

SUPPORTING PRIMARY JUSTICE IN INSECURE CONTEXTS

**STRATEGY DOCUMENT: POLICY AND PROGRAMMING
RECOMMENDATIONS**
SOUTH SUDAN AND AFGHANISTAN

CONTENTS

ACKNOWLEDGEMENTS	3
FOREWORD.....	4
1.BACKGROUND	5
2.RESEARCH AND METHODOLOGY	7
3.RULE OF LAW PERSPECTIVES AND LEGAL FRAMEWORKS	8
3.1 The rule of law concept in fragile states.....	8
3.2 Rule of law support and legal set-up.....	9
3.2.1 South Sudan	9
3.2.2 Afghanistan.....	9
4.COUNTRY SPECIFIC FINDINGS	11
4.1 The impact of insecurity on primary justice.....	11
4.1.1 South Sudan	11
4.1.2 Afghanistan.....	11
4.2 Counties and districts studied	12
4.2.1 Afghanistan: Istalif and Behsud districts.....	12
4.2.2 South Sudan: Western Equatoria State	12
4.3 Case study analysis	13
4.3.1 Institutional legitimacy, knowledge, capacity and presence	13
4.3.2 Hybrid legal systems	14
4.3.3 Normative realities.....	15
4.3.4 Women’s access to justice	16
4.3.5 Importance of land	17
4.3.6 Power and influence	18
5.POLICY AND PROGRAMMING RECOMMENDATIONS.....	20
5.1 Strengthen the justice chain	20
5.2 Support hybrid and transitory justice models, involving civil society.....	21
5.3 Address impunity and power imbalance.....	21
5.4 Assure law enforcement	22
5.5 Raise community awareness.....	22
5.6 Strengthen women’s participation.....	23
5.7 Raise institutional gender awareness and facilitate legal reform	23
ENDNOTES	24

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FOREWORD

Wherever you live, seeking justice when harm is done and your rights are violated can be difficult and burdensome. But what about the justice concerns of people living in fragile contexts of prolonged conflict and insecurity? How do they seek solutions of their disputes? What works and what does not, if your land is taken from you, if you need to leave your fields, cattle and other belongings behind just to save your life? What if you're being harassed, assaulted or raped, within or outside of your marriage? And what if the authority that should protect you becomes the threat? For decades Cordaid has been dealing with these issues and trying to find answers to these questions. We have been working with communities in the fields of primary justice, rights awareness, the functioning of justice providers – both formal and informal – and dispute solutions, especially in Afghanistan and what is now South Sudan.

I am proud and thankful to share the outcome of an applied socio-legal research project of the Van Vollenhoven Institute (VVI), Cordaid and our local partners, giving more contextualized knowledge of primary justice in both these countries and more coherence to the practical insights and experience we have gained throughout the years. This strategy report, written by Cordaid, is based on two country research reports and a synergy report produced by VVI.

Why South Sudan and Afghanistan? Like I said, we have a long rule of law and justice track record in both countries, giving us the entries and networks needed for applied research. But there's more. Both countries have a long history of conflict and conflict induced migration and both are involved in the cumbersome process of nation building and restoring the rule of law – Afghanistan somewhat longer than South Sudan. And lastly, experience taught us that in peoples' everyday lives, they often deal with the same kind of disputes. We focused on two categories: land and property disputes and disputes in which women's rights and integrity are at stake.

Some of the research findings will surprise you. Did you know that 80 to 95% of all the analyzed disputes were handled by non-state actors? It shows the huge importance of these so-called 'informal' or 'customary' justice structures, and the importance of linking state to non-state justice structures. Non-state courts settle a lot of disputes, but often fail to provide justice when it comes to unequal power relations between parties. And it is precisely unequal power relations and social norms that often prevent women from getting justice. And when verdicts are in their favor, enforcement is often problematic, especially when state actors are involved as perpetrators. In the case of Afghanistan this urgently calls for new legislation that criminalizes acts of violence within a marriage and child marriage, for more women in the police forces and more female judges. And for the protection of these judges. In South Sudan, legislation that protects women is scattered over many different laws, which hampers the course of justice for women. One coherent family law and the establishment of family courts, dealing with matters like child custody, inheritance and domestic violence, will be a step forward for many. Access to justice for women seems slightly better in South Sudan, due to the fact that more entries in the justice chain are staffed by women.

Last but definitely not least, our research findings show that, as local micro-level disputes can quickly escalate into macro-level violence, effectively solving disputes at a local level – whether it concerns land, marriage, dowry or sexual abuse – can help to prevent national conflicts to emerge or escalate.

This research project unlocks a wealth of information on local and primary justice chains in some of the most fragile settings. We hope it will prove both insightful and useful for both policy and decision makers and civil society in the countries concerned, as well as for international donors, policy makers and other professionals who are involved in justice, rule of law and security programs.

Hetty Burgman - Director Security & Justice

1. BACKGROUND

This strategy paper presents policy and programming recommendations for practitioners and policy makers following an applied socio-legal research trajectory, carried out among communities and institutions in two districts in Afghanistan and several counties in South Sudan. The research explored people's concerns and conceptions, responses and remedies, as well as potential synergies between the strategies of state and non-state actors, regarding the access to primary justice in insecure contexts.¹

The research project was implemented between 2014 and 2016 through an academic-practitioner (NGO) research collaboration, that is, the Van Vollenhoven Institute (VVI) of Leiden University and Cordaid. VVI has extensive academic research experience on formal and informal legal systems. Cordaid is one of the largest development organizations in the Netherlands, supporting in particular partners working on community-based security and justice in fragile and conflict-affected states. Both organizations have an extensive network of international as well as local partners and researchers in the countries studied. The research project was part of the applied research program 'Embedding Justice in Power and Politics' funded by the Netherlands Organization for Scientific Research (NWO) and supported by the 'Knowledge Platform Security & Rule of Law' of the Dutch Ministry of Foreign Affairs.

By combining academic experience and context-specific knowledge and networks, this project aspired to co-create practicable methodologies and knowledge products that can directly feed into development efforts aimed at facilitating the emergence, building and strengthening of accessible justice at district/county level, in which complementary statutory and customary justice mechanisms have a place.²

Central to the research was the concept of **primary justice**, which entails all forms of justice that people refer to as a first resort. This includes state and non-state actors, formal and informal authorities. Through case studies we looked at people's everyday concerns and conceptions of justice, and the responses and remedies that are provided through various mechanisms. The research also identified which responses work best given the different realities on the ground (what we call 'elements that work').

The following research questions guided the research:

- To which extent, how, and with which degree of success do men and especially women in selected areas in Afghanistan and South Sudan, who face serious justice concerns, notably property dispossession and other property disputes, engage with the available state and non-state mechanisms and practices to achieve justice and peace?
- To which extent do the available justice providers deliver adequate responses and remedies?
- How can successes and failures in the provision of justice through state and non-state mechanisms be explained, in particular with reference to:
 - institutional and legal aspects of justice mechanisms and their interrelations;
 - interaction and communication between justice seekers and providers;
 - the context of severe insecurity and power imbalances.
- Which norms, mechanisms and practices along the available spectrum of justice providers proved to be the main 'elements that work'? How can justice interventions effectively build on those elements, and strengthen the linkages and complementarity between them, shaping coalitions for primary justice, for women in particular, and ultimately adequate primary justice systems at the district/county level?

The research was conducted in two districts³ in Afghanistan, that is, Behsud in Nangarhar province and Istalif in Kabul province. These two districts differ as per socio-political profiles, local power arrangements, dominant ethnic and religious affiliations, recent migration movements and reconstruction and

development efforts. The local research partner was 'The Liaison Office' (TLO), an Afghan NGO with significant research expertise on peacebuilding, justice and livelihoods.

