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Too poor for rights?
Access to justice for poor women in Bangladesh:
A case study

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1. Introduction

One of the unique claims of the human rights framework, and in particular international human rights law, is its insistence that: “All human rights are universal, indivisible and interdependent and interrelated (UN doc. A/CONF.157/23, 1993)” - applicable to all, without discrimination based on race, colour, sex, language, religion, social origin etc.

Despite widespread international acceptance of human rights norms, as signified by the large number of states that have ratified the main international human rights instruments - including the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights - their application remain elusive for many, and in particular for those living in poverty.¹ Indeed, as stated by the previous High Commissioner for Human Rights, Mary Robinson, poverty is itself “a denial of a whole range of rights pertaining to the human being, based on each individual’s dignity and worth” (UN Doc. E/CN.4/2000/SR.41, 2000:1).

Crucially, from a human rights perspective, poverty is not only associated with denial of rights – but also the denial of the right to rights, as promoted and protected through an effective legal system. Legal systems around the world discriminate against people who cannot afford legal representation, are illiterate and lack the power to influence legislative processes (Anderson 2003a: 16-22).

Strategies for improving poor people’s access to justice attempt to decrease the gap between the concept of universal human rights, and poor people’s enjoyment of these rights through experience (Odinkalu, 2003:1-2). Typically, these strategies are aimed at making the legal system more responsive to poor people’s needs by addressing hurdles that hinder their access to court. This is a complex task and requires significant political commitment to be effective (Faundez 2001). In recognition of this, increasing attention is also given to the non-formal justice system, including the extent to which traditional mechanisms for dispute resolution can play a role in promoting greater respect for human rights.

This paper will focus on the experience of a select group of rural poor in Bangladesh, who, with the assistance of Nagorik Uddyog (a human rights NGO), have sought justice in the non-formal justice system.

Access to justice requires more than being able to present a grievance in front of a court, or as in this case, before a mediation panel. Crucially, provided your claim is recognised as legitimate, access includes an effective remedy whereby your right is translated into reality (Anderson 2003b: 2). Having no formal enforcement mechanism, this paper will explore the effectiveness of non-formal dispute resolution in realising

¹ An estimated 2.7 billion people were living on less than \$2 a day in 2000 - more than half of the population in the developing world (World Bank 2004).

rights for the aggrieved, with particular reference to a study of 113 cases submitted for mediation to Nagorik Uddyog (NU) in 2002.

Outline of the presentation

This paper is organised as follows: Following a brief methodology, Chapter 3 will provide a definition of access to justice, and establish a theoretical as well as contextual platform for analysing the research findings. Chapter 4 introduces Nagorik Uddyog and its access to justice programme. It also provides a brief presentation of the *shalish*, which is a traditional model for dispute resolution in Bangladesh. Chapter 5 presents the research findings, and gives an overview of what kind of disputes that are brought to NU, including how these are resolved and implemented. This is further explored in Chapter 6, which analyses the research findings with specific reference to the question of enforcement, followed by a conclusion of the overall findings and the extent to which NU's intervention contributes to the realisation of rights for poor women in particular.

2. Methodology

The research was conducted in three stages. In the first stage, relevant secondary literature on access to justice, including case studies from Bangladesh and other developing countries, were reviewed. While not seeking to pre-empt the findings from the actual fieldwork, this facilitated a line of questioning that would complement existing information and thereby allow for a more in-depth analysis of the issues to be explored.

The second stage of the research focused exclusively on the activities of NU.²

NU operates in four Upazilas (situated in four different Districts), targeting their intervention at the Union level (the 2nd lowest tier of local government, and the only tier where there is an elected body).³ Due to time constraints I decided to focus on one Upazila only, and selected Kalihati, which is where field activities were first initiated. Table 2.1 gives an overview of the number of applications filed in Kalihati since the inception of the programme in December 2000.

Table 2.1: Number of applications received in Kalihati

Year	# of applications
2000	6
2001	71
2002	113
2003	146

² I would like to express my gratitude to Nagorik Uddyog for their willingness to share information and assistance in organising interviews with their clients.

³ Bangladesh has a four tier local government structure. There are 64 Districts; 489 Upazilas; 4,460 Unions and approximately 83,000 Villages.

An average NU case is settled in 1-3 months. As my objective was to explore the strength of the mediated settlements, in terms of the actual enforcement, I decided to focus on applications made in 2002. This meant that the mediation process in all the surveyed cases had been completed. Allowing for a lapse of time also gave me an opportunity to assess the durability of the agreements reached in the NU shalish, which is particularly significant given the high proportion of cases that relate to domestic violence.

Using the summary records kept in NU's main office in Dhaka, and with assistance of a translator, a written summary of all applications filed in 2002 was prepared prior to the field visit (113 cases in total).⁴

The intention with the field trip was threefold:

- ✓ To review a representative number of complete case records, including the reported follow-up in the first three months after the mediation
- ✓ To get additional information on the enforcement of NU shalish decisions in specific cases, through interviews with applicants and others
- ✓ To discuss the question of enforcement and implementation with project staff and other relevant local actors

Complete records of 40 cases were reviewed (35% of all cases filed in 2002), of which 11 were further explored through interviews. Due to severe flooding and a shortage of field staff, interviewees were selected on the basis of accessibility and the availability of a Community Organiser who could provide directions. Visits were not, however, pre-announced, and decisions about which clients to visit were taken on a day-to-day basis. In addition to interviewing people that had been involved in specific cases, I also took the opportunity to sample views and opinions, on NU's programme in particular and informal/traditional versus formal/legal justice in general, from people who gathered around on our entry to people's homestead. This included people who had been involved with the traditional shalish (both as arbitrators and complainants/accused), as well as people with experience from seeking justice in the courts. These discussions involved both women and men.

One in-depth discussion was held with project staff, as well as sporadic discussion as we travelled between villages. I also had the opportunity to observe one NU-shalish, followed by a detailed review of this particular case with the Community Organiser and the applicant respectively.

In the third stage of my research, I interviewed academics and practitioners working in the area of human rights (including women's rights specifically)/access to justice.

⁴ Many thanks to Ms. Srabon Mannan, a newly graduated BA Computer Science, who assisted me with translations.

3. Access to justice for the poor– a platform for analysis

Definitions of access to justice

Before looking specifically at the research findings, a brief introduction to the study of access to justice is in order.

As stated in the introduction, access to justice is closely associated with the ability to bring a grievance before court, including the right to a fair hearing and an effective remedy. The right to access courts, while not specifically mentioned in international human rights law, has become increasingly explicit over time, through case-based standard setting (McBride 1998). The issue of access has also been taken up in domestic jurisdictions, with specific focus on promoting fundamental rights of the poor. In this regard, much attention has been given to South Africa, which has ensured the justiciability of economic and social rights in its constitution, and India, which has become famous for judicial activism and the broad interpretation of the right to life, as protected in Article 21 of the Indian constitution (Sunstein 2001; Cranston 1997; Hodson 2003: 166-173).

UNDP has defined access to justice as the “ability of people from disadvantaged groups to prevent and overcome human poverty by seeking and obtaining a remedy, through the justice system, for grievance in accordance with human rights principles and standards” (Sudarshan 2003: 1). While this definition gives little recognition to the role of informal or traditional justice, it is worth noting that it employs an expanded ‘material’, rather than formal understanding of justice, characterised as “related to a model of construction of a legal system in which such ideas/values as human and economic rights, recognised at an international law level, are to be implemented by the law, regardless of whether they are formally recognised by the national legal system of the country being assisted” (Zamboni 2001: 4).

Addressing the broader agenda of promoting access to human rights, International Council on Human Rights Policy (ICHRP) has provided a definition that *inter alia* includes the ability to report domestic violence to the police with the expectation that action will be taken; protection from corruption, crime and violence; as well as access to basic services like education, health, water and sanitation. They also recognise that “both state and non-state mechanisms can and should be used to improve access to rights”, and that “informal mechanisms and remedies favoured by the excluded deserve closer examination by human rights practitioners, since, despite their deficiencies, they offer cheap, accessible and legitimate services to the communities that use them” (ICHRP 2004: 7, 77).

Interestingly, both these definitions give importance to the quality of justice – indicating that there are minimum standards to be met not only in the process of accessing justice, but also with regard to the content of justice. While the focus of this paper is on the enforcement of rights, through effective implementation of informal justice, the question

of what exactly is being implemented, and the nature of the justice provided, will also inevitably have to be addressed.

Barriers to justice for the poor

To understand why informal mechanisms are seen to be popular among the poor, including in Bangladesh, it is worth summarising some of the main barriers that poor people face when trying to access the formal justice system. These can be divided into two broad categories: Barriers that are external to the individual, relating to “those authorities, institutions and entities that (can) guarantee enjoyment of the right or protect against interference with its enjoyment” (Odinkalu 2003: 3); and barriers that relate to the characteristics and circumstances of the individual (Golub 2003a).

Considering the judicial system in particular, some of the common barriers that have been identified are (Anderson 2003a; World Bank 2000: 99-115):⁵

- The existence of anti-poor laws, including laws that discriminate against people on the basis of income or wealth
- Negative attitudes to the poor among people working with law enforcement (including lawyers, judges and police)
- Excessive bureaucracy and inefficiency in the judicial system, contributing to non-transparency and delay in the legal process
- Corruption among law enforcing personnel, contributing to increasing transaction costs and greater uncertainty about the outcome
- Lack of judicial independence and abuse of political authority vis-à-vis law enforcing agencies, undermining the surety of a fair hearing

A well functioning legal system is not enough however, as individual constraints may still prevent poor people from being able to use ‘the legal levers’. Bringing a case to court typically represent significant opportunity costs - associated with loss of income, as well as various transaction costs for payment of transport, food etc - which poor people can ill afford. The predominant factor determining whether people are able to use the available legal remedies has therefore been identified as access to financial resources. Poor people are also constrained by lack of ‘institutional skills’, defined as the “ability to understand and use the system”, which among other things will be affected by their level of literacy and ability to access information (Anderson 2003a: 16).

