Children in contact with the law and customary justice in Afghanistan, Egypt, Jordan and Palestine

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Institut International des Droits de l'Enfant

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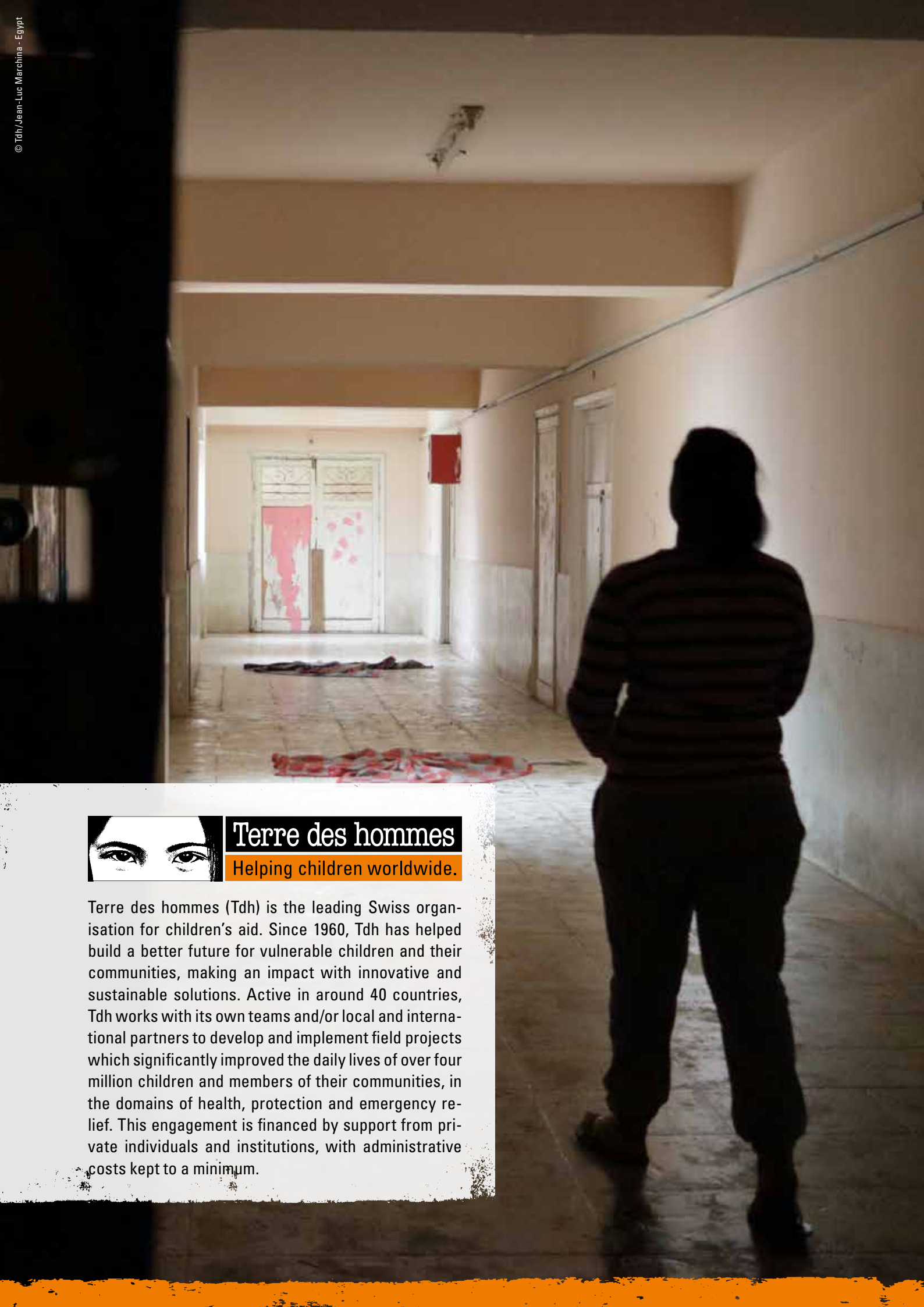

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Terre des hommes (Tdh) is the leading Swiss organisation for children's aid. Since 1960, Tdh has helped build a better future for vulnerable children and their communities, making an impact with innovative and sustainable solutions. Active in around 40 countries, Tdh works with its own teams and/or local and international partners to develop and implement field projects which significantly improved the daily lives of over four million children and members of their communities, in the domains of health, protection and emergency relief. This engagement is financed by support from private individuals and institutions, with administrative costs kept to a minimum.

Foreword

Across the globe, realising justice for children and young people remains a real challenge. Between 1.3 and 1.5 million children worldwide are deprived of their liberty. For those in the criminal justice system, laws on maximum limits of detention time are not respected and many children spend lengthily periods in pre-trial detention. Few children benefit from specialised legal aid. Conditions of detention are dreadful, resulting in life-long negative consequences which increase the likelihood of recidivism.

For decades, the international community and national authorities have oriented justice sector reform strategies around support to official institutions. The focus has been on formal justice systems that are often geographically limited, sometimes perceived as untrustworthy and not always culturally appropriate, and in which court rulings take a long time to be rendered. Meanwhile, customary or traditional justice systems are regularly excluded from these strategies because they are often judged as being incompatible with the "values" of the modern nation state. Over time, it has become increasingly clear that an exclusive focus on state systems has not been effective in creating access to justice for all.

Today, the failures of conventional justice sector reform strategies are apparent. We have seen, for example, the privatization of justice through popular justice mechanisms, known as "mob justice", which have gained in prominence for example in East Africa. In addition, we've observed the strengthening of criminal and political-religious groups that confiscate justice. In some regions of the world, particularly in conflict zones, violent extremist groups are thriving not only because of their political ideologies, but because they are able to provide justice mechanisms and offer forms of conflict resolution where the state is absent, opening space to violations of substantive and procedural rights.

These few examples, alongside many others, demonstrate the need for more effective approaches to governance and better ways of engaging in justice sector reform. In this regard, further efforts are sorely required.

History, particularly in colonial contexts, has demonstrated the ways in which the implementation of so-called "modern" state justice systems has sought to eliminate past judicial practices. In Western Judeo-Christian countries, the law has been established on moral notions of right or wrong and on religious conceptions of good and evil. Linked to this, the concept of the rule of law, which originated in Europe, was imposed across the globe by colonial powers and underpinned the establishment of state justice systems in developing countries.

Meanwhile, in clan-based and patriarchal societies, in societies where the social and legal organization is based on the possession of authority by men, the concept of justice linked to the individual was pushed into the background in order to uphold social cohesion, which emerges as the real purpose of justice in such contexts.

These broad brushstrokes highlight that, in fact, there are multiple understandings of "justice". Consequently, questions remain about how to navigate the distance between formal justice systems, embodied by the State, and customary or traditional justice systems.

Today, prevailing estimates suggest that over 80% of justice decisions in developing countries are delivered at the community level. In some contexts, formal justice systems are often not considered as reflecting community norms and values. In addition, physical and financial barriers are also apparent. We witness the avoidance or rejection of state justice systems by the populations concerned. No one can dispute today that localised conflict resolution mechanisms remain widely used.

All of this begs the questions: Are hybrid approaches, whereby formal and customary or traditional justice

systems and actors come together and collaborate, possible? Can such approaches improve access to justice and stem contemporary tendencies of expeditious justice?

Terre des hommes Foundation has been seeking to provide answers to these questions by exploring three main hypotheses:

The first is that improving knowledge and recognising good practices in customary justice systems, with due respect for human rights, can rehabilitate these ancestral conflict management methods and the actors responsible for them.

The second hypothesis suggests that that better collaboration between official and traditional actors based on mutual acceptance should enable converging interests to emerge. In turn, the assumption is that this can contribute to bringing justice closer to citizens and provide new answers to existing policy failures.

And finally, the third hypothesis argues that legislative reform should provide formal justice actors with accepted frameworks for building relationships with traditional and customary justice actors, thereby establishing the basis for how hybridity can function in a given context.

Of course, considerable scepticism around these suggestions remains and a number of obstacles should be highlighted.

Harmful practices do exist in the field of customary justice that contravene human rights. Informal justice is not homogeneous, its organization differs from region to region. Consequently, decisions are subject to significant variability and arbitrariness. Traditional justice actors are not always designated on the basis of their skills, but on more subjective criteria. This creates, in some contexts, a lack of knowledge of relevant norms on behalf of actors who embody or represent these systems. Traditional justice systems have often been equated with abuse of power, non-respect of international standards, degrading punishment, unfair trials and discrimination against women and children.

The task at hand, therefore, is not a matter of denying the existence of these shortcomings and abuses. Rather, it is a matter of not generalizing them and seeking to co-create workable, context-specific responses. Because, and I can assure you that over time I have had the opportunity to meet many traditional chiefs, customary judges and community members in many countries: community-based conflict resolution systems are trusted and valued.

I have been working on this subject for many years. While I have felt some reluctance from representatives of state justice systems regarding traditional and customary systems, I have also noted respect for these mechanisms. In some cases, official justice actors have acknowledged that they themselves have resorted to these mechanisms. In other contexts, formal judges and prosecutors routinely consult with community representatives before taking a decision.

I have also felt a real willingness on the part of traditional actors to share their practices, make them more transparent and collaborate with state justice systems.

The research and projects carried out by Terre des hommes Foundation in the Middle East, Africa and Asia over the past few years in the field of traditional and customary justice are really encouraging. They lay the foundations for real progress in terms of child participation in traditional conflict management mechanisms. They pave the way for decision-making that systematically considers the best interest of the child. They sow the seeds for improved collaboration with state justice actors.

They have also allowed us to question existing narratives about traditional and customary systems. For example, it is increasingly apparent that traditional justice does not mostly operate in civil disputes, such as in land personal status issues. It is also extremely solicited in criminal matters in the context of serious crimes (assaults, rapes, homicides). Moreover, we are increasingly aware of the interrelationships between justice systems: cases are referred by the police to traditional justice actors, while many magistrates rely on community actors to gather information to complete case files.

That interrelationships between justice system have been recently acknowledged by the Committee on the Rights of the Child in its General Comment No. 24 (2019) on Children's Rights in the Child Justice System, in which the consideration of the customary justice system in justice reform is highlighted as required. It also stresses on the fact that restorative justice responses for children are often achievable through customary justice systems, which may provide opportunities for learning for the formal child justice system.

This report, in its edition 2020, is the result of research conducted in Afghanistan, Egypt, Jordan and Palestine, provides a unique insight on the functioning of customary justice for children. It accurately describes the role played by various community actors and details the interactions between these actors and the formal justice system. It presents detailed descriptions of traditional justice procedures, investigation methods, incurred sentences, limitations of these systems and the incredible potential represented by the collaboration between traditional and formal systems to improve access to justice to children and young people.

This report is a fundamental contribution to understanding and working with traditional and customary justice systems in cases involving children.

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Contents

Acronyms

ADR
Alternative Dispute Resolution

ECOSOC
Economic and Social Council

EGP
Egyptian pounds (currency)

IJS
Informal Justice System

JOD
Jordanian Dinar

MENA
Middle East and North Africa

NIS
New Israeli Shekels

NGO
Non-governmental organisation

PNA
Palestinian National Authority

Tdh
Terre des hommes

UNDP
United Nations Development Programme

UNICEF
United Nations Children's Fund

UNWOMEN
United Nations Entity for Gender Equality and the Empowerment of Women

Glossary of non-English terms

The report makes reference to a variety of non-English terms to refer to specific practices or concepts. The following list specifies the words that are used most commonly throughout the report. All terms in the list below are Arabic unless otherwise noted.

'Atwa
An admission or confession of a crime by the party of the perpetrator that restricts the possibility of retribution on behalf of the victim. Different types of *'atwa* exist based on the circumstances of the case: *'Atwat al-iqbal* (acceptance truce); *'Atwat al-i'tiraf* (acknowledgment truce); *'Atwat as-sulh* (reconciliation truce); *'Atwa naqisa* (incomplete truce)

Baad
method of settlement and compensation whereby a female from the criminal's family is given to the victim's family as a servant or a bride

Beltagy
Local strongman (Egypt)

Diyyah
Blood money – an amount of money paid by the murder perpetrator to the deceased parents or family, "the avenger of blood"

Firash al-'atwa
Literally, "the cover of truce" – used to refer to actions and offences committed by the family of the victim while a truce is in operation in which the perpetrator(s) are not held accountable

Haq / Huqooq (pl)
Right / rights

Imam (Arabic) / Mollah (Dari)
Islamic leadership position; person who leads prayers in a mosque

Jaha
Delegation or group of representatives from the disputing parties who initiate customary proceedings

Jalwa
Forced expulsion of a perpetrator and his or her family from the community as punishment for the perpetrator's offence

Jirga / Shura (Pashto)
Customary ad-hoc council(s) to deal with important matters in Pashtun areas

Jirgamar / Jirgamaran (Pashto)
Members of a *jirga*

Kafan
Large piece of white material that symbolises a death shroud

Khan (Dari)
Tribal head, usually a landlord

Kafeel / Kufala
Guarantor(s)

Malek (Pashto)
In Afghanistan, liaison person between the government and the people

Muhakem / Muhakimeen
Arbitrator(s)

Mukhtar (Arabic)/ Malek (Pashto)/ Arbab (Tajik)/ Wakil (Dari)
Elected local representative

Islah men
a person who seeks to solve conflicts between two parties by bridging the gap between their points of view in order to resolve a problem, relying on a number of sources such as urf (customs) and Shari'a

Sulh
reconciliation

Tahkim
Arbitration

Munshed (West Bank)
A tribal judge specialised in honour cases

Pashtunwali (Pashto)
Customary code for Pashtun people.

Qur'an
The holy book of Islam

'Urf (Arabic); Anaana (Dari); Dood (Pashto)
Custom

Rabt (Arabic); Machalga (Dari)
An amount of money or property given as a guarantee

Sakk as-sulh
Document recording the outcome of a reconciliation process in the customary system

Shari'a
Islamic canonical law based on the teachings of the *Qur'an* and the traditions of the Prophet Mohammed (Hadith and Sunna)

Acknowledgements

This report containts a wide range of original perspectives and powerful narratives that were shared by girls, boys, women and men in cities and villages in Afghanistan, Egypt, Jordan and Palestine; in some cases, risking their lives to share information. This report is dedicated to their resilience and their hopes for more responsive, respectful justice systems.

Field-level research was conducted by: Gait Gauhar Archambaud in Afghanistan; Adel Mohammad Badr Mansour, Ashraf Mohammad Abdel Moneim, Elham Mahmoud Mohammad in Egypt; Jihad Arafat and Muna al-Shawa from the Palestinian Center for Human Rights in Gaza; Dr. Ahmad Barak and Mohammad Abu Arrah in Hebron; Samia Habboub and Omar al Arishly in Jordan.

Many members of Tdh teams from each of the target countries also contributed significantly to the shaping of the final report, namely: Hedayatullah Rameen and Qazi Sadaqatullah in Afghanistan; Mohamed Yahia, Ahmad Rahoumy and Hatem Qotb in Egypt; Khitam Abu Hamad in Gaza, Mahmoud Abu Kamal in Hebron; Nadège Chassaing in Jordan. Further contributions to the contents of the report were made by Nadia Franzoni, Fabrice Crégut, Yann Colliou, Marie Dupret, Marta Gil and Juergen Wellner.

The report was

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Executive summary

This report brings together a series of situation analyses conducted in urban and rural areas of Afghanistan, Egypt, Jordan and Palestine (Gaza and Hebron) between 2012 and 2015. The main objectives were to investigate, articulate and map the informal justice system currently operating in target areas and better understand its impact on child offenders and victims, with a view to providing tangible knowledge for practitioners.

In the Middle East, North Africa and across central Asia, customary justice mechanisms have a rich history. While many facets of customary justice in the region date back to the pre-Islamic period and are rooted in forms of tribal, nomadic or semi-nomadic social organisation, the contemporary manifestations of custom are heavily influenced by Islamic philosophy and law. *Shari'a* makes provisions for different types of dispute resolution outside of formal legal channels, the two most significant of which are *sulh* (reconciliation) and *tahkim* (arbitration), and specifies particular conditions under which these processes can be activated. Despite being based on common foundational principles, both the diversity in formal Islamic legal reasoning and differences linked to local political, ethnic, tribal, sectarian and urban/rural characteristics, impact on how customary processes unfold in Muslim-majority countries. The report provides an overviews of customary justice in each of the countries under study in order to highlight some essential background information to give substance to the analysis.

Actors and relationships in customary justice systems

In all of the countries in which the research was conducted, customary justice mechanisms function through the involvement of different types of actors, who may work individually or may be affiliated to groups, organisations or governmental structures. One of the overarching findings of the research conducted in the five research sites is that customary justice actors rarely work in an environment that is completely independent of government control. Rather, the organisations and structures that govern customary proceedings reflect the different ways that the state has appropriated and accommodated customary justice laws and processes.

Individuals who are active in customary justice proceedings enjoy prominent positions in the social hierarchy. They are notables of the main structures in society — most often tribes and families — or local governmental representatives. Across the board, customary justice actors describe their dedication to their work as a sort of calling, a commitment to promoting peace and stability in their communities. However, there are examples of customary actors who inherit their positions through established power structures or use their roles to reinforce the interests of specific political groups.

The research suggest a categorisation of different types of individual customary actors identified in the research areas, namely: tribal elders (Afghanistan, Jordan and Palestine); *islah* men and arbitrators (Palestine and Egypt); elected local representatives (Afghanistan, Egypt, Jordan and Palestine); and religious leaders. In addition, customary group structures exist in both Egypt (customary councils) and Afghanistan (*jirga* or *shura*).

An important contribution of this report to the extensive literature on customary justice is the identification of state institutions with roles in customary justice. This leads the research to suggest that the countries under study all represent varying examples

of what Eva Wojkowska calls "limited incorporation and co-existence".[1] Formal and informal systems should not be considered as antithetical or mutually exclusive; rather, they are part and parcel of plural legal orders that govern the lives of adults and children in complex and dynamic ways.

In most of the countries (except Afghanistan), the state attempts to supervise and regulate customary justice processes. Meanwhile, many examples of both formal and customary justice processes taking place in parallel to one other were identified: in some cases, a dispute lodged at the level of formal authorities, such as the police, would be handed over to customary justice actors, particularly if the dispute had severely damaged the harmony within the community. These cases yield rich examples of the way in which formal and customary processes are not mutually exclusive, but may operate simultaneously to fulfil different social functions. Formal structures retain a more retributive idea of justice based on establishing guilt and innocence, and consequently determining punishment, while customary justice structures are more concerned with repairing the harm done to the sense of community well-being, though sometimes at the expense of the best interests of the individual offender or victim.

Despite the heterogeneity of customary actors in the diverse social and political contexts of the five contexts under study, it is possible to imagine certain typologies of these actors based on their key defining characteristics as well as their relationship to the state. In turn, this suggests that contemporary manifestations of customary justice in the areas under study are quite distant from many descriptions of informal processes that can be found in the literature: far from embodying archaic practices residing upon ancient value-systems and oral history, customary justice in the twenty-first century across the Middle East, North Africa and Central Asia may best be described as distinctively "modern" examples of legal pluralism.

Stages of customary proceedings

The report outlines the various stages of customary justice proceedings, highlighting children's journeys through these different steps and the factors that influence treatment and outcomes through case studies. Despite the considerable social, economic and political differences between the countries under study and their significant diversity in terms of types of customary justice actors and relationships with formal justice mechanisms, the stages of customary proceedings are remarkably similar from one country to another. This may be due to the fact that all of the customary justice systems considered in this report are influenced by Islamic traditions, although the heterogeneity that exists within this larger category should not be overlooked.

It is also worth noting that, in each country under study, the research found that children who come into contact with customary justice systems follow the same proceedings as adults: there are no special steps or proceedings if a child is involved as a victim, offender or witness. Therefore, the idea of specialised juvenile proceedings for children in customary systems was not identified in the countries under study.

- **Identification of cases:** There are several main factors that impact whether a dispute is lodged in the customary justice system: the geographical characteristics of the community (urban/rural), the nature of the crime, the degree to which the crime impacts on community stability, and the willingness of the parties to engage in reconciliation. A dispute may be lodged before, in parallel, or after contact with formal justice actors. Although disputes usually reach the customary justice system following action by the victim's family, a case may also be brought by the offender's family, formal actors or a third party.
- **Guarantee:** Parties are asked to provide a guarantee at the beginning of the proceedings, to demonstrate that they are committed to the reconciliation process, a practice observed in all studied countries. In Afghanistan, it is called *baramta*, in Egypt *rabt*, and in Gaza *rizq*.

[1] *E. Wojkowska, Doing Justice: How Informal Systems can Contribute, UNDP, 2006. See also Peter Albrecht and Helene Maria Kyed, Non-State and Customary Actors in Development Programs in Peter Albrecht, Helene Maria Kyed, Deborah Isser and Erica Harper (eds.), Perspectives on Involving Non-State Actors in Justice and Security Reform (IDLO 2011), pp.28-29.*

- **Truce:** In all studied countries, in cases of grave crimes, a period of truce (*'atwa* in Arabic) is put in place in order to prevent retaliation by the family of the victim. Periods of truce may be enforced immediately after a crime.
- **Methods of investigation:** In general, the main disputing parties are invited to give their testimonies of the event and witnesses are summoned to testify. The customary justice actors may consult with relevant experts or professionals such as doctors or lawyers, to hear their opinions on the case. Some customary actors may consult official documents, including previous reconciliation agreements if such an offence took place previously, or police reports, depending on the customary justice actor's relationship with the police. If one of the parties to the dispute is a child, it is common for a family member, usually the father, to speak on his or her behalf. Only in Egypt was the practice of allowing a child to directly speak to a customary actor identified. Cases related to honour (most often involving sexual abuse) and lineage are held in private. However, in countries where group customary sessions are held, such as the customary councils in Egypt or the *jirga/shura* in Afghanistan, testimonies are given in front of all gathered for the session.
- **Outcomes of cases:** Customary justice appeals to the religious morals and outwardly-facing social value systems to emphasise forgiveness and reparation of the social bonds harmed during the dispute. This process is known as *sulh*. At the same time, they may also require a penalty or compensation to be issued as part of re-establishing the balance disrupted by the crime. The main types of penalties used by customary justice actors are financial penalties and exile, with the case studies mentioning minute details about how the value of financial compensation in cases of bodily harm or death *diyyah* are calculated. Rare and increasingly obsolete physical punishments were also mentioned, such as *baad* in Afghanistan.
- **Appeal:** Appeal against the decisions of customary justice decision-makers is, in theory, allowed in all studied countries. However, the research did not indicate whether or not users of the system could seek redress for misconduct of customary justice actors whether through formal or informal means. Although there are several points of intersection between the formal and informal justice systems, the formal system does not provide solid oversight, in terms of checks and balances, of customary proceedings.
- **Remuneration:** Customary justice actors, in the studied countries, all maintained that they provide their services on a volunteer bases and are not paid for their services. In all countries under study, it was common for actors involved in customary dispute resolution to have other jobs and sources of income. In some cases, a percentage of the financial penalty agreed by the parties was given to the customary actor, however it was more commonly reported that customary justice receive a symbolic remuneration, such as coffee, food or cigarettes.

