The Clash of Two Goods

State and Non-State Dispute Resolution in Afghanistan

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I. Introduction

In post-Taliban Afghanistan, the formal justice system has limited reach and legitimacy, and struggles to function in an environment with depleted human resources and infrastructure, a legal system in tatters, and where local power largely continues to supercede central authority. The justice system is relatively weak in the urban centers where the central government is strongest, and in the rural areas that house approximately 75% of the population, functioning courts, police, and prisons are an exception. For the majority of Afghans, disputes are settled, if at all, at the local level by village elders, district governors, clerics, and police chiefs. These settlements – involving both criminal and civil matters – may follow tribal tradition, religious interpretation, or prerogatives of power. As efforts to establish the rule of law expand and the power of the central government grows, the relationship between the formal and informal justice systems will be a critical element of efforts to maintain community harmony, protect rights, provide access to justice, and serve the interests of justice.

Afghanistan has had a rich and layered legal history. Over centuries, closely-knit, autonomous social cultures produced a variegated system of customary law administered by village elders and tribal councils. In the late 19th century a formal legal system emerged to expand state authority, delivering justice in the name of the Amir, and to resolve disputes concerning commerce and government in urban areas. Both of these systems were heavily influenced by Islam, and were to some extent dependent upon religious clerics.

The formal and informal systems soon found themselves in contention – providing competing forums and principles for resolving disputes. The focus of the formal system was to deliver justice and to create consistent rules to be followed throughout the land, whereas the focus of the informal system has always been equity – to resolve disputes according to local conceptions of fairness so as to restore harmony to the community. The power of the state grew through the first half of the 20th century, gradually increasing the reach of the police and the courts while limiting the sphere of the informal system. Still, with a predominantly rural population in geographic isolation, traditional mechanisms continued to operate at the village level.

Three decades of war and upheaval threw this already unsteady system into complete disarray. The formal system, illegitimate and bankrupt, ceased to serve most of the population, and ceased to satisfy those it served. The total failure of the state during the internecine civil war of the 1990s ended the existence of a formal "system" of laws and institutions to uphold them. Meanwhile, the informal system expanded to fill the void, adding *sharia* courts[1] and commander's *shuras*[2] to the more traditional councils of village

[1] *Sharia* courts were semi-formal courts, usually affiliated with one of the *mujahideen* parties controlling a particular area that based their decisions on the judge/cleric's interpretation of Islamic law.
[2] *Shura* is from the Arabic for "council." In order to govern areas effectively under their control, *mujahideen* commanders formed councils comprised of commanders and local notables to act as consultative and decision-making bodies.

elders, or "whitebeards." However, as social and power relations mutated with the conflict, leadership based on armed strength and party affiliation began to crowd out traditional authority and practices.

Legitimate and functioning justice and dispute resolution mechanisms are urgently needed to establish peace and stability in Afghanistan today, but the post-Taliban justice system remains a shambolic array of dysfunctional courts, ad hoc elder's councils, and rule by local strongmen. The new government in Kabul, with significant international assistance, has been attempting to rebuild Afghanistan's formal justice system as a critical pillar in the effort to establish the rule of law there. A new constitution was ratified in 2004, and new laws are being put in place; courthouses are being built or refurbished; judges and prosecutors are being trained; and teaching curriculums are being revised.

In the aggregate, however, the official reform process has yielded little. In the countryside most Afghans do not have easy access to state justice institutions. Those who can use the courts rarely choose to do so. The courts are widely seen as corrupt and lacking in authority. Executive officials in the provinces, provincial, district governors, police, and prosecutors tend to bypass the courts to settle difficult or important disputes, and many local court judges also refer disputes to community-based mechanisms for settlement.[3] Research suggests that 80-90% of disputes – criminal and civil – are resolved outside of the formal system.[4]

In many areas, however, the infirmity of the formal system is matched by the vagary of the informal system. Some traditional practices violate Afghan and international law, including honor-killings, forced and underage marriage, and payment of blood money in lieu of punishment. Women rarely, if ever, participate directly in informal mechanisms, and their basic rights under Afghan law are often ignored. With international support for Afghanistan heavily influenced by international human rights and women's rights standards, these traditional practices have made the human rights community very wary of informal justice systems. There is considerable internal frustration as well, as imbalanced power relations between landowners, landless farmers, and gun-holders tend to subvert the principles of equity upon which the system relies for its popular legitimacy. Large-scale problems often defy resolution by the existing means, as community-based justice mechanisms are often unable to deal with inter-community problems – especially between communities from different ethnic or sectarian groups.

In order to move forward, there is a need for evolution of both systems, and formalization of the relationship between them. At present, the formal and informal systems co-exist, but without official sanction or mutual recognition. The government wishes to establish a competent, coherent, and effective legal and justice system as a central component of a legitimate Afghan state. But it need not do so at the expense of all traditional or informal dispute resolution mechanisms. The capacity of the formal justice system will remain

[3] See "In the Balance: Measuring Progress in Afghanistan" (CSIS, 2005).
[4] See "Afghanistan in 2006: A Survey of the Afghan People" (Asia Foundation, 2006) finding that only 16% of Afghans would go to a government court to resolve their disputes.

limited for years to come, and informal mechanisms will continue to have an important role to play in resolving disputes, particularly in civil (non-criminal) matters. Recognizing the positive role that the informal system can and does play will enable the government to harness the good of that system, while also working to curtail its most problematic aspects.

The supporters of the informal system, for their part, must also recognize that the state and its justice system have an obligation to provide security and protect the rights of Afghan citizens. A successful outcome of the current state-building process will mean a greater role for government in the affairs of its people – and will require that local governance mechanisms cede some of their authority to the state. Through local cooperation and mutual recognition, citizens can take advantage of state institutions – such as the clerical functions of the court for recording property titles – while relying on informal mechanisms to resolve the underlying disputes.

Such local level cooperation provides guidance to how these systems may work together to improve rule of law and access to justice. However, the rebirth of a centralized government justice system has already reignited inherent tensions between these systems. Much of the political history of Afghanistan is a struggle between highly diverse, locally autonomous groups and governments in Kabul with ambitious centralizing agendas. The perpetuation of this conflict – already evident in the justice sector - will impede the establishment of the rule of law in Afghanistan.

This period of flux creates opportunity as well as danger. The robustness of the informal system could be harnessed to improve dispute resolution and increase the capacity of the state to maintain order and ensure fairness. The formal justice system will take years to build the necessary legitimacy and capacity to function effectively throughout the country. Its areas of comparative advantage are in urban areas, in criminal law, and in protecting citizen's rights. The strength of informal mechanisms is in their low cost, physical proximity to citizens, and ability to achieve consensus. A targeted series of programs including training, legal representation, liaison, and monitoring could take advantage of the relative strengths of these systems and improve delivery of justice for all Afghans.

The overarching conclusion of this report *is that the informal system is critical to dispute resolution in Afghanistan, and that a positive relationship between the state and non-state justice systems could substantially benefit the justice sector and Afghan citizens. Therefore, a modus operandi must be worked out such that governmental and non-governmental programs can be implemented to support access to justice to citizens within and between both systems.*

This relationship can be shaped through a process of dialogue, mutual recognition, and small-scale practical experience. Rather than attempt to create a new legislative framework, the formal justice system should work with citizens and community leaders to identify areas of interaction between the systems that meet two objectives: improving access to justice and improving protection of citizen's rights. For most civil claims,

voluntary use of community-based mediation should be encouraged – as is the case in many countries today. Such an approach reduces the burdens on courts, and reduces costs for citizens while producing consensus outcomes that reduce antagonism between the parties. For criminal disputes, it is the duty of the state to deliver justice and to punish the violation of basic rights. In the case of serious crimes, state authority is essential, but there may be a valuable role for community forums in reconciling parties and agreeing on compensation. For lesser crimes, community forums may be able to achieve outcomes that are acceptable to both parties rather than relying on imprisonment, which harms families and does little to satisfy victims.

