporting on human rights abuses within the formal and informal justice systems; representing the interests of particular groups such as women,

children and the disabled; providing justice services like legal aid, paralegal services and legal assistance and advice; building the capacity of and training leaders and adjudicators in the informal justice system on basic law, human rights, alternative dispute resolution and available justice options; and raising the awareness of the users of informal justice systems on their rights and obligations.

Supporting non-justice sector related initiatives. Support to the informal justice system could also be an element of support programmes that do not focus on justice sector reform as such. One example would be programmes that focus on natural resource management and that include greater access to justice for poor and marginalized groups around issues such as land and property. This approach may be particularly appealing to communities since efforts are likely to lead to the fulfilment of tangible and immediate needs.

A combination of partnership arrangements can support an integrated justice sector approach.

Where informal justice systems are incorporated in broader justice sector reform and/or there are strong linkages between formal and informal justice systems, partnerships might be pursued with formal institutions to carry out training and supervision (amongst other things) of the informal system.

Partnerships with civil society organisations that are sensitive to local norms and practices play an important role in bridging the formal and informal systems.

Partnerships with national human rights institutions and issue-based organisations, such as on land and women's rights, can serve to support advocacy for legislative reform.

Partnerships with universities or research institutions help to increase and document knowledge about informal justice systems.

Coordination and harmonization with other multilateral (including UNDP, UNOHCHR, UNICEF, UNIFEM, EU) and bilateral development partners supporting this area should be actively pursued.

5. KEY SUPPORT ELEMENTS

Guiding principles for Danish support for informal justice systems include that it should:

- **Apply a people-centred and demand-driven approach to access to justice.** Support for informal justice systems should begin with the needs of the poor to access justice that is non-discriminatory and inclusive, and that improves their livelihood. Specific attention should be paid to those who are excluded from or discriminated against in both informal and formal systems.
- **Promote local ownership and multiple stakeholder dialogue.** Many stakeholders with potentially conflicting interests are affected by support to informal justice systems. National ownership is essential, but an inclusive process at the local level must inform reform of both formal and informal justice systems.
- **Apply a holistic, integrated approach to justice sector reform.** Support to informal justice systems should complement or be incorporated into support to the formal justice system to enable everyone to access justice regardless of their education, class, ethnicity, gender, sexual orientation or caste.
- **Provide long-term support based on realistic objectives.** Improving access to justice for poor and marginalised groups is likely to be slow and incremental. It requires not only legal and institutional reform, but also efforts to influence the cultural beliefs, social barriers and structural inequalities that limit or deny justice to these groups. It is, therefore, important to be realistic about what can be achieved in certain periods of time.
- **Be harmonised with the support of other development partners.** Danish support to informal justice systems should be provided in collaboration with, in close coordination with, or through other relevant multilateral and bilateral development partners and actors.
- **Support the gradual adherence to human rights.** Denmark will only support informal justice systems that respect human rights, or that are willing and able to change norms and practices that infringe on human rights. When a system does not already adhere to international human rights norms and standards, but it is willing and able to change, Danish support should promote the gradual fulfilment of rights. Minimum core principles include:

- **Accountability:** Informal justice systems should be open to some form of regulation, supervision and monitoring
- **Non-discrimination:** Informal justice systems should be non-discriminatory.
- **Fairness:** Informal justice systems should ensure equality in procedures and outcomes as well as impartiality and independence in resolutions and decisions.
- **Physical integrity:** Informal justice systems should respect the physical integrity of users and refrain from corporal punishment and other inhuman or degrading treatment.

There is no single template for providing support to informal justice systems. Based on the outcome of context and stakeholder analyses as well as available entry points, support programmes should include a properly sequenced combination of at least some of the following *possible elements*.²

Support to justice sector reform

- Support to the development or implementation of sector-wide strategies and development plans for justice sector reform that include informal justice systems.

Support to constitutional and legal reform

- Support to law reform commissions or advocacy activities of NGOs to promote compliance of informal justice systems with international human rights standards and rights enshrined in national constitutions, and to clarifying and improving the links between informal justice systems and the state.

In Zambia, the Universal Periodic Review (carried out under the auspices of the UN Human Rights Council in 2008) recommended that customs or traditions undermining the dignity, welfare, interests or status of women be prohibited in the constitution as part of the constitutional review process.

Support for research on informal justice systems

- Support to local research institutions and civil society organisations to pursue regular qualitative and quantitative research into, and monitoring of, informal justice systems.

² A more comprehensive overview of programming options addressing informal justice systems can be found in the *Study on Informal Justice Systems*, written by the Danish Institute for Human Rights for UNDP, UNICEF and UNIFEM (forthcoming).

Support for capacity development

- Support relevant institutions within the formal justice system to introduce or improve structures, processes and procedures that enable supervision and monitoring of informal justice systems.
- Support relevant institutions and actors to implement and enforce existing legislation related to informal justice systems – for example, family, land, and inheritance laws that recognise informal justice processes. The role of decentralised local governments in this regard should also be considered. Support judicial training institutions to enable justice sector personnel (including judges, prosecutors, court clerks, registrars and lawyer) to better understand informal justice systems
- Support capacity development of existing forums of informal justice systems through, for instance, training and dialogue on procedural and enforcement issues to ensure fairness and non-discrimination; encouraging the inclusion of women on the panels of customary courts, and broader participation in nominating adjudicators to enhance accountability; and enhancing the transparency of the operations of informal justice systems – for example, by introducing basic reporting procedures.
- Support practical linkages between the formal and informal systems – such as justice centres or committees of community based organisations, the police, customary or religious authorities and formal court personnel to craft new arrangements that all sides can own – and that comply with local user needs and human rights; dialogue forums incorporating formal and informal justice providers; and legal aid NGOs or community mediators to facilitate links between the systems by playing a role in distributing litigation – for example, by ensuring that certain disputes and crimes are referred to the formal courts.
- Support alternative dispute resolution forums by exposing them to relevant and new techniques. The target groups may be ordinary citizens who volunteer, paralegals, local representatives of community based organisations, and staff of police-linked Victim Support Units. Mediation procedures can also be used to modify traditional procedures to ensure greater respect for human rights and gender equality.

