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# NON-STATE JUSTICE SYSTEM PROGRAMMING

## *A Practitioners' Guide*

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# Non-State Justice System Programming

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## Overview

- Non-state justice systems (NSJS) include community level institutions or processes which exercise non-state authority in resolving disputes, commonly for a religious, ethnic or indigenous group within a state or region using customary laws.
- Where NSJSs function well, they can provide speedy and expeditious justice, usually where state justice service is deficient or absent.
- NSJSs are often the guarantors of order and security as well as access to justice at the local level; they often have legitimacy the state justice system may lack. In post-conflict environments NSJSs are often the only institutions available.
- While many in developing countries access justice through NSJSs, they can have shortcomings. In prioritizing collective and community goals for ensuring justice and peace, NSJSs can deny opportunities for asserting and defending individual legal rights.
- This guidance examines three programming areas which can support community-level NSJSs to improve institutional capacity, equality and inclusion, public access to justice, and the legal framework.
- Challenges for community-level NSJSs include inconsistent operation, limitations on jurisdictional reach, ill-defined or non-existent linkages with state services, and a lack of standards or checks and balances to guard against discriminatory practices, elite capture, or corruption.
- Justification and impetus for donor support to community-level NSJSs can readily be found in the popularity of the services they provide. Indeed, NSJSs offer advantages over state courts in terms of accessibility, expeditious remedies, and familiarity to users. Community level NSJSs also tend to possess a cultural relevance for users, often-superior access to information relevant to a dispute, and a widespread perception as trustworthy.
- Previous donor engagement with NSJSs generally aimed to address weaknesses of both non-state and state justice institutions. This prior practice provides a useful knowledge base to continue to improve NSJS capacity and NSJS-state institutional collaboration in the interests of the rule of law and human rights.
- In general, donor work with community NSJSs has been limited to training and public education, fostering liaison between state and non-state actors, and supporting legislative or administrative reforms to reconcile potential conflicts.
- This guidance provides tools to support USAID development of support programs for community level NSJSs, highlights the importance of undertaking a comprehensive assessment and provides a sample inquiry methodology. It also illustrates the value of learning from prior efforts and provides a summary of lessons learned. In addition, a sample statement of work relevant to developing new program proposals.

## I. Introduction

This guide is intended to assist USAID Democracy, Human Rights, and Governance (DRG) Officers and other practitioners in designing, implementing, and monitoring rule of law programs that include support for community-level non-state justice systems (NSJSs). It aims to provide a digest of techniques used by donors in supporting such NSJSs and offers guidance on best practices and lessons learned, including a sample scope of work (SOW) that may be used as a starting point for future support programs. The observations and conclusions herein may also be useful for programmatic support to other types of NSJSs.

In addition, USAID emphasizes that this guide exists within an ecosystem of primers, assessment methodologies, and programmatic documentation developed and maintained by the Democracy, Rights, and Governance Center of Excellence. It is intended to be used in concert with other USAID technical leadership tools.

## 2. Defining Non-State Justice Systems

NSJSs vary widely. A 2010 United Nations-commissioned study by the Danish Institute for Human Rights noted five distinct NSJS types, including:

- Traditional leaders
- Religious leaders
- Local administrators with an adjudicative or mediation function
- Customary or community courts where the adjudicator is not a lawyer
- Community mediators

In addition, the study noted that “other actors, including paralegals, trade organizations or community groups may often resolve disputes on a more ad hoc basis” in efforts that might be described as legal services.<sup>1</sup>

This guide is not intended to cover the broad array of NSJSs; rather, it focuses on those mechanisms with deep community roots employing conciliatory dispute resolution practices, what is often referred to as the informal justice sector.<sup>2</sup> In general, this guide focuses on those NSJSs comprised of community level institutions or processes exercising some form of non-state authority to provide safety, security, and access to justice. This authority may be used to resolve a dispute, exact punishment for a crime, or administer regulatory authority.

The intersection of security and justice is fluid. Norms and institutions guiding and regulating conduct vary as widely as the sources from which their authority derives. For USAID, this intersection implicates several implementation concerns, from promoting the rule of law to combatting forms of extremism and terror to delivering basic government services.

NSJSs resolving disputes in accordance with local community norms can and should be part of a larger development value proposition that promotes security and ensures access to justice. They often supplement state systems while providing greater access to justice by alleviating burdens of expense, travel, and complexity. They may contribute to reducing feelings of

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<sup>1</sup> United Nations 2012, p. 54.

<sup>2</sup> ICHRP 2009, p. 43.

injustice among communities and populations, thereby easing the estrangement that too often grows between state systems and impoverished or conflict affected communities. This paper seeks to provide USAID field staff with an enhanced understanding of these mechanisms as well as lessons from prior work with them.

Thus, the NSJSs addressed by this paper are usually customary and thus deriving their authority from culture, customs, religious belief, and related practices and norms. These can include systems introduced by non-governmental organizations as an alternative to state-based justice remedies. They also may include processes or institutions introduced by the state itself to emulate customary practices for resolving disputes, either to complement the state-based justice system or to operate in parallel with it.<sup>3</sup> For purposes of this programming guidance, USAID prefers the term “non-state” over traditional or informal, as non-state systems may not be strictly traditional in origin and may not necessarily operate informally. The common feature uniting non-state systems is that the person or persons exercising authority in these matters are not employed by or under the direction of the state.

USAID groups NSJSs into two general categories: indigenous institutions that pre-date state systems, such as those that may be practiced by indigenous minorities; and institutions or mechanisms of more recent origin. For purposes of this guidance, NSJSs in the first category are characterized as “customary” and include all those organic practices and mechanisms that originate outside of the ambit and history of the state.

Customary justice systems tend to be grounded in religious, ethnic, indigenous or regional practices for governing community affairs. These systems, which in most cases have evolved over hundreds of years, survive and sometimes dominate as primary systems of dispute resolution. In countries affected by a history of colonization by foreign powers, persistent poverty or armed conflict, for example, village-based customary systems of justice have often been the only durable means of dealing with local level disputes. Colonial and other national political authorities often accepted NSJSs as appropriate or tolerable for local level administration because the resources of the state were inadequate to meet that need, especially in localities of poverty, remoteness, or low population. To the extent that many of these communities remain poor and disconnected from state-based systems of government, NSJSs tend to endure without significant interference by the state or conflict with state justice institutions.

Institutions or mechanisms of more recent origin, though some may have been inspired by customary practices, have been established or modified to complement state institutions. These systems involve some harmonization of state and customary law and are more likely to comply with human rights standards and modern conceptions of procedural fairness.

NSJSs are often more popular than state justice systems. The reasons vary, but according to the Danish Institute for Human Rights study may include “state failure” reasons related to the physical remoteness or economic inaccessibility of state justice actors as well as incapacity owing to human, technological, or material limitations, and “culturist explanation[s],” As the study noted, the latter included the characteristics of the NSJS itself in that the “procedures and

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<sup>3</sup> DFID 2004, p.1



substantive norms used and remedies [dispensed were] more in accordance with the local culture and social relations.”<sup>4</sup>

During the twentieth century, state court systems in many countries, including the USA and other developed countries, applied new mediation processes to civil disputes that placed emphasis on seeking the settlement of disputes by negotiation and compromise before pursuing a judicially-imposed solution. Greater use of mediation recognized the value in outcomes that could be mutually agreed upon more quickly and at lower cost than through a normal court proceeding. Some mediation schemes were attached to the state courts themselves, some to other government agencies, and others to non-state agencies. The common element is that each scheme placed primary, if not exclusive, emphasis on negotiating dispute settlements in an atmosphere of minimal formality. In essence, they were established to apply customary processes of dispute resolution, albeit within a statutory framework, as exemplified by the Barangay Justice System of the **Philippines** and the Village Courts of **Papua New Guinea**.<sup>5</sup>

In seeking to assist a state in extending access to justice, USAID and other donors have been open to supporting NSJSs where the state system is incapable of providing an adequate standard of access and where NSJSs can meet that need. State institutions are often perceived at the community level as being corrupt and self-serving, while NSJSs may enjoy comparatively greater trust and legitimacy among those they serve. The challenge for donors lies in developing assistance programs that can overcome structural, operational, or other weaknesses in NSJSs that limit access to just dispute resolution. As with state court systems, the effectiveness of NSJSs is commonly impeded by deficiencies in the competencies of those who resolve disputes, in the procedures they use, and in the decisions, they make, all of which can result in corruption, gender discrimination, uncertainty, lack of documentation, human rights violations, and other unjust outcomes for disputants, victims, and their communities.

### 3. Characteristics of NSJSs

NSJSs encompass a wide array of traditional, non-state justice and informal mechanisms that provide dispute resolution and justice-related services. Although NSJSs vary widely, even within regions and countries, scholars and practitioners have identified their common characteristics, including:

- A dispute submitted to an NSJS for resolution is usually viewed as a community matter rather than as a private dispute between two individuals.
- There is a high degree of public participation, as NSJS meetings are commonly held in public places and often include large numbers of community members participating and observing, thus providing the community with vested ownership of the dispute resolution process as well as its results.
- Decisions are based on customs, norms, community practices, and consultation rather than on a strict interpretation of a national law; and because it is important to find a consensus between the disputants, a settlement must be mutually acceptable. Thus, the concept of justice is derived from what the community considers to be fair and just, rather than what may be considered predetermined by law.

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<sup>4</sup> United Nations 2012, p. 75.

<sup>5</sup> Described respectively in Golub 2003 and Australian Law Reform Commission Report 31, 1986.

- Customary jurisprudence in some cases may not comport with constitutional and international human rights standards applicable in a jurisdiction.<sup>6</sup>
- NSJS procedures are generally aimed at reconciling differences and restoring social harmony based on decisions being agreeable to all parties.
- Penalties tend to be restorative rather than punitive.
- Apparently similar cases may not be treated alike, as customary norms and practices are often not uniform across regions or even within communities.
- NSJS leaders who preside at meetings are often appointed from within the community based on status or lineage, and so may be susceptible to elite capture.
- Rules of procedure and evidence are flexible.
- There is generally no professional legal representation.
- Decisions are enforced by means of social pressure.<sup>7</sup>

The business of NSJSs tends to deal with disputes limited to the village, ethnic, or indigenous group concerned. The substantive focus of NSJS activities that can overlap with USAID programming includes disputes about ownership and use of land and animals, money claims, domestic violence, religious offenses, street assaults and other criminal misdemeanors, family inheritance, dowry, divorce, and child support. These types of disputes may be said to be the area of natural coverage for NSJSs in that, in most instances, major crimes such as murder, robbery, drug trafficking, and sexual assault offenses are prosecuted by the state. However, where a NSJS is the only practical mechanism for resolving disputes, the NSJS may handle almost all public disputes and crimes.

Where NSJSs function well, they can provide speedy and expeditious justice in a conciliatory fashion that is supported by participants. Barriers that often apply to state court systems, such as high costs, difficult to reach locations, or language barriers, will often not apply to NSJSs.

USAID and other donors have seldom engaged with NSJSs in a systematic way, notwithstanding the increase in overall donor support for rule of law initiatives. In shying away from greater engagement with NSJSs, donors have cited their obscure, archaic, and informal nature and a perceived lack of respect for women's and other human rights. While these are legitimate concerns, the widespread reliance on NSJSs in some countries and regions makes them a potentially powerful tool for improving dispute resolution and access to justice at the local level.

### 3.1 Advantages of Engaging with NSJSs

USAID considers the rule of law to include five essential elements:<sup>8</sup>

- **order and security;**
- **legitimacy** (including both the substance of the law and the way it is developed);

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<sup>6</sup> Penal Reform International 2001, p.28.

<sup>7</sup> These common characteristics of non-state justice institutions are drawn from Penal Reform International 2001, p.22; Wojkowska 2006, p.16; and DFID 2004 p.2.

<sup>8</sup> USAID ROL 2008, pp.7-8.

- **checks and balances;**
- **fairness** (including equal application of the law, procedural fairness, protection of basic human rights and civil liberties, and access to justice); and
- **effective application** (in both the enforcement and application of laws).

In USAID partner countries, state justice systems often cannot provide all these elements effectively and to every citizen. Because they usually reach most the population, most donor-sponsored rule of law programs focus on the state justice system; however, the lived experience of rule of law reform teaches that not all legitimacy flows from state power. Recognition and accommodation of social, historical, religious, and cultural trends and realities are important to, and part of, the rule of law. Similarly, participation and accountability are recognized contributors to state authorities' legitimacy. Accordingly, rule of law program designs must recognize, seek to understand, and at times incorporate, NSJSs into program design and implementation.

NSJSs often have legitimacy within a community that the state justice system may lack. In post-conflict environments where state justice systems may either have been diminished or destroyed as a result of conflict, NSJSs are often the only institutions left on the ground. This was the case in **Somalia** from the 1990s, for example, where NSJSs maintained law and order at the community level throughout much of the country for over a decade, even though the country was effectively without a government.