Practical approaches to building a relationship may include allowing informal decisions to be reviewed, recorded, and enforced in formal courts; referring certain types of claims, as per the above, from formal to informal forums; and undertaking public education programs that focus on informing citizens about their rights and obligations, and focusing on eliminating the worst abuses. Ultimately, such approaches should be developed through the establishment of pilot projects that test different options in practice.

II. Non-State Dispute Resolution in Afghanistan

Afghanistan's ancient, informal systems of dispute resolution are in flux. The rules themselves, as well as the means of resolving disputes and enforcing decisions, are evolving. While it is in the nature of informal systems to change over time, upheaval, mass migration, and changing power relations have caused a dramatic degree of disruption in the last 30 years. In the face of the collapse of the formal system, the informal system filled the vacuum, often becoming the only means of dispute resolution for most Afghans.

Afghanistan is an ethnically and culturally diverse country, with no single dominant ethnic, language, or regional group. The largest and traditionally most powerful group, the Pashtuns, comprise from 40 to 45 percent of the population. But the Pashtuns exhibit a high degree of internal social and geographic diversity. There are populations integrated in large settlements, rural populations in highly tribalized and isolated villages, nomadic and semi-nomadic groups. The Tajiks (approximately 30 percent) are also spread throughout the country in highly diverse settings and groupings. The Hazara (15%), Uzbek (8%), and Turkmen (3%) populations are smaller and more homogenous. Traditions and norms of dispute resolution vary between regions and ethnicities, with some exhibiting a high degree of coherence and formality (e.g. the Pashtun *jirga* system) and others less well established.

Since the late 1800's Afghanistan has often operated under dual systems of governance. The urban areas of the country and the irrigated agricultural plains were under the control of formal governments and their institutions. The inhabitants of economically and geographically peripheral areas in the mountains, deserts, and steppes historically remained beyond the bounds of state control and therefore ran their own affairs. State control in these regions was often indirect or even non-existent. While throughout the late 19th and 20th centuries the ability of the Afghan state to penetrate such areas through

roads, communication systems, and force of arms progressively expanded, the level of local autonomy remained high. Absence of any experience with direct colonial rule, a largely subsistence economy, and demonstrated willingness to engage in armed resistance against encroachments by Kabul, particularly among the Pashtuns in the east, proved conducive to preserving local autonomy.

Customary Law and Dispute Resolution

Customary law is the means by which local communities resolve disputes in the absence of (or in opposition to) state or religious authority. It is based on a common cultural and ethical code that generates binding rules on its members. Communities use this code to resolve disputes, evaluate actions for praise or blame, and to impose sanctions against violators of local accepted norms. While systems of customary law are found universally throughout rural Afghanistan, their specifics vary widely and often idiosyncratically. In addition, far from being timeless and unchanging, they are subject to a great deal of manipulation and internal contest. While not based on the Islamic sharia per se, customary law is steeped in what are perceived as deeply Islamic norms and practices. Practitioners of customary law generally believe that their actions are consonant with Islamic principles in both substance and form, and direct appeal to "Islamic" values or the encouragement of a cleric are frequently employed to induce resolution.

Communities using customary law assume that that social order can be maintained in the absence of government. Here law's legitimacy was based on a community consensus and the preservation of order fell to individuals and their kinship or residential groups. Bound together by complex sets of relationships in face-to-face communities, the lack of formal law codes or judicial institutions did not breed anarchy. Instead the freedom of the individual to do as he pleased was restricted by his acceptance of a common cultural code of behavior whose norms were enforced by the community members at large. The stress was on the equality of male community members because all power and jurisdiction was reciprocal; no one by right had any more power or authority than anyone else. It was expected that all community members would refrain from invading each other's rights and property, and from injuring one another.

In the event of violations, however, everyone had a personal right to punish the transgressor himself and to take appropriate retribution: an eye for an eye, a tooth for a tooth, a life for a life. Thus instead of court prosecutions, one had blood feuds that operated under specific sets of restraints that defined acceptable limits of action. It was to prevent the emergence of such individual blood feuds, or to end those in progress, that communities developed forms of mediation and arbitration designed to restore social harmony. Indeed the worst punishment such a community could inflict on transgressors was not death but permanent exile because it severed the individual from the community, a form of social death.

Thus emerged a system of customary or traditional practices – dispute resolution methodologies – through which customary law could be applied, and conflicts resolved. One of the most distinctive aspects is the practice of using community members or

respected outsiders chosen by the disputants as fact finders and decision-makers. The other is the reliance on mediation and arbitration to resolve problems. Traditional mechanisms lack the power of coercive enforcement. They also apply only to people who see themselves as a part of the same community or who voluntarily agree to dispute resolution by a group that consists of representatives acceptable to the disputing parties.

The primary means of informal or customary dispute resolution is the *shura* or *jirga*,[5] an ad hoc council of village notables and elders, almost always exclusively men, who are gathered to resolve a specific dispute between individuals, families, villages, or tribes. These bodies are most often engaged as mediators, using their knowledge of custom, Islam, and the parties – as well as social and financial pressure - to establish a consensual settlement. Traditionally, the *shura/jirga* does not impose or enforce outcomes. The only means of coercion available to the community would be shunning or exiling a party that refused to compromise.[6] The fundamental goal of a *shura* or *jirga* process is to restore community harmony, which is generally achieved by arriving at an equitable settlement that corrects harm done to honor and/or property.

This system thus works best in small communities and can sometimes be extended to different communities within an ethnic group. It is most problematic when disputes arise between communities of different ethnic groups, particularly if they have an antagonistic relationship. The body of customary law varies from place to place, and impartial mediators may be impossible to identify. Given these weaknesses, failures to resolve serious problems, particularly those involving threats of bloodshed, have historically prompted state intervention to prevent disorder.

The Pashtunwali and Jirga System

Pashtunwali

The best known and most complex of Afghanistan's customary law systems is the *Pashtunwali*.[7] Its principles apply specifically to Pashtuns who constitute about 40% of Afghanistan's population located mostly in the south and east, with some migrant communities in the north. While the Pashtunwali is the basis for customary law in these communities, customary law is but one of its components. It is an oral tradition that consists of general principles and practices (*tsali*) that are applied to specific cases.

In its totality, the Pashtunwali serves as an ideal code of behavior, the most important elements of which are *badal* (revenge), *melmastia* (hospitality), and *nanawati* (sanctuary). In addition, it valorized the accumulation of personal honor (*ghayrat*) and defense against insults to the honor of the group or its women (*namus*). In most forms,

[5] *Shura* is Dari, and comes from the Arabic *mashwara*, to consult. *Jirga* is a Pashtu word, and comes from the Turkish for "circle".
[6] This is not to suggest that shunning or exile is not harsh punishment. In a closely-knit communal society, it may be impossible to survive without community support, and exile is social death.
[7] (Steul 1981)

Pashtunwali is a non-religious system, and some of its basic precepts, like trading women to resolve disputes (*bad*) contradict both *sharia* and statutory laws in Afghanistan.

Because of the Pashtunwali's stress on personal autonomy, the mobilization of a consensus is at the heart of leadership. The acceptance of any authority has to be seen as voluntary and not coerced by force. The *jirga*, where men meet as equals to discuss problems or resolve disputes, was the forum in which such decision-making normally occurred. This was reflected in Pashtunwali's mode of dispute resolution. In the absence of any formal court institutions, disputants had to agree to have the community settle their disputes. There were no specific crimes against the community only against individuals who must set aside their right of revenge or retaliation and accept mediation of arbitration.

Disputes among Pashtuns were traditionally said to arise from the three 'Z's: *zar*, *zan* and *zamin* (gold, women, and land) – the primary bases of wealth and honor in agrarian tribal society. The most difficult cases were those that had provoked blood feuds where settlements were difficult to arrange because they involved questions of honor and giving up the right of retaliation. These involved homicides and sex crimes such as rape, adultery, and elopements or kidnapping marriages. This was because such actions were viewed legally as an offense against the victim and his family, not against the community as a whole. Thus the victim's family had a strong desire to punish the person (or his relatives) who committed the act themselves. Failing to seek such blood retaliation personally was deemed a sign of moral weakness, even cowardice, not just of the individual who was wronged, but his whole kin group because involved questions of honor and personal responsibility.

