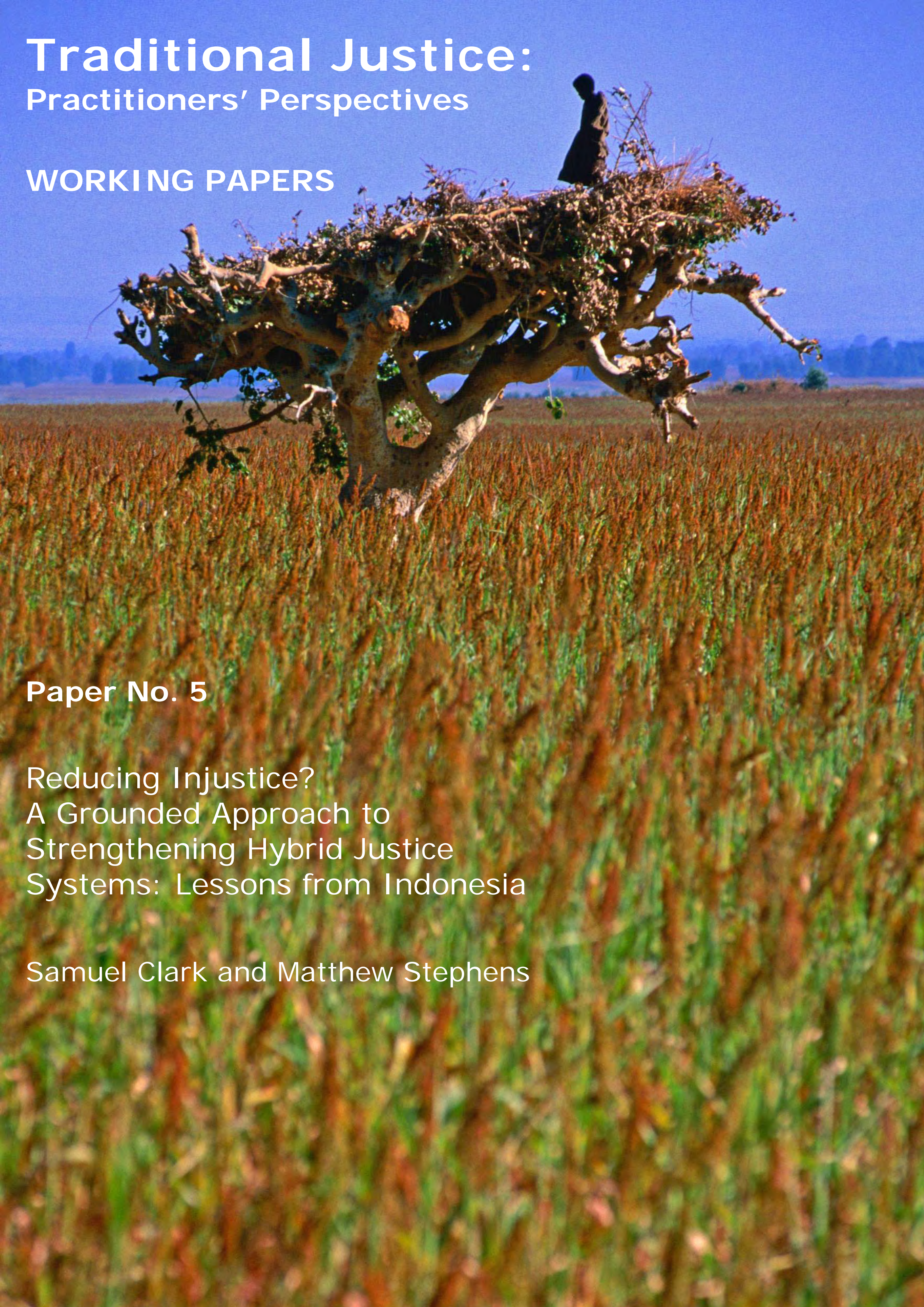

Traditional Justice:
Practitioners' Perspectives

WORKING PAPERS

Paper No. 5

Reducing Injustice? A Grounded Approach to Strengthening Hybrid Justice Systems: Lessons from Indonesia

Samuel Clark and Matthew Stephens

'TRADITIONAL JUSTICE: PRACTITIONERS' PERSPECTIVES' WORKING PAPER SERIES
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Reducing Injustice?
A Grounded Approach to Strengthening Hybrid Justice Systems: Lessons from Indonesia

Samuel Clark and Matthew Stephens[1]

> *"To improve the quality of dispute resolution, justice must be maintained in individuals' daily activities, and dispute resolution mechanisms situated within a community and economic context. Reform should focus on everyday justice, not simply the mechanics of legal institutions which people may not understand or be able to afford."*[2]

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[2] Commonwealth of Australia, *Strategic Framework for Access to Justice* (2009) 4.

1. Introduction

In most, if not all, countries in the world, court-based adjudication of legal disputes is considered an expensive and unwanted last resort.[3] Alternative dispute resolution mechanisms are, as many surveys and research attest, more commonly used and invariably more popular.[4] And yet at the same time, many of these "alternative" systems suffer (like courts) from systemic inequities that reaffirm existing power relations to the detriment of the socially excluded — what Amartya Sen describes as the "justice of fish", whereby the big fish eat the little fish with impunity.[5]

The phenomenon of the unpopular and distant state, and the debilitated community institution is particularly common in the developing world, where state capacity to deliver justice is undermined by financial and human resource deficiencies, and communal harmony challenged by socio-economic inequities and rapid social change. Therefore, on the assumption that effective justice systems and means of dispute resolution are crucial to development, equity and poverty reduction, what should be done in such a situation?

States have responded in various ways to the challenges of legal pluralism. These range from complete abolition of informal justice institutions — whether this has been effective at the local level is clearly a different question — to full incorporation, with many shades of partial recognition and incorporation in between.[6]

Abolition was pursued by a number of newly independent states in the post-colonial era.[7] Until recently, international development agencies have also focused almost exclusively on building formal justice institutions under the implicit assumption that customary arrangements will eventually wither away as an inevitable consequence of modernization.[8] Generally, these efforts have failed. Furthermore, and as the excerpt above from the Australian Commonwealth Government indicates, the evolution of justice even in the developed world is unequivocally in the direction of community-led processes such as compulsory mediation, restorative and diversionary justice, and alternative sentencing.[9]

This article starts from the presumption that, in the contemporary reality of most developing countries, no one system — state or non-state — can deliver justice. Rather than idealize

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[3] Michelson cites research suggesting that about 15 percent of disputes in the United States, England and Wales enter the legal system: E Michelson, 'Climbing the Dispute Pagoda: Grievances and Appeals to the Official Justice System in Rural China' (2007) 72 *American Sociological Review* 461. In Australia, only 6 percent of commercial disputes make it to court: Australian Law Reform Commission, *Review of the Adversarial System of Litigation* (1998). See also H Genn, *Paths to Justice: What People Do and Think About Going to Law* (1999) (on England and Wales); B Curran, 'Survey of the Public's Legal Needs' (1978) 64 *American Bar Association Journal* 848 and S Silbey, P Ewick and E Schuster, *Differential Use of Courts by Minority and Non-minority Populations in New Jersey* (1993) (on the US).

[4] Ibid. See also Asia Foundation, *Citizens' Perceptions of the Indonesian Justice Sector* (2001); World Bank, *Forging the Middle Ground: Engaging Non-State Justice in Indonesia* (2008); C Odinkalu, 'Poor Justice or Justice for the Poor? A View from Africa', Paper presented at World Bank Legal Development Forum, Washington DC (2005); Dale et al, *Trust, Authority and Decision Making: Findings from the Extended Timor-Leste Survey of Living Standards* (2010); and J Faundez, 'Should Justice Reform Projects Take Non-State Justice Systems Seriously? Perspectives from Latin America' in *The World Bank Legal Review* (2006).

[5] A Sen *The Idea of Justice* (2009), 20.

[6] For a typology of recognition of non-state justice, see B Connolly, 'Non-State Justice Systems and the State: Proposals for a Recognition Typology' (2005) 38 *Connecticut Law Review* 239.

[7] Some examples include Australia, Ethiopia and Indonesia.

[8] See generally T Carothers, *Promoting the Rule of Law Abroad: In Search of Knowledge* (2006); S Golub, *Beyond Rule of Law Orthodoxy: the Legal Empowerment Alternative*, Working Paper No. 14 (2003); Commission on Legal Empowerment of the Poor, *Making the Law Work for Everyone* (2008).

[9] See Commonwealth of Australia, above n 2.

one system over another, a more realistic strategy is to focus on overcoming the specific injustices of both state and non-state systems.

The article, therefore, broadly advocates for the creation of hybrid institutions through partial incorporation, an approach that attempts to blend the strengths and mitigate the weaknesses of formal and customary systems. This approach carries the challenge of marrying two systems that draw on different normative traditions, as well as the normative and political challenge of identifying comparative strengths and weaknesses.

These challenges, we contend, can be addressed by taking a "grounded approach" to designing programs to strengthen hybrid justice systems. This approach is attuned to local needs and opportunities, and focuses on reducing tangible instances of injustice in incremental steps rather than attempting to achieve an ideal form of justice.[10] Concepts and theory will be defined before drawing on case study research from five provinces and a nationwide quantitative survey from Indonesia to outline a grounded approach to reform. Specifically, five key steps are proposed: (i) understand the historical and contemporary political and policy context of formal and customary justice systems; (ii) analyze the strengths and weaknesses of formal and customary legal systems; (iii) identify entry points for strengthening hybrid justice systems based on an analytical framework of institutional change; (iv) realistically assess the opportunities for engagement on the entry points; and (v) ensure a flexible and long-term commitment to implementation.

