The Journal of
Law, Social Justice
& Global Development

Ensuring That no Child is Left Behind: Capitalizing on Existing Justice Pathways to Accelerate Progress Towards SDG Goal 16

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Article Information

Issue 27: 2023: *General Issue*, ed. Rajnaara Akhtar and Jonathan Vickery.
This article was published on: 14 March 2024
Keywords: customary justice, juvenile justice, Beijing rules.
Journal ISSN: 1467-0437 **Article DOI:** https://doi.org/10.31273/LGD.2023.2701

Abstract

This paper evaluates how customary justice systems align with juvenile justice standards as set out in the Beijing Rules. It considers a dataset of 3,894 interviews conducted by the Terre des hommes foundation with 259 customary actors in Afghanistan, Egypt, Lebanon, Burkina Faso, the West Bank and Gaza Strip. It is argued that reforming customary systems to better resemble access to justice mechanisms — at least from a child welfare perspective — may be wrongheaded. Instead, customary justice systems might be conceptualised as a potential juvenile justice tool. From an efficiency and scalability perspective, such an approach has intuitive appeal. As well as handling a majority of dispute resolution, these systems naturally divert children away from formal legal processes, shield them from detention, facilitate rehabilitation and promote reintegration. The question should hence be how current policies and programming might be reconceptualized to capitalize on customary justice systems as a response to the deficits in juvenile justice in the developing world.

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Part 1: Introduction

The scope for, and consequences of, child rights violations during justice processes has become a matter of increased concern over the last decade.[1] In 2019, the UN Global Study on Children Deprived of Liberty revealed that, in any one year, more than 400,000 children are detained as part of a justice process, with around 100,000 in prison and 300,000 held in pre-trial detention. The Study showcased how such children are at heightened risk of violence, including sexual violence, and the long-term impacts this has on their socio-cognitive development (Nowak, 2019: 16-62). More pragmatically, the involvement of children in events such as the Arab Spring, youth 'bulges' in many states, and a better appreciation of the connection between youth marginalization and political violence, has led to a repositioning of children. No longer passive dependents, children are increasingly viewed by states as critical stakeholders in promoting peace, security, and development. In turn, this has renewed discussions around juvenile justice, and particularly the factors that drive criminality in children, how they should be dealt with by the justice system and best practices for avoiding recidivism.

From a programmatic perspective, the focus of reform has been developing and fragile states. While incarceration rates in these countries are lower vis-à-vis global averages, children in conflict with the law are more likely to be denied due process guarantees, be exposed to punitive sentencing, and suffer violence in the judicial process. Of the 12 countries that allow capital punishment to be applied to children, the 69 that impose life imprisonment on children, and the 70 that set the age of criminal responsibility at less than 10 years, the vast majority are classified as low income and/or fragile.[2] Moreover, these contexts are more ripe for negative peace externalities — situations that can be 'tipped' by the experiences of children in conflict with the law. The civil conflict in Syria provides a salient example. It was the arrest and torture of a group of school children for anti-regime vandalism in rural Dara'a in March 2011 that prompted a nation-wide protest movement, catalyzing the now decade-long war (Gelvin, 2012: 101).

Reform programs derive from a body of principles based on diversion, rehabilitation and reintegration, otherwise known as juvenile justice. The core idea is that when children are held accountable for criminal actions, their status needs to be taken into account in assessing their culpability, and special rights and protections afforded to them, irrespective of the gravity of the offence. These include, inter alia, a presumption against prosecution, solutions that are geared towards rehabilitation and reintegration, and the imposition of detention only as a last resort and then for the shortest possible period of time. These norms are set out in the Convention on the Rights of the Child (1990), and complemented by 'soft law' including the 1985 UN Standard Minimum Rules for the Administration of Juvenile Justice ('The Beijing Rules'); the 1990 UN Guidelines for the Prevention of Juvenile Delinquency ('The Riyadh Guidelines'); and 1990 UN Rules for the Protection of Juveniles Deprived of their Liberty.

This favoring of a utilitarian approach over retributive philosophies of punishment has a salient rationale, buttressed by theories explaining why children come into conflict with the law, and the ineffectiveness of applying retributive approaches to them.