In South Sudan, research efforts were concentrated in Western Equatoria (WES). Although most attention was paid to Yambio county, visits were also made to six other counties (Nzara, Tombura, Ezo, Ibba, Maridi and Mundri-West) in order to assess the representativeness of the research findings. The main local research partner involved in South Sudan was the Justice and Peace Commission (JPC) of the Catholic Diocese of Tombura-Yambio. JPC brought in extensive knowledge on conflict issues in WES and managed to facilitate dialogue between local government representatives, communities and justice providers.

The research locations were selected because in these particular Afghan districts and South Sudanese counties the research could build upon prior engagement of Cordaid and its local partners, and their respective networks, with issues of justice concerning land and women's rights. In Afghanistan, for example, TLO performed a preliminary assessment of the security and justice situation in the chosen districts. In South Sudan, JPC already worked in the field of land rights. The districts and counties were also selected because they had a more favorable security situation at the time of the start of the research, compared to other regions.

2. RESEARCH AND METHODOLOGY

The research was designed to result in an evidence-base of examples and analyses of 'law in practice', as well as to formulate recommendations for policy and programming. The main priority for the data gathering was to capture the concerns and conceptions of justice seekers as well as customary and statutory justice providers, and their respective interactions and responses offered. During the inception phase, a series of kick-off workshops, meetings and preliminary interviews were held in South Sudan and Afghanistan, to further refine the research framework and later identify case studies.

In both countries, fieldwork was conducted by a mixed team of international and (primarily) local researchers and took place during the first half of 2015. Extensive data collection through hundreds of interviews and direct observation (especially attending the proceedings of dozens of customary and statutory court sessions) fed into the formulation of sixteen concrete cases, eight in Afghanistan and eight in South Sudan. In part based on customary and statutory court hearings of concrete disputes, the cases focused on specific aspects of land rights and women's rights. These included controversies over proof of ownership, the role of women in localized dispute mechanisms, and (non-)state mechanisms that have emerged to respond to certain legal gaps.

Towards the end of 2015 and during the first half of 2016, focus group discussions were held in South Sudan and Afghanistan with representatives from government, CSOs, NGOs, INGOs, religious institutions and community members to disseminate, discuss and validate research findings and output⁴ and share knowledge. These focus group discussions were also very useful to gain additional insights and seek 'elements that work' to address the primary justice needs of local communities, which can be integrated in and strengthened through development policies and programs of international and local stakeholders.⁵

3. RULE OF LAW PERSPECTIVES AND LEGAL FRAMEWORKS

3.1 The rule of law concept in fragile states

International development discourse considers the rule of law to be fundamental in advancing development and democracy.⁶ The rule of law-democracy nexus is two-faced. A narrow institutional approach to the rule of law as an instrument of governance associates the concept with the capacity of democratic state institutions and processes to bolster rights, equality and accountability through formulation and application of procedures. This capacity is by definition limited by the constitutional boundaries of the power of state institutions and statutory law. In countries such as Afghanistan and South Sudan, the capacity of the state to promote the rule of law is also determined by a context of fragility and conflict, which affects notions of democracy and the functioning of government and non-government institutions.

Our research best aligns with a broad interpretation of the rule of law that includes attention for (in)formal societal relationships, highlighting the diversity in roles and responsibilities of communities and actors at different levels in (re)defining and applying norms and procedures, as well as in protecting people's rights and advancing inclusiveness. This notion of the rule of law incorporates elements such as a strong constitution, an effective electoral system, an independent judiciary, but also a commitment to gender equality, attention for minorities and vulnerable people, and the need for a strong civil society. This interpretation frames the rule of law within broader discussions on human development and human security. It involves the notion that social change, dispute resolution, and the promotion of human rights are best guaranteed if interrelated statutory and (informal) customary justice systems are accessible to citizens at the lowest levels of society.

The Sustainable Development Goals (SDGs) aim, amongst others, to promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels. Strengthening the rule of law, ensuring access to primary justice and promoting human rights are key to this process. Rule of law development, which among other things helps address legacies of human rights violations, is important for achieving stability, reconciliation and peace in fragile states that are emerging from conflict. It involves the refinement and consolidation of an international framework of norms and standards, and, if required for specific contexts, the establishment of international and hybrid courts and tribunals and non-judiciary mechanisms. Rule of law development also consists of assisting countries at national level in drafting the constitution and national legal frameworks, building and capacitating physical legal infrastructure, capacitating justice providers, supporting security sector reform, identifying transitional justice mechanisms, and assisting civil society in, amongst others, awareness raising, monitoring of human rights violations, the provision of legal assistance and lobby efforts to hold justice mechanisms accountable.

This research found that in order to best address the challenges inherent to fragile contexts, justice programs should be designed, organized and delivered in ways that fit with the often highly hybrid socio-legal, political and governance structures present. It is equally important to be sensitive to the conflict history and the socio-cultural and religious context, and to pay due attention to prevailing norms, justice perceptions, experiences, concerns and interests of those who are vulnerable to abuse and discrimination. Importantly, any effective program of rule of law development must take into account the fundamental security problems people face and the key security actors involved, both state and non-state. Close cooperation is needed between all those involved in the justice chain, including security actors. The above factors require a broad, harmonized and long-term commitment of all stakeholders involved.

3.2 Rule of law support and legal set-up

3.2.1 South Sudan

The huge tasks associated with building the structures and institutions of a newly independent nation after decades of war are laid down in the South Sudan Development Plan (SSDP, 2011-2016). In this plan, conflict prevention and security reform are considered priority areas. Ensuring access to justice is a precondition to achieve this: “Improving access to justice and ensuring a well-functioning criminal justice system are intrinsically linked to peace-building and providing alternative options to redress disputes without recourse to conflict.” Institutional governance strengthening is also listed among the priorities, whereby the Government commits to “ensuring an independent and effective legislature which is able to hold the Executive to account, and an independent judiciary to uphold the rule of law and protect the rights of citizens”. The government of South Sudan is engaged in law development, conducting capacity assessments in all ten states to identify the needs of justice actors, and to set up formal training institutions on law studies as well as a customary law center.

In collaboration with the government of South Sudan, the UNDP, supported by the European Commission, the UK Department for International Development (DFID), USAID, Denmark, the Netherlands and Sweden, has taken the lead in supporting Rule of Law development in South Sudan. The focus has been on access to justice, customary law, human rights, institutional development of the judiciary, legal education, legal awareness, police reform and prison development. The International Development Law Organization (IDLO) has supported constitutional review, helped align the curricula of academic law courses with the new legislative framework, and builds capacities of legal staff⁷. A significant number of other UN agencies, INGOs, and civil society organizations also work on related subjects. The UN peace mission to South Sudan (UNMISS) has also been assigned rule of law work under its Justice Advisory Section. This includes support to develop regulatory frameworks, increase coordination between legal institutions and also those providing support, increase the number and capacities of judges, prosecutors and lawyers, and end arbitrary and/or prolonged detention.

Since the Comprehensive Peace Agreement (CPA) ended the war with Sudan in 2005 and South Sudan's independence in 2011, the country developed comprehensive legislation, embedded in the South Sudanese Transitional Constitution. The constitution reserves particular rights for women, including the right to inherit land and women's representation in government and the judiciary. The Constitution also foresees a greater role for traditional authorities and customary law. South Sudan's legal system combines statutory and customary legal systems. Despite the comprehensive set of statutory laws, the use of these laws is limited due to poor dissemination and weak experience in implementing them. Statutory courts (Judiciary Act of 2008) are foreseen on national level (Supreme Court), regional level (Appeal Courts), state level (High Courts), and county level (first class courts). Second and third class courts on respectively county and *payam*⁸ level are only mandated to address minor offenses. Customary courts are officially recognized by the Local Government Act (2009), but cannot hear criminal cases. They are organized at three levels: C courts on county level led by a paramount chief, B courts on regional level (*payam*) led by a head chief, and A courts on *boma* level led by an executive chief. Due to their official status - certain chief-judges also receive a state salary - the customary courts are hybrid structures. At the chief's discretion, they have jurisdiction based on the customs, traditions, norms and ethics of the respective communities, but at the same time draw on some statutory provisions. It is estimated that up to 90% of disputes in South Sudan are handled by customary courts. The most important reason is their easy accessibility compared to statutory courts.

