

Non-state Justice Systems in Bangladesh and the Philippines

Paper prepared for the
United Kingdom Department for International Development

Stephen Golub¹
Boalt Hall School of Law
University of California at Berkeley

January 2003

I. Introduction

This paper aims to help the Department for International Development (DFID) assess whether and how to work with non-state justice systems (NSJS) as part of its program to advance safety, security and accessible justice (SSAJ) in the countries where it operates.² It is further guided by the overall DFID goal, to which SSAJ programs contribute, of reducing poverty in its widest sense. Consistent with a growing international consensus, DFID views poverty as embracing such problems as powerlessness and vulnerability, and not just material deprivation. Given that in many developing countries NSJS handle more disputes than do the courts and other state institutions, they hold considerable significance for SSAJ and poverty alleviation.

Prepared as part of a larger DFID research initiative involving a number of consultants and countries, this particular report focuses on Bangladesh and the Philippines for a combination of reasons. Bangladesh features widespread use of a community-based, non-state dispute resolution technique, *shalish*, in three broad forms: as traditionally administered by village leaders and other influential persons, including religious figures; as modified through national legislation and accordingly administered by a local government body, the *union parishad* (UP);³ and as modified and overseen by NGOs in many parts of the country.

The Philippines features at least one significant type of NSJS that could inform DFID's work, even though the Department does not operate there. It has over 20 years of experience with a national *Katarungang Pambarangay* or Barangay Justice System (BJS, named for the administrative levels at which the system operates) that builds on

¹ Mr. Golub teaches International Development and Law at Boalt Hall School of Law. Comments on this paper are welcome. They may be forwarded to him at Sjg49er@aol.com.

² Because the immediate audience for this paper mainly comprises DFID governance advisors, country program managers and other personnel already familiar with the Department's terminology, the paper does not explicate the concepts underlying NSJS and SSAJ.

³ Despite its official status, the government form of *shalish* is still examined in this paper because of its non-state origins.

indigenous dispute resolution practices. A formal part of the country's legal system, the BJS gives such practices an official role and structure. In recent years NGO initiatives have selectively enhanced the BJS through pilot projects, though not on the same scale or in the same manner as NGOs have engaged with shalish in Bangladesh.

Both Bangladesh and the Philippines also have numerous cultural minorities whose non-state justice systems coexist (sometimes uneasily) with those of the state.⁴ By their very definition, these minorities' systems and experiences do not affect the majority of the populace. They nevertheless are significant for DFID because in many countries such groups are among the most victimized and powerless groups suffering lack of safety, security and access to justice. This paper accordingly aims to draw on their insights and experience regarding both their non-state and state systems to ascertain what can be done to help make SSAJ a reality for cultural minorities.

Finally, the two countries also are of interest in that some aspects of their NSJS experience offer interesting comparisons, given the regional, societal and political differences between the two. This paper does not aim, however, to compare them in a comprehensive, systematic way. It instead illustrates contrasts and similarities where they seem appropriate.

Much of this report addresses dispute resolution, and by extension the DFID priority of access to justice. Nevertheless, what is implicit in dispute resolution should be made explicit: it helps prevent escalation of disputes, with powerful implications for the other two DFID justice priorities of personal safety and security of property for the poor. As a recent United Nations Development Programme (UNDP) paper explains in highlighting effective Bangladeshi NGO work in this arena, "many of the disputes, if not resolved in the early stages, lead to violence, especially domestic violence linked to dowry demands, second marriages, etc. Many land disputes also lead to physical assault and even murder, owing to the critical importance of land ownership for economic survival." (United Nations Development Programme 2002: 92)⁵

This report draws on various sources of information:

- Document reviews carried out by the author and research associates in Bangladesh, the Philippines and the United States.

⁴ In a sense, much of the civil law system in Bangladesh could be seen as NSJS in origin, in that it applies Muslim and Hindu laws to these respective majority and minority religious groups. The Philippines also has special state Sharia courts in parts of its Muslim south, which incorporate previously non-state laws into processing of certain disputes within that religious group. It is beyond the purview of this paper, however, to explore the formal integration of religious law into state law. Doing so would make for a broader but shallower research effort, in view of the other topics covered, inevitable time and resource constraints, and the need to set research priorities. Of equal importance, the thrust of DFID's overall NSJS research initiative is to examine non-court systems to which most people in many countries turn to address SSAJ concerns.

⁵ Though that paper does not document this claim, a number of sources the author has consulted assert that the link between dowry demands and domestic violence is powerful and that land claims are of sufficient importance to trigger violent conflict in Bangladesh.

- Interviews the author carried out in the United States and during January 2003 visits to the Philippines and Bangladesh.
- The author's background in the Philippines, where he was based from 1987 to 1993 and where he subsequently returned on several consulting assignments.
- The author's background in Bangladesh, where he undertook several consulting assignments over the past decade, including those focusing substantially on shalish.

The document comprises two main parts. The first, "Experience with Non-state Justice Systems," summarizes various NSJS experiences of governments, NGOs, development organizations, communities and individuals in Bangladesh and the Philippines. It closes with a brief analysis of the two societies' comparative experience with NSJS. The second, "Recommendations and Conclusions," builds on that experience to recommend further steps DFID should take regarding whether and how to work with NSJS itself, including additional research it should commission.

II. Experience with Non-state Justice Systems

A. Shalish

The term "shalish" (or "salish") refers to a community-based, largely informal Bangladeshi process through which small panels of influential local figures help resolve community members' disputes and/or impose of sanctions on them. (It also can refer to the panels themselves.) NGOs and the government have drawn on and modified this process in recent years so that shalish now takes three basic, sometimes overlapping forms in Bangladesh: traditional; government-administered "village courts" (though under the relevant laws other terms technically apply for family and urban disputes);⁶ and NGO-modified.

Shalish is not the only local, informal method of dispute resolution in Bangladesh. As in many societies, disputants may seek out influential individuals for advice or decisions.⁷ But its widespread use and diverse forms make it of great potential interest to DFID.

Shalish may involve voluntary submission to arbitration (which, in this context, involves the parties agreeing to submit to the judgement of the shalish panel), mediation (in which the panel helps the disputants to try to devise a settlement themselves) or a blend of the two. In a harsh, extreme version of its traditional form, however, shalish

⁶ Whether the government-administered process is actually a form of shalish depends on the source analyzing it. Both because it does seem to be similar in nature and for the sake of simplicity, this paper does consider it one such form.

⁷ In fact, such very basic mechanisms may constitute the most common form of dispute resolution across the globe, but they operate at such an informal level that state, NGO or donor intervention may not be possible or appropriate. It is possible and even likely, however, that various development initiatives (including those directed at shalish) can and do influence the underlying dynamics affecting such mechanisms.

instead constitutes a de facto criminal court that inflicts trial and punishment on individuals who have not consented to its jurisdiction.

With the exception of the summary judgment imposed under that harsh version, a typical shalish may extend over numerous sessions and months. Negotiations between disputants, often including or represented by family members, sometimes also take place outside these sessions, complementing the discussions that take place within them.

Shalish addresses a wide variety of civil matters, some with criminal implications. These often involve gender and family issues, such as violence against women (whether within or outside marriage), inheritance, dowry, polygamy, divorce, financial maintenance (or lack thereof) for a wife and children, or a combination of such issues. Other foci include land conflicts, such as over the boundaries between neighbors' parcels, as well as other property disputes.

The term “dispute resolution process” suggests calm deliberation, with the parties patiently putting forth their perspectives and impartial facilitators soberly sorting through the issues. Though certainly not the product of a scientific survey, the impression flowing from over a dozen (NGO-organized) shalish sessions the author observed during the 1990s was rather different:

The actual shalish is often a loud and passionate event in which disputants, relatives, [shalish panel] members and even uninvited community members congregate to express their thoughts and feelings. Additional observers — adults and children alike — gather in the room's doorway and outside. More than one exchange of opinions may occur simultaneously. Calm discussions explode into bursts of shouting and even laughter or tears. All of this typically takes place in a crowded school room or other public space, sweltering most of the year, often with the noise of other community activities filtering in from outside. The number of participants and observers may range from a few dozen to well over one hundred. (Golub 2000: 137-138)

This paper categorizes the three forms of shalish for analytical purposes, particularly to pave the way for the “Conclusions and Recommendations” section's discussion of whether and how DFID might address such processes in Bangladesh and elsewhere. As with many or most non-state justice systems, however, these categorical lines often blur in practice, as do the lines between arbitration and mediation.

Traditional Shalish

As summarized by Khair in a thoughtful review of NGO-modified shalish, in its traditional form the practice

is basically a practice of gathering village elders and concerned parties, exclusively male, for the resolution of local disputes. Sometimes

Chairmen and elite members of the Union Parishad are invited to sit through the proceedings. *Shalish* has no fixed dimension and its size and structure depend entirely on the nature and gravity of the problem at hand. (2001: 5)

A recent report for the Asia Foundation, the international development organization that has most extensively examined shalish (and supported its NGO variation), further explicates the nature, appeal and drawbacks of the traditional approach:

[Shalish] generally saves time and money, and it serves as a platform for airing grievances...