First, scholars posit that child criminality is often rooted in socio-developmental deficits, usually laid down in early childhood. The argument runs that children who are exposed to violence or who are not given the tools to develop prosocial bonds and acquire key reasoning and relational tools, go

[1] The authors of this article would like to thank members of Terre des hommes teams who have played leading roles through the processes of methodological design, data collection and data analysis that were conducted in the scope of this research project, namely: Aoua Traoré, Boubacar Tchombiano, Christelle Antonetti, Claudia Campistol, Hedayatullah Rameen, Khitam Abu Hamad, Kristen Hope, Mohammad Yehia and Porgo Tasséré.

[2] As at 2021, countries allowing capital punishment are: Nigeria, Pakistan, Somalia, Tonga, Yemen Iran, Brunei, Qatar, KSA, Iran, UAE, Malaysia, the Maldives. With respect to life imprisonment all are in the developing world with the exceptions of US, Australia, UK, New Zealand, Singapore, Ireland, Japan, Canada and Japan. Of the 70 countries that set the age of criminal responsibility at 10 or under, all are in the developing world with the exceptions of the US, Australia, New Zealand, Ireland, UK and Switzerland.

on to suffer socio-behavioral deficits. When such children encounter challenges, for example failure, rejection or marginalization, they react by engaging in asocial responses, ranging from misbehavior through to acts of criminality or civic disobedience (Harper, 2019: 14-15; Smith and Thornberry, 1995: 451-481).

Neurobiological explanations may also be in play. It is broadly accepted that children, particularly adolescents, have a predisposition to 'boundary-pushing' and anti-social behaviors vis-à-vis adults, and that this is linked to brain maturation. Around puberty, teenagers and older children experience an arousal of the limbic system, which increases their appetite for novelty and sensation-seeking. This period of arousal precedes the growth of the child's self-regulatory competence and cognitive control systems (which usually develop in mid-adulthood). The consequence is a limited ability to appraise risk and consequence, coupled with an increased vulnerability to external pressure (Furby and Beyth-Marom, 1992: 1-44). This may, at least somewhat, explain the evidence of a temporal pattern to adolescent offending, whereby involvement in criminal activity begins at around 13 years, continues to escalate until 17 years, and then declines sharply (Johnson et al, 2009: 216-221).

The second argument presented in support of utilitarian approaches is that punishment has poor efficacy in terms of deterring children from crime. The reasoning is that when children are brought into criminal justice processes, this produces negative externalities, including exposure to violence, and the deficits created when children are removed from educational and social networks. These externalities manifest in social and economic disadvantages that place children on a negative trajectory of low expectation and learned behaviors, which then correlate with recidivism and cyclical patterns of deviance (Ogle and Turanovic, 2016: 18-21). An alternate explanation is that retributive approaches are premised on a misinterpretation of how children in conflict with the law view and exist in the world. Punishment implicitly assumes that these children have a stake in and are invested in society, whereas the opposite is more likely to be the case. They engage in deviant behavior as a statement of their 'outsider' status. It follows that removing them — for example through detention — from a world they do not feel part of and have actively chosen to disengage from, not only fails to repair the causal issue, but is likely to reinforce or consolidate it (Gladwell, 2014: 231-248).

Rather than punishment, the scholarship argues that what children in conflict with the law need is an opportunity to 'reboot'. This generally involves individualized programming to vest children with the skills they need — whether self-control, conflict resolution or critical analysis — to access alternate pathways and exercise more constructive life choices. These tools and choices act as a bridge to an existence based on social interest and connectedness with family, peers and community representatives where there is no need for to engage in deviant behavior (Strang, 2001: 183-195).

The literature also discusses the value in providing children in conflict with the law with opportunities to make reparation for harm caused and rebuild relationships — tools often referred to as restorative justice. Such approaches aim to promote a child's understanding of the wrong and its impacts on others, to develop a sense of responsibility for events that have taken place, and to take proactive steps to re-establish a place in the social structure (Larsen, 2014: 1-5). Making reparation may also facilitate deterrence. Braithwaite's reintegrative shaming theory argues that the prosocial bonds created and reinforced through acts of restorative justice dissuade future rule breaking as the individual avoids the poor opinion that friends and families may attach to subsequent asocial behavior (Braithwaite, 1989: 13-14).