Access to justice in Bangladesh

All of the factors mentioned above would seem to be relevant in the context of Bangladesh, and have implications for NU’s intervention that will be discussed in greater detail later. To set the stage, however, and by way of explaining why the informal, rather than formal justice system arguably represent the mainstream form of

⁵ This is not an exhaustive list.

dispute resolution in Bangladesh (Siddiqi 2004a: 7), a short summary of the current situation is offered.

First of all, it is worth pointing out that Bangladesh, despite having moved into the middle-income bracket in UNDP's Human Development Index, remains poor, with 82% of a population of more than 130 million living below the (upper) poverty line (UNDP, 2004). Its poor governance situation is recognised to be a strong impediment to ongoing poverty reduction efforts, and is subject to intense political and public debate.⁶

The lack of faith in the formal justice system in Bangladesh is colossal. As an illustration, a survey conducted by Transparency International – Bangladesh found that 96% of the households interviewed agreed with the assertion that it was almost impossible to get help from the police without money or influence. 89% of the households expressed a similar disillusionment with respect to the judiciary (with the notable exception of the Supreme Court), and 63% of the households involved in court cases reported that they had to bribe court officials (Transparency International – Bangladesh 1997: 1). Similarly, and reflecting this, a survey conducted by the World Bank found that “the breakdown of law enforcement – especially corruption in the police and long delays in the courts -- is the top concern of both rank-and-file citizens and entrepreneurs... And even though access to such social services as health care and education is often inequitable, *that pattern of discrimination against the poorest is even more perceptible when the most vulnerable Bangladeshis seek the help of the police or the protection of courts* [my italics]” (World Bank 2002: ii).

Another factor, which has received particular attention from human rights groups - including Amnesty International - is the issue of impunity (Amnesty International 2003). Reports of torture and police brutality are rarely investigated by the government, and contribute to an overall impression that law enforcement agencies have a *carte blanche* as far as use of violence is concerned, which also extends to non-state actors associated with members of the political establishment. It has been suggested that impunity deters ordinary people – as well as people involved in high profile cases - from seeking formal justice out of fear of reprisal (Hossain 2004).⁷

Governance failures, as described above, are aggravated by anti-poor laws and administrative practices, such as:⁸

- Laws that give police wide discretionary powers to arrest and detain people without a warrant⁹
- A system of monetary bail that discriminate against poor people

⁶ See e.g. Bangladesh Interim Poverty Reduction Strategy, accessed 23.08.04 at http://poverty.worldbank.org/files/14223_Bangladesh_IPRSP.pdf

⁷ Possible high-profile examples include the detention of Reuter's stringer Enamul Huq Chowdhury and senior opposition politician Saber Hossain Chowdhury respectively, both of whom were reported to have been tortured by police. In neither case has there been an effective investigation into the allegations, and neither of the two has taken steps to press charges against the government.

⁸ Information is taken from UNDP 2002 ch.1.

⁹ Including Special Powers Act (1974) and Section 54 of the Code of Criminal Procedure Code.

- Laws and judicial procedures (including rules of evidence) that are prejudicial towards women victims of violence, including rape
- Laws relating to the dispossession of immovable property, public nuisance, and vagrants that are not implemented in-line with their original intent, and that are used to discriminate against and harm the poor

Improving justice in Bangladesh

There is international pressure on the Bangladesh government to improve its justice system, as well as the overall governance situation in the country. International funding is given to more than 180 interventions under the broad heading of governance, including a 60 million dollar project for building judicial and legal capacity (LCG Bangladesh 2004).

Not waiting for these to take effect however, Bangladesh also boasts a rich variety of NGO interventions aimed at promoting human rights, including poor people's access to justice specifically. The areas of intervention can be divided into three broad categories:

- Public Interest Litigation – using courts to establish fundamental rights that are relevant for selected groups or the population as a whole
- Legal services, including legal education and legal aid so as to facilitate better access and more effective use of the court system
- Alternative Dispute Resolution (ADR), including mediation

Within the area of ADR, there is considerable difference in how organisations work, and in particular the extent to which they interact and co-operate with traditional mechanisms for settling disputes.

Implementation of informal justice: The point of departure

Common for most ADR interventions, and the point of departure for analysing the findings presented above, is that they are extra-legal, and do not command any formal support from law enforcing agencies for their implementation. As such, and considering the stages of accessing justice (Box 3.1), while recognising that informal, local interventions would seem well placed to overcome physical, social and financial barriers to access, in as far as initiating the process of (informal) justice is concerned, their ability to safeguard the outcome of this process, i.e. the implementation of justice, is less clear.

Box 3.1: Stages of accessing justice¹⁰

Naming	Identifying a grievance as a legal problem
Blaming	Identifying a culprit
Claiming	Staking a formal legal claim
Winning	Getting rights and legitimate interests recognised
Enforcing	Translating rights into reality

¹⁰ Table is copied from Anderson 2003b pg.2

From the perspective of human rights, however, effective implementation is crucial, as pointed out by Donnelly:

“We must distinguish between *possession* of a right, the *respect* it receives and the ease of frequency of *enforcement*.... It is the ability to claim the right if necessary – the special force this gives to the demand and the special social practices it brings into play – that make having rights so valuable and that distinguishes having a rights [sic] from simply enjoying the benefit of being the (right-less) beneficiary of someone else’s obligation” (Donnelly in Odinkalu 2003: 3).

Despite numerous studies and evaluations of NGO interventions working with the informal justice system in Bangladesh, the question of enforcement is rarely given much attention beyond cursory evidence based on client satisfaction; and the need for more information on the impact of these interventions has been recognised (ADB 2001; Golub 2003b: 20-28; Hossain 2002: 4-5).

This paper aims to shed more light on the extent to which informal justice interventions - drawing on the experience of one NGO in particular - provide effective implementation of justice. Furthermore, and critical in terms of the overall objective of realising *rights*, the *quality* of the justice offered will also be considered, and whether the nature of the satisfaction contributes to enforceability.

4. Improving informal justice – Introduction to Nagorik Uddyog

Nagorik Uddyog (“*The Citizens Initiative*”) was set up in 1995. One of NU’s key objectives is to enhance women’s access to justice, as a part of a larger goal to establish social and gender justice in Bangladesh. Within this, emphasis is given to promote the rule of law, as well as greater respect for human rights. Starting with voter education, their programme has gradually expanded to include various forms of legal and human rights training, women leadership development, and training on how to promote the rule of law and human rights through mediation. It also offers legal aid in cases where mediation fails. It operates in 24 Unions; spread over four Upazilas in four different Districts. From the inception of its mediation programme in 2000 and up to June 2003, NU had received a total of 2,194 applications for mediation, out of which 1,747 disputes were settled and 104 cases were pending (Nagorik Uddyog 2003: 6).

In its mediation programme, NU has adopted a strategy whereby it seeks to work through a traditional mechanism for dispute resolution known as the *shalish* (see Box 4.1). Specifically, NU seeks out members of the traditional shalish that are open to a more democratic and just form of dispute resolution – as identified through participatory local level workshops – and invites them to become members of a local NU shalish committee, along with other individuals representing a cross-section of the community. One third of the members are women, and a particular effort is made to include women Union Council members.¹¹

¹¹ Three of the twelve seats on the Union Council are reserved for women.

As a matter of strategy, NU seek to *transform* rather than *replace* the existing power structure through a method of cooptation, and in particular by bringing together ‘influential’ and ordinary (‘non-influential’) members of the community in training and mediation, thereby fostering new allegiances (Siddiqi 2003:16).

Box 4.1 – The *shalish*

The shalish is an informal, community-based process that has been in place through centuries. The term shalish can refer to the process of bringing together aggrieved parties in front of a panel of influential local figures (known as shalishdars), or to the panel itself. It is typically a public event, and has no set format. In adjudicating a particular case, the shalishdars might play the role as mediators, arbitrators or judges. According to a survey by UNDP, 60-70% of local disputes are resolved by the shalish (UNDP 2002: 92).

The shalish is an all-male affair reflecting the strong patriarchy that dominates Bangladeshi society. Furthermore, in its old form the shalishdars would typically be closely connected with the local (landed) elite. The traditional shalish is not known for its commitment to social justice or the rule of law. On the contrary, the shalish has been actively used as a means of social control, including upholding gender and social hierarchies. Following the independence of Bangladesh in 1971, traditional (old) power structures were disrupted and new actors have emerged. Elected (male) members of local government have come to play a key role in the shalish process, along with wealthy and politically well-connected members of the community. Despite having no legal authority, the shalish is considered to play “an extremely important role in ensuring acquiescence to prevailing moral codes of conduct on which rural society is based”, and serves to uphold and consolidate the prevailing structure of power. As such, while the actors have changed, the shalish remains undemocratic and has little knowledge or interest in promoting the rule of law. It has also retained a conservative and discriminatory approach to women. According to recent studies, money and muscle are key assets that influence the outcomes of present day shalish rulings, undermining its integrity and respect among common people.

