

Section III

The Strengths and Weaknesses of Non-State Justice



SECTION III: THE STRENGTHS AND WEAKNESSES OF NON-STATE JUSTICE

The research presented thus far indicates that there are clear advantages and disadvantages to the current practice of non-state justice in Indonesia. Some of the cases show that informal justice often fails to adhere to basic constitutional standards. Women are under-represented, minorities perceive discrimination and norms are not always clear. Some sanctions are draconian and enforcement is problematic.

Yet, villagers are not only far more likely to use informal rather than formal actors, but they are also report higher satisfaction levels. As indicated in Figure 6 overleaf, the GDS survey shows that 69% are satisfied with informal actors compared to 58.6% for formal.⁴⁹

Developing a strategy to engage with non-state justice requires an understanding of its core strengths and weaknesses. Section III analyzes and discusses these in detail. Interspersed throughout the section is a series of “examples of change” from the field and neighboring countries. These small steps provide some modest insights into the different ways the weaknesses can be tackled and strengths embraced.

A. Strengths: why do people prefer non-state justice?

‘People don’t only choose informal dispute resolution because it’s cheap, quick and simple. The more important aspect is that they support an approach which delivers order and security in their community.’

Religious Leader from Ambon, Maluku Province

Main Findings

- **Accessible, speedy and cost-effective.** Non-state justice is more accessible, speedy and less expensive than the courts. It works particularly well for petty cases.
- **Maintains social cohesion.** The maintenance of communal harmony is highly valued in village life, and informal actors prioritize the restoration of social relations when problems occur.
- **Flexible.** Structures and norms are flexible, with the capacity to accommodate social change.
- **Draws on local authority and legitimacy.** People prefer non-state justice primarily because of the authority of its actors in the village milieu to resolve problems and enforce resolutions.

Accessibility, speed and cost

Some of the strengths of informal justice are simple and apparent. Physical accessibility is one clear advantage. 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. Particularly where economic rights are at stake, lengthy resolution processes can impact on the livelihoods of the poor. At times when violence is imminent – as in several of the East Java cases – rapid action is also necessary. In cases that reached resolution, the process was normally rapid. The manslaughter in

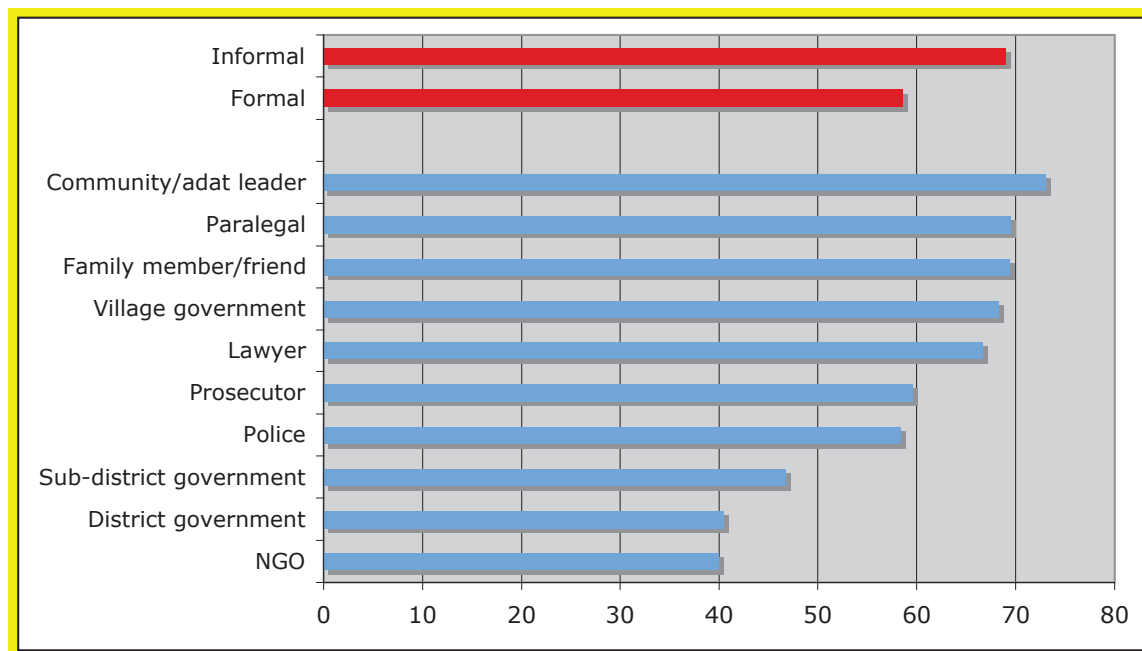
⁴⁹ Those considered formal are the police, lawyers and prosecutors. The remainder are considered informal. The Asia Foundation (2001), above n.3 notes that 86% of people expressed satisfaction with informal justice.

Palangkaraya was resolved in three weeks and the fight in Kuala Kapuas in two. Most cases in East Java and Maluku were also handled within two-three weeks or less.

By contrast, the average waiting time merely between filing and hearing cases ranges from 4-6 months at the District Court, twelve months at the High Court and 2-3 years for the Supreme Court.⁵⁰ More recent data indicates that the average time to see a case through from first instance to cassation is 7-12 years.⁵¹

Cost is another important consideration. Minor disputes are generally settled at no cost to the disputants.⁵² For most of the cases studied there were no case filing or hearing fees.⁵³

Figure 6: Satisfaction with individual informal and formal actors



Source: GDS Survey

The data in Figure 6 demonstrates that respondents express greatest satisfaction in those with whom they are most familiar – community and *adat* leaders, paralegals, family members and friends, and village governments. This finding has two major implications. Firstly, strategies to enhance dispute resolution should focus on the village and community level, not just the institutions of the state. However, secondly, it also suggests that efforts to increase community familiarity with actors from the sub-district and district levels (NGOs, prosecutors, government officials, etc) could help to improve satisfaction and trust levels.

⁵⁰ Bappenas/World Bank (1996) *Law Reform in Indonesia*, Cyber Consult: Jakarta, p. 130.

⁵¹ Mahkamah Agung RI (2003), *Cetak Baru Pembaruan Mahkamah Agung RI*, Mahkamah Agung: Jakarta, p.161.

