

2.3: Informal Dispute Resolution in Afghanistan

Summary

This chapter provides an introduction to traditional dispute resolution (TDR) mechanisms in Afghanistan including information on the Draft Law on Dispute Resolution *Shuras* and *Jirgas*, as well as an overview of the United States' (U.S.) programs supporting the development of informal dispute resolution mechanisms.

Introduction

The establishment of formal justice institutions at the district/local level is relatively new and developing (see Chapter 2.1). Traditionally, disputes have been settled through various community mechanisms based on a combination of tribal, religious or ethnic traditions, and customs. These mechanisms are as varied as the number of tribes in Afghanistan. This type of community dispute resolution, however, is collectively referred to as informal justice, traditional justice, customary law, traditional dispute resolution, or community-based dispute resolution. In this chapter, the term traditional dispute resolution (TDR) will be used to refer to the non-state dispute resolution mechanisms used throughout the country.

It is commonly understood that the vast majority of disputes in Afghanistan are resolved through TDR. The Afghan Government has acknowledged the need to develop a national policy on TDR in the National Justice Sector Strategy (NJSS) as well as in the National Justice Programme (NJP).¹ The U.S. has recognized the strategic need to support the development of traditional dispute resolution mechanisms.² U.S. programs have focused on linking the informal mechanisms with the formal justice system. A recent assessment, however, observes that the “current political trends in Afghanistan seem to make it more likely than not that the local

¹ The Islamic Republic of Afghanistan, Afghanistan National Development Strategy (ANDS), Justice & Rule of Law Sector Strategy 1387-1391 (2007/2008 -2012/2013), Pillar II, Good Governance (March 2008). The ANDS Justice & Rule of Law Sector Strategy contains the National Justice Sector Strategy (NJSS) and the National Justice Programme (NJP). Hereinafter references to the NJSS and the NJP refer to this official document. A hard copy is available from the Afghanistan Research and Evaluation Unit (AREU), Library Catalog Call Number p353.409581 J96, 2008. A copy of the final unsigned version of the NJSS can be found at: <http://info.publicintelligence.net/AfghanNJSS.pdf>. No electronic version of the NJP was available at the time of this writing. See Chapter 1.1: Afghanistan's Rule of Law Policy and Legal Framework Instruments for an overview of the NJSS and NJP.

² See Afghanistan and Pakistan Regional Stabilization Strategy, Office of the Special representative for Afghanistan and Pakistan, Updated February 2010 (hereinafter Regional Strategy), p.12: <http://www.state.gov/documents/organization/135728.pdf>.

context in many communities will not be receptive to externally-driven linkages projects in the near future.”³

Traditional Dispute Resolution

The current landscape of dispute resolution in Afghanistan is very different from its historical roots due to the instability of war and changing economic conditions. The terms used by Afghans to describe their community dispute resolution mechanisms vary, but the most common terms used are *jirga* and *shura*. *Jirga* is the Pashto word for council and refers to the temporary councils convened to address a specific conflict. *Shura* is the Dari word for council and refers to the more permanent or quasi-permanent councils.⁴

It is important to understand the traditional role of the council in upholding customary law in order to understand their role in communities today. Customary law is based on a common cultural and ethical code that generates binding rules on its members. Customary law is found throughout Afghanistan and varies based on the ethnic, geographical, and religious traditions of a community. A common thread, however, is they are generally based upon restorative justice and the preservation of communal harmony as opposed to individual justice.

The Pashtun tribe comprises 42% of the population and has the most extensive set of customary laws or code of conduct reflecting the community’s values referred to as *Pashtunwali*.⁵ These laws were enforced through ad hoc councils known as a *jirga*. *Jirga*’s were formed when needed in order to make community decisions and handle disputes. They were comprised of the community elders/leaders selected by the community. How the *jirga* was formed and the customary laws that applied varied with each community, but the leaders’ authority derived from the community, which provided accountability to the community. Minimum disparity in wealth along with marriage alliances kept the balance of power in check between leaders and community.⁶ Leaders were viewed as “the first among equals.”⁷

³ United States Institute of Peace (USIP), Building Peace No. 3, *Lessons Learned on Traditional Dispute Resolution in Afghanistan*, by Erica Gaston, Akbar Sarwari, and Arne Strand, April 2013, p. 4:

http://www.usip.org/sites/default/files/Traditional_Dispute_Resolution_April2013.pdf.