Despite its weaknesses – and particularly due to lack of viable alternatives - shalish remains the preferred mode of conflict resolution in rural Bangladesh, and it is “an enduring and fundamental feature of rural society, one that has neither been displaced nor endangered by the introduction of a formal justice system” (Siddiqi 2003: 10).

Golub, 2003b; Hashemi and Hayat 1998; Nagorik Uddyog 2000; Siddiqi 2004 and 2003; UNDP 2002

Once established, NU aims to provide the committee members with necessary tools for promoting greater justice in the shalish process. Emphasis is given to education and training, combining human rights education with information about the law, including

civil and criminal laws, as well as religious and customary laws. Committee members are also introduced to local lawyers who stand ready to assist them on a case-by-case basis. Role-plays and other forms of participatory exercises are used to enhance the members' sensitivity to prevailing attitudes and norms that discriminate against women, and develop legal and moral arguments for how these can be counteracted through the shalish. Members of the shalish committee are not, however, on NU's payroll, and are free to take part in the traditional shalish in their own capacity.

One of NU's main activities is to organise shalish hearings (NU-shalish hereafter). These are convened on the basis of an application from an aggrieved member of the community, which is filed with one of NU's Community Organisers (CO). COs are volunteers from the respective communities where NU operates, and each CO cover one Union. All COs have received human rights and legal training from NU, and have access to local lawyers.

When NU has accepted an application, which is recorded in form 1 (see Box 4.2), the CO undertakes a fact-finding exercise, to verify the applicant's claims and to collect other relevant information. Provided the application is considered valid (i.e. that the fact-finding confirms that there is a grievance), a formal notice inviting the respondent to a NU-shalish is sent (form 2). It should be noted that NU would not convene a shalish in criminal cases, as a part of their strategy to promote greater respect for the rule of law; and would take action to ensure that these cases are adjudicated by formal courts, with assistance from NU as relevant.¹²

Box 4.2: Format for NU case records

Form 1:	General information about the case as submitted by the applicant
Form 2:	A formal notice that is sent to the respondent, outlining the complaint and information about the date and time of the mediation.
Form 3:	A request to attend the NU-shalish as shalishdar (mediator)
Form 4:	An 'absentee notice', sent to respondents that have failed to respond to earlier notices sent by NU
Form 5:	Minutes from the mediation, including the names of those present and the decisions made. The applicant and the respondent both sign the minutes.
Form 6:	Summary of the case details and decisions made during the mediation. Written in duplicate. Original submitted to head-office in Dhaka
Form 7:	Information on the implementation of the settlement, based on monthly visits to the applicant for three months after the completion of mediation

Assuming the respondent is willing to meet in a NU-shalish, a mediation session is convened. While NU facilitates the mediation by organising the venue, NU staff plays a passive role in the discussion, which is led by members of the NU-shalish committee, representatives from NU's women leadership programme and representatives from

¹² From discussion with project staff, it is not clear how a decision about whether a case is criminal or not is made in the case of domestic violence. This will be discussed in greater detail in Ch.5 and 6.

each of the parties (which may include non-NU shalishdars and other influential people). According to NU policy, a resolution should be reached through mediation and not arbitration. As discussed with project staff, this is understood to imply willingness to compromise on both sides, and while law is a relevant factor in the negotiation, it is not the only - or even the dominant - consideration. This will be discussed in greater detail later.

Provided an agreement is reached, which is overwhelmingly the case, this is recorded in the minutes of the hearing, which is signed by both parties (form 5). If the opposing party is unwilling to reach a settlement, or the applicant considers the settlement unreasonable, NU stands ready to provide legal aid to the applicant so as to facilitate a formal court hearing. This is also an option in cases where the respondent does not abide by the decisions made.

Following the mediation, NU undertakes to visit the applicant on a monthly basis for three months, so as to monitor the implementation of the shalish decision.

Various aspects of this process, and how they relate to the enforcement of the NU-shalish decisions, will be discussed in more detail below. This includes an analysis of considerations that affect the notion of 'agreement' given the implied willingness to compromise, as well as the extent to which the settlements can be considered 'mediated' in the sense that they are consensus based. For the purpose of presenting a general overview of the research findings, and in line with NU's own description of their services, these words are used indiscriminately for the time being.

5. Research findings

General overview of applications made in Kalihati, 2002

Using form 6, which provides a brief presentation of the case and a summary of the decisions reached as a result of the mediation, 113 cases were reviewed and analysed with respect to the nature of the grievance and success in reaching a settlement.

Based on the recorded summaries and as illustrated in Table 5.1, the review found that the NU-shalish is very effective in facilitating an agreement between opposing parties, and that in some instances the receipt of the NU-notice (form 2) is sufficient to end a conflict.

A very limited number of cases reviewed have made any contact with the formal court. The threat of court is, however, perceived to provide a powerful incentive for respondents to both interact and comply with the NU-shalish, and the content and importance of this incentive will be explored further below.

Table 5.1 – Settlement of applications filed in Kalihati 2002

Number of cases where NU facilitated a shalish and where a settlement was agreed:	100
Number of cases settled without a shalish, on the basis of receipt of a written notice from NU (form 2):	8
Number of cases where no settlement was reached and where at least one of the parties decided to file a court case:	4*
*) NU-shalish specifically recommended court in one case only	
Number of cases where applicant was asked to re-submit the case due to inadequate or incorrect information:	1

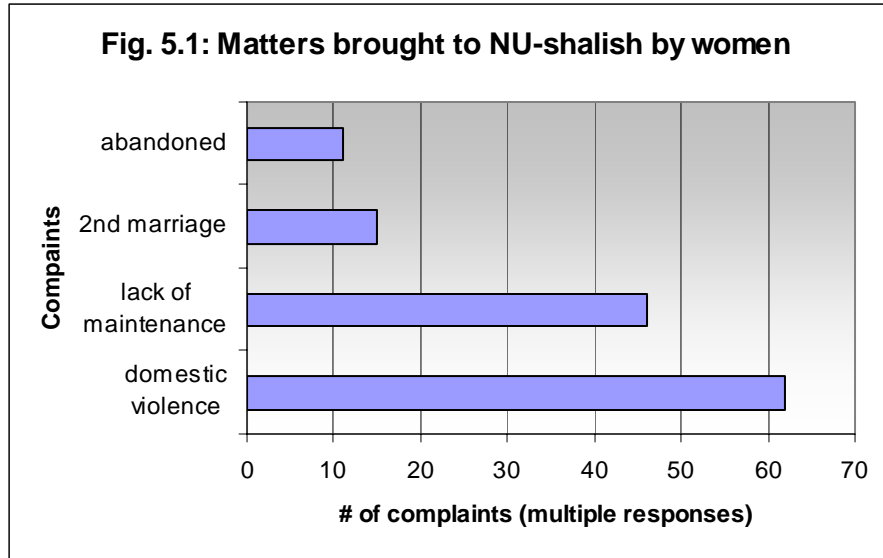
Table 5.2 gives a broad overview of the issues that are brought for mediation. Near 90% of all applications relate to marital disputes and the majority of cases are filed by women.

Table 5.2 – Nature of conflict sought settled

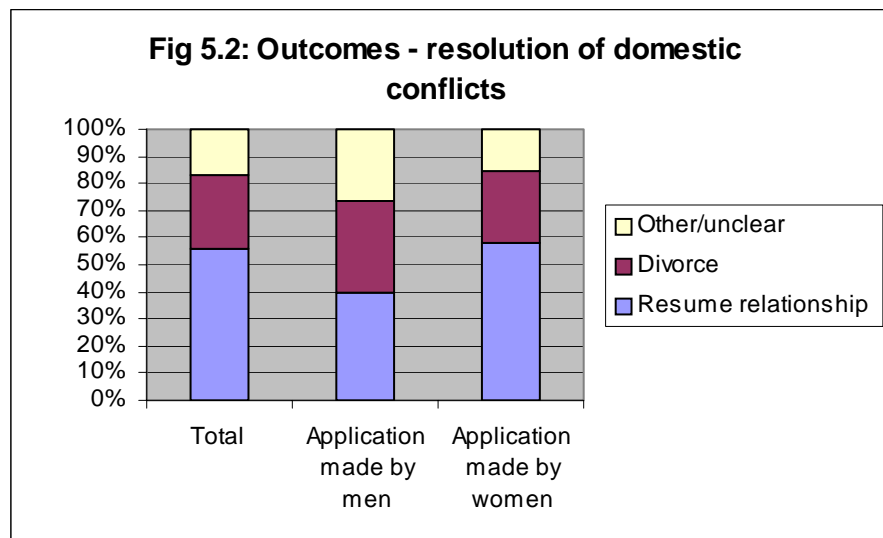
Reason for filing complaint	# of cases
Domestic matters (female applicant)	84
Domestic matters (male applicant)	15
Land or asset related	8
Other/miscellaneous	6

Domestic violence followed by insufficient maintenance is the most common grievance for women, as illustrated in Fig. 5.1. Based on the summary records, it is found that at least 64% of the women applicants are living with their parents at the time of filing a complaint, and have typically been living there for several months before approaching NU. The extent to which the woman's parents play an important role in deciding to approach NU is not known. It should be noted, however, that NU does not require the approval of her guardians for pursuing a case, which, as will be argued later, is significant from a human rights perspective.¹³

¹³ Women in Bangladesh typically depend on the support of a male guardian for accessing any formal or informal institutions: as explained by Schuler *et al* (1998): "Women often have... no socially sanctioned identity outside the family... As they grow up, women come to see dependence and deprivation relative to male family members as natural..." (Schuler *et al* 1988: 148).