Unlike state law, the customary system sought compensation for the wrong done and social reconciliation, not the punishment of the perpetrator. Communities, in particular, sought to bring an end to blood feuds because if unresolved they could lead to an ever-widening circle of revenge killings over time. Such settlements involved payment of compensation agreed to by both parties and in some cases marriage exchanges of women from the families involved. Punishment by the state courts had no impact on this system because punishments inflicted by the government did nothing to resolve the underlying issues of blood feud since the state was not a party to them.

The easiest problems to solve were those small disputes in which judges simply needed to access liability for damage claims to property or set compensation for minor personal injuries that had an accepted value.

Disputes that involved theft of movable property arose regularly in the customary system. Items include personal property and money in private households, livestock or crops taken from fields, or resources such as wood in a community forests. Thefts from private houses were considered the most serious because they dishonored the victims. In a society without formal policing institutions households were expected to defend their own property. Regaining honor after suffering a theft was often of as much importance as

getting one's goods back and hence the importance of seeking justice in the customary system.

Family law was an area that local communities most preferred to handle using customary law. Disputes about marriage arrangements emerged because they involved binding commitments and complex bride price payments. Questions particularly arose as to when or if a commitment was binding, particularly when the arrangement had been made decades before the marriage was expected to occur.

Rights over immovable property resulted in disputes in rural communities over 1) questions of ownership and ability to sell them; 2) irrigation rights and their distribution; 3) encroachments by neighbors on plots of land. Customary law was most suited to resolving these disputes since, in the absence of written documents and proper land registration, members of the local community were seen as the best judges of the merits claimed by each party. In addition many land or water claims arose from disputed inheritances, the legitimacy of which rested on local practices that were often at odds with both religious and state laws on such matters.

Jirgas

The usual forum for any type of decision-making among the Pashtuns was the *jirga*, an open forum that put great stress on the nominal equality of the participants. Women, however, are almost entirely excluded from participation as either jirga members or disputants. Everyone sits in a circle so that no one takes priority. All members have a right to speak and binding decisions are made by common consensus rather than voting. This may take considerable time (days, weeks or even months) or fail to come to a conclusion entirely.

Individuals or whole factions assert their disagreement by leaving the circle and refusing to participate further. This is the only way to avoid becoming committed to the group's decision. If the protestors have enough support their action can bring a *jirga* to a temporary halt as people attempt to convince the dissenters to return by offering them acceptable compromises or putting them under some kind of social pressure. Failure to bring enough people back into the *jirga* process can result in its collapse. Good oratorical skills and political savvy are essential in such a system. The most influential people may wait until they see an opportunity to end the discussion satisfactorily by making a proposal that incorporates earlier discussions and objections.

The *jirga* can consist of a very small number of people where the disputes were generated by minor injuries or small amounts of money or land. If the two disputing parties are members of the same lineage and have no other issues that divide them, then they simply invite two local elders to investigate the case and propose a resolution. In cases where the disputants are more distantly related or when the problem is more complex then as many as ten elders might be invited to be judges or *marakachian*. These *marakachian* investigate the facts themselves independently, question the parties and then propose a resolution of the problem. If they feel they are unable to resolve the problem, or one of

the parties declares their conclusions bent (*kazha*) or invalid, an appeals level *maraka* is held. The structure and process is the same as the first but the number of number elders serving as *marakachian* is enlarged to bring in a wider range of people. For both large and small mediations, it is often advantageous to include a religious figure among the mediators because he can assert that any necessary sacrifices are being made to please God and not the other party.

If the disputants refuse to accept the decision of the larger *maraka*, then they can demand the formation of a *tukhum*, a tribal assembly in which representatives of other lineages and even other Pashtun clans are called in. While the *tukhum* is the maximal level of appeal, as with all Pashtun *jirga*s it does not have the authority to impose a solution. However, through a system of guarantees and obligations of hospitality the cost of such an assembly to the litigants can be made so high that there is strong pressure to accept their conclusions. While very important disputes involving blood feud or large amounts of land or money might go immediately to a second level *maraka* or *tukhum*, even initially minor or silly disputes can evolve into major problems. Problems that began as disputes between two families can become problems between their respective lineages, making settlement complex and difficult. The larger the group involved the more likely the dispute is to become a political football in which the original cause becomes a mere footnote.

Because retaliation always remains an option in any ongoing dispute, it is first necessary to get the parties to agree to accept the possibility of a peaceful settlement. This can be initiated by the parties or by self-appointed mediators from other lineages or villages who will approach the disputants directly and propose a truce. If the case involves serious injury or valuable land, the judges may demand that they be given a *wak*, the power of arbitration. This is because the more complex the case, the more unlikely it is that simple mediation will suffice even if both parties agree to have their dispute judged and are willing to meet together. Each side is then required to provide a *baramta*, security deposit, to ensure that they will accept the final decision. The party that still refuses to accept the decision after its appeals are exhausted loses its security deposit to the opposing party. If the case is serious the *baramta* may be substantial, such as a valuable piece of property. In lesser cases it might consist of cash or personal property such as weapons, carpets or furniture.

The ability of individuals or kin groups to refuse arbitration, delay the process, appeal decisions to higher levels, and to ignore verdicts would appear to give the community little power to resolve disputes that threaten the peace. There are, however, countervailing forces that put considerable pressure on the disputants. The choice of taking blood revenge or other retaliation lies with the individual, but once a potentially violent dispute enters the public realm the community can intervene by sending its own intermediaries who ask for a truce and attempt to begin negotiations. It is hard to refuse such a truce, particularly when is proposed by men of influence or in the name of religion. However, this intervention is only likely to occur if it is feared that the dispute will create wider waves of social disruption that need to be controlled, not just because blood was spilt or fighting broke out.

Ultimately, Pashtun customary law is more concerned with questions of restitution than punishment. At a minimum this includes the return of goods stolen or their cash value in cases of theft, payments for wounds inflicted, or even arranging a marriage settlement and blood money in the case of a revenge killing. Pashtun customary law also attempts to make the accused publicly and personally accountable for his deeds should he be found at fault. It lacks the authority to imprison or execute, but it does have sanctions at its disposal. These can include ostracism, forcing the wrong doer to apologize publicly to the victim, and make payments to compensate of insults to honor.

Other Afghan customary law systems

The *Pashtunwali* is the most developed code of customary law in Afghanistan but other ethnic groups in rural areas have their similar traditions of dispute resolution that seek mediation or arbitration for problems outside of the state run judicial system. In general, they lack the regimented institutions of *jirga*, but most have traditions of ad hoc village assemblies (*shura*) that mediate and make decisions. Dispute resolution relies on village elders (*rishsafid*, Persian; *aqsaqal*, Turkish) or important political leaders to serve as judges or mediators. Blood feud and private revenge taking also occurs but is less common among non-Pashtun groups. There also is a greater willingness to take problems to government courts, particularly where disputants are not members of a single ethnic group.

The Central Asian Arabs of Kunduz province present a typical case of non-Pashtun structures before the war.[8] Here the customary law system established links between the villages and governments through the post of *arbab*. An *arbab* represented the village (or section of the village) to the local administration. In some cases state officials appointed him while in others he was chosen by the community. Those *arbabs* with influence in the community often played the role of mediator in resolving disputes. *Arbabs* mediated between the formal and informal by using their influence with state authorities in criminal cases to get charges reduced or eliminated, often through payment of bribes.

For larger issues, Tajiks, Uzbeks, Hazaras, Turkmen, and Arabs might convene a *shura-i-islahi* (resolution council) of respected community members to deliberate. In many cases, the distinction between the *shura* as a dispute resolution mechanism, and the *shura* as a governance mechanism was blurred. Disputes in communal environments tend to affect larger parts of the community. For instance, use of water and irrigation is a community issue because water is a communal resource, and because the means for using water (e.g. irrigation canals) are also usually communally constructed and operated. A significant dispute between neighbors over water use is therefore likely to implicate a broader policy issue for the community, and therefore requires communal resolution.

