Briefing

Non-state Justice and Security Systems

DFID's policy on safety, security and access to justice (SSAJ) recognises the importance of traditional and informal systems as complements to formal state systems. It notes that non-state justice and security systems may need reform in order to become fairer and more effective. This Note provides practical guidance on how to work with non-state systems using evidence from past interventions and research. It will constitute a new chapter in the DFID guidance document, *Safety, Security and Accessible Justice: Putting Policy Into Practice*, which is available at www.dfid.gov.uk.

1   Introduction

Non-state justice and security (NSJS) systems refer to all systems that exercise some form of non-state authority in providing safety, security and access to justice. This includes a range of traditional, customary, religious and informal mechanisms that deal with disputes and/or security matters.[1]   The relationship between NSJS systems and the state varies considerably. Systems include community-based practices that are relatively isolated from the state, systems fostered by non-governmental organisations (NGOs), and systems set up by the state outside the formal justice system for a specific purpose.

2   The case for intervention

NSJS systems are critically important in the context of DFID's pro-poor approach to security and justice. It is estimated that, in many developing countries, NSJS systems deal with the vast majority of disputes. They are widely used in rural and poor urban areas, where there is often minimal access to formal state justice. They tend to address issues that are of deep concern to poor people, including personal security and local crime; protection of land, property and livestock; and resolution of family and community disputes. They may also be used to defend and protect people's entitlements, such as access to public services.

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[1] A range of terms are commonly used to refer to types of non-state justice and security systems, including informal, primary, traditional, customary and others. These terms are used and interpreted in various ways in different contexts, and may be politically or culturally sensitive.

NSJS systems also have a particular significance in many post-conflict situations. It is likely that non-state systems will have operated in some form throughout the conflict period, and may play a critical role in the immediate aftermath of conflict where restoring security and rule of law is a high priority.

Box 1: Non-state justice and security systems: Some examples

Shalish, **Bangladesh:** *Shalish* is a means of dealing with disputes within the community. It generally takes the form of a public event in which civil disputes are resolved through arbitration and/or mediation, by people with some standing in the community.   There are three types: (1) traditionally administered by village or religious leaders; (2) administered by a local government body; (3) a modified form introduced and overseen by NGOs to make the traditional form fairer, such as by reducing gender discrimination.

Rondas Campesinas **(Night Watch patrols), Peru:** The *Rondas* are community-based organisations set up to control crime, particularly theft of private property including livestock. They have taken on both policing and judicial functions, which have expanded to address offences such as slander, assault and domestic disputes. Their members carry arms, and suspects are handed over to a general assembly, which determines guilt and administers punishment.

Chiefs and Assistant Chiefs, Eastern Kenya: The Chiefs / Assistant Chiefs are appointed by government as local administrators. They take on a significant role in settling disputes in areas where access to police and courts is restricted. They preside over, and record proceedings of, cases in which elders chosen by the disputing parties make the final decision. Research shows that they also hold positions of authority in their clans, sometimes on the basis of popular elections.

Street committees, South Africa: Street committees are the most common form of NSJS system in urban settlements and townships. Their dispute resolution processes, which incorporate traditional elements, aim to achieve reconciliation over retribution. Security mechanisms are also used to ensure personal safety at home and in the community (for example, the protection of battered women).
Sources: Faundez, Golub, Nyamu-Musembi, Schärf

NSJS systems are often preferred for a variety of reasons, including:
- low cost
- speed
- accessibility
- cultural relevance
- responsiveness to poor people's concerns

NSJS systems are often set up by communities themselves to respond to particular issues of concern - they may be preferred even in situations where the formal justice system functions relatively well. However, poor people's preference for using NSJS systems may reflect the weaknesses of the formal justice system, and does not necessarily indicate satisfaction with the NSJS systems themselves.

Common problems associated with NSJS systems include:
- corruption and abuse of power
- non-compliance with international human rights standards, such as discrimination or inhuman and degrading punishments
- lack of accountability

In general, actions should aim to identify and build on the strengths of the systems, and address those aspects that have a negative effect on poor people's safety and access to justice. Particular attention should be given to whether NSJS systems respect individual rights.   For example, where NSJS systems discriminate against women and marginalised groups, this has been highlighted by local civil society organisations (CSOs) as justification for reform.

Box 2: Two sides of urban community security and justice in Colombia
Shanty towns in Latin America are often established following land invasions. Their residents live outside the law and in fear of the police. *Juntas de Action Communal* (JACs) in Colombia defend shanty town residents against the police, resolve property disputes and lobby for services.