The empirical evidence supporting rehabilitation approaches is strong. The transitory nature of most adolescent offending supports the idea that juveniles are more likely to reform and desist from crime as they enter adulthood. Rehabilitation also seems to correlate with non-recidivism (Steman, 2007: 2-5), and in the limited number of studies that find efficacy in punishing children in terms of recidivism, the effect is mild (Zimring, 1995: 131-155).

The challenge of promoting these best practices in fragile and developing country-contexts is that the methodologies are resource and time intensive, require specifically trained professionals, and assume the existence of a strong welfare state. Juvenile justice norms also sit uncomfortably in societies with lengthy histories of violence, that lack civic freedoms and with cultures where patriarchy is deeply entrenched. Exacerbating these challenges, the same forces that make a child-friendly justice system unlikely, also expose children to the types of protection violations that tend to bring them into contact with the law. Poverty, armed conflict and discrimination drive violence against children in myriad forms, including in families, schools, workplaces and at the hand of state security and law enforcement. Poverty and conflict likewise push children out of school and into the shadow labor force, or into other rights violating situations such as early marriage and trafficking.

Given these challenges and imperatives, it is curious that development programming has focused — almost exclusively — on the reform of formal, state-run justice systems. Indeed, it is broadly accepted that in developing, conflict-affected and fragile states, customary justice systems play a crucial role in conflict management and dispute resolution (Wojkowska, 2006: 12). Moreover, the validity of engaging customary justice for the purposes of reform has been recognized. The Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies (2004) noted that:

> Effective strategies for building domestic justice systems will give due attention to laws, processes (both formal and informal) and institutions (both official and unofficial) (UNSC [35]).

In response, this article seeks to evaluate the utility of approaching customary justice systems (CJS) as tools of juvenile justice, and their capacity to supplement formal processes in ways that would bring benefit to children, as well as reap efficiency and scalability gains.

The discussion draws upon a dataset of 3,894 semi-structured interviews with 259 customary actors in Afghanistan, Egypt, Lebanon, Burkina Faso, the West Bank and the Gaza Strip. These data were collected between October 2013 and December 2018 by national child protection officers of the Terre des hommes Foundation (Tdh). Each interview concerned the resolution of a dispute involving a child by a customary actor, using a questionnaire (44 closed questions and 1 open question) split into five thematic areas: the locality of the dispute, the profile of the customary actor, the profile of the child, the conflict resolution procedure, and the outcome of the dispute. This data was supplemented by interviews with child protection staff and case studies of dispute resolution processes.

The survey methodology and ethical safeguards were developed with the assistance of an expert advisory committee made up of experts from the Inter-faculty Center for the Rights of the Child of the University of Geneva, the School of Criminology of the University of Lausanne, the Department of Social Work at the University of Griffith, the Department of Criminology at the University of South Wales and the University of Louvain la Neuve. Data were collected in anonymized form using a cloud-storage archiving device by trained Terre des hommes Foundation staff who had existing expertise in child protection and/or access to justice. The raw data were uploaded to a common server (Kobo), directly downloaded into an Excel file, and then converted into an SPSS database. Following internal validation, data processing and analysis was carried out by a coordination team of Tdh staff. All customary actors participated in the data collection process voluntarily. The questionnaire and an explanation of its objectives were presented, and they were asked to provide their free and informed consent. To allow comparative data on the basis of anonymity, each child and case was assigned an alpha-numerical identifier.

The data will be used to examine the extent to which CJS conform to juvenile justice principles. Four parameters were selected, drawn from Beijing Rules:

1. Children should benefit from a specialised juvenile justice model that caters for their age-specific needs and vulnerabilities, and protects their rights.

2. Juvenile offenders should be diverted away from the formal justice system wherever possible.

3. When children are held accountable for criminal actions, they should be enjoy certain procedural protections that reflect their child status and age-related vulnerabilities.

4. Solutions rendered should reflect a child's best interests and promote their wellbeing, including by being proportional, by taking into account their personal circumstances, and by protecting them from violence.