While NSJSs can provide broad and meaningful access to justice in many developing countries, they often have practical shortcomings. In preferring collective and community goals for ensuring justice and peace, NSJSs may limit or deny opportunities for asserting and defending individual legal rights, the hallmark of access to justice and perhaps the most important component of the rule of law for most citizens. NSJSs typically decide cases based on community norms that are generally unwritten and subject to interpretation and evolution over time, making it difficult to discern predictable or consistent rules, procedures, and outcomes, especially in countries where there are multiple ethnic groups, and potentially multiple NSJSs.

Also, the unwritten and community-based nature of many NSJSs may result in the failure to observe substantive and procedural rights guaranteed by national laws. While the community-based nature of NSJSs can make enforcement easier, at other times it may increase problems, especially when these institutions operate across community boundaries or lack the enforcement mechanisms of the state. These shortcomings can deprive NSJS disputants of procedural fairness, which is at the heart of the concept of due process. Other times, public access to justice may be impaired when individuals are denied the means of effectively asserting their rights due to weak NSJS institutional capacity. NSJSs may also entrench discrimination against marginalized groups, perpetuating unequal power structures and the denial of human rights at the local level.

The tendency of the international donor community to focus on state justice institutions as the recipients of rule of law assistance has at times overshadowed the importance of local values and cultural relevance. If it is not implemented effectively, such assistance can fail to root itself in the local culture, establishing only institutional shells and creating relationships of

accountability only between local government and the donor community rather than between the government and its citizens.<sup>9</sup>

Even in countries with relatively well-resourced state justice systems, a need to support NSJSs may be justified by the continuing reliance of the population on the services they provide. Indeed, in the United States, court systems make use of NSJS institutions and processes for mediation, diversion, and problem-solving justice services.<sup>10</sup> This reliance is often the product of the perceived advantages of NSJSs over state institutions, which include:

- **Accessibility.** The community-based nature of NSJSs makes them more physically and often more financially accessible to local populations. For many individuals in rural areas, resolving a claim through the state justice system may require not only the expense of travelling to the population center where the state justice institution is located, but may also mean missing work and foregoing income to make the trip. In addition, NSJSs typically conduct proceedings in local languages.
- **Expediiousness.** NSJSs can often address claims faster than state institutions. In **Indonesia**, for example, informal penalties and sanctions are usually enforceable immediately after a decision has been made. In simple cases, resolution may be achieved immediately, often within one to three days; this contrasts with the weeks, months, or years it may take to reach resolution in the state system.<sup>11</sup>
- **Familiarity.** The procedures of NSJSs may be more familiar to individuals at the community level, as they are a part of local traditions and culture. This is illustrated in **Timor-Leste**, where a 2004 study found that more than nine out of ten East Timorese reported being more comfortable bringing an issue to the *chefe du suco* (local council head) or using the traditional *adat* (customary law) process than the state courts.<sup>12</sup>
- **Access to relevant information.** Community-level NSJSs may have better access to the information needed to fairly adjudicate disputes. In **Burundi** and elsewhere in sub-Saharan Africa, NSJSs play a crucial role in addressing land disputes, as they are considered in many cases to be the most reliable witnesses.<sup>13</sup>
- **Cultural relevance.** Individuals may find the methods and sanctions of NSJSs more acceptable than those of the state justice system, which rarely allow for restorative or compensatory sanctions. This is often the case in post-conflict situations, when the restorative mechanisms of NSJSs may be more culturally appropriate in helping to repair societal bonds, which is often the focus of rule of law activities that address past abuses.
- **Perceived trustworthiness.** The non-governmental nature of NSJSs may engender trust in the community. This is especially the case when state structures have been implicated in recent conflicts or are otherwise distrusted.<sup>14</sup>

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<sup>9</sup> Samuels 2006, p. 20.

<sup>10</sup> Center for Court Innovation and National Center for State Courts 2017.

<sup>11</sup> UNDP 2006, p. 78.

<sup>12</sup> The Asia Foundation 2004, p. 49.

<sup>13</sup> Dexter and Ntahombaye 2005, p. 20.

<sup>14</sup> Connolly 2005, p.244.

## 3.2 Challenges in Engaging with NSJSs

Despite their strengths, programs targeting NSJSs should not be seen as a simple means of addressing access to justice and other rule of law challenges. In many countries, there may be significant challenges in supporting NSJSs, including:

- **Lack of uniformity.** Non-state justice norms and practices are often not uniform, which may create challenges to the equal application of justice. Even in a small country such as **Timor-Leste**, there are at least 63 forms of customary justice based on different communities and dialects.<sup>15</sup> Without established standards, arbitrary decisions can lead to discriminatory practices and further exacerbate perceptions of unfairness among groups, particularly for the poor and marginalized.
- **Jurisdictional limitations.** The local NSJS institutions may be inadequate to address inter-community disputes, which is often the case when the authority of an NSJS does not extend beyond the boundaries of the community in question, or when greater formality and the availability of binding enforcement is required to protect the parties, as in criminal cases. Reliance only on social pressure to enforce NSJS decisions can be problematic where the dispute involves individuals from neighboring villages or where the party penalized cannot otherwise be induced to obey the decision.
- **Lack of linkages with the state system.** Linkages between non-state and state justice systems are often tenuous, at best. As a result, a decision made by an NSJS may lack any reference to the state system or even to the national constitution, thereby denying individuals practical access to their lawful rights.
- **A lack of minimum standards.** Decisions depend on the knowledge and values of the dispute resolver in question. As NSJS dispute resolvers are often selected based on their status or lineage rather than elected, the checks and balances often seen in the state system are largely absent, and the quality of decision-making may vary. In addition, a selection process based on status rather than skills may result in a system where the quality of justice is dependent on the means and connections of the participants rather than on the facts of the case. For example, a 2006 study in **Somalia** reported that a militarily strong clan could openly refuse to comply with a judgment favoring a militarily weaker clan, and that as a result, minority groups were often heavily discriminated against in decisions made by the NSJS known as *xeer*. Simply stated, the unequal bargaining power of parties may result in a disadvantageous compromise.<sup>16</sup>
- **A lack of checks and balances.** In addition to the potential inequities of non-state decision-making outlined above, the decisions of NSJSs are often not reviewable. Any review that is available may be by the same decision-making institution or actors, and recourse to the state justice system is often limited.
- **Possibility of harm to justice seekers.** NSJSs generally have limitations and practices worthy of concern; however, their popularity counsels caution as reforming initiatives that destabilize or delegitimize the NSJS may negatively impact users without providing a viable alternative or by disrupting existing local incentive systems.<sup>17</sup>

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<sup>15</sup> Zifcak 2004, p. 46.

<sup>16</sup> Wojkowska 2006, p. 20.

<sup>17</sup> IDLO Practitioner Brief, p. 5-6.

- **Discriminatory practices.** Non-state justice institutions may discriminate based on gender or other factors (though this may also be the case in the state system). For example, in various countries of the Horn of Africa and elsewhere in sub-Saharan Africa, a woman who is raped may be forced by a NSJS decision to marry her attacker.
- **Elite capture.** NSJSs, like state-administered institutions, can be susceptible to elite capture and as a result may reinforce existing power structures and inequities. Decisions may thus be based on social status rather than according to the facts of the case. In addition, non-state dispute resolvers are often not paid or insufficiently paid, and so must depend on gifts and bribes for an income, which can influence the result of a hearing.<sup>18</sup> If the elders are unfairly pressuring a party to settle a dispute with a biased compromise proposal, the party may feel obligated to accept the proposal to keep the peace within their community or because they believe there is no alternative. A 2004 World Bank study in **Indonesia** found that NSJS decisions were not successful when significant power imbalances existed in non-state settings.<sup>19</sup> In an example from **Burundi**, after the public became increasingly distant from the selection of local elders, known as *Bashingantahe*, the elders were viewed by some as representing one political faction or ethnic group and, contrary to tradition, many were seen as corrupt and asking for fees.<sup>20</sup>
- **Illegal sanctions and human right abuses.** Remedies used by NSJSs to resolve disputes may not comport with constitutional and international human rights standards applicable to the country in question. A 2006 study reported that in the territory of the **Palestinian Authority**, NSJSs could require that a perpetrator's family be exiled from its place of residence, in breach of Palestinian statutory law.<sup>21</sup> NSJS human rights violations most frequently concern gender equality or a person's entitlement to basic due process.

Given the potentially serious shortcomings and disadvantages of NSJSs, should donors engage with these institutions? With the widespread use of NSJSs throughout the developing world, it is unlikely that the failure of donors and implementers to engage with them will affect their popularity; indeed, non-state institutions are common even in countries with well-resourced state justice systems. It is more likely that non-state institutions will continue to operate and may undermine or conflict with state justice structures, complicating attempts to resolve disputes by either means.

Poor linkages between the non-state and state justice systems, for example, could result in additional expense to litigants when the decisions of NSJSs are questioned in state courts. In addition, ignoring NSJSs and believing that top-down justice reform strategies will eventually change practice at the local level may mean that discriminatory practices and the oppression of marginalized groups in the local context go unchallenged.<sup>22</sup> The approach that is more likely to be effective is to engage NSJSs as part of a larger access to justice or rule of law program that addresses the weaknesses of both non-state and state justice institutions in ways that promote the rule of law and human rights, improve the effectiveness of the justice sector, and meet local needs.

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<sup>18</sup> IDLO Practitioner Brief, p. 10.

<sup>19</sup> World Bank 2004, p.5.

<sup>20</sup> Dexter and Ntahombaye 2005, p.6.

<sup>21</sup> Birzeit University 2006, p.137.

<sup>22</sup> Chirayath, Sage and Woolcock 2005, p.5.

### 3.3 Directions for Programmatic Support

Based upon the common challenges identified above, donor-supported NSJS programs are concerned with three main themes:

- **Institutional Capacity** – improving the competencies and capacities of NSJSs.
- **Public Access to Justice** – facilitating greater equality and human rights by improving the individual capacities of NSJS dispute resolvers, disputants, and other parties to articulate their grievances and participate in dispute resolution.
- **The Legal Framework** – helping to clarify what constitutes customary law and assist NSJSs in reconciling potential conflicts with state law.

These directions have been pursued by USAID and other donors, usually in conjunction with support to state justice institutions aimed at addressing rights violations, improving access for the vulnerable or marginalized, improving state-non-state justice collaboration, and bolstering public demand for improved justice services.

#### *Lesson Learned*

*The approach that is more likely to be effective is to engage NSJSs as part of a larger access to justice or rule of law program that addresses the weaknesses of both non-state and state justice institutions in ways that promote the rule of law and human rights, improve the effectiveness of the justice sector, and meet local needs.*

## 4. Illustrative Interventions by Donors

### 4.1 Institutional Capacity

In localities where NSJSs predominate, donors help sustain and strengthen them by improving the competencies and knowledge of NSJS dispute resolvers, i.e. those who take part in dispute resolution proceedings as mediators or adjudicators, or as spokespersons on behalf of disputants. This support will commonly take the form of training and development activities that foster knowledge and application of law, including customary law, and that develop the skills of dispute resolvers in mediation.

#### 4.1.1 Knowledge of Law and its Application

In 2002 in **Burundi**, the European Union supported NSJS leaders known as *Bashingantahe* when it provided training for them in the fields of land law, family law, conflict prevention and settlement techniques, and adult literacy.<sup>23</sup> A successful feature of this program was the joint training of *Bashingantahe* with magistrates, local government agents, and the judicial police, which focused on the respective functions and powers of each justice actor and the distinction between civil and criminal matters, to improve collaboration and encourage ongoing dialogue among the participants.<sup>24</sup>

Similarly, in **Zimbabwe**, USAID's Supporting Traditional Leaders and Local Structures to Mitigate Community-Level Conflict project revealed that training only village heads (the lowest

<sup>23</sup> Dexter and Ntahombaye 2005, p.17.

<sup>24</sup> Dexter and Ntahombaye 2005, p.8 and p.33.

level of traditional leadership authority and first instance forum for conflict resolution) yielded little benefit in governance or conflict resolution. But, the project trained village heads and local community leaders together, the two cohorts began to mutually reinforce learning on the legal framework. This “training plus horizontal pressure” produced more consultative village heads and positive governance effects.<sup>25</sup>

In **Afghanistan**, USAID pursued similar goals in its USAID Rule of Law Stabilization Project – Informal Component (RLS-I) during 2010 - 2014 and, from 2016, in Assistance for the Development of Afghan Legal Access and Transparency (ADALAT), which sought to address key justice challenges via a set of operational guidelines known as the *Afghanistan Justice Engagement Model (JEM)*. JEM’s overriding objective is to improve access, fairness, and respect for rights in the justice sector by engaging a representative critical mass of stakeholders with enough programming over an extended period to achieve lasting shifts in the justice culture toward improved collective knowledge, attitudes, and practice. The scope of JEM is outlined in the following case study.