But JAC members in some areas have joined forces with the local police to eradicate youth gangs, including through extra-judicial killings.   In the *barrios* (quarters) of Moraviz and El Bosque in Medellín, JACs have been overwhelmed by violent crime and drugs.   As a result, shanty town residents have turned to a militia group which is able to establish order, but whose methods of dealing with disputes are seen as unfair and arbitrary.

Source: Faundez

Engagement with NSJS systems is not a neutral, technical activity, but one that raises broader governance issues. There is often no separation between NSJS systems and local governance structures - that is, a person who exercises judicial (or quasi-judicial) authority through a non-state justice system may also have executive authority over the same property or territory. NSJS systems may be used to control the distribution of land and resources by local elites, who may abandon "traditional" norms in favour of their own material interests. Intervention may thus have an impact on existing power relations at both local and national levels.

Box 3: Local power imbalances

In Bangladesh, a "triumvirate" controls *shalish* as a part of local governance structures. The elected officials of the Union Parishad are the most powerful actors and are often connected to the ruling party. Village elders are next in the hierarchy, and often have vested interests in the local economy as rentiers or money lenders. The *mulla* also have influence, endorsing the activities of their patrons, the village elders, by issuing *fatwas*. The rural poor, often women, are victims of these *fatwas*. Local patronage systems also mean that a patron sitting on a *shalish* panel may use his power to benefit his client. There may be value in working with organisations such as Madaripur Legal Aid Association, which has been a pioneer in setting up reformed NGO *shalish* to challenge these power imbalances.

Source: Golub

A wide range of policy options towards NSJS systems can be considered by the state and CSOs (see Section 4 below). The right approach will depend on an assessment of the characteristics of the system and the particular objectives to be achieved. Working with the system in a constructive way may be the best approach in most situations. In some cases, however, it may be preferable not to engage with non-state systems, or even see them dissolved as part of an overall justice sector strategy.

> **This Briefing Note suggests ways of working with NSJS systems that have positive aspects upon which to build, and that have the potential to improve poor people's safety and access to justice. It is not applicable to situations where NSJS systems violate basic human rights such that donor engagement is both inappropriate and unlikely to achieve reform.**

3   Towards an effective strategy

It is important to view NSJS systems within their wider institutional context. A process of institutional analysis should be undertaken to better understand the incentives of key stakeholders and the drivers of institutional change.

a. Adopting a pro-poor approach

An effective strategy will start with the perspectives of users of both formal and non-state systems. Users' perspectives can help explain preferences for NSJS systems, thereby offering guidance on which aspects of the systems should be strengthened, and which may need reform.

It is also important to incorporate the perspectives of other key stakeholders, including those who control NSJS systems and those engaged in the formal justice sector. However, care must be taken to ensure that the vested interests of state officials or powerful, local elites do not determine the approach taken.

Box 4: Community institutions in Bolivia

In 1998, USAID commissioned a poll on public support for public and private sector institutions in Bolivia. Indigenous community authorities were placed second, while the courts ranked thirteen (out of fifteen institutions). State recognition of community justice was seen as the most effective way of satisfying the demand for justice by the majority indigenous population. Article 171 of Bolivia's amended constitution thus allows the natural authorities of indigenous and *campesino* communities to apply their own norms and standards as an alternative form of conflict resolution - provided they comply with the constitution and domestic laws.

Source: Lee Van Cott

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b. Overcoming resistance

Beneficiaries of the *status quo* are likely to resist attempts to reform aspects of NSJS systems. Even where measures aim to strengthen the systems, they may be resisted if they are seen to challenge existing practices or undermine the authority of those who control the systems. Detailed research and sound political analysis are vital. It is often useful to encourage dialogue on reform issues between the various stakeholder groups, including users, in order to understand the incentives and disincentives for them to engage in a reform process.

Box 5: Resistance from Key Stakeholders
As part of the design of Primary Justice Pilots in Malawi, a meeting was held with key stakeholders in Rumphi, Northern Malawi. Research findings on the use of various non-state justice systems were presented to initiate dialogue on the pilot projects. Tensions arose as traditional chiefs perceived that the project would encourage people to use other forms of dispute resolution, such as church organisations and community-based organisations (CBOs). The chiefs were reassured that the project would strengthen all institutions that offered accessible justice to the community, and that people would choose to access systems which were most responsive to their needs. This countered perceptions that the pilots were biased towards particular non-state justice systems.