Before exploring the survey data, it is important to set out some definitions and caveats. For the purposes of this article, customary actors are defined as individuals charged with responsibility for resolving disputes and inter-personal problems within their communities. Children are defined as persons aged between 0-18 years (the data set includes 76 cases of children listed as 18 years; these cases were not eliminated from the data set as the incident occurred prior to adulthood). Finally, CJS are understood as a system of customs, norms and practices that are repeated by members of a group for an extent of time that they consider them mandatory.

In terms of methodological constraints, because the data set concerns the resolution of disputes involving children in only five countries/territories, the figures must be interpreted with caution. Screening questions allowed the sample to be subdivided in order to minimize the number of questions for which a respondent would not be able to produce answers. This said, the data still reflects a lack of uniformity with respect to response completeness, and the distribution of cases over time and across countries. Principally, this was because data collectors worked on the basis of participant voluntariness, making it impossible to control the number of participants, nor the number of questions they were prepared to answer. A second reason was that not all questions were consistently put to customary actors, usually due to cultural sensitivities in different country contexts. A final caveat is that because questions were answered through the lens of the customary actor, the data is affected by a level of subjectivity concerning the child's role in a case. For example in cases of child marriage or sexual assault, the customary actor sometimes viewed the child as the perpetrator of the dispute, whereas according to this article's frame of reference, the child was clearly the victim. The same applies to cases of physical assault, where it was not always easy to identify who was the aggressor and who was the victim.

Part 2: Evaluating Customary Justice Systems Against the Beijing Rules.

2.1 *A specialized juvenile justice model catering for children's age-specific needs and vulnerabilities*

The fundamental principal underpinning juvenile justice is that children should be treated differently to adults. They should benefit from a specialist system that caters for their age-specific needs and vulnerabilities, and protects their rights (Beijing Principle 2.3). Moreover, this system should be staffed by thematically trained professionals, with a fair representation of women and minorities (Beijing Principle 6.3, 22).

The notion of age-specific needs and vulnerabilities creates an immediate tension with CJS insofar as this assumes a system operating in pursuance with a legal definition of a child, and a minimum age of criminal responsibility. Indeed, in each of the countries under review, legislation defines children as persons who have not reached 18 years of age, and sets the minimum age of criminal responsibility at between 7 and 13 years.[3] The respective CJS, however, loosely consider childhood to end around the age of puberty.

[3] Under the CRC, a child is defined any person who has not reached 18 years of age. Moreover, it charges states to set a minimum age where criminal responsibility can be attributed, the best practice being 14 years. The UN Committee on the Rights of the Child (2007) concluded in paragraph 32 of its General comment no. 10: children's rights in juvenile justice that 'a minimum age of criminal responsibility below the age of 12 years is considered by the Committee not to be internationally acceptable'.

Indeed, the average age of child disputants was 14.2 years.

Perhaps more importantly, because CJS understand and manage wrongdoing principally in terms of the disruption to community cohesion, the idea of restricting responsibility on the basis of age is non-efficacious. This is not to say that dispute arbiters do not take account of age; maturity plays an important role in understanding why a dispute took place and finding a solution to it. However, because the locus of dispute resolution is identifying a satisfactory solution, there will not always be a logical or fair linkage to culpability, and the age-related dimensions that attach to this. It follows that a special set of rules or methods that apply to children — insofar as this does not directly contribute to or promote the overall aim of re-establishing social relations — is deemed unnecessary or even illogical.

The CJS under review likewise performed poorly in terms of being staffed by thematically trained professionals, with both genders evenly represented. Of the 259 customary actors participating in the data collection exercise, the vast majority (95 percent) were men. Moreover, of the 142 actors who identified a professional affiliation, only four of these concerned children (3 retired teachers in the Palestinian Territories and one youth *shura* worker in Afghanistan).

These observations must be interpreted against the context of the formal justice system, however. Indeed, with the exception of Lebanon, the number of female judges in the courts system is very low (8-10 percent in Afghanistan, 48 percent in Lebanon, 0.5 percent in Egypt, and 18 percent in the West Bank and Gaza Strip). Moreover, from the case studies, a consistent criticism of these formal justice sector actors was poor knowledge of the law generally, and juvenile legislation in particular.