NSJS leaders are sometimes not versed in state law and may have a limited or erroneous understanding of customary law or the consequences when it is applied inconsistently. Capacity building programming needs to be focused, not only on understanding state law, but also on how to reconcile customary disputes in a way that is consistent with state laws. For example, JEM’s constitutional and criminal law legal workshops in **Afghanistan** addressed comparative law and dispute resolution techniques focused on those types of disputes most likely to give rise to conflict with international standards of procedural fairness and human rights, such as major criminal offenses, criminal detention, and disputes affecting rights of women and disadvantaged groups.<sup>26</sup>

#### **Case Study – Afghanistan Justice Engagement Model (JEM)**<sup>27</sup>

NSJSs are the predominant mode of dispute resolution in most locations in Afghanistan. USAID’s programs there are multifaceted, incorporating elements aimed at developing the capacities of NSJS dispute resolvers and disputants, and at reconciling conflicts of law with the state justice system. State justice presence and legitimacy are limited or absent in large areas of the country and state courts are often ill-suited to meet demands for conciliation of conflicts and community harmony. While NSJSs are familiar, trusted, and entrenched in local culture, they are also the source of harmful practices that reinforce social inequities in their communities.

JEM was designed to maximize stakeholder ownership of problem analysis, collective solutions development, and mutual support and accountability by facilitating consultative processes between respected and influential state and non-state justice stakeholders, including women, and broader outreach to the public. These stakeholders met regularly in each district over a period of 18 months in coalition building network meetings, legal education workshops, solutions-based discussion sessions, state and non-state justice coordination meetings, and women’s dispute resolution groups.

Network meetings served as the plenary sessions for full district groups composed of representative leaders from the entire area of intervention to assess challenges, identify priorities, reflect on progress, and commit to further action. Legal education workshops provided a focused curriculum of legal information relevant to addressing the most common disputes and to mitigating specific negative

<sup>25</sup> USAID Zimbabwe 2014, pp. iv-v, 18-19, 34.

<sup>26</sup> JEM Practitioners’ Guide 2018.

<sup>27</sup> Checchi 2014; see also USAID Timor-Leste 2009, p. 19.



practices. These workshops were presented by scholars, including religious leaders, with the requisite stature to influence local elders, many of whom hold inaccurate understandings of the law. Following the workshops, formal and informal justice sector stakeholders participated in issue-specific discussion sessions to assess and develop solutions to local justice problems, such as corruption or illegal decisions, and agree on the parameters of cooperation under existing law. The full district groups of leaders convened to jointly draft and sign pledges to adhere to best dispute resolution practices and forgo harmful ones, such as those that violate human rights. Finally, the leaders participated in a trainer of trainer's program to prepare them to train their peers on what they had learned.<sup>28</sup>

Women elders, called *spinsary*, received similar training, along with support in forming women's dispute resolution groups as a mechanism to bolster their existing roles in resolving family disputes; monitors documented hundreds of disputes resolved by these *spinsary*. The women also advocated for respect for rights, and particularly the rights of women and girls in male-led dispute resolution processes. USAID's external evaluations have found that women program beneficiaries also gained increased respect and stature from their male family members, a reflection of their newly-acquired expertise and confidence, and a key program objective.<sup>29</sup>

Other positive results, reported by judges and other state justice actors, included greater NSJS actor respect for state jurisdiction in criminal cases (e.g., fewer attempts to prematurely free detainees accused of crimes); resolution of longstanding disputes due to enhanced cooperation of influential state and non-state justice actors; and many examples of alliances of program participants applying new legal information to prevent harmful practices such as *baad*.<sup>30</sup>

The workshops helped to dispel common misconceptions that Afghan state law is un-Islamic or imposed by foreigners. They also included comparative dispute resolution practice seminars between NSJS leaders from different regions.

Donors have also empowered and supported networks or associations of NSJSs, on a regional or national basis, that can share—and standardize—best practices. In **South Sudan** in 2006, the U.S. Institute of Peace and the Swiss Agency for Development and Cooperation supported chiefs in establishing traditional authority leaders' councils and forums in each of the country's states. The aim was to use the councils to develop common policies on issues and to cooperate with NSJSs in developing their own legal frameworks.<sup>31</sup>

Here are other examples of institutional capacity programming that address the knowledge and application of the law.

- In **Guatemala**, USAID and the National Autonomous University of Mexico supported the development of an advanced degree program in indigenous law. The program was aimed at depoliticizing Guatemalan indigenous policies and overcoming prejudices and misunderstanding of indigenous and traditional systems through empirical and comparative studies<sup>32</sup>, thus building a cadre of attorneys able to understand and function in both systems.

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<sup>28</sup> JEM Practitioners' Guide 2018.

<sup>29</sup> Sayara Research 2014.

<sup>30</sup> "Baad," a customary practice in **Afghanistan**, is an example of gender discrimination. After a member of one family causes an injustice against another, the custom of Baad requires the family of the violating party to give a daughter to the wronged family—paying for a wrong with the trading and enslavement of a woman.

<sup>31</sup> Jones-Pauly and Nojumi 2004, p.14.

<sup>32</sup> Hendrix 2001, p.605.

- In **Somalia**, the Danish Refugee Council held a series of dialogues with elders and community leaders from five different clans on aspects of non-state clan law known as *xeer* that were ineffective in conflict management and contradicted basic concepts of justice and fairness enshrined in Islamic law and international human rights standards. The community dialogues focused on ensuring protection of the accused, fair treatment of women, minorities, problems associated with *diya* payment (blood compensation, usually paid with livestock), and collective punishment and property rights. Participants later issued a declaration modifying the local *xeer*, including, for example, those governing revenge killing and forced marriages of a widow to her dead husband's brother. The project followed up the signing of the declaration by traveling and training throughout the region to disseminate the newly agreed upon human rights protections among the local population.<sup>33</sup>

#### *Lesson Learned*

*Capacity building programming needs to be focused, not only on understanding state law, but also on how to reconcile customary disputes in a way that is consistent with state laws.*

### 4.1.2 Skills in Negotiating Dispute Resolution

A major strength of NSJSs over state courts is their value in securing negotiated dispute settlement, i.e. by using mediation techniques to encourage disputants to reach a resolution by negotiated agreement, USAID and other donors have supported the introduction of community mediation schemes working independently of state courts and administered by community-based volunteer mediators serving without remuneration. Examples include these initiatives supported by The Asia Foundation (TAF) along with other donors, including USAID:

- In **Nepal** from 2002, community mediation was introduced and is now operating in over 800 rural communities, making use of facilities support from local governments. Since 2010, community mediation has been recognized by legislation to establish a mediation council to regulate standards, but otherwise remains administered by community-based volunteers. Training of mediators in mediation techniques has been the major contribution of donors.<sup>34</sup>
- In **Sri Lanka**, mediation boards have operated since 1990, and a mediator training institute was established in 2002 to support their expansion. There are now 329 active mediation boards and over 8,400 volunteer mediators, 20 percent of whom are women.<sup>35</sup>
- In the Mindanao region of the **Philippines** in 2008, TAF supported the introduction of mediation in areas of widespread clan-based fighting, using trusted community members as mediators.<sup>36</sup>

While mediation schemes of these kinds are endorsed by government, receive government funding, and may be subject to government oversight or statutory regulatory bodies, they are invariably managed by non-government organizations and their activities are sustained by unremunerated volunteer mediators drawn from the local communities.

<sup>33</sup> Le Sage 2005, p.52.

<sup>34</sup> The Asia Foundation Nepal 2018

<sup>35</sup> The Asia Foundation Sri Lanka 2012

<sup>36</sup> The Asia Foundation 2016

### *Lesson Learned*

*A major strength of NSJSs over state courts is their value in securing a negotiated dispute settlement, i.e. by using mediation to encourage disputants to reach a resolution by a negotiated agreement.*

## 4.2 Public Access to Justice

Regardless of the quality of rights protections preserved in state law or custom, compliance depends on public awareness and acceptance of legal principles and human rights norms. Knowledge of those norms encourages disputants to pursue their rights during NSJS dispute proceedings, both in terms of the procedures applied and the outcomes reached. The satisfaction of disputants with NSJS leaders is also dependent on whether a disputant believes the process and outcome of their dispute to be fair.

Public access to justice activities promote human rights by supporting communities and local rights advocates. They also advance awareness through education, and can fuel a community-driven, civil society demand for the protection of basic rights. These activities can include literacy training, legal training, public awareness campaigns, or legal aid services provided by lawyers and paralegals. Other examples include activities that empower vulnerable populations to prevent elite capture, and that promote human rights education and awareness, especially among vulnerable and marginalized populations.

### 4.2.1 Public Outreach and Awareness

Public access and outreach activities are aimed at helping citizens to pursue their rights in dispute resolution, including resolutions produced by NSJSs. Examples:

- In **Afghanistan**, JEM provides public legal awareness outreach aligned with legal education training for justice providers. Methods include radio broadcasts, community theater, and illustrated print publications on legal rights issues identified in a pre-intervention assessment. Prominent participants are invited to be involved in outreach activities, including voicing radio spots or participating in interview programs.
- In **Cambodia**, more than 400,000 residents of remote rural communities across the country attended live performances of a traveling street theatre play on domestic violence, based on a traditional form of improvisational comedy familiar to most Cambodians. This enabled the program to reach a wider audience than had it used printed materials, which would have been less effective given the varying levels of literacy.<sup>37</sup>
- In **Zimbabwe**, non-government women's rights organizations conducted awareness-raising activities on inheritance law, which prompted more women to secure their rights as NSJS disputants. The Women Lawyers' Association also provided general human rights training. Village chiefs invited trained women to sit on NSJS dispute resolution panels as, in many cases, they had proven to be better able to apply human rights principles.<sup>38</sup>
- In **Burundi**, a Search for Common Ground project sought to raise awareness at the national level by disseminating laws, including the country's post-conflict constitution, by radio broadcasts.<sup>39</sup>

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<sup>37</sup> Wojkowska 2006, p.33

<sup>38</sup> DFID 2004, p.23

<sup>39</sup> Dexter and Ntahombaye 2005, p.35

- Women’s groups in **West Sumatra, Indonesia** have been active in mediating domestic violence and civil disputes, and in training women on non-state justice procedures. Through these training activities, NGOs have empowered women active in the *Adat Women’s Organization* to more effectively represent their interests before the male-dominated *Adat Council*.<sup>40</sup>

Public legal awareness and outreach programs should also include the development of community paralegals. According to research in Africa in 2011, public awareness campaigns and legal education alone are not sufficient to help individuals secure their rights without a mechanism, advocates, or other support to advise them. In **Tanzania** and **Mozambique**, women in villages where paralegals were connected to lawyers were more likely to bring their case to the state court when community leaders failed to resolve the case at the local level.<sup>41</sup>

*Lesson Learned*  
*Public awareness campaigns and legal education alone without other support are not sufficient to help individuals secure their rights.*

## 4.2.2 Legal Empowerment Using Paralegals

In most developing countries, a sustainable legal profession only exists in major cities or where courts have regular sittings, which usually excludes poor or remote communities. Where there are no courts, there are rarely qualified lawyers to advise or to act in dispute resolution. This deficiency of advisory expertise can be overcome by paralegals trained in basic elements of law and skills in negotiation, mediation, and advocacy so that they can assist disputants in settling disputes that do not involve court hearings. The work of paralegals in dispute resolution can help sustain legal knowledge and awareness long after donor-funded public legal awareness and outreach programs end. In considering support for paralegal programs, however, comparative studies have found that continuous training is a key to paralegal effectiveness, and that their effectiveness is derived from their being viewed by the community as locally-driven, rather than a foreign imposition.<sup>42</sup> Further, paralegal programs have been found to be most effective when the paralegal works with, or is supervised by, an attorney. Here are other examples of the use of paralegals:

- In **Sierra Leone** in 2006, paralegals played an important role in improving access to justice at the community level. Paralegals received ongoing training and supervision to be conversant in both the state and NSJSs, with an ability to advocate in both systems. Paralegals provided individuals with information on their rights, access to mediation, and assistance in dealing with court and chieftdom authorities. In extreme cases, or where there was a possibility of lasting legal impact, lawyers working as part of the program provided direct legal representation or high-level advocacy.<sup>43</sup> At the community level, paralegals engaged in community education, and advocated for their clients with both state and non-state authorities. As the NSJS may favor those with greater means or family connections, the ability to seek recourse in the state justice system can be important to disadvantaged

<sup>40</sup> Wojkowska 2006, p.34.

<sup>41</sup> Kapur 2011, parts 4.1 and 4.2.

<sup>42</sup> DFID 2004, p.22.