Source: De Gabriele, report of meeting with Rumphi stakeholders, 5th November 2003

The attitudes of lawyers, judges, magistrates and government or ministry officials towards NSJS systems – especially at higher levels – may be openly hostile or at best indifferent. Reasons can be diverse:

- Many lawyers and judges are concerned about human rights abuses in NSJS systems and believe they should be abolished;

- Judges may be reluctant to acknowledge the weaknesses of the formal system;

- Lawyers may see the growth of informal dispute resolution mechanisms as a threat to their incomes;

- Those who work within the formal system may criticise NSJS systems precisely for *not* being like formal courts with formalised rules of procedure;

- Government officials may criticise donor support to traditional systems as obstructing modernisation; there may also be political controversies over restoring or strengthening "traditional" forms of authority;

- Competition over the national budget and foreign aid can lead judiciaries and Ministries to view proposed support to NSJS systems as a threat to their own funding.

One approach is to get the backing of the legal profession and judiciary in an incremental way by working with those individuals and groups that already see the need to engage with NSJS systems. These might include lower level magistrates, lawyers and provincial administrators who are already involved in community-based initiatives, such as training paralegal workers. Donors can help to broaden the debate on reform of NSJS systems.

Box 6: Political Resistance to NSJS systems

In Peru, the Rondas Campesinas (Night Watch Patrols) have attracted the attention of national politicians due to their popularity and success in controlling crime. In the mid-1980s, laws were passed that subordinated the Rondas entirely to the local police and judicial authorities. A 1993 constitutional amendment further prevented the Rondas from administering justice. Although they have arguably been one of the most effective organs of local governance, many members of Rondas have been jailed for encroaching on the functions of the police and judiciary.

Source: Faundez

c. Conducting research on NSJS systems

The evidence base for this area of work is generally weak. An effective strategy should include research into NSJS systems, although such research can be difficult and time-consuming. It should only be undertaken when it is most needed – for example, as part of an initial diagnosis, or to monitor the impact of an intervention. Research may be used for one or more of the following purposes:

- *Institutional appraisal*: to understand the range of NSJS systems in a given context, and their relationships with state systems;
- *Accuracy*: to dispel common myths / folklore (see section e. below) and avoid misdirected actions;
- *Risk assessment*: to explore the political and economic governance aspects and anticipate resistance and reaction from key stakeholders;
- *Monitoring and evaluation*: to provide a baseline, measure performance (outputs), and assess the effectiveness and long-term impact (outcomes);
- *Capacity building and awareness-raising*: to help local researchers examine NSJS systems over the long term, and make government and other decision-makers aware of NSJS issues.

Box 7: Research design

Timing: Extensive initial research and consultations may create expectations. Anthropological research takes time and may not be needed as part of a first appraisal – instead, shorter studies can help identify longer-term research questions. Desk reviews, for example of reports by CSOs or academics, should be completed before primary research is carried out in the field.

Personnel: Research teams should be multi-disciplinary, including lawyers, anthropologists and other local experts. Specialists will be required to translate research findings into appraisal and design. Communities and other key stakeholders should have ownership of the research findings. A research strategy should also aim to build local research capacity, and research can be integrated into ongoing initiatives, such as national poverty monitoring surveys.

Method: Research methodologies should be sequenced as appropriate. Perception surveys can help understand "justice seeking" behaviour, but may reflect popular myths. Comparative surveys ("before - after" or "intervention – control") can provide more rigorous assessments, and highlight the impact of interventions on key areas such as knowledge, attitudes, participation, empowerment and gender equity. However, surveys may lead to problems as the presence of external researchers will influence how NSJS systems operate.

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d. Key research questions

Findings in the following areas will assist in understanding the specific nature of NSJS systems, and will help decide whether an action may be appropriate:

- Historical context
- Role and linkages to the state
- Key features
- Stakeholders
- Incentives for reform

Box 8: Understanding NSJS systems

What is the historical context?
- How have past regulatory frameworks (such as colonial regulations) shaped the institutional environment within which NSJS systems now operate?
- Are there past instances of use or abuse of NSJS systems, including actions by donors, civil society or the state?
- Have urbanisation or other trends affected the influence of NSJS systems within different sections of society?

What is the role of the NSJS system and its linkages to the state?
- Is it part of local or national structures of power and governance?
- Is it a response to the weaknesses, ineffectiveness or repressive nature of formal state systems?
- What is the level of influence and involvement by the state in NSJS systems, and vice versa?