The article seeks to provide guidance to practitioners and policy-makers by prescribing a *process* of engagement rather than any specific institutional arrangements or "quick fixes". To achieve this, it reflects on the establishment of a number of World Bank pilot programs in Indonesia.[11] In the next two sections, the basic steps of a grounded approach to engagement are illustrated by applying it to Indonesia. Section four presents the historical and contemporary context; section five considers the comparative strengths and weaknesses of Indonesia's hybrid justice system and its constituent institutions; and section six explains the entry points, opportunities and implementation modalities that have been identified through a discussion of three current pilot projects in Indonesia. The final section concludes.

2. Key definitions: Justice and hybridity

The title of this article includes a number of terms that need clarification. First, "reducing injustice" requires some discussion of how the article conceptualizes justice. Second, the concept of "hybridity" and the term "hybrid justice system" require definition.

2.1 Justice

Formal and customary legal systems tend to emphasize different concepts of justice, both in theory and practice. Understanding these different conceptions and how they interact is

[10] The term "grounded" is borrowed from the "grounded theory" approach to research. Although this article does not specifically propose a grounded theory methodology, it borrows a similar aspiration of developing policy based on field research rather than the application of best practice institutional templates. See generally, Barney Glaser and Anselm Strauss, *Discovery of Grounded Theory: Strategies for Qualitative Research* (1967). The focus on incremental steps to reduce tangible injustices rather than the introduction of ideal forms of justice is inspired by Sen, above n 5.

[11] We recognize that it is methodologically unsound to apply the analytical approach to the case from which it was inductively developed. However, the purpose of this article is not to prove the approach by applying it to the Indonesian case, but rather, illustrate the approach using the Indonesia case simply as a heuristic device. See B Geddes, *Paradigms and Sand Castles: Theory Building and Research Design in Comparative Politics* (2003), 94–5.

critical to our analysis. These different concepts are manifested in the underlying models of justice deployed (and thus the objectives they seek to achieve) and the way in which these models are implemented.

Accordingly, models of justice are commonly divided into three main categories: retributive, deterrent and restorative.[12] *Retributive* justice focuses on the moral dimension of justice. It emphasizes the notion that perpetrators of a crime or those who fail to abide by laws or customary norms "deserve" to be punished for their wrongdoing. On the other hand, a *deterrent* view of justice focuses on the instrumental dimension of justice. It emphasizes that punishment for wrongdoing is necessary to prevent further violations of the law and to signal the boundaries of socially acceptable behavior. Finally, the *restorative* view of justice focuses on the need to rebuild or restore relationships and/or socio-economic status. This form of justice includes scope for compensation as a way of correcting wrongdoing and achieving justice.

It has also been suggested that methods of justice can be divided into two categories: formal and negotiated.[13] The formal method arrives at its decisions — and therefore achieves justice — through the strict application of formal legal statutes and procedures. By contrast, the negotiated method arrives at its decisions through a process of negotiation. This could include a process of communal discussion, where a violation and appropriate punishment is discussed openly and settled jointly, but it can also manifest itself in ostensibly formal settings where a judge facilitates a negotiation between the lawyers of two opposing parties.

It is evident that formal justice systems and customary systems neither exclusively focus on only one model of justice nor a single means for the achievement of justice. Formal justice systems generally use formal means and emphasize retributive or deterrent views of justice in their approach to criminal law, but negotiated means and restorative views of justice are not uncommon in practice. Indeed, many other elements of formal legal systems simultaneously seek to achieve restorative objectives.[14]

Similarly, customary justice systems often use a combination of formal and negotiated methods to achieve all three justice-seeking objectives. Many "informal" justice systems are in fact formal in both procedural and substantive terms. Despite this overlap, many of the debates on the appropriateness of formal versus customary justice systems hinge on assumptions that each system only delivers one model or means of justice, or that some models or means are inappropriate for specific situations or contexts. However, as these examples suggest, it is not possible to maintain the first position, and the second rests on a normative assumption about the appropriate model and means in a given context or situation. This article thus takes the position that both state and local customary institutions are capable of delivering justice. Consequently, any attempt to reduce injustice must be based on consideration of local practices and justice-seeking objectives.

2.2 Hybridity

The theoretical and descriptive legal literature conceptualizes hybridity in the context of justice systems in three main ways. One approach understands a hybrid justice system as a

[12] See, for example, S Blackburn, *The Oxford Dictionary of Philosophy* (2005), 195–6, which uses the terms "retributive", "distributive" and "commutative", respectively.
[13] P Clark, 'Hybridity, Holism, and Traditional Justice: The Case of the *Gacaca* Courts in Post-Genocide Rwanda' (2007) 39 *George Washington International Law Review*, 772, 765.
[14] See G Williams, 'The Aims of the Law of Torts' (1951) *Current Legal Problems*, 137.

situation where two legal traditions mix in the same social field. These traditions are sometimes described as "mixed jurisdictions" or "hybrid systems of law", and are generally used to denote countries or jurisdictions where civil law and common law traditions are both applied.[15] Examples include Quebec, St Lucia, Seychelles, Scotland, Louisiana, the Philippines and Sri Lanka.

A second, somewhat similar account, suggests that a hybrid legal system exists where "two or more legal systems coexist in the same social field."[16] This explanation draws on the concept of legal pluralism. One important distinction between this account and the first is that the former encapsulates a broader range of legal traditions. The first approach is generally limited to the mixed application of civil and common law traditions, whereas the legal pluralist conceptualization of hybridity allows for other legal traditions, including customary and religious legal traditions. A second key distinction concerns the jurisdictional scope. The first approach implies that both legal traditions apply to all, but that civil law governs some sectors of society, and common law governs others, whereas the legal pluralist account allows for different rules to be applied to different subsets of the population.[17]

A third conceptualization understands hybridity as a characteristic of an individual legal institution rather than the justice sector as whole. In this way, both formal state and customary legal institutions can be considered hybrid if they borrow from other legal institutions or function in a hybrid manner, sometimes applying standard rules in a formal sense and sometimes negotiating outcomes, drawing on non-state legal norms. This has been referred to as "internal hybridity".[18] This conceptualization flows from recognition that customary legal institutions have borrowed from other legal institutions for centuries and that, in some places, they resemble their historical antecedents only in a very superficial sense. Indeed, contemporary research from Indonesia and the south Pacific region identifies a trend among customary authorities towards codification of rules and structures so as to "be seen like the state".[19] It also flows from the empirical analysis of legal systems in practice; analyses that suggest that legal systems rarely only pursue one justice objective (or the same mix of objectives) or method, but rather, adapt their objectives and methods to the local context and specific case circumstances. Similarly, the state borrows from non-state normative traditions in a dynamic process of institutional development and change.

This article conceptualizes the justice sector in countries like Indonesia as hybrid in the sense of the second approach (legal pluralism) and characterizes the individual systems that constitute the sector as internally hybrid. The focus of this article is therefore on strengthening the plural justice sector through both formal and customary justice systems.

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[15] P Da Cruz, *Comparative Law in a Changing World* (1999), 202.
[16] S Engle Merry, 'Legal Pluralism' (1988) 22 *Law and Society Review*, 870.
[17] RM Belle Antoine, *Commonwealth Caribbean Law and Legal Systems* (2008), 59.
[18] Clark, above n 13, 767.
[19] This seems like an attempt to seize the authority of the state to strengthen legitimacy, but it could also be a strategy to avoid state intrusion by taking a form that the state recognizes, understands and will then leave alone. J Timmer, 'Being Seen Like the State: Emulations of Legal Culture in Customary Labor and Land Tenure Arrangements in East Kalimantan, Indonesia' (2010) 37 *American Ethnologist* 703.

3. Five steps of a grounded approach to strengthening hybrid justice systems

This section outlines five key steps for a grounded approach to strengthening hybrid justice systems. The explanation of each step focuses on why it is important (the objectives or ends) and how it can be achieved (the methods or means). The five steps are:

1. Understand the historical and contemporary context.
2. Analyze the comparative strengths and weaknesses of the constituent parts of the hybrid justice system.
3. Identify entry points based on an analytical framework of institutional change.
4. Realistically assess opportunities for engagement on the entry points.
5. Ensure a flexible and long-term commitment to implementation.

Although the steps are presented sequentially, this is not to suggest that it is either feasible or desirable to pursue the grounded approach in this manner; rather, we suggest that all five steps should be considered from the outset of any new engagement with the hybrid justice system of a given country or context.

3.1 Step 1: Understand the historical and contemporary context

The first step in developing a grounded approach to strengthening hybrid justice systems is understanding the historical and contemporary political and policy context, as debated by policy makers, academics and civil society.

Understanding these debates and policy decisions is important for three main reasons. First, it will provide a sense of the opportunities available for strengthening hybrid justice systems. For example, the Philippines' compulsory mediation process at the village level, known as the Barangay Justice system, emerged from a different political and historical context than that in Indonesia, where the relationship between state justice institutions and local dispute resolution mechanisms is less institutionalized.[20] Understanding existing institutional structures and the policy imperatives that drove them is crucial to any efforts to strengthen them. Second, it will help to narrow the focus of engagement, a refrain repeated throughout this article. Third, it will help to prevent the "reinvention of the wheel". International development agencies, and even local non-governmental organizations (NGOs), often lack institutional memory and tend to reinvent the wheel or transplant reforms from other countries. The transplantation of legal concepts is not without merit;[21] but zeal for the new and foreign needs to be matched with an appreciation for the local and the past.

There are two main ways to build an understanding of the local historical and contemporary political and policy context — the "text-based approach" and the "people-based approach".

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[20] On the Barangay Justice System, see M Stephens, 'Local-level Dispute Resolution in Post-*reformasi* Indonesia: Lessons from the Philippines' (2003) 5(3) *Australian Journal of Asian Law*, 213; S Golub, 'Non-state Justice Systems in Bangladesh and the Philippines' (Paper prepared for DFID, January 2003); and G S Silliman, 'A Political Analysis of the Philippines' *Katarungang Pambarangay* System of Informal Justice through Mediation' (1985) 19(2) *Law and Society Review*, 279.