Although *shalish* members have the option of engaging in either mediation or arbitration to reach a solution, most commonly choose arbitration. This method involves unilateral decisions made by officiating members, whereas mediation engages opposing parties in reaching solutions of mutual satisfaction... Although the decisions are not always fair and equitable, they tend to carry a great weight within the community because they are issued by well-known and powerful villagers. However, among those who lack respect for these decision-makers, it is extremely difficult to enforce rulings if the parties refused to comply...

Sometimes solutions are arbitrary and imposed on reluctant disputants by powerful village or community members. Such "solutions" are based less on civil or other law than on subjective judgments designed to ensure the continuity of their leadership, to strengthen their relational alliances, or to uphold the perceived cultural norms and biases. The *shalish* also is susceptible to manipulation by corrupt touts and local musclemen who may be hired to guide the pace and direction of the process by intimidation. Furthermore, because the traditional *shalish* is composed exclusively of male members, women are particularly vulnerable to extreme judgments and harsh penalties. (Khair *et al* 2002: 8-9)

Corruption also can infect the process in other ways, such as through a panel member's solicitation of bribes to nudge the group's consensus in a given direction. Consistent with the inclination toward arbitration and arbitrariness, Hashmi claims that those the shalish finds to have offended community norms may be publicly shamed or, in unusual cases, socially ostracized. (Hashmi 2000: 99)

Social ostracism by no means represents the harshest, most extreme version (or perversion) of shalish, however. Amnesty International and other sources have documented numerous incidents of women, even rape victims, being lashed or even stoned to death for violation of local norms. Often these abuses stem from *fatwahas* (religious rulings) handed down by local *mullahs* who belong to the shalish panels or otherwise influence them, and who interpret or misinterpret *sharia* (Islamic law) to

impose such egregious treatment. What is less clear is whether the reports of these abuses reflect an actual increase in such incidents, perhaps due to a rise in militant fundamentalism, or whether these incidents have always occurred, but only received attention in the 1990s due to improved NGO, human rights and media penetration of rural Bangladesh.

Though such human rights violations merit international and domestic condemnation, there is a sense in which the necessary focus on them may mask the more pervasive, systemic manner in which traditional shalish can perpetuate the poverty and powerlessness of women and other disadvantaged populations. To its credit, traditional shalish may well provide easy, free, comprehensible access to justice in situations where biases and power imbalances do not mitigate against fair consideration of disputes. But a diversity of sources document the biases and power imbalances that hold back Bangladeshi women, and indicate the harmful ways in which these factors play out in traditional shalish. (Haque *et al* 2002; Bangladesh National Women Lawyers' Association 2001; Hashmi 2000)

An Asia Foundation report illuminates the case of a young woman whose husband's dowry demands led to his beating her and casting out of their home, adding the insult of severe social stigma to the injury of his physical assaults. She explains that a string of shalish sessions proved fruitless, and that the dynamic was such that "I could not speak up...I didn't have the chance to say anything." (Haque *et al* 2002: 22)

Nor do the power imbalances and victimization only materialize in the course of the shalish. It often may prove too powerful, in the sense of imposing unfair judgements and punishments on women. Yet traditional shalish also can prove too weak to be of use to them, leaving them with only other unsatisfactory courses of action. An investigation by a respected human rights NGO illustrates such a situation, in the case of a fifteen year old girl seeking support for the child resulting from her rape by a neighbor's son:

When the shalish gathered, [the father of the alleged rapist] organized a gang to break it up by using violence and money. It never reconvened. Meanwhile, a lawyer was found to represent [the victim] but it soon became obvious that he was taking advantage of a poor woman and her daughter by taking money from them and doing nothing in return. (Odhikar 2001: 59)

Biases and power imbalances do not only affect women. Hashmi describes a "*member-matbar-mulla*" triumvirate that controls village affairs, including shalish:

The *members* of the Union Parishad (the lowest electoral unit) are elected officials, in charge of the disbursement of public goods and relief materials among the poor villagers, are the most powerful in the triumvirate. They are often connected with the ruling political party of other influential power-brokers in the neighboring towns or groups of villages. The *matbars* (*matabbars*) or village elders, who also sit on the *salish* (village court), are next in the hierarchy, having vested interests in

the village economy as rentiers and moneylenders. They often get shares in misappropriated relief goods along with government officials and *members-chairmen* of the Union Parishads. The *mulla*, associated with the local mosques and *maktabs* (elementary religious schools), are sometimes quite influential as they endorse the activities of village elders albeit in the name of Islamic or *Sharia* law. They often sit on the *salish* and issue *fatwas* in support of their patrons, the village elders. The rural poor, often women, are victims of these *fatwas*. (2000: 137)

One need not fully concur with the picture Hashmi paints here (which takes on far more nuance as his analysis unfolds) to infer its implications for traditional shalish, even where the gender dimension is not involved. Where an influential individual's interests are at play, the process can become distorted. It also can be biased due to patron-client relations: if a disputant is a political, personal or financial client of a shalish panel member (which can often be the case, since disputants often are poor and the panel members affluent), the latter might use his influence on the client's behalf.

In his own thoughtful review of the literature, Blair echoes Hashmi in concluding that "social science analyses [of traditional shalish] are sobering." (2003:18) Most of those analyses suggest that it is a corrupt and/or deteriorating process:

Siddiqui, revisiting the Narail district village he had studied two decades previously, found that the highly deficient shalish of his earlier scrutiny had gotten significantly worse over the intervening period. The matbars dominating the shalish constituted the dominant male power structure, generally found against the poor (especially when one of the disputing parties belonged to the upper strata) and customarily discriminated against women, with increasing corruption in later years.⁸ Likewise Aminuzzaman (2000) found high levels of corruption in the shalish system. Tofail Ahmed, another local public administration expert, finds *mastaans* (local hoodlums) to have infiltrated many shalish bodies, undermining their validity and distorting their judgments.⁹ (Blair 2003: 18)

Government-facilitated Shalish

A series of laws have sought to regulate and administer shalish in various ways. The Muslim Family Laws Ordinance of 1961 empowers the Union Parishad (UP, the lowest unit of local elected government) to arbitrate family disputes. The Village Court Ordinance of 1976 and Conciliation of Dispute Ordinance of 1979 similarly enable it to settle civil disputes and petty criminal offenses, respectively in rural and urban areas.

⁸ [Blair's citation]: "Siddiqui (2000a: 147-148; 2000b: 299-310 and 337-338). Siddiqui cites Shepan Adnan also finding the shalish broken down as an institution in his restudy of another village in Comilla first analyzed by John Thorp (Siddique 2000a: 148)."

⁹ [Blair's citation]: "Personal interview, December 2002."

Government-administered shalish (otherwise known as a village court) does not impose the *fatwas* and harsh punishments that the extreme forms of the traditional practice entail. More generally, it features UP chairs and members playing leading roles in convening sessions.

However, often the reality of village courts does not differ substantially from that presented by the traditional process. A number of sources suggest that the dynamic and the membership of the government shalish panels often resemble the traditional form in terms of being either biased or ineffective at providing justice for the disadvantaged, including women. Some echo elements of Hashmi's analysis of how a "*member-matbar-mulla*" triumvirate influences village affairs and, by extension, village courts.

Haque and her associates recount numerous village women's experiences with seeking justice from UP officials. (2002) The document should be read with a grain of analytic salt, in that its focus is the women's (largely) positive experiences with NGO shalish, discussed below. Still, it is probably the most detailed paper on the topic. Its case studies suggest a great overlap between UP and traditional shalish. While government officials may convene the sessions (or, if unsympathetic, decline to do so), the process and panels are much like those of traditional shalish.

Numerous other studies reach similar conclusions regarding government-administered shalish, either in the context of directly examining it or in the course of addressing other topics. The aforementioned UNDP report draws on a (very limited) survey of residents of one district to conclude that their perceptions of both the quality and efficacy of village courts are very mixed. (2002: 94) A Bangladesh Ministry of Women's and Children's Affairs paper quotes the head of a local social service NGO as saying that shalish organized by UP members "will ignore the rights of [sexually abused] women and girls and either dismiss the case or award them money as compensation." (2001, 78) As an aforementioned report for the Asia Foundation suggests:

UP Chairmen, who are often overwhelmed with many disparate responsibilities and little governmental support, tend to view family disputes and other violations of law as low priorities. Many UP Chairmen and members are also ill-informed in the law, and some are reportedly corrupt and politically motivated, causing them to act with prejudice. (Khair *et al* 2002: 9)

Without directly addressing shalish, reports by both the NGO Odhikar and the British Council in Bangladesh have identified specific ways in which local political leadership impinges on justice regarding such diverse problems as land seizures and violence against women and children. (Odhikar 2001: 100; British Council 2002: 30, 35)

Other sources more directly suggest that politics has crossed into thuggery and criminality to an increasing extent in recent years. As summarized by a New York Times article:

Bangladesh is plagued by unemployed young men who do the dirty work of political parties at the local level, enforcing calls for strikes, rustling up people for rallies and intimidating opposition voters. In return, the parties look the other way when the thugs commit crimes. (Dugger 2001: 8)

In a related vein, one individual interviewed by the author casually mentioned that much of the crime wave that triggered a very public recent crackdown by the government was in fact the responsibility of criminals backed by politicians.