3.2.2 Afghanistan

Over the past 14 years, after the fall of the Taliban regime, both Afghan authorities and foreign donors have considered the rebuilding and reform of the justice sector in Afghanistan a priority. Following the 2012 Tokyo Conference, under the Self-Reliance through Mutual Accountability Framework (SMAF), agreements were made between the Afghan government and the international community on priority areas for support. One of the six priority areas is Anti-corruption, Governance, Rule of Law, and Human Rights - in particular those of women. The SMAF is the reform agenda for the 2015-2024 Transformation Decade, reflecting continued long-term commitment to state building in Afghanistan. Since 2006, Italy has had the lead on the

donor-side in supporting the juridical reform process, with important support from the USA, Germany, United Kingdom and several UN programs (UNOCD, UNDP, UNAMA). Against a huge cost of over \$1 billion spent by the US alone, efforts like the facilitation of a constitution-making process and legal reform, the physical reconstruction and equipment of justice institutions, and the training and professional capacity development of justice personnel (including the police) have been supported.

At civil society level, work that has been supported is linked to transitional justice and documentation, dispute resolution and informal justice, land conflict resolution, women's access to justice, Islamic law, constitutional interpretation and legal awareness/education. Although the efforts have resulted in tangible achievements, effective coordination between donors and the Judicial Reform Commission is oftentimes lacking.

Challenges continue to be immense as Afghanistan's justice system still lacks sufficient human and infrastructural capacities, especially in rural areas, and hardly operates as a system. Also progress on the integration of women into the justice apparatus is lagging behind. Although the number of female judges increased from 41 in 2007 to 180 in 2013, they still only make up 10% of the judiciary. Effective functioning is however mostly affected by endemic corruption and by the fact that, following the post-Taliban political order that promoted anti-Taliban warlordism, a situation has been created in which regional power-holders, whether they hold official positions or not, effectively exercise political and judicial authority, often aided by their control over militia forces. To a certain extent legal frameworks grant equal rights to women and men, for instance women are entitled to claim their part of the inheritance under the national inheritance law based on Sharia. On the other hand, certain laws can be discriminatory towards women or fail to protect them. The penal code for instance has no provisions on underage marriage and domestic violence, and conflates rape and consensual adultery. In 2009, former President Karzai signed the Elimination of Violence Against Women bill (EVAW), which at the time was hailed as the greatest achievement in the domain of women's rights. However, the law has still not been ratified because it encounters fierce opposition from conservative members of parliament who claim it goes against Sharia laws.

In Afghanistan, customary law, Islamic law and statutory law exist side by side. Afghanistan's legal system consists of the Supreme Court, Courts of Appeal and Primary Courts, which are approached for both criminal and civil matters. Further, *hoquq* offices are installed by the Ministry of Justice at district level and are the access point for civil cases, responsible for referral of the cases to the courts. There are other government institutions involved in dispute management such as the Ministry of Women's Affairs (MOWA), Afghanistan Independent Human Rights Commission (AIHRC) and the Afghanistan Land Authority.

Non-state justice institutions mostly deal with disputes in the realm of family and community relationships, including rape. Non-state administration of justice varies locally. Local councils called *jirgas* and *shuras* have been formalized to varying degrees, from ad-hoc meetings for a particular case (in Pashtu called *jirga*) to standing offices with opening hours (often referred to as *shura*), from government registered to non-registered councils. Their members vary from the traditionally legitimate authorities such as elders, *ulema* (Islamic scholars), *maliks* (category of elders) to specific groups (people with a particular profession, women) and local power-holders (often civil-war commanders). Both the statutory and non-state systems draw (in part) on Islamic legal doctrine.

In practice, it is often difficult to draw a clear line between state and non-state justice mechanisms in Afghanistan. Until recently, rule of law efforts supported by international donors only focused on statutory justice. Supporting a hybrid model was strongly opposed out of concern that granting official support to customary justice might undermine efforts aimed at promoting human rights. However, in late 2015, the Afghan government drafted a law that provides the legal framework for the linkages between statutory and customary justice for civil matters.

4. COUNTRY SPECIFIC FINDINGS

4.1 The impact of insecurity on primary justice

4.1.1 South Sudan

Following decades of devastating war with Sudan, the Comprehensive Peace Agreement (2005) and the Referendum of Independence followed by the official declaration of independence (July 2011), created new perspectives on peace and development for South Sudan. However, significant tensions remain between Sudan and South Sudan, especially in the oil rich and disputed region of Abyei. These tensions may act as a catalyst for renewed large-scale armed conflict. Furthermore, in December 2013, only two years after independence, violent ethnic conflict broke out again within South Sudan. The fighting between the SPLA, largely composed of Dinka loyal to President Salva Kiir, a break-away faction and militia of Nuer origin that supports former vice-president Riek Machar, and local militia called 'arrow boys', led to widespread ethnic killing and the displacement of around 2 million people. After peace was signed between the two main warring factions in Addis Ababa in August 2015, fighting again broke out in June 2016. Currently fighting on the ground continues, and the crimes committed against the population by state and non-state armed groups, including mass scale sexual violence against women, is spreading. The recurring rounds of violence have further weakened statutory and customary state structures. The situation in South Sudan shows that micro-level conflicts can quickly escalate into macro-level violence, whereby retaliation is privileged over dispute resolution and justice. Many other local disputes in South Sudan carry a similar risk of spiraling out of control. Recurrent rounds of violence have also led to continuous waves of displaced people, refugees and returnees, often fostering new tensions and conflicts. The conflicts have cut off trade routes, made farmland inaccessible and increased prices of basic commodities such as water. Added to this the severe drought currently affecting large parts of Africa, explains why the South Sudanese are once again facing extreme poverty and hunger.

4.1.2 Afghanistan

After 14 years of national and international efforts to rebuild Afghanistan and work towards lasting peace, the country remains deeply divided and insecure. The population of Afghanistan represents a multi-ethnic melting pot with a strong multi-cultural Afghan identity. However, at the expense of this multi-cultural identity both at the national and at local level identities are often manipulated by powerful warlords. Several regions remain Taliban strongholds, and country-wide insurgents carry out regular attacks on both state and civil targets. Human Rights Watch reports that the Taliban in Kunduz use *madrasas* (Islamic schools) to provide military training to children. In early 2016, heavy fighting broke out between the Taliban and the Afghan army in Helmand province. In Nangarhar province, militia affiliated with the Islamic State pose a security threat. The impact of insecurity on access to justice is significant, as both justice seekers and justice providers often cannot access courts (in places where these exist) out of fear of being attacked. Furthermore, warlords continue to strengthen their control over justice in their zones of influence, obstructing people to seek justice beyond their own community. Progress on reconciliation efforts remains limited. The Quadrilateral Coordination Group (involving Afghan, Chinese, Pakistani and US officials) attempted to relaunch discussions this year, but the Taliban refused to attend. Provincial and district council elections are scheduled to take place in late 2016, but some national unity government members argue that elections should not take place before thorough electoral reform measures have been implemented. Previous decades of war and increasing post war insecurity have led to frequent waves of displacement; in 2016, the numbers of internally displaced people (IDPs) have gone up significantly. This has led to a weakened social tissue, a break up of institutions and new conflicts arising due to multiple and conflicting claims on land and property.