What are its key features?
- *Values*: What are the underlying values and principles of the system (concepts such as restorative justice, importance of family and community relations, social harmony or hierarchies)?
- *Users*: Who uses the system? For what type of disputes or security concerns?
- *Authority*: Who controls the system? What is the source of their authority? To whom are they accountable?
- *Standards*: What rules and laws are applied (such as state law, customary law, religious law)?
- *Human Rights*: Do both norms and practice comply with international human rights standards? For example, is there evidence of discrimination or bias?
- *Funding*: How are the system's activities financed? Are sources of funding state or non-state?
- *Enforcement*: How are decisions enforced? By whom? Are they respected?

Box 8: Understanding NSJS systems (continued)

Who are the key stakeholders?
- Various groups of users (e.g. women, minority groups, the very poorest)
- Those who control the system (e.g. traditional rulers, NGOs, community / religious leaders)
- Central government or local administrative officers (e.g. land administration officers)
- Formal justice sector institutions (e.g. judiciary, police, prisons)
- Human rights accountability mechanisms (e.g. human rights commission, ombudsmen)
- Lawyers and paralegals
- Civil society organisations (e.g. NGOs, women's groups, grassroots associations)

What are the incentives and disincentives for reform?
- Is there dissatisfaction with existing NSJS systems, and how is this expressed? Are there champions for reform?
- Who stands to win or lose from changes to the status quo?
- What are the forms of power relations between users and those who control NSJS systems?
- What incentives and disincentives exist for policy makers and CSOs to engage with NSJS systems?

e. Myths and Folklore

Opinions and beliefs about NSJS systems that are widely held may not have a solid basis. Some assumptions may hold true in certain contexts, but not in others. A research strategy should recognise and respond to this. Dispelling a prevalent but erroneous myth about NSJS systems may be a strategic output in itself.

Box 9: Common assumptions	Evidence from country examples
Traditional justice is quick and simple.	In Bangladesh, a *shalish* may be a complex series of events, comprising many sessions over several months. *(Source: Golub)*
Traditional chiefdoms are male-dominated, and their dispute resolution mechanisms are biased against women.	In Lesotho, traditional chiefs have been delegating their authority to their wives or sisters due to male labour migration and low pay. As a result, decisions on inheritance issues have largely favoured women. *(Source: Schärf)*

f. Linkages

Linkages between the state and NSJS systems will vary. Characteristics of the NSJS system may show how closely involved the state is, including:

- Funding source(s);
- Personnel;
- Normative framework;
- Enforcement mechanisms.

For example, there may be partial state funding of NSJS systems; state officials may take part in dispute resolution proceedings in a non-official capacity; NSJS systems may be formally recognised in the constitution; and local courts may register the results of proceedings.

An examination of non-state justice practices may also inform a better understanding of formal state systems and how they work. For example, delays in the court system may be linked to litigants choosing to settle out of court.

NSJS systems also mesh with other aspects of non-state governance. Traditional authorities may carry out ceremonial or religious functions, which are difficult to distinguish from quasi-judicial dispute resolution roles. They may invoke supernatural forces in the course of their duties, or judge crimes (such as witchcraft) that are not recognised by the formal legal system.

Box 10: Traditional rulers in Malawi

It is estimated that the vast majority of disputes in Malawi are processed by customary justice fora, presided over by chiefs. After decolonisation, chiefs were co-opted and used as political tools to control opponents of the new regime. This prevented them from playing an official judicial role in the newly emerging democracy of the 1990s. They now have no formal jurisdiction and their recommendations have no force in law.

However, a chief is also the administrative head of the village, holding both executive and judicial authority. His authority extends to decisions such as land allocation and referral to state services. The local community therefore continues to recognise the authority of chiefs. This is despite the fact that they are paid by the Office of the President and Cabinet, and play a significant role in "delivering the electorate" to the ruling party. Their judgements are usually respected, although people may appeal or choose to access other forms of dispute resolution if they feel their rights are not respected.

Source: Schärf, De Gabriele

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4.   Planning and appraising an intervention

An appraisal of NSJS systems should form a part of any justice sector reform strategy. This is essential in order to understand the full range of justice and security options available to the poor. However, donors should not necessarily intervene in NSJS systems in all cases.

Donors should also be cautious in how they engage with NSJS systems, including through support for state policies and interventions.   If engaging through CSOs, their role within local power structures and local conflicts should be examined. A positive relationship with the community is essential if CSOs are to be effective.

Different entry points for an intervention may also be explored (e.g. gender issues, indigenous people's movements, land / agricultural reform), which can provide more effective routes into justice and security issues.