Turning to the outcome of NU-shalish mediations, considering only cases relating to marital disputes, Fig 5.2 shows that more than half (55%) of the mediations result in the husband and wife deciding to resume their relationship. Looking at the summary records, this agreement is typically reached on the condition that the reason for the grievance is addressed, and that both parties commit to change their behaviour as necessary.¹⁴ In some cases the NU-shalish appoint external guardians to whom the applicant can turn should the problem re-surface, as well as reminding the parties that the matter can be pursued further in court if there is a breach of the agreement.



¹⁴ As argued by Abel (1982), mechanisms for informal justice typically seeks to reduce, or neutralise conflict by apportioning blame on both applicants, thereby rendering the conflict “intra-individual” – an expression of the problems within each party”, rather than emphasising the conflict as being between individuals, or linked to structural reasons. (Abel 1982: 283-289).

In cases where the parties agree to divorce, the NU-shalish will generally play an active role in mediating a settlement; to be paid by the husband within a given date, and often in the presence of a NU staff member. While bearing in mind that the number of men filing complaints against their wives is low, disaggregating outcomes with respect to the sex of the applicant (Fig. 5.2) shows that cases filed by men are more likely to result in divorce than those filed by women.

Enforcement of NU-shalish rulings

Having provided an overall picture of the nature of applications that are brought before a NU-shalish, it is time to turn more specifically to the issue of enforcement.

Forty cases, which represent 35% of the 2002 caseload, were reviewed with regard to follow-up and implementation. Of these, 87% related to marital disputes, of which 72% were filed by women. Women's primary complaint was spousal abuse (68%), as seen in Table 5.3. In four cases, polygamy, i.e. disputes relating to a husband taking a 2nd wife or abandoning one of his wives, was given as the primary source. Polygamy was also mentioned as a factor contributing to violence in an additional four cases.

Table 5.3: Nature of women's grievances

Nature of grievance	# of cases
Violence	19
Polygamy	4
Abandoned	3
Lack of maintenance	2

Cases filed by men all relate to their wives' unwillingness, for whatever reason, to stay with them. This category includes cases where the woman has left home due to domestic violence (at least three cases).

In the six cases (i.e. 13%) that were not related to marital disputes, three were filed as a result of conflict between family members; two involved disputes over land and one concerned a long-standing quarrel between neighbours.

Information pertaining to the implementation of NU-shalish decisions was obtained from the project office records, and in particular form 7 which details the month-by-month situation of the applicant in the first three months following the mediation. Complementary information was obtained through discussions with project staff and members of the target community, including interviews of NU-clients (see Ch 2 for methodology).

Out of 40 cases, three were settled on the basis of receipt of a notice from NU, with one case being settled by the court. The remaining cases were subject to at least one NU-shalish session, and in several cases repeat sessions were held. As per the records,

including the follow-up form, the NU-shalish was successful in mediating an agreement in 84% of these cases. I.e. the agreements reached in 31 cases were seen to be adhered to within the three-month time frame that the follow-up covers.

In three cases, agreements were reached but not adhered to. Two cases were not resolved, and ended up in court. One case appears to be temporarily resolved, but the case history would indicate that this is a fragile settlement. A closer look at these cases is helpful to understand the dynamics that facilitate implementation of settlements, including the role of the courts:

Box 5.1 – Summary of ‘failed cases’¹⁵

Case 1: The couple has been married for 16 years. According to the applicant, Monwara, Shahid (the husband) has abused her violently on numerous occasions. He also has affairs with other women and leaves home for months at a time. When filing the complaint, Monwara was looking for an outcome whereby they would continue to stay together as a couple. In the NU-shalish, Shahid makes it clear that he does not want to continue the marriage, and offers tk 5,000¹⁶ as a divorce settlement. Monawara is unwilling to settle, however, and wants to stay married even if he refuses to pay for her maintenance.

A short while after the NU-shalish, Shahid is arrested for being involved with another man’s wife. Monwara pays the bail for him to be released from jail, and for a short while they live together peacefully. This all ends when Monwara finds out that Shahid has taken a 2nd wife without her permission, which motivates her to file a case in court.¹⁷ During the three months that NU monitors the follow-up, the court case is reported as pending.

Case 2: Nilufar (the applicant) and Rofiqul (her husband) have been married three years. According to Nilufar, their marriage turned sour after four months. Her husband is violent and has not provided for her maintenance. At the time of making the application she is living with her mother, and is not interested in getting back with her husband. Through the NU-shalish, a divorce settlement of tk 5,503 is agreed. In the first instance, Rofiqul fail to honour this agreement. This leads Nilufar to file a case under the Dowry Prohibition Act, upon which the agreed settlement is paid promptly, and the formal case withdrawn.

Case 3: The couple has been married for nearly two years. The applicant, Sultana, claims that her in-laws don’t like her and are trying to make their son leave her. (The couple have had two children, both of whom died as infants.) After having been married

¹⁵ All names have been changed.

¹⁶ Exchange rate: USD 1 = tk 59.

¹⁷ Polygamy is not illegal in Bangladesh, but requires written permission from an Arbitration Council, which typically asks for the 1st wife’s consent (Kamal 1988: 2).

six months, the couple moved to be nearer Sultana's parents. For one year they stay there together, before her husband disappears. At the time of filing the application, Sultana's husband has been absent for four months, and has not made any contact with her, nor arranged for her maintenance. She wants to keep the marriage together. A *traditional shalish has been held*, without reaching a solution.

The NU-shalish agrees to give the couple time to think things over, following which Sultana decides to file a court case (without assistance from NU). Upon hearing this, the husband files a counter-case.

The court later instructs the Chairman of the Union Council to solve the problem, following which a divorce settlement of tk 23,000 is agreed.

Case 4: The applicant, Rumela, and Sirajul (her husband) have been married for four years. Sirajul is very violent, and Rumela has had to flee to her parents' house for protection on numerous occasions. The beatings are so bad that Sirajul's father also has felt the need to intervene by taking her to her parents' house. Sirajul is addicted to drugs and alcohol, and is prone to gambling. A *traditional shalish has been held*, where Sirajul was instructed to stop the violence. As his behaviour did not change, Rumela filed an application with NU. She feels that she cannot go on living with her husband and wants to agree on a divorce settlement.

The NU-shalish results in an agreement to try again, with Sirajul promising to show her due respect, not beat her and not ask for money. In following up the case, the CO notes that Rumela is not facing any immediate problems, but that she is again living with her parents.

An interview with Rumela (19.7.04) revealed that her husband did not honour the agreement reached in the NU-shalish, which led her to seek a divorce. She subsequently married him again. At the time of her interview, she has temporarily left her house and is back with her parents, due to Sirajul's violent behaviour. She nevertheless hopes to go back to him at some stage. She feels that her husband is unafraid of both the shalish and the court, and does not have any immediate plan to seek further assistance from NU.

Case 5: Nazim (the applicant) is unhappy with his wife Kohinur. They have been married for a year, and he feels that she is well behaved when she stays with him. Kohinur has, however, stayed in her parents' house the last five months, and is refusing to meet with him or his parents. He has been informed that Kohinur will only come back if a loan of tk 20,000 is given to her parents. Nazim is not in a position to meet this demand, but wants his wife back and files a complaint with NU.

In the NU-shalish it is agreed that Nazim should not hurt his wife for no reason, and that he must look after her properly.

Three months after the NU-shalish, it is found that Kohinur has returned to her parents' house without any plan to go back to her husband. From the records, it is not possible to tell whether she wants to stay with her parents, or whether they are keeping her there against her will.

Case 6: Shirin (the applicant) has been married to Abdul for six years. He is violent, and she has previously filed two NU-complaints against him. At the time of filing this complaint, Abdul has taken their infant son away and declared that he does not want to continue their marriage, nor give up his son. Shirin is looking to agree on a divorce settlement.

At the NU-shalish, which is the third time this couple meet for mediation, it is agreed that they can no longer live together, and that Abdul is to pay a settlement for the divorce. Meanwhile, Shirin has discovered that she is pregnant again, and request that the implementation of the divorce be deferred until their child is born. On the follow-up visit, it is found that the couple are living together in relative peace, and that they have had a daughter.

Although these cases were not resolved directly by the NU-shalish, the process of filing an application with NU - and going through with the mediation - is likely to have contributed to an eventual settlement in at least three cases (the case of Monwara, Nilufar and Sultana respectively). The extent to which the NU-shalish has been able to offer any relief for Rumela or Shirin is more ambiguous. However, and to be discussed later, the very recognition of domestic violence as a grievance, meriting public recognition in the form of a NU-shalish, might in itself be considered to provide an element of an effective remedy. The case of Nazim and Kohinur is harder to interpret. The wording of the agreement would indicate that there are many sides to this story, and that the facts might have appeared different if Kohinur had been the applicant.

Findings from the case records were supplemented through interviews. The clients interviewed represent a variety of grievances and outcomes, as seen in table 5.4. All but one interview¹⁸ confirmed that the NU-shalish ruling had been (more or less) adhered to, and that it had proven durable. All clients interviewed also felt that this reflect the general picture, including in cases where couples resume their relationship following a complaint of domestic violence.

