

Briefing Paper

**Conference on the Relationship between
State and Non-State Justice Systems in Afghanistan**

**December 10-14 2006
Kabul, Afghanistan**

Briefing Paper
Conference on the Relationship between
State and Non-State Justice Systems in Afghanistan

In Afghanistan today, the formal justice system, which is struggling to stand on its feet after three decades of war and turmoil, co-exists with a diverse and robust informal system of dispute resolution. The new government in Kabul, with international assistance, is 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 and new laws are being put in place; courthouses are being built or refurbished; judges and prosecutors are being trained; and teaching curriculums revised. However, after 25 years of war and erosion of state institutions, non-state dispute resolution mechanisms remain dominant in the countryside and are utilized by many in urban centers.

Most Afghans do not have access to state-run justice institutions. Those who do have access rarely choose to use them. Instead, many Afghans rely on a mixture of tradition, tribal relations, Islamic law, and current power relations to resolve disputes. But the outcomes produced by the informal system are far from ideal. At their best, they rely on social cohesion and conceptions of fairness to solve problems and maintain community harmony. Even then, their decisions are largely unenforceable, seldom recorded, and reinforce problematic social conventions such as exclusion of women. At their worst, some traditional forums perpetuate gross human rights abuses such as forced marriage and extrajudicial killing. Despite these short-comings, community-based forums remain both more available, and in many cases more legitimate than what the state system has to offer.

A Way Forward

The Afghan government is responsible for protecting the rights of its people and for providing access to effective and accountable justice institutions. At the same time the government cannot prevent Afghans from resolving disputes at the community level. Indeed, rather than alienate community leaders, the government must strive to boost its legitimacy among them. *By creating a positive relationship between the formal and informal systems, the government can harness the positive power of shuras and jirgas while also ensuring that the worst abuses are prevented.*

According to the "Justice for All" strategy, the Government of Afghanistan, "sees positive elements in traditional mechanisms, including their role in community cohesion and locally accessible dispute resolution" while also recognizing serious concerns about their impact on the authority of the state system and human rights. The Government's strategy calls for a program to assess the relationship between the formal and informal sectors, to conduct dialogue at the local and national level, and to develop policies that will create a more cohesive, competent, and accountable future.

The Afghan Ministry of Justice, together with its partners the United States Institute of Peace (USIP) and the Fletcher School at Tufts University, have been pursuing this goal through a multi-year project of research and consultation. First, USIP commissioned a study of traditional/customary practices in Afghanistan, their evolution and relation to the formal system of justice. Second, in late 2005 and early 2006, with the cooperation of the

Briefing Paper
Conference on the Relationship between
State and Non-State Justice Systems in Afghanistan

Ministry of Justice, the Supreme Court, the Attorney General's Office, the Ministry of the Interior, the Afghan Independent Human Rights Commission, and UNAMA, USIP conducted a series of consultations in four different regions of Afghanistan among formal and informal justice system actors from over 20 provinces to gauge the status of each, their interactions and attitudes towards each other, and to begin a process of dialogue. Several of the key findings of this research are listed below.

The Conference

The next phase of this work is a workshop and conference organized by the Ministry of Justice, USIP, and AREU, taking place in Kabul from 10-14 December 2006. This conference will bring the results of this research and dialogue into the national level policy-making process. *The goal of the conference is to bring together actors from the state, the informal system, civil society, and the aid community to help devise policy approaches and practical solutions pertaining to the interaction between the formal and informal sectors.*

This dialogue is not without risks. From the perspective of the government, informal justice mechanisms pose a threat to state authority. In many places, criminal disputes are handled in jirgas instead of courts. While this may have some value in terms of reconciling the parties and providing compensation, it also undermines the duty of the state to provide justice, and to enforce the *Haq ul'Allah*, or rights of God for which the state is responsible. There is a fear that recognizing informal institutions will provide legitimacy to those practices that violate basic rights, such as *baad* (forced marriage of daughters for purposes of compensation and reconciliation). There is also concern that focus on the informal system will draw away already limited resources to the formal system.

From the perspective of the non-state actors, they see the imposition of the justice system as undue interference in affairs best left to the community. The state has been a corrupt and predatory entity for many years – variously attempting to impose Communism or Islamic extremism – and rarely working for the good of the people. Jirgas and shuras, on the other hand, represent time-honored traditions that respect local values, and that maintained community harmony and order while all else was collapsing. They also ensure that the *Haq ul'Abd* (rights of the person, e.g. compensation) are enforced. Given the current weakness of the government justice institutions, and their lack of respect for the informal system, incentives for cooperation are limited.

At present, however, there are no good alternatives to cooperation. There is too great a need for effective conflict resolution mechanisms in the current fragile state of stability to reject the positive elements of the non-state system. Indeed, a chief finding of the regional consultations is that, at the local level, the formal system is very reliant on community-based mechanisms, and regularly defer to them. This is hardly surprising – around the world judicial systems have embraced approaches that allow parties to voluntarily take disputes out of the formal system and resolve them through mediation.