<sup>43</sup> OSJI 2006, p.14.

groups. The potential of paralegals to access the state justice system thus enhanced their capacity to provide advocacy at the community level.<sup>44</sup>

- In **Malawi**, the community paralegal concept was adapted to establish a non-state Paralegal Advisory Service Institute that, with multi-year funding support from DFID, trained and deployed paralegals to visit police stations and prisons. Paralegals conducted in-prison training sessions to assist prisoners awaiting trial to lodge bail applications or appeals; or in the case of child detainees, they assisted in putting them in touch with often distant parents and village elders to secure their release.<sup>45</sup>

#### *Lesson Learned*

*The work of paralegals in dispute resolution can help sustain legal knowledge and awareness long after donor-funded public legal awareness and outreach programs have ended.*

### 4.2.3 Civil Society Monitoring the Performance of NSJSs

NSJSs may be unwilling or unable to provide a fair hearing or to make decisions that respect state law or the human rights of those affected. Efforts to directly monitor the activities of NSJSs to detect and respond to instances of poor decision-making, however, are difficult and costly for state agencies or donors to implement. Moreover, attempts at regulating or monitoring NSJSs are often seen as an outside imposition and are likely to be resisted. Civil society organizations, in contrast, are often perceived as less biased and thus are more likely to be tolerated by NSJSs. With the strong trend of urbanization and the associated shift in the distribution of population to cities from rural areas in most developing countries, civil society organizations in urban areas can be helpful in monitoring and reporting on the performance of justice systems in both rural and urban areas.

Donors can support the establishment of monitoring programs and training of civil society organization personnel. These programs can, for example, be aimed at strengthening the ability of the media to cover justice related issues as well as training human rights workers to monitor NSJS decisions. In developing monitoring programs of this kind, however, it will be crucial to consult with and collaborate with those who are to be the subject of monitoring, to secure their consent and active participation in the program design, implementation, and evaluation. Examples of monitoring programs include:

- In **Bangladesh**, the legal services organization *Ain O Salish Kendra* helped to organize and train local committees, sometimes composed entirely of women, to monitor *shalish* proceedings and educate those responsible for the proceedings.<sup>46</sup>
- In **South Sudan**, a civil society group known as the Rule of Law Promoters' Association monitored the activities of NSJSs with the support of UNDP and the International Rescue Committee. Monitors used a standard court observation form to record public perceptions, procedures, and subject matter jurisdiction of the courts, as well as to monitor NSJS proceedings for instances of human rights violations or misapplication of legal standards.

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<sup>44</sup> Wojkowska 2006, p.35.

<sup>45</sup> Walsh 2010, p.16.

<sup>46</sup> Golub 2003, p.36 - *Shalish* is a community-based, non-state dispute resolution technique used throughout Bangladesh.

- In the **Philippines**, the Gerry Roxas Foundation (GRF) has worked with local partners to strengthen the Barangay Justice System (BJS). Based on their program evaluations GRF reported that, by answering questions and assisting during BJS proceedings, those who serve as advocates significantly increased public understanding and confidence in the BJS.<sup>47</sup>

#### *Lesson Learned*

*In developing NSJS monitoring programs, it will be crucial to consult with and collaborate with those who are to be the subject of monitoring, with the aim of securing their consent and active participation in the program design, implementation, and evaluation.*

### 4.2.4 Increasing the Participation of Women in NSJSs

While the lack of representation of women and other disadvantaged groups within NSJSs is well-documented, it has proven difficult to identify workable remedies. In many cases, merely stipulating minimum levels of female participation in development programs will not guarantee impact. Female participation quotas or targets, for example, are often ignored in practice and can have unintended adverse impacts. Women who have not previously had the same opportunities as men to participate in decision-making bodies may consequently be unwilling or unable to effectively serve on NSJSs or to assist women who are disputants. Civic education and capacity building activities specifically for women may be needed before attempting to increase women's engagement in NSJSs. Examples:

- In **Afghanistan**, JEM included support for women's dispute resolution groups which, in combination with legal education, aimed to enhance the traditional role women play in resolving disputes, such as disputes between children (before they become serious inter-familial disputes), minor disputes between neighbors, and disputes involving women.<sup>48</sup> Evaluations provided positive feedback on this support in terms of the women's ability to prevent and resolve disputes fairly, the existence of an additional venue for women disputants, and the increase in respect for women's rights in male-led dispute resolution processes.<sup>49</sup>
- Women's groups in **West Sumatra, Indonesia** have trained women on non-state justice procedures and how to be active in mediating domestic violence and civil disputes. Through these training programs, NGOs empowered women who were active in the *Adat Women's Organization* to more effectively represent women's interests before the male-dominated *Adat Council*.<sup>50</sup>
- In **Bangladesh** since 1989, the *Madaripur Legal Aid Association (MLAA)* has organized village-level mediation committees and offered training in mediation to other NGOs. Organizations such as MLAA provide a dispute resolution venue primarily for women who might be discriminated against within traditional NSJSs. Alternatives such as MLAA can be further strengthened with legal education and rights seminars on, for example, a women's right to appeal to state courts.<sup>51</sup> Within the state-sponsored, locally administered *shalish* system in Bangladesh, USAID and its partners have provided training on mediation

<sup>47</sup> Golub 2003, p.15.

<sup>48</sup> JEM Practitioners' Guide 2018, p.11.

<sup>49</sup> Sayara Research 2014, p.30.

<sup>50</sup> Wojkowska 2006, p.34

<sup>51</sup> Penal Reform International 2001, pp.90-91,145-146

techniques, sensitized decision makers to gender issues, and increased involvement of women as mediators on *shalish* panels by raising awareness of and encouraging adherence to existing laws. This training has increased public confidence in the *shalish* system. In a 2002 TAF survey of women who used *shalish* and other USAID-supported dispute resolution procedures, 65 percent reported that they were satisfied with the decision reached.<sup>52</sup>

#### *Lesson Learned*

*Merely stipulating minimum levels of female participation in development programs will not guarantee impact - capacity building activities specifically for women may be needed before attempting to increase women's engagement.*

### **4.3 The Legal Framework**

Analysis of NSJSs often concentrates on the characteristics of the mechanism, sometimes to the detriment of understanding its legal/normative framework and standards. When a political entity has more than one applicable legal system, it can be said to be legally pluralistic. Indeed, the acceptance or incorporation of non-state justice providers may functionally recognize a plurality of legal frameworks and obligations applicable to different groups in society. At one level, this is not new; nearly all countries have one or more non-state sources of law. Colonialism, the rise in international law, and democratization have each contributed to the pluralism of national legal systems. The interplay between conceptions of justice, the legitimacy of certain institutions or mechanisms, and the state and non-state providers of justice involves the exercise and constraint of power and acceptance of authority. These core questions are also at the heart of effective USAID rule of law programming.

#### **4.3.1 Supporting the Harmonization of State and Customary Law**

Improved linkages between NSJSs and state justice institutions have often emerged from a process of legal harmonization. Legal harmonization is pursued by amending state laws and practices to reconcile conflicts between statutory law and customary law - a process some commentators have described as the establishment of “hybrid” systems. An example is the South African constitution, which, subject to specific state laws, preserves traditional leadership institutions and customary law, including the acceptance of customary law principles by state courts.<sup>53</sup>

Hybrid systems can be characterized as pluralist or hierarchical. Pluralist systems allow for the existence of NSJSs alongside statutory law, with separate appeal processes for each. Hierarchical systems allow for recognition of NSJSs, their legal practices, decisions, and customary law, but only to the extent that they do not violate fundamental rights enshrined in national constitutions.<sup>54</sup>

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<sup>52</sup> USAID 2002, pp.150-151

<sup>53</sup> Mennen 2007

<sup>54</sup> Mennen 2007. See also Clark and Stephens 2011, p. 2, which describes a five-step process for setting up a hybrid system: (i) understand the historical and contemporary political and policy context of formal and customary justice systems; (ii) analyze the strengths and weaknesses of formal and customary legal systems (identifies priorities); (iii) identify entry points on how to strengthen hybrid justice systems based on an analytical framework of institutional change; (iv) realistically assess the opportunities for engagement on the entry points; and (v) ensure a flexible and long-term commitment to implementation.

In countries where there is no explicit recognition of customary laws, state laws may facilitate, and in some cases even mandate, the use of NSJS processes before or during court proceedings. State courts may be empowered to refer cases to settlement negotiations, including court-annexed mediation or NSJS processes that may be appropriate to the type of dispute. State laws may also facilitate court review, recognition, and enforcement of agreements reached in pre-litigation negotiations, including informal court proceedings.

A review of the *Afghan Social Outreach Program (ASOP)* found that using community-based dispute resolution processes as part of a hybrid system linked to the state system is a viable approach in leveraging existing resources to resolve individual disputes and in fostering peace within communities. “In fact, using existing informal legal institutions such as tribal elders to maintain continuity, while tying them to the state system, gives development practitioners the time needed to maintain stability through a viable system of dispute resolution and discourages the resurgence of the Taliban in the communities in question”.<sup>55</sup> In conflict situations such as Afghanistan, reducing violence is a major program objective.<sup>56</sup>

#### *Lesson Learned*

*Using existing NSJSs such as tribal elders to maintain continuity, while tying them to the state system, gives development practitioners the time needed to maintain stability through a viable system of dispute resolution.*

To further strengthen the hybrid approach in some countries, local leaders are filing their NSJS decisions within a state office. For example, filing systems have been established in South-West Nigeria, Ghana, Bangladesh, and in some parts of Afghanistan. This extra step has enhanced predictability and consistency of decisions, and has, to an extent, discouraged power abuses, elite capture, and human rights violations. The local leaders themselves have decided whether certain high-risk cases, such as female inheritance, should be routinely reviewed by the state court system, or whether they should only be reviewed when a claimant initiates an appeal.<sup>57</sup>

Promulgating state laws to recognize and facilitate linkages with NSJSs serves to reinforce the need for states to continue linkages and collaboration activities after donor projects end, and thereby reinforces the sustainability of those activities. Examples include:

- In **Bolivia** USAID supported the formation of a network of civil society organizations, that worked with the Bolivian congress and constituent assembly to increase understanding of non-state justice as well as gender and human rights norms.<sup>58</sup> The network also developed draft language for the constituent assembly on the recognition of non-state justice authorities insofar as they are in accordance with human rights principles. The constitution was adopted in 2009, legitimizing the practices of the non-state justice sector.<sup>59</sup>
- In **Afghanistan**, representatives from the Afghan Ministry of Justice, Supreme Court, Ministry of Women’s Affairs, CSO community, women’s organizations, and donors drafted a policy recognizing the positive role of traditional dispute resolution councils, while identifying and calling for the elimination of their negative aspects. The draft specified that

<sup>55</sup> USAID Afghanistan 2011, p.5.

<sup>56</sup> Coburn and Dempsey 2010. p. 30.

<sup>57</sup> Clarke 2011, p.1.

<sup>58</sup> Reel 2008, p. A10.

<sup>59</sup> USAID project Participation and Justice Network presentation, March 13, 2007 (internal unpublished working document).



no person shall be forced to appear before a traditional dispute resolution body and that decisions of the bodies may be appealed to the state. The draft also enabled collaboration with state justice entities by promoting the recording of non-state decisions, allowing the state to send less serious criminal cases to traditional actors in some cases, and to improve access to justice for women.<sup>60</sup>

- In the **Philippines**, the Barangay Justice System law, which governs a statutory dispute resolution system for small disputes using traditional procedures within local government areas, prevents state courts from adjudicating claims unless they have first been processed via the customary mediation procedure. The law also provides that the courts will enforce agreements reached via that procedure.<sup>61</sup>
- In **Papua New Guinea**, the Village Courts law recognizes traditional dispute resolution under customary law and provides for its supervision by the state. State magistrate courts are empowered, for example, to review decisions of village courts when they exceed their jurisdictional power.<sup>62</sup>

### 4.3.2 Improving Coordination Using Written Agreements

Memoranda of Understanding (MOUs) or other written agreements between representatives of state justice institutions and NSJSs are a proven model for establishing and sustaining linkages and cooperation between the state and the NSJS while simultaneously protecting individual human rights. The case study of experience in Liberia illustrates the value of this approach.

#### ***Case Study – Using MOUs to Harmonize Non-State Justice in Liberia***

The Liberian Ministry of Justice signed an MOU with NSJS leaders to establish trust and a formal linkage to reconcile and harmonize customary justice practices with state laws. The signatories held participatory meetings to build consensus and secure community buy-in.

USAID supported the Carter Center in educating the public on the effects of the MOU through street theatre plays, community forums, and radio broadcasts. When a state law conflicted with a non-state tradition, the Carter Center explained the reasons behind the state law and provided an opportunity for dialogue and respectful discussion to assist the transition to the requirement to adhere to state law. They offered public guidance on how to use the state system and on the effect of new state laws that would be binding on NSJSs with respect to inheritance, sexual assault offenses, and land disputes.

The Carter Center also trained community legal advisors to assist rural residents in pursuing their rights in both NSJSs and state courts. These advisors provided mediation support, basic information about legal rights, legal assistance, and free consultations on navigating state court procedures.

Finally, the Carter Center successfully created a dialogue between the state and non-state institutions so that each side was better able to understand the other's perspective and could collaborate on reconciling and harmonizing traditional beliefs, values, and customs so that they did not conflict with Liberian laws. However, efforts to harmonize the two systems at times have appeared to some to be an attack on a culture rather than on harmful practices. To remedy this, USIP in a separate study suggested that the government: “adopt a more nuanced approach to defining jurisdictional

<sup>60</sup> Coburn and Dempsey 2010, p.4.