The *shura-i-islahi* are similar to Pashtun *jirgas* but with several important differences. The local clergy play an active role in the local *shura*, which means that local conceptions of *sharia* play a more prominent role during the proceedings. This does not

[8] (Barfield 1981, 1984)

mean, however, that the final remedy must fit exclusively within the jurisprudence of *sharia* law. *Shura* membership is comprised of respected members of the community who agree to sit in the forum and offer an unbiased opinion, usually made up of the local clergy, the *wakil* (local government representative) and prominent members of the community. In practice, women are generally only represented by male relatives. A *shura-i-islahi* can be comprised of mixed ethnic groups who either reside in the same village or are engaged in the process through relationship to the litigants.[9]

Shuras are used to resolve matters such as business partnership, property disputes, and family matters. The parties to a dispute select their representatives to either play as third party mediators or *hakam* (arbitrator).

Shura-i-jamaatkhana

The *shura-i-jamaatkhana* is a forum used by the Afghan Ismaili Shia. This forum is quite different from that of other ethnic and tribal groups. The term *jamaatkhana* comprises *jamaat* (gathering) and *khana* (place, house).[10] The head of a *jamaatkhana* is a cleric known as *mukhi* who is a learned person with background in the *Ismaili Usul* and *Fiqh* (rules and logic of the religion). At the *shura*, a *mukhi* acts as an informal judge without any law enforcement authority. Usually, disputes – especially those over internal family issues – are handled with the private mediation of the *mukhi*. In important matters, the head of village will also participate with the agreement of the litigants.

Customary Law and the Islamic *Sharia*

Islamic law (*sharia*) has been implemented to varying degrees in Afghanistan for centuries by trained religious judges (*qazi*) following the Hanafi legal tradition. *Qazis* were part of a larger class of professional clerics (*ulema*) who issued opinions (*fatwa*) on religious issues. They saw themselves as protectors of a divinely inspired tradition in which religion and government were inextricably melded. As opposed to the highly localized systems of customary law, *sharia* was believed to be universally applicable to all times and places. Based on their training in a literate and urban tradition of orthodox Islam, the *ulema* held rural customary law systems in contempt, particularly when they strayed from classic Islamic practices. The *ulema* often used their influence to demand the replacement of customary law practices with more standard sharia interpretations, which of course then demanded their own services to resolve disputes.

Although sharia law and customary law are distinctly different systems, they have often been confused (sometimes willfully so). Afghan government officials, particularly from urban areas, often asserted that the two are the same because they were unfamiliar with

[9] In small parts of northern Afghanistan where Pashtuns, Uzbek, Tajiks, Hazaras, and Turkmen live in a village or share land and water within a district, they often form mixed ethnic membership in their local Shura or within a specific Shura for solving an occurring dispute. This scenario is also obvious among the Tajiks and Pashtuns in parts of northern Kabul, especially in the provinces of Parwan and Kapisa.

[10] Mukhi or Jamaatkhana also is known as Takia-Khana, a place where the Muslim Shia held religious and social gatherings. This place is also known for Taazai-Khana, or Husseinia, a mourning place for Imam Hussein (the third Shia Imam) during the holy month of Muharam in Islamic calendar.

customary practices. Non-Afghan analysts have even been more prone to conflate the two systems. They have assumed that because the Afghan rural population has a deserved reputation for its adherence to Islam then customary and religious law must be one and the same. In fact, religious law is often in conflict with customary law at key points, such as matters concerning family law, attitudes toward blood feud and revenge, and punishments available – although this is seldom acknowledged at the local level.

More profoundly, customary law was an oral tradition rooted in local cultural values that were not assumed to be universal. When the community changed its opinion on any matter, customary law reflected the change. By contrast, religious law was fixed (although people might dispute each other's interpretation) and has rejected innovation as illegitimate. For this reason religious judges were expected to have some formal training to "learn the law". By contrast, in the customary system respected members of the community took the lead role in resolving disputes without any formal training. While they needed to craft solutions that were accepted not only by the parties in dispute and the community as a whole, they did not have to link them to a written legal code.

The Impact of the War

The customary law system was dominant in rural Afghanistan until the 1970s. It was deemed fairer and less corrupt than the formal legal system. The relationship of the Afghan state legal system to local communities that employed their own forms of customary law was problematic and often contradictory. In theory, state law applied to all residents of Afghanistan equally, but in practice government institutions were found almost exclusively in urban areas and in provincial centers of administration. The latter's direct control rarely reached beyond the limits of the towns where local officials were stationed. The central government slowly expanded its reach during the 1960s and 1970s, enabling itself to intervene selectively in local affairs when it chose to do so.

Over the course of the anti-Soviet war (1979-1989) and more thoroughly during the Afghan civil war (1989-2001), the state institutions of successive Kabul governments withered. In many parts of the country, formal government institutions ceased to exist. While this reinvigorated the autonomy of local communities, there was a change in their political organization in which the old domination of rural life by large landowners and traditional tribal leaders gave way to a new class of younger military commanders who also took on the responsibility of civil administration. The weakness of the central authority gave this new, armed elite the ability to take the law into their own hands and influence the distribution of local resources, including international relief.[11] The weakness of local communities due to social and economic disruption made them vulnerable to undue influence as well.

This trend was further cemented when the *mujahideen* groups established *sharia*-based court systems within the areas that they controlled. Legal cases such as the trials of POWs, spies, and other crimes such as murder and adultery were adjudicated under the

[11] See Dyan Mazurana, Neamat Nojumi, Elizabeth Stites, Human Security of Rural Afghans 2002-2003, Feinstein International Famine Center, Tufts University, June 2004.

mujahideen interpretation of the *sharia*. Clergy trained in theology, rather than *sharia,* were usually the judges. An influx of young clerics trained in Pakistan (of the sort that would later become Taliban) solidified their brand of *sharia* jurisprudence, crowding out both state and customary law as legal sources. In many Mujahideen controlled areas, the courts banned music, the presence of women at public activities, pigeon flying, gambling, and the consumption of narcotics. Some of these courts imposed capital punishment for collaboration with the communist regime. The better run of these courts helped maintain order and the rule of law, sometimes limiting the atrocities of *mujahideen* commanders against the local population.

The social disruptions of the war also produced the rise of new representative institutions such as village *shuras*, assemblies that were designed to represent local communities. While these had been common in Pashtun areas as *jirgas*, such collective assemblies were new to some other parts of the country. At the same time, the power and influence of the Islamic clergy (*ulema*) rose sharply compared to pre-war Afghanistan, particularly when it came to administering religious law (*sharia*) in the absence of central authority. The influence of the clergy peaked with the Taliban, the only clerical movement ever to seize power in Afghanistan.

During the Soviet war the central government lost direct control of most rural regions but maintained its power in the cities. Because rural Afghanistan had such a strong tradition of customary law and enforcement based on self-help, the withdrawal of government institutions such as the police did not lead to anarchy. People were already used to solving their problems without resorting to the government. Instead it increased the power of local assemblies (*jirgas* and *shuras*) and the leaders who represented them (*maliks* and *arbabs*). Military commanders also began to play an important role in community life. As leaders of resistance groups this emerging class of younger men from less prestigious social backgrounds filled the vacuum left by the departure of the old landowning khans.

The Current Situation

Since the collapse of the Taliban, traditional practices are again gaining momentum. Some local leaders are struggling to gain control of the local *jirga*s away from commanders and reinstating them based on the traditional structure. The new Afghan constitution calls for the formation of elected local governance councils at the provincial, district, and village level.[12] However, it remains unclear what authority – executive, judicial, or legislative – any of these councils might enjoy.