These links to criminality have ramifications for government and traditional forms of shalish. Islam, author of an in-depth, unpublished study of the topic, contends that while “people always used to go to shalish” even as recently as a decade ago, “the increased use of arms and miscreants for political purposes has corrupted the process and undermined the influence of respected persons.”¹⁰ The observation is very much in line with the analyses cited by Blair. Both point to the ways in which both traditional and government-administered shalish may be infected by corrupt and even criminal influence in many communities.

The point, of course, is not to suggest that all or even most UP members are necessarily corrupt, but rather to point out that various influences and constraints may powerfully affect their capacities to organize and conduct shalish, particularly as it affects women.

One positive development in this regard is the growing role of women in union parishads. Dina Siddiqi, a U.S.-based academic currently conducting research on shalish, considers this a very favorable trend in moving toward gender equity in the process. Even though many female UP members secured their positions through their husbands or other male relatives, they still are “wonderful—just having them there [at a shalish] is useful” for the women disputants.¹¹

Similarly, an Asia Foundation report documents gradual progress toward women’s greater involvement in UP affairs, including shalish. This often flows from training and other support by NGOs that are themselves involved in shalish (as discussed below). Though some UP members meet resistance from their male counterparts, others overcome this by virtue of the confidence, knowledge and other support stemming from the NGOs. As one woman puts it, “At the beginning I didn’t attend all the big shalishes, but for the last two years they have been calling me to every [village] court, because I have an excellent knowledge of the laws and the rules.” (Haque *et al* 2001: 37) Another female UP member even reports organizing a shalish herself at a local UP office, which resulted in an influential family having to pay a fine for assaulting a villager. (53)

Though the latter incident might more appropriately have been taken to court as a criminal case, it is very possible that community circumstances weighed against this

¹⁰ Interview with author, Jan. 12, 2003.

¹¹ Interview with author, Jan. 11, 2003.

proving effective. The female UP member's actions accordingly represent a measure of progress for the role of women and for justice in that locale.

NGO-facilitated Shalish

In recent years, non-governmental organizations have played increasing roles in initiating and facilitating shalish, and in modifying its gender-biased and class-biased aspects. Much (though not all) of this work has flowed from the pioneering efforts of the Madaripur Legal Aid Association (MLAA) and from its training of other NGOs in its techniques.

Though the approach varies among organizations, NGO shalish differs from that traditional and government forms in several respects:

- Though the line is not always clear, NGOs tend to encourage mediation, whereas the other two forms generally practice arbitration.
- NGOs often play a role in training and/or selecting the persons who constitute shalish panels. The training relates to relevant laws and, sometimes, to how to conduct mediation.
- They encourage participation of women in the process, whether it as shalish panel members or as disputants speaking up during sessions.
- NGOs facilitate the organization of a shalish, sometimes taking the lead role and sometimes a supportive role.
- They introduce basic record-keeping into the process, so that agreements and other key proceedings are documented.
- NGOs also tend to take an integrated approach to legal services, so that shalish is only part of their assistance. This integration includes training for shalish panels, as noted, as well as for the citizenry more generally. As with MLAA, it also can involve staff members seeking to resolve disputes even before a shalish becomes necessary. Perhaps most notably, the legal services can include taking a recalcitrant disputant to court should he (or conceivably she) refuse to participate in a shalish or refuses to honor an agreement.
- Development organizations such as the women's movement Banchte Shekha also pursue integration with their overall development programs. They do so in the sense that their programs (income generation, literacy training, group formation, etc.) aim to alter the underlying imbalance of power that biases shalish against women and other disadvantaged groups.

Research suggests that the above factors combine to make NGO shalish the most effective form in delivering a degree of justice and alleviating poverty. In their report for the Asia Foundation, Haque and her colleagues conclude that "NGO-administered shalish are far more equitable in their treatment of women than the traditional and UP shalish." (2002: 9) In the great majority of its 23 case studies, women were satisfied or very satisfied with their NGO shalish. Conversely, many had unproductive experiences with traditional or government shalish before turning to the NGOs. In a few instances, in fact, traditional leaders or UP members themselves suggested that the women request an

NGO to organize a shalish. Though not an absolutely unbiased source, since the Foundation has supported NGOs carrying out shalish, the report nevertheless does not attempt to portray the NGOs involved as unblemished or always successful, and carries some weight by using the voices of the affected women as much as possible.

The UNDP reports high rates of successful dispute resolution: 88 percent by the Madaripur Legal Aid Association (MLAA) and 75 percent by the development NGO Ganoshahajjo Sangstha. (92-93) While the statistics are those generated by the NGOs themselves, and therefore not compiled by more objective sources, they still provide at least preliminary grounds for seeing these NGOs' shalish work as effective.

Khair provides a detailed analysis of the multiple benefits flowing from NGO shalish in contrast with other forms and/or the judicial system. These include modification of an (often biased, arbitrary and harsh) process; cost effective delivery of justice; enhanced community knowledge of the law; women's participation in decision-making; greater gender equity and justice; more generally, greater negotiating strength for the disadvantaged; and a gradual sustainability of these changes over time. (42-50) She also reports changes in behavior and attitudes as greater legal awareness and access to NGO shalish grow. Such changes include reduction in child marriages, dowry demands, polygamy, spousal violence and arbitrary divorce. (44) Her information is largely qualitative rather than quantitative in nature, but as an academic (on the Law Faculty of the University of Dhaka) she arguably approaches the subject with more objectivity than NGOs.

Dina Sidiqqi reports favorably on the work of a Dhaka-based, women's legal services NGO, Ain O Salish Kendra (ASK), whose shalish-oriented work she is reviewing. Working in cooperation with rural partner NGOs, ASK's Gender and Social Justice Programme has helped organize and train local committees (in some cases solely composed of women) to monitor shalish and indirectly educate those carrying it out. She feels that active committees' educational and monitoring efforts have helped eliminate a kind of marriage that divorced couples must endure if they wish to reconcile: previously, through intentional misinterpretation of religious law and capitalizing on popular ignorance, intermediaries would tell the couples that the woman must first marry (and sleep with) another man before re-marrying her husband.

On the other hand, she also reports that even where people learn the law, it sometimes is not enough for them to change their conduct. For example, childhood marriage may even be increasing because girls are increasingly harassed as more of them go to school. By having their daughters marry early, parents ensure that this takes place before the harassment can take a nasty turn toward sexual abuse, which results in the ostracism of the girls.¹²

The voices of disputants themselves also lend weight to these conclusions. One woman who had a favorable experience with her own NGO shalish comments more generally on the process in her area:

¹² Interview with author, Jan. 11, 2003.

I think it is good to go and see a shalish, because you learn. My friends and I went there together. You know, before no documents were kept in a shalish and that was bad. Now there are documents. Everybody knows that one can be sent to court if one does not obey the verdict of the shalish. (Haque *et al* 2002: 39)

Confirmation of the qualitative assessments of Khair, Siddiqi and others, and of the anecdotal reports by village women, must await rigorous quantitative research, a point addressed under “Recommendations and Conclusions below.” Still, preliminary evidence does exist, in the form of small-scale survey research undertaken by the Asia Foundation in Bangladesh under the aegis of a 2000 Asian Development Bank study of legal empowerment in seven countries. Though both the methodology and the modest survey size weigh in favor of treating the findings cautiously, they do indicate that an integrated combination of MLAA and Banchte Shekha activities (including shalish) yields concrete benefits in terms of knowledge, attitudes and behavior—and by extension, poverty alleviation. (Asian Development Bank, 2001)

B. Barangay Justice System

The Philippines’ *Katurangang Pambarangay*, or Barangay Justice System (BJS), is a formal system based on traditional mechanisms of mediating local disputes. It operates at the level of the barangay, a local government unit of which there are approximately 42,000 in the Philippines. Like shalish, the BJS is rooted in its society. Unlike shalish, its most salient, widespread form is that run by government officials and persons they appoint, rather than traditional or NGO versions. A 1978 presidential decree first established the BJS. It was modified by the country’s 1991 Local Government Code and other subsequent legislation.

Though not without its flaws, as sketched below, the BJS does offer key advantages over the judicial system. These include:

- It is based on Philippine traditions, which include the use of friends and neighbors to amicably settle disputes.
- The BJS is far less costly than the judiciary, with an average filing fee of 20 pesos, a tiny fraction of court costs and lawyers’ fees.
- It also is far faster, with problems settled in a matter of days or weeks, rather than (typically) years.

A recent inter-organizational review of the BJS (mainly carried out by two organizations engaged in trying to strengthen the system) and an independent study respectively summarize many of its key features:

At the forefront of this system is the punong barangay [PB, otherwise known as the barangay captain]...an elected official who also acts as chief executive and as presiding officer of the local legislative council.

