AFGHANISTAN – Justice and Reconciliation

The Informal Justice System in Afghanistan

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The purpose of this paper is to provide a brief explanation of the informal justice system in Afghanistan. More comprehensive information is available at www.cimicweb.org.¹ Hyperlinks to original source material are highlighted in blue and underlined in the text.

Following the collapse of the Taliban regime in 2001 preceded by decades of war and turmoil, the Afghan justice system was in ruins. Rebuilding a functioning justice system and engaging in comprehensive reforms of both laws and justice institutions has therefore been high on the Western-supported agenda for reconstruction and reconciliation in Afghanistan. In 2005, the Afghan Ministry of Justice (MoJ) launched a 10-year plan for reform, ‘Justice for All: a Comprehensive Needs Analysis for Justice in Afghanistan’. The plan identified four main areas of reform, namely: institutional strengthening; reaching out to the people; reaching out to traditional justice; and supporting other government programmes such as counter-narcotics, anti-corruption or land tenure. Afghanistan’s international partners, with Italy as lead donor, supported the efforts, but the plan specified that the Afghan government must take the lead and, among other things, the reforms must be Afghanistan appropriate. According to two researchers, Astri Suhrke and Kaja Borchgrevink, in their 2008 article, ‘Negotiating justice sector reform in Afghanistan’, by late 2007 “it was commonly observed that the justice sector in Afghanistan was among the most significant but also most problematic areas of reform.” The article states that Italy had assigned an expert to draft a new criminal procedure and other laws. However, the expert, who followed Italian standards, failed to consult with Afghan officials, who asked President Karzai not to sign the draft. The article explained that the donors’ approach was too narrowly focused on Western legal traditions and did not take into account Islamic law, which negatively impacted the acceptance of these programmes by Afghan society. Furthermore, in a recent report, ‘Informal Dispute Resolution in Afghanistan’, the United States Institute for Peace (USIP) stated that despite all the international support for strengthening the Afghan justice system, the formal justice sector in Afghanistan remains in a severely dilapidated state.

The justice sector is still unable to reach many parts of the country and functions poorly in areas where it has a presence, with many judges and other legal professionals illiterate and unable to understand or apply the laws of the country appropriately. See chart below extracted from the UNDP 2007 Afghanistan Human Development Report from the Supreme Court.

¹ A CimicWeb user account is required to access some of the links in this document.
According to another report by USIP, in post-Taliban Afghanistan, the formal justice system has limited reach and legitimacy and often struggles to properly function in an environment where human resources and infrastructure are seriously limited and constrained. With the justice system already very weak in urban centres where the central government is the strongest, in rural areas, where about 77% of the population reside, functioning courts, police and prisons are often non-existent. Therefore, the majority of Afghans rely on a more traditional, informal justice system. Disputes are settled, if at all, at the local level by village elders, district governors, clerics and police chiefs. 

The 2001 Bonn Agreement recognises the existence of the informal justice system but specifies that it shall not be applied when inconsistent with the provisions of the Afghan Constitution or with international legal standards.

According to the US Department of State’s 2007 Report on Human Rights Practices in Afghanistan, the informal justice system plays a vital role in Afghan society, with around 80% of all cases tried by local Shuras. Further research done by the Asia Foundation in 2006 suggested that 80-90% of disputes (criminal and civil) are resolved outside of the formal system. According to USIP, the formal justice system is perceived as being corrupt, expensive and difficult to access, leading conflicting parties to prefer their cases to be resolved by traditional community dispute resolution mechanisms.