Some tribal communities are moving back toward reestablishing their tribal organizations and the rule of customary law. However, due to a shortage of local resources resulting from years of militant warfare, drought, and the influence of armed political groups, the pace of remobilization of tribal organizations, especially the institution of *jirga*, has been slow. In other areas, remaining local institutions are under the direct control of dominant

[12] Article 140 of the Constitution of the Islamic Republic of Afghanistan, Kabul, Afghanistan, December 2004.

political groups and armed militia commanders. In most cases, these commanders are the last word in decision-making. Completion of major contracts or resolution of important disputes requires the endorsement of these powerful individuals.

Abdul Manan, a teacher in Gardez, offers one reason for the revitalization of the traditional institutions (i.e. *jirga*): the local communities do not want to lose more men in factional fighting, therefore, the community leaders are supporting the institution of *jirga* as a way to bring the local commanders under the scrutiny of the *jirga* and to reduce factional fighting and violence.

Types of cases appearing before non-state legal institutions

Property Disputes

Conflicts over land, in the form of residential, business, farm, and grazing property, make up the largest category of disputes in post-Taliban Afghanistan. Large scale migration, destruction of property, and abuse of power have created complicated disputes with regard to land ownership, such as sale of confiscated properties – often through several owners, culminating in the return of the original title holder; construction on property that encroaches on a neighbor's property rights; leased properties that were passed on mistakenly as inheritances; unrecorded property divisions between family members; and illegally confiscated land – often distributed as patronage along with permits of ownership.

According to recent reports, the processes of the non-state legal system outside of the government court system handle the majority of property disputes.[13] These studies indicate that *jirgas* and *shuras* can be effective in finding a remedy property disputes.

Family Disputes

Internal family disputes are highly sensitive in Afghanistan's insular culture, and families prefer to resolve them at the local level, often within their own extended network. For many Afghans, resolving disputes which involve women through government courts and police controlled by strangers contradicts customary practices of *purdah* (separation of sexes). Thus family issues, including sibling and marital disputes, are treated as private matters and people avoid bringing them to public forums. This results in almost complete disenfranchisement of women from the justice system in many parts of the country. Even when appearing before the courts, the generally conservative judiciary acts to repress women's rights, for example jailing women who run away from forced marriages without family permission. At the same time, women have extremely limited access even to customary forms of dispute resolution, leaving them powerless and often without recourse. A potent symbol of this powerlessness has emerged in western Afghanistan,

[13] See NRC Report. AND Dyan Mazurana, Neamat Nojumi, Elizabeth Stites, Human Security of Rural Afghans 2002-2003, Feinstein International Famine Center, Tufts University, June 2004.

where many women have set themselves on fire in recent years as the only means at their disposal to get out of otherwise unbearable domestic situations.[14]

Crime

It is the goal of the community not only to resolve criminal disputes and reconcile the parties, but also to avoid state intervention, with its differing norms concerning guilt and punishment Serious crimes, such as murder, are in many ways what drove the creation and continuation of the informal system, which seeks to make victims whole and reconcile parties to maintain community order. Because Afghan custom dictates that the family of victims of violence are honor bound to retaliate, or reconcile, revenge killing is a source of conflict between community members. Consequences of unresolved blood feuds have become magnified in the current environment of instability. If a family member is killed due to political affiliations, it may provoke a wider response between armed groups. Due to the need for community reconciliation, and the shortcomings of formal justice system the majority of blood feuds are handled by local *jirgas* and *shuras*.[15]

Reconciliation

Courts do not concern themselves with reconciliation, which means that even where the state system does intervene, non-state practices are needed in addition to reconcile parties and prevent further conflict. A person convicted in a state court and sentenced to prison remains a target for retribution even after serving time. The non-state legal system reaches reconciliation as a result of complex processes of public condemnation, forgiveness, and acceptance. These complex processes generate public recognition of reward and punishment that supports the parties to engage in healing and transformation of identity from victim and perpetrator to normal members of the community. It should be noted, however, that these traditional approaches do not easily extend to inter-community conflicts between armed groups. Nor have they proven able to deal with larger scale atrocities related to the armed conflict of the past 25 years.

Effectiveness and legitimacy of informal mechanisms

Customary conflict resolution is rooted in the respect that parties have for the authority and opinion of the community. Only if the disputants see themselves as part of a common community can this form of dispute resolution be effective and its rulings binding. Because communities must first get the disputants to agree voluntarily to mediation or arbitration, the legitimacy of the outcome is determined at the outset when the parties agree to take part and be bound by the results of the process. And in taking on such disputes, the community has its own goal of not merely coming to a solution for the

[14] See Human Rights Watch, Humanity Denied: Systematic Violations of Women's Rights in Afghanistan, Vol. 13, No. 5, October 2001, New York: Human Rights Watch.

[15] Ibid.

issues at hand but of reconciling the parties and ending divisions that may spawn further disputes. The closer the community bonds the greater legitimacy of the process. While enhancing effectiveness and legitimacy, this requirement for social cohesion also limits the viability of customary mechanisms in the current environment. The enormous disruptions caused by the last thirty years of turmoil and displacement have strained social bonds in many areas. Communities are far more susceptible to influence by "gunlords" than in earlier times.

Because community members share common values and attitudes, the informal system often provides more certainty than the formal court system because all the players understand the logic of the system and because it focuses more on substance than procedure. The informal system is also favored because parties choose the judges or mediators by agreement. While sometimes accused of favoritism or accepting bribes, the public nature of the customary process puts mediators under more scrutiny than in the formal system.

The informal system has several key failings in its ability to deliver justice. Women are generally excluded from informal processes, having to rely on male family members to represent them, and are subject to cultural norms that impose a deep inequality on women. Some practices, such as forced marriage as compensation, are gross human rights violations and cannot be tolerated under Afghan law or Islam. There is also unfairness in the informal system in the inability of a weak party to demand settlement from a much stronger one.

Another weakness in the customary law system is the power it gives to individuals to seek their own justice. As long as the community respects the right of victims' families to seek redress by force, and particularly through blood feud or "honor killings" of women, it indirectly sanctions violence because such violence is seen as a legitimate recourse as long as the targets are appropriate. The community cannot punish individuals who assert their right to revenge or defense of honor even if this causes problems for the community. However, after decades of conflict and the mass importation of weapons, leaving the decision to take revenge or accept a settlement solely to the individuals involved can exact a huge price. A "Kalashnikov culture" has emerged in which the taking of life has become all too easy and community sanctions may be too weak to prevent new cycles of violence.

Where customary law fails entirely is where it was never meant to go: solving disputes among people who do not see themselves as part of a common community. These disputes are political in nature and most often solved to the benefit of the more powerful party. In the absence of strong common bonds, disputants have less incentive to accept an unfavorable outcome or to consider a ruling as binding. Under such conditions disputes become more political in nature and are resolved to the advantage of the stronger party. The history of regime changes and shifting power balances in Afghanistan over the past 25 years has exacerbated this process by moving power away from communities and into the hands of armed factions. Customary law has little impact on powerful militia commanders who can afford to ignore community sentiments and act as they wish. Those

with guns do not need community consensus to maintain power (at least in the short run) and they short circuit the informal system to their own advantage.

III. The Formal Justice System in Afghanistan

Evolution of the Justice System

In the 1880's Amir Abdur Rahman embarked on a campaign to form Afghanistan into a unified state, with a national army, defined borders, and a centralized system of government. Creating a coherent, defined legal system was a critical element of this state-building process, as Abdur Rahman "sought to monopolize the enforcing power to establish his rational and legal authority over the society which he was trying to organize under a centralized state structure."[16]

Abdur Rahman adopted a code of procedure and ethics in 1885, the *Asas al-quzat* (Fundamentals for Judges). This code established the *Hanifi* school of Islamic jurisprudence (*sharia)* as the basis for judicial decision-making. By establishing *sharia* as the law of the land, and his rule as the arbiter and implementer of the sacred law in accordance with Muslim political tradition, Abdur Rahman cloaked his temporal authority and administration in divine right.[17] The Amir simultaneously empowered the clergy by making sharia the law of the land, and subordinated them to his executive authority. He further reigned in the judges (*qazi*) by requiring that all judges be vetted and appointed, thereby serving at the will of the Amir.