Assisting the punong barangay is the Lupong Tagapamayapa (peace-seeking committee) composed of 10-20 persons...who are selected from among the residents of the village or working in the barangay...A distinct character of the system is its informality and lawyers are banned in the entirety of the process. (Asia Foundation *et al*, undated: 1)

Once the complaint is received, the PB [or another barangay official to whom the function may sometimes be delegated] will call both the respondent(s) and complainant(s), with their respective witnesses, to appear before him for a mediation of their conflicting interests. If the PB fails, a date is set for the constitution of the conciliation panel—pangkat [a three-member panel chosen from the Lupon members by the disputants or, if they cannot agree, the PB]—that will hear both parties and their witnesses, simplify issues, and explore all possibilities for amicable settlement. Arbitration is also recognized as an ADR procedure under the BJS, and parties can, at any stage of the proceedings, agree in writing that they shall abide by the arbitration award of the Punong Barangay or conciliation panel. (Rojo 2002: 25)

An agreement that the parties reach through mediation or arbitration is legally binding on them: it can be enforced by the courts. On the other hand, the BJS jurisdiction is limited in a number of ways. It only can hear disputes between members of the same barangay or of neighboring barangays. Where the conflict has criminal implications, the BJS can only handle it if the penalties do not exceed a year in prison or a fine of 5,000 pesos (about 60 pounds). Crimes committed by government personnel in the course of their official functions cannot be submitted to the BJS, nor can agrarian disputes (for which separate processes have been established) or crimes having no offended parties.

As explained by the above inter-organizational review, when the BJS was launched in 1978, “its overriding objective was to decongest the courts of cases brought before it.” (1) It advances this objective through the requirement that civil disputes cannot be referred to the courts unless the barangay captain certifies that resolution has been attempted through the BJS. It contributes to this objective, though whether it actually succeeds is another matter. While the Philippine judiciary remains swamped by cases and delay, the BJS did handle almost 279,115 disputes in 1998, settling 84 percent of them. (136) The review further claims that “it is also a known fact that there are many undocumented disputes being handled and resolved under the BJS.” (136)

According to the review, “Another avowed objective of the BJS is its recognition of indigenous modes of dispute resolution born out of tradition and culture... Time-honored traditions based on kinship, utang na loob (debt of gratitude), padrino (godfather), pakikisama (comradeship) and community mores define how justice is to be served.” (2)

These “time-honored traditions” constitute a double-edged sword in advancing what the review considers a third objective of the BJS: access to justice. (2) Though the

report puts them forward without any apparent sense of irony or ambivalence, they can detract from access to justice under many circumstances, rather than improve it. These traditions all establish special links which can bias the barangay captain or Lupon members. In fact, in summing up other sources' research the report acknowledges that sometimes "personal biases of the barangay captain emerge. Thus, there were cases [in which] one faction of the village is favored over another, or those who offend the barangay captain are punished...[Furthermore,] in gender-related issues, the male perspective of the dispute prevails." (6)

Independent assessments of the BJS reach similar conclusions, suggesting that the political status of the barangay captain and Lupon members render their neutrality suspect. (Rojo 2002; Abaya 2000) Echoing other analysts' broader assessments of the Philippine polity, (Wurfel 1988; Steinberg 1990) Rojo summarizes how the underlying political economy of the society affects the BJS:

In the Philippines...social relationships are predominantly based on a patron-client logic, where affectivity becomes the prior guiding force. It is therefore a society that functions according to a political clientelist model, characterized by a personalized, affective and reciprocal relationship between actors with very unequal degree of resources...

The role of the local elites, as a result, is to...serve as the patrons to a local constituency, representing the intermediary layer between the central government and the voters. Moreover, it is important to highlight that these patron-client relations are not necessarily smooth in nature, and in many cases, violence, coercion and fraud are strongly present...

[This has] an extreme impact on the dynamics of local justice administration. Local elites at the barangay level will always have sufficient power to manipulate the dispute settlement process, and even to discourage poor and disadvantaged people [from participating]...Surveys indicate that a majority of community residents believe the settlement of disputes is influenced by politics, which is often mentioned as one of the main concerns. (30-31)

Despite the surveys to which the report alludes (but does not cite), as well as 1999 survey results indicating that over a quarter of those dissatisfied with the BJS identified favoritism as a factor (Asia Foundation *et al*, undated), other research indicates some acceptance of the system. The fact that it handled nearly 280,000 disputes in 1998, with most of them resolved, is at least prima facie evidence of such acceptance. Nevertheless, we should be open to the possibility that some disputants chose the BJS out of lack of alternatives (such as for those who cannot afford to litigate) or due to inappropriate influence (such as where a woman is pressured by her husband, family or community to abstain from seeking judicial relief). This is not to suggest that favoritism, pressure or lack of resources always influences outcomes, in terms of influence generated by or on

mediators to push resolution in certain directions. But given the underlying nature of the Philippine polity, such a phenomenon should not be considered rare.

Another indicator of popular acceptance of the system can be found in a 1999 national survey that included those who were BJS complainants and respondents. Within the former category, 67 percent were satisfied with the system, versus 28 percent dissatisfied. Within the latter, the results were 44 percent versus 46 percent. (Asia Foundation *et al*, undated: 76-77) While the results are mildly promising, the survey size for complainants and respondents is not clear. In addition, we should be aware of the possibility of respondents in these surveys to provide answers that they believe interviewers want to hear.

Of course, problems affecting the BJS are not solely a product of underlying societal factors. They also include more technical and financial constraints, including:

- Barangay leaders' and Lupon members' lack of understanding of the system and lack of technical capacity in implementing it;
- Poor reporting by and supervision of these persons, to ensure that they carry out their duties properly.
- Inadequate public knowledge of the BJS, stemming partly from inadequate informational outreach;
- Budgetary constraints that limit national and barangay governments' abilities to address these other shortcomings.

One innovative effort to address both the technical shortcomings and political biases of the BJS has been launched by the Gerry Roxas Foundation (GRF), a Philippine NGO that both funds and implements projects. Though neither the breadth nor ambition of its effort matches the several NGO initiatives concerning shalish in Bangladesh, its experience nevertheless may be instructive.

Basically, the Manila-based GRF has worked with local partner NGOs on the island of Panay to build what it calls a Barangay Justice Service System (BJSS). The system draws on persons with whom these local NGOs are in contact to act as Barangay Justice Advocates, persons who can act as resources for their fellow community members about both the BJS and other legal matters. The general underlying notion is that these Advocates (the majority of whom are women) will act in a manner akin to public health outreach workers. A more specific rationale is that they will both monitor BJS operations and enable community members to better understand those operations.

GRF reports success in spreading understanding of the BJS, of making it a more accountable process, and increasing community knowledge of the law by virtue of the availability of the Advocates to answer questions and provide assistance. Perhaps most notably in terms of sustainability, the Foundation also notes that in return for it providing initial training for them regarding the BJS and the law, it secures a commitment from barangay officials that they will provide ongoing support for the BJSS. Crucially, however, documentation of such lasting impact is not yet available.

C. Other Aspects of Non-state Justice Systems

Thus far, this paper has considered two broad types of dispute resolution processes, shalish in Bangladesh and BJS in the Philippines, that may be of relevance to DFID's work with non-state justice systems. But Bangladesh and the Philippines offer other respects in which NSJS could inform such work.

Integrating Respect for Cultural Minorities' Laws into State Systems

In the Philippines, as in many other nations, there has been an ongoing tension between the national system of private land ownership and many cultural minorities' communal systems of land use. A 1983 law journal article fleshes out the distinction as it applies to a prominent cultural minority of the Cordillera region, the Kalinga:

With individual ownership as its central feature, the Torrens system of land ownership and registration draws its philosophy from the Western capitalist mode of economic relationships. Land is treated as an individual commodity... To promote commerce, trade and the circulation and accumulation of capital, land is made easily alienable...

On the other hand, Kalinga customary laws of land ownership are basically indigenous. Unlike the Torrens system, their underlying philosophy is communal—not individual—ownership... Land is not a mere commodity but a sacred and valuable possession... Preservation—not alienation—of property is the basic policy.

Despite various and vigorous government campaigns to introduce the Western system of land ownership in the mainstream of Kalinga life, it is only in recent decades that the drive has begun to gain significant headway. This development came in the wake of the cash economy's increasing penetration into Kalinga society, accompanied by the growth of trade and commerce in the area. (Aranal-Sereno and Libarios, 1983: 448)

The last paragraph is noteworthy because it exemplifies a general reality that non-state justice systems are dynamic, not set in place by written laws in the ways that state systems are. In this instance, in some parts of Kalinga society there is greater acceptance of the state system of private, alienable land ownership. Various other sources have noted the ways in which indigenous mores are changing in response to education, commercial activity and political developments.

Yet this particular kind of evolution does not only move in one direction. In fact, a series of policy, regulatory and finally legislative reforms in the 1990s integrated notions of communal ownership into state law in key respects, as it applies to cultural minorities. These changes culminated in the passage of Republic Act No. 8371, otherwise known as the Indigenous Peoples Rights Act of 1997 (IPRA). The law

promotes state respect for indigenous peoples (an alternative term for cultural minorities), their cultures and their customary laws, including their claims and processes regarding lands historically farmed and otherwise used by these groups. This includes a cultural minority's "right to resolve land conflicts in accordance with customary laws of the area where the land is located." (Government of the Republic of the Philippines 1997: 8)

Another significant feature of the Act is the manner in which it integrates state and non-state systems. To protect their claims to lands they have historically used and occupied, otherwise known as ancestral domains, cultural minorities must go through a certification process that results in recognition of title. Thus, the claim is rooted in tradition and the nature of the claim is communal. But the formal state recognition of it comes about through a process established by the national government.