Box 11: Non-justice entry points

Malawi: A number of local community-based organizations (CBOs) provide care for orphans and those affected by HIV/AIDS.   A critical problem faced by orphans is the loss of land and property through dispossession, often by relatives. DFID's Malawi SSAJ programme is supporting these CBOs to provide advice and support for people dealing with property dispossession, advising families on the advantages of wills, and training non-state justice providers to promote fair inheritance practices.

Bangladesh: The women's organisation "Banchte Shekha" integrates its support for *shalish* with programmes such as literacy training, livelihood development and group formation. These aim to alter the bias of *shalish* against women and disadvantaged groups by addressing underlying power imbalances. Evidence shows a positive impact on dowry, women's status and other issues.

Kenya: Initiatives such as the "peace elders initiative" in Laikipia district are working to make dispute resolution processes more inclusive, by bringing in youth and women as "elders".   In Kwale, distrust with official mechanisms for dealing with land disputes has led to a new system enabling villagers to elect elders to deal with cases.

Sources: Bosworth, Golub, Nyamu-Musembi

There is a tendency to reform characteristics of NSJS systems that are perceived as "deficiencies" when compared to formal systems, such as a lack of record keeping. However, it is important to first consider the benefit that such reform would have on levels of safety and access to justice among poor people.

The following tables identify a range of possible options based on past experience and research. Annex A describes each option in more detail, with an outline of the pros and cons and relevant examples.

Table 1: Policy options for intervention by the state

Incorporation	The state may incorporate NSJS systems into the lower levels of the formal judicial system. It may also incorporate practices or principles of non-state justice (such as restorative justice) into the formal system.
Codification	The state may attempt to codify or write down customary laws, in order to make them accessible to jurists and/or harmonise them with statutory law.
Human rights compliance	The state may require NSJS systems to comply with human rights standards or constitutional provisions. State accountability institutions, such as Human Rights Commissions, may play a role in monitoring compliance.
Minority rights recognition	The state may acknowledge indigenous or minority rights by formally recognising the use of NSJS systems by particular groups.
Regulation / Self-regulation	Governments may enact legislation to define and regulate NSJS systems. Self-regulation may be initiated by the systems themselves, which may (or may not) be encouraged by the state.
Innovation	The state may set up alternatives or complements to the formal system, which draw on NSJS systems - for example, to address specific issues such as post-conflict justice.
Collaboration	The state may assist or work with NSJS systems, including by providing funds.

Table 2: Options for engagement by civil society organisations

Direct Provision	CSOs may conduct or help establish alternative NSJS systems, such as informal dispute resolution mechanisms or security committees.
Capacity building	CSOs may train NSJS systems' personnel on procedural or substantive issues, or may train them as paralegals to advise or represent parties to a dispute. They can also offer resources to support the operations of NSJS systems.
Human Rights monitoring	CSOs may monitor the activities of NSJS systems, report on human rights abuses, and help ensure fairer outcomes. They may assist NSJS systems to become more responsive to the needs of marginalised groups, such as minorities and women.
Awareness-raising	CSOs and the media can inform users about the options available to them, as well as inform judges / lawyers / police about NSJS systems and their formal linkages. They can engage in advocacy and lobbying as part of the policy-making process, and raise awareness of relevant human rights issues.

Checklist for Appraisal

In order to identify how measures should be designed, it is helpful to go through the following list of questions:

- *Is an intervention needed?* What measures will enhance safety, security and access to justice? Have alternative options, such as improving state institutions, been considered?

- *Will the measures taken contribute to poverty reduction?* Will they help improve the living standards or well-being of disadvantaged populations? Will they strengthen the position of people who rely on NSJS systems for security and justice?

- *How to intervene?* Should the intervention support state policy towards NSJS systems, and / or work with civil society organisations? Can non-justice entry points be used? Does the approach taken build on the NSJS system's positive features?

- *Efficiency and fairness:* Will the action help the system perform better? Have principles of fairness and respect for fundamental rights been taken into account?

- *Accountability:* Will the initiative help to make the system more accountable to its users and to other state or non-state institutions?

- *Inclusiveness:* Will the measures taken enhance inclusiveness and enable women and marginalised groups to participate in, and benefit from, the NSJS system?

- *Linkages:* Will the intervention help to clarify and improve linkages with state, other NSJS systems and civil society organisations?

- *Approach:* Is there a sufficiently long time line to allow social and political change to take place? Is the process flexible enough to adjust to changing local contexts and national politics?

- *Research:* How will new research findings be incorporated into the strategy?

- *Change strategy:* How is the intervention likely to affect the local or national political context? How will likely resistance to change be managed (such as from local elites, judiciary, legal profession)?