The second phase of evolution took place during the first and second constitutional periods (1919 – 1964). After securing independence for Afghanistan from British India, the new King, Amanullah, initiated an extensive reform program to modernize Afghanistan, drawing heavily from Ataturk's modernization of Turkey. In 1923, Afghanistan's first constitution was issued. The constitution was known as the *nizamnama-asasi*, or foundation for a code of regulations. This constitution opened the way for codification of laws, in areas covered by the *sharia* as well as those pertaining to the order and function of the state that were not directly derived from the *sharia.* In 1924, the state adopted its first ever penal code, based on Hanifi jurisprudence. Several civil codes were also adopted, largely derived from Egyptian and Turkish law, attempting to codify Hanifi jurisprudence where possible. This codification process significantly limited the discretion of judges to interpret the *sharia* or to apply custom. The Law of Basic Organization, passed in 1923, specifically required the *qazis* to refer to statutory provisions in making their decisions.[18] These measures privileged state-defined law, and the state-approved justice system, above the traditional application of *sharia* and custom by the religious establishment and tribal elders.

[16] Amin Tarzi, The Judicial State: Evolution and Centralization of the Courts in Afghanistan, 1883-1896, Doctoral Thesis, New York University, 2003, p. 18
[17] Tarzi, The Judicial State, p. 142.
[18] Kamali, Law in Afghanistan, p. 37.

In 1923 a system of Reconciliation Courts was created, in order to promote agreed settlements between parties in civil and commercial disputes, rather than resorting to litigation. This structure replicated, in certain respects, the *jirga* model. The Reconciliation courts were effectively attempting to turn the traditional dispute resolution process – a circle of elders convening on an ad hoc basis to resolve a dispute through socially coercive mediation – into an official state process.

During this relative period of tranquility the structures of the state established in the previous decades began to grow and take root. By 1936, there were 106 primary courts, 19 provincial appeals courts, and a supreme court in Kabul.[19] The 1964 constitution made further significant changes to the judicial system: the courts were made independent, and the legal and judicial systems were unified, marrying the sharia courts and state courts into one centralized system. With these changes the need for legal professionals increased, and by the late 1960s, the Afghan legal community consisted of about 1200 people, of which 715 were judges, 170 prosecutors, and 100 lawyers.[20]

At present, the logic of the general court system is as follows: the bulk of cases are basic civil and criminal law cases, in which all judges are trained and which occur in all districts of the country. Therefore, in each district there is to be a District Primary Court[21] that has a criminal bench, a civil bench, and a document registration office for legal documents pertaining to birth, marriage, divorce, and property. The geographic jurisdiction of the court is same as the administrative district of the state. Appeals can be made to the provincial courts on questions of fact and law, and appeals on questions of law can be taken to the Supreme Court in Kabul.

The Current State of the Law

Applicable law in Afghanistan is difficult to determine due to the numerous regime changes since 1964. A new constitution in 1964 was superseded by new constitutions or basic laws in 1977 (Daoud's Republic), 1980, 1987, 1990 (PDPA) 1992 (proposed Mujahideen constitution), and the new constitution approved in 2004. Each of these regimes passed laws. Most of Afghanistan's laws have been adopted through executive fiat, and not through legislative processes.

In 2001, the Taliban was overthrown and a transitional government sworn-in under the Bonn Agreement. The Bonn Agreement also recognized all existing law and regulations, "to the extent that they are not inconsistent with this agreement or with international legal obligations," or the remaining provisions of the 1964 constitution. A 2002 Presidential decree reiterated this requirement, and gave the Ministry of Justice responsibility for determining which laws were valid – a process that is far from complete.[22] In addition,

[19] Gregorian, 372.
[20] Kamali, 207.
[21] The term "primary" is used throughout to indicate a court of first instance, in other words the first court to hear a claim.
[22] Decree No. 66. Decree on the Abolishing of all decrees and legal documents enacted before 22 December 2001.

the Bonn Agreement gave the interim head of State, President Karzai, the power to issue decrees until such time as a legitimate legislative body could be put in place. In that period, several hundred decrees were issued – some of which were quite significant and a departure from prior legal practice, such as an overhaul of the criminal procedure code, the press law, and counter-narcotics law passed just days before the new parliament was sworn in.

In addition to the lack of clarity about the controlling law, many judges do not have access to legal texts and/or simply apply their version of *sharia* law to many disputes. Under Afghan law, the application of *sharia* has been allowed only in a very narrow segment of cases when no Afghan law exists. The current application of *sharia* however extends to many areas covered by Afghan law. Uncertainty about what constitutes applicable law may explain part of this, but also seems to stem from training and orientation rather than from confusion about applicable law. In effect, the judiciary does not have access to laws at present due to a lack of education and materials. At the same time, Afghan citizens know very little about the prevailing law, an important reason why non-state forums that rely on well-established principles are popular.

Formal Institutions

The national-level institutions of justice in Afghanistan include the Supreme Court, the Ministry of Justice, the Attorney General's office, and the Ministry of the Interior. The Supreme Court, in addition to serving as the highest court of the land, also manages the entire court system at the provincial and district levels. The Ministry of Justice has four primary functions: to serve as the government's lawyer; to manage the prison system; to provide legal assistance to government and citizens in the provinces; and to draft laws for the government. The Attorney General's office is an independent executive entity responsible for investigation and prosecution of crimes. The Ministry of the Interior is responsible for the police.

There is clearly a severe deficit of human resources in the justice sector, but it is difficult to say how many competent legal professionals – including support staff – are needed for Afghanistan's justice system to function at the most basic level. There is limited information on the current caseload, or the likely caseload once the system is functioning. The best available guide to the needs of the system is the administrative structure of the country and the court systems. In order to achieve the goal of a district primary courthouse in every district, some 330 to 360 functioning court houses are required, each with a minimum of two to three judges and prosecutors each. Similarly, there would be 34 provincial appeals courts, each likely requiring at least a dozen judges and several prosecutors. The Supreme Court has approximately 1350 official "judge" positions in its staffing scheme.[23] Of these, approximately 50 percent are occupied, and of that 50 percent, the UN estimates that perhaps one third are educated to a university standard.[24] The situation of the prosecutors is similar. According to the office of the Prosecutor General, 2212 legal professionals are needed nationwide, among a total of 4934 staff.

[23] List of Supreme Court Judges for the year 1381 (2002-03), Supreme Court of Afghanistan, 2003.
[24] Criteria and Actions for Strengthening the Justice System, UNAMA, February 2004.

Effectiveness and legitimacy of the formal system

Several factors combine to limit the legitimacy of the formal justice system at present. Overall, justice officials including police (as opposed to militia members), prosecutors, and judges have very little actual authority to make or implement their decisions. These offices do not apply the rule of law, and they are seen as instruments of unaccountable power-holders.

The current situation must also be viewed in the context of Afghan history. Afghan society has long been resistant to the intrusion of the state into local and personal affairs, and the formal court system has always struggled for legitimacy. The despotism of the last 30 years has destroyed the legitimacy of the state, making Afghans distrustful of all central government institutions. The collapse of the state led to rule by local warlords. In some areas the ruling faction paid attention to welfare and justice, in others not. Afghan officialdom also has a long history of corruption, which has worsened in the current unstable context. It is understood that involvement in the formal court system means payment for officials throughout the process. The threat of formal litigation is often used as a means to convince disputants to settle their disputes in the informal setting.

It will take years to overcome these significant hurdles. Limited resources, power struggles, and entrenched networks are already making reform a slow and difficult process. The path forward for the justice sector, and for the Afghan state in general, is to slowly establish pockets of effective, fair, and accountable government. First some degree of capacity and legitimacy must be restored in significant population centers. The urban areas are more likely to utilize and respect the formal system, and the impact on the population is greater. The provincial centers can also serve as a check on the districts as cases are appealed, or important issues are brought directly to the center. Selecting and training officials to be at the vanguard of this process is also critical. There are enough competent officials in the bureaucracy to reinvigorate the system, if concentrated. They must be removed from local control and given the resources to do their work freely and effectively, with sufficient oversight.

