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The Kabul Courts and Conciliators: Mediating Cases in Urban Afghanistan

Summary

- USIP observation in the Kabul court system shows that a significant number of legal disputes are being resolved through a combination of formal and informal justice mechanisms, contrary to the assumption that resorting to traditional dispute resolution bodies occurs only in rural areas where legal awareness and access to courts is low.
- Specifically, the Kabul courts frequently refer cases to conciliators who are not part of the formal judiciary. This yields benefits for both the courts and litigants: Conciliators reduce the courts' caseload and litigants receive a cost-effective and expeditious alternative to trials.
- The Afghan civil and commercial procedural codes specifically allow decisions made between litigants and a conciliator to be formally registered with the court, which may provide a legal model for recognition of decisions by traditional shuras or jirgas.
- In practice, however, litigants are not uniformly provided with the option of settling their cases through conciliators. Therefore, increased public awareness of the legal option to refer cases to conciliators would provide litigants with the relevant knowledge they need to make an informed decision about the best way to resolve their disputes, and reduce the demand for the already overburdened formal justice sector.

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Introduction

The fact that the vast majority of legal disputes in Afghanistan are resolved through informal justice mechanisms, such as shuras or religious leaders, has been well documented.¹ At the local level, representatives of the state, such as provincial and district governors, often refer cases to jirgas, shuras and other informal bodies for dispute resolution.² This has given way to a common assumption that state institutions dominate Afghan urban locales, while rural communities lay outside state reach and are marked by a continuum of informal practices.

To test this assumption, between January 2010 and July 2011, a USIP researcher, who is also a judge, observed court proceedings, collected data and conducted interviews in civil and criminal divisions of Kabul's fourth zone Primary Court in addition to the commercial and family courts. She found that even in the urban and relatively well-developed boundaries of Kabul, formal institutions often rely on informal traditional conciliators, known as mosliheen or hakamain, to adjudicate civil, commercial and some aspects of criminal cases. Over the course of one four-month period, 11 of 27 civil and seven of 23 criminal cases were resolved through conciliator mediation,³

suggesting that an active relationship between the formal and informal justice systems exists and generally facilitates access to justice.

Referring cases to conciliators is often mutually beneficial for judges and litigants, relieving pressure from an overburdened formal justice sector characterized by understaffing, poor training, extensive delays and high costs. According to the Civil Procedure code, primary courts are required to handle cases within four months, yet they often take between six months to over two years to finalize due to the backlog of cases. Conciliators work on cases as soon as they are assigned and typically reach a mediated decision within weeks, thus offering a cost-effective and expeditious alternative to the formal process, as well as reducing the likelihood of bribery—which is often an attempt by the disputant to influence the court to prioritize their case.

The use of conciliators also fits into prevailing cultural and religious norms that afford a high value to reconciliation over punitive action. The premium placed on reconciliation is due in large part to the Islamic value of *islah*, or reconciliation. The ninth verse of the Quran's Hajarat Surah reads, "And if two factions among the believers should fight, then make peace between the two." In interviews and court hearings, judges note that religious values of reconciliation support attempts to mediate a resolution before going to trial.

The fact that a significant number of disputes are being resolved through a hybrid of formal and informal justice mechanisms underscores that even where there are active formal justice institutions, the strengths and values of the informal system are still in popular demand and being harnessed by state actors to deliver justice in a manner that is less costly, more expedient and responsive to Afghan cultural norms.

Procedures for Conciliation

The legal process of mediation by conciliators is delineated in Afghanistan's Civil and Commercial Codes, which require courts to explain the option of conciliator mediation to disputants before a trial begins. Specifically, Articles 230 and 231 of the Civil Procedure Code state that "the court shall recommend the assignment of conciliators in cases where the court senses willingness on the part of the parties for settlement," and "If the settlement takes effect during the proceedings and the trial, the settlement is recorded in the decision and a judgment is issued allowing the settlement and an end to the dispute between the parties." If litigants cannot agree to settle their dispute through conciliator mediation, Article 232 of the Civil Procedure Code states that the court shall proceed with the matter and shall issue a decision accordingly.