Responding to requests for assistance

Donors have limited experience in supporting measures affecting NSJS systems. The following requests for assistance are some of the most frequent, but may not be the most appropriate. If needed, objectives should be clarified and alternatives identified.

Codification: Governments may request help with writing down customary law. Past experience with restatement and other codification projects suggests that there is a danger that law will become "frozen" and that judges and lawyers will start formally applying customary law without taking into account the particular context. It is more useful to work with multidisciplinary teams, including anthropologists, to understand the norms and principles of non-state systems, and assess options for collaboration between state and non-state systems.

Record keeping: Informal or traditional systems for settling disputes may ask for assistance with formal record keeping. The aim of this might be:
- to ensure that decisions are based on fact (for example, information about land holdings in Ghana);
- to use during appeals in formal courts (for example, palace court records in South-West Nigeria),
- to monitor decisions using objective information (for example, monitoring by the Madaripur Legal Aid Association in Bangladesh).

Such initiatives can have positive results, but should be carefully designed. Elaborate or computerised systems are probably not appropriate, though they may be requested to enhance the status or power of the institution. Before measures are designed, it will be important to identify what the recorded information will be used for, how the system will be maintained and what linkages with the formal system are envisaged.

Human rights training: Training may help improve the laws and practices of NSJS systems so that they comply better with international human rights standards (e.g. non-discrimination, non-use of inhuman or degrading punishments). At the same time, human rights training should take into account why NSJS systems operate in certain ways, given cultural, political, institutional, economic or security constraints. It should be accompanied by practical measures to lead to sustainable changes.

Box 12: Partial training for Neighbourhood Watches in South Africa

Neighbourhood Watches in South Africa are voluntary organisations, armed with batons and guns. In high-crime areas, they can outnumber the police ten to one. They undertake street patrols, stop-and-searches, and carry out citizen's arrests.   To reduce the number of abuses committed by these groups, provincial and local governments provided some initial training and equipment. The success of the Neighbourhood Watches depends on a close working relationship with the police, for example with respect to carrying out arrests. However, joint training with the police was not conducted. As a result, there has been mutual suspicion and lack of clarity over roles, rather than positive collaboration.

Source: Schärf

5.   Monitoring And Evaluation

While NSJS systems that are sponsored by the state or facilitated by NGOs may keep records, the majority do not. This makes monitoring of the impact of interventions considerably more difficult. The box below outlines possible indicators for the achievement of potential objectives, which would vary with the specific context. As with all indicators, it is necessary to guard against the danger of "perverse incentives", where measurement of activities and outputs is emphasised at the expense of quality and substantive outcomes.

Outcome	*Potential indicators*	<u>Possible data sources</u>
Increase transparency of process and results	Change in proportion of non-state institutions that have systems for recording actions and documenting decisions	• Special visits • Administrative data, when available
	Change in proportion of non-state proceedings to resolve disputes where information about the parties, claims, and resolution is recorded	• Special visits • Administrative data, when available
	Change in proportion of people who understand how to access services	• Expert or public surveys
Improve rights protection	Change in proportion of women who express confidence in non-state institutions	• Public surveys and interviews
	Change in proportion of disputes resolved through mediation	• Expert surveys or administrative data
	Change in perceived consistency and fairness of decisions and actions	• Special visits • Expert surveys
	Change in perceptions of equal and dignified treatment	• Expert or public surveys and exit interviews, disaggregated by gender, age, social status, occupation, etc.
Enhance cooperation between state and non-state institutions	Change in proportion of disputes received or arrests made by non-state institutions that are referred to state institutions	• Special visits • Administrative data
	Change in proportion of disputes received or arrests made by state institutions that are referred to non-state institutions	• Special visits • Administrative data
	Change in proportion of non-state decisions that are appealed to state courts and other agencies (including ombudsmen)	• Special visits • Administrative data

Source: adapted from "Measuring Progress toward Safety and Justice: A Global Guide to the Design of Performance Indicators across the Justice Sector", Vera Institute of Justice (2003)

6   Further Reading

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ANNEX: NON-STATE JUSTICE AND SECURITY (NSJS) SYSTEMS – OPTIONS FOR ENGAGEMENT

Table 1: Policy Options for Intervention by the State

Incorporation	The state may incorporate NSJS systems into the lower levels of the formal judicial system. It may also incorporate practices or principles of non-state justice (such as restorative justice) into the formal system.
Example	**Uganda's** Local Council Courts (LCCs), initially set up where official judicial institutions were absent, are now officially incorporated into the lower court system with a right to appeal to a Magistrate's Court. They also carry out local government functions. The Ministry of Justice and the Ministry of Local Government jointly supervise the LCCs.
Pros and Cons	**+** Incorporation facilitates linkages between customary and statutory law, and may clarify jurisdiction over different types of disputes. + Incorporation introduces the possibility of appeals to higher courts and administrative oversight. - Effective linkages between formal systems and traditional authorities may be difficult to implement due to limited capacity. - Lengthy appeals and referrals between formal and informal systems may increase opportunities for exploiting the weaker party to a dispute.