IV. Potential for Co-existence of the Formal and Informal Systems

The overarching conclusion of this report is that the informal system is critical to dispute resolution in Afghanistan, and that a positive relationship between the state and non-state justice systems could substantially benefit the justice sector and Afghan citizens. The formal system of law in Afghanistan has never been adequate to the needs of the country. The courts, judges and prosecutors have always relied on the informal system to resolve many disputes. During the past 25 years of war, the formal system became even less relevant as the power of the central government collapsed.

Therefore, a modus operandi must be worked out such that governmental and non-governmental programs can be implemented to support access to justice to citizens within and between both systems. State capacity should be directed at maximizing the benefits

of a widespread informal system with deep roots in society and minimizing its harms – rather than trying to supplant it altogether.

The Clash of Two Goods

There is an inherent tension between the goals of state-building according to international norms on one hand, and respect for local customs and practices combined with practical requirements of sustainable development. Afghanistan is a signatory of almost all international human rights conventions, and has a constitution that demands central government control over legal affairs. Furthermore, the international community is bound by "universal" norms that require application regardless of context. Thus its agents are responsive to criticism that they should be instituting international norms and practices. This tension emerges especially strongly around the rights of women. Between 1920 and 1992 Afghanistan's national government under various regimes attempted to improve the status of women through changes in the law and their own policies. National law codes attempted both to reform *sharia* law practices and change or abolish customary ones to improve treatment of women. However, opposition to these reforms came from conservative religious scholars who rejected the state's right to interpret religious law and from local communities hostile to any form of outside interference. Governments that demanded rapid universal changes found that this undermined their political legitimacy because they were accused of abandoning true Afghan values.

At the same time, respect for cultural values and practices is a bedrock principle of successful development and reform. To advocate dismantling a deeply-embedded system of social cohesion that has allowed communities to cope with conflict in the absence of governmental institutions would be a highly dangerous bid at social engineering, and unlikely to succeed. Indeed, the trend in development has been towards decentralization in general, and towards alternatives to courts in the justice sector. Such alternatives are used to increase access to justice for the poor and dispossessed, and to increase the stability of outcomes.

In reality, the formal and informal already co-exist, and will do so for many years to come. The question is whether they will co-exist in a cooperative or antagonistic environment. These systems already overlap in reality. Disputants often have more than one option available to them and they will shop for a forum depending on the type of problem they have, as one system may be more sympathetic to their claims than another. The systems are also inter-dependent to some extent. Judges, prosecutors, and provincial and district governors routinely refer cases to the informal sector, and many judges report recording informal sector decisions brought by the parties to the court. Local officials have been known to jail disputants until they agree to have their cases settled by customary means and actors in the informal system use the threat of turning the problem over to the state courts as a way to gain cooperation. In theory the formal system trumps the informal, but in rural Afghanistan the reverse is more often the case.

Mutual Recognition

Recognition of some non-state practices could offer benefits to both in the short and long terms, and could enhance efforts to reestablish the rule of law. At present, while the two systems show some interaction at the fringes, they do not recognize the legitimacy of the other. Mutual recognition is the first step needed to create cooperation.

Technically, the formal system recognizes both *sharia* and customary law in a very limited way. The first two articles of the Afghan Civil Code establish a hierarchy of legal sources: Afghan law, then Hanafi *sharia*, then general custom, so long as it is not contrary to principles of law, justice, and Islam.[25] In reality, this virtually precludes any reference to custom. Since the formal system does not, in effect, recognize customary practices, it is not in a position to oversee them. As a result, customary law seeks to shield disputes and their outcome from state authorities as a way to insulate their communities from state control or exploitation.

The potential for co-existence, therefore, would seem to lie in state recognition of the value of informal practices coupled with pro-active measures by the state to provide access to justice and to enforce basic rights. Afghan law will have to be supplemented to reflect respect for informal mechanisms.

Areas of Potential Cooperation

The government should define those areas where it believes the non-state system can be most positive. Property disputes and criminal cases are two critical areas where the systems are already overlapping, and where utilization of the comparative advantages of the systems in tandem will yield better results than either acting alone. Due to upheaval and lack of precise records, property disputes require a degree of community involvement to resolve. At the same time, creating a strong legal basis for recordation, sorting through often complex evidentiary claims, and combating intimidation or confiscation are roles best played by the formal system. A legal aid project assisting returning refugees and IDPs to address legal claims in both forums has shown that when these approaches are integrated, they may be most effective at resolving such disputes for the long term.

Cooperating in the criminal law sphere is sensitive, but equally critical for long-term dispute resolution. In the criminal sphere, the government has a right and a duty to deliver justice. However, crime disrupts community relations and, therefore, has the potential for far greater impact than that resulting from the criminal act itself. While communities must recognize the monopoly of the state (once competent) to punish criminals, especially for violent crime, the state must recognize the need of communities to resolve tensions in order to prevent further violence. Thus, the courts should encourage community participation in sentencing and convening of separate community forums for forgiveness and reparation. The government may wish to identify two types of crimes: those where prosecution is essential, and some recourse to community mechanisms may also be an important part of the process (e.g. murder); and those where prosecution may actually be avoided in favor of a community-based process approved by the court/prosecution (e.g. petty theft). In this way, the government remains responsible for

[25] Article 1 and 2 of the Afghan Civil Codes, (Pashtu and Dari version) Kabul, Afghanistan, 2004.

the *haq ul-Allah* (rights of God) while the non-state mechanisms contribute to the resolution of the *haq ul-Abd* (rights of the person).

Similarly, the government should define those areas where the influence of the non-state system is most negative, and work to counter them. The protection of women's rights to voluntary marriage, inheritance, and freedom from domestic violence must be a priority for the government in their dealings with customary practices and institutions. A public education campaign, coupled with prosecution of known violations, would send the signal that community-based dispute resolution per se is not bad – but practices that violate basic rights will not be tolerated. Because women's access is limited both the formal and the informal system, the government should make women's access to the formal system a priority.

Integrating the legal systems

Currently, as a result of the devolution of power and their closer connections with the customary law tradition, it appears that some members of the judiciary are more open to the recognition of customary law by the court system. Some judges realize that non-state mechanisms can reduce pressure on the system, but many in the legal profession are concerned that any recognition of customary practices might reduce the status and prestige of the formal system and its agents. Successive Afghan governments have all opposed the formal recognition of customary law institutions. In part this was because the state wished to assert its exclusive right to make laws and execute them. Tribal *jirgas* and other local dispute resolution mechanisms were seen as obstacles to achieving this goal. Both the communists and the Taliban wished to implement universal law codes (though obviously of very different types).

Formalizing an informal system, however, presents a number of obstacles. First, customary law is not a single set of rules that can be collected and codified for simple application. Rather it encompasses sets of principles and rules that are tailored to specific contexts that are used to seek reconciliation rather than adjudication. It is this very flexibility and sensitivity to local social relations that make it so effective. To the extent that such systems are codified and used in adjudication by outsiders, they simply become an alternate form of law. For example, British colonial policies in Africa, where they often attempted to determine land rights by codifying customary practices, had the unintended consequence of freezing the system and producing a new arbitrary set of rules that were now enforced by the government rather than the local people.[26] Even if such an approach were desirable, it is well beyond the capacity of the government to undertake such a project.

Second, local *jirgas* or *shuras* work because they are voluntary. Currently such bodies serve either as either mediators or arbitrators that must first get the cooperation of the parties to begin their work but ultimately lack any coercive power to enforce their decisions. It is this very lack of coercive power that pushes the players to come to an acceptable compromise agreement instead of standing on principle.

[26] Moore 1986.

Finally, customary law in Afghanistan is not restricted to civil disputes but also handles criminal cases such as murder, theft, and assault. It is not clear that any state would be willing to cede power to enforce criminal codes to customary institutions publicly, although in practice many criminal complaints are resolved in this manner.