⁵² Re the economic benefits of non-state justice, a study in Colombia concluded that using non-state justice systems to resolve land and inheritance claims led to higher income gains than using the courts: see Edgardo Buscaglia (2001) 'Justice and the Poor. Formal vs. Informal Dispute Resolution Mechanisms' Paper presented at *Empowerment, Opportunity and Security through Law and Justice Conference*, St. Petersburg, July 2001, pp. 9 & 10.

⁵³ *Adat* dispute resolution in Central Kalimantan is an exception. Case filing fees in the market fight case were Rp 600,000. In the manslaughter case, the *Adat* Council charged Rp 6 million.

Petty cases resolved quickly and peacefully

The majority of disputes that emerge at the village level are petty in nature – fights between neighbors or youths, minor thefts and slander. Where the stakes are low, non-state justice mechanisms usually operate smoothly and effectively. As these kinds of cases are the most common, high satisfaction rates are to be expected.

Case Study 10: Fist Fight Fixed Fast⁵⁴

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

Rather than report the case to the police, Nuri approached Pak Parmin and Pak Bejo, the head of his hamlet and 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. Pak Nuri categorically said that problems taken to the police never turn out well. 'If you take a problem to the police,' he said, 'they like to beat you, lock you up. There's no control.'

Local authority and legitimacy

Another important and related factor is the ability of non-state justice to restore harmonious relations. According to the Asia Foundation survey, 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. 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). They are directly involved in the day to day workings 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. It is not one in which local actors engage.

This is evident in the Pananguan and Souhoku village land cases described above (Case Studies 2 & 3). In these instances, the village head and *Raja* respectively were able to help reach a compromise solution. Neither determined the objective truth nor referred to any legal norms, but the outcome was accepted by the parties in question. The mere authority of the village head was sufficient to resolve the dispute and ensure enforcement.

Calling on higher norms

In parts of the country, non-state justice actors are regarded to have supernatural powers, further enhancing their capacity to resolve local disputes and ensure enforcement. Many people in rural communities in Maluku, for instance, believe that breaching *adat*-based sanctions relating to protection of the environment, known as *sasi*, can lead to illness or even death. In East Java and Lombok, the *kyai* and *tuan guru* often enjoy significant levels of loyalty

⁵⁴ This case is drawn from field notes prepared by Alpien, Pieter Evers and Cathy McWilliam from a May 2007 field trip to the Lampung to evaluate Justice for the Poor's Revitalization of Legal Aid program.

⁵⁵ The Asia Foundation (2001), above n.3.

among their constituency, stemming from their ability to call on “higher” norms. In a case in East Java, a *kyai* was able to prevent a mob from murdering a villager accused of practicing black magic:

Hamzah was accused of practicing black magic (*santet*), and a plan had been made to murder him. However, the *kyai* heard about the plan, and then stood up in front of the Friday congregation in the Mosque and swore that Hamzah would not practice *santet* ever again.⁵⁶

In these instances, the individual authority and legitimacy of the non-state justice actors proved sufficient to intervene effectively. Courts and the formal system do not necessarily enjoy this legitimacy. The Tanah Awu case from Lombok mentioned above is one of many where court decisions were ignored.⁵⁷ When Anggeng (Case Study 8), successfully challenged *adat* sanctions in court, the *Adat* Council merely increased his punishment.

Flexibility

*‘If the river is in spate, the washing plate is shifted. With a change of rajah comes a change of adat.’*⁵⁸

Non-state justice is inherently flexible. As norms, processes and sanctions are usually unwritten, actors can forge solutions and provide remedies that are socially appropriate and tailored to the context of each case.

And as demonstrated by the examples of change documented later in this section, informal justice can also be flexible and open to shifting social dynamics and realities. The examples of change are admittedly modest – women securing a voice in West Sumatra; clarification of norms and processes in West Nusa Tenggara; the power of legal literacy to open up options and choices. But while modest, these examples suggest that there is potential to bring about reform at the local level, perhaps where such space does not currently exist with respect to the courts and other state justice institutions.

B. Weaknesses: When informal justice mechanisms fail

‘It’s hard when people are strong, smart and rich.’ Female villager, Palangkaraya, Central Kalimantan

Main Findings

- **Arbitrariness and lack of oversight.** While social authority is the core strength of non-state justice, its unchecked exercise is concurrently the main weakness. The lack of clear procedures and norms and absence of downward or upward accountability mean the weak and marginalized are poorly served with little recourse to alternatives.
- **Biased against women.** Women have limited political capital at the village level, thus there is little to be gained from protecting their interests. Women’s legal problems (such as family law issues, domestic violence) are on occasion, therefore, either not taken seriously or overlooked in favor of communal harmony.
- **Ethnic exclusivism.** Particularly for *adat* systems, many non-state justice institutions are dominated by indigenous ethnic elites. This can militate against effective resolution of inter-ethnic disputes
- **Trans-communal disputes.** Non-state justice mechanisms cannot project authority beyond the village. Consequently, inter-village disputes and those involving powerful third parties can be difficult to resolve.
- **Clashes between formal and informal systems.** Informal mechanisms breakdown when they clash, rather than cooperate, with formal systems.

⁵⁶ Respected Community figure, Paangaan Daja village, Pamekasan, East Java.

⁵⁷ A district court judge in Ambon related to the research team at least one land dispute in the area in which villagers paid no attention to a Supreme Court verdict.

⁵⁸ Minangkabau saying on the dynamic nature of *adat*. Cited in Timothy Lindsey (1998) ‘Square Pegs & Round Holes: Fitting Modern Title into Traditional Societies in Indonesia’ 7 *Pacific Rim Law and Policy Journal* 699.

This research was launched with a focus on the experience and perceptions of women and minorities. This was based on the premise that gender bias is a major cause of poverty and that discrimination between identity groups sparks violence and is at the core of the social conflict that has affected Indonesia in the post-Suharto era. Understanding how non-state justice perpetuates these problems and, at the same time, how it could help address them was on the main objectives of this study.

That power imbalances inherent in non-state justice discriminate against the weak has been well documented.⁵⁹ Social authority may well be the key strength of informal justice, but its unchecked exercise is simultaneously the core weakness. Consequently, informal justice faces both internal and relational weaknesses. In this section we address three of these – providing access to justice for women; addressing the needs of ethnic minorities; and finally, inter-village and external third party disputes.

Women's access to justice

'It's unthinkable that women should decide over us.' Male *adat* leader in West Sumatra

On the whole informal justice mechanisms do not protect and serve women's interests well.⁶⁰ Justice tends 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 objectification of women's rights. Consequently, many women's legal issues are either ignored or not taken seriously.