4.2 Counties and districts studied

4.2.1 Afghanistan: Istalif and Behsud districts

Located 50 km north of Kabul at a mountain range, Istalif district has traditionally been a geographical stronghold for the Kabul area. The majority ethnic group in Istalif are Tajiks (90% of the population), who are comparatively well educated. Since the fall of the Taliban in 2001, overall security in the district has been relatively good, with little insurgent activity and no known drug trafficking. The major security threat, according to residents, is the occasional night robbery. Women also pointed at the practices of gambling and drug consumption.

Behsud district is located in the north of Nangarhar province in eastern Afghanistan and inhabited by half a million people of heterogeneous origin (60% Arabs with 9 sub-tribes, 30% Pashtun and a minority of Kuchi nomads). Due to insecurity and a lack of agricultural land in neighboring districts, as well as the proximity of economic opportunities in the city of Jalalabad, the district has experienced an influx of migrants. The main security threats are widespread murder, theft, kidnapping and drugs trafficking. The security situation is deteriorating; insurgent attacks and suicide bombings are on the rise.

Both Istalif and Behsud district are under government control, but power also rests with village council members, such as *maliks* and *ulema*. Their power depends on their relations with influential individuals, especially commanders of former civil war factions such as Jamiat-e Islami and Hizb-e Islami Gulbuddin.⁹ Most disputes arise over interrelated claims regarding inheritance, water rights and land. Land ownership carries a strong significance for people's identity and is a source of influence. Land disputes are caused by the absence of documentation and, in particular for Behsud, the sharp rise in the price of land. This is partly explained by increased demand due to population growth, but most importantly caused by 'land grabbing' by power-holders or those who have their backing. To a lesser extent, allegations of promiscuity also cause disputes within and between families. Women face dramatically higher barriers to accessing security and justice institutions than men. Women in Istalif enjoy greater freedom of movement, and hence slightly better access to legal institutions. While it is generally thought that women in regions further away from Kabul have less freedom it often depends on other factors such as rural-urban and cultural factors and the security situation¹⁰.

Land disputes account for over 80%¹¹ of the cases brought before statutory courts. The population generally perceives these courts as slow, inefficient and plagued by corruption. Hence, in line with the general trend of dispute resolution processes in Afghanistan, most disputes in Istalif and Behsud are addressed by informal justice forums, such as *jirgas* and *shuras*, or individual figures of authority and power. It is estimated that, similar to other districts, informal justice forums are involved in 95% of dispute resolution cases in Istalif and Behsud.

4.2.2 South Sudan: Western Equatoria State

Western Equatoria State (WES), with Yambio as fast-growing capital, is one of the largest states in South Sudan. It borders the Democratic Republic Congo as well as the Central African Republic. The counties included in this study are mainly Yambio, Tombura and Ezo. The population of WES consists of a wide variety of ethnic groups. The two most prominent ones are the Azande and Dinka. The Azande, who are primarily agriculturalists, are the largest population group in WES; the Dinka, who include both sedentary and migratory cattle keepers, are among the most powerful people at the national level. Since 2005, the population of WES has been growing substantially as a result of the return of South Sudanese who had been displaced during the years of war with Sudan. The recent internal violence in South Sudan, which started in late 2013, also brought IDPs from other parts of the country to WES, as it is the only state that for a long time remained relatively peaceful and stable. Political and spiritual leaders in WES have vigorously tried to maintain this stability, but eventually also got drawn into the recent rounds of conflicts.

The influx of cattle migrants, former refugees and IDPs has increased the pressure on the available land, rendering access to land more problematic and causing disputes that may easily escalate into inter-communal violence. Because WES is home to some of the most fertile lands in South Sudan, land grabbing by influential actors, also those from outside of WES, is common. Clear legal frameworks for ownership,

acquisition and management of land are lacking. In addition, although the right to own and inherit land for both men and women is enshrined in the Transitional Constitution of South Sudan, day to day practices and social norms regarding inheritance render women's position with regard to access to land particularly vulnerable. Moreover, the state-led process of demarcation targeting individual plots as well as the borders between *payams* (sub-county level) within or even beyond the state is unclear and contested. In Ezo county a complicated border dispute is ongoing between different *payams*, while in Tambura county land conflicts are particularly frequent at the border with the Central African Republic. Furthermore, the customs, traditions and livelihoods of the IDPs differ greatly from those of the host communities, which complicates dispute resolution between the two groups. Both traditional authorities and statutory justice institutions usually lack the capacities to effectively solve land disputes.

4.3 Case study analysis

The sixteen case studies conducted in the selected districts/counties in South Sudan and Afghanistan provide an interesting range of examples of practices that show the justice concerns people have in the context of insecurity and conflict as well as the challenges they encounter in seeking redress for these concerns. There are significant differences between the socio-cultural and political contexts of both countries. The research findings presented thematically below, nevertheless, bear relevance to both.¹²

4.3.1 Institutional legitimacy, knowledge, capacity and presence

Following a peace agreement or political transition, the population of a country often has high hopes for a quick return to stability, law and order. In many cases, however, recurring violence interrupts the reconstruction process. Consequently, people quickly lose trust that the 'new' government will manage to live up to their expectations. The weak legitimacy of state institutions in many post-conflict countries, like in South Sudan and Afghanistan, is caused by a murky institutional set-up and a history riddled by corruption, weak government capacities, lack of accountability, and impunity. Participants of focus groups held in Afghanistan clearly argue that security is the main pillar of governance. When security is absent, this immediately affects people's trust in the authorities. They will turn to other individuals, groups or institutions that better represent their interests. This may include non-state mechanisms for justice, such as a powerful commander who is able to guarantee security in the community. The justice received, however, is not necessarily in line with the constitution, religious or customary laws.

In both South Sudan and Afghanistan significant steps have been taken to build consistent legislation. However, laws are sometimes incomplete and need further provisions to better protect the vulnerable. In both countries, therefore, legal reform remains a priority. This should go hand-in-hand with legal awareness/education, as the vast majority of Afghan and South Sudanese people still have little knowledge about the available statutory procedures of dispute resolution.

In Afghanistan, legal reform in the area of women's rights is especially urgent. While the Afghan constitution provides for equal rights for men and women, additional provisions are needed to protect women and children in the family sphere, against for example underage marriage and domestic violence. In South Sudan too, family and domestic matters, including domestic violence, are a key issue and the subject of most of the cases brought to court by women. At the same, time provisions to address these issues are scattered over various laws and difficult to apply.

In South Sudan, there is a (capacity) gap in the justice chain of referrals. Especially on county level, support for institution building has so far been very limited and statutory justice mechanisms at this level are therefore often completely absent. In Afghanistan, significant infrastructural and capacity building support has focused on the statutory justice framework, be it mostly in urban areas. Yet, widespread insecurity stops people from actually accessing the available legal services. It similarly stops justice providers from travelling to and providing legal services in rural institutions. In both countries, access to justice is further complicated by lengthy procedures, high costs and a general disrespect of basic legal principles. For example, there are many cases where the accused spend years in pre-trial detention, which is a violation of people's basic right to a fair process.

One of the South Sudan cases showed that the use of mobile courts can offer remedies in situations where geographical gaps in access to legal services exist. However, this appears to be merely an intermediary solution, given the fact that mobile courts highly depend on the personal commitment of individual judges. This commitment clearly differs between persons, some of whom at times stretch their mandates and budgets or invest their own money as structural (state) budgets for mobile justice are absent.