Briefing Paper
Conference on the Relationship between
State and Non-State Justice Systems in Afghanistan

At the same time, the informal system is very limited in its ability to address issues broader than the community, or to address systemic violence. A strong government that can control violence, punish injustice, and mediate across communities is an absolute necessity for stability. From the human rights perspective, it is constructive engagement with community leaders over time that will ultimately eliminate abusive practices and open the way for broader access to community forums and government institutions.

Research Findings

The following issues represent several key findings from the research and dialogue conducted since the inception of the project.

1. The state and non-state justice systems in Afghanistan need not be in conflict.

The state justice system is essential for justice, stability, the economy, and the legitimacy of the government. However, at present, the formal system does not have the capacity to meet all the justice needs of the Afghan people. At the same time, community-based dispute resolution is a deeply-rooted Afghan tradition that provides a desperately needed service to many Afghans. Increasingly around the world governments are embracing alternative means for people to resolve their disputes (civil claims and even minor criminal issues) outside of the courts. Voluntary mediation often produces more satisfactory and more stable outcomes than adversarial processes in courts.

2. The non-state system in Afghanistan today is popular and diverse.

The informal system is popular for resolving disputes because it is closer, quicker, cheaper, and relies on principles that are known and respected (as opposed to the formal law, which is unknown to most). A recent public opinion survey showed that in 85% of cases, people prefer to take their problems to a village or tribal council, local notables, or a cleric, while only 15% would bring a dispute into the formal system. Informal practices vary throughout the country in style and substance. However, they share some basic characteristics: they are generally voluntary, they rely on locally influential people, and the power to enforce outcomes relies on social pressures rather than force.

3. But the non-state sector has some significant weaknesses.

The non-state system has three significant problems. First, in general, non-state forums are not directly accessible to women. In addition, some traditional practices that violate basic rights, such as *baad* (offering women into marriage to settle a dispute), are reinforced by the informal system. Second, community-based processes are not effective at dealing with issues that are larger than the community (e.g. inter-communal issues, commerce). Third, community-based mechanisms can be very susceptible to capture by warlords (as are formal institutions at present). Local power-holders are prone to misuse

Briefing Paper
Conference on the Relationship between
State and Non-State Justice Systems in Afghanistan

the informal system, or at least fail to respect its outcomes, which rely on community consensus rather than force.

4. There is already much practical cooperation at the local level between the formal and informal systems.

In discussion, most local government officials speak of the necessity of the informal system to fill the gaps in the state system. Indeed, judges, prosecutors, civil law officers, and provincial and district governors routinely refer cases to the informal sector to be resolved. As the one district prosecutor explained, "*According to Islam, shura and consulting is always encouraged as the best way to settle disputes. Shuras are historical part of social life in Afghanistan from ancient times.*" The head of a Huqooq office explained his job as taking decisions whether to refer litigants to judges, district governors, or community elders. Most cases go to the community elders. Even without a formal procedure in place, many judges are registering out-of-court settlements with the court.

5. Provincial authorities play a key role in dispute resolution.

Executive authorities, including provincial governors, district governors, and police chiefs take an active role in resolving all manner of disputes outside of the court system. Executive officials have long played such roles, and currently see this as an essential element of their responsibility to maintain stability. This role has been enhanced in recent years because contrary to historical government practice, local government officials tend to come from the areas where they serve, whereas judges tend to be outsiders. There is also evidence that the newly elected provincial councils are heavily engaged in dispute resolution in their role as a bridge between people and the government.

6. There is, however, excessive executive interference in judicial affairs.

Judicial officials in the provinces frequently complain of interference by the executive authorities in the functions of the court and prosecution. This is partially related to the heavily involvement of executive authorities in dispute resolution, which has a tendency to by-pass the judicial system entirely, even in serious criminal cases. Claims of interference are also due to frequent pressure by powerful individuals to influence judicial outcomes, to reverse decisions made by a court, or the failure to enforce decisions.

7. Avoiding corruption is a strong motivation for use of the informal system.

There are two kinds of corruption plaguing the Afghan judicial system: financial and political. Financial corruption reaches throughout the system, from petty bribes to police and court functionaries, to massive pay-offs to buy official positions, appropriate land and property, and change legal outcomes. Political corruption, wherein unaccountable power-holders undermine the rule of law and use the government system as a means to wield their personal power, is also pervasive. Fear of corruption has made citizens very

Briefing Paper
Conference on the Relationship between
State and Non-State Justice Systems in Afghanistan

wary of any contact with the formal system, and the lack of accountability challenges the legitimacy of the entire government.

