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Traditional Dispute Resolution and Afghanistan's Women

Summary

- At least 80% of all disputes in Afghanistan are resolved through traditional dispute resolution (TDR) mechanisms, principally community councils called *shuras* or *jirgas*. TDR is therefore impossible to ignore as the primary justice institution in the country.
- Still, most women's groups in Afghanistan tend to oppose international donor or Afghan government support for TDR because they generally exclude women from participation and are known to issue decisions that violate women's rights.
- In the spring of 2011, the U.S. Institute of Peace in Kabul hosted meetings to examine the broader question of how women can gain greater access to justice.
- The outcome of the conversations was a more nuanced view of TDR and women in Afghanistan and a recognition that creative engagement rather than condemnation is a more productive approach to resolving deficiencies in women's rights in TDR venues.

“Despite extensive efforts since 2001 to build Afghanistan's formal courts, at least 80% of all disputes in Afghanistan continue to be resolved through TDR mechanisms, principally in the form of community councils called *shuras* or *jirgas* . . . But traditional mechanisms have been criticized for violating women's rights . . . Afghan women's rights advocates fear that ongoing financial and political support from NGOs and foreign governments validates TDR, despite its reputation for inequality.”

Background

Despite extensive efforts since 2001 to build Afghanistan's formal courts, at least 80% of all disputes in Afghanistan continue to be resolved through TDR mechanisms, principally in the form of community councils called *shuras* or *jirgas*. Afghans generally trust TDR to resolve disputes more fairly, cheaply, and quickly than courts.

But traditional mechanisms have been criticized for violating women's rights. Certain customary practices—*baad*, for example, whereby girls or women are forcibly exchanged as brides to settle blood feuds, debts, and other disputes—are illegal under both Afghan and international law and contrary to Islamic legal principles, but they are sometimes sanctioned within TDR based on customary practice. Women are also usually not allowed to sit on TDR bodies or even be present if they are a party to a dispute.

Afghan women's rights advocates fear that ongoing financial and political support from NGOs and foreign governments validates TDR, despite its reputation for inequality. Some women even allege that donor support for TDR bodies might empower them to further discriminate against women, because any infusion of political capital and financial resources may increase their capacity to suppress women's rights.

That said, while all women's advocates oppose practices that do not respect women's rights, some recognize that TDR might help women resolve certain disputes, and that, in any case, TDR cannot be ignored.

Furthermore, the same repressive values towards women reflected in TDR are evident in the formal courts. In some cases, women cannot exercise their rights to appear in court and may even have more access to traditional forums through local male proxies. In other cases, the formal court system officially sanctions practices that violate both Islamic and Afghan law.

For example, Afghan President Hamid Karzai recently pardoned a rape victim, identified only as Gulnaz for her protection, whom the courts had sentenced to 12 years in jail for adultery. However, the pardon also allows an agreement that Gulnaz will marry her rapist, which was approved by the courts.¹ Gulnaz's case is not uncommon. An estimated half of the inmates in female prisons are there for zina, or moral crimes, and many of them are victims of rape. Thus, the imperfections of TDR should thus not be compared to an idealized vision of the formal system.

The findings and recommendations below are based on ongoing discussions with civil society advocates and USIP's research in 13 districts and seven provinces.²

Findings on Women's Access to Justice and TDR

- **Donor activities that work with TDR bodies should aim to maximize their positive aspects and minimize and prevent negative outcomes and side effects.**

Rather than strengthening *shuras* and *jirgas* themselves, donors should work to support linkages between TDR and formal justice systems and to introduce legal accountability into the traditional bodies. Women's groups do not support projects that purport to strengthen or embolden traditional practices. Programs that ensure greater accountability and oversight through reporting or recording judgments can help to highlight and reform repugnant practices, rather than allow them to perpetuate out of sight.

To be clear, there is absolutely no perceived need for additional donor funding.

- **Initiatives to raise awareness on women's rights must begin with specific, locally identified needs.**

Women's rights projects require long-term partnerships based on earned trust that incorporate local values. Lasting impacts on the status and rights of women are not achieved when trainers are brought from Kabul or even a nearby city to conduct one-off workshops or campaigns. Because communities are often self-contained and isolated, such actors are usually considered untrustworthy outsiders with different values from the community. Thus, the lessons they wish to impart are discounted or dismissed outright, especially by those who are already suspicious of concepts such as women's rights.

- **TDR projects are most effective if pursued with the least controversial concepts in more secure areas.**

Partnerships are easier to build in more stable districts, and successful development projects in stable areas often have positive spillover effects across a province or region. Limiting work to areas where the insurgency is ripe and military operations are intense is unlikely to achieve results. Pushing TDR projects in insecure areas risks negative long-term impacts on the equity of the Afghan justice system. These areas tend to be those where women's rights have already taken a back seat to stabilization gains and women's mobility is especially restricted because of the relative power of more conservative elements, so there is also less political space to promote the cause of women's rights.

The very fact of educating a girl or woman is controversial in Afghanistan, partly explaining why the national literacy rates among adult women are less than 20 percent, and as low as 4-5% in rural areas.³ But there are less controversial subjects, such as women's freedom of movement or freedom to participate in the economy, as consumers or entrepreneurs, that may be better starting

points, since those issues potentially benefit men as well. Research has already shown that, where Afghan women have greater social and political capital, they are also better able to claim their rights in both the formal and traditional justice systems.