Stakeholders' perspectives about customary justice

The views of different stakeholders, both justice actors and justice users, adults and children, were analysed, highlighting trends in each group regarding the strengths and weaknesses of customary systems.

All customary justice actors who participated in the research argued that customary justice processes were better than formal processes. They agreed that the main advantages of customary mechanisms are their ability to resolve disputes quickly and inexpensively, without making recourse to distant, and often corrupt, formal avenues. Indeed, customary justice actors were quick to cite the imperfections of the formal system as justification for the continued use of customary justice practices. However, when pushed to be more critical of their practices, many customary justice actors were not willing to acknowledge the shortcomings of their work.

In contrast to the views of customary justice actors, representatives of the formal system were overwhelmingly critical of customary processes. Importantly, a certain nuance was often provided: formal justice actors often stated that solving disputes through informal channels could have a positive effect on access to justice insofar as it alleviated cases from over-burdened formal systems. However, because customary justice actors lack formal education and legal training, formal actors were concerned that their decisions could perpetuate traditional and archaic judgments that were in conflict with national law.

In focus group discussions conducted with children and families across the research sites, participants overwhelmingly stated that they would pursue informal channels for conflicts in which there is a risk that the community harmony may be disrupted if the dispute is not resolved, for example in cases of family disputes and minor thefts. There was also a consensus that customary justice mechanisms were preferable for disputes of a private nature in which one or both parties does not wish for the matter to become public, especially if the accused is a minor, as well as sexual assaults on or by minors. Choosing not to pursue formal justice channels in such cases is often understood as a strategy for protecting a child and the family from the stigma and consequent social exclusion they may suffer in the event that the issue becomes public.

Many of the children and families interviewed considered the main advantages of customary justice to be the expediency of the process, the solutions offered, and the free or relatively low costs. They also expressed preference for community-based dispute resolution mechanisms because they kept them away from formal justice procedures and institutions, which had a negative reputation amongst children for being violent and resulting in stigmatization, and allowed them to continue their schooling. Nevertheless, there were some participants who considered that resorting or being forced to resort to customary justice mechanisms led to injustice. Overall, children expressed dismay at the fact that they were not allowed to play an active role in customary justice processes, pointing to how they are not given the opportunity to participate or express their point of view. A number of child victims expressed their dissatisfaction with the reconciliation agreements that had been reached, as they believed that their rights had been relinquished without their being consulted.

Lastly, despite the symbolic importance of reconciliation in Islamic communities, some adolescents that participated in the research from Egypt, Jordan and Palestine, raised questions about the extent to which the community harmony achieved by customary justice processes is sustainable, as indicated by acts of revenge that occur years after a crime. Such doubts are significant, because they question the very heart of assumptions that provide the foundations of customary proceedings, namely that customary solutions can deliver "justice", seen as the long-term reparation of the damaged social fabric of community.

Customary systems through a child rights lens

The research indicates that customary justice systems are viewed with a high degree of legitimacy across the studied countries, particularly in rural areas or among marginalised urban communities. Nevertheless, certain aspects of these informal systems raise questions regarding whether the best interests of children are taken into consideration and to what degree children's rights are upheld.

- **Existence of a specialised child justice system:** customary justice does not allocate special procedures for any age group including children, but rather follows general and inherited procedures that are referred to when adjudicating all types of cases and people involved.
- **Right to preservation of dignity:** the research concludes that in contrast to the risks faced by children in the formal system, such as violent and degrading punishments, most customary justice actors refrain from implementing measures that compromise the child's dignity, as within customary justice practices there is a prevalence of financial punishments which are seen as more humane and less damaging.
- **Right to confidentiality:** although many groups who participated in the research maintained that customary justice proceedings upheld the right to confidentiality, from a child protection perspective, this is not the case. Indeed, it seems that communities hold a specific understanding of confidentiality that has more to do with value judgments, such as preserving good reputations, than with provisions of anonymity.
- **Right to a fair trial:** in the customary proceedings examined in the research, it is apparent that the presumption of innocence is not upheld. Rather, proceedings tend to assume that the child accused is guilty unless proven innocent. Indeed, given that informal justice mechanisms are less about establishing the truth than diffusing tensions, parties participate in them whether or not events are disputed. It is probable that personal relationships between disputing parties and arbitrators compromise the neutrality of customary justice processes.
- **The right to be protected from harmful and degrading punishments:** given that appeasing the family of the victim and repairing the social harm are priorities of customary justice, the research indicated that the most widespread penalties issued by customary justice systems are financial. In most countries under study, customary actors do not order or condone harmful punishments upon children, with the exception of *baad* in Afghanistan which was described as increasingly rare. Efforts to rehabilitate both child victims and child offenders are largely absent.
- **The right to participation:** customary justice actors agree that children who are party to disputes do not have any effective role in the customary justice procedures and their testimony or opinions are not asked. Children's involvement in formal justice proceedings is considered to damage their reputation. Consequently, particularly acute concerns exist about how the best interests of the child are determined, given that risk factors and vulnerability of children increases when the best interests of the child do not coincide with that of parents, guardians or close family.
- **The right to non-discrimination:** researchers raised concerns that the treatment of girls in informal proceedings is never fair and that cases are "buried" rather than followed up, in order to preserve the reputation of the family. Customary justice actors believe that maintaining confidentiality, in terms of keeping the case a secret, in a dispute involving girls is an indicator of success, and that restoring the child's honour represents justice for the victim. Apart from gender, the research indicates that there are other factors that raise concerns about the ability of customary justice processes to deal with children equally: the relative social and economic status of families potentially impacts on the way that parties are treated.

The research summarised in this report has shown that customary justice mechanisms represent a fundamental aspect of the lived experiences of access to justice for countless children in Afghanistan, Egypt, Jordan and Palestine. The examples and analysis have illustrated not only the advantages and disadvantages of customary justice systems for children, but also the ways in which these systems are inextricably linked with formal mechanisms, and therefore constitute a key area for consideration in child justice sector reform. Given that the state is the main duty-bearer for children's rights, a functioning formal justice system that complies with international child rights standards must remain a key guarantor for the protection of children against abuse, exploitation or other violations of their rights. This report has, however, clearly demonstrated that solely focusing on the state to enhance access to justice for children in Afghanistan, Egypt, Jordan and Palestine would be irrelevant at best and counterproductive at worst.

The main challenge for international non-governmental organisations is, therefore, to develop strategies that consolidate the benefits of customary justice systems while encouraging appropriate reforms to mitigate harmful practices. There is a clear need to address the gaps in knowledge about customary justice systems and children in order to formulate evidence-based practices for engagement that seek to enhance restorative practices while reforming trends that compromise the best interests of the child and violate children's rights.

Moving forward with such an ambitious project implies conducting learning-oriented actions that aim at providing more insights on how to interact with customary justice actors in the field of justice for children. This requires courage and commitment, and a rigorous approach to further inquiry. The intention should be to stay open-minded to learning about the wide range of customary practices and variety of perspectives without prejudice, prioritising the dynamics of children's engagement with these customary justice processes, all the while ensuring that children's rights are upheld. These reflections should help to inform further action-oriented research around children's access to justice in the near future.


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1. Introduction

1.1 Background

Significant efforts have taken place to ensure that access to justice is included as a key component of the post-2015 international development agenda,[2] subsequently confirmed in the formulation of Sustainable Development Goal 16 on Peace, Justice and Strong Institutions. This process has revived long standing debates around the role of informal and customary justice systems in justice sector reform programming, prompting questions among international agencies about how they should situate themselves in relation to plural justice systems.

Custom is defined as "an oral legal practice, consecrated by time and accepted by the people of a given territory"[3]. Custom is a form of law born of prolonged usage and gradually considered mandatory.[4] Much recent scholarship has recognised that customary justice can constitute an effective mechanism for access to justice, particularly among poor, vulnerable and marginalised groups or in post-conflict situations.[5] In such cases – when law is considered to reside in the hands of an elite, when corruption is a major concern, when societies are fragmented or when top-heavy state bureaucracies are rendered slow and ineffective – communities may turn towards more familiar and accessible community-based structures that are trusted and more efficient in terms of time and financial resources.[6] Both the practical advantages of customary proceedings and the ways that they are linked with powerful narratives of community identity should not be overlooked.

Meanwhile, from a rule of law perspective, customary justice mechanisms are often perceived as being in conflict with the values and processes of state-centric liberal democratic systems and incompatible with broader development goals.[7] They have been associated with corruption, abuse of power, lack of accountability, and non-compliance with international human rights standards. Specifically, they have been criticised for inhumane punishments, unfair trials and discrimination against women, children and minorities.[8] Customary justice mechanisms may "*confer power on unelected leaders, reinforce hegemonic […] interpretations of custom [or] undermine plurality of identity-based laws segregate society in ways that reinforce ethnic and religious fundamentalisms.*"[9]

The fact remains that a large percentage of disputes around the world, including an estimated 80 and 90 per cent of all disputes in developing countries, are solved through informal mechanisms.[10] Consequently, there is growing support for the idea that customary justice needs to be taken into consideration in access to justice strategies in developing countries, and that the main challenge is to ensure that they can move in line with international human rights standards.

[2] M. Sepúlveda, *Equality and access to justice in the post-2015 development agenda*, Office of the High Commissioner for Human Rights, United Nations See also UNDP, *Rule of law and development: integrating rule of law in the post-2015 development framework*, Issue Brief Democratic Governance, January 2013

[3] E. Harper, *Customary Justice: From Programme Design to Impact Evaluation*, 2011, IDLO, Rome, p.33

[4] Danida, *How to Note: Informal Justice Systems*, 2010

[5] E. Wojkowska, *Doing Justice: How Informal Systems can Contribute*, UNDP, 2006. See also Peter Albrecht and Helene Maria Kyed, *Non-State and Customary Actors in Development Programs* in Peter Albrecht, Helene Maria Kyed, Deborah Isser and Erica Harper (eds.), *Perspectives on Involving Non-State Actors in Justice and Security Reform* (IDLO 2011)

[6] E. Harper, *Customary Justice: From Programme Design to Impact Evaluation*, 2011, IDLO, Rome, p.33

[7] Ibid.

[8] Danida, *How to Note: Informal Justice Systems*, 2010

[9] International Council on Human Rights Policy, *When Legal Worlds Overlap: Human Rights, State and Non-State Law*, 2009, p.vii

[10] Danida, *How to Note: Informal Justice Systems*, 2010, p.2

With regard to developing countries, the low numbers of children coming into contact with police and formal criminal justice proceedings compared to numbers in developed countries imply that customary justice systems play an important role with regard to children in contact with the law.[11] The emphasis on reparation of social harm and community harmony that lies at the core of customary mechanisms resonates with the principles of restorative juvenile justice, which advocate for "*a way of treating children in conflict with the law with the aim of repairing the individual, relational and social harm caused by the committed offence.*"[12]

Perhaps unsurprisingly, community-based initiatives have underlined the importance of including both formal and non-formal systems in child protection considerations and actions.[13] The United Nations Guidance Note of the Secretary General acknowledges that informal justice may be "*less intimidating and closer to children both physically and in terms of their concerns.*"[14] Subsequently, the Special Rapporteur to the Secretary General on Violence Against Children reiterated this call in 2013 by urging states to develop and use "*effective alternative mechanisms to formal criminal proceedings that are child- and gender sensitive, [including] diversion, restorative justice processes, mediation, and community-based programmes.*"[15]

The Committee on the Rights of the Child's General comment No. 24[16] (2019) on children's rights in the child justice system acknowledges that "many children come into contact with plural justice systems that operate parallel to or on the margins of the formal justice system. These may include customary, tribal, indigenous or other justice systems. They may be more accessible than the formal mechanisms and have the advantage of quickly and relatively inexpensively proposing responses tailored to cultural specificities. Such systems can serve as an alternative to official proceedings against children and are likely to contribute favourably to the change of cultural attitudes concerning children and justice". It adds that "restorative justice responses are often achievable through customary, indigenous or other non-State justice systems, and may provide opportunities for learning for the formal child justice system".

International bodies continue to be wary of engaging with customary justice systems in relation to contact with the law because of concerns that they do not meet international child rights standards. One major concern is that "*deeply held attitudes regarding the role of children can present a major challenge for engaging with IJS in some communities, children are viewed as property under customary norms.*"[17] There is significant unease with decision-making processes and where the best interests of the child lie, particularly given that risk factors and vulnerability of children increases when the best interests of the child do not coincide with those of parents, guardians or close family.[18]

The proponents of different approaches to customary justice agree that additional research is required before any decision is taken on whether and how customary justice should be integrated into juvenile justice programming. There is an emerging global momentum on the importance of building knowledge and understanding of the mechanisms and processes that deal with children in contact with the law outside of formal judicial structures, with a view to integrating customary justice as a core component of juvenile justice sector reform programmes.

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[11] UNODC, "Juveniles brought into formal contact with the police and/or criminal justice system, all crimes", 2011, retrieved 30 May 2013, *www.unodc.org/unodc/en/data-and-analysis/statistics/data.html*

[12] Available at: *www.tdh.ch/en/media-library/documents/lima-declaration-restorative-juvenile-justice*

[13] M. Wessels, *What are we learning about protecting children in the community? An inter-agency review on community-based child protection mechanisms*, Executive Summary, Save the Children UK, 2009

[14] United Nations Guidance Note of the Secretary General, op. cit. 2008, p.4

[15] SRSGVAC, *Promoting Restorative Justice for Children*, New York, 2013, p.3

[15] UNDP, UNICEF and UNWOMEN, *Informal Justice Systems: Charting a course for human rights based engagement*, 2012, p.15

[15] UNDP et al, op. cit, p.122

[16] COMMITTEE ON THE RIGHTS OF THE CHILD, "General Comment No.24 – Child's Rights in Child Justice Systems," CRC/C/GC/24, 18 September 2019

1.2 Objectives and scope

To address the lack of evidence around children involved in informal and customary justice systems, in general but particularly in certain countries of the Middle East, North Africa and Central Asia, Terre des hommes Foundation (Tdh) has been engaged in a process of action-oriented research between 2012 and 2015 in four countries: Afghanistan, Egypt, Jordan and Palestine (Hebron and Gaza).

The research process was formulated in three phases:

- **Phase 1:** Conduct analysis of the situation, with a view to building knowledge and understanding of the mechanisms and processes that deal with children in contact with the law outside of formal judicial structures
- **Phase 2:** Begin engaging with customary justice alongside formal justice systems through pilot activities
- **Phase 3:** Explore possibilities of a holistic approach to juvenile justice sector reform

During Phase 1, five separate research studies were conducted in urban and rural areas of Afghanistan, Egypt, Jordan and Palestine (Gaza and Hebron). **The main objectives were to investigate, articulate and map the informal justice system currently operating in target areas and better understand its impact on child offenders and victims, with a view to providing tangible knowledge for practitioners.** This involved building a detailed picture of the processes and actors involved in customary justice, understanding how a child is treated at different stages of informal proceedings, identifying the links between the informal and formal child justice systems and exploring participants' perspectives of the positive and negative aspects of the system.

This report presents the consolidated findings of the situation analyses conducted in Phase 1. The main advantage of grouping situation analyses from five different contexts together is that it enables a more macro vision of the phenomenon across a geographical region where, despite national differences, certain similarities exist, particularly in view of Islamic law and value systems. There are also disadvantages, however. Significantly, the scope of the report does not allow for exploration to a great level of detail. Though the report presents a brief overview of factors that have impacted the development of customary justice in each country, providing an in-depth account of the evolution of legal frameworks of the countries under study is beyond the scope of this report. Another disadvantage is that the particularities of each context make the process of drawing comparisons difficult. Consequently, this report aims to put the findings of the situation analyses into conversation with one other, with a view to drawing out any major similarities and differences across the research areas.

It is important to emphasise that this report is not a desk review of the theory of customary justice in relation to children. **Although substantial scholarship has focused on customary justice in the MENA region, limited attention has been devoted to children in these systems.**[16] Therefore, this report will only draw on certain key literature when relevant to the outcomes of the field research presented here.

This report is presented in seven parts. Following the present introduction, Part II provides details of the methodology used in the studies, including a theoretical discussion about key definitions and concepts. Part III presents brief overviews of the five contexts under study. Part IV highlights the main findings of the situation analyses, focusing on the actors of customary justice in target areas, while Part V outlines the key steps in customary proceedings, and illustrates examples of children's journeys through customary justice systems using case studies. Part VI of the report presents the perspectives of various stakeholder groups, from customary and formal justice actors to parents and children. Part VII provides an analysis of findings of the research through the lens of international standards for child rights and child justice systems. Finally, Part VIII presents concluding reflections on how to move forward.

[17] Between 2015-2016, Tdh, in partnership with the School of Law from the School of Oriental and African Studies, University of London, embarked on a comprehensive review of literature on children and customary justice in the Middle East.


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2. Methodology

2.1 Definition of key terms and concepts

Various terms are used to designate forms of dispute resolution that are not part of formal, state-led justice mechanisms and each carries with it particular nuances. United Nations agencies, led by UNDP, have opted for the phrase "informal justice systems" (IJS), defined as everything that falls outside of formal state-based justice institutions and procedures, such as police, prosecution, courts and custodial measures.[18] Yet there is also recognition that in many countries, traditional and informal practices are recognised and regulated by the state through laws, regulations and jurisprudence, yielding a grey area of "semi-formal" processes.[19] Meanwhile, in 2010 Danish Development Agency Danida described the relationship between formal and informal and state to non-state in terms of a gradual scale.[20] It offers a different categorisation of IJS that is not solely based on the relationship between state or non-state actors, but other factors such as the types of knowledge bases that inform the IJS processes. Accordingly, Danida suggests distinguishing traditional, religious and indigenous systems; semi-formal systems; and alternative, community-based systems.[21]

More recently, in 2012, a study by UNDP, UNICEF and UNWOMEN adopts what it describes as a "broad definition" of IJS: "*The resolution of disputes and the regulation of conduct by adjudication or the assistance of a neutral third party that is not a part of the judiciary as established by law and/or whose substantive, procedural or structural foundation is not primarily based on statutory law.*"[22]

Meanwhile, other organisations have opted for the term "customary justice systems", whereby custom is defined as "*A traditional and widely accepted way of behaving or doing something that is specific to a particular society, place, or time*".[23] For example, the International Development Law Organisation (IDLO), have opted for the term "customary justice systems", which they use to emphasise the more specific arena of customs, norms and practices that "*draw their authority from cultural, customary or religious beliefs and ideas, rather than the political or legal authority of the state.*"[24] There is, therefore, a normative connotation in the word "custom" that is not reflected in other terms.

The researchers held different views about what term should be used in the context in which they were working. In Hebron, Egypt and Jordan, the researchers preferred to use the term "IJS" because they felt that it is the most comprehensive and general term to describe the different forms and sources of the system. A similar observation was made by the researcher in Afghanistan, although she chose to use the term "alternative dispute resolution" (ADR) because she felt that it fit better with the variable and multiple forms of non-state justice that exist in contemporary Afghanistan. Meanwhile, in Gaza, the research team opted for the term "customary justice systems."

Drafting a consolidated report raised the need to select one term to be used throughout, and after considering the various points of view of the researchers and the language of the literature, Tdh opted for the term "customary justice" for several reasons. Firstly, it avoids setting up a binary opposition between formal and informal justice systems, which is a limited way of understanding how different aspects of justice systems in the MENA and Central Asia zones coexist and relate to one another. Secondly, the term "customary justice" refers as much to social or political orders as legal orders, and may encompass both descriptive and normative aspects of communities, what they do and what they should do. Interestingly, the idea of custom carries with it the understanding that "*norms and rules are actively produced, enforced and recreated through processes of participation and contestation,*" meaning that customary law can be dynamic, adaptable and flexible.[25] Finally, the term "custom" is a familiar concept and widely used in the dominant languages of the research countries: *'urf* in Arabic; *anaana* in Dari; *dood* in Pashto. Significantly for this report, the term *'urf* is used frequently by both Dari- and Pashto-speaking

[18] E. Wojkowska, op.cit, p.9
[19] Ibid.
[20] Danida, op. cit.
[21] Ibid.
[22] UNDP, UNICEF and UNWOMEN, op. cit, p.8
[23] Oxford English Dictionary
[24] E. Harper, op. cit., p.17
[25] Ibid.

communities in Afghanistan, and it is also a term employed in the Afghan legal system.

The scope of the research in all countries focused on children who were in contact with justice systems either as accused, offenders or victims. The report, therefore, uses the term "children in contact with the law" to designate those groups of children.

2.2 Research methodology

The situation analyses in Phase 1 sought to investigate customary justice systems in both rural and urban settings in Afghanistan, Egypt, Jordan and Palestine. In Palestine, two separate studies were conducted in Gaza and in Hebron in the West Bank. While Tdh acknowledges that in conducting two research studies in Palestine, it may appear to be a statement about Palestinian politics, the decision was made based on the recognition of the very different juridical histories of each territory linked to their specific colonial pasts and presents.[26]

The research is underpinned by an action-oriented methodology, which is widely used in child protection and social work research.[27] This strategy provokes an "action reflection cycle," whereby knowledge is built inductively and space for critical reflection remains open.[28] This, in turn, paves the way for piloting activities within a spirit of ongoing learning.