2.2 *Diversion away from the formal justice system*

A second juvenile justice principle is that, wherever possible, there should be a presumption against prosecution, with juvenile offenders being diverted away from the formal justice system (Beijing Principle 11). Such diversion should not be conflated with impunity. The Principles note that where it is voluntary, and an option for recourse to state institutions exists, cases might be referred to community mechanisms to facilitate, for example, temporary supervision and guidance, restitution or compensation (Beijing Principles 11.3, 11.4).

By their nature, CJS work pre-emptively to prevent cases from reaching the formal justice system. Indeed, only 2.2 percent of cases were referred by the customary actor to the formal system. Moreover, although no data was collected on the number of cases referred directly to the formal system by disputants, the case studies suggest that this was negligible.

In terms of safeguards around the voluntariness of diversion, the case study data suggested that disputes could be referred to the formal system at the behest of one of the parties at any time (and would be if a matter could not be resolved through customary processes). Such choice was exercised by parents, with the child not being consulted. Importantly, a parent's discretion to move between formal and customary fora was subject to a range of influences. Preference for CJS was found to be driven by financial considerations, community expectations (particularly the normative preference of customary justice actors), or a desire to protect a child from externalities such as stigma, violence or privacy violations. This is not to imply though, that children would not opt for CJS given the opportunity; of 1,077 cases where children were asked their opinion as to a solution, only 15 stated that the matter should be referred to the formal system.

It is also not to imply that the formal and customary systems exist independently, or that the relationship between them is one of contestation. In fact, the data revealed a significant level of integration and cooperation — both ad hoc and formalised. While the number of cross-referrals between the systems was low (7.2 percent), formal justice actors (often more than one) were involved in customary proceedings in 39.5 percent of cases. Police were involved in 993 cases (1,987 police), prosecutors were involved in

327 cases (403 prosecutors), judges were involved in 88 cases (92 judges), and probation officers were involved in 102 cases (121 probation officers). Another phenomenon observable in the data is 'double-hatting'. Around half of the customary actors (106 out of 259) identified themselves as being affiliated with an official structure.

The situation in the Palestinian Territories provides an interesting example of how formal and informal actors work in an integrated manner. According to the case studies, less serious offences are often referred to the public relations department of the police (in the Gaza Strip) or the Juvenile police (in the West Bank). Police were described as often pressuring children with the threat of arrest or detention to encourage them to proceed informally, and/or call upon customary actors to intervene. Alternatively, customary actors might ask police to detain both parties (or the fathers of the parties) until an agreement is reached, thus reducing the possibility of retaliatory violence. If police refer the matter to the public prosecution, either directly or because an informal solution could not be reached, CJS actors often continue their efforts to broker a resolution. Where successful, prosecutors generally close the case (if the complaint has been withdrawn), or invoke legislation allowing the court to impose a reduced fine (in the case of misdemeanors). Where cases reached a judge, but reconciliation had occurred, they tended to use their discretion to reduce sentences as far as possible. In fact, they would often not consider cases until there was proof of either a reconciliation agreement or that the victim had refused reconciliation and would postpone sessions until such time (Barak, 2013: 17-19, PCHR:16-18).

2.3 *Procedural protections that reflect age-related vulnerabilities*

A third juvenile justice principle is that when children are subject to a legal process, they are entitled to procedural protections relating to their status and age-related vulnerabilities. Children should be allowed to participate in proceedings (as well as their parents) and express their opinions freely (Beijing rule 14.2, 15.2), proceedings should not be subject to unnecessary delay (Beijing rule 20.1), and children's privacy should be protected (Beijing rule 8). Such standards have a strong grounding in the scholarship on child psychology, recidivism and civic disobedience. In particular, the longer the duration a child self-identifies as either a perpetrator or victim, the longer term and more negative the consequences for socio-cognitive development. Likewise, protecting a child's privacy is grounded in the disproportionate and negative impact that stigmatisation — whether as a perpetrator or victim — can have on identity development, relationship-building and milestone attainment.