The 2010 Survey of the Afghan People conducted by the Asia Foundation revealed that only about half of survey respondents believe that state courts are effective at delivering justice and less than half of the population agree that state courts are not corrupt compared to other institutions. A recent article in the Joint Force Quarterly (JFQ) noted that in Kandahar City, 67% of the population believe that the government cannot provide justice due to corruption, and 53% believe that the Taliban are incorruptible. In the previously mentioned article by Suhrke and Borchgrevink, the authors note that the lack of an effective formal justice system was increasingly cited as the main reason villagers turned away from the government and chose to support the Taliban – who sharply cut down on crime during their rule - and in

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**Table: Judges’ Level of Education**

<table>
<thead>
<tr>
<th>Level of Education</th>
<th>Percentage</th>
</tr>
</thead>
<tbody>
<tr>
<td>University Shariat</td>
<td>44.0</td>
</tr>
<tr>
<td>University Law</td>
<td>11.6</td>
</tr>
<tr>
<td>Other University</td>
<td>7.7</td>
</tr>
<tr>
<td>Non University (Madrasa or equivalent)</td>
<td>16.1</td>
</tr>
<tr>
<td>Non University (Primary, 12 and 14)</td>
<td>20.5</td>
</tr>
</tbody>
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*Source: Judges Survey of Training Needs (4 May 2006), the Supreme Court*

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2 The Bonn Agreement, Section II, Article 2 states: “the judicial power of Afghanistan shall be independent and shall be vested in a Supreme Court of Afghanistan, and such other courts as may be established by the interim Administration. The Interim Administration shall establish, with the assistance of the United Nations, a Judicial Commission to rebuild the domestic justice system in accordance with Islamic principles, international standards, the rule of law and Afghan legal traditions.”

3 A more precise definition of Shura is given in the next section of the paper.
some parts of the South accepted Taliban justice. The same trend is highlighted by the International Crisis Group (ICG) in its latest report, Reforming Afghanistan’s Broken Judiciary, which discusses the non-functioning formal justice sector and the subsequent lack of confidence it evokes. Consequently, this leads more Afghans to accept the rule of the Taliban and other powerbrokers in areas with little government control.

USIP defines the informal justice system in Afghanistan as being less of a system than an array of local mechanisms for resolving disputes. The term ‘informal’ generally includes shuras, a Dari word referring to permanent and quasi-permanent local councils, and jirgas, a Pashto term typically used for more ad-hoc meetings intended to address a specific dispute.

The term Jirga originates from Pashto, which in its common usage refers to the gathering of a few or a large number of people; it also means consultation according to the Pashto Descriptive Dictionary. For Ali Wardak from the Institute for Afghan Studies, the Jirga is a traditional institution that is more strongly bound up with the tribal economy and society of the Pashtuns of Afghanistan. It is therefore more commonly and effectively used as a mechanism of conflict resolution among the Pashtuns. However, the same article explains that there is evidence which shows that the jirga, or its equivalents, are used as informal mechanisms of conflict resolution in rural or less urbanised areas where Afghan Tajiks, Hazaras and Uzbeks are the majority of the population. The 2007 Afghanistan Human Development Report also underlines that there are striking similarities between the traditional Pashtun jirga and shura among other ethnic groups.

The term Shura also refers to institutions that handle ongoing community governance or resource management tasks. According to Dr. Lynn Carter and Dr. Kerry Connor, in their report ‘A Preliminary Investigation of Contemporary Afghan Councils’, “A shura is primarily an advisory council that does not have decision-making powers. It is a group of individuals which meets only in response to a specific need in order to decide how to meet the need. In most cases, this need is to resolve a conflict between individuals, families, groups of families, or whole tribe.” This description of a shura seems to suggest the inter-changeability between the term and function of jirga and shura in the informal conflict resolution mechanisms in Afghanistan.
In the context of the resolution of disputes and crimes, jirgas and shuras are more often an ad-hoc body rather than a standing institution with fixed membership or, in some cases, a combination of these two forms – a standing body with additional members chosen according to the issue at hand. Both Jirgas and Shuras involve groups of community leaders, respected elders, landowners and religious leaders, generally, but not always, men, who discuss disputes and other political issues with the communities. The fact that members of the jirga/shura are respected community members with established social status and a reputation for piety and fairness is cited as one of the reasons why the Afghan population is turning to this system for dispute resolution and justice.

The ICG describes traditional justice mechanisms as having the advantages of being familiar to the population and are less costly and more accessible than courts. According to the previously mentioned survey by the Asia Foundation, respondents in all regions were most positive about the accessibility of local shuras and jirgas than the traditional system. Overall, the traditional justice system is believed to perform better than modern state justice, which explains why public confidence is higher for shuras and jirgas (66%) than for the state justice system (48%).