We noted above the almost complete absence of female representation in village leadership and the virtual impossibility of women securing decision-making roles in *adat* structures. In West Sumatra, for instance, while Minangkabau society is matrilineal, membership of the *Adat* Council is restricted to men. Women are reliant on their matrilineal uncle to represent their interests in the *Adat* Council, often with significant socio-economic consequences.

Case Study 11: Ibu Marnis' land is sold by her brother: Sumpur, West Sumatra

Ibu Marnis and the other women in her family got wind 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 4 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 title

⁵⁹ '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,' Odinkalu (2005), above n.5 and World Bank (2004), above n. 26. Also Sinclair Dinnen (2001) "Building Bridges – Law and Justice Reform in Papua New Guinea" *State, Society & Governance in Melanesia Project Working Paper 01/3*; Australian National University: Canberra. Of course, much research indicates the formal system is little different. See, for instance, the seminal article by Mark Galanter "Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change" (1974) 9 *Law & Society Review* 95

⁶⁰ For more on this topic, see also Julia Suryakusuma (2004) *Sex Power and Nation*, Metafor: Jakarta. Lawyers from LBH-APIK (Women's Legal Aid NGO) in Lombok also said women are better served by formal justice. Similar findings emerged in research on women's access to justice conducted by the World Bank in three provinces through 2007. This will be documented in a new publication in 2008.

holders over 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.

The lack of representation does not necessarily equate to a total lack of access to justice for women. Despite being overlooked in the case above from Sepa Village, rape and sexual assault is generally taken very seriously and referred directly to the police. For instance, in a case in Sampung District, East Java, local religious leaders and NGOs successfully mobilized behind the victim to push the police to arrest and punish the perpetrator.

Domestic violence, however, is not viewed similarly. In the Asia Foundation survey, only 12% of respondents considered domestic violence to be a legal problem. Stigma attached to domestic violence means that most women do not report cases. One informant in East Java noted, ‘I was too ashamed to report, because people would ask what I did to get beaten.’⁶¹

Women are unlikely to disrupt marital relationships because of economic dependence. During a Focus Group Discussion in East Java, a researcher from a local STAIN (State Islamic Religious College) stated that her quantitative research on the local Religious Court indicated that lower-class village women are far more likely to request divorce than urban and upper-class village women. Her explanation was that these women, who often work the land and provide a significant proportion of the household income, are less economically dependent on their husbands. This observation was quickly dismissed by the majority of (male urban) FGD participants. This phenomenon, they argued, was because these women were uneducated and did not understand their position within the family according to Islam.

Either way, conflict avoidance is a common “strategy” for women.⁶² As a community leader in Hanive Village, Central Kalimantan said,

It [domestic violence] happens here. Quite often too. [But] the victim stays quiet. The perpetrator stays quiet. Just wait until everything cools off, and the problem’s settled.

When domestic violence is reported, it is far from certain that formal or informal justice will respond favorably.

Case Study 12: ‘It’s just excessive libido’

Sri lived in a simple house with her husband on one of the main roads in the urban kecamatan 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 the 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 Dayak *adat*, if a wife leaves her husband, the assumption is that she is seeking a divorce. So, when the families met before the *damang*, Sri’s husband requested a divorce. Dayak 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

⁶¹ Interview, 26 February 2005, Pamekasan, East Java.

⁶² See also Stephens (2003), above n.47 discussing cases from Flores, NTT province: ‘Most of the time women do not turn to anyone and remain silent about their problems’, p. 231.

to sign as well. This was partly driven by threats from the husband's lawyer that she would be fined Rp 100 million 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*. So, it fell through the cracks. The husband did not honor the agreed division of property. 'They don't care,' said Eka. Although the *damang* lives literally across the street from the husband, he has taken no action to enforce the agreement. No social sanction has been applied against the husband either – he is still invited to neighborhood and *adat* events. Indeed, the strong sense was that domestic violence is not treated as a serious problem. When asked about the case, the *damang's* Secretary laughed and said, 'It's just excessive libido.'

Sri's inability to enforce her property rights upon divorce was repeated in several other research provinces. A recent baseline survey for the World Bank "Women's Legal Empowerment" program also showed that women do not assert their property or alimony rights on divorce due to social stigma and a lack of knowledge of legal rights and procedures.⁶³ This can have significant social and economic consequences. Sri herself is now living back with her parents, working a low-paid job.

Protective and paternalistic paradigm

Much *adat* law is actually geared around protecting women from "moral" offences, such as pre-marital pregnancy and sexual assault. A village head in Lombok observed that women were the "carriers of the law". In other words, protecting women's purity is one of the *raison d'être* of the system. While this does in some circumstances protect women's rights, it reflects a paradigm in which women are objectified rather than active subjects in their own right.

Overcoming gender exclusion is possible, however. Box 2 overleaf provides two examples of change documented during the field research. These examples demonstrate the importance of both understanding and working within the system, as well as the power of community leadership and mobilization to change it. They also highlight the central importance for marginalized members of the community to gain awareness of how systems operate and norms are applied and manipulated.

⁶³ For a detailed report on the methodology and findings of the baseline survey, see www.justiceforthepoor.or.id.

Box 2: Examples of Change I: Tackling the under-representation of women and gender bias through legal empowerment

Afrida's Case: Overcoming gender exclusion in West Sumatra through understanding of adat law

Afrida, a relatively uneducated and poor woman, grew tired of having her ancestral land sold off by her lineage heads. On one occasion, Afrida discovered officials from the government land office measuring her mother's land and, in anticipation that another sale was pending, called the village head to demand that the land assessment stop. When the *ninik mamak* heard of this he came and, bringing a knife, angrily threatened her, asking why the assessment had been stopped. Despite these initial protests, her mother's land was sold.

Although Afrida feels that the formal justice system is fairer than the local informal mechanisms, due to her family's concerns (the *mamak* is her mother's brother) and fear of local reprisal her response was to develop an understanding of *adat* norms and processes and to try to change them.