In a majority of cases (61.4 percent) both the perpetrator and victim participated in proceedings; only in 7.4 percent was neither involved. Moreover, children usually gave their account of the dispute (49 percent of cases compared to 27 percent where they did not), but less consistently their point of view as to a solution for the case (in 26 percent of cases children gave their opinion, whereas in 42 percent they did not). Although parental participation was not examined in the data collection process, the case studies indicated that children were almost always represented by their parents in proceedings.

With respect to the expeditiousness of proceedings, the data collected found that case duration in CJS averaged 11 days. There was some cross-country variation; a minimum average of 3 days was identified in Burkina Faso, compared to a maximum average of 19 days in Lebanon. Field staff interviewed stated that this compared favorably to the formal justice system. In this regard, it is important to understand expeditiousness, not only in terms of the time that passes between a dispute and its resolution, but the conditions the parties are exposed to during this period. In each of the target countries, the use of pre-trial and trial detention in cases concerning children was widely criticised, particularly children's exposure to violence, conditions of detentions that do not meet

minimum standards, and children not being separated from adults.

With respect to privacy, the case studies indicated that both users and customary actors believed that CJS were more committed to protecting confidentiality when compared to the formal justice system. Particularly in sensitive cases, such as those involving pre-marital sex, rape or sexual assault, a key reason why parents opted for CJS was to protect their children from the stigmatisation they associated with a court process. This is not to say that identity protection was always pursued with a view to upholding child's best interests. There was some evidence from the case studies that parents conflated a child's privacy with protecting family honor, and that the customary system facilitated this by disposing of or 'burying' cases. In short, protection of the child's identity was achieved, but through impunity of the perpetrator.

Finally, it should be noted that the Beijing rules make reference to generally-applicable (i.e. not child-specific) procedural safeguards, for example the right to legal counsel and the right to a fair trial free from discrimination (Beijing rules 7.1, 9, 14, 15). The survey data found that access to legal counsel was rare. Of 3815 cases assessed, only 389 children had access to a lawyer. To assess procedural fairness, the child protection worker collecting the data gave their opinion on role of power imbalances and discrimination on the customary actor's decision-making. Of 3,894 cases examined, evidence of discrimination against the child was identified in 3.9 percent — most commonly, gender discrimination. Of 2,985 cases examined, evidence of power imbalances was identified in 6.5 percent.

2.4 *Solutions that reflect a child's best interests and promote their wellbeing*

A final juvenile justice principle examined concerns the extent to which decision-making was made in accordance with a child's best interests and promoted their wellbeing (Beijing rule 14.2, 17.1d). Drawing on the commentary to the Rules, such solutions are (i) proportionate to the circumstances of both the offender(s) and the offence, (ii) take account of the child's personal circumstances, and (iii) provide rehabilitation assistance (Beijing rules 5.1, 17.1a, 16.1a and 24). Moreover, children should not be subjected to corporal punishment (Beijing rule 17.3), and detention should only be used as a last resort and for the shortest possible period of time (Beijing Rule 13, 17.1b and c, 19.1).

In no case did a CJS impose a detention sanction on a child, but in 80 cases the child was subject to corporal punishment. The proportionality of outcomes rendered — assessed subjectively by child protection workers — was also found to be sound in 62.4 percent of cases.

Assessing whether the solution rendered was guided by a child's best interests and analysis of their broader social situation was more difficult to ascertain. The data collection process did not examine these questions specifically, however it did consider other questions of relevance, including flexibility in working methods, and rehabilitation and restorative justice elements. Indeed, most cases examined were mediated (67 percent) as opposed to a judgement being rendered (12.7 percent). Moreover, in a majority of cases (54 percent), the outcome was considered to contribute to the rehabilitation of the child, and in 22 percent of cases the child received follow-up support following their reintegration into the community.

Part 3: Drawing Conclusions around the Child-friendliness of CJS

3.1 *How customary and formal justice systems stack up*

The above discussion showcases a paradigmatic difference between customary justice systems and juvenile justice approaches. The societies where CJS operate generally feature multiplex relationships where members rely on mutual cooperation and social bonds for livelihoods and protection. The role of CJS is to manage these relationships, stop them from breaking down, and when they do, to repair them as quickly and easily as possible. Importantly, in the event of a conflict, wrongdoing is understood principally in terms of

the disruption to community cohesion. It follows that when crafting a solution, the nature of the offending act, who was at fault and the damage caused may be seen as less important than subjective matters such as local power dynamics, cultural beliefs (even incorrect or discriminatory ones) and the status of the disputants. The implications scarcely need setting out. It might be that the solution needed to restore social harmony is giving impunity to a powerful offender, or appeasing a powerful victim with a disproportionately harsh sentence.