The five situation analyses first embarked on a desk review of relevant literature (see Part III). Researchers then designed qualitative data collection tools for primary research, to fill in gaps in information. To this end, focus group discussions and structured interviews were conducted with adult and child members of the target population, and with formal and informal justice actors. A common set of terms of references was drawn up with specific research questions to guide the research in each country. However, each group of researchers used their own data collection tools to best suit the context.[29] In all countries except Egypt, researchers developed case studies in order to describe real incidents of children moving through the various stages of the customary justice system – from the moment an offence occurs, to investigation, final verdict, and finally punishment.

In total, 755 people, of whom 41 per cent were children, participated across the five research sites, as shown in the table 1 below.

	Afghanistan	Egypt	Jordan	Gaza	Hebron	Total
Justice system actors (Formal and informal)	54	96	46	93	40	**329**
Parents and community members (Adult system users)	43	30	17	14	13	**117**
Children	7	40	236	13	13	**309**
Total	**104**	**166**	**299**	**120**	**66**	**755**

Table 1 *Number of people who participated in the research*

[26] Tdh has been working in Palestine since 1976. It currently has a head office in Jerusalem and and a field office in Gaza.

[27] M. Alston and W. Bowles, *Research for social workers: An introduction to methods*, Routledge, London, 2003

[28] B. Hamber et. al, "Exploring how context matters in addressing the impact of armed conflict" in Brandon Hamber and Elizabeth Gallagher (eds.) *Psychosocial perspectives on peacebuilding*, Springer, Cham, 2015 p.20

[29] See Annex 1 for the questions included in the terms of reference for the researchers.

In each context, the geographical areas in which the research was conducted were selected based on a number of criteria:

- Tdh areas of operation: Given that the action-oriented research methodology seeks to ensure that the results of the research process can feed into concrete action, in most countries under study, it was decided to conduct research in the geographical areas where Tdh already had project activities.
- Prevalence of customary justice mechanisms: In some contexts, the researchers and Tdh decided to investigate in areas where Tdh did not have project activities in place but which were known to have strong and enduring customary justice traditions. For example, this was the case for southern regions of Jordan such as Karak and Ma'an, as well as south-western cities in Gaza such as Khan Younes and Rafah.

The following table 2 presents the target areas and time frame of the research.

Country	Regions	Time frame
Afghanistan	Kabul, Rustaq and Jalalabad	November 2013 to January 2014
Egypt	Assiut, Cairo and Damietta	September 2012 to March 2013
Jordan	Amman, Ma'an, Karak, Irbid, Mafraq, Zarqa	October 2013 to March 2014
Palestine (Gaza)	North Gaza, Gaza, Middle Area, Khan Younes and Rafah	January 2012 to August 2012
Palestine (Hebron)	City of Hebron, the Old City, North Hebron, West Hebron, East Hebron and South Hebron	March 2012 to May 2012

Table 2 *Target areas and time frame of the research*

Despite the significant historical, social and political differences across the research sites, the researchers encountered comparable challenges. One recurring challenge was that customary actors were often reluctant to speak about sensitive issues. In cases of sexual abuse, for example, they were anxious that they may inadvertently disclose children's identities and, consequently, risk stigmatising them and their families, and ultimately lose the trust of their communities. In some contexts these barriers were overcome as relationships of trust were built with the researchers. Moreover, the involvement of different types of customary actors alongside one another sparked suspicion. In Hebron, one tribal judge was called before the tribal panel, accused of leaking information about or defaming parties involved in a dispute, and subsequently fined.

Additionally, in all the research sites, gathering information from primary sources was complicated by the absence of written records that document past customary proceedings. Therefore, the data collected represents the living memories of those who participated in the research, and does not necessarily capture a historical evolution of customary justice processes.

Finally, the greatest challenge encountered was seeking a gender balance among research participants. In all research sites, the majority of people who participated in the research were male. In Egypt and Hebron, all of the customary justice actors and all of the children were male, while the women who participated were formal justice actors, lawyers or civil society actors. In Gaza, only one girl and five women took part,

representing 8 per cent of participants. The pattern of limited girl participation was broken in Jordan, where over half of the children who participated were girls (125 girls compared to 111 boys), and in Afghanistan, all of the children who participated in the research were girls. This is due to the fact that the focus group discussions took place at a girls' detention centre in which Tdh has been working for several years.

As mentioned above, the difficulties in accessing the targeted population of female children in the formal and informal/customary systems is due to the social sensitivity surrounding cases involving female children in contact with the law and the social impact of stigmatisation of these girls and their families. Most of the interviewed customary justice actors reported that they do not intervene in cases related to girls. Some argued that when the conflict is related to a girl and so-called "honour" crimes, social peace can be best achieved by "burying" or concealing the case, which is seen as protecting the girl from social stigma and upholding her reputation and that of her family.

2.3 Ethical considerations

In all the target areas, high standards of ethical conduct in research with children were upheld. All of the research consultants were provided with a briefing about child protection and signed Tdh's Child Protection Policy and Code of Conduct. Furthermore, the research adhered to the following principles:

- Informed consent from all participants was obtained: researchers explained the purpose of the research to participants and outlined how they intended to use the information that they gathered. In some locations, such as Gaza, children and parents were asked to fill out written consent forms. In others, such as Afghanistan, verbal consent was given by child and adult participants. Language used with children and parents was simple and clear in order to encourage research participants to feel safe and at ease, especially during discussions of sensitive topics.
- Participants' confidentiality was upheld: neither the real names of participants nor other identifying factors were used in any reports. In line with international best practice, the only circumstances in which confidentiality could be broken were if the researchers became aware of an immediate protection concern that needed to be addressed.
- The principle of "do no harm" guided all phases of the research: The best interests of children take precedence over the objectives of the research. Concretely, in some contexts, such as the West Bank, it was decided not to include certain case studies in the findings reports because of potential harm that could be done to the research participants or the researchers themselves.


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3. Country snapshots: description and evolution of customary justice in target countries

In the Middle East and North Africa (MENA) region and across Central Asia, customary justice mechanisms have a rich history. While many facets of customary justice in the region date back to the pre-Islamic period and are rooted in forms of tribal, nomadic or semi-nomadic social organisation, the contemporary manifestations of custom are heavily influenced by Islamic philosophy and law.[30] One scholar has argued that, despite being rooted in the guidance contained in the *Qur'an* and the *Sunna* (sayings and traditions of the Prophet Muhammad), *shari'a* law is characterised by religious pluralism,[31] as evidenced by the four main schools of jurisprudence in Sunni Islam (Hanafi, Hanbali, Maliki and Shafi'i) and the two main schools in Shia Islam (Jaafari and Ismaili Fatimid). This is also illustrated by the numerous mechanisms for interpretation of religious texts, namely: *ijma'* (consensus of jurists), *qiyas* (analogical deduction of rules), individual or collective *ijtihad* (evolving new principles on the basis of old ones), *takhayur* (eclectic choice of divergent principles in Islamic law) and *talfiq* (combination of two or more legal rules to evolve a new one).[32]

Shari'a makes provisions for different types of dispute resolution outside of formal legal channels, the two most significant of which are *sulh* (reconciliation) and *tahkim* (arbitration), and specifies particular conditions under which these processes can be activated.[33] The importance of *sulh* stems from two verses in the *Qur'an* (Surat al-Hujurat 49:9 and 49:10), which appeal to the brotherhood of believers to make peace and reconciliation in cases of conflict while striving for fairness and justice. There are also several references to the virtues of *sulh* in the Sunna. With respect to *tahkim*, it is a process usually engaged in to settle civil or commercial disputes. *Shari'a* provides clear guidance regarding cases where *tahkim* is not permissible, such as those involving *hudud*.

Despite being based on common foundational principles, both the diversity in formal Islamic legal reasoning and the differences linked to local political, ethnic, tribal, sectarian and urban/rural characteristics, impact on how customary processes unfold in Muslim-majority countries. According to interviews conducted with participants during the research, all customary justice systems actors in Egypt, Jordan and Palestine draw on *'urf*, *shari'a* and previous rulings. These judgments are unwritten and inherited, and the customary actors in their turn memorise them, or they are preserved in the form of poetry and proverbs. In Afghanistan, decisions are based on *shari'a*, religious and social values as well as the *Pashtunwali*, which is the code of conduct of the Pashtuns. This code gathers all unwritten laws and elements of governance dating back to the pre-Islamic period. The *Pashtunwali* sometimes contradicts with *shari'a*, and in such cases, *Pashtunwali* takes precedence. Before resolving a dispute, a party may ask the other if it prefers to resolve the conflict by referring to the *Qur'an* or the *Pashtunwali*. Non-Pashtun ethnic groups use the term *rawaj* to indicate the preference to settle the dispute in accordance with local customs.

In all the countries included in the research, the hierarchy is usually as follows: *shari'a*, *'urf* and Islamic jurisprudence. However, as seen above, in Afghanistan, the *Pashtunwali* comes before *shari'a* for Pashtuns. In all the research sites, there are further bases for decision-making beyond Islamic law, *'urf* and jurisprudence. Indeed, some customary justice actors may resort to additional bases for their decisions such as their professional experience.

Meanwhile, in cases where children come into contact with customary systems as offenders, victims or witnesses, there is a remarkable degree of similarity across the countries under study.

In order to provide context to the remaining sections of the report, the following pages aim to provide very brief overviews of customary justice in the countries under study. These descriptions highlight some essential background information, with suggestions for further reading in the footnotes.

[30] J. Thielmann, "A Critical Survey of Western Law Studies on Arab-Muslim Countries," in B. Dupret et al (eds) *Legal Pluralism in the Arab World*, 1999, The Hague: Kluwer Law International

[31] M. M. Keshavjee, "Alternative dispute resolution: its resonance in Muslim thought and future directions", speech given as part of the Ismaili Centre Lecture Series, 2 April 2002, London, retrieved 1 July 2013, *www.iis.ac.uk/view_article.asp?ContentID=101143*

[32] T. Mahmood, *Statutes of Personal Law in Islamic Countries – history, texts and analysis*, New Dehli, 1995

[33] M. Zahidul Islam, "Provision of alternative dispute resolution process in Islam", *IOSR Journal of Business and Management*, Vol. 6, No. 3, pp.31-36

3.1 Afghanistan

In Afghanistan, which has witnessed continuous conflict for three and a half decades, justice and the rule of law are considered cornerstones of peace and human development.[34] The centuries-old community structures of local governance and dispute resolution, historically aligned along tribal lines are key features of life in rural and urban areas of Afghanistan. They display a striking degree of consistency in social and political structures across the rise and fall of successive political orders. *Jirgas* are the key decision-making and dispute-resolution institutions in Pashtun areas, *shuras* are approximate equivalents in non-Pashtun areas and *maraka* is the equivalent in Hazara dialect.

Some scholars have described this phenomenon as groups of people being locked in a tribal-traditionalist praxis, whereby traditionalism produces cohesion and belonging: "*Tribalism between groups generates some kind of stability from a delicate and ever-negotiated balance of interests in the competition for scarce resources. All in all, social interaction is focused on immediate needs and groups' competition.*"[35] Although the tribal structures in Afghanistan are often described as exhibiting remarkable stability over time, the functioning of customary structures have evolved over time according to the specific economic, social and political junctures of Afghanistan's complex history.

One such example is the *Pashtunwali*, the way of the Pashtuns (or "the ideal of honourable behaviour of tribal life"). This way is "*simple but demanding. Group survival is its primary imperative. It demands vengeance against injury or insult to one's kin, chivalry and hospitality toward the helpless and unarmed strangers, bravery in battle, and openness and integrity in individual behaviour.*"[36] However, at the same time, the practices of *Pashtunwali* "*are not static and do not rest on an unchanging version of tradition and custom,*" but change through influence of social and political ideas, for example increased awareness of *shari'a* law.[37] In addition, over the past decade, the influence of *Pashtunwali* in Pashto communities has waned as it has been challenged by concerns about corruption and limited capacities of formal and informal/customary actors. This has left a gap that continues to be filled by the Taliban's judiciary, which has been described as the most efficient component of the Taliban's shadow government structures.[38]

Since the fall of the Taliban in 2001 provoked by the American invasion, discussions about customary justice in Afghanistan are politicised in that they speak to the heart of the Afghan government's struggle to assert legitimacy and exert control and rule of law over its territory. In this context it is unsurprising that some studies have revealed negative attitudes on the part of Afghan government officials towards informal actors.[39] However, several prominent scholars continue to argue that the way forward is a "hybrid model of Afghan justice" that engages with *jirgas* and *shuras* and builds on their restorative characteristics while reforming them to be more inclusive and respectful of human rights standards. Wardak and Braithwaite present this model as: "*a synergy between state and non-state justice systems and a female-dominated human rights unit as a check and balance on rights abuses by both courts and jirgas*", in which courts and *jirgas* in turn become checks and balances of each other. [40]

Since 2010, the Afghan government has been attempting to formalise the operation of customary justice by drafting the Law on Dispute Resolution by *shuras* and *jirgas*, which aims to regulate the affairs of dispute resolution councils by setting criteria for who can participate in decision-making and how the process should proceed. It also promotes links between *jirgas* and formal justice institutions. At the time of drafting this report, the law is under revision. Meanwhile, there are non-governmental initiatives working to include customary justice components in their justice sector strategies.

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[34] UNDP, *Afghanistan Human Development Report. Bridging Modernity and Tradition: Rule of Law and the Search for Justice*, Center for Policy and Human Development, 2007

[35] G. G. Archambeaud, «L'Afghanistan et le langage de l'égalité : une approche de la poïétique du contrat social sur une zone de fracture du système-monde», thèse pour le doctorat de Science politique, Université de Bourgogne, 30/05/2013, 663 p. (French)

[36] L. Rzehak, *Doing Pashto*, Afghanistan Analysts Network, Thematic Report 01/2011, 2011, p.66

[37] Gang in A. Wardak and J. Braithwaite, "Crime and War in Afghanistan. Part II: A Jeffersonian Alternative?", *British Journal of Criminology*, 2013, Vol. 53, p.201

[38] C. Guistozzi, C. Franco and A. Baczko, *Shadow Justice: How the Taliban run their judiciary*, 2012, Integrity Watch Afghanistan

[39] R. D. Lamb, *Formal and Informal Governance in Afghanistan*, 2012

[40] Wardak and Braithwaite, op. cit., p.203

3.2 Egypt

Egypt's legal system is a mixture of civil law, based primarily on French legal concepts, particularly Napoleonic codes, and *shari'a*. The constitution preceding the 2011 revolution and both constitutions that have been drafted post-2011 state that Islamic *shari'a* is the main source of legislation. The Civil Code 131/1949 – inspired by the French civil code, but also allowing for interpretation through *shari'a* – regulates business and commerce. The Penal Code 58/1937 and the Code of Criminal Procedure 1950 outline the main provisions for criminal justice proceedings in the formal system.

Many studies of customary justice in North Africa have focused on the Bedouin tribes of the Sinai peninsula or the Western Desert. Research has found customary justice to be the most important means of social control in nomadic Bedouin communities, in that it regulates social norms, expectations and relationships.[41] The importance of tribal leaders in these communities has been identified as contributing to the resilience and perpetuation of customary justice across generations, as their presence reinforces tribal identity in semi-nomadic communities.[42] Social cohesion is also bolstered by community perceptions that tribal laws adhere to sacred Islamic principles, in contrast to state law, seen to be derived from foreign influence. A similar phenomenon was identified in a study of the Awlad Ali tribe near Marsa Matrouh, in the Western Desert, whereby the sense of tribal belonging seemed to be enhanced by increasing popularity of political Islam in that specific area.[43]

Customary law in Egypt is said to have been "*studied in a very uneven way.*"[44] A notable exception is the work of Hans Christian Neilsen, who has published several texts on dispute resolution in Upper Egypt.

> *"Feuds remain a part of the social fabric in Upper Egypt and often get reduced in the press as merely the result of backward 'clan' systems. Yet a wide range of arbitration and reconciliation councils exists to deal with local disputes including 'blood feuds.' Even though the media may not report on their successes, councils frequently resolve conflicts and play a role in curtailing the escalation of feuds and violence. These councils underscore the importance of reconciliation and peaceful solutions, rather than violent ones, in Upper Egyptian culture and tradition."*[45]

Despite the relative scarcity of research, it is apparent that the current functioning of customary justice proceedings in Egypt has their roots in the policy of decentralisation adopted by Gamal Abdel Nasser in the 1960s. A series of laws provided for the establishment of groups at village, district and city levels tasked with local administrative organisation. Most important were the Popular Committees formed through Law 57/1971, whose members should include at least 50 per cent of farmers or workers. These local administrative structures provided the architecture for the establishment several years later of the Dispute Resolution Committees following Law 43/1979, which were formed under the supervision of security authorities to bring together prominent members of society, such as religious men and representatives of well-known families, to take steps to resolve conflicts, including of a criminal nature, between individuals, families or tribes.

[41] A. E. Melijy, "Social Control and Problems Associated with the Interactions and Behavior Patterns in Sinai", unpublished study, The National Center for Social and Criminological Research in conjunction with the Academy of Scientific Research and Technology, Cairo, 2002

[42] M. G. Abdel-Razek "Social Status as a Force of Community Control at the North Sinai Bedouin Tribes", *National Center for Social and Criminological Research Magazine*, Thirty-first edition, January 1993

[43] S. Al Masri, "Shariah governs: a study of judiciary Islamizing process among Bedouin tribes of the Awlad Ali", Research paper presented at conference with Center for Information and Support Decision-Making, 2010

[44] B. Dupret, Legal Traditions and State-Centered Law: Drawing from Tribal and Customary Law Cases of Yemen and Egypt, in Chatty, D. (ed) *Nomadic Societies in the Middle East And North Africa: Entering the 21st Century*, 2005, pp.280-301

[45] H. C. Neilsen, "Settling Disputes in Upper Egypt", ISIM Newsletter 13, December 2003
openaccess.leidenuniv.nl/bitstream/handle/1887/16905/ISIM_13_Settling_Disputes_in_Upper_Egypt.pdf?sequence=1
See also: "State and Customary Law in Upper Egypt", *Islamic Law and Society*, Vol. 13 no. 1., 2006, Leiden: Brill

It has been argued that customary justice bolsters state power and authority. For example, in a 2005 analysis of Dispute Resolution Committees in Upper Egypt, one scholar maintains that by formalising the functioning of customary justice processes, these structures are a mechanism for strengthening central state power at the local level.[46] This is also suggested by the way in which younger populations appear to have lost faith in the customary justice system due to its lack of transparency and the ways it seems to fit into the state bureaucracy.[47] Importantly, the Popular Committees were abolished by military decree after the 2011 revolution which would suggest that the Dispute Resolution Committees also ceased to function. However, this is not the case, and at the time of writing, they remain active and powerful, especially in rural areas of Upper Egypt.

In Upper Egypt, customary justice is modelled on centuries-old dispute resolution methods to deal with conflicts such as feuds, revenge for killing and land disputes.[48] That these structures persist today may be linked to the social and economic characteristics of the region, where rates of poverty and unemployment are significantly higher than national averages.[49]

This stands in contrast to urban areas, in which proceedings differ considerably depending on the specificities of the community in question. For example, in poor suburbs of Cairo and other major cities, where a large part of the population are migrants from rural areas, the local strongman or *beltagy* oversees informal/customary justice proceedings but without reference to tribal codes rendering these practices more an example of clientelism than customary norms.

[46] S. Ben Nefissa, "Les assemblées d'arbitrage en Égypte", *Le shaykh et le procureur*, pp. 55-72 (French)

[47] Ibid.

[48] S. Mokrani, *Technical Support to Research-Oriented Action about Informal Justice Systems and Children in Asyūṭ*, unpublished report, Terre des hommes, 2015

[49] UNDP, *Egypt's progress towards Millennium Development Goals*, 2015

3.3 Jordan

In Jordan, customary justice has its roots among Bedouin tribes, who for centuries, have lived nomadic or semi-nomadic existences in the deserts of present day Jordan, Iraq and throughout the Arabian Peninsula. The harsh conditions of desert living meant that individual survival was predicated on group cohesion, giving rise to the values of loyalty, honour and solidarity that are the pillars of Bedouin life. Bedouin tribal affiliations are determined through the patrilineal line, and their organisation can be represented as concentric circles, with the largest group known as the *qabilah* (association of tribes), followed by the *'ashira* (tribe) and narrowing down to smaller structures such as *humula* (clan) and *ahl* (family).[50]

The historical role of tribe as the cornerstone of social and political organisation in Jordan is attested to by numerous historical events – from the romanticised tactics of the British and T.E. Lawrence to undo the Ottoman Empire by co-opting tribes to revolt to the feats of the first emir of Jordan, Abdullah I, in forging truces among tribes in the process of the formation of the Emirate of Transjordan, in 1921.[51] Importantly, following the creation of the state of Israel in 1948, many Palestinians from Bedouin tribes in the Naqab desert either left or were forcibly expelled to Jordan.[52]

In the first years of the modern Jordanian nation state, several laws were passed to regulate the functioning of the tribes: the Law of Clan Courts of 1924, replaced by three laws in 1936, which created courts in which both customary and national laws operated. These courts were presided over by tribal judges appointed by mutual agreement between the state and members of tribal hierarchy.[53]

These mechanisms were modified by the 1972 and 1973 Laws of Council of Elders, which stipulate that members of the council are to be appointed by Royal Decree. This was subsequently repealed completely in 1976 when all tribal laws were declared null and void.[54]

Despite this, over the past 40 years, numerous attempts at the institutionalisation of particular provisions for members of Bedouin communities have taken place, including:

> *"Distinct voting districts and seats for the Bedouins in the Jordanian Parliament; a Desert Police Legion consisting entirely of Bedouins or Semi-Nomadic Tribesmen; and a ministerial-level post of Advisor to H.M. the King for Tribal Affairs (usually filled by a member of the Royal Family itself or by a Sharif, and traditionally responsible for investigating the conditions of, particularly, the Bedouins and the Semi-Nomadic Tribes, for advising the King thereupon, for organising personal contacts between the Tribes and the King, and for protecting and promoting of their interests with the Government."*[55]

Beyond illustrating how the state has attempted to accommodate tribal systems, the complex interactions between the modern Jordanian nation state and tribal structures have led some scholars to argue that tribalism actually forms the basis for the legitimacy of the Jordanian monarchy.[56] One such example is the existence of the Chancellery of Clans under the Royal Hashemite Court.