The jirga puts great emphasis on the nominal equality of the participants. Everyone sits in a circle so that no one takes priority. All members have the right to speak and decisions are made by common consensus rather than through voting. The jirga settles disputes over land and water, minor and major crimes, restitution from criminal acts (particularly in areas where the state has limited presence) and civil disputes – from commercial and contract matters to land and inheritance claims - by using both local custom and Sharia as their basis for decision-making.

The way cases are handled by the Jirga is largely similar: the council allows for a claimant to lodge a complaint or ask for recompense, and the defendant is then allowed to respond to the claim. The representatives of the community will give a decision which may involve the payment of a fine, a reallocation of land, or mutually agreeable terms for sharing a public resource such as water. The ICG also notes that unlike state courts, jirgas/shuras settle disputes without long delays and financial costs, and they are accessible to the illiterate – which includes the majority of Afghans, who are unable to fill out applications for court as well as read or understand the law. The 2007 Afghanistan Human Development Report states that an important feature of the jirga is that its outcome or Prikra commands a morally and socially binding effect only when it is arrived at fairly, and is therefore agreed by the accused offender, the victim and the village. Depending on the nature of the dispute and the form of jirga/shura, the trial is often concluded within a few days. However, some more serious issues, such as murder or dispute over communal lands, may take longer.

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4 A. Palmisano and G. Ricco (2007), Afghanistan: how much of the past in the new future, p.49
5 International Crisis Group, Peacebuilding in Afghanistan, September 2003. One interviewee describes a Jirga as: “Mullahs, elders, even in some communities, women participated, and they solved all conflicts and never allowed them to leak out. Youths would go, but to sit and listen and learn: they would never talk.”
6 According to the 2010 Survey of the Afghan People, 73% of respondents agree that local jirgas/shuras are fair and trusted.
7 According to the 2010 Survey of the Afghan People, more than four-fifths (86%) of respondents agree that local jirgas/shuras are accessible and more than two-thirds agree that they follow local norms and values (70%), are effective at delivering justice (69%) and resolve cases promptly (66%).
8 The Prikra is the collective ruling (with binding effects on the parties involved) about the settlement of a specific dispute.
Throughout Afghanistan, informal mechanisms tend to be restorative rather than retributive, seeking to promote community harmony through Islahi (reconciliation) rather than focusing on individual rights or personal punishments. USIP notes that informal mechanisms frequently assign both parties with the responsibility to compensate for wrong done and restore communal harmony. In addition, these mechanisms tend to be voluntary, allowing members of both parties to walk away if they cannot resolve the dispute.

Nevertheless, the informal justice system is also characterised by serious shortcomings as noted by international human rights organisations such as Amnesty International or Human Rights Watch. For instance, women are rarely allowed to participate in the process of dispute settlement, to take part in the jirgas or even be present before the assembly when they are a party to a dispute as most of the jirgas are either entirely male or male dominated. Moreover, a testimony given by a woman is considered less reliable than one given by a man. Certain customary practices in some parts of the country are also illegal under both Afghan and international law, as well as contrary to the principles of Islamic law. For example, in some cases, jirga outcomes may recommend baad, a practice that traditionally involves offering a girl or young woman, without her consent, for marriage to a male family member of the perceived victim of a crime. According to Mah Gul Yamam, a female legal expert at the Afghan Independent Human Rights Commission (AIHRC), baad is against the criminal code of Afghanistan and is punishable by up to two years in jail. She further adds that “unfortunately in Afghanistan, when a man commits a crime, it is the females that have to bear the punishment and no legal action can be taken unless the women or girl who is given away makes a complaint; however, females are often reluctant to initiate criminal proceedings against their relatives.” A June 2009 report from the Women and Children Legal Research Foundation (WCLRF) found that out of 330 women forced to marry against their will, 57 were through baad as compensation for a crime.