The mobile court of judge Kaya

In March 2015, judge Kaya of South Sudan travelled to Tambura county to visit 16 accused who were in prison without trial and to deal with their cases. The challenges he encountered were plenty. First, the disputes had happened long ago and many witnesses and complainants had since left the area. Second, long pre-trial detention had affected the health of the accused, which negatively affected proceedings; one woman was so sick and confused she was unable to walk or speak. Furthermore, the documentation in most case files was well below legal standards, which meant that Judge Kaya had to redo some of the pre-jurisdictional work. Judge Kaya is determined to continue his efforts of offering justice in communities where statutory structures are absent. The success of his mobile court will largely depend on his own financial investment – as a structural budget is absent – and his relationships with customary chiefs. His good rapport with them is largely thanks to the time Kaya took to discuss in detail the pending cases with the Paramount Chief.

4.3.2 Hybrid legal systems

In both countries, statutory justice co-exists with a diverse set of customary legal practices, which are usually preferred by people involved in a dispute; especially when it concerns family matters. An important reason is their easier access, but many people also believe that the customary courts are more in line with their own norms and values. Statutory court procedures are considered less reconciliatory in nature than customary procedures. Furthermore, as the majority of disputes at community level concern land – which is of crucial economic value to claimants – most people prefer the quicker and cheaper customary road to justice in relation to such claims. However, customary justice systems should certainly not be over-romanticized, as customary mechanisms may have difficulties dealing with disputes between unequal parties. Also their procedures and rulings on accounts may be discriminatory and unjust, especially towards women.

While in Afghanistan, both customary and statutory laws in principle refer to Islamic law, in practice they differ in many regards. In South Sudan, there is duality and overlap between customary and statutory laws, while the limits in the mandate of either system are not always respected; especially with regard to criminal cases, which are legally the unique domain of statutory law. In many situations, moreover, customary practices in South Sudan deviate from the written regulations, partly because certain institutions foreseen by law are absent, or because institutions that have no formal role informally contribute significantly to dispute resolution.

The case studies from both Afghanistan and South Sudan furthermore point to a situation where the customary-statutory framework is not only hybrid, but also transitory in nature. What stands out is that there is a tendency to formalize informal customary justice, as well as to institutionalize intermediary structures, such as the *hoquq* in Afghanistan. In South Sudan, the official legal set-up as said includes formal roles for customary court chiefs at community (*payam*) level. Also, a newly created structure dealing with land demarcation and land disputes in South Sudan, the County Land Authority (CLA), formally includes both state and customary actors. The CLA establishes who has the right to ownership claims on land on the basis of customary histories of evidence. In part because of this valorization of customary knowledge, the CLA quickly gained legitimacy at the local level.

These examples of local structures show that there is potential for innovative ideas to be welcomed by the people if they manage to adapt laws and institutions to the given (cultural) context.

In Afghanistan, we looked at the example of the creation of intermediary structures by local strongmen (or warlords), such as a *shura* in Istalif that was set up by a leading warlord. Although at first instance such an

effort may address pressing concerns people have, thus filling in a gap in access to justice, it cannot be considered a model for non-state legal administration. Even though such intermediary structures draw mostly on customary principles, they address their own power concerns more than factual justice, thus granting the strongmen growing power and unilateral rule. In many situations their rule extends to strongly influencing statutory legal authorities. Focus group participants in Afghanistan indicated that a state of insecurity favors such developments, as it allows strongmen to create alliances with armed groups and in turn intimidate statutory justice actors. There are also positive examples of how non-state mechanisms can serve as an evidence-system to bridge customary and statutory justice. For instance, the paperwork of land transactions kept by Afghan real estate agencies is meant to forestall land disputes. Documentation of customary agreements and witness testimonies can also provide useful evidence at statutory level. The creation of women's *shuras* can also be seen as a positive example of hybrid justice (see below).

Finally, in both countries we found examples of cases which were referred back to the customary structures by the statutory system. This happened especially with disputes that, according to the prevailing normative framework, belong to the domain of (intimate) family relations. The resolution to the dispute gains legitimacy and enforceability when the mutual support between statutory and customary bodies is evident, as in Afghanistan in case of matters on which there is little normative disagreement. This does however depend on the complexity of the case, whether the dispute opposes (ethnic) minorities whose justice claims might not necessarily be recognized by the general status quo.¹³ In South Sudan counter referral is oftentimes unsatisfactory because customary structures are marginally equipped to settle the affairs.

The commander's *shura*

One of the influential former civil war commanders (Taliban period 1996-2001) of Istalif district founded a *shura* to fill the power vacuum created by the weak governmental control in the area that followed the fall of the Taliban. Among others, the *shura* takes up juridical and executive functions and deals with the rise in land ownership disputes in the area. The commander himself is directly involved in dispute resolution, but also draws on local leaders and, when required, invites state actors to take part. It herewith differs from the traditional *jirga*, the composition of which is decided by the parties in dispute. This *shura* does not distinguish between civil and criminal matters. Its dependence on the participation of warlords makes it neither impartial nor locally controlled. This is reflected in the opinion of residents, who state that "the main aim of this *shura* is to allow these former jihadi commanders to keep control of the district and to retain their influence over the population".

4.3.3 Normative realities

In both Afghanistan and South Sudan, the existing complex set of socio-cultural norms and values that define public order strongly underlie the way in which people interact with either statutory or customary justice. These norm sets have traditionally formed the basis for especially customary legal practices and local dispute resolution, but are also in part adopted by or adapted in statutory regulations. In both countries, however, conflict and displacement have contributed to a disruption and contestation of local norms, which makes it difficult for people to know which norms apply in which situations. Also, in both countries social norms and rules tend to be stronger than the formal legal rules. This at times undermines the rights granted in the countries' legal frameworks, especially where it concerns women's equal rights to men. In this context, it depends on the personal background and character of judges whether they decide to emphasize the social norms or legal rules.

In South Sudan, social norms are highly plural and vary per region or tribe. They are also subject to change and contestation over time, reinforced especially by conflict-induced migration, displacement and urbanization. Beliefs attached to occult practices, such as witchcraft, also define social norms. The presence of witchcraft, strongly rooted in South Sudanese society, poses challenges when dealing with such 'crimes' at the intersection of customary and statutory justice. This has led to 'adapted' practices, an example of which is that Church representatives are called upon to swear on charms to disarm spells, oftentimes against payment. This example shows, apart from a monetization of witchcraft, how institutions can find a middle ground between or incorporate sets of norms and practices that originally belong to a different domain. This includes institutions - in this case the Church - that are not formally part of (non-)state justice

mechanisms, but which are important in society from a norms and values perspective, and sometimes play important informal mediation roles.

In Afghanistan, as in South Sudan, customary norms show local variations and have been affected by waves of migration and displacement, adding to the complexity of applying justice. In addition, it is difficult for people to claim rights that may go against the normative framework, even though they are embedded in the state law and classical Islamic jurisprudence. Especially with family-related disputes, it is socially considered shameful to take a conflict 'outside'. In this strongly patriarchal society, the male head of the household is responsible for the family's safety, well-being and good name. Men who appear unable to safeguard family harmony, risk losing face and authority. As a consequence, women who face abuse within the intimate sphere of the family are rarely able to bring the matter to justice, neither to a customary nor statutory court.

4.3.4 Women's access to justice

In both countries, state-based frameworks of justice are adequate to a certain extent in providing women's rights, however, as mentioned in the previous paragraph, social norms tend to prevent women from finding justice. In Afghanistan, even though women's access to justice is provided by both statutory and Islamic law, strong male dominance over the family largely inhibits women to claim their rights. They are threatened to be publicly shamed and/or socially and economically excluded if they do so. This concerns for example inheritance claims over land, but also cases of domestic violence or marital rape, which by Afghan law is not considered a criminal act. As state legal institutions mostly employ male judges, whose value systems are rooted in the same social order, there is a tendency to prefer cases that serve male interests (e.g., upholding the good family name), and these are usually not the ones involving women plaintiffs. The research strongly indicates that male judges act first as men, and only in second instance as justice providers. It also shows their tendency to refer cases involving women back to customary systems arguing these concern family matters. The strong influence of normative values over formal legislation in Afghanistan thus undermines women's options to redress. This underlines once more the urgency of legal reform, in particular in Afghanistan, to ensure that statutory provisions regarding the rights of women prevail over customary norms and practices. At the same time, measures need to be taken to close the gaps or discrepancies between law and practice, including the gap between a court ruling and its enforcement.