<sup>61</sup> Golub 2003, p.13.

<sup>62</sup> Australian Law Reform Commission Report 31, 1986, para. 770.

limitations—for example, by introducing criteria to determine when crimes may—and may not—be adjudicated by customary authorities. Such criteria might include whether or not the parties prefer customary adjudication, whether or not a third party is affected, whether or not there is a political or ethnic dimension to the crime, etc. Among the benefits of such an approach would be a reduced caseload in the formal courts.”<sup>63</sup>

Other examples include:

- In **Afghanistan**, pledges drafted by NSJSs and state justice leaders were the product of JEM’s legal education activities. Program participants reflected as a group on what they learned and developed a collectively drafted and signed pledge list. The list included, for example, pledges to respect the jurisdiction of both systems, to honor women’s rights, to forgo corruption, and to cooperate in addressing longstanding disputes. The lists were posted in mediation halls in local government facilities designated for joint use by state agencies and NSJSs.<sup>64</sup>
- In the province of **Aceh, Indonesia**, an MOU was signed to govern standards for determining compensation for mediators, filing fee costs, transparency agreements, non-state jurisdiction, and agreed basic rights and norms for dispute resolution. The MOU also clarified the jurisdiction of NSJS processes over certain criminal matters, such as theft, assault, arson, and destruction of crops.<sup>65</sup>

MOUs create a locally agreed upon solution to a community problem, thereby making the solution more likely to be effective, adhered to, and legitimate. By including non-negotiable human rights protections, both state and non-state actors benefit from a MOU arrived at through a consensus-building process.

Such MOUs are similar to the ‘self-statement’ used in Namibia. Self-statements are non-binding representations of non-state practices that cover only the main rules of the NSJS and do not attempt to be all-inclusive. They are constructed in a forum of open dialogue and include only what is agreed upon by the parties involved. This is in contrast to codification, where the codified rules may be imposed from above in a way that handcuffs mediators into a rigid system that is unable to adapt to changing circumstances. Additionally, research has shown that participants are more apt to accept a non-state decision if it is based on a written guide.

#### *Lesson Learned*

*MOUs create a locally agreed upon solution to a community problem, thereby making it more likely to be effective, adhered to, and legitimate.*

## 5. Developing Support Programs

### 5.1 Programmatic Options for Supporting NSJSs

The range of NSJS development programs have generally been limited to supporting training and public education, fostering relationships between state and non-state actors, and supporting

<sup>63</sup> USIP 2009, p. 7; see also Flomoku and Reeves 2011.

<sup>64</sup> JEM Practitioners’ Guide 2018, p.5.

<sup>65</sup> Clarke 2011, p.23.

legislative or administrative reforms to reconcile potential conflicts. Drawn from these three categories, the following is a summation of the kinds of support donors have offered to date:

Building institutional capacity - improving the competencies and capacities of NSJS institutions or groups - by means of:

- Joint training workshops involving NSJS leaders and state court judges to improve collaboration and to encourage ongoing dialogue.
- Training of trainer programs to give NSJS leaders the capacity to impart their knowledge to others.
- Training targeted at developing women as NSJS leaders and participants in dispute resolution.
- Supporting the establishment of representative groupings or councils of NSJS leaders to foster collaboration, knowledge sharing, and greater consistency of practices across regions.
- Supporting higher education institutions in offering advanced degree studies in customary law to foster the development of attorneys who are able to understand and support state and non-state dispute resolution.
- Training of those who serve as volunteer community mediators as part of an organized community mediation service.

Enhancing public access to justice - facilitating greater equality and human rights through the improvement of individual capacities of NSJS dispute resolvers, disputants and other participants - by means of:

- Legal educational programs for citizens, particularly vulnerable or marginalized groups, such as indigenous minorities.
- Public awareness campaigns via electronic media broadcasts, community theatre, and print publications.
- Training programs for justice providers, including lawyers and paralegals, on customary law and the application of state law principles in non-state dispute resolution.
- Legal aid services provided by lawyers and paralegals.
- Training aimed at developing community paralegals to serve communities that have no practical access to state courts or attorneys.
- Monitoring and evaluation of NSJS activity and effectiveness through NGOs.
- Training programs specifically for women who serve as NSJS decision makers or who otherwise assist in negotiating disputes affecting women.

Developing the legal framework - helping to clarify what constitutes customary law and the reconciliation of practical conflicts with state law - by means of:

- Legal harmonization legislation aimed at acknowledging, recognizing, or integrating customary practices and standards into statutory law administered by state courts.
- Adoption of procedures to allow state courts to review and enforce decisions of NSJSs.

- Non-legislative agreements or memoranda of understanding between the state and NSJS leaders to govern the harmonization of practices applied by state courts and NSJSs, aimed at minimizing practical conflicts.
- Establishment by legislation of non-state institutions that adopt NSJS dispute resolution processes or features and whose roles are distinguished from those of state courts.
- Establishment by legislation of state-sponsored institutions with powers to mediate disputes outside state courts.

## 5.2 Assessing Which Programmatic Options Should be Preferred

In seeking to assist a state in extending and reinforcing the rule of law, USAID recognizes the need to support NSJSs where the state system is incapable of providing adequate standards of order and security, legitimacy of the law, checks and balances, fairness, and effective application of law. Where the justice needs of a community are being met or could be better met by non-state systems of dispute resolution, then supporting NSJSs in addition to state institutions can be a more effective use of limited aid funding. Determining whether this investment will be effective can only be known by undertaking a comprehensive assessment of access to justice from the perspective of the users of justice services rather than justice service providers.

## 5.3 Undertaking an Assessment of NSJS Development Needs

Existing expertise or experience will rarely be sufficient to assess the adequacy of justice options and services in any country or region. Program design must entail gaining an understanding of the local context, often through a formal assessment that is comprehensive, multi-faceted, and based on evidence collected with analytic rigor.<sup>66</sup> An assessment should survey and analyze existing non-state justice institutions and practices, along with the state justice system as a whole, including gaps in services, relationships and linkages between the state and NSJSs, and the sociocultural and political context. It should also consider the effects of systemic corruption, capacity deficiencies, prior initiatives taken by donors, and the consequential impacts on access to justice.

The assessment should illuminate practical features and impacts of NSJSs in terms of how they affect service delivery from the perspectives of justice practitioners and users. This should include an examination of the dispute resolution methodologies used by NSJSs, applicable rules and standards, impacts of procedures on human rights of disputants, funding sources, enforcement mechanisms, and incentives for reform.<sup>67</sup>

### *Lesson Learned*

*Where the justice needs of a community are being met or could be better met by supporting non-state systems of dispute resolution, then supporting NSJSs in addition to state institutions can be a more effective use of limited aid funding.*

The assessment data should be gathered from a broad base of stakeholders, including rural citizens, minorities, women, and other disenfranchised groups representing those who use justice services rather than those who seek to provide them. Assessments that only gather information from those in power or who administer state justice institutions may overlook

<sup>66</sup> USAID ADS 201.

<sup>67</sup> DFID 2004, p.8.

essential data, which may exacerbate existing problems of biased representation or elite capture.<sup>68</sup>

An assessment should be scheduled and adequately funded to achieve representative samples of data and opinion from all stakeholder groups from each geographic locality likely to be affected by the proposed program. This will be a crucial first step in ensuring not only that information is gathered from stakeholder groups, but that a process of dialogue with those groups is begun and sustained, with the aim of ultimately securing their genuine and informed consent to whatever aid interventions are proposed to affect them.

#### *Lesson Learned*

*Determining whether supporting NSJSs will be more effective can only be known by undertaking a comprehensive assessment of access to justice from the perspective of the users.*

## 5.4 Defining the Scope of Evidence and Analysis to be Undertaken

The assessment needs to raise questions and collect data and opinion from stakeholders. USAID has developed multiple tools and amassed a significant reservoir of practical experience in this regard. In addition to this guidance, USAID recommends use of its a) Guide to Rule of Law Country Analysis: The Rule of Law Strategic Framework, b) Applied Political Economy Analysis Field Guide, and c) Rule of Law Practitioners' Guide (forthcoming).<sup>69</sup> These tools have been designed to take a wider, systemic view of how various actors engage on justice delivery and the rule of law. They can readily be combined in modular fashion to garner a rapid, but still comprehensive view of the attitudes, knowledge, and incentives important to the interaction of citizens, state, and NSJSs.

**Annex I** offers a list of associated questions that may be pursued in undertaking an assessment. These have been organized loosely in accordance with the various levels from the Applied Political Economy Analysis Field Guide. The important consideration is that the assessment product should offer a sound evidence base for deciding upon and prioritizing activities to be developed in designing a support program and consideration of associated risks. USAID DRG Center of Excellence experts are ready to assist at any point in the program design process.

## 5.5 Best Practices in Designing Programs

Deciding on how and when to provide support to NSJSs in any country is challenging. The following needs to be considered in making that decision.<sup>70</sup>

### 5.5.1 Inclusive Local Ownership

Donors need to aim to secure and maximize stakeholder ownership through inclusive consultative processes at each step of the engagement process, i.e. during assessment, design, implementation, and evaluation. Open dialogue and engagement will help to ensure that planned solutions are responsive to and accepted by citizens by establishing common understanding of need, self-generated solutions, and mutual support and accountability in seeing them through.

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<sup>68</sup> IDLO 2011, p.6.

<sup>69</sup> USAID ROL 2008; USAID APEA 2018; USAID ROL Practitioner's Guide 2019.

<sup>70</sup> These key factors are discussed more broadly in Golub 2003 and DFID 2004.

Harnessing of local resources to implement solutions also improves the chances for the solution to be sustainable.

### 5.5.2 Managing Resistance to Change

Possible resistance to change needs to be managed, both from within the participating NSJSs and from state justice sector actors and lawyers who may be sensitive to perceived threats to their authority. To serve this need, stakeholder groups can be convened to discuss the scope of proposed reform and to make it clear that the goal is strengthening access to justice, rather than supporting one set of institutions at the expense of others. In particular, if a program activity affects an indigenous group, the consent of that group is essential, as required by major donors such as the World Bank, and pursuant to the forthcoming USAID Indigenous Peoples Policy. If affected indigenous people do not consent, then the activity should not be implemented.

### 5.5.3 Setting Realistic Objectives

Program objectives should be realistic and well defined in terms of long-term development objectives and more immediate-term stabilization goals. For example, paid dispute resolution councils established for post-conflict reintegration purposes where they did not previously exist should not be expected to continue as justice entities when salaries and outside support ceases.

### 5.5.4 Identification of Program Partners and Participants

In selecting program participants, it is essential to identify legitimate NSJS representatives who are recognized by their communities as respected leaders. Partnering with groups of geographically, ethnically, and tribally representative non-state and state justice actors is necessary to avoid exacerbating inter-communal tensions and to reach a critical mass of respected and influential stakeholders.

### 5.5.5. Holistic Strategies

Because NSJS users and practitioners are part of local culture, reforming local justice practice is usually best implemented holistically, i.e. where essential components are introduced in a comprehensive and coordinated fashion. Without establishing a critical mass of mutual support and accountability by bringing all key stakeholders onboard at once, efforts at reform are unlikely to last. For example, one short program of legal education for one group of elders is unlikely to instill the requisite individual initiative or social influence to affect broader community knowledge, attitudes, or practices. Coordinated and sustained support to justice actors and the community help establish a collective justice culture that is adequately attuned to achieving the intended reform goals.

### 5.5.6 Long-Term Engagements

Applying a broad-based, minimally invasive approach is a long-term commitment. For change to be sustainable, engagements should include multiple installments or program cycle iterations over an extended period to allow participants multiple contacts with messaging, and to develop solutions, commit to action, assess progress, and adjust. A minimalist, value-adding, and long-term approach also helps to alleviate the risk of exceeding the absorptive capacity of stakeholders. If interventions are not aimed at replacing or drastically changing existing systems, assistance can be scaled to what will add long-term, sustainable value to those systems.

Stakeholders should grow with the added value rather than being overwhelmed by it. To that end, design processes dealing with cultural change need to be as participatory and inclusive as possible to ensure that risks of adverse social impacts are identified early and mitigated in the design.

### 5.5.7 Education and Public Awareness

Legal education concepts should be made understandable and targeted at specific practical needs. Donors should use positive customary ideas about justice to introduce new concepts to the audience. Talk of state law or international human rights could mean little to an audience if not expressed in terms of local concepts of justice, community values, or religious faith by respected sources such as elders, educated religious leaders, judges, and other legal professionals. Drawing parallels between statutory law and custom or faith may serve the additional function of defusing misconceptions of statutory law, and the state itself, as being counter to local values. Public awareness campaigns on their own have little effect on change. Such programs, if done at all, must be coupled with other lines of effort.