[50] B Clinton, *Bedouin Law from Sinai and Negev: Justice without government*, 2009
[51] G. bin Muhammad, *The Tribes of Jordan at the Beginning of the Twenty-first Century*, Rutab, 1999
[52] Adalah – The Legal Centre for Arab Minority Rights in Israel, *Nomads against their will: The attempted expulsion of the Arab Bedouin in the Naqab*, 2011
[53] A. Abbadi, *The Bedouin Judiciary*, Jareer House for Publishing and Distribution, 2008 (Arabic)
[54] M. Abu Hassan, *Bedouin customary judiciary*, the Ministry of Culture, 2008 (Arabic)
[55] G. bin Muhammad, op. cit. p.16
[56] Y Alon, *The Making of Jordan: Tribes, Colonialism and the Modern State*, 2007, p.1

In the twenty-first century, tribes remain a prominent feature of identity for many Jordanians, although this varies significantly across geographical location. The influence of tribes on social processes and expectations are acknowledged as being more prominent in rural than urban areas, particularly in the south and east of the country.[57] This is also relevant for Jordanians of Palestinian descent, given that many Palestinian Bedouin tribes from the *Naqab* settled in Jordan following the *Nakba*.[58]

Less well understood is the impact of the uneven prevalence of customary justice practices across Jordan on access to justice more generally, particularly in light of other factors such as gender. Though research about this topic is not widely available from other countries under study, a recent report about Jordan notes that not only are women marginalised from customary decision-making processes, tribal value systems also actively discourage cases involving women from being addressed through formal courts, both civil and *shari'a*, because this may compromise the reputation or honour of the group. The report concludes that:

> *"Women are falling between the cracks of the tribal and state justice systems [in which] patriarchy and male dominance maintain a system where law, religion and culture operate in independent and connected ways to maintain the status quo."*[59]

The WANA (West Asia and North Africa) Research Institute argues that, given that tribes are not static but rather dynamic structures, it is possible to work with them to reform access to justice for women. However, the current debate is marked by little information or analysis about other vulnerable groups, such as children.

[57] G. bin Muhammad, op. cit.

[58] Adalah, op. cit.

[59] WANA Institute, Tribal Dispute Resolution and Women's Access to Justice in Jordan, 2015, p.32

3.4 Palestine

The legal system in Palestine consists of a complex mixture of laws introduced during different political regimes, from Ottoman rule, the British Mandate, and the period of Egyptian administration in the Gaza Strip and Jordanian administration in the West Bank that lasted until the start of the Israeli occupation in 1967.[60] These myriad systems have led to the absence of a unified legal framework across Palestine, with current legislation characterised by many gaps and inconsistencies.[61]

Due to the decentralised administrative system of Ottoman rule and because provinces were far from the main cities, the central Ottoman government exerted its control by appropriating the authority of tribes and powerful families who were responsible for maintaining public order, collecting taxes, and resolving disputes.

Following the collapse of the Ottoman Empire through to the Palestinian National Authority (PNA)'s current role, there has been a formalisation of informal and customary justice mechanisms in Palestine. The British Mandate contributed to the regulation of informal justice through the Palestine Constitution Act of 1922 Article 45; the Law of Procedure for Tribal Courts 1937; the Law of Civil Contraventions 36/1944.[62] Overall, British Mandate regulations were not holistic in terms of regulating the proceedings, penalties and courts, and this lack of consistency allowed for a wide range of customary practices to flourish.

The history of the evolution of customary justice in Palestine is intimately linked to the political context. The Israeli occupation did not grant official powers to the formal justice system, but rather attempted to usurp it for its own ends: a number of Israeli military orders were issued to rule, legislate and appoint the public administration.[63] Consequently, people were reluctant to make recourse to formal justice under the authority of the occupation, and the Palestine Liberation Organisation and other active organisations made calls for Palestinians to boycott the occupation and its apparatuses.[64] This created a state of competition between customary and formal justice, the latter being imposed by occupying powers, resulting in a promotion of the role of tribal justice, becoming part of the struggle for national liberation.[65]

Between the beginning of the first intifada in 1987 to the signing of the Oslo Accords in 1993 and subsequent birth of the PNA in 1994, informal justice played a significant role in maintaining order primarily through settling disputes.

Following its establishment in 1994, the PNA began the unification of laws applicable in the West Bank and the Gaza Strip. This process was, however, deeply marred by the fact that, in contrast to Gaza, the PNA was accorded limited sovereignty in the West Bank: the PNA has full control of Area A, which represents 17 per cent of the total area of the West Bank, whereas in Area B the PNA has only civil administrative control while Area C is under full Israeli control.[66]

Meanwhile, the PNA took a pragmatic approach to the tribal justice actors: it formalised them, bestowing both recognition and regulation. In 1994, Presidential Decree 161/1994 was issued establishing the Department of Tribal Affairs and National Conciliation Committees in the governorates. Moreover, according to Articles 16, 17 and 18 of the Palestinian Law of Penal Procedures, in cases of infractions and misdemeanours punishable by a fine, parties are able to choose to seek reconciliation which the public prosecution is obliged to accept and record.

The Second Intifada (2000–2005) weakened the PNA

[60] NRC, *Customary Dispute Resolution Mechanisms in the Gaza Strip*, Norwegian Refugee Council, 2012

[61] WCLAC and DCAF, *Palestinian Women and Personal Status Law*, Policy Brief, Women's Centre for Legal Aid and Counselling and the Geneva Centre for the Democratic Control of Armed Forces, Ramallah and Geneva, 2012

[62] Article 70 of the Law of Civil Contraventions 36/ 1944 dealt with jurisdiction of tribal courts in ruling on blood money (*diyya*), although its application was restricted to Bir al-Saba. See Al-Waqa'a Al-Falestiniyyeh, *The British Mandate*, Issue 1380, Palestine, 1945 (Arabic)

[63] Birzeit University, *Informal Justice: Rule of Law and Dispute Resolution in Palestine*, Birzeit University Institute of Law, Birzeit, West Bank, Palestine, 2006

[64] Ibid.

[65] Ibid.

apparatuses and its judiciary system. The siege and the destruction of its headquarters along with the weakening of its administrative bodies minimised the capability of the PNA on the ground. This led to a reactivation of the reconciliation committees and tribal justice.

The 2006 presidential elections, in which Hamas won a majority, constituted another turning point in Palestinian justice. Political rivalry between Fatah and Hamas led, in 2007, to a political split, leaving Fatah in control of the West Bank and Hamas in control of Gaza. This led to a total fragmentation of formal institutions as well as executive power. Since 2007, the legal systems in each territory have continued to diverge: the Palestinian President in the West Bank has continued to issue laws and decrees, while the Hamas majority in the Palestinian Legislative Council (PLC) in the Gaza Strip began to issue laws without holding preliminary sessions.[67]

The effects of the political division between Hamas and Fatah have resonated strongly in Gaza. In 2007, the Attorney General was prevented from working, and later that year was arrested alongside prosecutors according to a contested decision issued by the acting Minister of Justice.[68] After 2007, the Director General of the Police in Ramallah issued a decision to suspend the work of the civil police in the Gaza Strip.[69] An assistant to the Attorney General and a number of prosecutors were assigned to fulfil the duties of the General Prosecution in the Gaza Strip, but many judges refused to cooperate with the new assistant Attorney General and prosecutors, as they had not been appointed in accordance with legal procedures.[70] This led to a dire shortage of judges in Gaza, and consequently long periods to process cases became the norm.

In turn, this has led to a significant revival of the activities of customary justice actors in Gaza. The Fatah-Hamas division has also impacted on the shape of the main customary justice bodies, and now the majority of customary justice actors in Gaza are affiliated to political parties. The situation has had repercussions on the Palestinian public that have started to lose trust in the role of the tribal conciliation committees.[71]

Alongside the ongoing Israeli siege and successive Israeli military operations in Gaza in 2009, 2012, and 2014, the breakdown in law and order is reflected in decreased living standards in all areas of life, including shelter, social security, health and education.[72]

[66] Birzeit University, Institute of Law, Legal Reform and State Building: Ending Colonization and State Building, 2009

[67] For more details regarding the effect of the Palestinian political division on the legislative process, see PCHR, *2007 Annual Report*, 2008, Gaza Strip, Palestine, pp.61-62

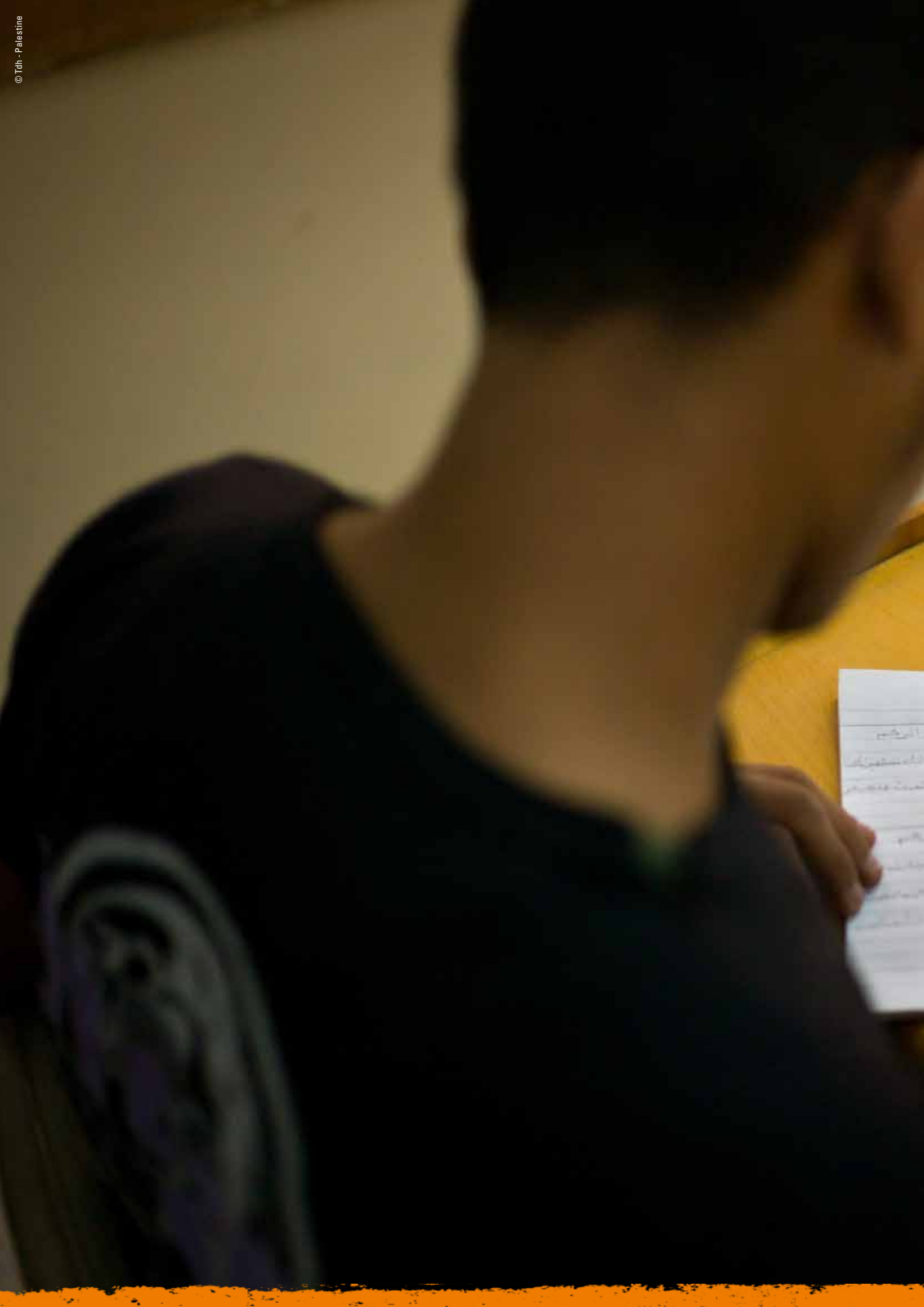
[68] Ibid, p.58. See also: Gaza Cabinet of Ministers Resolution 94 of 2008, which delegates the powers of the Attorney General to the Minister of Justice to appoint a number of prosecution attorneys and assistants.

[69] PCHR, op. cit., 2008, p.58

[70] See also Gaza Cabinet of Ministers Resolution 94 of 2008, which approves the appointment of an assistant General Prosecutor in the southern governorates; and Cabinet of Ministers Resolution 146 of 2008, regarding the appointment of new prosecuting attorneys.

[71] UNDP, *Access to Justice in the Occupied Palestinian Territory: Mapping the perceptions and contributions of non-State actors*, 2009

[72] PCHR, *2010 Annual Report*, 2011, p.38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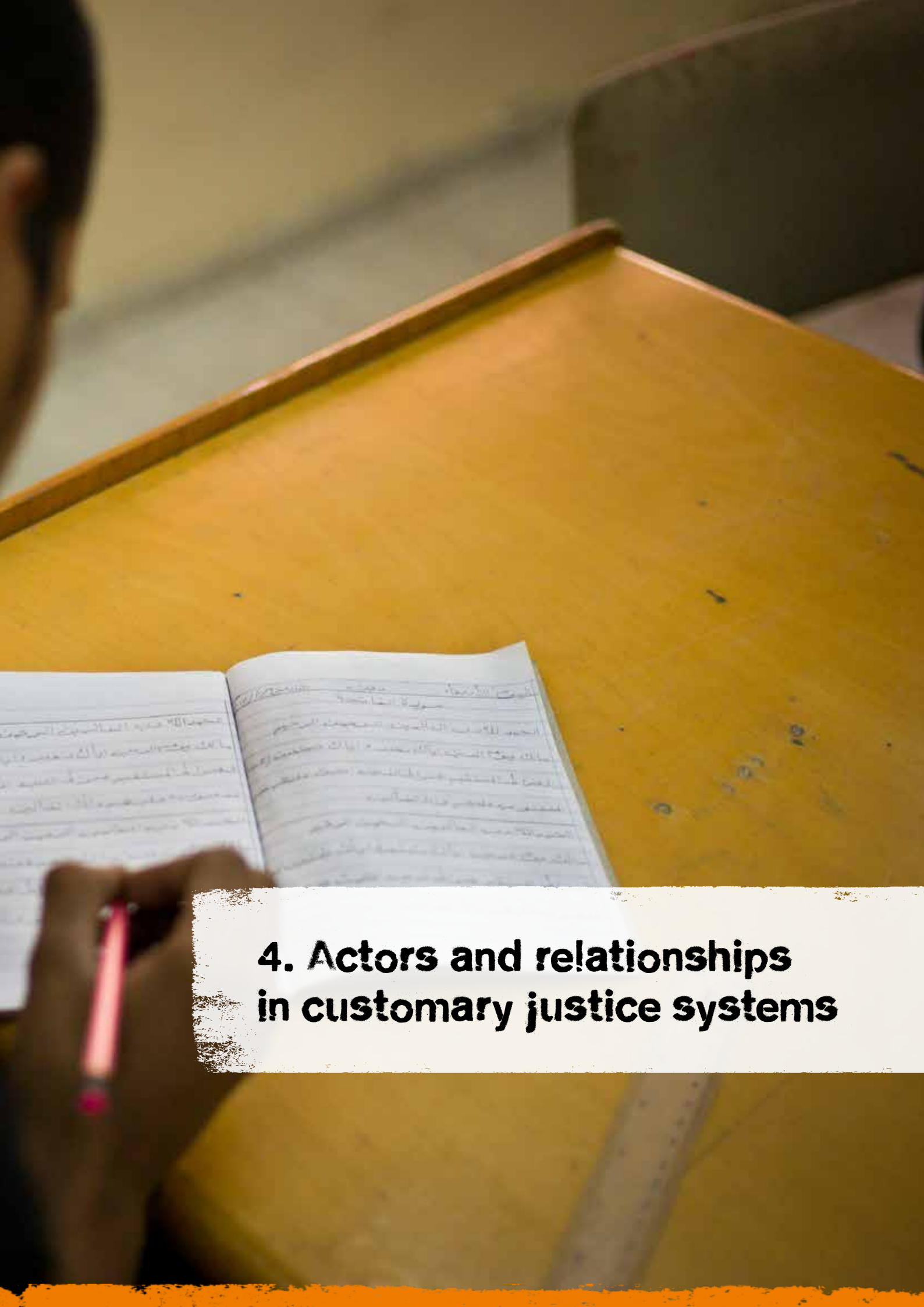

4. Actors and relationships in customary justice systems

What happens when a child commits a crime in a remote area of Afghanistan, in a tribal village in Jordan, or in an urban part of Gaza? Who is involved and what are their relationships with one other? If a dispute is referred to a police station, does this mean that customary processes can no longer be activated? This part of the report will present the findings of the research that help to answer these questions.

In order to understand how a system works, it is essential to identify the people who weave its threads. In all of the countries in which the research was conducted, customary justice mechanisms function through the involvement of different types of actors, who may work individually or may be affiliated to groups, organisations or governmental structures.

As suggested by the historical evolution of customary law laid out in Part III, one of the overarching findings of the research conducted in the five research sites is that **customary justice actors rarely work in an environment that is completely independent of government control. Rather, the organisations and structures that govern customary proceedings reflect the different ways that the state has appropriated and accommodated customary justice laws and processes.**

The table below lists all the actors that have been identified in the studied countries, the groups they may belong to, and the types of decision-making bodies that structure how customary processes unfold.

	Afghanistan	Egypt	Jordan	Gaza	Hebron
Individual customary actors	• *Mollah* • *Wakil* / *Malek* / *Arbab* • Tribal leaders (*khans*)	• *Muhakimeen* (arbitrators)	• *Islah* men • Tribal judges • *Mukhtar* / *makhatir*	• *Islah* men • Tribal judges • *Mukhtar* / *makhatir*	• *Islah* men • Tribal judges • *Mukhtar* / *makhatir*
Customary justice group structures	• *Jirga* / *maraka* / *shura*	• Customary Councils (assemblies of customary actors)		• Registered associations affiliated with political parties • *Rabeta* (Hamas) • *Makhatir* Charitable Association of Palestine; National Islah Committees (Fatah)	
State institutions with customary justice functions	• Local self-governance structures	• Dispute Resolution Committees • Family Dispute Resolution Office • Police	• Chancellery of the clans in the Royal Hashemite Court • Department of Clans, Directorate of the Royal Bedouin Police	• Tribal Affairs Department of the Ministry of Interior or Tribes Commission or Department of Reconciliation and Tribal Affairs - Police Directorate for Public Relations	• General Directorate of Tribal Affairs

Table 3 *Customary justice actors in the research sites*

4.1 Individual actors

Those who are active in customary justice proceedings enjoy prominent positions in the social hierarchy. They are notables of the main structures in society – most often tribes and families – or local governmental representatives. For the former group, their work in customary dispute resolution is generally part-time and technically unpaid, although they often receive in-kind compensation for their work. These actors therefore often "wear many hats:" they may play a prominent role in the community or hold a senior position in a local institution, such as a school, civil society organisation or mosque. They do not necessarily hold a formal degree nor have any formal training, but gain experience through practice and earn their reputation by acting in respectful and trustworthy ways. In some cases, will be seen later, customary actors may also earn their status in dispute resolution by virtue of them being locally elected leaders.

Across the board, customary justice actors describe their dedication to their work as a sort of calling, a commitment to promoting peace and stability in their communities. However, there are examples of customary actors who inherit their positions through established power structures or use their roles to reinforce the interests of specific political groups.

This section will explore these issues in more detail, starting with descriptions of the most common customary justice actors in each country, followed by further information about country-specific structures and other characteristics of how customary actors function.

4.1.1 Tribal leaders

In all the countries under study, there is a strong tribal heritage, although the extent to which this translates into contemporary customary justice differs from one context to another. Tribal judges are active in twenty-first century Palestine and Jordan, where the tribal judicial system is closely related to the culture and heritage of the historically nomadic Bedouin community. Similarly, in Afghanistan, the main principles of *Pashtunwali* are linked to the nomadic past of Pashtuns, despite the fact that in the present day, the vast majority live a sedentary existence. Tribal leaders in Pashtun communities, known as *khans*, play a key role in social life, particularly in rural areas. In contrast, in Egypt, tribal identity is not as strong as it used to be. In the most populated areas of Egypt that run along the banks of the Nile, the tribe is no longer a central unit of social organisation but has been replaced by the relatively smaller family unit, although the Sinai and the Western desert are exceptions to this.

Most tribal judges in the areas of study are elderly men over the age of 60 with basic formal education. Women were widely seen as unsuited "by nature" to the role of a judge, as gendered social constructs posit them as being too emotional or rash for good decision-making.

In all countries under study, tribal lineage and positions of power are hereditary. A future tribal judge accumulates experience by attending customary sessions where decision-making takes place and by spending time with the judge, who is normally his father or grandfather. Information about previous judgments is not contained in written sources but passed down orally across generations. In Jordan, however, the appointment of the tribal judge to the courts depends on the central governmental body responsible for tribes.

In Palestine and Jordan, tribal judges are specialised in dispute arbitration and have a wide scope of knowledge about tribal customs and methods for evidence-gathering and hearing arguments. Asked about their limited formal education, during field research conducted by Tdh, tribal judges asserted that this was compensated for by the breadth and depth of life-experience resulting from their age. In Hebron, tribal judges emphasised the quality of the elementary education they received, stating that they consider the secondary examination certificate earned several decades ago to be equivalent to a bachelor's degree today. Despite their limited education, they are eloquent and knowledgeable about many social issues and *shari'a* principles, as well as about the customs, traditions, and histories of the clans and lineages of their community.

While the characteristics of tribal judges may be similar across countries, the ways in which they function differ significantly according to the specific ways in which the state has attempted to control tribal justice. Areas where tribal groups are strong are often seen as being beyond state control. For example, in Afghanistan, the heartland of the Pashtun tribes in the east of the country has, over centuries, been one of the most difficult areas for any Kabul-based administration to control (to the extent that on the Pakistani side of the border, the area is known as the Federally Administered Tribal Areas).[73]

In areas of Palestine under PNA control, the tribal judicial system is concentrated in Hebron and the Gaza Strip, mainly because the Bedouin community were forcibly displaced in the wake of the 1948 war from Beer Sheva to these localities. Tribal justice in Palestine is divided into several branches, based on the nature of a dispute. There are judges who consider so-called "honour" cases, for example, while others resolve cases involving lands. Interestingly, each branch has been mastered by an individual family, resulting in wide experience of the traditions and rules in each area of litigation.