In South Sudan, women's heritage rights were traditionally obstructed by patrilocal marriage customs, but the Transitional Constitution (2011) and the Land Act (2009) granted women the same rights as men. This improvement is reflected in the notable increase in women judges – also in customary structures – and the fact that, in our sample from WES, currently between 30-44% of all legal cases are opened by women. Nevertheless, women face a number of challenges in getting justice. When women go to take a dispute to court, in most cases this relates to domestic and family issues, including divorce and domestic violence. Legal provisions related to family matters are however scattered over numerous laws, making it difficult for both customary and statutory courts to apply the provisions and to provide protection for women. Even if a just verdict through the courts is received, this may not be enforced. In Afghanistan, the participation of women may not be as significant as in South Sudan, but nevertheless a growing number of women speaks up for their concerns. The example of Istalif shows that women's *shuras* exist and appear effective under certain circumstances. These include the self-confidence and experience of the *shura* members, good relationships with district authorities, and supportive family members (father, husband, brothers). In addition to being engaged in the resolution of family disputes, the women's *shuras* may play an important role in awareness raising among women about their rights, encouraging and supporting them to seek justice. But for the women's *shuras* to increase their role beyond family mediation, empowerment is needed. Also, as their sustainability is influenced by their capacity to raise the necessary means, *shuras* that manage to generate an income tend to be more successful and also better accepted by the wider community; when a woman brings money home she is usually less restricted in her public participation.

Socio-political barriers to women's access to justice in Behsud

A popular Pashtun proverb says 'women are made for home or grave'. This illustrates the shame that is

connected with the disclosure of family matters to outsiders, as well as the restrictions imposed on women who cannot leave the house without being accompanied by a male family member. A woman who decides to take a family dispute to a statutory institution violates the cultural norms. Her act is moreover seen as weakening the power and autonomy of community structures. In the rare instance that a dispute involving women does reach the state institutions, this is usually because community means have been exhausted. Yet, the statutory judges, who draw on the same normative framework, often refer such cases back to the community. They do not want to get their fingers burned on sensitive matters, and therefore downplay criminal cases to civil cases. But even if a case is dealt with by a statutory court, the lack of means of enforcement for issues that belong to the intimate/family domain will still prevent women from finding justice. What is more, the mere decision to take a case to court means risking losing the socio-economic security offered by male family members. One of the interviewees reflected: "I would have preferred to inherit the land without having an argument with my nephew. Now I am not happy about our relationship. He excluded me from his life and treats me as an enemy, not an aunt. Also the rest of my family and the people from the village are blaming me for what I have done since they consider it shameful. In their eyes I am not a good woman."

4.3.5 Importance of land

Our research distinguished three types of disputes over land. There are general disputes between citizens that are more or less at equal footing in terms of power, land disputes that involve parties not at equal footing and land disputes between citizens and state actors. Women face particular challenges. The existing patriarchal tradition in both South Sudan and Afghanistan dictates that a woman, once married, belongs to the family of her husband. For this reason, women are rarely entitled to inherit land. Despite some improvements noted, challenges surrounding land rights are vast and moreover affect not only women. The cases studied showed that displacement caused by conflict, and in South Sudan also due to the migration of cattle nomads, causes increased competing claims over land. In the latter case, conflicting interpretations of the right to land depend on different historic narratives and are closely linked to contestations over (ethnic) identity, autonomy, fairness and justice, as well as decentralization and federalization.

Displacement and migration have, especially in urban centers, caused sharp rises in the price of land in receiving communities both in South Sudan and Afghanistan. These high prices combined with the fact that the majority of people do not have official documentation to prove their land titles, makes land a constant breeding ground for conflict. People may not own official documentation because they were granted oral customary rights, or because documentation was lost in the war, or forged. This makes it very difficult to prove the validity of one's land claim. From a statutory perspective, merely oral proof is not likely to qualify according to the law. From a customary perspective, the long-term war and large-scale displacement have broken the body of social knowledge and the reliability of testimonies about the exact conditions under which rights were granted. The war and conflict have also discredited the trustworthiness of certain social actors. Meanwhile, persisting impunity favors land grabbing by the rich and powerful, which results in multiplied disputes at the community level.

In both countries, the most vulnerable people are the worst victims of this situation. Authorities are starting to respond to this and recognize the need to regulate and redefine notions of public, private and community land. In South Sudan, a (re)demarcation process is underway with donor support, whereby the person holding the biggest piece of land on a plot where multiple claimants are found is granted the land title. The demarcation process strongly builds on customary witnesses as reliable sources of proof, holding historical information about who owns and inherited land in the community history. In Afghanistan too this mechanism is used. However, conflict-induced displacement has often broken the chain of community evidence. Moreover, given that corruption and power-influence are also rooted in community governance structures, the demarcation process enjoys little support at the community level and risks to generate more confusion and conflict, especially in situations where the most powerful person is granted the title without owning the biggest share of land, as our case studies showed.

Land disputes and ethnicity in Maridi

In recent years, Maridi county in South Sudan has seen a number of violent incidents over land, often pitting Dinka cattle keepers and Azande agriculturalists against each other. The seasonal migration of cattle keepers is a historical feature of the region, however, due to the persistent insecurity in surrounding states, cattle migration to Maridi has fast increased and hence also the pressure on available land. The Dinka and Azande have different interpretations of their access rights to land. The Dinka argue their right is based on the role they played in the 1990s, when they liberated the region from the Sudanese army. They feel unjustly excluded by the Azande who “told us that those plots are for [their] children and not for Dinkas”. The Azande on the other hand claim that they are the autochthone inhabitants of the region, accusing the Dinka of “threatening security here in Maridi”. This case shows that disputes about land are not just legal battles but also reflect contestations over identity and belonging. Such disputes need due attention because relatively small-scale disputes carry the risk of easily escalating into widespread violent conflict.

4.3.6 Power and influence

A final issue revealed by the case studies from both Afghanistan and South Sudan is the overriding influence of power relations on the provision of justice. Power differences and imbalance between parties, based on gender and on social, economic and political status, frequently influence the outcome of dispute resolution processes. If a more powerful party is involved, people may refrain from seeking justice altogether, or if they do decide to claim their rights, they will meet unfair competition. Our cases also point at examples where influential individuals manage to forge positive change, such as Judge Kaya or the women’s *shura* in Istalif led by a locally influential woman called Hassina. The Afghanistan focus groups moreover showed that persons with a wide network of connections more easily become influential in state and non-state justice. The other side of the coin, however, is that locally influential persons often become spoilers of justice. In addition to disputes between citizens, cases between citizens and state parties have their own challenges. Our research reveals the justice sector is best equipped to deal with cases that do not involve state or armed actors. Mechanisms addressing violence and power abuse by state and security actors are lacking or inadequate.

In Afghanistan, the post-war reconstruction process strongly depends on local power holders and former civil war commanders and warlords – either putting them back in power or creating the conditions under which they regain and strengthen their position. Taking advantage of the persisting and increasing insecurity and the lack of law enforcement by statutory actors, such warlords engage in land grabbing and influence decision-making of both customary and statutory courts. They do so either through corruption or by setting up intermediary justice structures based on customary *shuras*, as mentioned earlier. In South Sudan, the cases show that the transitional character of justice mechanisms causes a loss of power of customary chiefs as people seek justice through transitory structures where these are available, as the case on the CLA showed. However, influential politicians especially have a degree of control over these structures and when the motives of political influence or land-grabbing are at stake, they easily manipulate and destabilize ethnic communities.