### 5.5.8 State-NSJS Justice Linkages

Collaboration between state and NSJSs enhances mutual support and accountability where neither stakeholder enjoys complete control over justice system processes. Donors should assist in developing these linkages by facilitating stakeholder consultation aimed at setting parameters for cooperation and revising policies and practices. Improving linkages in this way typically serves to legitimize both sectors and can be a key driver of reform.

### 5.5.9 Preferences for Activities with Greatest Impact

Not all activity options applied by USAID and other donors are necessarily effective. Public awareness campaigns may not have much impact, or it may not be feasible to resource such campaigns on a scale or duration to achieve significant improvements in the level of legal awareness among target audiences. And the provision of training of NSCS and state personnel, a chief element of most programming, can have disappointing results unless targeted systematically, broadly, and over a sustained period. Activities less commonly applied by donors, such as those aimed at training individual community paralegals and community mediators and associated organizations, can have more enduring benefits as their continuity is often not dependent on ongoing donor support. Choices about which activities are to be pursued should be tempered by the likely benefits that can reasonably be sustained well after a donor program is finished.

### 5.5.10 Opportunities to Influence the Legal Framework

Although donors have sought to influence government policies toward legislative reforms to harmonize state laws with customary practices and systems, there are few examples of success, even in establishing MOUs or other administrative arrangements with similar aims. Donors tend to provide practical support in these areas in response to government initiatives often unrelated to the urgings of donors. This suggests that unless a government is actively advancing legal framework reform proposals, donor support is more likely to be effective if it is dedicated instead to NSJS institutional capacity building and public awareness objectives.

### 5.5.1 | Pursuing Non-Prescriptive Directions for Giving Support

**Annex 2** provides a sample statement of work (SOW) that illustrates how some of the program options available might be expressed in seeking proposals from USAID implementing partners. Building on USAID’s experience in developing SOWs, a feature of this sample has been to frame requests for proposals or requests for applications in ways that are not prescriptive as to how the program objectives can best be achieved. In particular, the sample eschews the practice of providing offerors with “illustrative examples” of the types of activities that USAID is expecting or would welcome. Instead, the SOW allows offerors to advance innovative solutions that USAID or other donors may not have previously considered or applied, where those solutions may be appropriate to the context of a particular program. This sample SOW may require modification once the Assessment (see above) is complete.

In addition, USAID has generally had positive experiences with releasing a draft SOW for consideration and comment by potential implementing partners. This process can collect valuable additional perspectives as well as provide an opportunity for additional research that can inform and improve the planned program.

## 6. Conclusions

When appropriately targeted and planned, USAID support to NSJS institutions and processes can serve to complement other support to state justice institutions in ways that can significantly improve the provision of justice services to the poor, the marginalized, and those citizens in areas that cannot be adequately served by state institutions. In countries and regions where NSJSs are prominent, even dominant, such support can be crucial in overcoming major incapacities of state institutions, especially when they are affected by institutional corruption and intractable capacity deficiencies. USAID’s support to NSJSs is likely to be most effectively deployed in conjunction with complementary support to state courts and other justice institutions, and when that support increases access to justice and public confidence in the services these institutions provide.

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## Annex I – Undertaking a Non-State Justice Sector Assessment

This annex offers abbreviated guidance on assessing the significance and impact of NSJSs in dispute resolution and how their activities and methods may affect the role, reach, and effectiveness of state justice institutions. The central aim of such an assessment is to identify opportunities for USAID to foster improved access to justice in areas where the state justice system struggle to adequately serve.

Assessing an NSJS is not a stand-alone effort but should be done in conjunction with other applicable analytical tools, including other USAID guides covering the rule of law framework, country analysis, and applied political economy analysis. Similarly, the process of collecting and analyzing information about non-state justice actors is not a solo endeavor for a lone analyst but requires a multidisciplinary team effort. USAID officers are strongly encouraged to consult with the Bureau for Development, Democracy and Innovation (DDI) Rule of Law Team for advisory assistance in planning and implementing an NSJS assessment.

The questions outlined below are neither exclusive nor comprehensive; rather, they are designed to prompt understanding and delve more deeply into the stakeholders, networks, linkages, and feedback loops that describe the interplay between state and NSJSs. Every system is interactive, interdependent, and intersecting with other systems, and the dynamics of one part will affect the others. More effective justice programming and deeper thinking about possible integration with other programming are possible only with greater knowledge of these issues.

### Assessment Goal

Identifying an objective for the assessment will shape the assessment questions and help gather useful information.

### Context

This level of inquiry is analogous to the “Foundational Factors” level of analysis described in USAID’s Applied Political Analysis Framework (APEA). This level of inquiry seeks to understand the embedded structures that shape the character and legitimacy of the state. Having stood the test of time, these issues are subject only to slow change and require longer-term engagement. In addition, they are also likely to be locally sensitive, touching on political systems, socio-economic structures, borders with conflict-affected countries, or natural resource endowments. USAID recommends utilizing this guidance to focus a political economy-driven analysis.

#### Social, historical, and cultural context

- Does the state effectively administer the entirety of its population and territory?
- Is there a history of conflict, economic deprivation, colonialism, and/or lack of territorial integrity?
- Does the state exercise a monopoly on force throughout the country?
- Are there historical events that echo today with respect to the formation, legitimacy, capacity, and leadership of the state?
- What is civil society’s position and influence?



- How do ethnic, caste, religious groups and networks interact with the state?

#### Political and economic context

- How are relationships between government, the elite, and society managed generally?
- How are rents and patronage created and allocated?
- How is citizen and voter support obtained/retained by leaders nationally, regionally, and locally?
- What recent or on-going global or regional events are or will impact domestic political, economic, or social processes and outcomes (e.g., urbanization or resource exploitation)?
- What new pressures are anticipated (e.g., climate change or migration) and how will they influence existing actors, structures and institutions?
- Are there major resources (e.g., oil, minerals, timber, land, water) available and how and by whom are they exploited? How does this activity overlap or intersect with the geography and demography of the state's population (including minorities and rural populations)?
- How are the state's economic sectors and returns geographically and demographically distributed (who controls, who shares, and how much?)
- How is the national economy integrated into the international economy?
- What are the main constraints to economic growth, equity, integration, and stability?
- What sociocultural features are important determinants of behavior and change?
- What influences, maintains, or undermines these features?
- What are the sociocultural values driving how justice providers, users, and communities understand and engage in justice practice?

#### Normative framework/legal context

- What is the national legal framework (constitutional, legislative, regulatory)? Is it fully routine, known, and understood, and fully implemented (including geographically)?
- What are the provisions affecting or regulating equality, transparency, certainty, and predictability?
- What international agreements has the government signed (e.g., UN conventions) and how have they been implemented by or integrated into national law?
- What is the nature of national – subnational authority over key legal and regulatory matters (e.g., criminal, business disputes, land tenure, family relations, etc.)?
- What are community conceptualizations of “justice” (e.g., reconciliation and social harmony; respect for individual rights)?
- Which informal norms and cultural or social traditions have continuing influence? Are they changing and why/why not?
- How do these norms and traditions affect power distribution, social justice and equity, economic processes, service delivery, governance, etc.?

## Stakeholders, Institutions, Networks, and Influence

These lines of inquiry correspond generally to the “rules of the game” level of analysis in USAID’s APEA. The formal and informal rules and norms these questions seek to identify shape the quality of governance and influence actors’ behavior. They define incentives, bound relationships and power dynamics, and may limit capacity for collective action.

- Who are the key political actors and power brokers? How, if at all, are they constrained (by law, informal norms)?
- Which groups hold important stakes in the state justice system?
- Which civil society organizations (e.g. NGOs, women’s groups, grassroots associations) are most active and how?
- Is political competition (including elections) and the distribution of power regulated effectively and lawfully? What norms and rules govern how power is distributed and used?
- Is civil society activism, the business of the media, individual free expression, and access to information protected and regulated by law?
- To whom are powerful actors accountable, how and why?
- Do legal reforms promote the interests of certain groups or persons? Can entrepreneurs or minorities depend on the state justice system for redress of grievances? How or why not?
- Are central economic processes (property rights, tax collection, production, lending etc.) regulated by law and managed effectively? What role do non-state institutions play, if any?
- Are human rights abuses and corruption regulated by law and punished when appropriate? If not, why not?
- Are international relations (including debt, aid, investment, trade, ownership of property, immigration etc.) subject to the rule of law?

## Administration, Provision and Perception of Justice

These questions seek to understand the justice actors’ interactions and operations in the context of locally relevant and current circumstances. These relate generally to the “Here and Now” APEA level of analysis, focusing on how current events affect the influence, goals, and behavior of key actors and stakeholders.

- What is the status of the state justice system? Does it have national reach, effective processes and personnel, and a national strategy? Is it compliant with basic rule of law principles (e.g., separation of powers, independence of the judiciary and legal profession, predictability, and transparency)?
- What is the legitimacy status (public perception) of key justice sector actors?
- Are there NSJSs active in the country? Which predominate and what is their connection to the factors above?
- What services (dispute resolution, paralegal support, CSO legal aid or advice clinics, legal awareness and education, bar association advocacy) do the NSJSs provide and to whom?

- What principles (community harmony, restorative or reparative justice, individual protection, etc.) undergird and drive the NSJSs?
- How have past regulatory frameworks (such as colonial regulations) shaped the institutional environment within which NSJSs now operate?
- Who controls, administers, and presides over NSJS mechanisms? How do they derive their authority?
- What role(s) do participants/disputants have in the process (e.g., can a participant select a presiding authority? be represented by a third party?)?
- Which actors in the process have the benefit of what type of education, training, and/or practical experience?
- What are the typical disputes and their underlying causes?
- What types of disputes pose significant challenges (exhibited by backlogs, delays, procedural barriers or geographic limitations, etc.) to the state system? Are these well-understood in systematic terms (e.g., a backlog is not necessarily an indication of inefficiency, but may be also affected by inter-organizational non-cooperation)? Are there 'typical' disputants? What are the usage rates for the state justice system?
- Do any types of disputes pose regular challenges to the NSJSs? Which disputes and why?
- Do justice seekers (citizens or residents with a legal need) 'vote with their feet' and use specific mechanisms (state or non-state) for certain disputes? Which mechanisms and how often?
- Do justice seekers have access to dispute resolution or regulatory oversight options (legal awareness)? Why or why not? Where and where not?
- What are the existing linkages between the state and NSJSs (e.g., full or partial state recognition of traditional, customary, or religious systems; cross referrals or 'repugnancy' clauses; codification of customary or religious norms into state procedures or laws, etc.)?
- What is the nature of state and non-state justice actors' collaboration, cooperation, or competition?
- Are disputants free to select the legal framework in specific cases (e.g., custom vs religious or statutory law)?
- What methodologies does the system more closely resemble: mediation, arbitration (binding or non-binding), etc.? Are disputants free to select the methodology?
- What types of solutions or penalties are generally imposed?
- Are records of decisions kept? By whom?
- How are decisions enforced? Voluntary consent? Social pressure? Other means?
- Can decisions be rejected or appealed? If appealed, to whom?
- Does the NSJS provide for coercive means such as arrest and detention, and if so, under what circumstances and standards?
- How is the system financed? Are there incentives for corruption?

- How consistent are dispute resolution practices?

## Status of Justice Sector Development and Change

This level of analysis recognizes that a NSJS and a state justice system are interactive and interrelated systems nested within larger social, political, and economic systems. The information collected by the foregoing questions is necessarily interdependent, affecting and influencing prospects for change. As USAID's APEA guidance notes, when systemic features are in flux, they may drive an opening or closing of space for change. This level of analysis -- which, as noted above, is best conducted as part of a larger political economy assessment process -- seeks to understand those international and/or domestic drivers of change that are acting on the state, society and markets. Identifying points of complexity and uncertainty, incentives and/or disincentives for change, potential champions and spoilers, and importantly prospective alliances and coalitions to lead reform or overcome resistance to change is the goal.

- Who is doing what to whom in the justice sector (donor-driven, demand-driven, internally-sponsored, etc.)?
- Is there a justice sector national strategy and coordination and deconfliction body(ies)?
- Have there been previous engagements of NSJSs? When, by whom, and to what effect?
- How, if at all, does patronage of NSJSs reflect ethnic or social change?
- Is access to either the state or non-state system becoming more or less available? To whom do existing restrictions apply and why?
- What are the shortcomings of NSJSs? Is there dissatisfaction with existing NSJSs? If so, how is this expressed?
- What are the most common challenges to the state and NSJSs (e.g., human rights violations, inequity/unfairness, corruption, elite capture, discrimination, etc.) and how are these being addressed or not in each system?
- What interest groups (e.g., women, ethnic minorities, LGBT, refugees, etc.) are pursuing greater responsiveness, equity, or access from the state justice system?
- How are these groups currently treated by the NSJS and how do they perceive that system?

## Program Design Concerns

- What past and current interventions have engaged the NSJS?
- What challenges did they address? Were they successful? What are the lessons learned? What challenges remain?
- What impact might a donor-driven NSJS program have? Is it likely to positively or negatively affect the NSJS's legitimacy? Relationship with state institutions?
- Is there a mechanism for NSJS stakeholder participation in program design? For NSJS and state system stakeholder cooperation and coordination in program design?
- What is the potential for improvement? Are there champions for reform? Do these same persons/groups have the platform, stature, and/or legitimacy to influence NSJS change?