8. Women's access is limited in both formal and informal forums.

In both cases, women do not tend to have direct access or involvement, but instead must work through a male representative, even if they are the direct party to the case. Judges who have worked in north and south note that in the south courts are never used for enforcement of women's rights, while in north they frequently are. This general lack of legal access results in a systematic denial of women's rights. It is believed that the high incidence of female self-immolation in the east and west is due, in part, to lack of access to justice in formal and informal spheres. There is some evidence that women's participation in community development councils through the national solidarity program is improving access to women to discuss community issues.

9. Property disputes comprise the largest category of cases throughout the country.

A series of factors – massive emigration and immigration, decades of conflict and transformation of society, frequent misappropriation of resources, and population pressures on limited land – have combined to make property disputes in Afghanistan explosive and widespread. Due to the high value and the political issues at stake, these conflicts can be very difficult to resolve in both the formal and informal systems. The courts have long played a clerical function for land recordation, but official records are scarce and untrustworthy due to corruption and regime changes. One advantage of local shuras in this regard is that community members share knowledge of past uses and claims, and understand the social context of disputes. In situations without written records this information is essential to fair resolution. There were numerous cases reported where disputes were settled voluntarily in jirgas and shuras, and then the outcome registered in the courts to ensure the posterity of the settlement.

10. In criminal cases, the state and the non-state sectors have different, but potentially complementary roles.

The formal system is needed for coercion and punishment in serious crimes. As one prosecutor from Balkh province said, "we have two kinds of rights, the Right of Person (Haq ul'Abd) and the Right of God (Haq ul'Allah). The Prosecutor's office's responsibility is to never let the Right of God be violated." The informal system is used for restoring harmony to the community and for providing compensation – the Haq ul'Abd. Many in the courts see criminal matters as their exclusive jurisdiction, and feel that the settling of criminal issues in non-state forums undermines the rule of law. In reality the governors, police, and prosecutors offices serve as filters, deciding which cases will be brought to the court, and when there is a need for community mediation.

11. Reference to Islamic law and principles is a foundation of both systems.

Briefing Paper
Conference on the Relationship between
State and Non-State Justice Systems in Afghanistan

Actors in both the formal and informal systems consider “sharia” as a fundamental basis of their decision-making. While there may be disagreement between the systems as to whether certain principles or practices are actually “Islamic” – both systems rely heavily on the perceived righteousness of their outcomes. In the formal sector, this position is based on the fact that most judges have had formal training in Islamic law or theology, and that Afghan law is derived from the sharia. Actors in the non-state sector believe that the practice of shura – or community consultation – is an Islamic form. Community leaders also implore parties to embrace notions of fairness, forgiveness, and charity, which are strongly associated with being a “good Muslim.” In some regions, and especially among the Shi’a, local clergy also play a very prominent role in non-state resolution.

Recommendations

- 1. The government must distinguish between non-state practices that support the government’s goals, and those practices that undermine the government’s goals.**
- 2. By creating a positive relationship between the formal and informal systems, the government can harness the positive power of shuras and jirgas while also ensuring that the worst abuses are prevented.**
- 3. The government should define those areas where it believes the non-state system can be most positive.**

For instance, land and property disputes, which are the most frequent, can be resolved with a combination of informal and formal methods. In many cases, the non-state can provide the necessary local knowledge and mediation between parties. The formal system can provide a means for parties to record outcomes and to enforce agreements. It can also stand by for adjudication should the non-state process fail to deliver an acceptable outcome.

In the criminal sphere, the government has a right and a duty to deliver justice. However, the informal sector plays a critical role in compensation and reconciliation that is necessary to avoid further violence. 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).

Essentially, the government would remain responsible for the *haq ul’Allah* (rights of God) while the non-state mechanisms, where practical, contribute to the resolution of the *haq ul’Abd* (rights of the person).

- 4. The government should also define those areas where the influence of the non-state system is most negative, and work to counter them.**

Briefing Paper
Conference on the Relationship between
State and Non-State Justice Systems in Afghanistan

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.

- 5. 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.**
- 6. The next steps should be practical measures to better define the limitations of the informal system and the interaction between the state and non-state, such as:**
 - a) All parties, whether in the formal or informal system, should be aware of their legal rights.
 - b) Courts may develop a defined set of cases where referral to informal processes is acceptable and/or recommended. All non-state processes are completely voluntary for all parties.
 - c) Informal decisions should be recorded in simple (non-legal) terms, and should not violate basic rights under Afghan law.
 - d) Courts should be available to review or record decisions from non-state mechanisms upon the agreement of the parties. Such decisions would then be enforceable in a court.
 - e) A protocol should be developed for use of informal mechanisms in criminal cases.
 - f) Women's shuras created by the National Solidarity Program, the Ministry of Women's Affairs, and the Afghan Independent Human Rights Commission should work to provide access to women to state and non-state mechanisms.
 - g) Pilot projects should be created to develop the means for carrying out these recommendations.
 - h) The government should develop an easy-to-use manual for non-state practitioners outlining basic rights, the functioning of the court system, and the means for state and non-state interaction.
- 7. Grand legislative or policy programs should be avoided until there is greater experience in addressing these recommendations.**