⁴ See USIP Special Report 247, *Informal Dispute Resolution in Afghanistan*, by Noah Coburn and John Dempsey (Aug. 2010), p. 3: http://www.usip.org/files/resources/sr247_0.pdf.

⁵ See CIA World Factbook, Afghanistan: <https://www.cia.gov/library/publications/the-world-factbook/geos/af.html>. For an in depth discussion of *Pashtunwali*, see USIP, *Afghan Customary Law and Its Relationship to Formal Judicial Institutions*, by Thomas Barfield (2003):

<http://www.usip.org/files/file/barfield2.pdf>.

⁶ USIP Special Report 285, *The Politics of Dispute Resolution and Continued Instability in Afghanistan*, by Noah Coburn (Aug. 2011), p. 10: <http://www.usip.org/files/resources/sr285.pdf>.

⁷ Ibid.

The community's balance of power was upset during the war against the Soviets. A report by Tufts University explains the impact the war had on the economy, social organizations and local customs, and how the Taliban entrenched themselves into the community's affairs.⁸

The relative independence of the process of *Jirga* was increasingly undermined in this period by the military commanders who sought to manage populations through control of the *Jirgas*. Additionally, the practice of customary law was overwhelmed by numerous different interpretations of *Sharia* law, led by a new generation of clerics trained in Pakistan. These trends accelerated during the Taliban regime with the increased participation in the religious schools (*madrasas*) in Pakistan of large numbers of young Afghans from the tribal areas. Upon coming to power, the Taliban sought to control the *Jirgas* directly and, as a result, the *Jirgas* increasingly lost their political independence.

Taliban leaders attempted to use the local institution of *Jirga* as an arena to raise political support for their cause. The Taliban banned all customary law and attempted to enforce their version of *Sharia*. They interfered with the traditional way of forming village *Jirgas*, whereby all adult male members of a community had previously been able to freely express their opinion and participate in electing delegates to the *Jirga*. The Taliban regime changed the Pashto word *Jirga* into the Arabic version *shura* (council), and appointed the village Mullah as the head of the *shura*. The village Mullahs were made government employees and were paid salaries by the Ministry of Pilgrimage and Endowment (*Wazarat-e-Haj wa Awqaf*). The local Mullah was authorized to select four to five adult male members of the village to work under him, who together formed the village *shura*. Each village *shura* elected one adult male to the district level *shura*. In most cases, the majority of members of the district *shura* were comprised of local Mullahs, who also held the membership of the *shura-e-ulama* (council of clergies) at the district level.

The *shura* system was expanded to the provincial level whereby members from the district level *shuras* were selected/elected to form the provincial *shura*.⁹ The district and provincial *shura* structure remains in most parts of the country, along with a variety of other dispute resolution mechanisms including *jirgas*, commercial or merchant (*tejarati*) *shuras*, and local mosque *shuras*. "In addition, a range of respected individuals, including religious and tribal leaders, may act as mediators in a given case. Mediators may also include government officials, such as the district governor or district police chief, if they happen to have local legitimacy. Finally,

⁸ Tufts University, Feinstein International Famine Center, *Afghanistan's Systems of Justice: Formal, Traditional, and Customary*, by Nojumi, Neamat, Dyan Mazurana and Elizabeth Stites (2004), p. 39:

<http://www.gmu.edu/depts/crdc/neamat1.pdf>

⁹ *Ibid.*

government bodies like the Ministry of Justice Huqooq Department (civil affairs department) can serve as mediators or as referring agents to one of the above sources of dispute-resolution authority.”¹⁰ In short, TDR is “currently taking place in Afghanistan using an ad hoc array of government officials, and local leaders, who often resolve low-level disputes based on community consensus.”¹¹