¹⁸ I.e. Rumela, see Box 5.1, case 4

Table 5.4: Case study summaries

#	Summary of case
1	Husband took a 2 nd wife without permission. Applicant is the 1 st wife. She wants to live separately from the 2 nd wife and receive proper maintenance. ¹⁹ Her husband took her back and they are living together at the time of the interview. The fate of the 2 nd wife is not known. ²⁰
2	Husband was violent. Case was first brought to <i>traditional shalish</i> , but husband failed to show up for the hearing. Following two sittings in the NU-shalish, a divorce settlement of tk 18,500 was agreed (<u>according to the girls father</u> , who claims that he was later approached by representatives from the husband's side and asked to settle for tk 17,000). As per the NU records, the agreed settlement was 17,000, which is the amount they (the girl's family) in the end received.
3	A mother was beaten by her son. She is a single mother, with three sons. She is also a woman leader under the NU programme. She said she filed the complaint to teach her son a lesson, and that she has not had any trouble since.
4	Husband was violent and did not provide maintenance. Applicant moved to her parents' house, and wanted a divorce. A settlement of tk 9,500 was agreed. She has re-married.
5	Applicant got married when she was 14 years of age. The marriage was arranged against the boy's wishes (he was also very young). The husband ran away at the night of the marriage. Her in-laws mistreated her. After living with them for five months, she went back to her parents. A divorce settlement of tk 20,000 was agreed. She is living with her parents and is not in a hurry to get re-married.
6	Applicant was married at the age of 12-13, against her will. Abused by husband and in-laws. The girl had wanted to live peacefully with her husband, but as this was not possible, she accepted a divorce. The divorce settlement was tk 11,500. She is living with her parents and wants to get married again.
7	Applicant was abandoned by her husband. Did not receive maintenance. Case is first brought to <i>traditional shalish</i> , where in-laws said they did not want her. No agreement was reached. An NU-shalish is held and the couple agree to live together. She is still living with her husband (and in-laws) and they are doing well.
8	Husband was violent. Went to NU with the aim to put an end to the violence, but not the marriage. The mediation was effective, and they are living together happily.
9	Applicant initiated the sale of a family property without seeking the family's approval. Received an advance. Buyer was unwilling to cancel the sale. NU-shalish decided the terms on which sale should be cancelled, which were accepted by both parties.
10	Husband took a 2 nd wife without permission, and left his 1 st wife. Case first heard in a <i>traditional shalish</i> . No solution was reached. NU-shalish decided that he should take his 1 st wife back, and look after both his wives in accordance with law. He is providing maintenance and separate housing for his wives.

¹⁹ Both of these demands are in line with her entitlements under the Muslim Family Laws Ordinance, 1961 (see Kamal 1988 for further information relating to Muslim Family Law in Bangladesh).

²⁰ As seen from the records, there are several instances where a husband abandons one wife for the benefit of the applicant wife. There does not seem to be a consistency with regard to ensuring the welfare of the 'losing' wife.

Considering the overall findings as presented above, and also taking into account information from the project staff and people living in the community where NU operates, it would seem appropriate to draw a preliminary conclusion that agreements facilitated by the NU-shalish are upheld - and that the implementation of justice in this respect is effective - despite the absence of a formal enforcement mechanism. The next section of this paper explores the context of these findings further, and seeks to explain why NU-shalish decisions are enforced – and whether this indeed represents ‘realisation of rights’ for NU clients.

6. Why is the NU–shalish so effective?

Drawing on the research findings, as well as other research on informal justice in Bangladesh and elsewhere, five main factors influencing the enforcement of NU-shalish decisions have been identified:

The reasons emphasised by the clients, as well as by NU, are:

- NU is seen as a powerful organisation, with influential connections both locally and in Dhaka
- The threat of Court is made effective by NU’s ability to provide legal assistance to its clients

A third factor that emerges, although less coherently is:

- The effect of introducing elements of ‘due process’

A fourth factor not emphasised by the clients, but which nevertheless will be considered is:

- The importance of social pressure

Finally, the implementation will be analysed in context of the quality of the settlements, considering the relevance of what Golub has described as:

- ‘The tension between process and substance’ (Golub 2003b: 23)

The contribution of each of these factors will be considered below.

6.1 NU is powerful and can bring a case to court

Before discussing this in more detail, it should be noted that providing the opportunity to ‘appeal’ a case from the NU-shalish to the court is an explicit part of NU’s strategy, to foster respect for the NU-shalish, as well as for the rule of law. It is a strategy adopted by most NGOs working in this area, and is generally held to be effective (e.g. Golub and McClymont 2000; Hashemi 1988; Siddiqi 2004a).

Discussing why people would adhere to a NU-decision, one villager noted that people have respect for the NU shalish because it issues a formal (i.e. written) notice, giving

the impression that it is powerful. Some people emphasised its link to the urban elite in Dhaka. The importance of NGOs being able to bring with it “the authority of the urban power structure” has also been identified as important in other studies (Siddiqi 2004a: 14). From the discussion, it also emerged that some people think NU is linked to the formal court system, i.e. that they operate as an extension of the courts.

Giving importance to the availability of legal assistance, another villager noted that it makes a big difference for poor people whether they file a case alone or have the backing of NU. In particular, the risk of corruption is considered much smaller when NU is involved, and it is felt that judges are more likely to pay attention to the case. Faith in NU’s ability to provide effective legal support would seem justified by the fact that they so far only have lost one of the 27 cases they have been involved in.²¹

My findings from NU are in line with the result of a similar, more in-depth study of shalish interventions, which found that “the threat of taking cases to court frequently works to persuade otherwise unwilling disputants to accept shalish rulings” (Siddiqi, 2004a: 19).

While perceived to form a powerful incentive to abide by mediated agreements, as reflected in the statements above, it must be recognised that the threat of court has many layers and that it should not be assumed to reflect a fear of ‘the rule of law’. Understanding why people are seen to be so eager to avoid courts, is relevant when considering the overall aim of promoting greater respect for human rights, including through the rule of law, as argued below.

First of all, it must be pointed out that the people interviewed, and NU’s target group in general, are poor. Information from the 40 case records reviewed in detail, reveal that the average daily income of applicants is only US\$ 1.3, and US \$1.4 for respondents.²² This places both parties well within the bracket of ‘poor’ considering an upper poverty line of US\$ 2 per day, and only slightly above the category ‘extremely poor’ (i.e. below US\$ 1 per day). The highest monthly income reported for any party is US\$ 85 (tk 5,000). Only two people have passed Secondary School and more than 75% have received no schooling at all.

Referring back to the importance of income and ‘institutional skills’ in accessing legal remedies, the findings above would imply that NU’s target group start from a point of significant disadvantage in both respects. The situation is further aggravated by the dismal governance situation described earlier, and makes it an imperative to avoid contact with any part of the law as far as possible – for the sake of not becoming poorer than they already are. The willingness to submit to mediation, as an alternative to court, must in other words be understood in the context of their poverty.

²¹ Of 27 cases, 18 cases were won, three were found invalid and dismissed and five were solved prior to the court hearing. In the case that was lost, NU has filed an appeal suspecting that the opposition paid a bribe to the judge.

²² Calculations are based on information from the case records.

This is also recognised by people involved in developing NU's programme, who, in emphasising that mediation is only likely to work when both parties are poor, admit to 'take advantage of poor people's ignorance about the police and the role and functions of the court, and fear of getting involved with either of these institutions' (Hassan 2004).

The threat of court is, in other words, effective not only because people are worried about being 'tried and found guilty', associated with the rule of law; but also reflect a fear of the arbitrariness and illegal practices that currently characterise the judicial system.

While actively using the law as a threat would seem acceptable from a human rights perspective, taking advantage of people's lack of ability to use the legal system, including trading on ignorance, is arguably more questionable.

It should also be noted that the threat of court, as applied here, creates an asymmetry between the applicant and respondent. Without NU backing, the parties would be equally disadvantaged in using the 'legal levers'. NU's ability to assist the applicant radically changes the equation. While the applicant only has to consider the risk of losing the case, the respondent is faced with the prospect of having to overcome the access barriers on his/her own, and thereby run the risk of further impoverishment in the process. This adds considerable muscle to the applicant, and could conceivably cause the respondent to accept and abide by agreements that otherwise would have been unacceptable, and that may be considered 'unfair'. (The importance of this must be weighed against the fact that women applicants in particular start at a point of disadvantage relative to male respondents, as argued elsewhere in this paper).

Finally, if one accepts that the threat of court, for a host of reasons, is effective, this would not only contribute positively to the implementation of settlements, but should also be reflected in the quality of the settlements that NU facilitate. While NU does not fully control the outcome of the mediation, one would expect that the process of making its clients aware of their legal and human rights – combined with access to legal aid - would result in the applicant being more assertive in claiming his/her rights than they otherwise would have been. This will be discussed in more detail below.

6.2 The importance of 'due process'

The threat of court is not the only factor facilitating the enforcement of NU-shalish decisions. As brought up by many clients interviewed, as well as bystanders taking part in the discussion, one important difference between a NU-mediation and the traditional shalish is that the process of seeking a resolution in itself does not cost money. Reflecting the situation in the formal justice system, there is a general agreement that working the traditional shalish requires either money or influence, and preferably both (Siddiqi 2004a: 10-11). The NU-shalish, on the other hand, is not only free, but has also introduced a range of elements of 'due process', which add transparency and thereby, it is argued, considerable legitimacy to the final decisions once made. These include:

- The procedure for filing a case is easy. Applicants can file on their own behalf, without the intervention of middlemen or the backing of a guardian. This has significant implications for women in particular (to be discussed later).
- The mediation panel, hand-picked and trained by NU, have been selected for their integrity and stated commitment to promote greater respect for the rule of law and human rights.
- Each application made is recorded on paper and kept by NU for future reference.
- During the mediation, both parties are encouraged to present their case. In addition, NU might contribute to establish the facts, drawing on its own investigation.²³
- Decisions made during mediation are recorded on a separate paper that is signed by both parties.
- NU monitors and record the post-mediation situation of each applicant for three months.
- There is an implicit 'right of appeal', either by returning to NU for further mediation or by seeking a legal remedy.