IPRA is a step forward in a number of respects. It provides a legal basis for protecting the safety and security of peoples who historically have suffered repression and discrimination, including being forced off of their land. This notably includes granting cultural minorities the right to regulate entry of outside settlers into the cultural minorities' ancestral domains.

The Act also may further the protection of natural resources in such areas in a number of ways. These include limiting cultivation to sustainable methods used by the cultural minorities and strengthening their legal ability to assert control against outside parties, including legal and illegal logging interests.

Of greatest relevance to DFID's interest in NSJS, IPRA represents a recognition of customary laws that do not rely on the courts for dispute resolution.

On the other hand, whether the Act will actually advance these ends remains to be seen. It co-exists with laws, regulations and concessions that grant mining, logging and other land use rights, conflicting with them in ways that have not yet been reconciled. IPRA also has been challenged as discriminatory, with key provisions only barely surviving an evenly split Philippine Supreme Court decision. This throws its long-term viability and impact into question. The Act itself faces potential internal contradictions, such as between a section upholding women's equal rights and another protecting indigenous culture and traditions (which for some groups might not recognize women's equal rights).

This situation stands in contrast with that of cultural minorities in Bangladesh, most notably in the Chittagong Hill Tracts (CHT). While under state law they have considerable autonomy in settling their own disputes, government officials often are ignorant of their processes and prerogatives. For example, while the law authorizes officials involved with land issues to take account of customary laws in addressing disputes, most rarely do so.

The Role of NGOs

The situation in the CHT also stands in stark contrast to that of Philippine cultural minorities in that the latter partner with legal service NGOs that have played important, multi-faceted roles in bringing about integration of NSJS with the state legal system. These NGOs all belong to the network known as the Alternative Law Groups, so named because they pursue an alternative type of legal practice that views disadvantaged populations as development partners rather than clients, and that focuses on capacity-building, administrative processes and policy advocacy more than litigation.

One such NGO, *Tanggapang Panligal ng Katutubong Pilipino (PANLIPI)*, was at the forefront of advocacy leading up to adoption of IPRA. Based on years of addressing specific cultural communities' grassroots legal needs, the NGO's leaders developed expertise regarding potential reforms. As consultants to USAID-supported policy reform programs, in the 1990s they began to convert that expertise into Philippine Department of Environment and Natural Resources (DENR) regulations that, for the first time, recognized ancestral domains and established processes for certifying the boundaries of such areas. PANLIPI later played a leading role in drafting IPRA and its implementing regulations.

The Legal Rights and Natural Resources Center (LRC) complemented PANLIPI's work by providing the Philippine Congress with a budgetary analysis that led DENR to partly cover the cost of demarcating cultural communities' ancestral domains. As with many new laws, this step was crucial in supporting services that converted legal reform into actual implementation.

One additional, noteworthy feature of these two organizations' operations is that key leaders assumed positions within the government at various points, enabling them to pursue change all the more effectively. As already mentioned, PANLIPI personnel were consultants to a policy reform process within DENR. One of them also served as a key advisor to the Department's Secretary. A founder of LRC later became Undersecretary for Legal and Legislative Affairs at DENR, bringing many progressive attorneys to the agency with him.

Other ALGS also collaborate with cultural minorities to protect their rights and build their legal capacities, often in the context of natural resources management. Their work and impact occupies the nexus of where environmental protection overlaps with indigenous people's property rights. The potential importance for DFID is that the capacity-building, representational and advocacy work of these NGOs all contribute to cultural minorities' access to justice and security of property. Working in collaboration with indigenous peoples, other NGOs and sympathetic government personnel, the ALGs advance both the formulation and implementation of reforms.

D. A Comparative Analysis

What accounts for the differences and similarities between the NSJS experience of Bangladesh and the Philippines? As a preliminary caveat, any conclusions in this regard should be seen as tentative. A core recommendation in this paper's next section is

that more research is needed to understand NSJS in these two countries and paint a fuller picture of practices that this discussion can only, in a relative sense, sketch. Nevertheless, a few factors come to mind.

State-modified and traditional NSJS in both societies are affected by gender biases and other undue influences that make NGO interventions desirable.

To varying extents, gender biases, corruption, political patronage and other factors seem to affect both who conducts NSJS and the outcomes that flow from these systems. Particularly in Bangladesh, but apparently to some extent with the GRF initiatives in the Philippines, NGO engagement in NSJS seems to ameliorate these factors.

The lower status and lesser empowerment of women in Bangladesh make NGO-modified NSJS a necessary option wherever in the country it is possible.

One reason that NGOs have engaged in NSJS in Bangladesh more than in the Philippines may well be because there are more alternative avenues available to Filipinas. Working through and seeking to modify traditional procedures may be the “least bad” option open to civil society groups seeking to achieve a minimal level of justice for women in Bangladesh. Without suggesting that Filipinas experience anything near gender equity, and without diminishing the widespread nature of problems such as violence against them, it must be said they generally have higher levels of income, education and independence than most women in Bangladesh. This translates into greater capacities to go to court, work together toward common goals, and generally assert themselves. It also means that men in the Philippines are accustomed to a higher status for the women there, and more amenable to such assertiveness.

Conservative religious forces play a greater role in Bangladesh.

Though as a whole it is a relatively moderate society in its interpretation of Islam, there nevertheless are parts of the country where fundamentalism (sometimes derived from ignorance) yields harsh NSJS treatment of women in Bangladesh. This consideration largely does not apply in the largely Catholic Philippines, and even in the country’s Muslim south fundamentalism is not as strong a factor. Against these comparative backdrops, NSJS in the Philippines does not have the same punitive potential as in Bangladesh. The need for the state or civil society to address excesses in the former therefore is not nearly as powerful.

Philippine NGOs tend to be more sector-specific and mobilization-oriented.

Though both countries can boast vibrant civil societies, in the Philippines NGOs tend to focus even more on specific sectors (e.g., women, farmers, workers, urban poor) than Bangladesh and display a greater proclivity to advocate and mobilize those sectors rather than provide individually-oriented services. Thus, community organizing, together with its political (though usually non-partisan) component is more of a feature of the

Philippine NGO landscape, whereas group formation (more service delivery and education-oriented) is more prominent in Bangladesh. Philippine NGOs therefore are less inclined to focus on such NSJS processes as dispute resolution because those processes involve more individual services.

Circumstance and key individuals' and organizations' histories play a role.

As much as factors inherent in the respective societies contribute to the greater NGO focus on NSJS in Bangladesh, circumstance also has had significant influence. The founder and head of the Madaripur Legal Aid Association pioneered work with shalish in Bangladesh partly because his father had been called on to mediate disputes. Many of the (then) young lawyers who founded Alternative Law Groups in the Philippines were powerfully influenced by a few mentors who helped set them on an explicitly empowerment-oriented course, rather than one that prioritized individual service delivery, alternative dispute resolution or (except for those who became involved in cultural minorities' rights) non-state justice systems. The legacies of these different personal influences live on.

III. Conclusions and Recommendations

A. Conduct further research on current NSJS experience, so as to shape future NSJS programs.

As with many aspects of SSAJ, there is a dearth of hard data that can inform decision-making concerning non-state justice systems. At least in Bangladesh and the Philippines, the development community does not know whether the various forms of NSJS tend to impose unfair processes and settlements flowing from power imbalances or whether they more typically tend to offer imperfect but still-valuable vehicles for the poor. In other words, which is the exception and which is the rule? The research may reveal a mixture of tendencies, but also should produce nuanced findings that inform the work of DFID. Properly disseminated, the findings may take on significant added value in terms of influencing the thinking and programs of the broader development community.

DFID accordingly should support both qualitative and quantitative studies indicating the current state of NSJS. It also should fund research illuminating whether and how NSJS activity it supports (or considers supporting) is having an impact on SSAJ and broader poverty alleviation goals.

At least two broad, additional preliminary considerations should inform this research. The first is ethical. Some research proposed here involves observation of situations that, if they so choose, researchers could influence (probably, though not necessarily, for the better) by exercising their superior knowledge of state law or by their status as educated individuals. Other studies involve interviews with persons who may offer questions as well as answers. Is it ethical to refrain from assistance under such circumstances? There are ways of striking a balance—certainly, the academic and

development communities do so all the time (though how well is another matter). Another powerful argument for these studies, of course, is whether it is ethical *not* to do such research in exploring whether and how to work with NSJS, and, much more broadly, whether the dearth of applied research across the spectrum of law and development work reflects an unethical approach.