4.1.2 *Islah* men and arbitrators

In contrast to tribal judges, who inherit their position through the paternal line, another category of customary justice actors earn their roles by virtue of their reputation in the community. In Jordan and Palestine, these people are referred to as *islah* men where *islah* refers to reparation, while in Egypt they are called *muhakimeen*, which translates as arbitrators.

When researchers asked about the qualities of these actors, it was common for participants to reply that *islah* men and *muhakimeen* are known for their honesty, wisdom and moderation. Other qualities included having the necessary skills to conduct an investigation into a dispute and verify the facts of an occurrence, which entails being a good listener, and being tactful at diffusing any anger expressed by parties to a dispute. Piety is also seen to be an important quality of these individuals. Parties to a dispute often turn to *islah* men and *muhakimeen* first to settle conflicts when they do not wish to refer to official justice institutions for whatever reason. They focus on reconciling people by bringing together divergent views and finding compromises. To resolve a problem, they rely on a number of sources such as '*urf* and *shari'a*, and utilise their personal qualities, such as their ability to convince, their eloquence and their good reputation to come to a solution. However, their knowledge of customs and tribal conciliation is usually less extensive than that of the tribal judges. Therefore, they are not constrained by specific patterns of conduct and customary procedures, but are flexible to use their own discretion to fit a specific situation.

In Palestine, *islah* men are provided with identity cards accredited by the Ministry of the Interior. Such cards are issued on the basis of a recommendation by other *islah* men, and recipients must sign a document to acknowledge receipt of this card.

In Egypt, there is not the same level of overt government control or regulation of arbitrators. As such, any male member of a community who is widely trusted and respected may be called upon to arbitrate in times of conflict. According to arbitrators interviewed during Tdh's research, it is essential for an arbitrator to assume a neutral position and not display bias to any of the disputing parties. This is understood to mean that he cannot be a representative of a political party. Some arbitrators claimed that it was not mandatory to be literate to take on the task of arbitration. Moreover, lawyers who participated in the research specified more technical areas of proficiency expected of arbitrators. They maintained that an arbitrator should not only be familiar with the customs and norms of a specific community, but that he should also have a basic knowledge of Egyptian law and *shari'a*.

Despite the professed neutrality on the part of arbitrators, there are several structures that shape the way in which they process disputes and make decisions, which will be discussed later in the report (part 4.4).

[73] S. Taizi, *Jirga System in Tribal Life*, Tribal Analysis Centre, University of Peshawar, 2007

Tdh's research in Egypt also revealed contexts in which individuals with vested interests played the role of arbitrator. For example, in poor urban areas of Cairo, arbitration is controlled by the *beltagy*, or the local strongman, who has a firm grip on social relations and economic transactions in the community. Meanwhile, in some rural areas, the mayor may play the role of arbitrator. In school settings, social workers may arbitrate between disputing parties. In particularly sensitive cases, such as rape, it is possible for formal justice actors, such as the public prosecutor, to take on the arbitration role. In rural areas, the arbitrator is decided upon by both parties of the dispute and their representatives. For minor crimes or uncomplicated cases, there is a single arbitrator. However, if the case involves a serious crime or has a wide-reaching impact on the community, up to three arbitrators may be selected and they may decide to involve other actors in the arbitration process, thus resulting in the formation of a customary council.

4.1.3 Elected local representatives: *Mukhtar* (Arabic), *wakil* (Dari), *malek* (Pashto) and *arbab* (Tajik)

In the late Ottoman Empire, the position of *mukhtar* ("the chosen") was created by the government, whereby senior members of the most powerful families were selected to represent rural communities and neighbourhoods in their communication with the government.[74] The role still exists in Palestine and Jordan.

Makhatir are involved in customary proceedings either as mediators or representatives of the party to whom they are related. They settle disputes within their own family or disputes in which a member of their family is a party. The work of a *mukhtar* is linked to his family's reputation in their area of residence, and usually, a *mukhtar* is born or has lived in his neighbourhood for a long time. In carrying out his role in the customary system, the *mukhtar* also plays the role of an *islah* man in arbitrating between parties.

In Palestine, someone seeking to occupy the position of *mukhtar* must submit the signatures of at least 200 members of his family, recommendations from a further 20 *makhatir* and notable persons, and a certificate of good conduct issued by the Ministry of Interior. The Ministry of Local Governance will then consult with the Tribal Affairs Department of the Ministry of Interior to decide whether this person is qualified to become a *mukhtar*, and if so, he will be given a certificate.

In Jordan, a *mukhtar* is appointed by submitting a request to the Provincial Governor where he is living, accompanied by the signatures of 50 individuals representing families resident in the neighbourhood, which are authenticated by the Provincial Authority. The candidate will then undergo a security check before he is appointed by the District Administrator. In practice, despite the formal appointment, the role of the *mukhtar* is very modest in various provinces in Jordan.

The most active individuals in customary justice in Afghanistan are also locally elected officials. Due to the significant ethnic heterogeneity across the country, these are referred to by different terms: *wakil* mostly in urban areas, *malek* in rural and particularly Pashtun areas, and *arbab* in Tajik areas. These figures are elected by members of their community to act as official representatives of their district. In theory, they are impartial and should oversee dispute resolution in an unbiased and neutral way, but in practice, this is often not the case. Field research conducted by the Afghanistan Research and Evaluation Unit (AREU) reports that many community members feel that decision-making of these supposedly neutral representatives is influenced by ethnic and or religious affiliations[75] and that "*the idea or representative governance is undermined by the historical strength of patron-client politics in Afghanistan.*"[76]

[74] Birzeit University, op. cit., p.11

[75] Afghanistan Research and Evaluation Unit, *Community-based dispute resolution processes in Kabul city*, 2011, pp.17-19

[76] Ibid.

4.1.4 Religious leaders

In all the countries under study, religious leaders often play a role in customary dispute resolution. One key reason for this is that they are well educated, and in many rural districts across Egypt and Afghanistan, religious education is seen as more academically rigorous than state education, and it is often less expensive. Meanwhile, in all these countries, the tertiary religious education required to become an Islamic religious leader (*imam* in Arabic or *mollah* in Dari/Pashto) includes the study of *shari'a* law, meaning that these individuals are well versed in the language and concepts central to one aspect of formal justice proceedings: those dealing with family law and personal status issues. Religious leaders also occupy respected positions in the social and moral hierarchy of their communities, and this status can be harnessed to influence disputes.

4.2 Customary justice decision-making structures

In Afghanistan, several terms are used to denominate the decision-making bodies in dispute resolution, usually made up of groups of elders: in Pashtun areas, they are known as *jirgas*, also known as *maraka* in the Hazara language, while *shuras* are approximate equivalents in other non-Pashtun areas.[77] The importance of these structures lies in the value of consensus: even when the opinions of respected individual elders and religious leaders are pronounced, unilateral decisions may not be implemented.[78] One notable finding of the abundant body of research that has been carried out on these structures is that, although they are based on Islamic principles to some extent, there is significant heterogeneity of customary justice mechanisms across Afghan provinces due to differences in Islamic denominations and tribal customs. There are significant differences in how justice is administered between, for example, the southern and eastern regions, guided by the *Pashtunwali* code, and the central Hazarajat region where Shia jurisprudence (Jaafari and Ismaili Fatimid) is prominent.[79] In turn, these differ from tribal justice in more urban areas.

In Egypt, it has been noted that it is unlikely that decision-making in conflict resolution will originate from a single individual through sheer force or influence, especially in a "*world where traditional forms of social control are losing their meaning.*"[80] Customary justice councils are formed by several arbitrators, usually starting with three but with the possibility of others being invited to contribute to the process in cases that have had a widespread impact on the community. Similar to the work of single arbitrators, the councils' decisions are made based on negotiations with the disputing parties and, where possible, precedents. Neilsen maintains that these councils should not be perceived of simply as a reaction to the incapacities of the formal legal system, but as "*an important, integrated component of Upper Egyptian society… invested with numerous layers of political and symbolic meaning.*"[81] Neilsen argues that even this is changing according to expectations of younger generations, who have come to demand more accountability and transparency from decision-makers.

[77] See, for example, the Community-Based Dispute Resolution Series from the Afghanistan Research and Evaluation Unit.
See also S. Taizi, *Jirga System in Tribal Life*, 2007, Tribal Analysis Center; R. Lamb, *Formal and Informal Governance in Afghanistan, Reflections on a Survey of the Afghan People*, Part 1 of 4, 2012; The Asia Research Foundation; EUREKA Research, *Pre-Assessment for Local Justice Programme in Kapisa and Surobi*, 2011

[78] S. Miakhel, *Understanding Afghanistan: The Importance of Tribal Culture and Structure in Security and Governance*, 2009, US Institute of Peace

[79] International Legal Foundation, The Customary Laws of Afghanistan, 2004

[80] Neilsen, 2005, p.29

[81] Ibid, p.53

4.3 State institutions with roles in customary justice

The brief histories of customary justice in the countries under study in Part III indicate that the state has played a pivotal role in the evolution of these systems over time. This suggests that in order to develop a clear overall understanding of justice mechanisms in a given place, it is crucial to identify the various articulations and manifestations of the role of the state within customary justice systems.

Based on analysis of customary justice structures in Upper Egypt, one Tdh-affiliated researcher came to the conclusion that, "*State representatives definitely constitute major stakeholders of customary justice, if not the main ones.*"[82] The structures that primarily channel state functions are the Dispute Resolution Committees, affiliated to the local Popular Committees, made up of members of well-known families and religious men, who have good reputations and are widely trusted in the community.

The committees are formed, with the approval of the security authorities, of 10 members at the level of each local unit, and 12 members at the level of each district, of those who are members of the Local People's Councils. For example, in Abnoub district of Assiut governorate, which consists of four local units, the Dispute Resolution Committee included 52 elected members (40 at the level of the local units and 12 at the district level) in 2015. The law 43/1979 governs the formation of the Dispute Resolution Committees, authorising them to immediately initiate dispute resolution measures and holding meetings with the parties of disputes, whether individuals, families and/or various tribes, including for cases of murder and revenge. However, there is no legislation governing the scope of activities of these committees or that allows them to legally deal with such crimes. Their activities, in other words, are practices with no legal basis.

The Dispute Resolution Committees work in coordination and collaboration with security forces, mainly the police. During a customary justice session attended by one of Tdh's researchers, the chief of police gave an opening speech, which was said to be common practice. At first glance, it may seem that security acts to maintain law and order, to ensure that sessions unfold peacefully and to guarantee the safety of participants during the proceedings. However, upon deeper analysis, the role of the police at customary justice sessions is not only linked to maintaining security: it is probable that their very presence influences the discussions and, possibly, the outcome of the session itself, again suggesting the extent to which the formal justice system influences customary activities.[83] At the same time, the research did not indicate that their role is to ensure that proceedings or judgment conformed with national laws, (as, for example, is amongst the roles prescribed to formal justice actors in Ali Wardak's hybrid model in Afghanistan as seen on p.31).

In Palestine, differences are noted between the West Bank and Gaza. In the West Bank, the Department of Reconciliation and Tribal Affairs, a specialised department under the Ministry of the Interior, operates at governorate level and seeks to regulate the functioning of tribal judges by issuing permits and to ensure that tribal judges operate in line with the law. In Hebron, only a minority of tribal judges have Ministry of Interior permits and the majority work independently of the state. Meanwhile, in Gaza, most groups of customary actors are linked to political parties, such as the Hamas-leaning Rabeta and the Fatah-affiliated National Islah Committees, while yet others are bound to family and clan groupings, such as the Palestine Makhatir Charitable Association. Actors may receive an identification card from their affiliate organisation, but not the Gazan government. In Gaza, the conflict between Fatah and Hamas means that the Hamas-affiliated actors in the formal justice system do not accept reconciliation agreements with stamps belonging to Fatah-affiliated groups. Al Rabeta has taken further steps to advertise their services using information communication technology: it set up an online directory that lists the *islah* men associated with it and their contact details in 41 neighbourhoods across Gaza.

[82] Mokrani, 2015, p.27

[83] Ben Nefissa, op. cit.; Mokrani, op. cit.

In Jordan, there two bodies regulate the functioning of tribes: the Department of Clans under the Directorate of the Royal Bedouin Police and the Chancellery of Clans under the Royal Hashemite Court. The Jordanian Department of Clans is similar to the Department of Reconciliation and Tribal Affairs in the West Bank, in that it is dedicated to following up issues or conflicts between tribes at provincial level through the administrative governors, however it does engage in formal processes to issue permits to tribal judges. Meanwhile, the Chancellery of Clans is a more senior body empowered to deal with major and serious conflicts between tribes by virtue of its being placed at the centre of the Royal Hashemite Court, which provides administrative and political links between the King of Jordan, the constitutional authorities, the army and the security forces.

The parties mentioned above most often intervene in a conflict following either a request from one or more parties to a dispute or a referral from a formal justice actor. In the former case, the conflict may be resolved completely separately from formal mechanisms. In the case of a referral from a formal justice actor, mediation and reconciliation efforts can occur parallel to formal proceedings, and if a resolution is achieved in the customary system, this may be taken into account by the judiciary.

4.4 Interface between formal and "informal" actors in the scope of customary justice

As previously noted, UNDP has presented a typology for interpreting the relationship between formal and informal systems, laying out a spectrum that ranges from abolition at one end to full incorporation at the other, with limited incorporation and co-existence in the middle.[84] Based on the findings of Parts III and IV of this report, it is clear that, regardless of the state's attitude towards customary justice, only the third category of relationship of limited incorporation and co-existence is the de facto reality in the countries under study. Formal and informal systems should not be considered as antithetical or mutually exclusive; rather, they are part and parcel of plural legal orders that govern the lives of adults and children in complex and dynamic ways.

In most of the countries (except Afghanistan), the state attempts to supervise and regulate customary justice processes. This may take the form of appointing the members of the customary justice institutions if the state has a strong grip on the system, such as in Egypt, or by requiring their registration in formal registers, such as the *makhatir* in Hebron. In other places, the state's role is limited to recording the reconciliation agreements, such as in Gaza where affiliation of customary actors is not centralised at State level, but dispersed among various political parties .

The state may also refer cases to customary justice actors or solicit their services in formal proceedings to help resolve a conflict or restore calm and security, particularly in cases of homicide. In Gaza, it appears that mechanisms for consultation between formal and informal systems are in place but mostly active along political lines: All the departments in Rabeta, the group of customary justice actors in Gaza that are aligned with Hamas, have some form of interaction with the formal justice system. After the 2006 election, a number of the *islah* men belonging to Rabeta were selected to work with the police. Moreover, the police also refer cases to Rabeta when parties to a dispute wish to reach reconciliation. However, given that such referrals are still not documented by a central authority, it is difficult to assess how common they are or to assess their outcomes.

[84] Ibid, pp.28-29

According to Wojkowska's theory of models of state recognition of customary justice, when national legislation recognises a customary justice system and regulates its proceedings, or establishes a court to hear only disputes arising under customary law, this is an indication of state incorporation of customary justice. The preceding analysis of the Dispute Resolution Committees in Egypt, and the way that they are intimately linked within the state apparatus, suggests that the Egyptian case errs on the side of incorporation. This is also evident in Egyptian law 10/2004 which formalised a mediation process through the creation of the Family Dispute Resolution Office to hear personal status disputes.

In contrast, in Afghanistan, the Supreme Court ruled that legalising ADR would be a breach of the formal system's universal jurisdiction. A law drafted in 2016 aimed at restricting and controlling ADR rather than recognising it and encouraging cooperation, ultimately criminalising any local dispute resolution practitioner who does not meet government formal standards. Faced with objection, the bill was taken off the cabinet's agenda. According to Wojkowska's model, the configuration in Afghanistan represents a limited, if hostile, relationship between formal justice and customary justice actors.

The nature of the offence does not necessarily determine where the dispute will be dealt with: in all the research sites, customary justice processes deal with civil cases as well as criminal offences, including felonies such as homicide. It is rather social dynamics, such as the relative positions of power and influence of parties to the dispute, and the extent to which the dispute has impacted on community peace that tends to determine whether or not the customary system in any given case will be activated.

Many examples of both formal and customary justice processes taking place in parallel to one other were identified: in some cases, a dispute lodged at the level of formal authorities, such as the police, would be handed over to customary justice actors, particularly if the dispute had severely damaged the harmony within the community. These cases yield rich examples of the way in which formal and customary processes are not mutually exclusive, but may operate simultaneously to fulfil different social functions. Formal structures retain a more retributive idea of justice based on establishing guilt and innocence, and consequently determining punishment, while customary justice structures are more concerned with repairing the harm done to the sense of community well-being, though sometimes at the expense of the best interests of the individual offender or victim.

This section has illustrated how, despite the heterogeneity of customary actors in the diverse social and political contexts of the five contexts under study, it is possible to imagine certain typologies of these actors based on their key defining characteristics as well as their relationship to the state. In turn, this suggests that that contemporary manifestations of customary justice in the areas under study are quite distant from many descriptions of informal/customary processes that can be found in the literature: **far from embodying archaic practices residing upon ancient value-systems and oral history, customary justice in the twenty-first century MENA and Central Asia regions may best be described as distinctively "modern" examples of legal pluralism.** [85]

[85] Dupret, B. (2005). What is Plural in the law? A Praxiological answer, *Égypte/Monde arabe*, Troisième série, 1, 159-172. Available online: *ema.revues.org/1869*


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5. Stages of customary justice proceedings

This part of the report focuses on the stages of customary justice proceedings. It uses case studies to highlight the treatment of children in these proceedings and outline the factors that influence treatment and outcomes.

To understand how customary justice systems impact on the child we need to understand:

- what steps are taken when a child commits a crime or is the victim of a crime
- what factors influence the number and duration of proceedings
- how interactions between formal and informal/customary actors shape these processes

Despite the considerable social, economic and political differences between the countries under study and their significant diversity in terms of types of customary justice actors and relationships with formal justice mechanisms, the stages of customary proceedings are remarkably similar from one country to another. This may be due to the fact that all of the customary justice systems considered in this report are influenced by Islamic traditions, although the heterogeneity that exists within this larger category should not be overlooked. It is also worth noting that, in each country under study, the research found that children who come into contact with customary justice systems follow the same proceedings as adults: **there are no special steps or proceedings if a child is involved as a victim, offender or witness.** Therefore, the idea of specialised child justice proceedings for children in customary systems was not identified in the countries under study.

In view of these similarities, the following will describe the general stages of customary proceedings. It will do so specifying the stage before customary proceedings, the stage during customary proceedings, and the stage following customary proceedings, which are based loosely on the pre-trial, during trial and post-trial stages of formal justice proceedings.

5.1 Before customary justice proceedings: identification of case

While some literature suggests that mainly civil cases or minor crimes are referred to customary justice proceedings, Tdh's research recorded criminal cases processed through customary channels including crimes of homicide, sexual assault and theft.

There are several main factors that impact whether a dispute is lodged in the customary justice system: the geographical characteristics of the community (urban/rural), the nature of the crime, the degree to which the crime impacts on community stability, and the willingness of the parties to engage in reconciliation.

A dispute may be lodged before, in parallel, or after contact with formal justice actors. Although disputes usually reach the customary justice system following action by the victim's family, a case may also be brought by the offender's family, formal actors or a third party.

In practice, customary justice actors may also unilaterally decide to investigate a case if they deem community stability to be threatened. Community leaders and arbitrators in Egypt have this authority, as do *islah* men and *makhatir* in Gaza. In such cases, it may take a long time for reconciliation to be achieved, because the mediators do not have authorisation from either party of the dispute.

Conversely, in urban areas, disputes often come to the attention of the formal system early on, but formal actors, such as the chief of the police department or their representative, may try to reconcile between the parties before referring to formal procedures or even in parallel to formal procedures.

5.1.1 Dispute lodged by the offender's family

There are three main reasons that the family of an offender would refer a case to the informal/customary justice system: out of fear of retribution on the part of the victim and their family, to avoid their child's appearance before the official justice bodies, which could result in prosecution of the child and/or detention, or to seek an early release if the offender is in police custody.

5.1.2 Dispute lodged by formal actors

A dispute, which has been initially lodged in the formal system, may be referred to customary justice actors upon the direct request of the parties to the dispute. Sometimes, however, the case is referred to the customary justice system on the initiative of the formal justice actor out of fear of escalation. Usually the two families agree first, but in some cases, parties may be coerced into giving their acceptance. For example, in Gaza, the research identified cases in which police officers threaten the parties with arrest and detention to convince them to resolve the conflict according to customary methods. The police may even detain the fathers of the two children, instead of the children themselves, in order to pressure them to achieve reconciliation, rather than resorting to the formal system or engaging in acts of revenge.

Case study 1: Gaza

Name:	**A.R.**	**Type of crime:**	**Physical assault**
Gender:	**Male**	**Status in proceedings:**	**Victim**
Age:	**14**		

Description of the case

A.R., 14, was beaten by one of his friends, and sustained wounds for which he received hospital treatment. A fight subsequently erupted between the offender and the victim's brother. The two parties filed complaints against each other in the police station, and the fathers of the two parties were detained.

Upon the request of the offender's father, *islah* men intervened and went to the police station to carry out the preliminary reconciliatory steps. The two parties dropped their official complaints and were released. A process of reconciliation was completed by *islah* men. The offender was obliged to pay a fine of JOD 1,000 to the victim's father. In addition, *islah* men ruled that, in the event that the offence recurred, the family of the offender would pay an additional JOD 2,000. Fifteen days later, the victim's father voluntarily returned the money to the offender's family through the *islah* men, as per custom.

This case study highlights two important points. Firstly, in the customary proceedings, it was only the initial dispute, the assault on A.R., which was considered as the main crime. The subsequent fight between the offender and the victim's brother was not seen as an incident which required dealing with as it was contingent on and an escalation of the original dispute. This is a pattern that often emerges in customary justice. Secondly, the financial compensation from the offender's family was paid in Jordanian Dinars although the currency in Gaza is Israeli Shekels. This highlights the symbolic nature of the fine, which is reinforced by the fact that the money was returned to the offender's family after some time had passed. Again, this is a common characteristic of solutions in the customary system, whereby the core focus is on achieving a moral reparation to the harm done rather than a strictly financial compensation.