Codification	The state may attempt to codify or write down customary laws, in order to make them accessible to jurists and/or harmonise them with statutory law.
Example	In **Kenya**, through a project organised in the late 1960s by the School of Oriental and African Studies (London University), monographs were compiled on various communities' customary laws. The monographs were widely consulted in judicial decision-making, sometimes in a rigid manner that did not reflect local practice or responsd to the local context.
Pros and Cons	+ Codification may be useful for decision-makers who do not know or understand customary or religious law. - Codification tends to "freeze" knowledge, leading to the application of laws that are out of touch with local reality. - Codification's rigid approach to customary / religious law may lead to unjust outcomes. - Harmonisation with statutory law may cause problems if it results in the suppression of cultural diversity and practices.

Human Rights Compliance	The state may require NSJS systems to comply with human rights standards or constitutional provisions. State accountability institutions, such as Human Rights Commissions, may play a role in monitoring compliance.
Example	The constitutions of **Ghana**, **South Africa** and **Uganda** include broad statements to the effect that cultural practices that injure mental and physical well-being and dignity will be judged unconstitutional. In contrast, the constitutions of **Kenya**, **Zimbabwe** and **Zambia** exempt certain areas of customary and religious law (family and personal law) from the non-discrimination provision.
Pros and Cons	+ Improving compliance of NSJS systems with human rights standards can have a significant impact on realising the rights of poor people and other marginalised groups. + Linking the valuse underlying NSJS systems with human rights standards can improve dialogue on rights issues at the local level. - Ensuring compliance of NSJS systems with human rights standards may require challenging existing practices and lead to resistance. - The domestic constitutional and legal framework may itself be inconsistent with international human rights standards.

Regulation / Self-Regulation	Governments may enact legislation to define and regulate NSJS systems. Self-regulation may be initiated by the systems themselves, which may (or may not) be encouraged by the state.
Pros and Cons	+ Legislation may clarify the powers of NSJS institutions and their relations with the state. It may also set standards for NSJS practices. - Constitution, laws and decrees may be used by the state as a means of controlling NSJS systems. + Self-regulation may be preferable in order to preserve those aspects of NSJS systems that are the most effective. - Regulation by the state may undermine the legitimacy of NSJS systems that are managed and regulated by communities themselves.
Example	The *Rondas Campesinas* in **Peru** have become an effective crime control measure and the state has attempted to regulate their powers and to co-opt them. Various laws subordinate them to police and judicial authorities. The 1993 constitution did not allow *Rondas* that were not linked to an indigenous community to administer justice, and members have been imprisoned for usurping the power of the police and judiciary. At the same time, in areas such as Cajamarca, the *Rondas* have formed a federation with a set of regulations governing their own operations and setting up committees to deal with cases.

Innovation	The state may set up alternatives or complements to the formal system which draw on NSJS systems - for example, to address specific issues such as post-conflict justice.
Examples	In **India**, *Lok Adalats* ("people's courts") have been created as informal, conciliatory small claims courts with some lay participation. Research suggests, however, that the justice provided is paternalistic, with judges attempting to "impose" conciliation on the parties, based neither on the law nor on local customs, with no possibility of appeal. In **Rwanda**, the Government has set up *gacaca* jurisdictions to handle the cases of up to 130,000 persons detained and accused of having been involved in the 1994 genocide. The approach was inspired by traditional *gacacas* whereby communities solved low-level disputes through mediation. Under the new *gacaca* system, communities participate in establishing the facts and hearing confessions from alleged perpetrators of genocide and other serious crimes.
Pros and Cons	+ Non-state alternatives can reduce the pressures on the formal system. + Non-state alternatives may also be cheaper, more efficient and accessible, and closer to cultural norms. - Using non-state alternatives to substitute for the formal justice system may be viewed as offering a form of "second-class justice, and a breach of the state's human rights obligations. - State-sponsored initiatives may export some of the failings of the formal system, and may distort some of the core values or components of traditional / customary systems.