This creates a clear tension with the principles underpinning juvenile justice. Because the *raison d'etre* of CJS is to repair social relations, the idea that children should be afforded a different set of rules, special protections or solutions that promote their best interests, is non-efficacious. Moreover, because they are rarely breadwinners or spouses, and are less likely to carry political influence, children may be viewed as less important to social peace, creating even more scope for their rights to be overlooked.

It is curious then that in the data examined the child-specific protections elaborated in the Beijing Rules *were* largely adhered to. Children were naturally diverted away from the formal justice process, thus avoiding detention and associated interruption to their education and social relationships. They participated in dispute resolution along with their parents and expressed their opinions; cases were flexibly mediated; and outcomes were generally considered proportional and rehabilitative. In terms of more general protections, case resolution was expeditious, there was little evidence of power imbalances or discrimination, and children were shielded from corporal punishment.

These positive norms must also be considered against a child's likely treatment at the formal justice system. The scholarship highlights the deleterious consequences of slow case processing and violence in pre-trial and remedial detention. Protracted case processing is linked to recidivism, negatively impacts socio-cognitive milestone attainment, and diminishes the corrective potential of participating in a justice process (Butts and Halemba, 1996: 3-5). Children's exposure to violence is equally injurious, manifesting in physical and mental health disorders, violence repetition and escalation, and a heightened potential for asocial behaviors (Nowak, 2019: 16-26). The case studies supported this. The children interviewed by Tdh:

> […] viewed the penalties imposed by the formal justice system as synonymous with violence, especially in detention facilities. After spending time in detention, they felt it was very difficult to escape from stigma on the part of the community, which negatively impacts their future. […] In the West Bank, children who committed an offence were considered by the community as offenders or criminals they are labelled as "the thief", "the rapist" or even "the guilty". In Afghanistan the minors incarcerated in a detention centre are stigmatised: their reintegration into their communities of origin is almost impossible; it is difficult if not impossible to find work; they soon become a burden on their family; it is often impossible for them to marry. On the other hand, in Jordan, participating children indicated that resolving conflicts at the community level focused not on the crime itself but on reparation; a view that was supported by stakeholders like teachers and religious leaders who were also consulted. (Colliou and Hope, 2016: 8-11)

These differences are underscored by comparing rates of recidivism between the two systems. At the formal system, juvenile recidivism sits at around 40 percent (Butts and Halemba, 1996: 3), whereas in the data examined in only 107 of 3,741 cases involved a repeat offender, suggesting a recidivism rate of less than 3 percent. While it is possible that repeat offenders were dealt with by more than one customary actor, this conclusion is significant. It may be that while the aim of CJS and main principle of juvenile justice appear to sit in contradiction, in practice they are relatively well-aligned.

3.2 *Implications for juvenile justice programming*

Today, juvenile justice programming is strongly skewed towards reforms targeting the formal sector. This is arguably a reflection of development programming generally, which tends to preference state over of non-state systems. It is also quite logical; as noted, children in conflict with the law are exposed a range of protection risks. However it does beg the question whether it would be more efficient to leverage customary justice systems which — by their nature — seem to share many of the characteristics associated with child-friendly justice processes.

A larger tension concerns the nature of the programming that *does* target CJS. As discussed in the introduction, starting in the early 2000s, development agencies have increasingly engaged in CJS reform. The norm has been to view justice as existing along a continuum, with formal and informal systems sitting at either end. This encouraged interventions aimed at 'fixing' CJS to make them better resemble state courts. The positioning of children in this new era of programming begs particular interrogation. Although there are notable exceptions, as a general rule, children have been grouped along with women, minorities and the poor under the banner of 'marginalised groups' — a single commodity with uniform vulnerabilities and needs

From a technical perspective, such a classification is warranted. Children do face risks under customary justice systems. The emphasis on solutions aimed at restoring community cohesion means that children's best interests rarely leads decision-making. Moreover, violations such as sexual assault and domestic abuse may not be considered serious or even sanctionable offences. The flip side is that vulnerability approaches have reduced the space for viewing and responding to children through the lens of juvenile justice. This has created both risks and missed opportunities.