In addition to these largely procedural elements, NU actively promotes respect for the rule of law and human rights; including customary and religious laws in as far as these are compatible with fundamental rights and freedoms. Greater attention to law should work to make the NU-shalish outcomes more predictable and less arbitrary than is the case with the traditional shalish. This element is not straight forward, however. While it is NU policy to reject settlements that are deemed illegal, and in particular by refusing to mediate what are considered criminal cases, the mediated outcomes of marital conflicts reveal a pragmatic approach to law - and considerable attention to norms - as will be shown below.

6.3 The role of social pressure

There is little evidence that social pressure plays an important role in ensuring adherence to NU-shalish rulings, and applicants were generally critical in their assessment of the *samaj*, which is seen to show little interest or concern for their well being.²⁴ My research did not explore this question in detail, but findings from a recent study of the context in which NGO shalish interventions operate offer some useful insights.

Firstly, the study found evidence of an increasing fragmentation of the *samaj*. This is attributed to increasing globalisation, including institutionalisation of market relations and access to technology and media; as well as increased politicisation of everyday life and the criminalisation of politics (Siddiqi 2004a pg.31-32). A less coherent *samaj* would

²³ A study of popular justice in Uganda, found that women considered the ability to testify and be subject to a cross-examination as a guaranteeing the 'right to participate in public discourse on matters directly affecting their lives', making the option to settle disputes in the magistrate's office – despite access barriers associated with it being a formal institution - more attractive than using a local (formally empowered) mechanism (Khadiagala 2001: 72).

²⁴ *Samaj* is the the bangla word for 'society', but also has a wider meaning defined as 'people who build for a future together', implying that living in the same geographic area does not necessarily mean that you belong to the same samaj (Kemp 2004: 8-9).

likely undermine its overall ability to push for concerted action and to act as a local force (i.e. a predictable, consistent force as an oppose to an arbitrary, brute force). Evidence of this is also found in the case studies presented above (Box 5.1 and Table 5.4), where at least five cases were sought resolved through the traditional shalish prior to approaching NU, without success.

Secondly, the study revealed considerable local resistance to 'liberal' justice - that is, justice that is out of sync with e.g. gender norms, and which pushes what might be perceived as a feminist or western agenda - that NGOs are seen to represent. This was evident in the experience of women shalishdars (basically an NGO invention), who complained about harassment from their male counterparts and the constant risk of being labelled as 'bad and immoral' for speaking out (Siddiqi 2004a: 21). Similarly, NGO representatives expressed frustration about their inability to prevent illegal or unjust practices, such as marrying rape victims to their rapist, child marriage and dowry; as well as having to deal with pressure from people around not to 'rock the boat' in these cases (Siddiqi 2004a: 3-5). It was also found that: "enforcing the rulings of an alternative shalish exposed shalishdars to accusations of bias, political pressure, threats of retaliation from politicians, warning letters from local outlaws, as well as a general unwillingness to accept the verdicts" (Siddiqi 2004a: 27).

While NU seems to operate in a less hostile environment than the one described here – perhaps due to their strategy of involving members of the local power structure – they too are vulnerable to alienation. Taking into account this vulnerability, combined with the compromising spirit associated with mediation, it is argued that social pressure is likely to play a larger - and more important role - in determining the *outcome* of a mediation (see fig. 6.1), i.e. in identifying an acceptable solution, than in the actual enforcement process. Evidence of this will be presented below.

6.4 The quality of settlements vs. enforceability

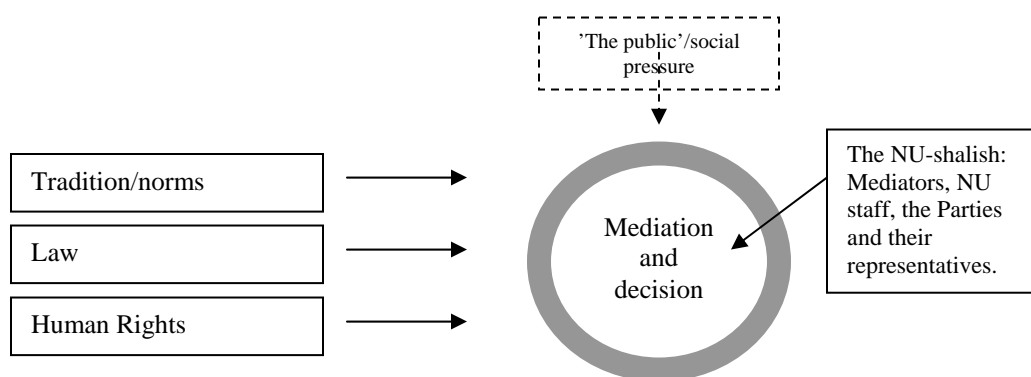
This section explores the remedies provided by the NU-shalish, and how these relate to the enforcement of decisions made. The starting point for this discussion is that NU's intervention is specifically designed to improve women's access to justice, within which establishing the rule of law is seen as an explicit goal. This implies that the implementation of NU-shalish decisions is only important and relevant in as far as it contributes to either of these larger objectives.²⁵ In this regard, the investigation below aims to establish whether NU-shalish agreements exhibit 'substantive injustice', which has been identified as an explicit danger with non-state justice systems (Golub 2003b: 23). Furthermore - and to the extent that some norms clearly discriminate against women - it also examines whether NU's intervention simply improve the application of the norm, or also 'plant the seeds' for changing the norm (Kabeer 2004).

²⁵ It should be noted that NU does not generally take a strict legalistic point of view in the mediation, and considers the ability to facilitate an effective (enforceable) compromise as more important. As stated in the Annual Report (2003): "NU's record for defending cases is raising awareness of the sometimes stricter penalties within the formal legal system for breaking the law and abusing human rights, which is leading to more cases being resolved within the [NU-] Shalish" (Nagorik Uddyog 2003: 10).

Looking closer at how domestic disputes are resolved, it is suggested that ‘conservative’ settlements could be one reason why the implementation of NU-shalish agreements is seen to be high. I.e. the settlements are implemented because they conform with prevailing attitudes and norms relating to family and gender. Drawing on findings from divorce cases in particular, tensions between positions that reflect tradition and norms, law and human rights respectively are highlighted.

Fig. 6.1 depicts the NU-shalish and factors that influence the mediation process.

Fig 6.1: The context of a NU–shalish



Women and divorce: Wanting to stay, having to go?

In a majority of cases, as seen from the case records and confirmed in interviews with clients, project staff and researchers, a woman will want to salvage her marriage if possible. Besides the social stigma of divorce, it is also a question of subsistence: “One can expect that the wife’s economic dependence on the husband and the fear of subsequent poverty and her weaker position in the marriage and economic markets are powerful deterrents for her from leaving the husband, however unhappy the marriage. She compromises more than her husband to keep the marriage intact. Therefore, the decision of divorce is likely to be initiated more often by the husband than by the wife” (Alam *et al* 2000: 4-5). Women’s preference for reconciliation has also been confirmed in other studies (e.g. Matin 2001).

Before moving on it should be noted that as per the Muslim Family Law (in Bangladesh), women, unlike men, do not have a unilateral right of divorce although they can seek judicial separation on specified grounds as well as get divorce on the basis of mutual agreement.²⁶

The first point to be made here is that discriminatory divorce laws, coupled with social stigma and the added vulnerability to poverty associated with being divorced, leave a

²⁶ A Muslim marriage can also be dissolved by agreement between husband and wife (Kamal 1988: 5)

woman in a weaker bargaining position than a man as she enters into negotiation about her marital situation. In this context – while not arguing against the dissolution of marriage per se - it is worth noting that these cases do not necessarily reflect the realisation of the right to divorce as a measurement of women’s empowerment. Consequently, the enforcement of divorce in and of itself cannot be assumed to have contributed to realising women’s rights – and might in some cases be a punishment for challenging male authority.

Breach of contract: Divorce settlements and alimony

The NU-shalish cannot deny a husband his legal right to insist on divorce. They can, however, and do play an important role in negotiating the alimony.