Afrida has joined and actively participated in clan head *musyawarah* meetings. Instead of simply serving the drinks and snacks, the role usually reserved for women, she has vocally presented the interests of women and argued for greater participation for women in land sales. Afrida argued successfully that all clan heads must agree to all land sales. This has effectively taken the monopoly on land sales from one (male) actor and diffused decision-making power amongst a group of, albeit male, lineage heads. Afrida's efforts have managed to prevent unjust land sales and have boosted her status. She is now entrusted to safe keep valuable lineage documents. Her ability to learn the "game" of *adat* and speak-up in *musyawarah* means she is now consulted on issues relating to lineage property and history.

Women Organize and Lobby for Action

In Batu Gadang, West Sumatra, a women's group, which was initially organized through small business activities, has become active in mediating community disputes. In 2002 they were part of a coalition that resolved an environmental dispute between the community and corporate giant, Semen Padang. On a more micro-level, the group has also successfully mediated a dispute over electricity theft and lobbied for a village road. They have managed to secure an allocated seat in the village parliament and are also seeking representation on the *Adat* Council.

Their success is based on three factors. Firstly, the group linked into a women's institution with a traditional basis in West Sumatra, the Bundo Kanduang. This provides legitimacy as the women are seen to be revitalizing an existing community body rather than introducing threatening new structures. Secondly, by developing economic independence, the women gained respect and a degree of influence in village affairs. Finally, the links to a local NGO helped the women to learn strategies to organize in numbers and enhance legal awareness. This has equipped them to move beyond problem solving to securing representation in the seats of village power.

Ethnic exclusivism

'Why does it have to go through adat? It's better to use the national law.'

- Member of minority ethnic Madurese recently returned to conflict-affected Central Kalimantan

Adat-based dispute resolution processes are typically not suitable for inter-ethnic disputes.⁶⁴ The provinces studied vary greatly in ethnic composition and inter-ethnic relations. Central Kalimantan has experienced large-scale bloody conflict between Dayaks and Madurese. As the revival of *adat* is identified with the majority Dayak population, ethnic minorities regard *adat* dispute resolution as biased against them. Similarly in Maluku, migrants do not always

⁶⁴ As Benda-Beckmann has observed, 'Local customary laws...rarely express the values and aspirations of all members of the rural population.' Franz von Benda Beckmann (2000) "Legal Pluralism and Social Justice in Economic and Political Development". Paper presented at *IDS International Workshop on Rule of Law and Development*, 1-3 June 2000.

recognize the *raja*, so *adat* does not always represent a means of resolving disputes involving non-indigenous people.⁶⁵ In East Java, ethnic homogeneity means that this issue rarely emerges.⁶⁶

The Case of West Sumatra

In West Sumatra, Minangkabau *adat* is exclusive in the sense that all members of a *nagari* are required to submit to it. This has special consequences for the large number of Chinese merchants who have lived for generations in West Sumatra and for the more recent, but very large number of Javanese transmigrants as well as members of other ethnic groups, primarily Bataks from North Sumatra. Members of these groups are required to be “adopted” into a clan so that they can be acknowledged by a *mamak* who can represent them in the *nagari*. This is referred to as “*bermamak*.” Although adopted into local clans, non-Minang populations are precluded from positions of leadership at the local level. *Adat* law is foreign and often misunderstood by non-indigenous populations. This can lead to discrimination and result in violence, as seen in the case below.

Case Study 13: Conflict between ethnic Batak and Minang in Kinali

In a village of 13,000 people, around 2000 were ethnic Batak from North Sumatra. The case erupted in the market of Tempurung in late 2000 as a private dispute between a Batak and a Minang who had been gambling. A fight broke out between the two and it soon developed into a major conflict between the two ethnic communities. 94 houses owned by Bataks were burned down and the Batak population fled or was evacuated from the *nagari*. For about three months, the market was closed, no children went to school and the parents did not go to work. Before the conflict, there were about 400 Batak families in the community. Now about 56 remain. According to a Minang hamlet chief in the area, the social background to the conflict was inequitable treatment of the Batak residents by lineage elders.

Resolution was managed by both *adat* heads and sub-district government officials. Representatives from the Batak and Minang populations, including all 32 lineage elders, met with senior government officials and an agreement was signed by the two parties at the *camat* office. The local government compensated the house owners who had lost their property with Rp 2 million per house, too little to rebuild them. The Batak were given their own hamlet and can use their own *adat*. They only have to report to the Minang *adat* leaders for weddings. According to the Batak, interaction between the two communities remains reserved.

The Case of Central Kalimantan

A clash of laws and norms, coupled with the absence of an effective dispute resolution framework to reconcile them increases the risk that disputes will erupt into violence. As Kane *et al* have observed, ‘This issue is more acute in post conflict [regions]...where there is an urgent need to find appropriate ways to resolve conflicts between members of different communities.’⁶⁷

And yet in post-conflict areas across Indonesia, rather than establishing local mechanisms that are representative of all members of the community, local government initiatives to strengthen

⁶⁵ For an historical perspective on Maluku and the exclusionary effects of *adat* law on non-indigenous populations, see Franz von Benda-Beckmann (1990) above n.20 and Benda-Beckmann, *ibid* – ‘often migrants have a second rate political and economic status under their hosts’ customary law’, p.11.

⁶⁶ 78% of the population is Javanese and 20% Madurese.

⁶⁷ M. Kane, J. Oloka-Onyango & A. Tejan-Cole (2005) ‘Reassessing Customary Law Systems as a Vehicle for Providing Equitable Access to Justice for the Poor.’ Paper presented at the Arusha Conference, *New Frontiers of Social Policy*, December 12-15, 2005.

dispute resolution have comprised a return to *adat* structures and processes. The reversion to the “old ways” is politically driven, strongly linked to a reassertion of regionalism and ethnic identity. It asserts difference, not commonality.

In Central Kalimantan, for example, one of the more prominent impacts of the ethnic conflict of 2001 has been a reassertion of Dayak cultural identity. As a government official in Kuala Kapuas District stated, ‘Our pride as Dayaks has risen since the conflict.’ Many others conveyed a view expressed by a senior Provincial government official, in that ‘If outsiders had respected our *adat*, the conflict might not have happened.’

The political response to revive the role of *adat* leaders has seen little impact on the ground, however. As a Provincial Parliamentary member told us, ‘*Adat* law is not all that dominant. The regulations do not reflect what’s in the field.’ *Damang* are under-resourced, lack skills and knowledge and are open to co-optation by government and/or private sector interests. The *damang* of Pondok Demar in Seruyan District, for example, receives a Rp. 750,000 monthly stipend from a palm oil plantation involved in a number of land disputes in the area. He called it a liaison fee, but local NGOs and villagers consider it a pay off.