An overlapping consideration is the practical one of how methodologically sound this research must be. It of course needs to be informed by careful planning that brings into the picture expertise that reaches beyond the legal community. But it is important to bear in mind the experimental nature of these inquiries: they will themselves constitute learning experiences about how to employ applied research to NSJS, so as to yield findings with practical applications. In carrying out these studies, then, the perfect must not be the enemy of the good.

With these considerations in mind, the research can and should take a number of forms:

Extended observation of current NSJS procedures

For periods of at least six to twelve months, domestic social scientists, graduate students, law students or other researchers would undertake extended residence in or frequent visits to a diversity of communities to explore the dynamics of their non-state justice systems. Among other goals, such studies would address the aforementioned crucial question of whether traditional and (where they exist) government-administered and NGO dispute resolution systems primarily operate in neutral or biased manners and primarily yield fair outcomes.

The studies would be almost anthropological in nature, except of course for the fact that they would be geared toward offering practical insights. Those insights might indicate, for example, that traditional and governmental systems do not operate as poorly as feared, or that a gradual process of training regarding the law, mediation and gender might be the best way of DFID relating to them. However, they might instead reveal deep flaws and biases that operate to the detriment of the disadvantaged, and that require more extensive interventions (whether working with or around NSJS, and whether working with NGOs or through other mechanisms) if there is to be SSAJ in these areas.

The research would examine the evolution of disputes, how they are handled and the factors influencing their resolution (or lack thereof). The roles of traditional and political leaders would be explored, as would those of NGOs to the extent that they conduct or otherwise influence non-state justice processes in a given area.

Though as unobtrusive as possible, this field research would build informative relationships with community residents in ways that a brief visit by DFID staff or consultants cannot. Carried out by indigenous researchers, it would yield far more societal insight than foreign consultants could bring to bear.

We must bear in mind that to observe is to change what one is observing. The target communities would not necessarily operate in the same way under study that they do while not subject to scrutiny. Still, these studies have the potential to yield far better information than we currently have, with important implications for DFID programming.

Survey research involving intervention and control populations

In an effort to understand whether current NGO work with NSJS is having an impact, DFID should commission surveys of statistically significant intervention and control populations. Local research institutions should play the lead role wherever possible. These surveys would compare certain results between the “intervention” communities, where the NGOs are working with NSJS, and demographically similar “control” communities, where they are not. The research could benefit from the ADB-supported Bangladesh study noted above, though what is proposed here would employ larger samples and a refined methodology.

The response variables could include people’s knowledge (of their rights); attitudes (toward themselves, their rights, or the government); behavior (as demonstrated by reported participation in relevant processes, as well as abusive actions such as reported violence against women); and material circumstances (income, health, shelter, or other measures). In terms of priorities, the most revealing information would pertain to behavior and material circumstances, because they more directly and importantly pertain to poverty reduction.

To the extent possible, questions in the survey interviews would not focus on the NSJS activities themselves, since respondents might conclude that favorable comments about those activities are being sought. That is, people would not be asked how a given NGO helped them, or about more specific variations on that theme. Instead, the questions would probe the general status of knowledge, attitudes, behavior and material circumstances. The impact of the NGO work would be inferred from statistical comparisons of the intervention and control populations’ responses.

With the above ethical considerations in mind, one way of benefiting the control populations is to seek to draw from general areas (though not specific communities) where an NGO already is operating or is planning to initiate operations. If this proves practical, persons who seek assistance could be referred to the NGO. In addition, under these circumstances the findings could provide insights that would benefit the NGO and the survey respondents alike.

Survey research involving comparisons of NSJS initiatives

In a variation on the survey research just discussed, where it is appropriate DFID also could compare the impact of various types of NGO and government NSJS activities. As in Bangladesh, different NGOs may approach NSJS differently—for example, with some just focusing on NSJS itself and others building on a base of development work.

One key variable that such research could scrutinize would involve whether and how women's participation in NSJS affects outcomes. Examining the difference among initiatives that feature varying levels of such participation could shed light on the relative importance of promoting their involvement in NSJS.

Comparisons of government records

Certain types of government records, such as marriage registration, may indicate whether NSJS is having an impact on people's knowledge and actions in ways that benefit the disadvantaged. If, for example as in Bangladesh, implementation of certain women's rights can occur only where marriages are registered, NSJS could have an indirect impact revealed by these records.

Of course, not all government documents tell a clear story. Is it a sign of progress that police record more reports of domestic violence in a community where legal services are being provided? Does this indicate that they are more responsive, or simply that more incidents are being reported, or even that abuse has increased? But this suggests that the use of government records be approached carefully, not that it should be avoided.

Pre-intervention and post-intervention survey research

Another device for determining and learning from impact would be to survey selected communities before (DFID-supported) NSJS work begins and then again at least a year or two later (and preferably longer). The pre-intervention surveys could serve additional functions, such as needs assessments that help structure the activities to begin with.

B. Seek to ameliorate the NSJS power imbalances that block safety, security and access to justice.

One cross-cutting pattern that emerges from reviewing non-state justice systems in Bangladesh and the Philippines is the tension between process and substance. As dispute resolution processes, they can and often do provide accessible, affordable, comprehensible forums for disadvantaged populations to air and settle problems. Yet where power imbalances and biases infect such systems, NSJS exhibit substantive injustice. This typically occurs in the barangay justice system and shalish wherever gender issues, income disparities or patronage connections are salient.

Yet it would be misleading to portray NSJS under such circumstances as absolute "access to injustice." The bottom line is that under some circumstances they are better than nothing for women and other disadvantaged groups. In many societies, a wife who has been tossed out of her home by her husband may well return to an inferior status and unpleasant situation if a shalish persuades him to take her back. But as unfortunate and unjust as this is, that situation is preferable to the ostracism, penury or prostitution that life on her own may offer her. As in Bangladesh, the underlying problems are the lack

of education, resources and, in the end, power for the disadvantaged. These result in many women being treated as a cross between property and liability.

As therefore detailed below, a central thrust of DFID programming should be to ameliorate power imbalances that infuse many non-state justice systems and that block NSJS.

C. To help address these power imbalances, fund and otherwise work with progressive civil society forces.

As both NGO-modified shalish and the ALG experience (including with IPRA) demonstrate, NGOs can play indispensable roles in working with NSJS and strengthening the capacities of disadvantaged populations affected by such systems. Organizations such as MLAA and Banchte Shekha have done trailblazing work in reforming a practice that in both its traditional and government-administered forms often fails to serve the poor. The Alternative Law Groups have been crucial in helping Philippine cultural minorities to assert their interests on both policy and grassroots levels. The ALGs have helped their partner populations make use of their customary laws and justice systems in the face of political and bureaucratic resistance, to the point of regulatory and legal reform that integrates NSJS with state law.

As with any strategy that features civil society, one can and should ask whether NGOs are overreaching in taking on these roles. Such scrutiny breaks down into at least three questions:

- Do NGOs represent foreign-funded elites competing with traditional ones? Many NGO personnel do hail from relatively privileged backgrounds, but many also come from the communities in which they operate, as with the Bangladeshi NGOs that are reforming shalish. Others partner with and defer to the populations they serve, as is the philosophy and practice of the ALGs. Furthermore, in scrutinizing them, we should bear in mind that the term “elites” covers a range of socioeconomic groups, some progressive and some repressive. Taking affluent, educated local persons and their organizations out of the programmatic mix simply by virtue of their “elite” backgrounds would be the same as denying DFID and its personnel a role.
- Is the prominent place of attorneys in some of these groups advancing the role of lawyers more than the rule of law? In at least the short run, attorneys inevitably assume greater roles in the lives of the poor when they provide or oversee services for them. They are, after all, the persons who know the law, take cases to court, and otherwise possess the highest levels of legal expertise. But the reality of most Bangladeshi groups discussed here, and of legal aid and development NGOs providing legal services in many other societies, is that they are staffed partly or even exclusively by non-lawyers and aim to build the legal capacities of the communities they serve. Even the Philippine ALGs, which mostly are led and staffed by attorneys, aim for partner population capacity-building that lessens

their dependence on lawyers, through such devices as community and paralegal training. This becomes all the more important in the many situations where the private bar is unresponsive to the needs of disadvantaged groups, and where private practitioners exploit such groups' ignorance and deference to extract fees for poor services.

- As with shalish in Bangladesh, do NGOs disrupt stable social systems when they change traditional practices? Bangladeshi NGOs do alter the way communities operate, and do take on quasi-governmental roles, when they administer shalish. But stable clearly does not equal equitable, nor does it even mean that such social systems have been set in place for decades or centuries. Dowry only seeped into Bangladeshi rural society in the second half of the 20th century, as an import from India. Fundamentalist groups in some societies clearly are trying to shift social dynamics themselves, in ways that might not even reflect a correct reading of Islamic law. A key consideration in supporting such NGOs is not whether they alter social systems, but whether they do so in a manner that is desired by their partner populations and that does more good than harm. The experience of NGO-modified shalish does seem to meet these qualifications. (The issue is less salient in the Philippines because ALGs and allied NGOs there seek to preserve many facets of cultural minorities' social systems within an overall framework of advancing gender and other human rights.)

D. For the short and medium terms, consider NGOs as the lead partners, rather than the subsidiary ones, in donor-government-civil society cooperation.