Another issue underlined by the 2007 Human Development Report is linked to enforcement. Many of the jirga/shura decisions are enforced through social pressures, informal local and tribal mechanisms, as jirga members are usually in a position of social authority. However, in some areas, decisions are enforced through local mercenaries called “Arbakians.” Ali Wardak, in his article “Jirga – A traditional Mechanism of Conflict Resolution in Afghanistan”, describes Arbakian as young, unmarried male members of the tribe who are given the responsibility to implement jirga decisions. In certain cases, although it is being employed less and less, Arbakian may be asked to burn the house of the offender. In any case, such actions are in conflict with the Afghan state law. Lastly, the report notes that another shortcoming is the lack of proper record-keeping for decisions issued by jirgas, which may contribute to disputes resurfacing or decision-makers being unable to refer back to previous cases; however more information on the subject could not be found.

Currently, both the formal and informal justice system co-exist parallel to each other in Afghanistan, with very few interactions and low public trust in the formal system. According to USIP, however, both systems are also inter-dependent to a certain extent. For instance, judges and prosecutors sometimes refer cases to the informal system and vice versa, however neither system fully recognises the legitimacy of the other.

In 2008, the Government of Afghanistan, began to focus on the informal sector and as such, both Afghanistan’s National Justice Sector Strategy (NJSS) and the Afghanistan National Development Strategy (ANDS) of 2008 highlighted the need for the government to adopt a policy on the Afghan state’s relations with non-state resolution councils. In 2009, in close consultation with the Afghanistan Independent Human Rights Commission (AIHRC), the Supreme Court, the United States Agency for International Development (USAID), the Ministry of Women’s Affairs (MoWA) and the United Nations Office on Drugs
and Crime (UNODC), among others, the Ministry of Justice (MoJ) drafted a National Policy on Relations Between the Formal Justice System and Dispute Resolution Councils. The policy paper, which has not yet been published, aims at increasing women’s participation in informal dispute resolution as well as acknowledging that informal bodies have positive aspects that should be strengthened, while recognising that there are sometimes informal justice decisions that violate the law and therefore should be eliminated. Moreover, the draft contains provisions that require serious crime to be prosecuted by the state and in some cases, allow petty crimes to be diverted from the state to informal justice mechanisms.

President Hamid Karzai further reiterated his government’s commitment to working towards clarifying the relation between both systems at the London International Conference on Afghanistan in January 2010 with the Conference Communiqué welcoming the new national policy and calling for it to be implemented without delay. The international community has also started to focus more attention on the informal sector. The United Nations Development Programme (UNDP) through its programme, Justice and Human Rights in Afghanistan, seeks to engage with the informal justice sector and provide those involved in jirgas with training on the legal and constitutional rights of the Afghan people. The programme also attempts to harmonise the work of the informal sector with the formal justice system. USIP has also, since 2002, been working on projects to improve communication and to establish a better relationship between the formal and informal justice sectors. During a symposium on Informal Justice and Rule of Law in Afghanistan held at the end of October 2010, Pajhwok Afghan News reported that the Ministry of Justice (MoJ) had finally drafted a special law, The Law on Dispute Resolution, Shuras and Jirgas, to govern the informal justice system in Afghanistan and give a legal cover to the decisions of local shuras and jirgas.

While the informal justice system has an important role to play being in such close proximity to the Afghan population and therefore can assist in resolving local disputes fairly successfully, the formal justice system is vital in ensuring that cases are resolved equitably and in accordance with Afghan laws and international human rights standards. Hence, as underlined by the ICG, it is critical to restore public confidence in the judiciary system as a way to counter-act the insurgency and lessen the gap between the government and the Afghan people.

As the Afghan government begins to take on more responsibility in the development and future of the country, it is imperative that the Afghan government, the international community and local elders work together towards strengthening the formal justice system and rule of law. Furthermore, it is necessary to ensure that past lessons-learned are taken into account to prevent a recurrence of previous mistakes. With the strengthening of Afghanistan’s formal justice system, the Afghan population will become less reliant on informal mechanisms as Afghanistan’s justice sector will become a legitimate option for dispute resolution.

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9 The donor countries funding this project are the European Commission, Canada, UK, Norway, Germany, Denmark and Switzerland.