In Hebron, if a complaint has been lodged in the formal system but proceedings have also taken place and eventually been resolved in the customary system, the prosecution office may accept to register a reconciliation agreement before the case is referred to the judge specialised in the matter. In such cases, when a reconciliation document – the *sakk al-sulh* – is recorded, it is legally binding within the Palestinian formal system. The reconciliation document drops the penal action but not the civil one. Importantly, the formal judge does not review the procedures taken by the tribal justice and does not verify their legality or compliance with provisions of the law.

5.2 During customary proceedings

5.2.1 Commitment to customary proceedings through a guarantee

Parties are asked to provide a guarantee at the beginning of the proceedings, to demonstrate that they are committed to the reconciliation process, a practice observed in all studied countries.

In Afghanistan, two types of guarantee can be established and presented by each party: the *machalga*, referring to an amount of money or property, often arms, (with an equivalent value to the injury), and the *baramta*, which refers to a person who acts as a guarantor during conciliation proceedings in Afghanistan. According to Smith, when a guarantee is required as a proof of authority, "*the* jirgamaran *[leader of the* jirga*] fixes a certain amount from each side as* machalga *and if the disputants do not agree to accept the decision of the jirga, they will not have their machalga returned to them at the end of the jirga process […] If people cannot afford to pay the machalga which is asked for, someone else who is wealthier may stand as guarantor for them, often a shopkeeper or trader […] While this money serves mainly as a deposit, it is also used to cover the expenses of the* jirga*, such as food and tea [or travel]. [If the machalga if not given back to the disputants who do not accept the final decision in a jirga process,] a jirgamaran reported that it will be used on development works for the village or will be used if the village has guests […] The most common response was that the jirgamaran will divide the money among themselves.*" [86]

In Egypt, the initial sum of money or property deposited by the perpetrator, is known as the *rabt*. Its amount is established by the arbitrator and depends on the type of crime or the amount of damage done. Usually, the *rabt* will be valued to exceed the estimated cost of damages. After proceedings and payment of compensation, any leftover amount will be returned to the perpetrator. In cases of serious crimes, the families of the two parties will be the guarantors, in order to demonstrate commitment to achieving a solution. This practice is also present in Jordan and the West Bank, where terms used for guarantors are the same: *kafeel al wafa* for the guarantor of the perpetrator, and *kafeel al dafa* for the guarantor of the victim. A *kafeel* is a known and respected member of the community who is expected to give weight to the agreement between the two parties. In case a party objects to the *kafeel* or does not follow through with its commitments, its reputation suffers dramatically. In Gaza, each party must pay the *rizqa*, similar to the *rabt* in Egypt, which will be reimbursed to the winning party. It is most common for older male relatives to take on the role of guarantors.

5.2.2 Truce

In all studied countries, in cases of grave crimes, a period of truce (*'atwa* in Arabic) is put in place in order to prevent retaliation by the family of the victim. Periods of truce may be enforced immediately after a crime. In Hebron and Jordan, the truce is put in place

[86] Smith 2009-2, p.51

by the *jaha* (a group of representatives of the informal/customary justice) who pay a visit to the family of the victim, seeking to calm and soothe the family and initiative a truce to prevent retaliation.

In cases of grievous harm and so-called "honour"-related crimes, an initial three-day truce is put in place when the perpetrator admits or confesses a crime. This restricts the possibility of retribution on the part of the victim or their family. In Hebron, it is common for the family of the victim to retaliate in the immediate period following a grave crime by attacking the houses of the family of the perpetrator, setting their assets on fire, attacking them physically and in some cases, exiling the family, including children and women. However, if such retaliation does occur during the truce period, then it is seen as accepted but also limited: any act carried out by the family of the victim is pardoned and overlooked, especially in the case of serious crimes such as homicide and so-called "honour"-related crimes, under the pretext of *firash al-'atwa* (literally "the cover of truce.") Called *muharrabat/musarrabat*, this is a practice whereby the family of the victim is not held accountable for any offences under *firash al-'atwa* (cover of the truce).The logic underpinning this practice is that a smaller act of retribution is considered negligible compared to the harm done by the initial crime. At the same time, the truce prevents the initial offender from repeating the retaliation, so that a cycle of retribution does not ensue. In this way, the truce is seen as containing the conflict from extending to larger proportions.

Case study 2: Hebron

Name: Y.T. **Type of crime:** Physical assault as retribution

Gender: Female **Status in proceedings:** Victim

Age: 17

Description of the case

A dispute broke out between family T. and family M. regarding municipal elections and other related issues. One person from family M. was murdered and the killer was not identified. As a result of this, a short time later, members of family M. attacked the house of J.T., a relative of family T., who had not had a role in the dispute that led to the murder. The attack on J.T's house occurred while the police were present at the scene. Attackers threw stones at windows and cars parked in front of the house.

J.T's daughter, Y.T., was inside with her mother. They were both seriously injured by stones thrown at a close range and were taken immediately to hospital. The father of Y.T. and her brothers were at the scene of the crime but did not react, instead controlling their anger in the hope that the attackers would be punished by the prosecution.

Y.T. sustained injuries to her head and received five stitches. She and her mother stayed in hospital for two days, receiving the necessary tests such as X-rays and CAT scans. The police came to the hospital and a complaint was filed against the attackers, who were known to all. However, the police did not arrest them until five months later, after Y.T.'s family had made contacts with the Presidential Office and the media.

The tribal justice mechanisms intervened through the National Islah Committee and the Governorate Office. The tribal judges ruled that Y.T. and her mother did not have the right to compensation because the attacks were in retaliation for a murder. The family of the murdered person is seen to have more

rights than those of the family of the offender. The tribal judges did not consider the incidents as two crimes, but combined them into one case, although there was a time interval between them and there was *'atwa* in the first case.

The *jaha* and tribal judges put pressure on Y.T.'s family to withdraw their complaint with the police. They affirmed that custom allows the family of the murdered the right to throw stones, break and set property on fire as part of *fawret ad-dam* (raging of the blood), which indicates the period immediately after the crime is committed which lasts until the taking of the first *'atwa*.

Other *islah* men and tribal judges, however, refused that the two cases be treated as one, and maintained that the murder and assault should be considered as separate cases because J.T. and his brothers and uncles were not involved in the murder. They added that the attack could not be considered as fawret ad-dam because it occurred two months after the murder.

Eventually, the attacker was arrested and held in custody. The prosecution took the statement of the man who, according to witnesses, was the main suspect in the attack. However, he was subsequently released and did not stand trial because he had an official letter from the Governorate Office that absolved him from responsibility under the customary principle of *fawret ad-dam*.

The complaint presented to the prosecution and the justice was withdrawn by the lawyer without informing Y.T.'s family. When Y.T.'s family inquired, the lawyer told them that he had been following instructions from the Governor's Office, the National Islah Committee and the tribal judges who intervened in the case.

Y.T. exhibited signs of trauma, for example feeling panic whenever she heard screams or loud noises. She was admitted to Al-Zahra Centre for abused women and children, located in Hebron Governorate, to help her overcome the negative psychological impacts of the incident. Y.T. and her mother required long-term medical follow-up of the injuries they sustained.

This case study illustrates how rulings issued by the informal justice actors are heavily influenced by tribal social norms and expectations, even to the extent that certain crimes may not be considered as crimes in their own right, but as extensions of previous disputes.

Moreover, it highlights how informal proceedings can interfere with and pervert the course of formal justice proceedings by pressuring or issuing implicit threats to victims.

In addition to the initial *'atwa*, further different types of truces were identified in Jordan and the West Bank, ranging over periods of several months. The truce may be extended to allow for the gathering of further evidence in cases where the parties to the dispute have reached an impasse or if the family of the perpetrator denies the crime. This period may last from one to six months in Hebron and from three months to a year in Jordan. In Hebron, the family of the offender is required to pay an amount of money for the *'atwat al-sulh* (reconciliation truce) to be established. If the perpetrator admits the charge, a third type of *'atwa* may be issued: *'atwat al-i'tiraf* (acknowledgment or admitting truce). This means that a truce is enforced until the judges establish the penalty and /or reconciliation agreement. Lastly, *'atwat al-iqbal* (acceptance truce) is the final *'atwa* offered to the perpetrator so that a reconciliation agreement can be made. If reconciliation or conditional reconciliation is refused, the *'atwa* is then called *'atwa naqisa* (incomplete truce). Overall, as mentioned above, the purpose of these various truces is to allow sufficient time for a solution to be achieved in order to prevent cycles of retribution and escalation of the conflict.

Case study 3: Jordan

Name: M.Y. **Type of crime:** Murder
Gender: Males **Status in proceedings:** Offenders
Age: 16 and 15

Description of the case

A tribe elder in south Jordan related a case he had dealt with concerning two male teenagers, aged 16 and 15, who had killed an adult during a fight. The children were brought to the police station in order to protect them. When news of the incident reached the *sheikh* of the clan, he went with a *jaha* to the clan of the victim and arranged a three-day and a third day *'atwa*, as is customary. When the three-day *'atwa* expired, the *jaha* went again to the clan of the victim, presenting them with *'atwat al-i'tiraf* for a period of three months, acknowledging that the two children had inadvertently committed the murder of their son during a fight. The agreement included *wafa* and *dafa* guarantors, and resulted in the signing of a reconciliation document, *sakk al sulh*, between the two clans. The guarantors took the *sakk al sulh* to the Magistrate court which resulted in reduced sentences for the youths.

5.2.3 Methods of investigation

Customary justice hearings are usually held in a neutral place defined by the customary justice actor(s). For example, in Egypt, it often takes place in the house of the arbitrator or a respected third party in the community; in Afghanistan it may also take place in a mosque.

In general, the main disputing parties are invited to give their testimonies of the event and witnesses are summoned to testify. The customary justice actors may consult with relevant experts or professionals such as doctors or lawyers, to hear their opinions on the case. In Gaza, the tribal judge may also use other methods, such as asking the parties swear an oath to speak the truth. *Islah* men may also consult official documents, including previous reconciliation agreements if such an offence took place previously, or police reports, depending on the customary justice actor's relationship with the police. In Hebron, the procedure differs according to whether the case is dealt with by *islah* men or tribal judges. The process of investigation by tribal judges is more rigorous and takes significantly longer than a case taken on by *islah* men. In Egypt, the hearing may last anywhere between a few hours to several days, depending on the severity of the crime and the amount of time needed to secure supporting evidence, such as a medical report.

If one of the parties to the dispute is a child, it is common for a family member, usually the father, to speak on his or her behalf. However, in some of the case studies in Gaza, the child was represented by the eldest brother, an uncle or a grandfather. In Egypt, the child only attends the proceedings to hear the final judgment. A child witness may have the opportunity to testify if invited by the arbitrator, who will then decide to take this testimony into consideration or not. However, a child may be allowed to present their version of events if he or she is seeking a customary hearing against an adult in the family, often for alimony purposes. The presence of an adult guardian is requested, and sometimes the guardian may be the same person that the child is testifying against. In Gaza, customary justice actors do not consider testimonies of children in disputes, and testimonies are taken from the child's father or male guardian. In some cases, *islah* men stated that they would request to see the wounds or scratches of the child victim in order to determine the value of compensation.

Cases related to honour (most often involving sexual abuse) and lineage are held in private. However, in countries where group customary sessions are held, such as the customary councils in Egypt or the *jirga/shura* in Afghanistan, testimonies are given in front of all gathered for the session.

5.3 Outcomes of customary proceedings

Customary justice appeals to the religious morals and outwardly-facing social value systems to emphasise forgiveness and reparation of the social bonds harmed during the dispute. At the same time, they may also require a penalty or compensation to be issued as part of reastablishing the balance disrupted by the crime.

5.3.1 Sanctions

Customary justice does issue penalties: repressive reasoning is based on the notion that the sanction will serve as an example for the rest of the community, and ensure strong social cohesion. The most common form of sanction in all studied countries is financial (5.3.1.1), which may be accompanied by the exile of the offender (5.3.1.2), physical punishments in rare cases (5.3.1.3), or other type of sanctions (5.3.1.4).

5.3.1.1 Financial penalties

The results of the research indicate that financial penalties have both a practical role, in terms of compensation or reimbursement of costs endured by the victim, and symbolic role. In Egypt, the family of the offender is sentenced to pay the *diyya* (blood money) for the harm done, in addition to any medical expenses incurred by the victim. The payment of the *diyya* has a symbolic value: it indicates that the disputing parties have been reconciled and the possibility of revenge is no longer open. The exact amounts are not predetermined, but calculated based on the nature of the crime and an estimation of the cost of damages incurred. For incidents involving bodily harm, there are fixed values for specific injuries. For example, a stitch in the head is valued at 500 EGP, a stitch and a clearly apparent wound is valued at 1,000 EGP, a multiple fracture is valued at 25,000 EGP, while an injury involving an installation of brackets and screws is worth 50,000 EGP. In addition to setting the amount of the *diyya*, arbitrators are responsible for determining the amount of time within which the payment should be made.

Arbitrators who participated in the research stated that in cases of serious crimes such as homicide, Islamic *shari'a* and jurisprudence are the main source for establishing the amount of the *diyya*. One group referred to a hadith, in which the Prophet and his companions Abu Bakr and Omar Ibn al Khattab, differentiated between accidental and intentional murders. An accidental murder was put at an amount equivalent to the value of 100 camels, which in contemporary Egypt is 600,000 EGP. For an intentional murder, or a death occurring as a result of a fight, the amount rises to 800,000 EGP. These are guidelines, and the final amount of the *diyya* will be decided upon in consideration of other factors in the context. For example if the deceased was married and had children, the value is higher. If a woman is killed inside her home, the value of the *diyya* is double that of a man, while if the deceased is a child, the amount will be less than that for a full-grown man. If the victim is accused of wrongdoing, an amount of money known as *radwa*, usually worth 20,000 EGP, can be deducted from the *diyya*.

According to *'urf*, the *diyya* is paid to the father of the deceased within 40 days of the crime, during the mourning period, which again illustrates the importance of rapid resolution of homicide cases. If there is a delay, a penalty is imposed for each additional day that passes. When the *diyya* has been paid, any formal criminal proceedings that may have been in process against the offender are likely to be dropped, although this is technically illegal in homicide cases.

In all countries, customary actors reported that the penalties in cases involving children are usually financial penalties borne by the child's parents and guarantors, and not the individual child.

In Gaza, like in Egypt, the financial punishment is called the *diyya*. It is proportional to the gravity of the offence, and greater financial punishments are imposed if the same offence is repeated. If the offender is a child, the punishment is imposed on the child's father, eldest brother or the family's *mukhtar* in his capacity as the guarantor. Research revealed that the *diyya* is usually returned to the family of the offender after receipt by the family of the victim. Customary justice actors explained that the financial punishment is imposed with the purpose of exposing the offender to a kind of discomfort and public humiliation when the money is collected. Customary justice actors have a negative view of victims who refuse to return the *diyya*.

Case study 4: Gaza

Name: M.F. **Type of crime:** Physical assault
Gender: Male **Status in proceedings:** Victim
Age: 16

Description of the case

On his way home from school, M.F., 16, argued with one of his classmates who used a metal tool to strike M.F. on the back. M.F. was seriously wounded and was transferred to hospital where he received 15 stitches in his back. After leaving the hospital, he submitted a complaint to the police, and the offender was detained.

Upon the request of the offender, *islah* men intervened to seek reconciliation between the two parties. The offender was ordered to pay JOD 100 for each stitch in M.F.'s back in exchange for the withdrawal of the complaint and his release from custody.

Two weeks later, M.F.'s family returned the money to the family of the offender and withdrew the complaint.

In Hebron, the judge has the discretionary power to estimate the *diyya* according to the case and its circumstances. He may also decide on a percentage to be deducted from the amount paid as a gesture of respect towards the *jaha* and the tribal judge himself. In the tribal justice system, criminal liability does not fall on the perpetrator alone but extends forward five generations. When the customary/informal court decides that a *diyya* is to be paid, any relatives of the perpetrator who hold an ID are obliged to make financial contributions. This means that all children in conflict with the law over the age of 16 also share responsibility in payments.

In the process of evaluating the *diyya*, tribal judges may refer to several sources, including past judgments or *shari'a*. At other times, if there is no precedent, the amount may be decided at the discretion of the judge. However, in cases of homicide and grave so-called "honour"-related crimes, the family of the victim has to choose one of these penalties: the *diyya* or bloodshed. This means that the family of the victim has the right to kill the perpetrator with no tribal entitlements to his/her family.

Case study 5: Hebron

Name: R.S. **Type of crime:** Rape
Gender: Female **Status in proceedings:** Victim
Age: 5

Description of the case

One day, five-year-old R.S was taken from her home by a male neighbour. He took her 200 metres down the road to a hidden spot, undressed her and raped her from behind. The violent assault caused her to bleed profusely, so he dumped her aside, thinking she was dead. The offender was seen leaving the scene of the crime, and later apprehended.

The family of the offender disowned their son and demanded that he be punished severely, even calling for his murder. The offender was arrested and referred to the formal justice system and sentenced to life imprisonment as requested by the prosecution. In parallel, the case was referred to the tribal justice

system in order to seek the tribal *haq* (justice) for the crime. The *jaha* of the family of the offender, sought out an acknowledgement truce (*'atwa al-i'tiraf*) for 45 days, valued at JOD 10,000.

During the period of the *'atwa*, the two parties gathered in the house of the *munshed*, a judge specialised in honour cases. According to tribal traditions, the family of the child victim presented their argument while the family of the offender was not allowed to present their argument.

The following list presents the issues that the tribal judge took into consideration when determining the amount of the *diyya*:

1. The right of the neighbour: Prophet Muhammad urged Muslims to take care of the neighbour. The violation of this right is estimated at JOD 100,000.
2. The right of affinity: Even when not bound by family ties, Muslims are deemed to be bound by affinity. The violation of this right is estimated at JOD 40,000.
3. Taking the child to the crime scene, which was 200 metres from her house. Each metre is valued as a camel, which is priced at JOD 1,000. The total amount for 200 metres is JOD 200,000.
4. The cost of taking the child from her father's house to Hebron Hospital to examine her by a doctor estimated at JOD 50,000.
5. The harm done to the child by having her appear on television, thereby ruining her reputation and that of her family, is estimated at JOD 200,000.
6. Attempted murder of a child at this early age is estimated at JOD 50,000.
7. The psychological and social problems endured by the child are estimated at JOD 50,000.
8. The child's difficulty in emptying her bowels is estimated at JOD 20,000.
9. Depriving her of the possibility of going to kindergarten and school in her town is estimated at JOD 50,000.
10. Throwing her on the ground, disfiguring her face and assaulting her are punished by amputating his legs and arms, the value of which is estimated at JOD 200,000.
11. Abandoning her, thinking she was dead is estimated to be the value of 4400 grams of gold, or the equivalent in cash estimated at JOD 40,000.
12. Her loss of memory is estimated at JOD 50,000.
13. Cutting of the flesh of his body that touched her body estimated at JOD 100,000.
14. Blood on her face and all over her body estimated at JOD 100,000.

The total *diyya* amounted to JOD 1,250,000.

In addition, the family of the child requested JOD 90,000 to cover medical expenses abroad according to medical reports they claimed to have and would present to the *jaha* later. After negotiations, the amount was reduced to JOD 35,000 and another JOD 10,000 would be paid upon *'atwat al-i'tiraf*. The *jaha* requested the medical reports from the family of the child but they did not present any medical documentation, and consequently the victim's family returned JOD 15,000 to the family of the offender.

The *munshed* was entitled to one third of the amount of the *diyya*, which is deducted and waived in favour of the offender. He received JOD 5,000 that he returned to the family of the offender.

Following the calculation of the *diyya*, the family of the child victim was given the choice between killing the offender (with no entitlements to his family) or receiving the amount of money set by the *munshed*. The family chose to kill the offender.[87]

A ceremony was held to lay a white sheet at the place of the crime and her father's house was covered with a white sheet, symbolising the restoration of the child's virginity.

[87] Editor's note: the subsequent information of how the retribution took place, including how negotiations took place with the formal actors to release the perpetrator into the community. As mentioned in the methodology section, details around such cases were extremely sensitive and, due to the safety of the research team, certain elements were left out of the report.

This case study illustrates several aspects about the way that financial punishments are decided and meted out in customary justice proceedings. Firstly, it indicates the intricate level of detail with which amounts of *diyya* are calculated, and the way in which references to *shari'a* and Islamic jurisprudence inform this. Moreover, it suggests that in cases where blood has been spilt, while customary justice does not impose physical punishments it may reserve the right for the victim's party to choose retribution over monetary compensation. Lastly, it shows how the solution is mainly linked to compensating the harm done to the reputation and honour of the family unit and not the individual victim. While efforts were made to symbolise the girl's purity and virginity, no measures were taken to encourage her psychological rehabilitation and healing.

5.3.1.2 Exile

In addition to financial penalties, the perpetrator and sometimes his or her family may be exiled from the community. This practice, known as *jalwa*, was identified in Egypt and Palestine. Customary actors who participated in the research maintained that this practice was used to facilitate the healing of the victim, but also to prevent future conflict between the two parties in the dispute. This practice tends to be used when the family of the offender lives close to the family of the victim, especially cases of assault or sexual violence, where the victim's family are more likely to seek revenge.

Case study 6: Gaza

Name:	**R.A.**	**Type of crime:**	**Sexual assault**
Gender:	**Female**	**Status in proceedings:**	**Victim**
Age:	**4**		

Description of the case

R.A., who is 4 years old, was the victim of a sexual assault by an 18-year-old man who was working ina shop close to R.A.'s home. The man took advantage of the fact that R.A. was alone in his shop and put his penis in her mouth.

Once the family of R.A. found out about the incident, they attacked the man, his father, and the family-owned shop where the incident had taken place. They also submitted a complaint to the police and the offender was put in detention.

Five days later, the Tribal Affairs Department of the Ministry of Interior intervened and ordered a five-day period during which the family of the offender was not allowed to open their shop for as long as the dispute was not settled. After many sessions, the *islah* men from the Tribal Affairs Department withdrew because it proved too difficult to solve the dispute. Another group of *islah* men from Rabeta intervened.