[21] Legal transplantation has occurred throughout history and often with positive effects. For example, Roman law has had a sustained and profound influence on civil and common law traditions in Europe, see P Wormald, *Legal Culture in the Medieval West* (1999). On legal transplantation and diffusion, see A Watson, *Legal Transplants* (1993); D Nelken and J Feest (eds), *Adapting Legal Cultures* (2001); M D Adler, 'Can Constitutional Borrowing be Justified?' (1998) 1 *University of Pennsylvania Journal of Constitutional Law* 350; and W Twining, 'Social Science and Diffusion of Law' (2005) 32(2) *Journal of Law and Society*, 203-40.

As the name suggests, the text-based approach is based on acquiring knowledge through texts, which includes books, journal articles, newspapers, laws, regulations and reports. Since this approach is limited, particularly in contexts that lack a strong writing culture, it is critical to balance it with a "people-based approach". This involves interviewing academics, politicians, researchers, activists and communities engaged in justice and governance issues or securing background papers or briefing sessions on the historical background and contemporary policy context. This may seem obvious, but in some contexts, particularly in smaller countries where international agencies appear to dominate the institutional landscape, international actors tend to consult only among themselves.[22]

As a final note in this subsection, it is important to be aware of the biases that one's background can have on the kind of texts and people one seeks out. For example, a lawyer might tend to place emphasis on laws, lawyers and the judiciary; a political scientist on policy, politicians and governance structures; and an anthropologist on the views of village-level actors and institutions. Although focus is necessary, it is important to think beyond one's background when designing programs to strengthen hybrid justice systems. For example, decentralization and village administrative reforms in Indonesia have had a significant influence on customary legal systems — this would not be apparent if one focused on statutory legal reform or Supreme Court regulations. Similarly, community development programs, which may be launched with no immediate aim of influencing customary justice mechanisms, often introduce norms and procedures that have precisely that effect.[23]

3.2 Step 2: Analyze the comparative strengths and weaknesses of the hybrid justice system

The second step of a grounded approach is to analyze the comparative strengths and weaknesses of the hybrid justice system and its constituent institutions *in practice*. This is important for three main reasons. First, institutional arrangements as written on paper are likely to be significantly different from their implementation in practice. Second, and as suggested by the discussion of justice and hybridity in the previous section, it is likely that the hybrid justice system, and its constituent institutions (generally, the formal state justice system and local customary legal systems), deal with different problems with varying levels of success. Such an analysis will, therefore, help to avoid the simplistic platitudes of "formal equals good, customary equals bad" and vice versa. Third, an analysis of strengths and weaknesses will facilitate the identification of priorities for strengthening hybrid justice systems. It is unrealistic to expect that external programs (or even local initiatives) will establish perfect institutions. It is more realistic to address a particular weakness or build on a particular strength rather than wholesale reform. As Amartya Sen has recently suggested, the focus should be on reducing injustice rather than attempting to achieve an ideal form of justice.[24]

There are two broad ways to implement this step. One involves undertaking original field research on the strengths and weaknesses of hybrid justice systems. Another simpler and more efficient method involves tapping available research and findings. In some countries, there is substantial empirical research on the workings and relative strengths and weaknesses of formal and customary legal systems. In others, however, research is weak or excessively formalistic and based on romanticized notions of customary systems. In

[22] This needs to be balanced against the tendency for each international agency to undertake its own assessment to the frustration of local agencies, particularly local government officials.
[23] The need for thinking laterally about the policy background and contemporary context will become apparent in the discussions on entry points below.
[24] Sen, above n 5.

Indonesia, for example, the World Bank decided that, although there was substantial historical research on *adat* (customary law) and dispute processing at the local level, there was little empirical research on these institutions because the country had undertaken major democratic and administrative reforms in the late 1990s and early 2000s. Consequently new empirical research was launched.

If empirical research on hybrid justice systems is insufficient, it is important that methodological rigor and multi-disciplinary perspectives are brought to bear in research design. Often those charged with developing strategies are lawyers or diplomats with limited empirical research experience. The authors also recommend that any new research be as specific as possible. This will help to ensure that research findings identify specific injustices and concrete, incremental steps that can be taken to reduce them. If research questions are too broad — for instance, *Are hybrid justice systems in Indonesia gender-sensitive or not?* — there is a danger that findings will focus on unattainable ideal forms of justice rather than overcoming tangible injustices. Research should, therefore, focus on: a particular type of dispute (land, divorce, labor, enforcement of community contracts); a particular type of problem (gender representation, inter-village or inter-ethnic issues, court-community relations, community-investor relations); a particular type of institution (district courts, village institutions) or a particular region or location (a province, post-conflict contexts, areas with forest land or plantations, etcetera).

3.3 Step 3: Identify strategic entry points based on an analytical framework

The primary objective of this step is to identify entry points for strengthening a hybrid justice system so that its constituent institutions deliver an appropriate mix of punitive, deterrent and restorative justice. In this article, an "entry point" is interpreted as a strategy for addressing a weakness or reinforcing a strength identified and prioritized in the previous step — it denotes *how* one addresses the problem, not the problem itself.

The identification of entry points requires an analytical framework for thinking strategically about institutional change. One problem with substantial research on and analysis of customary and hybrid legal systems is how they romanticize and present these institutions as "centuries-old", when in fact, like any institution, many are often adapting to internal demands and changes in the external environment.[25] This is reflected in the Indonesia context, for instance, in the call by many advocacy groups and some local governments for blanket state recognition of customary justice systems, often overlooking systematic biases within these systems against ethnic minorities and women.[26] By contrast, many women's NGOs seek, at the other extreme, to completely bypass customary justice systems, something that is not always feasible and that overlooks substantial inequities and injustice in the functioning of formal legal systems.[27]

Once the exotic nature of customary justice institutions and the presumed superiority of formal state justice systems is stripped away, it is apparent that they are just as susceptible to standard institutional or sociological analysis as any other institution. They involve the basic building blocks of any social phenomenon: actors or decisions, rules and norms, incentives and preferences, and resources and power relations. Thus, standard analytical

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[25] D L Van Cott, 'Dispensing Justice at the Margins of Formality' in Gretchen Helmke and Steven Levitsky (eds), *Informal Institutions and Democracy: Lessons from Latin America* (2006) 249, 251. See also, D Bourchier, 'Positivism and Romanticism in Indonesian Legal Thought' in T Lindsey (ed), *Indonesia: Law and Society* (2008), 94.
[26] See, for instance, W S Saputro, *Village Mediation Hall: Expansion of Community Access to Law and Justice [Balai Mediasi Desa: Perluasan akses hukum dan keadilan untuk rakyat]* (2007).
[27] For more on this topic, see World Bank, *Women's Access to Justice: Case Studies of Village Women Seeking Justice in Cianjur, Brebes and Lombok* (2008).

frameworks can be legitimately applied to hybrid justice systems to facilitate strategic thinking about how a particular issue or weakness can be addressed.

Helmke and Levitsky propose one such framework in a recent article on formal and informal institutions.[28] They identify four main mechanisms of change: (i) institutional design; (ii) institutional effectiveness; (iii) social values and norms; and (iv) changes in the external environment that alter the distribution of power and resources within communities. This framework provides our basis for thinking strategically about entry points for strengthening hybrid justice systems (see Table 1).

Table 1: Analytical framework for identifying entry points

Mechanism of change	Pace of change	Examples	Entry point
Change in institutional design	Often relatively rapid	Establishment of the Barangay Justice System in the Philippines; village-level codification of customary legal systems	Policy dialogue, working groups, design workshops, legal drafting
Change in institutional effectiveness	Variable	Provision of training to judges or community leaders	Procedural and skills training, resources, legal aid, organizational incentives
Change in social values and norms	Generally slow	Changes to kinship-based norms of reciprocity; changes to community values on gender relations	Information campaigns, grassroots workshops, education, etc.
Change in power relations and resource distribution	Generally slow	Changes to the economic role of women, and other marginalized groups	Group formation, economic empowerment, access to justice initiatives, etc.

3.3.1 Institutional design

The first mechanism of change relates to institutional design. In the context of hybrid justice systems, this mechanism — one that seeks to change formal rules and institutional structures — can apply to both the state legal system and formalized elements of local customary mechanisms. For example, our research in the Indonesian province of West Sumatra identified one village where a local woman successfully campaigned to change the local rules governing customary land to prevent the sale of matrilineal land by male clan heads.[29] We identified a number of local government regulations and court circular letters on

[28] G Helmke and S Levitsky, 'Informal Institutions and Comparative Politics: A Research Agenda' (2004) 2(4) *Perspectives on Politics* 725.
[29] World Bank, above n 4.

the recognition of decisions of non-state justice institutions in the courts. Our research also demonstrated that this mechanism of change can form a part of initiatives to formalize customary legal systems. In the province of West Nusa Tenggara, for instance, a group of villages on the island of Lombok has formalized institutional structures and codified local rules for the delivery of local justice; in some cases, this involved making substantive changes to the design of local institutions.[30]

3.3.2 Institutional effectiveness

The second mechanism of change is to improve the effectiveness of the institutional arrangements in protecting the rights of the vulnerable. This mechanism could relate to either state or customary legal systems. It should be noted, however, that efforts to improve one institution are likely to affect the operation of the other, depending on their interaction and relationship. Efforts to improve the accessibility of the police and their capacity to handle domestic violence, for instance, could well induce victims, and possibly also community leaders, to abandon the use of customary legal institutions for this type of problem.

Improving the effectiveness of institutions could involve a number of entry points. An obvious one is the provision of skills training to key justice sector actors, such as judges, prosecutors, the police, community leaders, religious leaders and women's leaders. The content of such training would depend on the specific strengths and weaknesses identified in the previous step. It could include mediation skills for judges and/or community leaders, training on how police should handle domestic violence complaints, or facilitating opportunities for state and non-state justice actors to interact. Another entry point is the provision of resources to ensure that established regulations and guidelines are actually implemented. Such an entry point would obviously only be effective if the previous analysis clearly indicated that the bottleneck was the lack of resources and not other factors such as institutional incentives or informal norms.