There is a tendency in much law programming for donors to view NGOs as adjuncts to government projects, serving as sources of information or advocates for reform, but not the main funding recipients or lead actors. The experience of shalish in Bangladesh and cultural minorities in the Philippines indicates that under these kinds of circumstances it would be better to focus support on NGOs themselves in at least the short term (up to five years) and medium terms (up to ten years).

One virtue of such an approach is that it would more effectively concentrate funding on building the capacities of the poor themselves and on the civil society groups serving them. Such an approach is far more empowering, and by extension poverty-alleviating (in the broad sense of the term and perhaps even in the narrow financial sense), than one that anticipates poverty alleviation trickling down to the poor through enhanced government capacities. Building the capacities of UP officials to administer shalish may not prove effective where they have too many other responsibilities, are indifferent to the process, or are biased against women and other disadvantaged groups.

This does not mean that government agencies would not receive funding or capacity-building under the approach proposed here. But by virtue of their substantive expertise, NGOs often are in a better position to provide necessary training. And by virtue of their regular operational contact with government officials, NGOs often are in a far better position to assess the sincerity and dedication of state personnel than are donor

personnel or outside consultants. A lead role for NGOs can enhance development project cost-effectiveness by putting some training functions in the hands of organizations best equipped to assess how and whether to carry out training.

As with every type of general advice, of course, there are exceptions to the rule. Programs in such relatively functional states as South Africa and Chile, or in those where there may be a proven top-level commitment to reform and capacity to implement those reforms, perhaps Uganda, may merit a greater emphasis on the state side of the equation. Even there, however, NGOs may constitute pivotal partners for purposes of training, other capacity-building, and enabling civil society to carry out a de facto monitoring function.

E. For the long term, keep options open regarding working mainly with the state or civil society.

Can reform, strengthening and delivery of NSJS services be sustainable if they hinge on outside support for civil society, as opposed to institutionalizing such operations under the ongoing funding umbrella of the state? An adherent of what might be considered the prevalent, institution-centered approach to development, which focuses support on the government, might powerfully argue that only through improving the capacities of government personnel and institutions can DFID advance NSJS sustainability in the long run. Ongoing support for NGO services, the argument goes, makes such services permanently dependent on foreign funding. Thus, the conclusion is that even if government is not doing as good a job as civil society, as in modifying shalish, a long-term perspective demands investment in government operations.

Fully addressing the issue of state support versus civil society support for any aspect of SSAJ would require a more extensive discussion than can be offered here. And of course, decisions regarding this matter do not necessarily come down to an “either/or” choice: it often will be advisable to work with both sides of the equation. Nevertheless, a number of factors weigh in favor of DFID keeping its intellectual and programmatic options open for the long term, rather than making concrete plans to support state institutionalization of such services:

- A key consideration in whether DFID should support NGO operations as substitutes for government services pertains to whether their partner populations desire this and whether such substitution does more good than harm. Again, the Bangladesh experience with shalish seems to weigh in favor of such support, in view of the favorable response from partner populations and the long-term factors that undermine government capacity to conduct the process fairly.
- It is important to consider sustainability of impact, and not just sustainability of operations. Even if support for an NGO ends after a period of time, and even if the NGO ceases to function eventually, a key consideration is whether it achieves ongoing impact. Have partner populations’ capacities, power and/or material circumstances improved in a permanent way? Are the changes the NGO has

contributed to regarding safety, security and access to justice surviving the organization's demise? Has it contributed to a ripple effect of changes in government operations or NGO personnel going on to have impact through other vehicles, whether civil society or governmental? If so, the fact that the group itself no longer functions is less important than its ongoing impact.

- Conversely, we should not place inordinate faith in the sustainability of a given governmental reform. Training, other capacity-building, equipment and other material support do not necessarily translate into sustained impact in the face of political, bureaucratic, economic and other obstacles. The fact that government personnel draw salaries and occupy offices long after a donor intervention has ostensibly improved their capacities does not necessarily mean that this is alleviating poverty or empowering the poor. Furthermore, impact of government reform varies tremendously from office to office and locale to locale, in ways that actually may prove more limited than NGO-centered efforts.
- Where NGOs provide SSAJ-advancing services and capacity-building, and where the government track record in these regards is dubious, the most cost-effective manner of perpetuating NGO poverty-alleviating impact might well be to accept that sustainable impact will best flow from sustained support for civil society initiatives. One clear lesson that emerged from the Ford Foundation's review of its support for law-oriented NGOs such as the ALGs is that a long-term commitment generates powerful impact on law reform and implementation. Furthermore, over time the need for their services may diminish and or the society may evolve so that NGOs can generate local resources. Any investment in government institution-building is a long-term one that, even in the end, may not generate great impact. Where NGOs seem to be the better short-term investment, they may merit long-term infusion of funds as well.
- These arguments for a "sustainability of impact" perspective notwithstanding, DFID and other donors have understandable concerns about long-term (beyond ten years) sustainability of NSJS operations carried out by NGOs. One concern involves ongoing dependence on outside funding sources. Yet even creating the potential for effective state delivery of services may well involve ongoing injection of support by those outside sources (i.e., donors). Actual state implementation of effective services regarding NSJS may involve such long-term change that assuming that donors can withdraw from this field in the foreseeable future may be unrealistic. And given that possible reality, it may be better to invest at least partly (or even wholly) in NGOs that in time may be able to secure state funds (or otherwise secure support, such as through endowments), rather than in state institutions directly.
- Another concern involves the partial reach of NGO operations. Even if they prove sustainable or otherwise prove to be a worthwhile investment, they may reach only a relatively small portion of the populace. This is true, but there is no guarantee that *effective* government services will reach a larger slice of the

population, however broad their nominal coverage may be. We also should bear in mind the development experience of Bangladesh, which features large national NGOs substituting for government regarding a wide array of services. Though adapting this approach to other societies is not necessarily workable, it should not necessarily be precluded as a long-term strategy.

- It also is possible that government and NGO forms of NSJS need not be mutually exclusive. They can be complementary, leaving villagers the option of which vehicle to employ.
- Finally, the unpredictable nature of events and developments waiting a decade over the horizon also weighs against making firm plans for long-term institutionalization of state (or for that matter, NGO) services. If DFID supports appropriate research, pilot projects and gradual expansion of successful NSJS initiatives in the medium term, the proper programming course to will emerge over time.

F. Where national or local governments evince sufficient political will to integrate NSJS into state systems in a relatively equitable manner, or where NGOs lack the capacity or inclination to work directly with NSJS themselves, NGOs might best be limited to a training and monitoring function.

One likely direction for DFID to pursue under these circumstances is to support a government-centered approach to non-court dispute resolution, but engage NGOs in providing the training that could transmit both knowledge and perspective to the mediators and their communities. Training alone will not alter ingrained gender biases, but in combination with NGO monitoring and broader development progress it can gradually assuage such defects.

G. Integrate litigation with NGO-modified NSJS.

Experience with shalish indicates that the threat and reality of litigation creates powerful incentives for otherwise resistant parties to participate in NSJS and honor resulting agreements. This merger of non-state and state justice systems serves the poor where the NGO can maintain its credibility to both advocate for its partners and organized fair dispute resolution processes, as in Bangladesh. Whether NGOs elsewhere can walk this line, or are even inclined to do so, remains to be seen. This option at least remains a path that DFID should consider in working with NSJS, however.

H. Integrate NSJS support into broader development and empowerment initiatives.

As with Banchte Shekha in Bangladesh, NSJS may best operate in an equitable manner where it builds on broader development and empowerment work. This kind of “mainstreaming” could involve introducing gradual reform of NSJS in communities where group formation has, for instance, already brought women together around livelihood, reproductive health or micro-credit concerns. Clearly, education and

employment for women can alter power dynamics in ways that influence NSJS more than simple technical training can.

I. Prioritize training and participation for women.

A noteworthy feature of both the Gerry Roxas Foundation's work in the Philippines and that of several NGOs in Bangladesh is that they all endeavor to increase women's participation in NSJS. Regardless of whether DFID focuses support on government or NGO NSJS, it should aim to build such participation.

J. Introduce law students to NSJS.

One long-term approach to productive work with NSJS can and should involve introducing law students to such systems. It was precisely such introductions, in the form of practical experience, that influenced eventual ALG attorneys to engage with cultural minorities while they were in law school in the 1980s and 1990s. A similar initiative now is under way in Bangladesh, where a Dhaka Law Faculty program is exposing students to the lives of the poor and to resulting development concerns. And of course, classroom instruction that focuses on NSJS could also enhance the ability of a country's future legal profession to work productively with NSJS down the line.

K. Maintain realistic expectations.

As with its substantial work with state justice systems, DFID should maintain realistic expectations for any NSJS programs. Over the medium term, perhaps ten years, it can only contribute to ameliorating power imbalances and other problems that plague such systems, rather than ending them.

The ultimate, overlapping goals of equal rights, equal power, safety, security, accessible justice and poverty elimination should be kept in sight. But the obstacles to achieving these have deep roots in the political, economic and social structures of most places that the Department operates. Establishing realistic medium-term expectations obviates the danger of over-ambitious goals that can mask gradual programmatic progress.