Principally, insofar as the aim of CJS reform is to improve individuals' access to justice — an end understood in terms of human rights, due process and rule of law — interventions may have ironically worked to make CJS *less* child-friendly. Examples include efforts to divert criminal cases to the courts, reduce procedural flexibility and promote certainty around decision-making. Juvenile justice practitioners might argue that such ends are counterproductive against their goal of steering children away from formal legal processes. Moreover that children are best served by individualised decision-making that takes into account their broader social and community context — norms that are frustrated by reforms geared towards consistently applied sanctions and judicial objectivity.

A second tranche of risk speaks to what dominant programming approaches overlook. To the extent that reform efforts have prioritized human rights, gender parity and due process compliance as the best way to serve marginalized groups, this leaves less room to promote child-specific ends such as expressing their opinion, privacy protection and rehabilitation.

Orthodox customary justice programming might also constitute a missed opportunity. Although they tend to be the object of criticism, CJS's loosely mediated decisions, flexible working methods and focus on restoring relationships, perhaps do more to promote the aims of juvenile justice than undercut them. It also should not be forgotten that CJS account for a majority of dispute resolution in developing and conflict-affected states. Together, this suggests that a change in approach may be needed, at least as far as children's case processing is concerned. Instead of viewing CJS as malfunctioning justice mechanisms that require reform to better resemble state courts, programming agencies might view them as tools to expand and promote the juvenile justice agenda.

Arguably, this would not be all that hard. Development practitioners would need to accept that the rationale of CJS is largely incompatible with a specialist system grounded in juvenile

protections. With this out of the way, they could concentrate on consolidating and sharpening positive practices that do not conflict with CJS's *raison d'etre*, such as children's participation and flexible decision-making geared towards rehabilitative solutions. Practitioners could also more strategically capitalise on the aims of CJS to

achieve their aims. They could champion the evidence that asocial behaviors in children are often rooted in protection violations, that punitive sanctions promote recidivism, and that long-term rehabilitative support is the best tool to prevent future violence. CJS actors *should* be interested in this. Their authority is closely linked to their ability to maintain the societal balance, and tools that make this job easier are valued and taken seriously.

3.3 *Conclusion*

This article drew on an analysis of data collected by Tdh to highlight that CJS exhibit many of the juvenile justice principles enshrined in the Beijing Rules, somewhat bucking popularly held notions about them. This finding has important implications for the justice sector reform strategies promoted by development and child protection agencies in poverty-affected, fragile and conflict-affected states. Such efforts generally focus on diverting children's cases away from courts, and promoting solutions that enable rehabilitation and community reintegration. The rationale is undoubtedly salient. If the reasons children come into conflict with the law are rooted in socio-behavioral deficits, then punitive approaches are unlikely to be effective in preventing recidivism. Moreover, where formal justice processes heighten children's exposure to violence and other rights violations the result may be to entrench cyclical criminality rather than assuage it.

While clearly important, a concentration on court-based juvenile justice reform may have resulted in alternate pathways being overlooked. Specifically, CJS — which handle the bulk of cases — might be better leveraged. The data suggest that these processes facilitate individualised outcomes and child participation, uphold basic procedural protections, and are rarely violent or punitive. This child-friendliness is not a product of design, but rooted in the internal logic of how CJS operate. Such opportunities have not been capitalised upon for two reasons. First, the development sector tends to look at CJS through a narrow lens, where the goals are compliance with minimum justice standards and human rights. A second reason is a tendency to group children along with other vulnerable groups, such as women, minorities and the poor. Such invoking of umbrella concepts clouds the fact that these groups — while all disadvantaged — have highly specific justice needs. In the case of children, the approaches and outcomes offered by CJS largely mimic what is trying to be achieved at the courts, making them fertile territory for justice gains at scale.

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