3.3.3 Social values and norms

The origin and evolution of social values and norms is complex.[31] Yet generally, changes in social values are slow and incremental, and not prone to deliberate external intervention. For example, it might take decades for social norms of punitive justice for rape and sexual abuse to strengthen to the point that they override norms of kinship.[32] In some circumstances, as Helmke and Levitksy have suggested, some social norms can actually change rapidly when a "sufficiently large number of actors become convinced that a new and better alternative exists, and if a mechanism exists through which to coordinate actors' expectations".[33] However, overall, the strength and resilience of local norms and beliefs emphasize the need to understand local authority structures at the village level. Thus, entry points for change are likely to be more effective when sponsored by local authorities or leaders.

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[30] Ibid 54.
[31] J Elster, *Explaining Social Behavior: More Nuts and Bolts for the Social Sciences* (2007), 368.
[32] See Case Study 5 below: Rape Overlooked in Sepa Village. The point of this discussion is not to suggest that erosion of social norms is either desirable or an aim of local justice reform programs, but rather, that there is a need to be aware of and respect the strength of local norms in designing such programs.
[33] Helmke and Levitsky, above n 28, 732.

3.3 4 Change in Power Relations

The fourth mechanism of change focuses on the role that the distribution of power and resources has on the implementation of state and customary legal systems. This mechanism is best illustrated with an example from the Indonesian province of West Sumatra. In Batu Gadang, a village in the province, a women's group was established to run small business activities, but later evolved to become active in mediating community disputes. After demonstrating success in this endeavor, members of the group managed to secure an allocated seat in the traditional customary law council, which was previously not possible for women. At least part of their success was due to financial independence, which significantly improved their bargaining position on issues of institutional design and decision-making in the village.

This mechanism of change highlights the importance of thinking laterally about entry points for engaging hybrid justice systems. It indicates that activities not directly related to strengthening justice institutions can have a significant impact on their operation and the justice-seeking objectives they achieve. Social mobilization, group formation and economic empowerment can change power dynamics, improving the bargaining position of justice-seekers *vis-à-vis* both the state and customary legal systems and, in turn, carry the potential to drive institutional reform.

3.4 Step 4: Realistically assess opportunities for engagement in the entry points

The main objective here is to stand back and double-check that the strategic entry points identified in the previous step are realistic. This is important regardless of whether the entry points are policy-focused (e.g. institutional design changes), or program-focused (e.g. provision of skills training). For example, institutional design changes require significant political buy-in, irrespective of whether they are focused on regulatory reforms at the national level or changes to the way customary-based mechanisms are structured at the village level. Similarly, efforts to improve skills will have little influence if social norms and unequal power relationships compromise their application in practice.

Ensuring that entry points identified in the previous step are realistic requires detailed and careful identification of local partners who have the understanding and the influence to drive change. If local actors — national or local politicians, religious leaders, civil society organizations or community leaders, etcetera — are not genuinely interested in addressing the weaknesses, then external efforts are likely to prove fruitless. Care needs to be taken, however, when a possible partnership involves the provision of financial resources. Some NGOs or community leaders may be prepared to claim commitment to reform if it means gaining access to resources.

3.5 Step 5: Ensure a flexible and long-term commitment to implementation

Occasionally, there are opportunities for quick wins, but these are the exception, not the rule. As indicated in step three, many of the possible entry points involve slow processes of change. Thus, the final step of the "grounded approach" is to manage expectations and ensure that the timing of any initiative is appropriately adapted to the mechanism of change.

For example, if the entry point is "social values and norms", then a long-term and flexible implementation modality is necessary. One-off workshops at the local level are unlikely to have any significant effect. By contrast, putting resources into a civil society network of

women's groups that would provide support for literacy, education, financial independence and legal awareness over an extended period is more likely to facilitate change.

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The previous two sections provided the theoretical outline of a grounded approach to strengthening hybrid justice systems. The next three sections illustrate this approach by summarizing the results of recent research by the World Bank on non-state justice in Indonesia.[34] This includes a description of the historical background and contemporary policy context (step one) and an analysis of the strengths and weaknesses of the hybrid justice system in Indonesia (step two). Finally, to demonstrate how the grounded approach can be translated into practical activities on the ground (steps three, four and five), section six presents a summary of some of the pilot programs that the World Bank is supporting across Indonesia with a broad set of local partners to address weaknesses and build on strengths identified in section five.

4. The historical and contemporary context of hybrid justice systems in Indonesia: colonization, independence and regional autonomy

This section briefly summarizes historical and contemporary approaches to customary legal systems in Indonesia. It highlights how the advent of regional autonomy in the post-Suharto era has generated significant opportunities for strengthening Indonesia's hybrid justice system at both the national and local level, but that it has also brought out the weaknesses of current arrangements. This paves the way for a broader discussion of the strengths and weaknesses of hybrid justice systems in the following section.

4.1 Historical context: colonization and independence

When Indonesia achieved independence in 1945, it inherited a justice system combining traditional, colonial and Islamic legal influences. The Dutch administration had dealt with the plurality of customary norms and institutions by establishing a hybrid legal system that applied different laws to different racial groups. In simple terms, Europeans were subject to Dutch law, and Indonesians to traditional customary or *adat* law.[35]

In institutional terms, the status of village justice mechanisms also varied, reflecting the tension between, on the one hand, recognition of diversity and, on the other, the desire for legal unity and "modernity". Until 1874, the Native Courts operated in accordance with traditional customary (*adat*) law and procedure. From 1874–1935, official recognition for village justice was withdrawn, although it continued to operate in practice. In 1935, the colonial government rehabilitated village justice by requiring first instance state courts to take the prior decisions of *Adat* Councils into account.

When the new republic was formed in 1945, national policy promoted a uniform legal system. Institutionally, legal pluralism was viewed as inimical to nationhood and modernity. Nonetheless, the 1945 Constitution and subsequent amendments have provided conditional

[34] World Bank, above n 4.
[35] See generally T Lindsey and M Achmad Santosa, 'The Trajectory of Law Reform in Indonesia: A Short Overview of Legal Systems and Change in Indonesia' in T Lindsey (ed) *Indonesia: Law and Society* 2, 4–12.

recognition of traditional customary law.[36] This level of recognition is very limited, however: judges are required by law to "[e]xplore, follow and understand the legal values and sense of justice which exists in society".[37] While judges are obliged to take into account the outcomes of non-state justice deliberations, in reality they are free to ignore or pay lip service to this requirement, and indeed many do. Thus, despite the legal protections and policy rhetoric, the sum of the above has been that historically, "*Adat* is [a] default legal source, applicable only informally or where regulations are silent."[38] At least from the state's perspective, written state law will always trump customary law.

In addition to legal and policy constraints on the recognition of customary norms and institutions, the Indonesian Government imposed a uniform model of village governance, based on Javanese structures, through *Law 5/1979 on Local Government*.[39] This restricted the authority of customary leadership across the country.

4.2 Regional autonomy and the *Adat* revival

The formal position of customary local institutions changed in 1999 when post-Suharto Indonesia instituted a broad process of regional autonomy. *Law No. 22/1999 on Regional Governance* authorized district governments to reconfigure village governance structures — including dispute resolution mechanisms — along inclusive and democratic lines. Reflecting a spirit of autonomy, the law established democratically elected village parliaments and devolved a greater degree of executive authority. On the "judicial" side, article 101(e) gave binding authority to village heads, together with the *Adat* Council, to resolve disputes.[40]

Through local regulations, a limited number of local governments have sought to recognize and raise the profile of local customary actors, institutions and norms. Generally, the provinces and districts that have taken advantage of the national policy shift have sought to revive what H Patrick Glenn has called "the old ways", promoting local justice institutions dominated by male, indigenous elites.[41] This revival of customary institutions has been particularly evident in locations outside Java, primarily in areas where religious or traditional cultural identity has remained strong, or where ethnic conflict has been experienced since 1999. Some examples of local governance reform in the post-Suharto era are explored below.

4.2.1 Maluku Province

In Maluku, a province in Eastern Indonesia, the regional government has regulated a return to traditional village structures. At the provincial level, *Regional Regulation No. 14/2005 on the Return to the Negeri* enhanced the dispute resolution authority of the *raja* (literally "king"), who represents the highest authority and is often both the traditional and the

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[36] The Constitution asserts "The State recognizes and respects individual traditional customary law communities and their traditional rights as long as they survive, and in accordance with the development of society and the principle of the Unitary State of the Republic of Indonesia, as regulated by law." (Article 18B(2)); and "Cultural identity and the rights of traditional communities are respected in accordance with the continuing development of civilization over time." (Article 28I(3)).
[37] *Law No. 4/2004 on the Authority of Judges* (Indonesia), art 28(1).
[38] T Lindsey, 'Inheritance and Guardianship and Women: Islamic Laws in Aceh, a Year After the Tsunami' (2006), Paper commissioned by the International Development Law Organization (IDLO).
[39] *Law No. 5/1979 on Local Government* (Indonesia).
[40] *Law No. 32/2004 on Regional Government* (Indonesia), which replaced *Law No. 22/1999 on Regional Government* (Indonesia), removed this jurisdiction, but it was later restored by *Government Regulation No. 72/2005 on the Village* (Indonesia). *Adat* councils are generally non-elected local tribunals that represent the different clans within a traditional community. *Adat* leaders often serve concurrently as elected village heads or appointed members of other village councils. For more on Adat Councils, see World Bank, above n 4, 20.
[41] H P Glenn, *Legal Traditions of the World* (2001), 77.

elected leader of the village. At the time the World Bank undertook research in this province (2005–2007), only a handful of districts had issued their own regulations under the provincial umbrella.