Practical Approaches

There are essentially two ways to approach the question of greater integration of the two systems: formally or informally. A formal approach would establish new state institutions to overtake, incorporate, or manage the non-state mechanisms. An informal approach would attempt, through programmatic means, to build a link between the two systems. Strictly formal approaches are likely to fail, as cooption of the informal by the formal would be strongly resisted. Formalizing non-state institutions would make them state institutions, and destroy their essential character. Also, the state is unlikely to develop the capacity to so fully occupy the field anytime soon. The state must expand its credibility as a provider of public goods by providing useful services, rather than by imposing them.

The key to cooperation would be to establish a mutually beneficial link between the two systems, without threatening the integrity of either. The goal of any program should be to harness the positive aspects of each system and undermine the negative. The key variables to consider in establishing a link between these systems are: the definition and function of the link; the definition and function of the informal dispute resolution mechanism itself; and the types of claims that can be heard before an informal forum; and the formal mechanisms of review.

The Link Between the Systems

How might the formal court system relate to informal mechanisms? There are three issues to consider when thinking about such a relationship: 1) referral of disputes between the entities; 2) review and recordation of informal decisions by the courts; and 3) enforcement of informal decisions.

A formal relationship may allow or require that certain types of disputes be referred by one entity to another. If parties come directly to the courts, the court may in certain cases inform parties that they are eligible to take part in an informal process. Taking the dispute to an informal mechanism, however, should never be mandatory – i.e. parties will always have the option to remain in the court system. The agreement of both parties is required to move the dispute to an informal mechanism. Many government primary courts are already engaging in these practices. If parties have come before an informal mechanism at the suggestion of the court, that body should be responsible for informing the Court (or relevant government office) of the dispute and its resolution. Even if just for information purposes, this knowledge will be critical to increasing an understanding of the informal system and any programs in the field. Similarly, when disputes come before an informal mechanism, that body may be encouraged to inform the parties of their legal rights in the

formal court system. An outreach campaign on legal rights targeted at informal justice providers could facilitate this process.

Courts may be asked to review and record settlements from informal processes. Whether the court should be able or required to review informal decisions may depend on the type of case, the legal issues, or the amount of money involved, etc. Some review may be required, while in most cases it would likely be up to the parties to seek review from a court. If an informal decision is brought before the court, on what basis does the court review the decision? Two key issues that courts may be asked to review are: first the consent of the parties to the case, and; second the legality of the decision/order (in terms of the rights of parties). In any case, the standard of review would likely be whether the decisions violate basic rights or principles within the law – rather than whether the informal mechanism followed Afghan state law (which is unlikely). Once review was complete, the court could officially record the settlement, making it legally binding on the parties. Such recordation can be enormously helpful in avoiding future disputes by providing official support for land and property claims.

Enforcement of informal decisions presents some challenges. Enforcement actions will occur when the terms of an agreement have been violated, and thus the "voluntary" nature of the settlement has broken down. Non-state actors cannot be allowed to employ coercive force (i.e. seizure of property). However, these mechanisms do have a considerable means of social coercion, which may be more effective than the courts. If parties need an informal decision to be enforced, they can either return to the informal sector or avail themselves of the courts. If the aggrieved party goes to the court, the court would only be able to enforce the decision if the parties had previously sought the approval of the court for the settlement.

The Informal Mechanism

Should there be limits on how informal mechanisms can be composed and operate? Due to the diversity of practice in Afghanistan, it may not be prudent or productive to define the entity too restrictively, as this would change, rather than harness, the existing system.

The composition of informal mechanism is critical to the functioning and outcome of the process. At present, selection of the members relies on a combination of local authority, tradition, skill, and the parties to the dispute. One on one hand, the membership may reinforce undesirable power dynamics in a community by ensuring that only the powerful are involved. On the other hand, upholding power-relations and tradition helps to confer legitimacy on the process. Attempts by the government to impose selection rules for jirgas would likely backfire.

The government could play more of a liaison role between citizens, and the formal and informal systems. These representatives could act as facilitators, monitoring the process and exchanging information among the formal and informal systems and the parties, and even as advocates where appropriate. This role could also be taken on by an implementing NGO.

As a means to facilitate a relationship, the recordation of informal decisions may be encouraged, based on its findings and on terms of the agreement of the parties. This written decision might include a number of things: the facts of the case, the rationale for the decision, and the final settlement or order. Because these mechanisms are informal, and the members often without legal training, it might not make sense to require a strict formulation of the bases for decision. However, the decisions should not be contrary to certain rights and legal principles. A manual laying out basic rights and principles could be distributed by the government and training undertaken to minimize abuses and increase knowledge among citizens.

Types of Claims Heard by Informal Mechanisms

Determining what types of claims can be heard in the informal sphere is a critical and possibly controversial aspect of this process. The treatment of civil cases and criminal cases within this framework must be considered separately.

Civil Claims

All civil cases are brought voluntarily by a claimant before the court. In a suit between private individuals or legal entities (i.e. corporations) there is no state involvement in the initiation of a case. The state's powers are limited to the adjudication of legal disputes, and where necessary, to the enforcement of legal decisions. The plaintiff can withdraw a civil suit at any time. Indeed, there is no barrier, legal or otherwise, to the concerned parties reaching an agreement about the dispute without ever filing a claim in the first place. Therefore, it is likely that all civil suits would be eligible for alternative means of dispute resolution. However, there should be no mandatory requirement for parties to resort to informal mechanisms. The government may wish to promote the establishment of mediation centers, especially in urban environments, that resemble government-sanctioned "alternative dispute resolution" methods now practiced around the world.

Criminal Cases

In criminal cases, it is the responsibility of the state to prosecute crimes. The decision to prosecute lies with the office of the prosecutor and not with the victim or the victim's family. The state is responsible to bring the case, to adjudicate the case, and to enforce the punishment in all circumstances. Individuals or non-governmental mechanisms cannot enforce punishment.

However, informal mechanisms have a critical role in criminal matters. A key aspect of criminal cases in Afghan society is reconciling the victims and perpetrators, and their families or clans, and providing compensation. Achieving social harmony is at the root of customary dispute resolution, and the failure to do so can cause small conflicts to grow large – often instigating additional violence. Thus the government may work with informal mechanisms in criminal cases to ensure that reconciliation and compensation also accompany any punishment.

There is also a distinction to be made between types of crimes. While the state may insist on its role in punishing violent crime or murder, it may be willing to allow communities to handle to resolution of smaller crimes through non-state means, which aim to compensate victims and reconcile the parties, rather than punishing a perpetrator in a fashion that harms his family and does little to satisfy the victims.

A Case of Integration: Information and Legal Assistance Centers

A program launched by the Norwegian Refugee Council (NRC) has followed a model somewhat similar to that outlined here. The program attempts to use the processes of *jirga* as a means of conflict resolution for returning refugees and internally displaced persons. The NRC has established Information and Legal Assistance Centers (ILACs) in Kabul and another three provinces.[27] ILACs are run by Afghan attorneys and judges with legal education and training, many of who have served in the government judiciary in the past. NRC has a system of filing, evaluation, and investigation of cases and NRC judges and attorneys facilitate the litigants in selecting their representatives to play a third party mediating role. The NRC attorneys and judges meet with the local respected individuals who are willing to participate in the *jirga* processes to resolve a dispute. They explain the nature of the case, relevant information, and monitor participation in the meetings as facilitators without any vote. During settlement, they provide information and advise parties so as to avoid violations of state law. These facilitators record, and file minutes of the meetings, and produce a document to be kept by the parties once a solution is agreed. NRC reports have handled hundreds of disputes, predominantly civil cases, out of which a significant percent have reached out-of-court solutions. NRC reports that the role of informed judges and attorneys has created more durable remedies.

In light of this experience, pilot projects should be designed and launched in several districts of Afghanistan to test models and determine how such approaches might function in practice. Given the fluid nature of the formal and informal systems at present, and the deep sensitivities involved, pilot projects – as opposed to a significant new national policy – are an essential approach to addressing this issue.

[27] See Legal Protection of IDPs in Afghanistan, NRC
http://www.db.idpproject.org/Sites/idpSurvey.nsf/wCountries/Afghanistan