Nonetheless, in a political sense, the revival has not gone unnoticed by non-Dayaks. Before the conflict, *adat* was considered ineffective to resolve the growing number of problems between Madurese and Dayaks. At the same time, many Dayaks believed the formal justice system was in the pockets of the Madurese.⁶⁸ The Madurese interviewed for this study consistently expressed a preference for resolution by local governments or the formal legal system. They see *adat* as belonging squarely to the Dayaks. Thus, the regulatory changes introduced since regional autonomy have strengthened the hand of the Dayaks, but do not represent a channel for inclusive resolution for problems across ethnic boundaries.

This represents a particular problem in post-conflict Central Kalimantan. Madurese are returning in large numbers.⁶⁹ Many return to difficult circumstances. District Regulations in Kotawaringin Timur, one of the main centers of the conflict, establish criteria under which Madurese are entitled to return and stay.⁷⁰ Those considered acceptable to the local community may nonetheless return to find themselves homeless, as many Madurese neighborhoods were destroyed during the conflict. Homes still standing might now be occupied by other families. In other cases, Madurese property has been stolen or sold. In all such cases, Madurese seeking to return to their homes face difficult negotiations with those occupying their residences. Many spent or lost everything fleeing Kalimantan after the riots, so any return to normality is dependent on re-securing the right to their property.

And yet they naturally feel their bargaining position is very low. At any time they could be returned to Madura. Such threats are indeed commonplace. As one Kalimantan-born Madurese, Ova, told us, ‘Before [the conflict], the Madurese were rough. Now we have to

⁶⁸ In an interview in 2003, the former Head of the Provincial Police in Central Kalimantan told us that the police were in fact not biased on ethnic grounds but just towards whomever paid them the most. This generally just happened to be the Madurese.

⁶⁹ As of December 2004, there were 9000 registered returns of the 120,000 Madurese who had fled.

⁷⁰ East Kotawaringin Regional Regulation of 2004 on *Population Control in Kotawaringin Timur*

humble ourselves...our position now is very weak.’ This is driven by a fear of revenge and a recurrence of the violence of February 2001. ‘The bottom line is we are scared,’ she added. Ova recounted how the house of one of her friends was occupied by Dayaks after they fled for Madura due to the conflict. The Dayak family later sold the house on to a Chinese family. Ova’s friends now have to buy back their own house, yet have no money and no real power to secure their property rights.

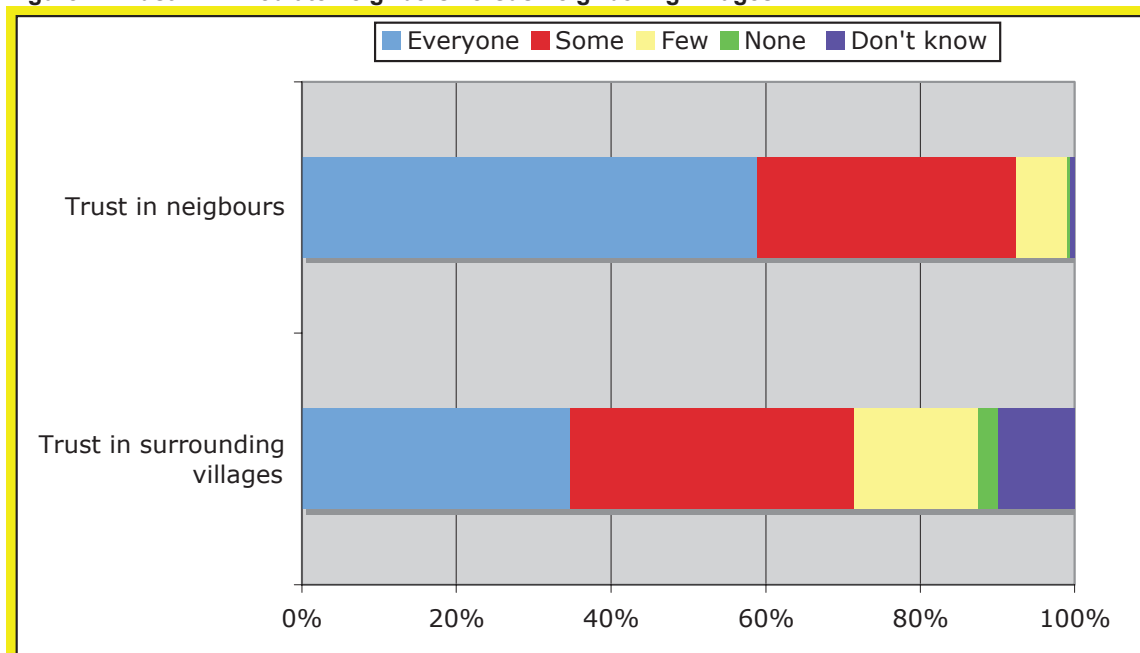
Even though some *damang* told the research team that they thought a multi-ethnic body to address disputes would be valuable, little has been done to establish or improve dispute resolution processes in preparation for such problems. ‘There is no institution which can protect us,’ observed Ova.

Similar attitudes were expressed in Buru Island in Maluku by transmigrants trying to deal with a major land dispute dating back to 1954 (Case Study 22). The Javanese village head and his secretary did not wish to pursue resolution based on *adat* law, as they did not understand it and felt it discriminated against newcomers. This created tension in the area. The Village Secretary of the transmigrant village said, referring to the ethnic conflict in Sambas, West Kalimantan, in 1999, ‘This could become the second Sambas.’ The *Raja* of the neighboring local village conceded, ‘There’s some tension here.’

Inter-communal disputes

The authority of non-state justice actors rarely extends beyond their own sphere of influence, be that 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. As evident in the graph below, GDS respondents reported drastically lower levels of social trust in people from adjacent villages compared to their own neighborhood.

Figure 7: Trust in immediate neighbors versus neighboring villages



Source: GDS Survey

These dual factors – inability to project social authority and lack of social trust – severely compromise the ability of village actors to resolve trans-communal disputes. The case below is an extraordinary example of that problem, from the tourist island of Lombok in West Nusa Tenggara Province.