- Is the NSJS capable and willing to adapt to international human rights standards? How might the state system participate, support, undermine, or obstruct such adaptation?
- What incentives and disincentives exist for policy makers and CSOs to engage with NSJSs?
- What are the best ways to promote improvements? Ignore/marginalize or engage and reform?
- How much change is realistic given education levels, entrenched customs, etc.?
- What are the expected and likely program time horizons?
- What other donors and projects offer opportunity for leverage, cooperation, co-funding, or follow-on activities?

## Theory of Change

With the above information collected, digested, and organized, it may be time to develop a theory of change applicable to the NSJS. USAID’s revised program cycle guidance (ADS 201) requires that program designs, SOWs (or scope of objectives), and program descriptions be based on a theory of change that reflects a development hypothesis. As rule of law programming generally occurs in rapidly changing environments and since unforeseen occurrences and challenges are routine, program design must leave room for changes, as suggested by the CLA framework. In addition, the evidence gleaned from program monitoring data is best addressed through flexible reform models.

Any program, and especially an NSJS-focused program, is more likely to be successful if grounded in an empirically valid and reliable theory of change that describes how and why a program’s purpose is expected to be achieved within the established context. Developing a theory of change ensures that planning focuses on anticipated outcomes, rather than resource inputs, near term outputs, or specific interventions.

With the information above, reference to USAID’s ROL Framework and Guide to Country Analysis, and consultation with Agency ROL experts, development of a complete theory of change should commence. The completed product should include:

1. Reference to the context in which the development problem is situated, including root causes — political and technical — of the problem and conditions in the operating context that may affect outcomes;
2. An “if-then” statement explaining causal outcomes needed to achieve the desired change that illustrate the relationship between program elements and the program’s purpose;
3. Major interventions that will be undertaken to lead directly or indirectly to these outcomes;
4. Key assumptions that underlie the success of the theory of change: programmatic assumptions about which key outcomes will lead to other higher-level outcomes and context assumptions of external factors outside the program’s control that are needed for success; and
5. Key indicators to monitor how progress unfolds during implementation.

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## Annex 2 – Sample Statement of Work (SOW)

### Non-State Justice System Strengthening Program

#### SECTION C - STATEMENT OF WORK

##### Introduction

*Key Goal: Establish purpose of solicitation with an introduction, including overall challenge and project objective(s).*

USAID/Afghanistan intends to award a contract for services aimed at strengthening non-state justice systems (NSJS) in Afghanistan. Often referred to as traditional dispute resolution, these systems and processes typically take the form of *shuras* or *jirgas*, which have been used for centuries to resolve disputes at the village level and in most urban areas. *Shuras* and *jirgas* are usually constituted of tribal elders, religious or spiritual leaders, or other respected community leaders.

This two-year Program will build on the successes and lessons learned from pilot activities undertaken by an earlier NSJS program. The Program's core objectives (*the objectives should mirror the "if" statement in the Theory of Change*) will be to:

- Improve the knowledge and attitudes of NSJS practitioners;
- Increase cooperation between state justice and NSJSs;
- Expand the roles in NSJSs for women and other marginalized groups; and
- Promote better public understanding of the law and justice processes.

##### Background

*Key Goal: In providing background information, use existing knowledge and literature to establish a basic understanding of the current justice system. Discuss the history and roles of state and non-state justice sectors along with the respective strengths and weaknesses of each. Also describe specific issues related to gender and marginalized groups.*

After more than 30 years of conflict and almost 20 years since the fall of the Taliban, Afghanistan continues to struggle in establishing an effective and efficient judicial system governed by the rule of law. Most donor activities in the sector have focused on rebuilding institutions of justice, providing access to legal resources, and training on procedure and law. As progress made at the state level cannot be readily extended to provincial and district level institutions, justice services remain limited outside the major centers. State courts are widely viewed as corrupt and inaccessible, and traditional justice mechanisms face challenges across the country, including in areas of armed conflict.

A study by the International Crisis Group found that most Afghans still have little or no access to state judicial institutions and that the public lacks confidence in the state justice sector amid an atmosphere of impunity.<sup>1</sup> Polling data from the critical southeastern and southwestern parts

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<sup>1</sup> Reforming Afghanistan's Broken Judiciary, November 17, 2010, page i.

of the country indicates that less than half the population perceives the state courts to be fair and trusted, effective at delivering justice, or capable of resolving disputes in a timely or satisfactory manner.<sup>2</sup> Perhaps because of the extent of state court dysfunction in many parts of the country, studies suggest that up to 80% of disputes that might be adjudicated in courts or by other state agencies are instead resolved via NSJS processes.<sup>3</sup> Those studies also show that the success of NSJS derives primarily from the fact that the process is driven by community elders and other trusted resident leaders, as these are the actors ordinary citizens are accustomed to turning to in resolving their disputes.<sup>4</sup>

Although many Afghans consider the traditional sector to be faster and more effective in delivering justice than the state courts, NSJS decisions are often at odds with Islamic law and Afghan law and are usually not recognized or registered with the state sector. Nevertheless, NSJS leaders and processes frequently interact with state justice processes and the two systems can be mutually reinforcing in resolving disputes or enforcing case outcomes. Afghan Ministry of Justice (MoJ) officials may engage with NSJS processes and actors through state agencies such as the *Huqooq*, which is concerned with pre-court dispute mediation of civil grievances. Judges and prosecutors may also have contacts with community elders and others engaged in NSJS.<sup>5</sup> Despite the interaction between the two sectors, however, some state justice actors - along with women's groups - have raised concerns about NSJS processes because they may serve to advance partisan interests, discriminate against marginalized groups, or impose decisions that infringe on human rights.

## Past USAID Assistance

*Key Goal: Describe recent related activities of USAID and other donors with enough information to allow offerors to find additional information to inform proposals.*

In May 2017, USAID signed a one-year contract for the implementation of a pilot effort to strengthen NSJS and develop linkages among NSJS practitioners in selected districts in the south and east.<sup>6</sup> In each pilot district, the program identified village elders who are respected in their communities and have experience with NSJS mechanisms, brought them together with elders from neighboring communities to form district-level networks, and helped build relationships within these networks by inviting the elders to meet on a regular basis. The purpose of the meetings is to discuss, at the elders' request, topics of Afghan law, including inheritance, property, criminal procedure, and Constitutional law. In addition, USAID has supported efforts to promote alternatives to using girls as commodities to settle disputes (called *baad*) by holding discussion sessions with the elders on this subject.

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<sup>2</sup> The Asia Foundation survey reported that 39% and 37% of respondents from the southeast and southwest respectively found the courts fair and trusted; 48% and 38% from the southeast and southwest respectively believed the courts were effective at delivering justice; and 33% and 34% from the southeast and southwest respectively thought the courts resolved cases in a timely and proper manner.

<sup>3</sup> Afghanistan Human Development Report 2007: Bridging Modernity and Tradition - The Rule of Law and the Search for Justice, Center for Policy and Human Development, 2007.

<sup>4</sup> The Asia Foundation Survey, page 125.

<sup>5</sup> Afghanistan Research and Evaluation Unit (AREU), March 2011; Community-Based Dispute Resolution Processes in Nangarhar Province, AREU, December 2009; and Community-Based Dispute Resolution Processes in Bamiyan Province, AREU, December 2009.

<sup>6</sup> Offerors should refer to the quarterly and final reports for detailed information on the performance and results of the pilot program.

The district-level networks have also served as the platform for dialogue with state actors on developing linkages between NSJS and state-administered systems. In some districts, these linkages include a process for recording decisions made by the village elders in *Huqooq* offices where all civil judgments are recorded, while in others they involve a procedure by which state actors can refer disputes to village elders.

### **Other Donor Assistance Supporting the Informal Justice Sector**

Several other donor-assisted initiatives are providing support for NSJSs in Afghanistan, including programs funded by the State Department's Bureau of International Narcotics and Law Enforcement Affairs (INL), the World Bank, and the British government in Helmand.

In addition to projects targeted specifically at NSJS, there are broader governance and stabilization projects that have dispute resolution components. These include USAID-funded efforts to establish more than 90 community councils (CCs) at the district level throughout Afghanistan as part of the Afghan Social Outreach Program. These CCs, which are government bodies composed of community representatives, are intended to facilitate interaction between communities and the government at the district level.

### **Problem Assessment**

Weaknesses in NSJSs in many areas of the country include:

- Rights violations and corrupted NSJS processes can produce unjust outcomes, harm innocents, and prolong disputes. Significantly, discriminatory social attitudes in many areas adversely influence justice practices.
- State-NSJS collaboration in many areas is still largely ad-hoc, with the extent and quality of collaboration varying widely from province to province.
- Marginalized groups, particularly women, have limited roles in NSJSs and limited ability to directly represent themselves and contribute as NSJS practitioners.
- Public understanding of and respect for rights and statutory law remains limited in many areas.
- Corrupt or imposed justice actors and/or processes distort the positive, consensual, and conciliatory nature of traditional NSJS practices and result in lower satisfaction with outcomes.
- Long-standing disputes that are unresolved contribute to increases in conflict, violence and destabilization.

### **Strategy**

*Key Goal: Link to CDCS Development Objectives and Intermediate Results*

USAID/Afghanistan's core investments in governance development are focused on expanding access to justice and dispute resolution by working with state and NSJS entities at the provincial and district levels and supporting pluralistic and inclusive governance by state and local institutions. This focus is reflected in its overarching Development Objective (DO 1) for Democracy and Governance: improved performance and accountability of governance. Five intermediate results comprise this DO, the first of which is IR 1.1: Increased public confidence in the rule of law system. This IR is further broken down into five sub-IRs:



- I.1.1: State rule of law system improved;
- I.1.2: Availability of quality legal education expanded;
- I.1.3: Citizen awareness of legal rights and legal processes of the judicial system increased;
- I.1.4: Traditional dispute resolution and justice in contested areas strengthened; and
- I.1.5: Implementation of national anti-corruption strategies enhanced.

The NSJS Strengthening Activity will support sub-IR 1.1.4.

### **Theory of Change**

*Key Goal: Describe how the project will seek to affect the status quo, how the process of change will take place, and USAID's opportunity to directly or indirectly influence those changes.*

If the knowledge and attitudes of NSJS practitioners are improved, there is increased cooperation between NSJS and state systems, roles in NSJSs for women and other marginalized groups are expanded, and the public has a better understanding of the law and justice processes, then access to fair and transparent justice services will increase, improving public satisfaction with justice outcomes and diminishing the drivers of conflict and sources of instability.

### **Program Objectives or Goals**

*Key Goal: USAID's current practice is to avoid including illustrative activities in SOWs to encourage offerors to propose their own innovative approaches to a problem. If some activities are considered necessary, they should be stated as mandatory. Expected results should be included with each component.*

*Objective 1: Improve knowledge and attitudes of non-state justice intercessors*

Although NSJS mechanisms have been remarkably resilient over the past 30 years in Afghanistan, they have nevertheless been weakened by conflict, shifting power dynamics, corruption, and the ascendancy of other dispute resolution providers in many rural and urban areas. In some areas that have seen or been affected by conflict, community elders may have become apprehensive about engaging in dispute resolution to any significant extent. In other areas, local powerbrokers have assumed primacy in resolving disputes or newly-established bodies have begun to exercise a dispute resolution function, thus marginalizing community elders.

The contractor will work to address these weaknesses to the extent practicable across the targeted districts. The contractor must conduct an assessment (mapping) of NSJS processes, the political and economic context as it affects NSJS, women's roles in NSJS, the nature of the disputes, linkages to state actors, and dispute resolution actors in the community, to include both state and non-state actors. The assessment will lay the groundwork for an action plan that clearly outlines the objectives for engagement in that specific district, links the proposed activities with those objectives, and addresses sustainability. The Offeror is encouraged to propose illustrative activities that seek to creatively address NSJS deficiencies, including those highlighted above.

Expected Results:

- There is increased knowledge of Afghan law, Islamic law, and human rights norms in communities, particularly among tribal elders and community leaders;
- NSJS decisions better reflect and/or are based on Afghan law, Islamic law, and human rights norms;
- NSJS decisions and their practitioners are perceived to be more impartial;
- The quality of decisions emanating from the NSJS improves as evidenced by increased confidence in the decisions on the part of target communities;
- Tribal elders and community leaders make commitments to halt social practices like *baad* that are harmful to women, as evidenced by a decline in the number of harmful decisions; and
- The resolution of long-term intractable disputes reduces sources of conflict.