- **Raising awareness of the myriad ways Islam protects women's rights is more powerful than any other justifications.**

While women's rights organizations often focus on how TDR practices are at odds with the Afghan constitution and international law, it has been overlooked that the most repugnant violations of women's rights in TDR forums—such as forced marriages or mutilation of women for leaving their home—are clearly against shari'a. Many mullahs, themselves not properly qualified to opine on Islamic law, will sanction these un-Islamic practices. They possess substantial authority in an Islamic republic where more than 70% are illiterate. Education about how TDR practices may violate Islamic law is far more effective than references to international standards or the Afghan constitution. A women's radio station in Jalalabad, called Nargis, has stated that its radio messaging on rights is always informed by Islam, since without a religious context the topic of women would face intense vulnerability. These messages must, however, be delivered by a credible authority on Islam.

- **Additional research is necessary for a more complete and nuanced understanding of women's access to justice.**

Improved planning, assessment of target populations, feasibility studies, and evaluation are essential to successful development projects targeting Afghan women. Because of the sensitive nature of alleged abuses such as *baad*, rape, and forced marriages, there are no historical baseline data on these practices. Without such data, it is extremely difficult to measure trends. Still, a 2011 report by AREU found that, "[w]hile questions over human rights and the treatment of women remain, the use of more extreme customary practices, such as *baad*, is declining" among TDR bodies.⁴ It would be useful to examine how credible data on these practices can be collected. Research should additionally focus on the perspectives of local women on whether and in what circumstances women view courts or TDR mechanisms as better vehicles to claim their rights.

- **Research should explore the use of legal aid providers to improve women's access to justice.**

Legal aid providers such as the Legal Aid Organization of Afghanistan (LAOA) and Cooperation for Peace and Unity (CPAU) can be important resources for both female litigants and for members of *jirgas* and *shuras*. With basic legal training, paralegal representatives can identify alternatives for resolving a dispute that are relevant to the local population and highlight pertinent Afghan and Islamic laws.

Recommendations for Future Projects and Programming to Women's Access to Justice in Afghanistan

The recommendations below aim to inform existing TDR programming and suggest specific forms of constructive engagement to increase women's access to justice. Broadly, the hope is for donor activities in TDR to work toward mitigating TDR practices that are harmful to women and to prevent, to the extent possible, harmful practices from being reinforced by official actors.

- **Disseminate progressive interpretations of shari'a, especially among religious leaders.**

Demands for rights training—from more progressive mullahs and traditional leaders—should be nurtured and supported. Also, thousands of mullahs form a powerful network of religious scholars and community activists already engaged and respected in their communities. This network presents

ABOUT THIS BRIEF

This brief is based on recent discussions USIP held in Kabul on traditional dispute resolution (TDR) and women's rights. Based on these discussions and USIP's research, it outlines recommendations on how to increase access to justice for women. Sylvania Q. Sinha served as rule of law advisor in USIP's Kabul office from November 2010 to November 2011.



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great potential to raise awareness on women's rights and to work against other powerful conservative elements that have infiltrated communities with ideas that directly violate tenets of mainstream Islam.

- **Explore the expansion of religious education on civic and human rights.**

Contrary to their reputation in the West, madrassas do not necessarily teach conservative principles. In fact, employing an estimated 7,000 teachers, madrassas offer a great opportunity to teach progressive rights in a secular or Islamic framework. Collaboration between the Ministry of Education and the Ministry of Hajj and Religious Affairs is needed to promote teachings of Islamic principles of justice, rights, and due process that are consistent with Afghan law in Madrassa curriculums.

- **Engage with local change agents.**

Male change-agents possess the greatest potential to publicize and popularize women's access to justice. Identifying who has the ear of a community—local maliks, mullahs, or other actors—and educating those local gatekeepers are critical to a broader understanding of rights. This requires long-term engagement and is most plausible in stable communities where the political and security space allows for positive change-agents to emerge. Each community will be different, as each has different leaders willing to risk their political capital in different degrees by promoting progressive ideas.

- **Focus on training female legal aid providers.**

Female legal aid providers, who are in a better position to have access to women, particularly in more rural areas, need to be trained across the country. UNIFEM's pilot projects in Kandahar and Bamiyan to train female paralegals may be expanded and mined for lessons learned. Legal awareness programs that include training on matters such as how drafting marriage certificates defining women's rights in marriage and divorce can also help reduce arbitrary or illegal TDR decisions. Also, "Legal Aid Referral Centers" for women, already established in Jalalabad and Parwan at the request of the Ministry of Justice, are useful resources, provided they have local buy-in and are accessible.

- **Use media to raise awareness of religious discourse on women's rights.**

The wide reach of radio, television, and print media should be exploited to promote discourse on women's rights under Islam. Radio programs, in particular, have impact across the country and are the most obvious way to reach the large percentage of the population who are illiterate.⁵

In the coming months, USIP will facilitate continued dialogue between opponents of donor activities in TDR and development organizations working in TDR. The goal is that increased communication can promote creative solutions to the challenges of women's rights and access to justice in Afghanistan, given the realities and limitations of both the formal courts and TDR.

Endnotes

1. "For Afghan Women, Rape Law Offers Little Protection," Quill Lawrence, NPR, December 2, 2011, at <http://www.npr.org/2011/12/02/143057341/for-afghan-women-rape-law-offers-little-protection>.
2. See, e.g., *Informal Dispute Resolution in Afghanistan*, Special Report, by Noah Coburn and John Dempsey, USIP, August 2010, available at <http://www.usip.org/publications/informal-dispute-resolution-in-afghanistan>.
3. International Women's Rights Project, "Women's Equality in Afghanistan," available at http://www.iwrrp.org/pdf/afghan_paper.pdf.
4. Dr. Douglas Saltmarshe and Abhilash Medhi, "Local Governance in Afghanistan: A View from the Ground," AREU, June 2011.
5. See, e.g., *Afghanistan Media Assessment*, Peaceworks by Eran Fraenkel, Emrys Shoemaker and Sheldon Himelfarb, USIP, December 2010, available at <http://www.usip.org/publications/afghanistan-media-assessment>.