In some villages, this amounts to recognition of continuing, well-organized institutions. For example, in Pelau, a village in Central Maluku district, the local *adat* dispute resolution structure is well-defined. It incorporates all key elements of local power into one body: the *raja;* the Islamic priest or *penghulu*, who represents religious authority and manages family disputes; and the heads of village clans, covering the community at large. In other villages, the system is less defined and more informal. In these locations, the regional autonomy regulatory reforms have had little effect and local dispute resolution mechanisms continue to operate in similar ways — families attempt bilateral resolution, moving up to the local hamlet or clan leaders, and then the village head if resolution is not possible. Many of these regulations and village practices make no distinction between legislative, executive and judicial functions, as is common in small-scale communities.[42]

4.2.2 West Sumatra

In West Sumatra, a province in Western Indonesia, indigenous *Minangkabau* ethnic identity remained strong despite the imposition of uniform Javanese village structures under *Law 5/1979 on Local Government*. This law created 3,138 *desa* — the Javanese term for village — replacing 543 *nagari* — the territorial, social, political and independent self-governing entity of the Minangkabau that ideally comprised four exogamous matrilineal descent groups. However, a provincial decree followed in 1983, protecting the status of the *nagari* as an *adat* entity.[43] This stipulated that the Nagari Adat Council (*Kerapatan Adat Nagari*, KAN) would continue as the highest authority regarding *adat* and act as a mediator and judge in *adat* cases, particularly regarding *adat* land.[44] According to some informants, the authority of the KAN in relation to the new village administrative structure caused difficulties such that in some locations, the role of the former was gradually confined to ceremonial functions only.

Following the institution of regional autonomy, the provincial and district governments of West Sumatra moved rapidly to restore the full authority of the *nagari*, including strengthened recognition of local customary dispute resolution institutions.[45] The Village Customary Council (*Lembaga Adat Nagari*, LAN), which replaced the KAN but still comprises lineage heads, is stipulated as having official responsibility for village-level dispute resolution, although in practice, the village head also discharges this function. In many locations, the LAN has become increasingly involved in all aspects of village governance such that it has displaced the village parliament or other legislative bodies as designated in district regulations.

4.2.3 Central Kalimantan

In Central Kalimantan, a province on Indonesian Borneo, a number of regulations have been passed to strengthen recognition of the *damang*, a local customary leader traditionally responsible for dispute resolution.[46] This has been mostly a rhetorical exercise, however, which concerns more the reassertion of indigenous Dayak ethnic identity in the aftermath of

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[42] M Shapiro, *Courts: A Comparative and Political Analysis* (1981), 20-2.
[43] *Regional Regulation No. 13/1983 on the Nagari as a Community Adat Legal Entity* (West Sumatra).
[44] *Gubernatorial Decision No. 08/1994 on Adat Dispute Resolution Guidelines in the Jurisdiction of the Kerapatan Adat Nagari* (West Sumatra).
[45] *Regional Regulation No. 9/2000 concerning Provisions of Nagari Governance* (West Sumatra).
[46] *Regional Regulation No. 25/2000 on the Jurisdiction of the Government and the Provincial Government as an Autonomous Region* (Central Kalimantan); *District Regulation No. 15/2001 on Adat Institutions* (East Kotawaringin).

bloody conflict between Dayaks and transmigrant Madurese over the 1999–2002 period than the strengthening of local justice.[47]

The regulations have not been backed by additional training or support for *damang* to discharge their dispute resolution function, with the result that the level of community respect for the *damang* is mostly a product of individual personal characteristics rather than institutional strength or legitimacy. Indeed, the fieldwork undertaken in Central Kalimantan between 2004 and 2006 indicated that *damang* were active and provided an important dispute resolution service to communities in some places, but were moribund or purely opportunistic in others.

4.3 The Indonesian approach: Partial incorporation?

Despite considerable variation across the provinces, the overall trend in Indonesia has been a policy shift towards what Connolly dubs "partial incorporation", where informal and formal justice systems operate relatively independently, but with local dispute resolution mechanisms receiving recognition, some resources and oversight from the state.[48]

Local governments have led these reforms. In addition, as the regional examples above illustrate, in a number of provinces and districts, a healthy debate has evolved on the appropriate role and form of customary justice institutions. In this debate, few question whether *village-level* justice systems are important, but many query whether the *adat* revival is appropriate for strengthening justice at the community level.[49] Since *Adat* institutions tend to be dominated by male, indigenous ethnic elites, they are often ill-equipped to handle the legal concerns of minority groups and women. Hence, some local actors argue for a new form of local justice that better accommodates the modern realities of ethnic heterogeneity and constitutional protections against discrimination on the basis of gender, race and religion. Furthermore, democratic reforms and the opening up of political space more broadly has led to an increased role for civil society groups in customary dispute resolution and governance institutions through capacity-building, research and advocacy. This has brought a range of different voices and perspectives into policy dialogue on this issue.

This article interprets this contemporary policy context as an opportunity, but acknowledges that partial incorporation is not without problems. First, there is significant variation in the effectiveness of these newly recognized local institutions. Second, judges required to take into account local customs and the decisions of these institutions often do not understand them. Finally, there is also the risk of "over-formalization". In the process of recognizing local institutions, their very advantages — namely, flexibility to match process, remedy and sanction to local realities — could be undermined. Codification of norms also risks locking in one person or group's interpretation of local norms when these are usually contested. The next section turns to a discussion of the strengths and weaknesses of these current arrangements.

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[47] On the conflict, see International Crisis Group, *Communal Violence in Indonesia: Lessons from Kalimantan*, Asia Report No.19 (2001).
[48] Connolly, above n 6, 239.
[49] F von Benda-Beckmann and K von Benda-Beckmann, 'Recreating the *Nagari*: Decentralisation in West Sumatra', Paper presented at the conference of the European Association for Southeast Asian Studies, London, 6–8 September 2001.

5. The practice of local justice in Indonesia: Strengths and weaknesses

Developing a strategy to strengthen hybrid justice systems requires an understanding of how its constituent institutions deliver dispute resolution services in practice and an understanding of the core strengths and weaknesses of these arrangements. This section presents some of the key findings of World Bank research on local dispute resolution and justice in Indonesia, undertaken between 2003 and 2007.[50] This research employed a mixed methods approach combining qualitative and quantitative techniques to achieve depth and breadth of analysis. In-depth interviews and focus group discussions were undertaken at the provincial, district and village levels in five provinces, generating case studies of over 30 disputes. The research also drew on the nationally representative 2006 *Governance and Decentralization Survey 2* (GDS2), which included a number of questions on dispute resolution and conflict.[51]

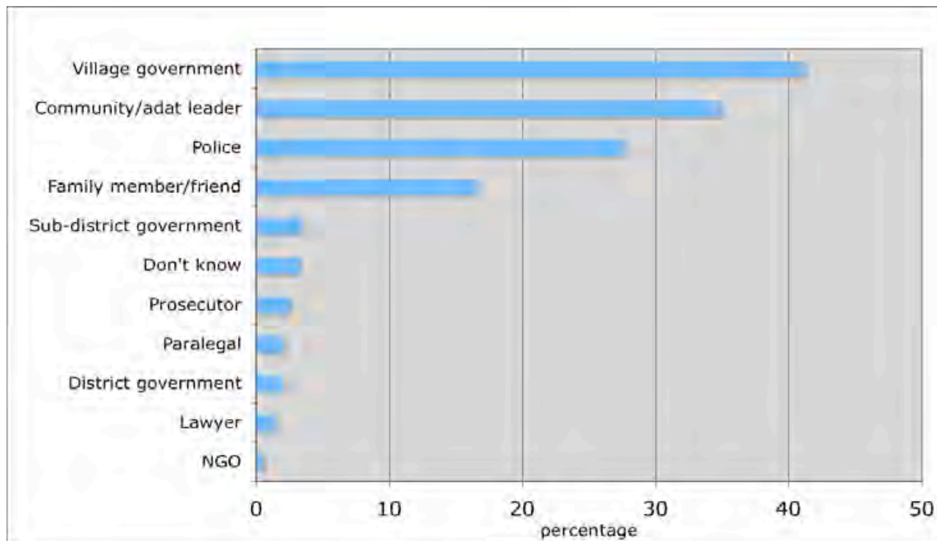
5.1 An overview of hybridity in practice

Villagers in Indonesia with a grievance have, at least hypothetically, a range of options or "paths to justice" open to them. First, they can attempt to resolve the dispute themselves. Indeed, the majority of disputants attempt bilateral resolution. Second, the disputants can seek the mediatory or adjudicatory assistance of local community leaders. This usually includes hamlet heads, village heads, religious leaders as well as other customary and influential figures. The third option is to report the matter to the police. This is common for serious criminal offences, particularly when violence is involved or likely to occur. Fourth, and finally, the disputants can report the case to the court or prosecutors' office. This is rare. Generally, a disputant begins with the first option and moves up the hierarchy of authority and influence until a satisfactory outcome is reached.

Overall, the vast majority of disputes are resolved either bilaterally or by village officials or community leaders. Figure 1 shows that in 2006 village officials (mostly hamlet and village heads) and community leaders (mostly religious and traditional customary leaders) are the most active dispute resolution actors, involved in the resolution of over 40 percent and 35 percent of disputes, respectively. The survey also highlights the active role of police in dispute resolution.

[50] World Bank, above n 4.
[51] *The Governance and Decentralization Survey 2*, 2006 <http://www.smeru.or.id/report/research/gds2/gds2_eng.pdf> at 13 January 2011.