At one point, the father of the man opened the shop in violation of the initial agreement. The family of the victim attacked him in his shop and he was hospitalised. The father of the victim and a number of family members were arrested by the police.

Later, a new agreement was reached which expelled the perpetrator from the area, while the father was allowed to open the shop but not allowed to run it. He had to hire someone to run the shop and was given permission to go himself two hours daily. The father was later required to sell his shop and leave the area.

Similar to case study 5, this case study indicates the way in which the actions of the customary justice were more concerned with maintaining peace in the community by removing the perpetrator rather than repairing the harm done to the individual child victim.

It is important to note that in Hebron, although a presidential decree has been issued banning the exile of families, it continues to occur.

The following case study presents a poignant illustration of how children can become indirect victims of customary justice rulings. It indicates that the use of exile by tribal justice can negatively affect the wider family even those who were not directly involved in the crime, which compromises children's rights to housing and education.

Case study 7: Hebron

Name: A.A.; S.A.; L.A.; M.A. **Type of crime:** Manslaughter

Gender: Males and Females **Status in proceedings:** Parties to the perpetrator

Age: 15, 11, 8 and 5

Description of the case

There was a quarrel involving several people, including the owner of the house in front of which the fight was taking place. His wife came out of the house with another family member to try to stop the scuffle. One of the men present, F.A., was holding a gun. When someone tried to take the gun away from him, it discharged and a bullet hit the house owner's wife, killing her instantly.

The person who committed the manslaughter was arrested, stood trial, and sent to prison. In addition, the victim's family brought the crime before a group of tribal judges and requested that 15 members of the offender's family, including the families of his brothers and his paternal cousins, be exiled from the village. In order to appease the family of the victim, the judges granted this request and forced the families to leave.

One cousin was the father of four children, aged 5 to 15 years old. All the children were in school except for the youngest, who was about to start kindergarten. The family left the village to live in the city of Hebron for a year, hoping to be able to return to the village after further intervention by the tribal judges.

The exile negatively impacted on the family. It caused them financial hardship because they had to rent a house and the father had to find new work. His income decreased by two thirds. The children were transferred to different schools and they faced challenges adjusting to their new social environment. In particular, because it was known they were from the family of a killer, social prejudice made it difficult to make new friends or fit in with school-mates. The school performance of the three eldest children decreased significantly during that year. The youngest child did not go to a kindergarten because of the difficulty of transportation and expenses. The mother experienced a tiring and difficult year during which she was not able to visit her parents and friends.

After a year, the family was able to return to their village with agreement from the tribal elders.

However, returning was not as they had expected, and the family still faced stigma that lasted from the original dispute.

5.3.1.3 Physical punishments

According to participants in the research, in general, customary justice in the countries under study does not impose physical punishments. It is widely believed that only agents of formal justice, such as the police and security services, are more likely to use physical violence against accused individuals in custody. Nevertheless, the research raised concerns that physical punishment meted out by other parties may be openly prescribed or implicitly condoned by customary justice actors.

In Jordan, the research identified that in cases involving children, a judge may decide that the child offender should be beaten by their family. In Gaza, the family of the offender may agree to violently beat the offender or break one of his legs and the opposite

arm, a punishment called "the breaking of opposite extremities", in exchange for the family of the victim agree to being reconciled. However, the scale of such practices is not known, and the research team in Gaza only identified one such case. According to *islah* men, this punishment may be proposed by the family of the offender, the family of the victim, the *mukhtar* or *islah* men. It is resorted to when the family of the offender wishes to avoid paying *diyya*, facing charges in the formal system or revenge by the victim's family. The family of the offender is always at least partially responsible for implementing the punishment, in order to spare other parties the legal liability. However, the majority of customary justice actors in Gaza stated that they refuse to apply such a punishment.

In Hebron, although it is officially banned, tribal judges stated that the traditional method of *bisha'a* is used in some Bedouin areas to prove guilt. *Bisha'a* is a traditional means of establishing proof whereby an iron rod is brought close to the tongue of the person denying the act and if his tongue is burned, what states is a lie.

5.3.1.4 Other penalties

In Egypt, Jordan and Palestine, in cases of so-called "honour" crimes, it is not uncommon for the victim to bear the brunt of punishment, for example by being obliged to marry her attacker in order to restore her honour and that of the family. Significantly, such practices also exist in the formal justice systems of the countries under study, meaning that they are not a characteristic exclusive to customary justice systems. Due to the sensitivity of such issues and actors' desire to protect the confidentiality of the parties to these cases, none were identified during the research.

In Afghanistan, the tribal practice of *baad* involves the family of the offender giving a young female in marriage to a member of the family of the victim as a form of compensation. During the Taliban era, significant efforts were made to eradicate this practice because it was perceived as un-Islamic, and most of the literature suggests that the practice has become very rare. "*People before used to give baad but now there isn't the custom anymore to give girls. This ended a long time ago. In place of baad, people pay money, compensation. If people accept the money and sheep they say they want, they will decide to give this instead of the girl.*"[88] During the research in Afghanistan, no cases of *baad* were identified.

In Hebron, customary justice actors may take precautionary measures such as forbidding the family of the aggressor from walking in particular areas and streets of the area, closing down commercial stores and preventing relatives of the aggressor from reaching their workplaces. These sanctions are consistent with the principal objective of customary justice: to restore civil peace and harmony and prevent acts of revenge or vendetta. In a customary justice framework, civil peace takes precedence over the rights of the individual.

5.3.2 *Sulh*: Reconciliation

The importance of *sulh* stems from two verses in the *Qur'an* imploring the brotherhood of believers to make peace and reconciliation in cases of conflict while striving for fairness and justice.[89] There are also several references to the virtues of *sulh* in the Sunna. The weight of the value of *sulh* stems from the "duty to reconcile" that is imposed on all Muslims, is perceived as an ethically and religiously superior way to solve a dispute.[90] In practice, the forms that *sulh* take have shifted over time and are influenced by social and political norms. Tribal *sulh* as practiced in Palestine and Jordan ensures a resolution to the dispute through a combination of religion, custom and tribal traditions.[91] In some countries the discourse and technique of *sulh* has been adopted by actors outside of the sphere of customary justice, for example by civil society organisations.[92]

[88] Smith in Archambaud, p.60

[89] M. Zahidul Islam, "Provision of alternative dispute resolution process in Islam", *IOSR Journal of Business and Management*, Vol. 6, No. 3, pp.31-36

[90] A. Al Ramahi, 2008, "Sulh: A crucial part of Islamic Arbitration", *No.08-45 Islamic Law and Law of the Muslim World Research Paper Series*, p.2

[91] Bir Zeit, op.cit.

[92] O. Safa, 2007, *Conflict Resolution and Reconcilliation in the Arab World: The work of civil society organisations in Lebanon and Morocco.* Berghof Research Centre for Constructive Conflict Management.

In Egypt, reconciliation is viewed by arbitrators as the most important aspect of customary justice proceedings. Reconciliation may be marked by the symbolic act of drinking coffee together: the perpetrator should go to the home of the victim and drink coffee in order to show to the community that the dispute has been resolved and is now behind them. Different tribal groups may also have specific rituals that symbolise reconciliation, such as the offender presenting a white cloth that symbolises the death shroud of the offender (*kafan*), to the victim in some areas of Upper Egypt.

In Afghanistan, the process of reconciliation is called *rogha* and is always preceded by the act of seeking forgiveness or pardon, known as *nanawate*.[93] This is mostly employed in cases of accidental killing or where physical fighting has taken place and people have been injured.[94] It is against the tribal code to reject a *nanawate*.

The importance of seeking forgiveness carries with it, implicitly, an admission of guilt, which, in practice, is a prerequisite for *sulh* to take place. The case study below from Gaza illustrates how a child's reluctance to admit guilt led to the breakdown of the *sulh* process.

Case study 8: Gaza

Name: M.H. **Type of crime:** Theft
Gender: Male **Status in proceedings:** Accused
Age: 4

Description of the case

M.H. was accused of stealing from a merchant in his neighbourhood. The merchant detained him and called the police who came and arrested the child.

The child was questioned at the police station by policemen, who are authorized to investigate such incidents, but he refused to admit that he had stolen anything from the merchant. He was then transferred to be investigated by a prosecuting attorney. Two days after the investigation, the child was transferred to Al Rabee' Juvenile Rehabilitation Center.

Following the child's detention, a member of his family tried to intervene to end the dispute amicably. However, because the child refused to admit guilt, the attempts to reach a *sulh* failed.

Consequently, the child was detained in Al Rabee' for a period of seven months.

At the end of the seven-month period, the merchant decided that the child's detention was not proportionate to the accusation and revived the *islah* process in order to ensure the child's release. *Islah* men intervened on behalf of the family and reached a *sulh* agreement.

As a result, the court issued a decision to release the child on bail until the date of trial. The judge set the amount of bail at 2,000 NIS. However, the family was unable to pay; as a result, the child was kept in detention for a further period of time.

In addition to highlighting the importance of *sulh* to achieve a resolution, this case study shows how, in the absence of an admission of guilt, customary proceedings cannot move forward, and the case is relegated to the formal system.

[93] Archambaud, op. cit.
[94] Smith in Archambaud, p.76

5.4 Recording of the decisions

In Afghanistan, decisions pronounced by *jirgas* and *shuras* are not recorded. Consequently, disputes can result when a case resurfaces as it is impossible to objectively refer to previous decisions.

In Egypt, the arbitrator notes down the verdict and the type of punishment issued, and both parties sign the document. The arbitrator may also sign the paper, implying that he takes on the role of guaranteeing that the judgment is implemented. If, at the time of judgment, proceedings are still ongoing in the formal justice system, the document issued by the arbitrator can be taken to the police station or court as proof that solution has been found in the informal system, and on that basis formal actors will cease any proceedings.

5.5 Appeal

Appeal against the decisions of customary justice decision-makers is, in theory, allowed in all studied countries. In Afghanistan, if a party refuses the final decision, it gives up the guarantee, which will be given to the other party or to members of the *jirga*. It can also request another *jirga* to review the case. If after the review, the party still objects to the decision, it may use a last resort to challenge the ruling. In case of refusal of the decision, it is the tribe who will decide the sentence.

In Egypt, if one of the parties is not satisfied with the judgment issued by the arbitrators, they have the right to appeal up to two times. In such cases, the *rabt* deposited with the initial arbitrator will be given to the second and finally the third arbitrator. If, after three rounds of arbitration, a party still does not accept the outcome, the *rabt* will be returned to the victim's family and the customary justice actors will either insist that the families solve the problem between themselves, or instruct them to seek redress in the formal system. This rarely happens, as parties who engage in informal proceedings are usually intent on avoiding the formal justice system. The fact that the judgments issued by arbitrators are not strictly binding on disputing parties indicates that the process described also reflects elements of mediation. In Jordan, tribal justice also has mechanisms for appeal, referred to by Bedouin communities as *haq as-som*.

While disputing parties have the right to appeal customary justice decisions, the research did not indicate whether or not users of the system could seek redress for misconduct of customary justice actors whether through formal or informal/customary means. Although there are several points of intersection between the formal and informal/customary justice systems, the formal system does not provide solid oversight, in terms of checks and balances, of customary proceedings.

In Hebron, tribal justice contains provisions for the two parties to the dispute to appeal the ruling and transfer it to a higher judge called *m'dhufi*. Nevertheless, the possibility for appeal is rarely granted, and in practice most of the decisions taken by tribal judges are considered final. In cases where the tribal judge is unable to reach a solution based on tribal customs or *sharia'a*, he uses his discretionary powers. Rejection of tribal rulings is rarely allowed, in order to preserve the credibility of the tribal justice system, which poses a danger in that a judge is unlikely to acknowledge mistakes or shortcomings in his practice. For non-tribal actors, such as *islah* men and *makhatir*, if a decision is appealed, then it is likely that the dispute will go to the formal system.

5.6 Remuneration

Customary justice actors, in the studied countries, all maintained that they provide their services on a volunteer bases and are not remunerated for their services. They must, therefore, have sufficient resources to devote time to this activity. In all countries under study, it was common for actors involved in customary dispute resolution to have other jobs and sources of income.

However, in certain cases where a *diyya* is involved, it is possible for the customary actors to take a percentage of the amount of the *diyya*, although this tended to be more in Jordan and Palestine than Egypt. Moreover, the research found that some customary justice actors may receive a symbolic remuneration. The remuneration may be just enough to cover coffee, food, cigarettes and transportation, but it may also be more substantial such as in the case of tribal judges in Gaza who are given an amount of money for their services. In some countries, customary justice actors may even perceive a symbolic monthly salary. As such, *islah* men in Gaza receive 800 NIS per month (179 euros) while certain members of Rabeta receive around 891.71 NIS (200 euros) per month from the Ministry of Interior. It is important to note that not all members of Rabeta receive a monthly salary. In Hebron, *makhatir* are not paid, but during the Jordanian occupation between 1948 and 1967, they were salaried.


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6. Stakeholders' perspectives of customary justice

This part of the report looks at customary justice from the perspective of different members of the communities who participated in the situation analyses, including both adult and children users. It highlights trends in each group regarding the strengths and weaknesses of customary systems.

6.1 Perspectives of customary justice stakeholders in research areas

Perceptions of customary justice often reflect the role of participants in proceedings and their relationship to the system, and as such, the views of different stakeholder groups will be analysed separately.

6.1.1 Perspectives of customary justice actors

Whether in bustling capitals or remote desert villages, all customary justice actors who participated in the research argued that customary justice processes were better than formal processes. They agreed that the main advantages of customary mechanisms are their ability to resolve disputes quickly and inexpensively, without making recourse to distant, and often corrupt, formal avenues. Indeed, customary justice actors were quick to cite the imperfections of the formal system as justification for the continued use of customary justice practices.

In Egypt, arbitrators reported that for minor offences, it was common for a solution to be reached within a single session lasting one day. Moreover, given that customary justice actors work on a voluntary basis and that proceedings take place within the community, they asserted, all costs linked to formal proceedings such as transportation and legal representation are bypassed.

Other customary justice actors noted that individuals prefer to resort to customary channels due to the fact that judgment is based on the parties' consensual agreement rather than litigation. They maintained that while customary justice actors work on resolving the root causes of the conflict, formal actors only address the consequences. Participants in Jordan articulated that customary justice promotes a culture of forgiveness, peace and dialogue and, as a result, encourages positive social relationships. Indeed, there is a prevailing opinion among customary justice actors that customary justice succeeds in eliminating negative and vengeful feelings between the disputing parties by fostering a sense of reconciliation. This was in contrast to views of punishments meted out by the formal system, which were seen not to repair the damages done, and therefore to leave open the possibility of retribution. Furthermore, customary justice actors in Jordan pointed to another advantage: that the system allows children to remain within the family environment and out of detention.

When pushed to be more critical of their practices, many customary justice actors were not willing to acknowledge the shortcomings of their work. In terms of power relations, there were differences in perceptions between rural and urban areas. In rural areas of Egypt, participants felt that customary justice did not discriminate against families in more vulnerable social positions or of lower social status. On the contrary, they claimed that arbitrators took into consideration difficult circumstances and would even try to decrease the financial punishment if they felt a family could not pay. Moreover, arbitrators felt that decisions taken through customary justice channels were fair and democratic, as there is an effort to achieve consensus among different arbitrators involved. These views differed from those in urban areas, for example in cases where the arbitrator is a *beltagy* and has his own interests at heart. The idea of customary actors ever serving their own interests was rarely mentioned and, if so, was largely rejected in all countries.

6.1.2 Perspectives of formal actors

In contrast to the views of customary justice actors, representatives of the formal system were overwhelmingly critical of customary processes. Most felt that supporting customary justice undermined the role of courts and the judiciary as fundamental state institutions. In Egypt, for example, lawyers from urban areas and younger lawyers tended to be more sceptical of customary justice, whereas lawyers from rural areas or those with many years of practice were more inclined to see the positive aspects. In Palestine, formal actors criticised the activities of the customary system for jeopardising not only the principle of rule of law in Palestine, but also the very possibility of Palestinian statehood. They saw the existence of a parallel justice system as a *de facto* indictment of the capacities of the state to rule.

In all studied countries, there was an argument expressed among formal justice actors, that solving disputes through informal/customary channels was a positive phenomenon insofar as it alleviated cases from over-burdened formal systems. However, because customary justice actors lack formal education and legal training, there was a concern that their decisions could perpetuate traditional and archaic judgments that were in conflict with national law.

Lawyers in Egypt suggested that arbitrators' knowledge of the disputing parties may at best make them biased and at worst open up the possibility for bribes, consequently compromising the principle of equality before the law. On the other hand, in the opinion of many Egyptian lawyers who participated in the research, the majority of judgments issued during informal processes were in accordance with the law. In Gaza, the prosecution office argued that customary justice was necessary due to the tribal nature of Palestinian society and stated that it was better equipped to deal with certain types of cases, as the intervention by formal actors may damage the social fabric, or result in stigma in so-called "honour" cases.

Regarding children's rights specifically, a commonplace view was expressed by a member of Afghanistan's Juvenile Appeals Court who had been working as a juvenile judge for 11 years. He stated that he had "*found no local decision respecting the rights of children.*" Other formal actors, however, in the studied countries believed that customary justice constitutes an effective means for diverting children from formal justice channels, which often entail violent and traumatising treatment at the hands of security forces, as well as lifelong stigma. A juvenile prosecutor in Jalalabad, Afghanistan argued that child offenders get better rehabilitation if left within the community. The Juvenile Reconciliation Centres are "*schools of crime. A child in JRC is an outcast; he misses his community and stops his education.*" He praised customary justice settlements where children remain with their families and continue their education. In this regard, the majority of participants in Egypt felt that customary justice upheld the best interests of the child. Moreover, arbitrators and lawyers in Egypt pointed to so-called "honour" cases, such as sexual abuse, arguing that customary justice processes preserve the confidentiality of the parties.

6.1.3 Perspectives of system users: children and families

In focus group discussions conducted with children and families across the research sites, participants overwhelmingly stated that they would pursue informal/customary channels for conflicts in which there is a risk that the civil peace may be disrupted if the dispute is not resolved, for example in cases of family disputes and minor thefts. There was also a consensus that customary justice mechanisms were preferable for disputes of a private nature in which one or both parties does not wish for the matter to become public, especially if the accused is a minor, as well as sexual assaults on or by minors. In such cases, customary actors are seen as being better placed than formal actors to protect the reputation of these minors and spare them a scandal. People seek the intervention of customary justice actors for "moral crimes," such as rape and sexual abuse, because there is a widespread perception that customary proceedings will preserve the confidentiality of the parties better than formal processes. As a result, choosing not to pursue formal justice channels in such cases is often understood as a strategy for protecting a child and the family from the stigma they may suffer in the event that the issue becomes public.

Given the many different actors and institutions active in customary justice, in some cases, families may chose the customary actor based on merit or reputation, while in others, if an actor is said to represent a family or community, such as a *mukhtar*, the scope for choice is limited. In most cases, this decision lies with the parents, and the child is rarely consulted. Choices may be made according to the political affiliation of the individual parent or family or the degree of trust and esteem that they hold for a particular representative in their area. However, it is important to bear in mind the particularity of the Gazan context, in which the conflict between Fatah and Hamas means that formal actors do not accept reconciliation agreements with stamps belonging to Fatah-affiliated groups.

This directly impacts on families' choices, and may sway them more towards the Hamas-affiliated Rabeta group. In Hebron, a recent survey indicated that 61 per cent of respondents prefer to resort to tribal justice because of shortcomings in the formal justice system.[95] The main criticisms of the formal system were insufficient training for staff and judges, lack of political will for reform, insufficient numbers of staff and judges, and interference by executive authorities. Another concern about the formal system is the duplication of roles, for example the overlap between the responsibilities of the childhood protection counsellor and that of the probation officer. In this case, the weaknesses of the formal system are indirectly translated into strengths of the informal system.

Many of the children and families interviewed considered the main advantages of customary justice to be the expediency of the process, the solutions offered, and the free or relatively low costs.

Nevertheless, there were some participants who considered that resorting or being forced to resort to customary justice mechanisms led to injustice. In Hebron, it was common for the least powerful party in a dispute to feel that the proceedings and judgments were unfair, and that justice had not been achieved. Often, they claimed, the solutions reached by tribal judges were biased to one of the parties of the dispute. To the contrary, families in rural areas of Egypt felt that the majority of customary justice proceedings did achieve justice and maintained that if a family felt that justice had not been done, they were still free to pursue the matter through formal channels.

Overall, children expressed dismay at the fact that they were not allowed to play an active role in customary justice processes, pointing to how they are not given the opportunity to participate or express their point of view. In Jordan, the children who participated in the research articulated both favourable and critical opinions of the customary system. On one hand, they viewed IJS as fair and equitable processes for resolving disputes. They also expressed preference for community-based dispute resolution mechanisms because they kept them away from formal justice procedures and institutions, which had a negative reputation amongst children for being violent and resulting in stigmatization, and allowed them to continue their schooling. On the other hand, children also acknowledged the weaknesses in the informal/customary systems, the fact that they were not listened to, that their opinions were not sought, or that no steps were taken by IJS actors to contribute to the rehabilitation of the offender or victim.

A number of child victims expressed their dissatisfaction with the reconciliation agreements that had been reached, as they believed that their rights had been relinquished without their being consulted. Furthermore, a number of the children interviewed in Gaza stated that they preferred to resort to customary justice because it is a part of custom and tradition, and that they felt more comfortable speaking to customary justice actors compared to police officers or representatives of official authorities.

In many cases, families felt that customary justice was respectful of confidentiality, especially in cases of so-called "honour"-related crimes and sexual abuse. However, one participant in Hebron stated that some customary justice actors spread rumours in order to damage the reputations of parties to the dispute.

[95] UNDP, *Access to Justice in the Occupied Palestinian Territory: Mapping the perceptions and contributions of non-State actors*, 2009

In Afghanistan, it appears that the *shuras* and *jirgas* are assessed differently according to whether a dispute is criminal or non-criminal.[96] One study conducted in Kapisa and Surobi provinces found that, asked where they report crimes, 42.5 per cent of respondents listed the Afghan National Police (ANP) and 26.3 per cent of respondents reported they opt for village elders, *jirgas* and *shuras*.[97] However, when asked where they report disputes, 49.0 per cent responded that they report to the village *jirga* or *shura*, while only 13.4 per cent cited the ANP. This reflects the findings of a more recent study, which reported that, when asked who they approached to solve a problem, the proportion of respondents who cited *shuras* or *jirgas* increased from 41 per cent in 2010 to 52 per cent in 2011. The number of people who cited Afghan National Police decreased from 11 per cent to 8 per cent over the same period. However, it is not clear if these were criminal or non-criminal disputes. Overall, the main findings of these studies indicate that rates vary significantly across districts and types of crime.