Support for the legal empowerment of the users of informal justice systems

- Support to NGOs aimed at raising the awareness of local citizens on laws, human rights and available justice options, including how to approach formal courts. To address underlying attitudes and power relations, training should incorporate practical empowerment solutions such as how women can use the inheritance laws to better claim their rights to land.

In Bangladesh, the Madaripur Model of Mediation (MMM) was developed by a local legal aid association and aims to assist poor and marginalised groups to better access justice. Rather than import a new model, the MMM has worked to revitalize and reform the traditional Shalish system, which had become subject to local elite exploitation and enforced discriminatory practices. MMM builds on traditional, consensus-based mediation, and adjusts human rights standards of fairness, equality and non-discrimination to the realities of local communities. It establishes Mediating Committees of volunteers (including women) at village level, and Mediation Workers who provide technical support. Members are trained in law, human rights, and mediation techniques.

Committees have a high rate of durable resolutions and MMM has provided the poor and marginalized with a viable, cost-effective opportunity to access justice that addresses various forms of discrimination. It has increased awareness of rights and encouraged a general questioning of unjust practices – for example, those relating to marital and property issues.

MMM does not replace the formal courts, but complements them and committees regularly forward cases to the courts. The model has an in-built, participatory monitoring system that ensures accountability (<http://www.blast.org.bd/publications/ADR%20Brochure.pdf>).

6. MONITORING AND EVALUATION

The majority of informal justice systems do not keep records, and even semi-formal systems tend to do so irregularly. This creates considerable challenges in monitoring and evaluating the impact of interventions. While some objectives lend themselves to quantitative measures (such as the number of women on the panels of the informal justice systems), monitoring will more likely depend on qualitative analyses. This requires special means of verification other than

How to Note on Informal Justice Systems
June 2010

Publisher
Ministry of Foreign Affairs
of Denmark
Asiatisk Plads 2
DK-1448 Copenhagen K
Denmark

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Internet: www.um.dk

Design: Ministry of Foreign Affairs of Denmark
Print: Ministry of Foreign Affairs of Denmark
Photo: Klaus Holsting

The publication can be downloaded or ordered from:
www.danida-publikationer.dk

The text of this publication can be freely quoted

ISBN -978-87-7087-387-1 (print version)
ISBN -978-87-7087-388-8 (internet version)

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written records – such as visits to court sessions, before and after user surveys, baselines, and qualitative interviews with providers and users to measure changes in perceptions and practices. This kind of monitoring must be built in at the programme design stage and should be an ongoing element of support to informal justice systems.

Civil society and non-governmental organisations familiar with the local context can also perform ongoing monitoring of project activities and should directly assist external evaluation missions. Collaboration with universities and research institutions could also be promoted to produce before and after surveys.

It is unrealistic to expect that partner countries in the short to medium-term will have the capacity to thoroughly monitor the performance of informal justice systems. But it is important to help build the capacity of relevant institutions to provide an oversight role in ensuring the compliance of informal justice systems with human rights. Depending on the linkages between the formal and informal justice systems, such institutions could include the judicial service commission, the supreme council of judicial magistrates or, for cer-

tain aspects that do not imply undue interference, local government. Alternatively, or in addition, it may also involve civil society organisations. Experience from Africa and Latin America shows that committees to regularly monitor performance, made up of coalitions or networks of representatives of informal justice systems, community based organisations, non-governmental organisations, and paralegals, can be a viable model.

Support to informal justice systems should also help build or strengthen existing self-monitoring mechanisms. This is important for local ownership, and is itself a significant means to improve the performance of the systems and mechanisms. On the other hand, to ensure participation of women and marginalised groups, there will likely be a need to expand existing self-regulation practices.

Monitoring and evaluation indicators will ultimately depend on the entry points and objectives of the support.³ As far as possible, monitoring systems should be aligned with those of the recipient partner, whether a state or government institution or a civil society organisation.

7. FURTHER READING

Danish Institute for Human Rights, (forthcoming), *Study on Informal Justice Systems*. UNDP, UNICEF and UNIFEM

DFID, (2004), *Non-state justice and security systems, Briefing*. Available at: <http://www.gsdr.org/docs/open/SSAJ101.pdf>

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World Bank, (2008), *Justice for the Poor Programme*. Available at: <http://siteresources.worldbank.org/INTJUSFORPOOR/Resources/J4POverviewMay2008.pdf>

³ A framework for a comprehensive set of generic indicators related to support to informal justice systems is currently under development: *Study on Informal Justice Systems* (forthcoming) written by the Danish Institute for Human Rights for UNDP, UNICEF and UNIFEM. Suggestions for indicators are provided in UNDP (2006) and DFID (2004).