Collaboration	The state may assist or work with NSJS systems, including by providing funds.
Example	In **Tanzania**'s Serengeti region, representatives of *sungusungu* groups (local neighbourhood watches) collaborate with the state, and are permitted to monitor the work of the police, prosecution and courts, to ensure that suspects handed over are not subsequently released through corruption.
Pros and Cons	+ The state may partly compensate for the lack of capacity within the formal system by working through NSJS systems. + Mutual co-operation and learning between non-state and state systems can improve the effectiveness of both set sof institutions. + Support to NSJS systems may allow them to maintain a strong sense of ownership and legitimacy. - Where assistance is provided unconditionally, the state may be supporting practices that are contrary to human rights principles.

Table 2: Options for Engagement by Civil Society Organisations

Direct Provision	CSOs may conduct or help establish alternative NSJS systems, such as informal dispute resolution mechanisms or security committees.
Examples	A local NGO in **Peru**, IPAZ, has established Rural Centres for the Administration of Justice in the Ayacucho District. The Centres operate at the municipal level and are composed of delegates from local associations (peasants, women), the Mayor, the Justice of the Peace and the local police. Decisions are taken on the basis of a compromise, without reference to customary law, and proceedings are conducted in the local language.
Pros and Cons	+ CSOs can help reform or create non-state institutions in contexts where existing formal or informal mechanisms are not operating effectively. + Popular participation in the administration of justice may also help re-build trust in state justice institutions. - CSO intervention may perpetuate the absence of formal institutions, - CSO interventions may not be sustainable without external funding.

Capacity building	CSOs may train NSJS systems' personnel on procedural or substantive issues, or may train them as paralegals to advise or represent parties to a dispute. They can also offer resources to support the operations of NSJS systems.
Examples	The **Uganda** Women Lawyers Association has initiated training of Local Council Court officials on the scope of their newly expanded jurisdiction to deal with juvenile offenders. In Northern Uganda, OXFAM and local NGOs assists *Kal Kwaro* elders to travel to dispute resolution venues. In **Malawi**, paralegals are involved in both state and non-state justice and provide referrals to the appropriate system. In the **Philippines**, Alterative Law Groups have helped indigenous peoples through community and paralegal trainings.
Pros and Cons	+ CSOs are likely to be closer to NSJS systems than formal institutions, and can act as a bridge with the state and international norms. + CSOs can provide access to lawyers or paralegals, which may help reluctant parties to participate in the process and offer advice on referrals to state systems. - CSO interventions may still be seen as "externally" imposed, particularly if they are reliant on external donor funding.

Human Rights Monitoring	CSOs may monitor the activities of NSJS systems, and help ensure just outcomes. They can assist NSJS systems to become more responsive to the needs of marginalised groups, such as minorities and women.
Examples	The *Banchte Sheka organisation in* **Bangladesh** has organised dispute resolution processes which are a modification of *shalish*. The aim is to achieve more inclusive processes and outcomes. Women are allowed to operate as decision-makers and the number of women attending these *shalish* has increased in comparison to the traditional ones. A Dhaka-based legal services NGO (Ain O Salish Kendra) has also helped to organise and train local committees, sometimes entirely composed of women, to monitor *shalish* and indirectly educate those responsible for the proceedings.
Pros and Cons	+ CSOs can assess whether practice is respectful of rights, and their interventions can make NSJS systems fairer and more inclusive. + Local CSOs may have the ability to translate human rights norms into local values and concepts. - Monitoring may be rejected if it is seen as a form of policing or as a threat to existing practices. - Short-term initiatives such as quotas for women or minorities on panels may not lead to significant change.
Awareness-raising	CSOs and the media can inform users about the options available to them, as well as inform judges / lawyers / police about NSJS systems and their formal linkages. They can engage in advocacy and lobbying as part of the policy-making process, and raise awareness of relevant human rights issues.
Example	In **Zimbabwe**, women's rights NGOs have conducted awareness-raising activities on a new inheritance law which has increased action by women to claim their rights in customary courts. The Women Lawyers Association (FIDA) has also provided general human rights training. Chiefs have asked trained women to sit on panels, as they are better able to operationalise human rights principles.
Pros and Cons	+ Such activities can raise awareness of options for the poor and build understanding of NSJS systems amongst state officials. + While it may appear superfluous to train communities on how to use their own systems, it is useful for communities to receive information and advice on how to achieve better and fairer outcomes. + Engaging with NSJS systems may be an entry point to addressing human rights issues within communities.

POLICY DIVISION