Draft Law on Dispute Resolution *Shuras* and *Jirgas*

The NJSS and the NJP require the Afghan Government to develop a national policy on TDR to promote compliance with “Afghan Constitutional principles and values, and Islamic law.”¹² In November 2009, a draft “National Policy on Relations between the Formal Justice System and Dispute Resolution Councils” (National Policy) was prepared by a working group consisting of representatives from the Ministry of Justice (MOJ), the Supreme Court, the Ministry of Women’s Affairs (MOWA), the Afghanistan Independent Human Rights Commission (AIHRC), NGOs, and international organizations.¹³ The National Policy was signed by representatives from the MOJ, Supreme Court, AIHRC, and MOWA as well as by international advisors from the U.S. Department of State (DoS), U.S. Agency for International Development (USAID), United States Institute of Peace (USIP), the United Kingdom Department for International Development (DFID), the United Nations Assistance Mission in Afghanistan (UNAMA), the United Nations Office on Drugs and Crime (UNODC), and the United Nations Development Fund for Women (UNIFEM – now UN Women).¹⁴

In 2010, Habibullah Ghaleb was appointed Minister of Justice. Minister Ghaleb opposed the implementation of a policy in favor of a law and began the process for a law. In October 2010, a Draft Law on Dispute Resolution *Shuras* and *Jirgas* (Draft Law) prepared by the Taqin was completed.¹⁵ The Draft Law was informed “by the discussions of the Working Group, the draft National Policy, and the draft Peace Councils Law.”¹⁶

¹⁰ *The Politics of Dispute Resolution and Continued Instability in Afghanistan*, *supra* note 6, p. 4; see Chapter 2.1 for a discussion of the Ministry of Justice Huquq Department.

¹¹ *Ibid*, p. 2.

¹² NJSS/NJP, *supra* note 1, p. 40.

¹³ See Draft National Policy on Relations between the Formal Justice System and Dispute Resolution Councils. Provided by USIP.

¹⁴ USIP, Memorandum Re: Comments on Draft Law on Dispute Resolution *Shuras* and *Jirgas* (Jan., 20, 2010)(hereinafter Comments on Draft Law), p.2.

¹⁵ Draft Law on Dispute Resolution *Shuras* and *Jirgas*, 4 Oct. 2010; See Chapter 2.1 for information on the Taqin.

¹⁶ Comments on Draft Law, *supra* note 14, p. 2. The Peace Council Law was drafted by Justice Baha who more recently has been very vocal about his opposition to working with the traditional dispute resolution mechanisms.

Some key provisions of the Draft Law include:¹⁷

- formal recognition of dispute resolution councils (DRCs);
- official recognition of registered decisions (with the Huquq or the primary court);
- the right to appeal a DRC decision to the formal system unless the decision is registered (registration terminates the dispute);
- DRCs do not have authority to detain individuals;
- DRCs may hear civil and legal disputes between natural persons;
- DRCs may not hear disputes involving marriage, divorce, termination of marriage, revocation of the divorce and lineage; endowed property, will and trusteeship; legal incapacity and bankruptcy;
- DRCs may not hear criminal cases except for children's obscenity crimes and offenses that do not require imprisonment. A justice institution may refer to a DRC juvenile criminal cases that do not require confinement and adult obscenity crimes if the offense and its consequences are petty;
- DRC members must, among other things, be completely familiar with Afghan laws and proper tradition;
- DRC members are obliged to observe Islamic Sharia, Afghan laws, international human rights standards, and proper traditions;
- DRC members are subject to prosecution for violation of the Draft Law;
- consent of all parties is required.

NGOs and international organizations have expressed concern about the Draft Law. MOWA and the AIHRC have been outspoken about the law's failure to protect vulnerable groups, especially women and children, by allowing many traditional practices that are contrary to human rights, like *baad*, *badal*, and *tuyanna* to continue.¹⁸ Disagreement regarding subject matter jurisdiction, particularly over criminal cases, remains an issue within both the Afghan and international community. Many believe the Draft Law violates the exclusive jurisdiction provision of the Afghan Constitution.¹⁹ Additional concerns have been raised regarding criminalizing the actions of the DRCs, the restrictions on DRC membership, and the restrictions on jurisdiction.²⁰ The majority of disputes heard by TDR mechanisms relate to land and water

¹⁷ Draft Law on Dispute Resolution *Shuras* and *Jirgas*, *supra* note 15.