Lastly, despite the symbolic importance of reconciliation in Islamic communities, some adolescents that participated in the research from Egypt, Jordan and Palestine, raised questions about the extent to which the peace achieved by customary justice processes is sustainable, as indicated by acts of revenge that occur years after a crime. Such doubts are significant, because they question the very heart of assumptions that provide the foundations of customary proceedings, namely that customary solutions can deliver "justice", seen as the long-term reparation of the damaged social fabric of community.

6.2 Limitations of customary justice identified by participants

6.2.1 Lack of qualified or experienced customary justice actors

The most significant challenge identified by participants across the research sites was the lack of qualified or experienced customary justice actors. In Egypt, lawyers, arbitrators and child protection workers believed that customary justice would improve if it was regulated by the state. In Egypt, arbitrators and lawyers felt that the state should have a role in training and regulating informal proceedings. Arbitrators said that their work would be facilitated if there were state-sanctioned customary committees who could intervene to support informal proceedings if required. Similarly, participants in Gaza expressed the importance of strengthening the relationship between formal and informal/customary justice systems through a formal, clear system of cooperation and referral, which is not based on personal relations with representatives in the formal system. Social workers in schools in Egypt expressed the need for more guidance from state child protection actors on how to better take into consideration the specific interests of children according to their age and circumstances. Many customary justice actors who deal with children in Gaza emphasised the need to build the capacity of customary judges and familiarise them with local and international standards and principles related to the treatment of children and the best interests of the child.

Representatives of the formal justice system in Egypt believe that the biggest disadvantage of customary justice is the lack of knowledge of the law and legal procedures, which can result in the issuing of sentences that are not in accordance with formal regulations. Others highlighted the importance of setting specific criteria related to cases involving children, for example the conditions under which *islah* men should intervene and how they should deal with children.

[96] R. Lamb, "Formal and Informal Governance in Afghanistan: Reflections on a Survey of the Afghan People, Part 1 of 4", *occasional paper No.11*, April 2012, The Asia Foundation.

[97] G.G. Archambaud, *Pre-assessment for Local Justice Program in Kapisa and Surobi*, EUREKA Research, 2011

6.2.2 Lack of neutrality

One recurring narrative in discussions about customary justice is the way in which customary practices are balanced, neutral, and do not reflect any particular interest groups. However, this claim was often questioned across the research sites. Some customary justice actors in Gaza argued that the affiliation of customary justice institutions with different political parties has led to the politicisation of customary justice, and to the loss of neutrality. Similarly, they stated that the best interests of the child will not be served unless customary justice is reformed to ensure neutrality, and that customary justice actors should not be affiliated to any political faction or party.

In addition, participants in Egypt expressed concern that the lack of regulation resulted in inconsistent judgments. Some participants in Gaza had the same concern, particularly pertaining to the implementation of the principles of non-discrimination and the best interest of the child.

Uncertainty about the supposed neutrality of customary actors were framed by questioning the extent to which decisions reached by customary justice actors may be influenced by their own social background and professional roles, and responsibilities. Community members in Egypt and Palestine also alluded to the fact that ideas of "justice" are not self-evident, and that achieving "justice" required the balancing of various considerations that may come into conflict with one another, for example achieving justice and preserving general peace and order, or achieving community harmony and the protection of children. Many parents and children were critical about the extent to which customary justice is successful in being able to simultaneously maintain social order and achieve justice for children and young people.

6.2.3 Lack of enforcement and follow-up mechanisms

One source of fragility of the customary system is that the moral authority of customary actors is counter-acted by their total lack of executive power. The ability of decisions or solutions developed through customary proceedings hinges on social expectations of conformity and upholding the reputation of the group (family unit, clan etc.), rather than on the threat of being punished for non-compliance.

Participants in Gaza regretted the lack of enforcement mechanisms compelling the parties to accept or implement the terms of reconciliation agreements. The guarantors, personally responsible for ensuring the implementation of rulings, are in many cases unable to ensure compliance.

Beyond that, one *islah* man in Gaza highlighted the importance of having a follow-up system for victim children whose cases are resolved. He also suggested the introduction of a system of referral to experts who will monitor the psychological well-being of the child. Participants in Egypt shared a similar concern, stating that there were limited possibilities for seeking redress if rulings were not implemented. In Egypt, parents also articulated the need for more broad-based community involvement, including the activation of parent's councils, and follow-up of at-risk children by community committees.


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7. Rights-based analysis of findings

The research indicates that customary justice systems are viewed with a high degree of legitimacy across the studied countries, particularly in rural areas or among marginalised urban communities. Nevertheless, certain aspects of these informal systems raise questions regarding whether the best interests of children are taken into consideration and to what degree children's rights are upheld.

Guidance from international child justice instruments set out the main principles that should be respected in any justice system dealing with children. This body of standards includes, but is not restricted to:

- The Convention on the Rights of the Child (1989)
- The Committee on the Rights of the Child, General Comments 12, 13, 14 and 24
- United Nations Standard Minimum Rules for the Administration of Juvenile Justice: The Beijing Rules (1985)
- United Nations Guidelines on the Prevention of Juvenile Delinquency: The RiyadhGuidelines (1990)
- United Nations Rules for the Protection of Juveniles Deprived of their Liberty: TheHavana Rules (1990)
- United Nations Guidelines on Action for Children in the Criminal Justice System: Administration of Juvenile Justice (1997)
- United Nations Guidelines on Justice Matters involving Child Victims and Witnesses of Crime (2005)

The paragraphs below highlight the fundamental principles pertaining to juvenile justice.

7.1 Existence of a specialised child justice in the informal system

Customary justice does not allocate special procedures for any age group including children, but rather follows general and inherited procedures that are referred to when adjudicating all types of cases and people involved.

Given that customary justice procedures are not written but passed down from one generation to the next, the majority of customary justice actors have no formal qualifications such as degrees and nor are they specialised in child justice, mediation or negotiations. None of those interviewed in the research had any concrete child-related expertise. This reflects directly on the nature of customary justice procedures and rulings concerning children. The majority of participants of the research in Hebron set the upper age limit of childhood at between 13 and 15 years old, or when a child reaches puberty.

Some of the participants set the beginning of adulthood as the age of 16, coinciding with eligibility to hold a national ID.

However, judgments that are based in *sharia'a* law may provide different punishments according to age or gender, including the value of blood money.

7.2 Preservation of children's dignity

In accordance with international human rights norms and UN guidelines for dealing with children in conflict with the law, a child who commits an offence must be treated in a way that preserves their dignity, does not cause them physical or emotional humiliation and prevents discrimination. The research concludes that in contrast to the risks faced by children in the formal system, such as violent and degrading punishments, most customary justice actors refrain from implementing measures that compromise the child's dignity, as within customary justice practices there is a prevalence of financial punishments which are seen as more humane and less damaging. Outcomes of informal proceedings, such as *jalwa* (expulsion from a certain area), might be perceived as having a preventative and protective character, however, the harshness of the punishment seems to override this, particularly for children.

Nevertheless, the research encountered a few cases where customary justice procedures entailed humiliating measures, for example issuing cruel physical punishment or suggesting such punishments to be taken by the offender's family against their child as means to reach a *sulh* with the victim's family.

7.3 The right to confidentiality

Customary justice is somteimes successful in maintaining privacy and confidentialitywhen meetings are held in private locations.

However, in all countries, the identities of the victims, offenders and witnesses are known to all those who participate in the customary justice sessions, which in cases concerning serious crimes, may be a large number of people. Participants in these proceedings are usually from the community and knowing the disputing parties increases the risk of bias. Local power dynamics, family relationships, personal opinions and past experiences may come to bear on the views of customary justice decision-makers. Moreover, witnesses testify in front of all parties to the dispute, which not only compromises their confidentiality but could endanger them. Although customary justice actors claimed to provide protection to witnesses, in the absence of other guarantees, such as confidentiality of testimonies, witnesses potentially expose themselves to risks when they testify during public sessions. This concern is particularly amplified for vulnerable groups such as children. Therefore, although many groups who participated in the research maintained that customary justice proceedings upheld the right to confidentiality, from a child protection perspective, this is not the case. Indeed, it seems that communities hold a specific understanding of confidentiality that has more to do with value judgments, such as preserving good reputations, than with provisions of anonymity.

7.4 The right to fair trial

Besides allegations of corruption among arbitrators and the absence of legal representation during customary justice proceedings in the studied countries, the research indicates that the presumption of innocence is not upheld. Rather, proceedings tend to assume that the accused is guilty unless proven innocent. Indeed, given that informal/customary justice mechanisms are less about establishing the truth than diffusing tensions, parties participate in them whether or not events are disputed. Instead, the admission of guilt is a prerequisite to reconciling a dispute. During proceedings, child offenders are often referred to using labels that imply that the child is a delinquent or criminal, such as "the offender," "the rapist" or "the thief." In addition, there was no indication in the research that a child or adult accused of a misdemeanour or crime could be "proven innocent" and have the penalties imposed by the customary system dropped.

It is probable that personal relationships between disputing parties and arbitrators compromise the neutrality of customary justice processes. In some cases, this may be seen to work in the favour of the more disadvantaged party, as an arbitrator may try to ease the severity of a punishment imposed on a poor family.

In addition, of particular concern are reports that adult perpetrators of violence against children in local institutions may be dismissed instead of being held accountable in order to preserve the reputation of the institution. If the reputation of an institution is prioritised over the best interests of a child, this is a clear breach of children's right to protection.

Finally, given that the two main knowledge bases for customary justice judgments – *'urf* and previous judgments – are not written down, this raises the concern that there may be a lack of consistency of judgments, even within village or community.

7.5 The right to be protected from harmful and degrading punishments

The research indicated that the most widespread penalties issued by customary justice systems are financial. In most countries under study, customary actors do not order or condone harmful punishments upon children. A notable exception is the practice of *baad* in Afghanistan, although participants claimed that this practice is increasingly rare and only occurs in very remote areas.

Given that customary justice is often based on the principle of solidarity among members of the family, the process often imposes punishments on the group, not the individual. Directly and indirectly, this can negatively affect children. In rural areas, where the whole family unit will be implicated in the payment of a financial penalty, a family may take it upon themselves to mete out physical punishments on a perpetrator privately within the family unit. Accordingly, it is possible that beatings in the family unit are an unreported punishment for children involved in customary justice processes. In addition, the weight of collective responsibility means that children may be subject to psychological pressure by family and community, particularly in cases where perceived honour is at stake. With little recourse to rehabilitative services, such pressure may incur long-term damage.

In addition, the precautionary measures taken in customary justice processes are often in clear violation of the basic rights of the child; forbidding a child to use some streets and exile are some examples. Children exposed to such penalties will be affected in terms of school performance and may be estranged from their families and environment. This represents a violation of the standards protecting the best interests of the child.

Furthermore, when a punishment is imposed on the party representing the child, no explanation is given as to why this punishment is imposed. In such cases, participants felt that there is a risk that children will think that they enjoy impunity and may thus re-commit the same offence.

Lastly, rehabilitating and reintegrating the child are not the primary concerns of customary justice proceedings. As such, they do not look into the reasons behind the conduct of the child. The penalties imposed do not achieve the main objectives set in local and international standards, which aim at rehabilitating and reintegrating children in contact with the law.

7.6 The right to participation

Customary justice actors agree that children who are party to disputes do not have any effective role in the customary justice procedures and their testimony or opinions are not asked. Children's involvement in formal justice proceedings is considered to damage their reputation. Customary justice proceedings cannot be initiated unless a parent or an adult who represents the accused child, most commonly an older brother or grandfather, attends the sessions. Consequently, particularly acute concerns exist about how the best interests of the child are determined , given that risk factors and vulnerability of children increases when the best interests of the child do not coincide with that of parents, guardians or close family.[98]

In the countries under study, when reconciling a dispute, customary justice actors do not consider children's testimonies, and they prefer to deal with adults as much as they can in order to avoid dealing with children. In the case of a child offender, customary actors may hear the statement of the child at the beginning of proceedings, on the condition that this statement is verified by the child's father or representative. Even in such cases, the child does not attend the rest of the proceedings . As for child victims, it is very unlikely for them participate in any proceedings in front of customary justice actors or to give testimonies; it is considered sufficient to listen to the child's family. Child victims do not participate in any other proceedings, and their opinions regarding the proceedings are neither asked for nor considered. Thus, there is a risk that child victims will feel doubly victimised: first following the offence and secondly when an agreement is reached that does not consider their opinions.

If a particular customary actors is sensitised to the importance of child participation, a child may have the opportunity to explain their version of events to the customary actor, however it is unlikely that a child's testimony will be considered as having equal weight as an adult's. This indicates that although there may sometimes be space for children's voices, there is not an environment in which they are heard and valued.

[98] UNDP, UNICEF and UNWOMEN. (2012). *Informal justice systems: Charting a course for human rights Based engagement*, p.122

7.7 The right to non-discrimination

The research encountered a strong cultural taboo with regard to the treatment of girls in informal/customary proceedings, especially as victims of moral crimes, which made gathering information on this question very challenging. However, researchers raised concerns that the treatment of girls in informal/customary proceedings is never fair and that cases are "buried" rather than followed up, in order to preserve the reputation of the family. Customary justice actors believe that maintaining confidentiality, in terms of keeping the case a secret, in a dispute involving girls is an indicator of success, and that restoring the child's honour represents justice for the victim. The opinions of girls, boys and parents about this issue require deeper investigation. Of great concern is that reports outside of this study suggest that victims of sexual violence are often not sufficiently protected, but instead might be at risk of being married to their rapist or killed in the name of family honour. That some types of cases are less visible than others will pose a definite challenge to any attempts to monitor customary justice proceedings.

Apart from gender, the research indicates that there are other factors that raise concerns about the ability of customary justice processes to deal with children equally: the relative social and economic status of families potentially impacts on the way that parties are treated. At its extreme, this could mean that parties with more social capital are allowed to have the dispute dealt with in the customary justice sphere, thereby avoiding formal proceedings, while those with less social capital may be pressured into the formal system. In Gaza where there are significant power imbalances between different families, there is cause to believe that they impact customary justice proceedings although the research did not encounter examples of this. Nevertheless, in the context of the rift between political factions, there is a cause for concern regarding the ways in which political affiliations of customary justice actors may impact on equal access to justice.

Lastly, given that most customary actors work on a voluntary basis, in theory accessing customary justice proceedings should not depend on the availability of financial resources, as is often the case in the formal system. However, it is important to remember that the guarantee set by the customary justice actor is a prerequisite for beginning the customary hearing sessions. Therefore, the degree of access to customary justice processes may depend on the ability of the defending party to mobilise financial resources, which raises concerns that economically vulnerable families may be forced into material or symbolic debt through participation in customary justice.

7.8 Accountability and monitoring

While the research indicated that disputing parties have the right to appeal customary decisions, it did not indicate whether or not users of the system could seek redress for eventual misconduct of customary actors through formal or informal means. Although there are several points of intersection between the formal and informal/customary systems, there are no provisions providing for the formal system to oversee informal/customary proceedings. Although, in some contexts, *sulh* agreements reached by conflicting parties can be taken into consideration by the prosecution lawyers and by the judiciary when such agreements are connected to cases pending trial, many cases that are solved through customary channels never reach to the knowledge of the formal system. In addition, there are no standards or procedures to examine the credibility of the customary procedures or their compatibility with legal texts. Also, there is an absence of mechanisms for considering the seriousness of cases to determine whether the case should be referred to the IJS in the first place. Thus, there are major concerns around the extent to which adequate accountability and monitoring measures exist for the customary system.


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8. Concluding thoughts

The research summarised in this report has shown that customary justice mechanisms represent a fundamental aspect of the lived experiences of access to justice for countless children in Afghanistan, Egypt, Jordan and Palestine. The examples and analysis have illustrated not only the advantages and disadvantages of customary justice systems for children, but also the ways in which these systems are inextricably linked with formal mechanisms, and therefore constitute a key area for consideration in child justice sector reform. Given that the state is the main duty-bearer for children's rights, a functioning formal justice system that complies with international child rights standards must remain a key guarantor for the protection of children against abuse, exploitation or other violations of their rights. This report has, however, clearly demonstrated that solely focusing on the state to enhance access to justice for children in Afghanistan, Egypt, Jordan and Palestine would be irrelevant at best and counterproductive at worst.

The main challenge for international non-governmental organisations is to develop strategies that consolidate the benefits of customary justice systems while encouraging appropriate reforms to mitigate harmful practices.

The importance of engaging with customary systems has been argued by many international organisations, and important guidance has been offered. UNDP, UNICEF and UNWOMEN have outlined principles of engagement with customary justice to guide I/NGO programming, chief among them the importance of ensuring that customary justice is approached within the scope of wider justice and human rights interventions that are sensitive to local communities' own priorities for development and survival. Consequently, they maintain the importance of linking interventions in customary justice with engagement with the formal justice system and within development programming that addresses the broader social, cultural, political and economic context.

Meanwhile, the International Council on Human Rights Policy maintains that those interested in pursuing engagement with customary systems should:

- Aim to secure all basic human rights for every member of the community.
- Deal with internal stresses and differences within the community that are due to external forces.
- Avoid establishing distinct and possibly conflicting systems of law that will generate inequalities and inefficiencies.[99]

However, these are serious gaps in the evidence base, and before any additional steps are taken, further research is necessary. The ECOSOC resolution on restorative justice (2002/12) emphasises the need for research and evaluation to understand the extent to which practices are restorative. The stakes, however, are high, and previous initiatives have exhibited significant shortcomings:

> *"Donor-funded justice reform projects […] frequently promote non-state legal orders or alternative dispute resolution mechanisms. […] Many programmes lack a sound research base and may be underpinned by poor scholarship resulting in inconsistent, incoherent or unrealistic policies."*[100]

There is a clear need to address the gaps in knowledge about customary justice systems and children in order to formulate evidence-based practices for engagement that seek to enhance potentially restorative practices while reforming trends that compromise the best interests of the child and violate children's rights.

[99] ICHRP, op. cit, pp;139-140
[100] Ibid, p.xi

Moving forward with such an ambitious project **implies conducting learning-oriented actions that aim at providing more insights on how to interact with customary justice actors in the field of justice for children.** This requires courage and commitment, and a rigorous approach to further inquiry. The intention should be to stay open-minded to learning about the wide range of customary practices and variety of perspectives without prejudice, prioritising the dynamics of children's engagement with these customary justice processes, all the while ensuring that children's rights are upheld. These reflections should help to inform research around children's access to justice in the near future.


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Annexes

Annex I: Research questions in researchers' terms of reference

General objective:

To conduct action-oriented research to investigate, map and analyse the informal juvenile justice system in urban and rural areas of [country].

Specific objectives:

1. Identify and outline the main knowledge bases that inform the informal justice system in [country];
2. Description of main causes of offending and types of crimes that IJS deals with, especially offences committed by children;
3. Map the key IJS stakeholders, actors, groups and institutions, and analyse the relationships between these actors;
4. Outline the main steps and processes of IJS proceedings, from detection, investigation and decisions in cases of children - offenders, victims, and witnesses;
5. Identify the links between the formal and informal justice systems;
6. Develop case studies to illustrate the findings of the assessment;
7. Investigate the views and perspectives of different stakeholder groups, including IJS actors, formal actors, community representatives, families and children, about:
   - How successful IJS is in maintaining general social peace and achieving justice
   - The role and future of IJS for children, including its links with formal justice mechanisms
   - The levels of willingness and readiness among stakeholders to participate and engage in the process of reform of the juvenile justice system in [country]
8. Analyse the steps and procedures of IJS according to the following criteria on best practices for restorative justice:
   - ***Accessibility***
     - → Are the procedures accessible to everyone or are some people excluded from participating?
     - → Is IJS employed only between members of the same community/neighbourhood/religion (intra-group) or does it also address inter-group conflicts?
   - ***Participation***
     - → Do children take part in proceedings or are they represented by somebody (such as family members)?
     - → Is the use of IJS voluntary or compulsory? Is there a choice between using the informal and formal system? Is conflict resolution in the informal system always required even if a case is dealt by the formal system?

- ***Accountability***
  - → Are rules clear and strict or negotiable?
  - → Is the nature of the system based on adjudication (i.e. decision by space needed party) or mediation (i.e. settlement between victim offenders)?
  - → How are adjudicators/mediators chosen (inheritance, election, appointment etc.) and by whom?
  - → What is the gender, age, class, religious, ethnicity, race or politicalaffiliation profile of adjudicators and mediators?
  - → Are there standards for the performance of adjudicators and mediators (laws, code of conduct etc.) and monitoring mechanisms?
  - → Are processes and decisions recorded?
- ***Non-discrimination and equality***
  - → How fair are trials?
  - → Are the norms and rules enforced in a discriminatory or non-discriminatory manner?
  - → Are power relations in the community reflected in IJS processes?
- ***Prohibition of cruel or degrading punishment***

9. Analyse the steps and procedures of IJS according to the following international guidelines for juvenile justice:

- ***Prevention***
- ***Limitations on pre-trial detention***
- ***Diversion from formal court processes***
- ***Right to due process***
  - → Is IJS only used when the alleged offender admits responsibility or also in cases in which the facts and responsibility are disputed?
  - → If the last option, does the IJS investigate the incident? If yes, how and are the findings reliable?
  - → Do children have access to legal representation?
  - → Is there a right to appeal decisions?
- ***Right to confidentiality***
- ***Avoidance of liberty-depriving measures***
- ***Presence of rehabilitative services***
  - → Are there protective measures for children victims and witnesses during and after dispute resolution?
- ***Best interests determination***
  - → Are decisions taken in consideration of the best interest of the child (protection of children) and/or best interest of the community (general social peace, community harmony)? Is the general underlying philosophy punitive or restorative?
  - → Are there human rights and particularly child rights concerns?

10. Based on gaps identified, draft recommendations for how IJS can be improved in line with international child rights standards.

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