Figure 1: Informal and formal actors in Indonesia in dispute resolution



Source: GDS Survey (2006)

It would be incorrect to suggest, however, that the four pathways noted above represent a distinct dichotomy between state and customary institutions. Indeed, the cases researched in Indonesia demonstrate significant interaction between state and customary institutions. Specifically, the research suggests that state and local customary institutions interact in two main ways – direct and indirect. *Direct interaction* occurs when: (i) the formal system becomes directly involved in handling a case that has passed through the informal system through a process of "appeal"; or when (ii) a dispute is simultaneously processed through both formal and informal mechanisms. The research also indicated that even if the formal system does not directly handle a case, it can *indirectly* play an important role in informal dispute processing. This occurs when: (i) formal justice actors act as informal actors (most prominently when police mediate crimes); or more commonly when (ii) informal justice actors or disputants use the formal justice system as a point of reference or source of norms in informal justice proceedings; and, *vice versa*, when (iii) formal justice actors use the customary justice system as a point of reference or source of norms.

This hybrid arrangement, where dispute resolution and justice-seeking are shared between formal state and local customary institutions, has advantages and disadvantages, as discussed below.

5.2 Strengths of Hybrid Justice Systems

5.2.1 Accessibility and responsiveness

Some of the strengths are clear and simple, such as physical accessibility. Neighborhood heads, village heads, *adat* leaders and religious leaders are based in the village, known to community members and accessible. By contrast, the police and the courts are often located in distant district capitals.

A concomitant strength is speed of action. Lengthy resolution processes can impact on the livelihoods of the poor, particularly where economic rights are at stake. At times when violence is imminent between disputing parties or groups, as in several cases researched in East Java, rapid action is also necessary. In cases that reached resolution, the process was normally quick. A case of manslaughter in Palangkaraya, Central Kalimantan, was resolved

in three weeks, and a fight in nearby Kuala Kapuas in two (see also Case Study 1). Most cases in East Java and Maluku were also handled within two to three weeks or less. Cost is another important consideration. For most of the cases studied, there were no case filing or hearing fees.[52]

Case Study 1: A fistfight fixed fast[53]

Nuri is a farmer from a rural village in Lampung Province. One day, his son got into a fight with a school classmate. The child's father stepped in and beat Nuri's son.

Rather than report the case to the police, Nuri approached Parmin, the hamlet head, and Bejo, a paralegal under a program run by a local legal aid NGO. As Nuri said, they were known as people "who can resolve problems". Parmin and Bejo called the parties together at Parmin's house, talked through the problem and were able to resolve it quickly and peacefully through an acknowledgment of fault and an apology. Nuri categorically said that problems taken to the police never turn out well. "If you take a problem to the police," he said, "they might beat you, lock you up. There's no control."

5.2.2 Formal actors act informally to overcome power imbalances

The ability of the state to work with informal actors extends the "shadow of the law" downwards, bringing the authority and power of the state down to the village level. This can assist enforcement by backing social legitimacy with state authority.

As noted above, the police are often involved in dispute resolution. Yet, as clearly shown in Figure 1, other actors in the formal system, such as prosecutors and lawyers, are rarely involved. This demonstrates that a report to the police does not immediately trigger formal legal action. Indeed, police action often takes the form of mediation or the provision of security at village mediations.[54] The police sometimes actively convince or instruct the disputants (or just the reporting disputant) to report or revert to village leaders rather than pursue their case through formal legal channels. The presence of the police and the inherent threat to escalate a case to the formal system often provides strong motivation to mediate conflicts at the local level. In this way, the involvement of the police effectively casts the "shadow of the law" over informal justice proceedings and outcomes. For example, in Case 2, the police were closely involved in the informal resolution of a street fight in Madura, East Java, by protecting the victim, participating in the negotiations and, finally, guaranteeing enforcement.

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[52] *Adat* dispute resolution in Central Kalimantan is an exception. Filing fees in one case studied were 600,000 Rupiah (around US$65); in another, the *Adat* Council charged 6 million Rupiah (US$650).
[53] This case is drawn from field notes prepared by Alpian, Pieter Evers and Cathy McWilliam from a May 2007 field trip to Lampung Province to evaluate the Justice for the Poor's *Revitalization of Legal Aid* program.
[54] In A Baare, *Policing and Local Level Conflict Management in Resource Constrained Environments* (2004) 9, unpublished memo, police claimed that they mediated as many as 80 percent of the legal complaints they received.

Case Study 2: Street fight turns ugly

One afternoon in the village of Blumbungan, the streets were full as a procession of pilgrims returning from the *Hajj* passed through the town. At an intersection, a motorbike rider overtook a car waiting at a traffic light. The car then turned right without looking, crashing into the motorbike. Wardi, who had been watching the procession, rushed to help the motorbike rider and shouted at Paidi, who was driving the car, "If you're going to drive a car, be careful, don't be so reckless. This is what happens when you speed." Feeling insulted and humiliated in front of the crowd, Paidi jumped from his car and began to punch Wardi. The fight was short-lived, as some people stepped in to separate the two. Paidi returned home, while Wardi remained at the procession.

But Paidi wasn't finished yet. Still enraged by the insult, he returned to the scene, this time carrying a kitchen knife and backed by his father. He attacked Wardi, threatening to kill him. Standers-by separated the two again, but Wardi reported the incident to the local police. After collecting evidence from witnesses, the police initially detained Paidi in the local police cell. They then called a local Islamic priest (*kyai*) to attempt peaceful resolution without a formal police report. However, Wardi refused.

A few days later, Paidi reported the matter to his village head. The village head proposed to call a community meeting to resolve the problem. Wardi agreed to attend. Shortly thereafter, the village head called together a neighborhood leader, the village military officer, a member of a local gang and a number of other community leaders, all from Paidi's village. They brought with them a pre-prepared letter of agreement in which Wardi agreed to drop his police complaint.

Wardi felt intimidated, particularly by the presence of the gang member and military officer. Initially, he refused to cooperate. Finally, after much discussion, Wardi agreed to resolve the issue informally, providing that a letter of agreement was witnessed and signed at the police station. In this way, Wardi managed to secure an informal guarantee of no further reprisal, his security ensured by the police. Nonetheless, the outcome of this case was not fully fair — it was clear that Wardi had been pressured into an outcome that did not satisfy his demands for punitive justice.

5.2.3 Ability to restore harmonious relations

Another important and related factor is the ability of non-state justice to restore harmonious relations. According to a survey undertaken by The Asia Foundation, the majority of respondents who chose informal justice cited the prospect of maintaining communal harmony as their main motivation.[55] Informal justice actors are able to achieve this by virtue of their local authority and flexibility of norms, processes and sanctions. People seek assistance from their village heads, religious and traditional leaders precisely because they possess social legitimacy in the village milieu. They are not neutral and independent actors (as judges are required to be), but rather, they are directly involved in the day-to-day life of the village and are familiar with the social and political background of disputes. Separating dispute resolution from village governance, politics and social relations is something of an artificial exercise that local actors do not engage in.

5.2.4 Flexibility to balance justice-seeking objectives

Cooperation between the constituent institutions of the hybrid justice system can facilitate balancing of the objectives of punitive, deterrent and restorative justice. Direct interaction between informal and formal disputes often involves compromise and negotiation between the two systems, which sometimes have different imperatives. A manslaughter case from Kalimantan illustrated how formal and informal systems can successfully cooperate in order to balance these imperatives. In this case, the families of the victim and the perpetrator reconciled and *restored* relations through *adat* processes; the court delivered *retributive* or

[55] Asia Foundation, above n 4.

deterrent justice through a prison sentence. A light sentence was imposed, since the judicial panel took into account the *adat* process that the families had undertaken.[56]

5.2.5 Providing potential pathways to accountability

The ability of disputants to "appeal" customary justice decisions to the formal system acts as a form of accountability to a system that arguably trumps local values and customs. Just as cases are appealed through the formal system up to the Supreme Court, cases can be "appealed" from the informal to the formal. This can be conceptualized as a "reactive" form of oversight, triggered only when a disputant submits a complaint to the court that has already been handled through informal mechanisms.[57] In Case Study 3, a disputant, dissatisfied with an *adat* sanction that effectively outlawed him from having an opinion on whom his daughter should marry, appealed the *adat* decision to the District Court. In this case, the formal system acted as an oversight mechanism of the *adat* process.

Case Study 3: Heavy *adat* fines are "appealed"

Haji Anggeng is a prominent political figure and member of the Regional Parliament in West Lombok. He is from Tanjung sub-district, but lives in the provincial capital of Mataram because of his political activities. In February 2002, his daughter Linda was "kidnapped" by Sahrudin, a young man from a nearby neighborhood.[58]

The following day, Sahrudin's family asked the hamlet head to officially inform Anggeng of his intention to marry Linda. According to a witness at one of these meetings, Anggeng gave his blessing, subject to the payment of five million Rupiah (approximately US$500) as "compensation" for the kidnapping. However, two days later, Anggeng visited Linda at Sahrudin's house to verify her desire to marry. He also queried the capacity of Sahrudin's family to look after her financially. The next day, Linda left Sahrudin's house and, upon an investigation by the village, was found at her father's house in Mataram. This was interpreted as a violation of proper *adat* marriage procedures.

That afternoon, the hamlet head, religious leaders and neighborhood head held a *musyawarah* (community meeting) to consider the matter. At this meeting it was decided that Anggeng had violated *adat.* A heavy fine was handed down, including the payment of two goats, food and a sum of money to be distributed to the poor. Anggeng rejected these fines and took the case to the District Court.

In court, Anggeng objected to the procedures, decision and sanctions of the *adat* institution. The court determined that the fines were invalid, not on the grounds that the *adat* council had acted beyond its jurisdiction to hand down such a severe sanction, but that the sanction was not consistent with local *adat*. On this reasoning, the court would have upheld the sanction if it were in line with local *adat*.