In both countries, hybrid and transitory justice structures heavily rely on direct ties with politicians and use corruption to demotivate the dispute’s weaker party or plaintiff. Especially in Afghanistan, this leads to a situation in which statutory systems easily endorse solutions forged by intermediary structures controlled by strongmen. Hence, less powerful parties such as women, children, the poor or minorities are vastly inhibited in their access to justice. This in turn undermines the trust of local communities in the opportunity to address their disputes with local actors in a fair manner. Focus groups in Afghanistan show that corruption and power relations negatively influence law enforcement and make for unfair trials; even when plaintiffs are confident the law is on their side, court rulings often have the opposite outcome.

The consequence of such partisanship is that the legitimacy of both customary and statutory justice mechanisms is severely affected, as the independent and impartial authority of the judiciary to provide checks and balances over power holders is undermined. Also law enforcement authorities charged with surveillance and investigation into such practices, such as the police, are heavily involved. Trust in justice is

further complicated by the challenges faced with enforcement of rulings, as the implementation of and compliance with both customary and statutory judgments also suffers from power influence.

Land disputes in times of corruption and partisanship

During the Taliban regime, Kabir sold part of his land to Gul Mir, who made a down payment and promised to settle the outstanding amount later. After the war, both men had died. Gul Mir's son denied that he owed money to Kabir's family and moreover claimed that his father had purchased all of Kabir's land. The case came before a *jirga*, which ruled that two *jerib* of land, approximately 4,000 square meters, had to be given back to Kabir. In the meantime, Gul Mir received support from the district police chief who had started constructing a flat on the land that was to be returned to Kabir's family. Kabir's son got a loan in order to bribe the judge and then filed a court case against the police commander. However, he neither managed to get back his land nor to end the unlawful interference by the police officer.

5. POLICY AND PROGRAMMING RECOMMENDATIONS

In order to address the justice concerns people have and the challenges they encounter in seeking justice in the context of insecurity and conflict in Afghanistan and South Sudan, this chapter presents seven policy and programming recommendations for practitioners and policy makers. Reference is made to 'elements that work', as identified by the study and in particular the case studies. Most recommendations apply to both contexts, and some may also be applicable to rule of law programming in other fragile and post-conflict countries. Where relevant, recommendations that address specific issues pertaining to the South Sudanese or Afghan context have also been included.

As a general notion, the implementation of rule of law policy and programming, including access to primary justice, should be fully integrated into wider development assistance and security frameworks at national, regional and international levels. There should always be maximum attention to the harmonization and coordination of the activities of international donors and security actors. While legal institution building is the primary focus, programming should also support hybrid primary justice frameworks and be attentive to the strengthening of citizen empowerment. A clear understanding of (local) power dynamics and structures is indispensable for effective policy programming. Given that personal connections and individual commitment of state and non-state justice actors are important factors for success, thorough assessment and involvement of local justice structures is crucial when initiating solutions. Further research on primary justice and hybrid legal orders, especially addressing local views and feedback, will be very useful.

5.1 Strengthen the justice chain

In light of the fragmentation of justice chains in fragile contexts that hampers citizens' access to justice, and the challenges with independent and neutral functioning of the justice chain caused by political ties, relationships, ethnic bias and wealth, the following should be prioritized:

- Support to increase the physical availability of courts, especially in rural areas, and to ensure sufficient numbers of well-trained judges, prosecutors, lawyers and other legal personnel, also at the level of district/county statutory institutions. In South Sudan, focus should be on strengthening statutory presence and functioning at county level.
- At the end of the primary justice chain, support should involve - as much as possible practice-based - capacity building on legislation and procedures to ensure and improve the quality of processes and case outcomes. This entails technical (in addition to normative) assistance from higher to lower level courts and judges, and statutory to customary, non-state courts.
- Invest in individuals and strengthen the capacity of individual justice providers who work for change and can make a difference, in addition to building and strengthening complete systems of justice.
- Support to both statutory, customary and hybrid legal structures to facilitate and ensure that clear regulations for smooth referral are put in place, as well as a clear demarcation of roles, responsibilities and delimitations of the different justice levels.
- Define creative ways to provide community awareness raising about their rights, notions of fair trial, and state and non-state legal services available to them, including their differences, interdependence and limitations. Methods should in particular cater for an uneducated and largely illiterate audience and could involve public media.
- In areas where no statutory justice mechanism is present, the relevance, advantages and limitations of mobile courts as an effective intermediary solution can be tested, whilst transitioning to more sustainable legal presence in areas in need. Support to mobile courts should however always take place within legal frameworks, with respect for judicial independence.
- Invest in the institutionalization/strengthening of higher law education in order to build a professional and competent body of legal practitioners, including support to (refinement of) curricula. In addition to

technical knowledge, this also needs to include structural issues like fighting corruption, links between formal and informal justice systems, and cooperation between different departments/agencies involved in providing justice (such as police, human rights and women's commissions).

- Support the definition and adoption of strict recruitment procedures for legal staff at all levels, based on competence and diversity. This is necessary to guarantee independence and neutrality and to avoid as much as possible the influence of political ties and relationships, ethnic bias and wealth over jurisdiction.

5.2 Support hybrid and transitory justice models, involving civil society

The co-existence of customary and statutory justice systems can at times be challenging, but also presents opportunities. To harness the opportunities, support should be directed at:

- Developing and consolidating the presence and functioning of intermediary, transitory justice models that can offer a specific response to certain types of disputes and involve constructive collaboration between customary leaders and statutory authorities. Especially initiatives that have the potential to quickly gain legitimacy and local support should be encouraged (for example, the CLA in South Sudan). In South Sudan, a hybrid model already exists; in Afghanistan efforts to develop such a model should be continued.
- Testing the use of various customary-based methods for providing evidence of property and land ownership in the case of absence of documentation (due to war and/or migration), as part of a formalization process of land. Afghanistan could draw lessons from the CLA experience in South Sudan.
- Installing a mechanism whereby final decisions of customary courts - usually settlement letters, complete with testimonies of witnesses - can be verified and registered by the state court to increase streamlining and validity of decisions.
- Strengthening the role that civil society organizations and other non-state sanctioned authorities play in conflict resolution and reconciliation (e.g., churches in South Sudan, women's *shuras*, civil and *ulema* councils in Afghanistan), to widen the neutral space for public and multi-stakeholder dialogue around justice and to avoid that minor disputes are taken to court. Be attentive to the legal boundaries of these actors as well as their transitory role, redressing potential negative influences of overstepping.
- Identifying progressive, respected chiefs, tribal elders and local government members as mediators of tensions especially in situations where local dispute risks escalation into wider (national) violence, such as in South Sudan. Identification of such individuals should also be promoted within state and non-state justice mechanisms.

5.3 Address impunity and power imbalance

The power imbalances in fragile states emerging from conflict tend to have a negative impact on access to justice for weaker parties as well as to encourage impunity. To counter this, programs should explore the possibilities of:

- Addressing impunity by means of legal assistance programs for the benefit of weaker parties, involving competent lawyers and judges, paying attention to case balance. Also explore options for basic legal assistance that can be provided in the realm of customary justice, such as through paralegals. Financial support for court costs and transportation are also important.
- Initiating efforts geared towards curbing the seemingly growing power of warlords and politicians over justice in the hybrid, transitory contexts of fragile states, for example through informal civil watchdog structures that can monitor and raise civil awareness about cases of power abuse.
- Creating measures that can offer security to statutory judges in order to protect them from manipulation by powerful individuals. This requires cooperation with security providers such as the police and in some cases the military.
- Establishing an independent institution charged with addressing misconduct (e.g., overstepping the boundary between executive and legislative powers) by police, military, politicians, legal personnel and persons with financial influence through legal and professional sanction measures. Good performance should be encouraged, for example through salary incentives.