¹⁸ *Baad* – giving of a female as compensation for wrong; *Badal* – early/child marriages; *Tuyanna* – money in compensation for marriage.

¹⁹ 2004 Constitution of Afghanistan (Translated by Sayed Shafi Rahel for the Secretariat of the Constitutional Commission)(hereinafter Constitution), Art. 122 - No law shall, under any circumstances, exclude any case or area from the jurisdiction of the judicial organ as defined in this chapter and submit it to another authority:

http://supremecourt.gov.af/Content/Media/Documents/constitution2004_english3012201016726844.pdf.

²⁰ See Comments on Draft Law, *supra* note 14.

rights as well as family disputes including inheritance; disputes the Draft Law would prohibit DRCs from resolving.²¹

Despite the commitment made in the Kabul Communiqué to complete “the informal justice strategy in alignment with the National Justice Sector Strategy to link it with the formal justice sector, and [begin] implementation in the next twelve months” neither the National Policy, nor the Draft Law has passed.²² Efforts to develop a TDR policy currently remain at a standstill.

U.S. Government Support of TDR

The U.S. strategies for Afghanistan establish the core goal to disrupt, dismantle, and defeat al-Qaeda.²³ Within the rule of law sector, the strategies recognize the need to develop a responsive and predictable system of justice as an alternative to Taliban justice.²⁴ Taliban justice refers to the system of conflict resolution established by the Taliban that operates in addition to the formal justice system and TDR mechanisms. The “Taliban justice system itself primarily takes two forms: roaming judges and local elders. Often educated in or imported from Pakistan, roaming judges travel to different areas to resolve cases; the verdicts in those cases are then enforced by local Taliban commanders. . . . More common appears to be the co-option of local elders by the Taliban, who essentially demand that these elders resolve certain cases using the Taliban interpretation of *shariah* (Islamic law). The Taliban then leave the elders to resolve other cases as they see fit, leaving a system that resembles the informal [TDR] system in other less Taliban-influenced parts of the country.”²⁵

As mentioned above, the Afghan Government draft policy obligates DRC members to observe Islamic (*shari'a*) Law. This is understood to be *hanafi* jurisprudence as acknowledged in the Afghan Constitution (see Chapter 2.4: The Hierarchy of Laws in Afghanistan). The Taliban, however, apply Islamic Law from the *wahhabi* school sometimes called the *salafi* school, which is an offshoot of *hanbali*, and regarded as extreme fundamentalist. A minority, particularly those in Afghanistan, are considered militant.

The U.S. recognizes that “[a]s long as the [Afghan] population views the government as weak or predatory, Taliban approaches to security and justice will continue to be accepted.”²⁶

²¹ See *The Politics of Dispute Resolution and Continued Instability in Afghanistan*, *supra* note 6, p. 1; see also Draft Law on Dispute Resolution *Shuras* and *Jirgas*, *supra* note 15, Art. 17.

²² *Kabul International Conference on Afghanistan Communiqué: A Renewed Commitment to the Afghan People* (Kabul Communiqué), p. 3: <http://www.isaf.nato.int/images/stories/File/official-texts/Communique%20-%20Kabul%20International%20Conference%20on%20Afghanistan%20-%202020%20July%202010.pdf>

²³ See e.g. Regional Strategy, *supra* note 2, p. i.

²⁴ *Ibid*, p. 12.

²⁵ *The Politics of Dispute Resolution and Continued Instability in Afghanistan*, *supra* note 6, p. 5.

²⁶ Regional Strategy, *supra* note 2, p. 12.

To prevent TDR from being seized by the Taliban, the U.S. strategies recognize the need to support the development of the national policy/law on TDR; create space for TDR mechanisms, which uphold Afghanistan's Constitution, to re-emerge in areas cleared of the Taliban; and help strengthen the formal justice system.²⁷ In support of the strategic goals, the U.S. has implemented a number of TDR programs with the aim to increase stability and access to justice, reduce violations of law and human rights, and link the informal mechanisms with the formal justice system.