In response, the *adat* council simply increased the sanctions further, including evicting Anggeng from the village for three years and denying his civil rights and role in *adat* functions. However, a combination of the court decision and Haji Anggeng's powerful position meant that the *adat* sanctions were never enforced and have had little impact on Anggeng's ability to participate in village life. Nonetheless, the *Adat* Council's refusal to acknowledge its subordinate relationship to the court does highlight the difficulties that formal institutions face in ensuring the accountability of traditional systems.

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[56] See World Bank, above n 4, 55.
[57] On proactive versus reactive mobilization of the law, see D J Black, 'The Mobilization of the Law' (1973) 2 *Journal of Legal Studies*, 125.
[58] In Lombok, there is a tradition known as *merariq* or *memulang*, where the groom symbolically kidnaps his fiancée and brings her to his family as a way of announcing his intentions. Although not always the case, it is presumed that the woman is obliging.

5.3 Weaknesses of hybrid justice systems

Social authority may well be the key strength of informal justice, but its unchecked exercise internally and its relative impotence outside the village milieu are also simultaneously its core weaknesses.[59] Along these lines, the research in Indonesia focused on three such weaknesses: the resolution of disputes involving the interests of women; inter-communal groups; and external third parties. The research also identified weaknesses where customary institutions overlooked punitive and deterrent justice-seeking objectives, and conversely where formal state institutions enforced punitive sanctions that violate human rights and constitutional norms.

5.3.1 Failure to protect the rights and interests of women

Arguably, local justice institutions do not protect and serve women's interests well.[60] Rather than balancing interests, they tend to reinforce existing social norms and power relations. Divorced as they are from local authority structures, women's interests are often expendable; there is limited social or political return in protecting them. This is both caused by, and reflected in, women's lack of representation in local dispute resolution mechanisms and a paradigm of the objectification of women's rights. Consequently, many women's legal issues are either ignored or not taken seriously, as illustrated in Case Studies 4, 5 and 6.

Case Study 4: Ibu Marnis' land is sold by her brother: Sumpur, West Sumatra

Ibu Marnis and the other women in her family discovered that, in order to pay a debt incurred by his son, their maternal uncle (*mamak*) was planning to sell off lineage land without the required consent of the women. When they objected, the *mamak* threatened them verbally and physically. They appealed to the four lineage elders (*ninik mamak)* to urge their *mamak* not to sell the land.

But the *ninik mamak* supported the *mamak* and the sale went ahead. They were more concerned about the potential embarrassment the *mamak* would feel if his family could not repay a debt than the impact on the women as owners of the land. The women were pressured to sign the agreement and ultimately did so, but only on condition that no further lineage land be alienated. The *mamak* nonetheless continued to sell more lineage land the year after. The *mamak* is now dead but, more than 20 years later, Ibu Marnis is still using her savings to buy back the land he sold off.

5.3.2 Inter-communal conflict

The authority of customary legal systems rarely extends beyond its own sphere of influence, be it territorial (village and neighborhood heads), clan-based (*adat* leaders) or social (religious leaders). Furthermore, trust and social sanction are crucial to the sustainability of mediated agreements. These dual factors — the inability to project social authority and lack of social trust — severely compromise the ability of village actors to resolve inter-communal disputes.

This weakness is at times resolved through cooperation with state authorities such as the police, as noted above. However, some village leaders are reluctant to rely on these actors.

[59] This has been well documented. For example, Odinkalu notes: "The assertion that powerful men are liable to and do in fact get a better deal out of the application of customary law is obvious." See Odinkalu, above n 4. See also World Bank, *Village Justice in Indonesia: Case Studies on Access to Justice, Village Democracy and Governance* (2004); S Dinnen, *Building Bridges – Law and Justice Reform in Papua New Guinea*, *State, Society & Governance in Melanesia Working Paper No. 01/3* (2001); World Bank, above n 4; and T Hohe and R Nixon 'Reconciling Justice: Traditional Law and State Judiciary in East Timor' (2003). Certainly, much research indicates that the formal system is not very different. See, for instance, the seminal article by M Galanter, 'Why the "Haves" Come out Ahead: Speculations on the Limits of Legal Change' (1974) 9 *Law & Society Review* 95.
[60] Lawyers from LBH-APIK (Women's Legal Aid NGO) in Lombok also stated that women are better served by formal justice. See World Bank, above n 27.

Moreover, state authorities themselves are often reluctant to intervene or simply ineffectual. Our research identified a number of unresolved inter-communal disputes, including an extraordinary example from Lombok in West Nusa Tenggara Province, where two villages had built a three-meter high wall between them to prevent conflict that had claimed tens of lives over the previous decade. The lack of legitimate fora for communication and conciliation across local boundaries can lead to a clash of values and see minor disputes become major violent conflict.

5.3.3 Disputes involving the interests of powerful third parties

Indonesia's hybrid justice system and its constituent institutions are rarely able to overcome significant power imbalances at play in disputes pitting villagers against powerful third parties, such as forestry companies, palm oil plantations, factories and other major private sector interests. The research found that these types of disputes are increasingly common. This is particularly the case in rural areas where some newly empowered district governments are encouraging the expansion of extractive industries into traditional customary land.[61] Furthermore, although there are some signs that local communities are learning to self-organize and take on vested interests encroaching on their land rights (often supported by advocacy NGOs), both the former policy of rhetorical recognition and the current regime of partial incorporation do not provide a strong basis for the protection of custom-based rights *vis-à-vis* powerful external parties. Indeed, village leaders are increasingly of the opinion that in such conflicts, state-sanctioned rights and certificates of land ownership are a much stronger tool than customary claims.

5.3.4 Customary norms ignore punitive and deterrent justice objectives

Another weakness of hybrid justice systems is that the norms and decisions of customary institutions often ignore punitive and deterrent justice-seeking objectives in favor of restoring relationships among kin and clan. While this characteristic can equally be seen as a strength, the consequences are clearly demonstrated in a case of rape from Maluku (see Case Study 5). In this case, the traditional leaders ignored the rape of a 17-year-old and focused their efforts on restoring relations between the families. The harmony imperative trumped individual rights (see also Case Study 2).

Case Study 5: Rape overlooked in Sepa Village

In 2003, 17-year-old P was raped by her brother-in-law in the village of Sepa, Seram Island, Maluku. When she informed her husband, he became angry and beat her. Later, when she told her parents what had happened, relations became heated between the two families. Insults and threats were exchanged. The case was eventually reported by P's husband's family to the village head. He in turn referred it to the village *adat* leader, as the families were from the same clan.

A community deliberation (*musyawarah*) was called by the *adat* leader. It was attended by the families, *adat* functionaries from each village and neighborhood heads. They heard the details of the case, but ignored the rape, focusing instead on the threats passed between the two families. In fact, the rapist was not even called to attend. Ultimately, the *musyawarah* ended with both families being fined for the threats. The rape was overlooked. When asked her views on the case, P angrily responded, "Satisfied? No, I was not satisfied."

Strengthening the oversight role of the courts so as to ensure that punitive and deterrent justice-seeking objectives are not overlooked in a hybrid justice system requires additional

[61] With respect to the expansion of palm oil in particular, see J McCarthy, 'Changing to Gray: Decentralization and the Emergence of Volatile Socio-Legal Configurations in Central Kalimantan, Indonesia' (2004) 32(7) *World Development*, 1199.

efforts to improve their accessibility as well as efforts to change social and moral norms through activities that raise awareness of rights and formal legal processes. But it is neither feasible nor in the public interest for all legal grievances to be handled through the formal legal system. We have seen earlier that in developed nations as well, only a small minority of grievances or justiciable incidents are settled through court adjudication. Also, as discussed above, one of the major functions of the formal justice system is to establish a benchmark of rule-based legal certainty against which informal dispute resolution can occur — the "shadow of the law". However, even if state institutions are accessible, it is not always apparent that they will assist, as demonstrated below in the case study on domestic violence from Central Kalimantan (Case Study 6).

5.3.5 State institutions abuse discretion and overlook cases

In hybrid justice systems, as noted above, state institutions often work together with customary institutions to achieve a balance of different justice-seeking objectives. However, this does not always occur. As noted above, the courts are legally required to take informal processes and local values and customs into account. Clearly, "taking into account" does not mean "legally binding". This flexibility can be a good thing, as it allows for state institutions to cooperate with local actors and institutions and take into consideration restorative justice objectives. But state institutions can also abuse this discretion. Again, this often occurs when women's rights are at stake, indicating that state institutions are no panacea when it comes to counteracting the norms enforced by customary institutions.

Case Study 6: "It's just excessive libido"

Sri lived in a simple house with her husband on one of the main roads in the urban sub-district of Pahandut, near the center of Palangkaraya, Central Kalimantan. According to Sri's sister Eka, when engaging in sexual intercourse, Sri's husband would be extremely violent, hitting and biting her. Unable to tolerate it any longer, Sri left her husband and told her father what was happening. They reported to problem to the police. After two weeks of inaction, the police suggested that the problem be resolved through the *damang*, the traditional customary leader.

Under local *adat* law, if a wife leaves her husband, the assumption is that she is seeking a divorce. Therefore, when the families met before the *damang*, Sri's husband requested a divorce. Custom also dictates that on divorce, property and goods must be transferred to the wife, in accordance with a written pre-nuptial agreement. Sri did not want a divorce, just for the violence to stop. However, a divorce agreement was written up; the husband signed and she felt compelled to sign as well. This was partly driven by threats from the husband's lawyer that she would be fined 100 million Rupiah (approximately US$11,000) for absconding. Sri, ignorant of the law and unable to afford legal counsel, knew no better. "It's hard when people are strong, smart and rich," observed her sister, Eka.

The *damang* did not deal with the domestic violence aspect, feeling this was being handled by the police. The police, however, had already referred the problem to the *damang*. It therefore fell through the cracks. When asked about the case, the *damang*'s Secretary simply laughed and said, "It's just excessive libido."