5.4 Assure law enforcement

Impunity remains in part endemic due to weak (pre) procedural capacities of actors along the chain of justice, and because security actors are among the main spoilers of justice. Even when state-based dispute resolution comes to a conclusion, enforcement of the decision or judgment is often weak. As this crumbles the trust of citizens in state actors, support should be aimed at:

- Strengthening the pre-judicial capacities of for example the police (to avoid delay due to lack of crucial evidence), strengthening procedural coordination and follow-through of cases and setting clear procedures for referral between (pre) jurisdictional state and non-state institutions.
- Increasing oversight of institutional dispute resolution proceedings, through establishment of independent oversight institutions. This could be based on the model used in Afghanistan where lawyers and former judges provide supervisory functions during court proceedings and assist the justice sector to strengthen law enforcement. It could also take the form of an 'accountability bureau' with the authority to investigate possible flaws in judgments.
- Strengthening the enforcement of settlements/verdicts, among other things by increasing the customary receptiveness of statutory rulings, given that power and perceptions at local level often present an obstacle for the enforcement of court decisions. This can be supported by installing a clear system of checks and balances providing for upward (hierarchy) and downward (population) accountability of verdicts.
- Paying attention to the timely execution of judgments and restorative justice, especially addressing the fulfillment of compensation claims or other measures for redress, for example through setting up a government fund for redress for crimes committed by state functionaries (including security services) or a more general basket-fund for vulnerable victims.
- Exploring the possibility of performance based financing for rule of law support provided to both customary and statutory justice institutions, with a focus on the quality of process and proceedings, rather than the legal outcome, as performance indicator.
- Developing a comprehensive national security policy that includes policies and programs for justice and rule of law to avoid that security policies and justice policies operate as completely separate systems. This comprehensive policy should include law enforcement (needing capacity building of police and oversight) as well as improved security for justice personnel and witnesses during and after a court case.
- Supporting the training of police and security personnel regarding their civil responsibilities in law enforcement – in Afghanistan, introduce good experiences from the national level to the local level – and supporting the creation of an institution or mechanism that addresses criminal offenses committed by security personnel.
- Continuing support for demobilization and disarmament programs to address persistent insecurity that affects access to justice.

5.5 Raise community awareness

Communities especially in remote areas are often vulnerable to (ethnic) manipulation by warlords and politicians. Raising awareness of their rights to justice and building their capacities on legal procedures is of utmost importance. Efforts should be directed at:

- Providing legal awareness to communities, including training on statutory and customary procedures, concepts and provisions.
- Engaging communities in dialogue and reflection on how their socio-cultural normative order relates to and interacts with statutory provisions.
- Involving youth in such dialogues around justice as they are often easily manipulated to participate in violent conflict (e.g., recent conflict in South Sudan) and to prevent mob-justice.
- In areas where family and community traditions consider seeking justice outside the family shameful, raising community support for victims who seek legal redress and creating awareness on the role of state and non-state justice providers.

5.6 Strengthen women's participation

To address the inequalities in terms of access to justice between men and women in many fragile states, women's participation can be enhanced by:

- Creating, strengthening and supporting local structures that permit the involvement of women in dispute resolution, such as the women's *shuras* and local women groups in Afghanistan that address injustice and build the capacity of women in terms of legal awareness, self-confidence and leadership. Civil society structures in particular can provide such lobby and support, whilst also being attentive to strengthening women's literacy.
- Creating a safe space for women to bring their claims to the state court system, for example through a women's department or special legal advisors for women. Media coverage can also provide public encouragement for women to step forward.
- Supporting income generating activities that allow women's groups involved in dispute resolution to be financially independent and to gain respect at local and family level.
- Working with men, families and communities and mobilizing community leaders who are favorable to women's participation to gain support for women's claims and women accessing both state and non-state justice institutions.

5.7 Raise institutional gender awareness and facilitate legal reform

In countries emerging from conflict, legal reform must be supported to replace existing legislation that is incomplete or serves to sustain rather than resolve conflict among communities and ethnicities. Special attention to women's rights is particularly urgent.

- Review laws that are discriminatory or conflicting with regard to the rights of women, as well as legislation that aims to strengthen linkages between non-state and state-laws, such as the reconciliation law in Afghanistan. This could start with reflective efforts that confront customs with statutory law.
- In particular support advocacy campaigns that lobby for the adoption of legislation that promotes the rights of women and enhances their access to justice. In Afghanistan, this includes ratification of the Elimination of Violence Against Women bill (EVAW); in South Sudan the development of a coherent family law and establishment of family courts, and the ratification of the Maputo Protocol on the Rights of Women in Africa.
- Increase the number and/or raise quota of female personnel in justice institutions, and provide training and support networks to female justice personnel, especially in rural areas and at district/county level.
- Create women's desks at statutory justice institutions in order to improve women's access to justice and improve cooperation between these institutions and national departments dealing with gender and women's affairs (Ministry of Women Affairs in Afghanistan and Ministry of Gender, Child and Social Welfare in South Sudan).
- Train justice personnel and security personnel on gender awareness, including the differences that women and men experience in accessing justice.

ENDNOTES

- ¹ A more elaborate synergy report that presents findings is also available: Exploring Primary Justice in Insecure Contexts: South Sudan and Afghanistan, by Carolien Jacobs and Jan Michiel Otto. Leiden: Van Vollenhoven Institute.
- ² The research team interprets primary justice as justice mechanisms present and available to citizens as a first resort, regardless of whether they are provided by state or non-state institutions.
- ³ More background about the research locations is provided in chapter 2 and 3 of the synergy report of this research project.
- ⁴ This strategy document on policy and programming recommendations is based on the different outputs produced during the research process, such as all the case study reports, literature studies, and country working papers. For these documents a wide body of (academic) literature was analyzed and referenced. In this particular document these references are not repeated for the sake of brevity.
- ⁵ Due to deteriorating security conditions that restricted travel of the research team, one of the meetings was held in Uganda instead.
- ⁶ The UN defines Rule of Law as “a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards.” <https://www.un.org/ruleoflaw/what-is-the-rule-of-law/>
- ⁷ www.idlo.int
- ⁸ A *payam* is the second-lowest administrative division, below counties, in South Sudan. *Payams* are required to have a minimum population of 25,000. They are further subdivided into a variable number of *bomas*.
- ⁹ See for example the case study reports ‘commanders managing disputes’ and ‘uncontrolled abuse of power’.
- ¹⁰ APPRO, AWN, Cordaid (2013 – 2015), Afghanistan: Monitoring Women's Security in Transition, Baseline Report and Report cycle 2, 3, 4 and 5.
- ¹¹ Coburn, N. (2011) The politics of dispute resolution and continued instability in Afghanistan, US Institute of Peace.
- ¹² Wherever this section states ‘Afghanistan’ and ‘South Sudan’, this should be understood as referring to the districts/counties studied. Observations are hence not necessarily applicable to the wider country context.
- ¹³ Coburn, N (2011)

ABOUT CORDAID

Cordaid is based in the Netherlands and has country offices in 11 countries. It has been fighting poverty and exclusion in the world's most fragile societies and conflict-stricken areas for over a century. It delivers innovative solutions to complex problems by emphasizing sustainability and performance in projects that improve security and justice, health, education and economic opportunity. Cordaid is deeply rooted in Dutch society with more than 300,000 private donors. Cordaid is a founding member of Caritas Internationalis and CIDSE.

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