Annex: Considerations for Appraising NSJS

Appraising NSJS must hinge on individual circumstances at play in individual societies: as with much in legal systems development, no one checklist applies across the board. Nevertheless, there are numerous factors that can be taken into consideration in deciding whether and how to work with NSJS. This annex builds on the paper's previous analysis and recommendations in order to summarize several key considerations in terms of questions and answers.

- *Are NSJS widely used in any form?* In many cases, the answer to this threshold question will be “yes.” But if NSJS are only applied sporadically, they probably do not present an option for strategic DFID programming.
- *Are NSJS doing more harm than good?* This second threshold consideration is more difficult than the first, but even more important. If studies do not yet exist that address this question, DFID should commission them before moving forward. Surveys and extended, qualitative field observation are two possible mechanisms for seeking an answer. That answer should hinge on at least partly on whether studies indicate NSJS in a given community or society provide a reasonably fair system for resolving disputes for most participants, or whether they are so tainted by gender, patronage and other biases that fairness is an exception to the rule.
- *What underlying political, social, economic and cultural factors might shape the ways in which NSJS operate, and what if any biases flow from such factors?* If, as in Bangladesh and the Philippines, the roles of political actors in government-modified NSJS are salient, this can indicate that some outcomes are politically influenced. If gender power imbalances exist throughout the country, scrutiny must seek to assess their (likely) impact on its NSJS. If corruption and biases intrude into many aspects of the way a society functions, they likely will affect its NSJS. Of greater direct relevance to DFID, if any of these factors negatively impact NSJS in significant ways, it is likely that a strategy to mainly improve the knowledge and skills of key NSJS actors will constitute an ineffective technical fix for problems deeply rooted in the society. A political economy approach that seeks to ameliorate such problems might make more sense.
- *Are NSJS amenable to direct programming?* If local resentment or suspicion of non-community actors involving themselves with NSJS are such that such involvement is likely to do more harm than good, it may be better to focus on mainstream development initiatives that later might make constructive work with NSJS possible. Livelihood development and literacy training, for example, might provide avenues for women to gather in ways that begin to alter power imbalances and open the door to more law-oriented work. Conversely, under other circumstances straightforward, conventional legal aid might make possible later work with NSJS.
- *What is government, NGO and/or other donor experience in working to modify or strengthen NSJS?* Reviews of documents and interviews with stakeholders often may prove insufficient to assess that experience in the absence of applied research, but they are necessary parts of the research process. If in fact there have been relatively promising initiatives, as with NGOs modifying shalish in Bangladesh, these may merit DFID support that allows them to build on or expand such initiatives.
- *What indications of overall reforms in government or political systems could inform work with government-modified NSJS?* To the extent that such reforms

exist and seem to be making headway, they could reflect positively on the prospects for working through government in modifying or strengthening NSJS. To the extent that prospects are dimmer, it indicates that investing in government as an avenue for working with NSJS may not prove fruitful.

References and Other Sources

- Abaya, A.T. 2000. *A Comparative Assessment of Community Justice Systems in the Philippines, Sri Lanka and Bangladesh*. Master's Thesis, University of Massachusetts, Boston.
- Aminuzzaman, Salahuddin. 2000. *Baseline Survey for Capacity Building Interventions of BUILD Project* (Dhaka: CARE Bangladesh, March-April).
- Asia Foundation (AF), Gerry Roxas Foundation (GRF), Supreme Court of the Republic of the Philippines (SC), United State Agency for International Development (USAID). Undated. *Review of the Barangay Justice System: Consolidated Report* (Manila: AF, GRF, SC, USAID).
- Aranal-Sereno, Ma. Lourdes and Roan Libarios. 1983. "The Interface between National Land Law and Kalinga Land Law," *Philippine Law Journal* 58 (December), 420-456.
- Asian Development Bank. 2000. *Law and Policy Reform at the Asian Development Bank 2001* (Manila: ADB).
- Bangladesh Ministry of Women's and Children's Affairs (MOWCA). 2001. *Background Paper on Good Practices and Priorities to Combat Sexual Abuse and Exploitation of Children in Bangladesh* (Dhaka: MOWCA).
- Bangladesh National Women Lawyers' Association (BNWLA). 2001. *Violence Against Women in Bangladesh – 2000: A Report* (Dhaka: BNWLA).
- Bode, Brigitta. 2002. "In Pursuit of Power: Local Elites and Union-level Governance in Rural Northwestern Bangladesh" (Dhaka: CARE Bangladesh).
- Blair, Harry. 2003. *Civil society, dispute resolution and local governance in Bangladesh: ideas for pro-poor programme support*. Report prepared for the Department for International Development (DFID), U.K. High Commission, Dhaka (May).
- British Council. 2002. *Towards Pro-Women and Child-Friendly Policing* (Dhaka: British Council)
- Deb, Uttam Kumar. 2002. "Has Bangladesh Really Achieved Self-sufficiency in Foodgrain? A Review of the Evidence," in Rehman Sobhan, ed., *Bangladesh Facing the Challenges of Globalization: A Review of Bangladesh's Development 2001* (Dhaka: Centre for Policy Dialogue and University Press Limited).
- Diamond, Larry. 2002. "Thinking About Hybrid Regimes," *Journal of Democracy* 13, 2 (April), 21-35.
- Dugger, Celia M. 2001, "New Premier in Bangladesh Vows to Stamp Out Corruption," *New York Times*, 11 October.

- Golub, Stephen. 2000. "From the Village to the University: Legal Activism in Bangladesh," in Mary McClymont and Stephen Golub, eds., *Many Roads to Justice: The Law-related Work of Ford Foundation Grantees Around the World* (New York: Ford Foundation, September), 127-158.
- Government of the Republic of the Philippines (GRP). 1997. *Republic Act No. 8371: An Act to Recognize, Protect and Promote the Rights of Indigenous Cultural Communities/Indigenous Peoples, Creating a National Commission on Indigenous Peoples, Establishing Implementing Mechanisms, Appropriating funds Therefor, and for Other Purposes (Indigenous Peoples Rights Act of 1997)* (Manila: GRP).
- Haque, Tatjana, Karen L. Casper, Dan Turello, Debbie Ingram, Riffat Jahan. 2001. *Voices of Women: A New Era of Political Leadership in Bangladesh* (Dhaka: The Asia Foundation, December).
- Haque, Tatjana, Karen L. Casper, Debbie Ingram, Riffat Jahan. 2002. *In Search of Justice: Women's Encounters with Alternative Dispute Resolution* (Dhaka: The Asia Foundation, April).
- Hashmi, Taj. 2000. *Women and Islam in Bangladesh: Beyond Subjection and Tyranny* (London: Macmillan).
- Jandt, Fred E. and Paul B. Pederson, eds. 1996. *Constructive Conflict Management: Asia-Pacific Cases*. (London: Sage Publications).
- Khair, Sumaiya. 2001. *Alternative Approaches to Justice: A Review of ADR Initiatives Under the Democracy Partnership*. Report prepared for the Asia Foundation, Dhaka (May).
- Khair, Sumaiya, Karen L. Casper, Julia Chen, Debbie Ingram, and Riffat Jahan. 2002. *Access to Justice: Best Practices under the Democracy Partnership* (Dhaka: The Asia Foundation, April).
- Madaripur Legal Aid Association. 2002. "Annual Activity Report: 2001-2002" (New Town, Madaripur: Madaripur Legal Aid Association, November).
- Odhikar. 2001. *Women and Children in Disadvantaged Situations* (Dhaka: Odhikar, April)
- Rafi, Mohammad, and A.M.R. Chowdhury. 2001. "Human Rights and Religious Backlash: The Experience of a Bangadeshi NGO," *Development in Practice* 10, 1, 19-30. Reprinted in Deborah Eadel, ed., *Development and Advocacy: Selected Essays from Development in Practice* (Oxford: Oxfam, 2002), 47-61.
- Rojo, Silvia Sanz-Ramos. 2002. *The Barangay Justice System in the Philippines: Is It an Effective Alternative to Improve Access to Justice for the Disadvantaged?* Dissertation for the MA in Governance and Development, Institute of Development Studies, University of Sussex (September).
- Siddiqui, Kamal. 2000a. *Local Governance in Bangladesh: Leading Issues and Challenges* (Dhaka: University Press Limited).

- 2000b. *Jagatpur 1977-97: Poverty and Social Change in Rural Bangladesh* (Dhaka: University Press Limited).
- Sobhan, Rehman. 2001. “The State of Governance in Bangladesh,” in Rehman Sobhan, ed., *Changes and Challenges: A Review of Bangladesh’s Development 2000* (Dhaka: University Press Limited), 77-114.
- Steinberg, David Joel. 1990. *The Philippines: A Singular and Plural Place* (San Francisco: Westview Press).
- United Nations Development Programme (UNDP). 2002. “Human Security in Bangladesh: In Search of Justice and Dignity” (Dhaka: UNDP, September).
- Wurfel, David. 1988. *Filipino Politics: Development and Decay* (Manila: Ateneo de Manila University Press)