Case Study 14: The Berlin Wall of Lombok: Karang Geteng vs. Patemon

The conflict began in mid-1999 when a resident of Patemon secured land title over a graveyard located between his *kampung* and neighboring Karang Geteng. The community in Karang Geteng disputed the certificate, feeling the land fell within their boundaries. Nobody seems sure now what triggered the violence, but heated battles broke out in June 1999 when Karang Geteng residents attacked Patemon. The conflict raged through the rest of 1999, peaking in January 2000, leading to many injuries and deaths.⁷¹

The dispute has now evolved beyond the original disagreement over land and taken on a life of its own, based on revenge. As Sibawai, a religious leader in Karang Geteng observed, 'All that the people know now is that their family members have been killed by the people of Patemon.'

Dozens of battles have been fought over the last seven years. 'We are ready to oppose them at all times,' said the head of Patemon *kampung*. 'I have ordered all men from 16 to 50 years old to be prepared for war against Karang Geteng...if they aren't ready to fight, they aren't fit to be called citizens of Patemon!' Residents in Patemon maintain an arsenal of rocks, bottles, spears and even homemade firearms. 'If there are signs of an attack,' continued the Patemon *kampung* head, supported by the head of the local youth organization, 'we order rocks, bottles and trucks to attack them and defend ourselves.'

The local government response was extraordinary. A 3-meter high wall has been built along streets bordering the two *kampungs*. Separate schools and health facilities have also been established so the residents do not need to interact. 'Think about it,' said Sibawai, 'there's a war between citizens, yet the government builds a wall! Do they think this conflict is merely physical? What is needed is social restoration.'

The economic impact of the wall has been significant. 'Maybe the people have begun to think twice,' said the Patemon *kampung* head. 'We used to do Rp 35 million in business a day here. Now it's as low as Rp 100,000 or even nothing.'

A local NGO has attempted to reconcile the two *kampung*, but attempts are at a preliminary stage. No effort has yet been made to bring the different parties together. In the meantime, the 3-meter wall stands between the villages as a symbol of division.

The absence of legitimate forums for communication and conciliation across local boundaries can lead to a clash of values and see micro-disputes turn into major violent conflict. Furthermore, the inability of non-state justice actors to project authority beyond their spheres of influence can lead them to enhance their social legitimacy by acting as "petty nationalists", in that they act as supporters or advocates of their village rather than as neutral facilitators mediating a problem on its merits.

Third-party disputes

Disputes involving villagers and third parties, particularly forestry companies and palm oil plantations, are increasingly common in the research locations. Informal systems are usually unable to handle such disputes, as they involve parties beyond the social control of the village. In Central Kalimantan, disputes of this nature are rife as newly decentralized governments encourage expansion of palm oil plantations into traditional customary land.⁷² Backed by

⁷¹ We do not have precise numbers, as villagers were not forthcoming with this data and police unsure.

⁷² See John F McCarthy (2004) "Changing to Gray: Decentralization and the Emergence of Volatile Socio-legal Configurations in Central Kalimantan, Indonesia." *World Development*. 32(7) p. 1199-1223, July 2004.

government, plantations often acquire land unfairly or for inadequate compensation. Villagers across Seruyan and Kotawaringin Districts, for instance, reported that they routinely received an average of Rp 400,000 per hectare in compensation for land acquired by plantations. The Head of the Economic Division of the Kotawaringin Timur district government, however, informed us that the minimum compensation was required to be between Rp 600,000 to Rp 1 million.

The Sari Gunung limestone mine case in Sampung, East Java, described below is an example of how the authority of local actors was insufficient to prevent environmental damage being caused by a local limestone mine.

Case Study 15: Sari Gunung Mine Creates a Mess⁷³

Limestone has been mined near Sampung village in East Java since the Dutch colonial period. Since independence the operations have been owned by the local government but managed by a private company, PT Sari Gunung.

For over 20 years the community has complained to the company and the district government about the negative environmental impacts and damage to village infrastructure. The mine produces significant amounts of *grosok*, an unusable by-product mixture of chips and silt. As the mine is on a hill above the village, during the wet season the *grosok* flows down from the mine into the village. During heavy rain it causes significant damage to roads and some private residences.

In the 1980s, the then village secretary sent a letter of complaint to the District Head, signed by the sub-district, village and hamlet heads. They thought as a government-owned company that the District Head would take responsibility. However, he simply claimed the *grosok* problem was not a priority.

Suddenly in 1997 the district government built drains in the village so that the rain water and *grosok* would be channeled away from the village. However, this simply shifted the problem from the western hamlet to the eastern hamlet. Heavy rains later that year caused houses in the east as well as paddy fields further downstream to be flooded with water mixed with *grosok*. Another letter was sent, this time to the District Parliament and District Planning Agency, but again with no response. Shifting the problem from the western to the eastern hamlets began to fuel intra-community tensions. In 2003 a group of youths and farmers, tired of cleaning the *grosok* after heavy rain and having their fields polluted by dirty water, blocked the drains that diverted the water. Learning of this act of protest the village head called the youths to his home for a meeting. The community in eastern hamlet interpreted this as a hostile move by the village head, and approximately 20 villagers from the eastern hamlet arrived at the village head's house. Not wanting to inflame tensions, the village head accepted their protest action and the drains were left blocked.

The rain continued and the *grosok* water flooded the main road and a number of shops and houses. No one would dare unblock the drains or even clean up the mess created. Dwi Pertiwi, a member of the Village Parliament, observed, 'No-one in the other community dares clean it up, it could lead to brawls if someone cleaned it up.' There have been a number of motorbike accidents on the main road, made slippery by the *grosok*.

Legal action was never considered let alone taken by the village government. The Director of the mine explained that every year he gave company profits to the district government, thus, in his opinion it was up to them as to whether they would resolve the *grosok* issue. Given that the mine employs many villagers, the village and sub-district heads were reluctant to provoke the company. At the time of writing this dispute remains unresolved. Social tensions remain high, particularly between the east and west hamlets over the blocked drains.

Villagers fear opposing powerful interests in the case of abuse of land rights or environmental damage. Residents of Sembuluh II village in Central Kalimantan complained of skin diseases from water pollution they believed was caused by a local palm oil plantation. And yet, as a woman from the village said, 'We are reliant on them for jobs and money. We are too scared

⁷³ This case is from Patrick Barron, Rachael Diprose & Michael Woolcock (2006), *Local Conflict and Community Development in Indonesia: Assessing the Impact of the Kecamatan Development Program*, Working Paper 10, Social Development, World Bank: Jakarta.

to report the problem.’ This in turn can cause horizontal tensions between villagers who are pro- and contra- the influx of outside investment.