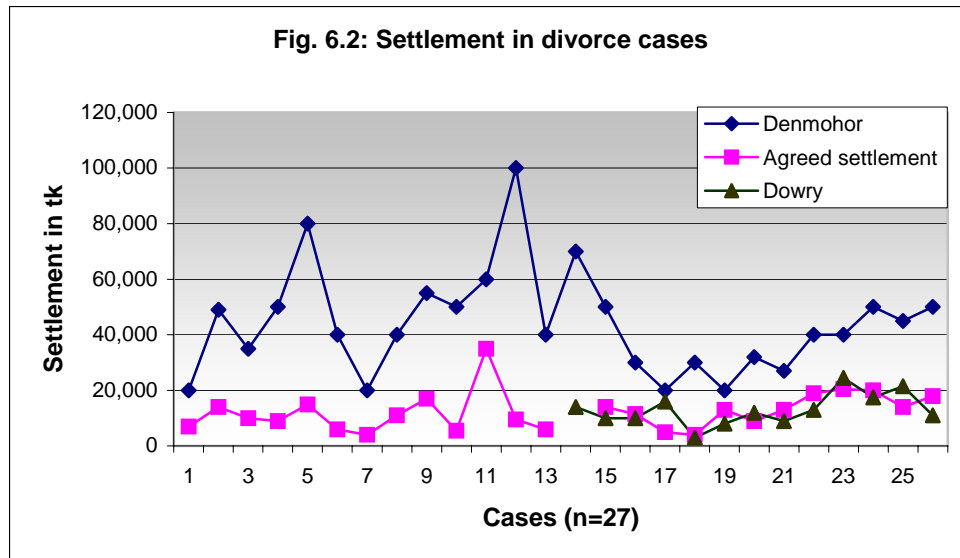
Before looking into the settlements for alimony, some additional features of the Muslim Family Law in Bangladesh must be noted: All Muslim marriages must be registered.²⁷ The marriage contract, which is based on Islamic law, stipulate the terms on which the marriage is entered into. One feature of this contract is that the husband is bound to maintain his wife as long as the wife ‘remains faithful to him and obeys his reasonable orders’. Another essential part of a Muslim marriage is that the husband - typically at the time of registering the marriage - commits to pay a dower, also known as the *denmohor* or *mehr*, to his wife. This amount is per law payable immediately on demand at any time during their marriage, and the woman’s claim remains valid if the marriage is dissolved. A woman is, in other words, entitled to receive the full amount of her *denmohor* upon dissolution of the marriage, provided it has not already been claimed (Kamal 1988: 3-5).

The amount of the *denmohor* promised in each case, is frequently recorded in NU’s files. As is seen from Fig. 6.2, amounts range from tk 20,000 – 100,00 (US\$ 340 – 1,695) (which must be considered generous in view of the average income level of NU clients). Settlements reached through NU-shalish mediations however, while arguably bearing some relation to the *denmohor*, are considerably lower, ranging from tk 4,000-35,000 (US\$ 68-594).

Taking a legalistic point of view, and bearing in mind that formal courts would be bound to award the full *denmohor* if claimed, it is observed that the NU-shalish settlements fall well short of providing an outcome that is in conformity with the applicants’ legal entitlements.²⁸

²⁷ Muslim Family Law Ordinance 1961

²⁸ Several studies have pointed to the difference between informal and ‘real’ justice; and the danger that informal justice might compromise the individual’s legal rights (see e.g. Abel 1982; Cranston 1997; Hossain 2002 and ICHRP 2004: 56-61).



The sense of women being short-changed by the NU-shalish is further enhanced when adding available information on the dowry that has been paid to the husband by the bride’s family.²⁹ As seen in Fig. 6.2 (cases 15-27) there appears to be a very close relationship between the agreed divorce settlements and the amount paid as dowry, and the settlements would, perhaps, be better described as a ‘pay back’ than ‘alimony’.³⁰

Normative universality and lived reality: A world of difference

Before passing a judgement on the NU-shalish, it must be borne in mind that there is a difference between having and realising a legal entitlement – whether through the formal justice system or the traditional shalish - as discussed earlier.

Secondly, to the extent that NU’s intervention is demand driven, in the sense that it cannot force people to file applications, there are limits to how far it can push a human rights agenda; as reflected in the findings from Siddiqi’s study (above) and as noted in an evaluation of a similar intervention: “The challenge ... is a difficult one: to promote gender equity and still maintain credibility among men. Pushing for equity too fast could undermine that credibility in organizing shalish sessions and jeopardize the association’s long-term efforts to gradually transform community attitudes. Not pushing hard enough undermines the very goal of equitable dispute resolution” (Golub and McClymont 2000: 139).

Recognising that NU to some extent operates in a market situation, and having so far focused on the role of NU as a supplier, the discussion below looks closer at the

²⁹ Demanding and paying dowry is not a part of Muslim family law, and is illegal in Bangladesh (Dowry Prohibition Act 1980). It is nevertheless a widespread practice and a major source of conflict between husband and wife (UNDP 2002 ch.7).

³⁰ ‘Alimony’ is understood to provide for some means of livelihood, which would seem negligible in this instance.

demand-side of this equation; and the extent to which women in particular feel that NU settlements offer the relief they are seeking, and thereby meet their expectations.

The relevance of paying attention to the demand side has been endorsed by ICHRP, in the recognition that traditional systems around the world “demonstrate the gap that exists between the normative universality of human rights and the lived reality and subjective enjoyment of rights by ordinary people” and thus arguing that: “the effectiveness of such mechanisms in affording access to rights is determined not only by cases won or lost, but by the *quality* of the rulings handed down and the *satisfaction* these afford to the applicant” (ICHRP 2004: 51).

In considering whether the NU-shalish afford women satisfaction, and as pointed out by Hossain (2004), one has to bear in mind that there is a distinction between formal and informal frameworks of justice – and that the latter is not a universal human rights framework. Thus, it is argued, simply proscribing remedies according to international norms would not only be impossible – but may also fail to afford women any satisfaction. Understanding ‘satisfaction’, as well as ‘quality’, therefore requires a shift of focus, giving emphasis to local context and the importance of incrementality.

On the same issue, Kabeer (2004) suggests that it might be useful to consider a position of absolutism versus consequences. Thus, in looking for outcomes that benefit women, this would consider the consequences of ‘pushing for more’ - i.e. outcomes that conform closer to human rights norms - and the extent to which this would penalise the woman more than the man.

No great expectations: Laws, norms and justice

Having abandoned the notion of universal justice (for now), we turn to the question of whether NU meets a contextually adjusted demand for a just satisfaction. In other words, what are the expectations of the NU applicants, and are these expectations met? These questions are sought answered below, with specific reference to the issue of violence against women.

A recent survey on “Gender Relations and Rights Violation at the Household and Community Level in Rural Bangladesh” offers interesting insights into current norms relating to gender violence, including domestic violence (BLAST 2004).³¹

The survey found that 13% of husbands admitted to physically abusing their wives, while 16% of wives reported that they are beaten frequently or intermittently. The two main reasons for being beaten, according to women, were poverty and talking back to their husbands. More than a third of the female respondents perceived that beating a

³¹ The survey is based on interviews with 1000 heads of households (6% female), 2000 women aged 12 years and above (57% above the age of 30) and 600 educated women and men (51% male).

wife for not observing *purdah*, or alternatively for talking back to her husband, is not wrong.³²

87% of the women and 82% of the men agreed to the saying that ‘a woman’s path to heaven lies at the feet of her husband’.

Looking into attitudes relating to rape, around 40% of the general population of women, educated men and educated women respectively felt that an unmarried woman who is raped should marry her rapist. Less than 10% of the respondents felt the need to realise a financial compensation from the perpetrator. If the woman is married, an average of 19% of all respondents felt that she should divorce her husband and marry the rapist, and around 20% felt that the realisation of financial compensation was in order.

The findings above reveal that domestic violence under certain circumstances is tolerated as acceptable, including by women themselves. Furthermore, as seen in the attitudes to rape, a significant proportion of the respondents, regardless of sex and education, would seem to weigh the loss of a girl’s “honour” – to be restored through marriage – as a weightier consideration than ensuring criminal punishment for the rapist. As argued by Hassan (2004), a similar sentiment can be discerned with regard to domestic violence, where the injustice done to a woman when subjected to violence by her husband weigh less heavy than the stigma associated with divorce, and the societal pressure (i.e. pressure from the *sama*) to preserve the institution of marriage (Hassan 2004).

Comparing norms, as presented above, to the position of the law, it should be noted that domestic violence has only very recently – as a result of intense lobbying by a range of civil society organisations - been recognised as a specific offence.³³ Previous to this, domestic violence was covered by the provisions of the Penal Code,³⁴ or, in the case of dowry-related violence, under the provisions of the Dowry Prohibition Act (1980). Rape is a criminal offence, but there is no provision of marital rape unless the wife is under 13 years of age (Matin 2001: 27-28).

While there is scope for improving the laws, the main obstacle to legal remedies for women is considered to be the lack of implementation of existing laws (UNDP 2002). A survey commissioned by UNDP, which included an analysis of the role of the police and the judiciary, attributes the failure of law enforcement to “pervasive sociocultural attitudes reinforced by religion, which to a large extent legitimise incidents of aggression against women”, rendering “the Acts enacted for the protection of women and children against dowry-related violence and repression are largely ineffectual” (UNDP 2002: 105)

³² It should be noted that *purdah* in this context, as revealed in the survey, is not understood as the extreme conservative notion of confining women inside the home, but rather as wearing a *burkha* (i.e. a piece of clothing that cover everything but your hands and feet) and moving with modesty.

³³ Prevention of Women and Children Repression (Amendment) Act (2003)

³⁴ Applicable in cases of murder, grievous hurt or assault in the family.

A remedy that works: Reconciliation, not punishment

Considering the combined effect of discriminatory norms, laws and legal institutions, it is argued that what NU clients seek could be thought of as “a remedy that is not unattractive given the limited range of alternatives” (Abel 1982: 290). Significantly, as discussed above, this includes strong emphasis on preserving the marriage, implying that even a slight improvement in her marital situation might afford a female applicant significant satisfaction. Accepting that the NU-shalish operates in the market of “2nd best” solutions also allows for a more nuanced understanding of what women who approach NU hope to achieve.

For example - drawing on the findings above, as well as argued by Siddiqi (2004b): a woman seeking relief from domestic violence is not necessarily insisting on ‘zero violence’, and might be satisfied if the violence is brought down to ‘acceptable levels’; both in terms of how it is triggered, and in its severity. The effective enforcement of a NU-shalish decision would thus be measured against this objective, which is less stringent than a legal, or human rights position.