Afghan law also makes a number of stipulations regarding the conditions and procedures of referring commercial and marital cases to informal mediators. In commercial cases, the court shall not appoint arbitrators who have an interest in the claim, have a first-degree blood relationship with either party, or are an heir to a claim, unless both parties agree.⁴ In marital cases, the Civil Code states that the court shall recommend the disputants to assign two conciliators, "one from the relatives of the husband and the other from the relatives of the wife."⁵ While there are no official qualifications that conciliators must meet, litigants typically choose individuals who are well-respected and display sound decision-making capabilities. For family disputes, conciliators, who are often the close relatives of the disputants, must take an oath before the court stating that they will settle the dispute in an objective manner. For commercial cases, individuals who have knowledge of commerce codes and experience with market conduct are often chosen as conciliators, and may often collect a small fee upon resolution of the dispute.

If the parties are willing to resolve their disputes through conciliators, they are asked to submit their written request for mediation and then present their conciliators to the court. Conciliators are

then given 20 days to come to a settlement once they have received a mandate to mediate from the court. During this time, they meet with disputants, other relevant parties and each other to identify the causes of conflict, and draft a solution that is agreeable to both parties.

When an agreement is reached, the court convenes a judicial session for the conciliators to present their decision and for the parties to express consent to the terms of the solution. In practice, the judge remains outside the processes of conciliator settlement until the parties bring the resolution to the court, where the judge simply records the decision. The conciliators' decision is finalized by recording the terms of the resolution, and requires both parties to provide their signatures and fingerprints as recognition of their consent.

Upon completion of the case, the verdict is attached to the case file to prevent parties from presenting the same claim and so that the solution may be enforced. The verdicts are considered final and conclusive without option for appeal—given that the parties came to the court having already consented to the decision. The settlement is written into the same format as other court decisions and the enforcement process is synonymous with decisions made solely through the formal system. While the judge technically has the authority to overturn a decision if it is contrary to Afghan law, out of 20 cases observed by USIP, settlements were never rejected by the court.

Conciliation in Practice

For civil and commercial cases, the terms of a conciliator-led solution often include some form of monetary compensation or substitution of property or profits. For example, in one dispute in which a tenant was unable to pay six months of back rent to the property owner, the conciliators determined that the tenant would work for three months unpaid on the owner's farm, rather than be required to pay the whole sum at once or incur further debt. The use of conciliators who are experts in the given type of dispute or commercial enterprise helps to arrive at an appropriate decision under the given circumstances that a judge without expertise in the subject might have missed.

Afghans generally try to resolve family cases, including marital disputes, among themselves because raising such personal issues in open court may be perceived as harmful to the family's reputation. When families do bring their disputes to the courts, however, the judge will often encourage reconciliation. The Civil Code underlines this preference by stipulating that if conciliators fail to find a resolution the first time in a marital dispute, another round of conciliator review should be held. One woman who was pursuing a divorce described how conciliators can help find a middle ground that the courts would not necessarily seek. "There was always disagreement between my husband and me as a result of my in-laws' interference in our family issues," she said. But, she continued, "the court recommended us to settle the situation through close relatives assigned as conciliators... They made my husband fund a separate house for me and he accepted."

While criminal cases are generally handled by the courts in Kabul, civil or compensatory aspects of criminal cases are sometimes adjudicated through informal mechanisms. Under Islamic jurisprudence, criminal disputes are composed of two aspects: *haq-ul-allah*, or the right of God, and *haq-ul-abd*, or the right of the individual. *Haq-ul-allah* aspects of crimes are those that cause serious damage in the community and cannot be abrogated, while *haq-ul-abd* aspects of crimes are those that cause damage to the individual and can be absolved. Recognizing this distinction, the Civil Code allows parties to compromise on the financial rights of criminal cases regarding individuals, stating: "Compromise is not allowed in pertaining affairs of personal status and public order. However, compromise on the financial rights arising from personal status or crimes, is permissible."⁶ Thus while *haq-ul-allah* aspects of criminal cases are the exclusive authority of the state, judges often recommend that *haq-ul-abd* aspects be deferred to conciliators. Settlement of the *haq-ul-abd* aspect

of a crime through the use of conciliators can reduce the overall criminal sentence, including in a high-profile case involving an Australian citizen convicted of killing an Afghan police commander. While the defendant was initially sentenced to death, representatives of the victim's and perpetrator's families brokered a payment of \$100,000 as compensation for the crime. As a result, the court officially reduced the sentence from capital punishment to a prison term of several years.