There are increasing signs that local communities, often supported by advocacy NGOs, are learning to self-organize and take on vested interests encroaching on their land rights. Political openness and democracy are supporting such movements. But in general, non-state justice mechanisms cannot overcome the significant power imbalances at play.

As the experience of Madurese in Central Kalimantan demonstrates, one of the core challenges for non-indigenous communities to understand and navigate *adat* normative systems is the fact that both procedure and substance is unwritten and unclear to them. One way that communities have attempted to address this challenge, in addition to improving dispute processing for smaller intra-village disputes, is to codify dispute norms and structures. Box 3 below describes such an example from Lombok, West Nusa Tenggara province.

Box 3: Examples of Change II: Clarifying dispute resolution norms and structures in NTB

‘Bentek village, as well as other villages within the Perekat Ombara alliance, feels it is necessary to formalize judicial institutions at the village level. This is in line with regional law on decentralization on village responsibilities and authority. The community values such an arrangement for they must have (clear) pathways for resolving their disputes.’

Kamardi, Village Head and *Perekat Ombara* founder, Lombok, NTB

In West Lombok district, twenty-five villages joined together in 2000 to form the *Adat* Community Alliance (*Perekat Ombara*). The alliance was initially established in response to environmental damage caused by forestry companies in the area. Since then, *Perekat Ombara* has expanded to 32 villages across seven sub-districts and become a movement for reforming village institutions, including dispute resolution.

Each member village has clarified dispute management processes by establishing a village tribunal, known as the *Mahkamah Adat* or *Majelis Krama Adat*, which comprises the tri-partite authority of the government, *adat* and religious leaders. Several are choosing to codify *adat* laws to apply in their villages. The member villages have an executive (village head), legislative (village parliament) and judicative (*adat* tribunal). The alliance has also established a council to hear disputes at an inter-village level, introducing checks and balances on the levels below through the right to appeal.

Unlike the top-down *adat* revivals in other research locations, *Perekat Ombara* is an organic movement. With external support, the organization is now moving to strengthen the position of women and minorities in local-level institutions. This could include participatory codification of local *adat*, followed by a gender and human rights analysis of codified *adat* law. While emerging from a traditional base, *Perekat Ombara* leadership has a broad definition of “*adat*” as dynamic and evolutionary, in line with modern social realities. It sees reaching out to women as necessary for broad social legitimacy.

Clashes between formal and informal systems

Legal pluralism inevitably means that different legal norms and systems will on occasions conflict. The cases studied show that the interface is largely defined in an *ad hoc* manner – if the terms of engagement are not defined, arbitrariness and confusion can result. The case study below describes how the clash of norms or sanctions between the formal and informal derives from their different imperatives.

Case Study 16: Stabbing in the City - Dual Track Resolution⁷⁴

Four young men went drinking together in the center of Palangkaraya, Central Kalimantan, on the evening of 31 August 2003. Two of the friends had a misunderstanding and a fight broke out. After an exchange of blows, 18 year old Ranno Jonfrid Siae pulled a knife and stabbed his friend Syahmanto. Ranno fled the scene, while his friends rushed Syahmanto to the local hospital. He died of the wounds shortly thereafter.

Ranno was arrested and detained by the police for two months while they conducted the investigation. In the meantime *adat* resolution processes ran in parallel. Both perpetrator and victim were Dayak and not long after the incident, their families met at the house of the neighborhood head of the victim to attempt resolution by *adat* means. Two separate deliberations ensued between the families, mediated by the neighborhood head. Once an agreement was reached, it was taken to the *damang* for “official recognition”.

Eventually a list of items required to be paid by Ranno’s family was drawn up, totaling Rp 36 million.⁷⁵ Ranno’s father Jonfrid and his lawyers felt the price of certain goods was excessive, but Jonfrid’s bargaining position was very weak in the circumstances and so he conceded, ‘It was difficult to negotiate with them because it would make them emotional.’ He decided to stay with the *adat* process despite urgings of some friends and families to withdraw. ‘I could have pulled out of the *adat* process, but personally it wouldn’t have felt right. What my son did wasn’t normal. It touched on feelings and emotions,’ declared Jonfrid.

A mere 18 days after the incident, an agreement was signed and Jonfrid paid the “fine”. His main motivation was to reduce tensions and ensure harmony with the victim’s family. ‘It dissolves revenge and fear...and that’s been proven.’ He also knew that a mediated resolution would be well-received in court and hopefully reduce Ranno’s sentence. Indeed, his lawyers had advised him of precedents where that had occurred. The *damang*’s secretary also noted that the purpose of *adat* resolution is to ‘help reduce the prison sentence.’ He added, however, that it also entails a degree of ‘divine forgiveness’ to reduce the gravity of the perpetrator’s sin. ‘There’s none of that in prison,’ he observed wryly.

For cases as serious as this, *adat* resolution is rarely the end of the matter. The criminal prosecution proceeded. Mindful of the *adat* process and wishes of the victim’s family who had written to the court requesting the lightest possible punishment, the Palangkaraya Municipal Court handed down a sentence of only 1 year imprisonment. The court’s judgment reads:

... the matter has previously been peacefully resolved in the adat way between the families of the victim and the accused. The accused has fulfilled all requirements of the Dayak adat resolution. These values which exist in the community should be observed and respected because besides the juridical and philosophical aspects of the case, this Judicial Panel must also look to the social ...

The sentence was later confirmed on appeal to both the High and Supreme Courts. Ranno is now out of jail and working in another district. The two families have met twice since to share a meal and claim that relations between them are sound.

The case contrasts the rationale of the two systems of justice. For the families and the *damang*, the imperative was restorative, to rapidly facilitate a resolution that would “dissolve revenge and fear”. The imperative of the court, in contrast, was to dispense justice in the public interest and to deter future crime.

The case also reflects how the systems approach each other. The desire to avoid double jeopardy whereby the perpetrator could be “tried” and punished twice for the same offence led the courts, including the Supreme Court, to acknowledge the *adat* sanction. Similarly the *damang* and Ranno’s lawyer understood the *adat* sanction could reduce the severity of the

⁷⁴ This case study is based on interviews with the perpetrator’s father and lawyers, the family of the victim, the prosecutor and one of the judges in the case and discussions with the *Damang* who helped resolve it. It also draws on Palangkaraya Municipal Court Decision 279/Pid.B/2003/PN.P1.R of 16 December 2003 & Central Kalimantan High Court Decision 14/Pid/2004/PT.PR of 16 February 2004. The citation is from the Municipal Court decision and is our translation.