*Objective 2: Strengthen linkages between NSJS and State Justice*

While connections between NSJS and the state administered system exist, strengthening these linkages should bring greater legitimacy to NSJS decisions, provide accountability for NSJS processes, and harmonize NSJS with the legal framework. Such linkages offer the potential for registering cases and decisions in the state courts so that, within the affected communities, they will be more readily known, understood, accepted, and enforced. Stronger linkages can foster greater accountability for NSJSs by helping to ensure that their activities are in conformity with Afghan law, Islamic law, and international human rights norms. Effective linkages will also allow for greater exchange of information and increase the frequency of cases referred from one system to another.

The contractor may want to test different strategies for linking NSJS and the state system during implementation. Linkages must be appropriate to the local context. In preparing to strengthen linkages with the state system, the contractor must explore the potential for developing relationships with various state bodies present in the targeted districts. This would include examining the role and legitimacy of such key actors as the district governor, police chief, local militia commanders, *Huqooq*, local judges and prosecutors, and others, to better understand local social and political dynamics. Within such local context, the contractor will seek to promote greater accountability and accessibility of both the state and NSJS. With respect to state and civil society actors alike, the contractor will be expected to take into account relevant evidence bases. For example, multiple studies demonstrate that citizen action promoting good governance becomes most effective through strategies that build alliances, mechanisms, and platforms linking champions of change from state and CSO together. Likewise, activities that promote oversight or improved performance management are most effective when they move beyond monitoring and actively change the incentives of government employees.

Some thought should also be given to promoting linkages that could be generalized across provinces or regions.

Expected Results:

- Agreements are reached, and processes are in place for the registration of NSJS cases and decisions within the state system;

- Procedures are developed to guide how cases are referred from one system to another;
- There is an increase in the extent to which NSJSs in targeted areas forward decisions to the state system for validation;
- The validation of NSJS decisions by the state system leads to an increase in the number of decisions that are in conformity with Afghan law, Islamic law, and human rights norms;
- Formal and lasting linkages between the government, NSJS, and if appropriate, civil society established and documented (e.g., Memoranda of Understanding or Joint Strategies and Action Plans);<sup>7</sup> and
- Parliament committees with justice sector jurisdiction demand an independent, responsive court system, including positive integration or interaction with NSJS providers.

*Objective 3: Enhance the roles of women in justice processes.*

Women play valuable but often unappreciated roles in resolving family disputes, preventing escalation, and counseling male practitioners on disputes related to women. Accordingly, an enhanced role for women could further improve dispute resolution practice and help protect the rights of women and other vulnerable groups. The Offeror should propose ways to enhance women's roles in NSJS processes in a manner that improves outcomes for them and other marginalized groups. The Offeror should also describe in detail the steps it will take to ensure that these activities are culturally appropriate and would not undermine support for overall objectives.

#### Expected Results:

- Women are better able to apply legal information in resolving disputes and advocating for respect for the rights of women and children; and
- Women make positive contributions to justice services, particularly for other women, as their skills and confidence as dispute resolution practitioners are enhanced.

*Objective 4: Increase public awareness of and demand for rights (lowest priority).*

NSJS practitioners are to a certain degree beholden to local culture, as reflected in the knowledge, attitudes, and behavior of the public. To reduce resistance to change in justice practice and increase public demand for improved justice services, it is important for the public to become familiar with new legal concepts. As the public (and disputants) are exposed to legal information targeted at discouraging harmful or discriminatory justice and social practices, community members will come to expect ownership over dispute resolution processes and fairer legal outcomes. Offerors should propose innovative ways to increase both public awareness of the law as well as the demand for fairer justice outcomes.

#### Expected Results

- Increased public understanding of the law in areas relevant to the most common disputes;

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<sup>7</sup> For more on CSO/government joint action plans to improve service delivery, see *Power to the People: Evidence from a Randomized Field Experiment of a Community-Based Monitoring Project in Uganda*, <http://www.povertyactionlab.org/evaluation/community-based-monitoring-primary-healthcare-providers-uganda>. For a comparison of four impact evaluation studies, see also <http://www.povertyactionlab.org/policy-lessons/governance/community-participation>.

- Increased public demand for respect for rights; and
- Increased public satisfaction with justice services.

## **Additional Requirements**

### *Participation*

Within each geographical area of intervention, the contractor should establish criteria and protocols for achieving a critical mass of male and female NSJS practitioners, state justice actors, and other community leaders who are representative of the ethnic/socioeconomic makeup of the area and have demonstrated potential to influence their peers and the general public toward improved justice knowledge, attitudes, and practice. This approach should be extended to reaching sufficient numbers of the public with legal messaging to create a critical mass of support for justice reform.

### *Local ownership*

The engagement from assessment to program design to evaluation should be approached as an inclusive dialogue among all key local stakeholders. All aspects of the Program should aim to maximize collective knowledge and ownership of Program outcomes.

### *Do no harm*

With a comprehensive understanding of the strengths and weaknesses of NSJS, the contractor should avoid attempts to modify positive elements of NSJS practice unless it can be shown that the modifications add value, while encouraging local initiative in mitigating negative aspects. The implications and risks of each approach or activity must be assessed prior to implementation.

## **Inclusion of Youth**

The Program shall endeavor to “improve the capacities and enable the aspirations of youth so that they can contribute to and benefit from more stable, democratic, and prosperous communities and nations” as called for by USAID’s Youth Policy. The Offeror should develop illustrative interventions and clearly describe how the Program will apply inclusive development practices across all objectives.

## **Gender and Women’s Empowerment**

To address gender mainstreaming, the Contractor will analyze how programs can be tailored to maximize gender participation and reduce the disproportionate threats and occurrences of human rights violations against women. The analysis should be undertaken as part of the process of determining baselines for performance indicators and when developing the Contractor’s Annual Work Plan.

In accordance with [USAID’s Gender Policy](#), the contractor will continuously monitor gender implications and opportunities, as well as collect disaggregated data. All activities performed are required to take into account not only the different roles of men and women, but also the relationship between and among men and women as well as the broader institutional and social structures that support them. It will be determined during the implementation phase which women or particular women’s groups represent useful interests or alliances and the Program will identify where attention to gender issues and/or women’s participation will contribute to

results. All gender programs must adhere to the gender lessons learned outlined in USAID publications, including the USAID Gender Policy.

The Offeror should pay attention to any gender imbalances within the Program and undertake efforts that promote gender equality across the justice sector. The contractor shall, for example, support:

- Awareness-raising on gender issues (such as gender bias);
- Support for international obligations of the host nation regarding gender equality, where applicable;
- When possible, support judicial and civil society efforts to conduct research and collect data related to equal access to justice for women, where applicable.

The Program offers important opportunities to have a positive impact on the gender-related knowledge, attitudes and practices of NSJSs. A commitment to advance gender equality and women's empowerment must be fully reflected in the Offeror's proposal. If awarding local grants, the offeror must also include a plan for soliciting and awarding grants for local sub-contracts to organizations supporting gender issues.

### **Monitoring and Evaluation**

Specific Program interventions will be driven not just by opportunity, but also by empirical evidence. The contractor will be responsible for developing metrics to measure the impact of the interventions under all four Program objectives. Methods may include but are not limited to: public opinion and user surveys, customer score cards, surveys of practitioners, comparisons of actions taken, and such other methods as the contractor may design with Mission approval. As part of their proposals, offerors must submit a monitoring, evaluation and learning (MEL) plan that describes how they will monitor results at the Program goal, objective, sub-objective, expected results, and output levels and promote collaborative learning.

The Contractor must integrate a baseline diagnostic for the projects, which must lead to a clear development hypothesis with realistic expectations of the value and scale of results, and understanding of implementation risks.<sup>8</sup> Further, the Contractor must be able to develop and administer flexible monitoring tools where country program goals and objectives may change, baselines and control groups may be lacking, cause and effect do not always follow a linear relationship, and programs rely on quick turnaround of data and analysis to inform programming decisions.

During implementation, the method for measuring progress must be agreed to and supported by the host nation and/or other stakeholders. As part of its MEL plan, this Program will use at least one "basket" of indicators. An explanation of the basket approach to indicators and relevant examples can be found in the United Nations Rule of Law Implementation Guide and Project Tools.<sup>9</sup> As applicable, the basket of indicators can utilize the ROL and human rights indicators outlined in the UN ROL Guide or similar guides, such as USAID's Rule of Law Indicator guide or Security Sector Indicator Guide. However, appropriate basket(s) of indicators will be established in consultation with the COR. Input from other stakeholders, including the Government, civil society, and/or the NSJS should also be considered. As part of

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<sup>8</sup> More information can be found in the section on Performance Management Plan.

<sup>9</sup> [http://www.un.org/en/events/peacekeepersday/2011/publications/un\\_rule\\_of\\_law\\_indicators.pdf](http://www.un.org/en/events/peacekeepersday/2011/publications/un_rule_of_law_indicators.pdf)

achieving local ownership, the contractor is expected to engage local civil society organizations, as well as other relevant local institutions, when determining indicators (and basket groupings) to be used. Consideration should be given to data that is, or can be, collected by local actors as part of the Program's efforts to achieve sustainable impact.

All data collection and analysis for each indicator or basket, as applicable, must be disaggregated by gender, ethnicity, disability, and location.

Where possible, when the Contractor is conducting training with stakeholders, all trainings must include pre- and post-tests unless an exception is given by the COR. In the more limited situations where circumstances permit, the Contractor may also provide a follow-up test at a later date to ensure the material has been effectively retained.

Finally, the offeror shall include in its proposal an independent subcontractor that will be responsible for establishing baseline data and conduct a mid-term and final evaluation of the Program. The subcontractor will prepare independent evaluation designs in accordance with USAID policy, to be approved by USAID prior to implementation of the evaluations.

### **Sustainability**

Sustainability has been of fundamental importance for USAID's work for over 50 years and is now a core part of US global development policy and USAID's reform agenda. For the purposes of this Program, sustainability will be achieved when host country partners and beneficiaries are empowered to take ownership of development processes, including financing, and maintain Program results and impacts beyond the life of USAID involvement. For example, mutual accountability reflects the need for heightened host country ownership. Country ownership is a fundamental prerequisite for the [Paris Declaration on Aid Effectiveness](#). Country ownership is increasingly recognized by multilateral and bilateral donors, as a key driver of sustainability and the long-term capacity of countries to plan, implement, manage, and evaluate high impact development programs. Country ownership is widely understood to be a process by which a country decides, plans, and directs its own development agenda.

Offerors' proposals should explicitly describe their technical approach to achieving sustainability.

### **Windows of Opportunity**

Programming strategies and annual work plans should be flexible and allow for responding to windows of opportunity, which may include support for national dialogues initiated by the Afghan government. The contractor should stay abreast of political and cultural shifts and be able to identify political and social change that may make reforms more likely to take root. In such cases, strategies and work plans can and should be adapted to accommodate the window of opportunity subject to USAID approval, as long the reprogramming does not require USAID to incur an additional cost unless otherwise directed by the CO.

### **Anti-Corruption**

Corruption can be an issue in any justice system, which undermines the administration of justice and public confidence in the system.

Within the context of justice accountability and integrity, the Contractor's personnel must be familiar with state-of-the-art research from [USAID's 2015 Practitioner's Guide to Anti-](#)

[corruption](#). As applicable, the Program must adhere to lessons learned outlined in the Practitioner’s Guide. A focus will be on ensuring that the justice system adheres to high standards of independence and impartiality, integrity, accountability, and transparency while minimizing opportunities for corruption. The Offeror should clearly articulate how lessons learned from the anti-corruption publication will be integrated throughout the Program to (a) counter corruption; and (b) enhance transparency, accountability, integrity, and professionalism.

### **Democracy, Human Rights and Governance Integration**

The NSJS Strengthening Program is part of a broader Democracy, Human Rights and Governance (DRG) effort supported by USAID and other donors. It is a USAID priority to strengthen collaboration and partnership with bilateral donors, multilateral donors, and international organizations to increase synergies, maximize impact, and avoid duplication or inconsistencies.

Offerors should demonstrate how their program will be integrated with these other efforts by describing coordination strategies and opportunities for joint implementation or collaboration. In addition, the Contractor is urged to investigate and utilize the potential for private-public partnerships and alliances to ensure sustainability of activities and processes after the end of the Program.

The Contractor shall seek to complement and coordinate activities with other USAID and donor activities. USAID’s priority is to strengthen collaboration and partnership with bilateral donors, multilateral, and international organizations to increase synergies and avoid duplication. Where permissible, the Contractor is required to act as a convening authority, share information with the relevant actors, and to put an emphasis on adhering to the strengthening donor collaboration policies and guidelines outlined in the ADS 300 Series.

### **Other**

Contractor must stay up to date Rule of Law research and annually provide to the COR a two-page summary of at least three Rule of Law publications relevant to the Program. The 2-pagers will include how, if at all, this Program can learn from and incorporate leading practices and innovations into current programming. This is done to ensure that the latest best practices are widely disseminated and employed in the field in real time.

Unless offerors have been awarded a contract and can knowingly provide employment, offerors shall not request or require local national staff or CSOs to enter into an exclusivity clause. Such exclusivity clauses create resentment and can inhibit the best staff from being hired by the offeror who is awarded the contract.