Similarly, while NU might give effective assistance to overcome weaknesses in the judicial system, it cannot protect a client from possible social repercussions of going against a normative position that favours reconciliation rather than punishment; and which may outweigh possible gains from winning a case. As noted by one NU applicant who chose not to pursue a maintenance claim in court: ‘being involved in a court case affects your social status (*manshonman*), and would bring dishonour to my family’.³⁵ This might be particularly relevant for women, as observed in the US State Department Report for Bangladesh in 2003: “Strong social stigmas and lack of means to obtain legal assistance frequently kept women from seeking redress in the courts” (US Department of State 2003).

In this regard, it might also be relevant to consider a survey of women’s responses to marital violence in three slum neighbourhoods in Dhaka. The survey found that “most women tended to follow a strategy of non-confrontation. Opting for overt conflict was considered a high risk endeavour and was often an imposed response” (Matin 2001: 26). In the 1700 cases of marital violence surveyed, less than 10% of the victims sought punishment of their husband as a form of redress, and only 2% sought assistance to file a court case (Matin 2001: 43-44).³⁶

Before commenting further on what NU can achieve, given these constraints, it should also be noted women in Bangladesh are not alone in facing an uphill struggle against violence. As pointed out in a recent report on violence against women by Amnesty International: “Even when the law prohibits violence against women, social institutions, cultural norms and political structures in every country sustain and maintain it, making the law a dead letter. Impunity remains the norm because of inadequate

³⁵ *Manshonman*: ‘loss of self respect and respect in the eyes of others’

³⁶ Note: The women were surveyed on the basis of contact with NGOs, and would have had the opportunity to seek legal assistance from these NGOs.

implementation, monitoring, documentation and evaluation of the law. Acts of violence against women therefore go unchecked and unpunished (Amnesty International 2004: 85).”

Legitimising a grievance: Unpunished, but not unchecked

While the NU-shalish, like the formal justice system, might offer limited satisfaction in terms of punishment and compensation, it has more to offer in terms of providing legitimacy to women’s grievances, including domestic violence. Not being bound by law also enables NU to address almost any grievance – regardless of whether it would merit a court case or not. As such, it can assist women in raising a red flag at an early stage of a conflict – signalling that e.g. an incidence of violence has not passed unnoticed – with the threat of further action if not stopped.

Related to this, it has also been argued that: “informal institutions engage in a covert manipulation that seeks to modify the *character* of a person whose behavior is viewed as an expression of irrational impulses” (Abel 1982: 272).

Keeping in mind the overall objective of promoting women’s access to justice, the ability to address - if not punish - practices or behaviour that the applicant considers to violate her rights, is arguably the most important function of the NU-shalish. Thus, while not negating the importance of effective enforcement as discussed above, it is important to recognise that - for many NU clients - every stage of accessing justice, including the ‘naming and blaming’ represent an important incremental realisation of rights, and particularly in the imperfect world in which the NU shalish operates.

7. Conclusions

This paper set out to assess the extent to which mechanisms of informal justice, like the NU-shalish, are effective in realising access to justice for the poor. Based on an understanding of access to justice as consisting of different stages, the investigation sought to establish whether NU-shalish decisions are being adhered to, given the absence of an enforcement mechanism. Drawing on a variety of sources, including specific research findings, this paper has concluded that NU-shalish decisions in practice are seen to be enforceable, and that the majority of respondents’ honour the agreements reached through mediation.

One major factor contributing to this is perceived to be the threat of court, which is made effective by the availability of legal aid through NU. As argued above, this threat is strengthened by the fact that respondents are poor and that the judicial system is seen to exhibit a range of anti-poor biases. While the threat of court is considered to provide a powerful incentive to abide by NU-shalish decisions, it is not – and this is a paradox – seen to have a similar positive impact on the quality of settlements that NU offers.

This paradox is explained by the fact that NU is a demand driven intervention. It depends on applicants who are willing to come forward with their grievance, as well as respondents who are willing to submit to mediation. Thus, while NU in theory stands ready to deliver outcomes that would exhibit 'absolute' or legal justice, i.e. in conformity with the law and/or international human rights standards, the effect of pushing for such outcomes – in the absence of an effective demand - would be at the cost of losing its appeal to the target clientele.

This paper has identified a number of factors that affect the effective demand for informal justice. While the threat of court is held to provide coercive power to force submission, evidence suggests that this effect is partly offset by social norms that discourage women from seeking a solution in the formal justice system, despite availability of assistance from NU in overcoming financial and institutional barriers to access. Looking at women applicants in particular, it has been argued that discriminatory norms put women who challenge the institution of marriage at risk of social sanctions and poverty. It has also been argued that the informal framework is not a universal human rights framework – and that NU clients enter into mediation in a spirit of compromise and reconciliation, rather than with the intent to secure a punishment. Finally, it has been argued that the 'market' for justice in Bangladesh is highly imperfect, and that constraints and biases associated with formal courts and traditional shalish respectively are likely to have a negative effect on the overall demand for legal or material justice.³⁷

Based on NU's growing popularity, as evident in an increasing case-load, it is therefore suggested that NU on balance delivers the kind of justice that people want - or at least expect and are willing to settle for; taking into account the various demand and supply factors. While not rejecting that some settlements might be outside the 'comfort margin' for some respondents, and implemented for fear of the power NU is perceived to have or the threat of being taken to court, it is argued that high rates of implementation would on average be better understood as a reflection of perceived reasonableness.

If one accepts this argument, the effectiveness and relevance of NU's intervention from a human rights perspective – and as pointed out by ICHRP - hinges on the quality of NU shalish decisions and the satisfaction this affords its applicants. The findings above suggest that quality of NU-shalish *settlements* - while not necessarily exhibiting 'substantive injustice' - cannot be considered to show strong evidence of the opposite, i.e. substantive justice. Thus, while acknowledging that NU settlements improve on what the traditional shalish has to offer, seen from a human rights perspective, they do not fundamentally challenge discriminatory norms and gender hierarchy.

Abel (1982) has argued that the jurisdictional limit of informal institutions – i.e. the fact that they typically operate very locally and adjudicate between equals – renders these institutions unable to affect structural change; as the 'forces of oppression' extend beyond neighbourhood and class boundaries. This, he argues, puts severe constraints

³⁷ Other informal mechanisms do exist, but are not seen to play an important role in settling local conflicts. See e.g. Gardner 2004.

on the range of remedies they can offer, and leads advocates of such mechanisms, including the complainants' themselves, to stress the *process* of seeking justice to the neglect of *outcome*: "pretending that no one wins or loses, advancing the satisfaction of individuals as the only appropriate criterion". In this respect, he argues that there is a willingness to forget that changes in the process "will not alter outcomes as long as the structure of the adversaries remains constant" (Abel 1982 pg.294).

This paper argues in favour of taking process, as well as satisfaction, seriously, which according to Abel's critique is a blind alley from the perspective of promoting justice and rights. Abel's argument is, however, based on the existence of a functional – if reluctant– judicial system. I have argued that formal justice – considering legal, social, institutional and financial barriers to access; and despite access to legal support – is near inaccessible for poor women in Bangladesh; and in reality completely so in the absence of support from an NGO, a guardian or other well-wisher.

Seen in this context, the NU-shalish, while not unique, is fundamentally restored as a human rights intervention: It provides an effective venue for hearing women's grievances where no such venue previously existed, and thereby, it is argued, allows poor women to enter into the matrix within which justice is accessed (Box 3.1), in a situation where she otherwise is excluded from it. This is achieved because NU:

- Allows for, and encourage, applicants to come forward on their own – as right bearing individuals and without the support of a guardian or other external agents.
- Involves women in the mediation process, including trained women mediators (shalishdars), female NU staff and representatives from the women leadership programme. While not necessarily being able to count on the support of all the women present, this is a significant improvement from not being present at all, or having to present her case in an all-male forum, which is typically the case in the traditional shalish.³⁸
- Supports the applicant's testimony by providing evidence from its own investigations, thereby adding to the legitimacy of her grievance.
- Offers some follow-up and protection of the applicant upon completion of the mediation.

Added to this, it is also argued that the NU-shalish over time - while not as a single intervention being able to change discriminatory gender norms in Bangladesh - may, at least in the locality where it operates, be successful in challenging the structure of the traditional shalish, and in particular create pressure for greater attention to due process, as well as greater involvement of women in the shalish process.

³⁸ A study of women's access to informal justice in Uganda found that the all-male nature of the Local Councils played a major factor in preventing women from realising their customary property rights (because women were barred from the venues where men network –i.e. barred from drinking beer in local bars) (Khadigala 2001). While conflicts relating to assets arguably differ from domestic conflicts, it has been proposed that the 'reformed' shalish, like the NU-shalish, might also provide an avenue to enforce women's inheritance rights, which still remain largely unrealised (Hossain 2002 pg.6-7).

It has been said that: “All interventions aimed at removing injustices suffered by the poor, and improving access to justice should aim at setting in motion a dynamic that is conducive to creating a virtuous spiral, taking advantage of the interdependencies among freedoms and power of collective action” (Sudarshan 2002:4). The overall effect of the NU-shalish will have to be evaluated over time, drawing on a much larger pool of evidence and research than has been presented here. Meanwhile, however, this paper has reached the conclusion that the enforcement of NU-shalish decisions is effective and provides poor women in particular with incrementally better access to justice than they otherwise would have had. More importantly, however, and in particular from the human rights perspective, the NU-shalish provides a venue for the recognition of women as rights bearers, and thereby their right to seek justice – in whatever form – as individuals and in their own right.

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