⁷⁵ The list included items for an *adat* ceremony, two pigs, one buffalo, one cow, 15 chickens, 500kg of rice, 100 kg of sugar and special plates and bowls. The amount also included Rp 6 million in case fees for the *damang* and his *adat* functionaries.

prison sentence. In this case, the “clash” of norms and imperatives was successfully negotiated to the satisfaction of all parties.

By contrast, “black magic” killings documented in East Java (Case Studies 18 & 19) illustrate the difficulties inherent in a court determining precisely what constitutes “local customs and values” and the extent to which these should be taken into consideration. In East Java, the practice of black magic or *santet* is widely considered a crime. At the same time, it is also widely practiced. In most cases, police protect community members accused of black magic. For the most part the community accepts this intervention. However, if the community does decide to take matters into its own hands and seeks justice for someone accused of *santet*, the police rarely act to investigate the killing.

In short, the formal system does not determine on a consistent and predictable basis what constitutes appropriate local customs and values and what lies beyond acceptable standards. In the stabbing case above, the court viewed the outcomes of the non-state justice process as valid, whereas in the Anggeng “kidnapping” case (Case Study 8), informal resolution was rejected. But in neither case file is there an explanation as to how these decisions were reached. The respective jurisdictions of the formal and informal systems are not clarified, meaning serious criminal offences are at times inappropriately mediated at village level. Procedural standards and protections are not articulated. On what basis was the process declared invalid in one case and legitimate in another? Similarly, what guides police discretion to mediate or prosecute? The interface is simply not defined and, as demonstrated in the Kalimantan domestic violence case and Anggeng’s case, sometimes the result is ambiguity and legal uncertainty that benefits the wealthy and powerful.

Addressing the Interface – Examples from the Region

Other countries in the region face the same challenges legal pluralism and are adopting practical approaches to addressing the formal-informal interface. Neighboring Papua New Guinea, for instance, acknowledges the importance and role of traditional justice, but has established a government mechanism to harmonize the formal and informal systems.

Box 4: Examples of Change III: Enhancing compatibility between formal and informal justice and building capacity – The Community Justice Liaison Unit of Papua New Guinea

Like Indonesia, informal systems are the dominant form of justice in neighboring Papua New Guinea. In order to enhance compatibility and consistency between formal and informal systems; to enhance the capacity of non-state justice actors; to document and disseminate progressive local innovations; to encourage the engagement of civil society organizations in the justice sector and to promote restorative justice, the Government of Papua New Guinea has established a Community Justice Liaison Unit (CJLU) as an official part of the Law and Justice Sector.

Through regular training, oversight, awareness raising and specific programs for women and vulnerable groups, the CJLU is a manifest policy expression of the importance of non-state justice, but at the same time a practical means to forge a middle ground between the two domains of justice.

Source: Government of Papua New Guinea (2007)

Some of the uncertainty, ambiguity and potential for a clash of norms can be mitigated by clearly defining the respective jurisdictions of court-based adjudication and village dispute resolution. This is precisely the approach adopted in Indonesia's near neighbor, the Philippines.⁷⁶

Box 5: Examples of Change IV: Defining the Interface – The Barangay Justice System of the Philippines

The Barangay Justice System (BJS) is a program of compulsory conciliation and mediation at the *barangay* or village level, implemented in all 42,000 *barangay* in the Philippines. Established in 1978, the BJS is a synthesis between formal and informal dispute resolution that attempts to capture the strengths of community mediation with the enforcement authority of the state.

The basic philosophy of the BJS is that no dispute may be filed with a court until an attempt has first been made to mediate it at the *barangay* level. Mediation under this system is conducted informally, without recourse to the rules of evidence. It is in essence a “de-legalized” environment.

The BJS comprises a mediation board in each village. The village head, or *barangay* captain, chairs the board which comprises 10–20 members depending on the size of the village. Cases are brought initially to the *barangay* captain for conciliation. If a settlement is reached, it is written up and signed by both parties. The settlement then has the legal effect of the final judgment of a court. If the captain fails to produce an amicable settlement, the case is raised to a three-member panel of the board, the members of which are selected by the disputants. If this fails, only then may the case be filed for adjudication in the courts.

The jurisdiction of the BJS covers all types of disputes with the following exceptions:

- where one party is a government official;
- criminal offences punishable by imprisonment exceeding one year or a fine exceeding 5000 pesos;
- where the dispute involves real estate located in different cities or municipalities; and
- other disputes considered by the *barangay* captain to be better suited to the courts in the interests of justice. (Local Government Code 1991: s 408)

While far from perfect, the Barangay Justice System consistently enjoys high satisfaction rates and heavy caseloads.

Defining the respective jurisdictions of the formal and informal systems through national legislation, as in the Philippines example above, delineates the boundaries of police discretion and restricts the capacity of informal mechanisms to inappropriately mediate serious criminal cases such as rape and sexual assault. Of course merely legislating this does not necessarily translate into reality on the ground. In the Philippines, serious crimes continue to be mediated at the *barangay* level in contravention of state law. But clarifying the issue helps to reduce confusion and guide the exercise of discretion.⁷⁷

These examples from the region could provide some inspiration to policy-makers in Indonesia.

⁷⁶ For more on the Barangay Justice System, see Gerry Roxas Foundation (2000a), *Report on the Efficacy of the Katarungang Pambarangay Justice System in the National Capital Region*, Manila: Gerry Roxas Foundation; Gerry Roxas Foundation (2000b), *The Panay and Guimaras Experience in Barangay Justice*. Manila: Gerry Roxas Foundation; GC Sosmena Jr. (1996), ‘Barangay Justice: a Delegalisation Mechanism’ 20 *Hiroshima Law Journal* 404; & G. Sidney Silliman (1985), ‘A Political Analysis of the Philippines Katarungang Pambarangay System of Informal Justice Through Mediation’ 19 *Law & Society Review* 279.

⁷⁷ Alfredo Tadiar (1988) ‘Institutionalising Traditional Dispute Resolution: the Philippine Experience’ in Asia-Pacific Organization for Mediation (APOM), *Transcultural Mediation in the Asia-Pacific*, Manila.