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This section has identified a number of strengths and weaknesses of the hybrid justice system as practiced in Indonesia. Strengths include cost-effectiveness, accessibility and flexibility to overcome power imbalances. It can achieve a mix of punitive, deterrent and restorative justice-seeking objectives. However, it also has weaknesses, some of which are closely related to its strengths. The system operates in a context of local power imbalances, often overlooking the interests of disempowered community groups such as women and

ethnic minorities. It is often unable to deal with inter-village disputes and issues involving powerful external interests due to a limited sphere of influence, and it prioritizes restorative justice-seeking objectives (over punitive and deterrent objectives). In addition, formal justice institutions often fail to correct these biases.

In conclusion, the findings identify some of the specific channels of interaction between the constituent components of Indonesia's hybrid justice system. This suggests that improving the functioning of Indonesia's hybrid justice system requires action to strengthen both customary and formal justice institutions and to better define the interaction between them. The next section turns to identifying entry points and strategies to build on strengths and address weaknesses.

6. Program examples from Indonesia: Entry points, partnerships and time frames

This section covers the final three steps of the "grounded approach" and it summarizes the approach employed by the World Bank in Indonesia to address some of the weaknesses identified in the previous section. Three pilot projects are described: the Strengthening Non-State Justice Systems Program (SNSJS), the Revitalization of Legal Aid (RLA) Program and the Women's Legal Empowerment (WLE) Program.[62]

The overall objective of the SNSJS pilot project is to develop more equitable and effective community-based dispute resolution processes based on constitutional principles and safeguards. Program activities include case documentation; capacity-building and skills development for local dispute resolution actors on conflict management, human rights and gender; and support for local and national regulatory frameworks that govern local dispute resolution institutions. It will also seek to inform national policy on non-state justice through partnership with a national-level NGO and the Supreme Court. The program will operate in two provinces – West Nusa Tenggara and West Sumatra – from late 2010 until 2011.

The primary objective of the RLA pilot program is to improve the capacity of village-level community legal aid posts to provide the following services: (i) legal aid, particularly with regard to land and labor rights; (ii) mediation; and (iii) community legal education, particularly for women and youth. The program has been implemented by local NGOs in three provinces — Lampung, West Nusa Tenggara and West Java — since 2005.

The WLE program works with women's groups at the village level and formal justice sector institutions at the province and district level to: (i) increase legal and rights awareness of village women; (ii) strengthen the capacity of formal justice sector institutions to understand and provide community legal education on women's rights; and (iii) increase legal aid services for women. The program is integrated into the work of the local NGO *Pemberdayaan Perempuan Kepala Keluarga* (PEKKA, or Female-Headed Household Empowerment Program) and is operating in eight provinces.[63] Each program seeks to build on certain strengths and address different weaknesses in Indonesia's hybrid justice system. Table 2 summarizes the entry points and change mechanisms that the programs use, in line with the analytical framework described in Section 3.3 above.

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[62] For more information, see *Justice for the Poor Program in Operational Area*, World Bank <http://go.worldbank.org/SSJK3PXWZ0>, at 10 January 2011.
[63] *Women Headed Household Empowerment*, PEKKA <http://www.pekka.or.id> at 11 January 2011.

Table 2: Strengths, weaknesses, change mechanisms, entry points and programs

Strengths & Weaknesses	Change mechanism	Entry points
Strengths		
Accessibility and responsiveness	Institutional effectiveness (customary institutions)	Case documentation skills
Balancing power/ ensuring execution through state-customary cooperation	Institutional effectiveness (state & customary institutions)	Multi-stakeholder fora of formal state institutions (police, judiciary and prosecutors) and customary law actors to share skills and mutual understanding
Ensuring social harmony	Institutional effectiveness (customary institutions)	Mediation skills for customary institutions
Recognizing and balancing justice-seeking objectives	Institutional design (state institutions)	Case documentation of balancing justice objectives Judicial guidelines on recognition of customary justice
Providing pathways to accountability	Institutional effectiveness	Legal awareness campaign Paralegals Legal aid provision
Weaknesses		
Women's rights and interests	Institutional effectiveness (state institutions) Institutional design (customary institutions) Social values and beliefs Economic empowerment	Training of state actors on gender Case documentation Mediation training for women leaders Human rights and gender training Legal awareness training for women and legal information campaigns Microcredit and training
Inter-communal conflict	Institutional design (state and customary institutions)	Regional workshop groups and fora
Powerful third parties	Institutional effectiveness (state institutions)	Legal aid and advocacy services
Weak provision of punitive and deterrent justice-seeking objectives	Institutional effectiveness (state institutions) Social values and beliefs	Legal aid and advocacy services Legal information activities
State abuse of discretion	Institutional design (state institutions) Institutional effectiveness (state institutions) Social values and beliefs Power relations	National and regional regulatory workshops and legal drafting Case monitoring and documentation Legal information activities Legal aid and advocacy services

The first point to make about the programs is that they work with both state and customary justice institutions. This acknowledges the value of promoting engagement between formal and customary justice as part of a hybrid system. The SNSJS program, for example, works directly with customary institutions on codifying and reforming their local rules and procedures, but also with state institutions on handling the decisions of customary processes that are "appealed" to the court.

The second point is that the programs operate at various levels of government, from the national down to the village level. At the national and regional levels, program activities seek to address inconsistencies in how the judiciary monitors the customary legal system, through institutional design and effectiveness mechanisms. Specifically, the SNSJS program will support the establishment and implementation of national guidelines for the judiciary to institutionalize a core set of principles for the recognition of the decisions of local justice institutions that are consistent with constitutional standards.

At the village-level, the programs use a range of entry points to facilitate change. The SNSJS program aims to facilitate changes in institutional design for local customary legal systems through a process of formalization of institutional structures and selected norms. This includes advocacy efforts to expand the role of women in local justice institutions. The WLE program seeks to improve the effectiveness of existing customary institutions and actors through skills training in mediation, human rights and gender. Additional training is provided to local women leaders. In addition, the SNSJS program will inform the development of social values and beliefs with an information campaign on human rights and gender.

The third point is that the programs are designed to adapt to local conditions at the community level; therefore, they neither attempt to address the same weaknesses nor utilize the same entry points in all locations. For example, the SNJSS program operates in two provinces that have divergent historical and contemporary policy contexts, and very different customary justice systems. West Sumatra, as seen earlier, has well-established traditional customary tribunals, with a standard structure and widely understood norms in the context of a dominant indigenous ethnic culture. In West Nusa Tenggara, the situation is more fluid. Ethnically, the province is more heterogeneous and a broad range of actors, encompassing village heads, traditional customary leaders and Islamic leaders, are active in dispute resolution.

Hence, in West Sumatra, given the extent to which customary systems are already established, the project focuses on grassroots empowerment for women and policy advocacy to include an expanded role for women on local dispute resolution tribunals. In West Nusa Tenggara, where local systems are less formalized, the project is more far reaching. It seeks to support existing efforts to define local justice mechanisms, structures, processes and even norms in a number of villages.

A fourth major point on program strategy is that local partners are central, particularly at the sub-national level. For the SNSJS program, working groups comprising relevant local government agencies, formal justice sector institutions, academics, NGOs and local community leaders were established to guide the initial research and subsequent project design and implementation. These partners know what is realistic and achievable in their location and have the influence to bring about change. They identified entry points and solutions that are realistic and appropriate. The central role of partners in project design and implementation means that the programs are not aiming to design an ideal justice system, but are rather capitalizing on the strengths and addressing weaknesses of local state and

customary legal institutions through a process of gradual and incremental change based on local realities.

A final and related point is that in some locations, external intervention may be futile. In Central Kalimantan, for example, the World Bank team was unable to identify suitable partners genuinely interested in strengthening local justice institutions in a manner that would equip them to serve the plurality of community groups seeking justice in a province recovering from bloody ethnic conflict. Thus, the decision was made not to proceed in that location. Similarly, in Maluku Province, there was little demonstrated commitment among key decision-makers in government and civil society to strengthen local justice systems. The decision not to proceed in this location was based squarely on the view that external actors can rarely, if ever, drive local institutional reform. Thus, without local support, the program was not launched.

This section summarized how the World Bank in Indonesia, through a series of legal empowerment programs, is seeking to support more effective and inclusive hybrid justice institutions. Driven by the insights and practical experience of local partners, program designs focus on a range of strengths and weaknesses via a number of entry points, including policy dialogues, training, documentation of cases and the development of local regulations and national guidelines. Prospects for success are built primarily on the central involvement of key local state and customary institutions in program design and implementation. This input — it is hoped — will ensure that program activities are grounded in local realities and match local priorities.

7. Conclusion

This article has described a "grounded approach" to the design of programs to strengthen hybrid justice systems that is attuned to local needs and opportunities. Five key steps were proposed: (i) understand the historical and contemporary political and policy context of formal and customary justice systems; (ii) analyze the strengths and weaknesses of formal and customary legal systems; (iii) identify entry points for strengthening hybrid justice systems based on an analytical framework of institutional change; (iv) realistically assess the opportunities for engagement on the entry points; and (v) ensure a flexible and long-term commitment to implementation.

The article explicitly refrains from prescribing specific institutional arrangements or one-size-fits-all "quick fixes". Instead, it seeks to provide pragmatic guidance to practitioners and policy-makers by suggesting a *process* of engagement. The underlying rationale for such an approach is the belief that hybrid justice systems develop incrementally. Therefore, practitioners and international development agencies should set themselves the task of supporting local actors to overcome tangible injustices and weaknesses in existing arrangements in an incremental fashion and in accordance with local timetables and opportunities, rather than attempt to prescribe "one-size-fits all" policies and institutional designs.

Finally, the article illustrated how this approach could be pursued based on real examples from Indonesia. The World Bank's recent research on state and customary justice institutions and subsequent operational programs may well be irrelevant to other contexts. However, we nonetheless expect that the *process* of identifying these strategies may be applicable to other country contexts as a means of supporting better justice systems in a context of legal pluralism.