Challenges of Conciliator Mediation and Recommendations

While courts are required by law to explain the option of conciliator mediation, USIP research revealed that in practice it appears to happen only on an ad hoc basis. When parties whose cases were resolved solely through formal mechanisms were asked why they did not choose informal mediation, most said that they were not informed of the option.

USIP's research also suggests that mediation may increase women's access to justice because litigants can directly voice their concerns and suggest solutions to trusted conciliators. On the other hand, conciliators are also subject to the same cultural norms that cause discrimination against women and minorities in the formal justice sector.

To improve the effectiveness of the conciliation process, increased public awareness of the legal option of conciliators and the informal processes can provide parties with the relevant knowledge they need to make an informed decision about the best way to resolve their disputes, while simultaneously reducing demands on the already overwhelmed formal justice sector. For civil and especially commercial cases, an effort should be made to uniformly provide parties with the option of mediation, with the understanding that the verdicts will be recorded by state actors. An improvement of this system which, for the most part is already functioning in Kabul, will facilitate a more timely delivery of justice and thus yield positive results for litigants and the justice system at large and potentially improve security gains by preventing conflicts from escalating.

In the future, both nongovernmental organizations and donors seeking to improve access to justice might encourage the Afghan government, particularly the Ministry of Justice and the Ministry of Women's Affairs, to develop pilot projects based on the positive elements of the framework currently being used in reconciliation in Kabul in some of the more rural, stable districts in which state courts have the capacity to refer cases to conciliators, record their decisions, and provide oversight on the final resolution. Based on the evidence collected in the Kabul courts, greater use of conciliators nationwide would reduce the burden on the courts to handle lengthy trials, and would reduce costs and expand the options for dispute resolution for Afghan litigants. The approach conciliators take toward resolving disputes in urban areas might also be adapted to the frequent but ad-hoc practice of referral of court cases to traditional shuras and jirgas in many rural areas.

Endnotes

1. See Noah Coburn and John Dempsey's "Informal Dispute Resolution in Afghanistan," USIP, August 2010; the Afghanistan Human Development Report 2007, United Nations Development Programme, 2007; Rebecca Gang's "Community-Based Dispute Resolution Processes in Kabul City," Afghanistan Research and Evaluation Unit, March 2011; and "A Survey of the Afghan People," The Asia Foundation, Nov. 2010.
2. Strengthening these links as a way to increase access to justice became a pillar of Afghanistan's national strategy in 2008 through the Afghan National Justice Sector Strategy and Afghanistan National Development Strategy, and were a key point of the Afghan Government's 2010 Kabul Conference Commitments.

ABOUT THIS BRIEF

Between January 2010 and July 2011, a USIP researcher officer, Zuhail Nesari, observed court proceedings, collected data and conducted interviews in civil and criminal divisions of Kabul's fourth zone Primary Court in addition to commercial and family courts. She is a Kabul native, who graduated from the Law and Political Science Faculty of Kabul University and is currently a judge in Kabul's appeals court. She has also worked extensively on USIP's informal justice projects in Afghanistan. Karima Tawfik works in USIP's Rule of Law Center of Innovation in Washington, DC.

3. The Fourth Zone handles cases from the four districts (nahias) of Nahia 11, 14, 15, and 17. Nahias 11 and 17 are composed mainly of Tajik residents with a mixture of some Pashtun and other ethnic groups. The 14th and 15th Nahias have a mixture of Tajik, Pashtun, Hazara, and Hindu ethnic groups. At the time of research, the Fourth Zone had the highest number of ongoing disputes compared to the other three zones.
4. Commercial Procedure Law, Article 216.
5. Civil Code, Article 186. The article continues by stating, "In the event when there are no relatives of the two sides, the conciliators shall be appointed from those who would have sufficient information about the conducts of the couple and would be able to resolve the differences of the spouses."
6. Civil Code, Article 1310.



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