National Policy/Draft Law on TDR

USIP along with the DoS/Bureau of International Narcotics and Law Enforcement Affairs' (INL's) Justice Sector Support Program (JSSP) worked with the Afghan Government, civil society organizations, and the international community on the development the National Policy and Draft Law on TDR.²⁸ Although efforts to formalize the role of the informal dispute mechanisms are at a standstill, the need for a policy remains. Specifically, there should be "a defined role for the formal versus the informal sectors, acknowledgment under Afghan law of cases resolved outside the formal system, and a common understanding of what weight such decisions should be given legally."²⁹ Without a policy, "many aspects of linkages projects are likely to face resistance, and ultimately will not be sustainable beyond the duration of a project."³⁰

USAID's Rule of Law Stabilization Program-Informal Justice Sector Component

USAID's Rule of Law Stabilization Program-Informal Justice Sector Component (RLS-I) "supports the traditional justice sector and works directly with traditional dispute resolution (TDR) elders and local government and religious stakeholders to foster linkages between the formal and traditional justice systems, increase access to justice, and increase stability through conflict resolution. The overall objective of the RLS-I Program is to strengthen Afghanistan's traditional justice sector and align it with the Afghan Constitution in order to safeguard the rights of individuals, particularly women."³¹ To reduce the likelihood of informal decisions violating the right of Afghans, the RLS-I Program "introduces principles of *Sharia* law to TDR stakeholders" through a "series of trainings and outreach tools."³² The RLS-I Program is

²⁷ Ibid.

²⁸ USIP, Goals in Afghanistan, Enhancing the Rule of Law (accessed February 7, 2014): <http://www.usip.org/node/7405#rol>.

²⁹ USIP Lessons Learned on TDR in Afghanistan, *supra* note 3, p. 30.

³⁰ Ibid.

³¹ USAID Afghanistan, Rule of Law Stabilization Program – Informal Justice Sector Component (RLS-I) Fact Sheet, October 1, 2013 (hereinafter RLS-I Fact Sheet): <http://www.usaid.gov/news-information/fact-sheets/rule-law-stabilization-program-%E2%80%93-informal-justice-sector-component>.

³² Ibid.

focused in Kandahar and Jalalabad. The program is scheduled to conclude on March 13, 2014.³³

Afghan Social Outreach Program

From July 2009 until January 2012, USAID funded the Afghan Social Outreach Program (ASOP); a program under the Independent Directorate of Local Governance (IDLG), “which bridges the gap between communities and district authorities through the creation of temporary district-level *shuras*, the establishment of local community councils, and performance-based funds for governors.”³⁴ As part of ASOP, and in coordination with the Provincial Governor’s Office, more than 115 district level community councils were established.³⁵ The councils “are intended to be the key governing bodies at the district level that will facilitate interaction between communities and government” until district-level elections are held.³⁶ “ASOP’s approach involves electing a 30-50 person community council at the district level to involve traditional tribal *shuras* and religious leaders in government structures.”³⁷ The councils are tasked with facilitating “communication between the government and communities, [mobilizing] community support to reduce conflict, [promoting] development, and encourage more efficient and transparent use of district resources. These councils will gather the concerns and needs of communities and establish channels of communication and coordination with government authorities.”³⁸ Within the councils there are three sub-committees: justice, security, and social and economic development.

In Helmand Province, the communities established a prison review *shura* (PRS) in some districts without functioning courts or justice professionals.³⁹ These *shuras* operate as a detainee review and processing mechanism. The PRS is chaired by the District Governor and its members include representatives from the Afghan National Police, Afghan National Army, the National Directorate of Security, and one member of the district community council justice sub-committee. In districts with a functioning court, a judge can refer a minor offense to the community council/justice sub-committee, which can then refer it to the community’s TDR

³³ “USAID stated that RLS-I will complete an impact evaluation of activities next quarter to measure project results.” U.S. Special Inspector General for Afghanistan Reconstruction (SIGAR) Quarterly Report to the U.S. Congress, January 30, 2014, (hereinafter SIGAR Quarterly Report Jan. 2014), p. 134: <http://www.sigar.mil/pdf/quarterlyreports/2014Jan30QR.pdf>.

³⁴ Regional Strategy, *supra* note 2, p. 8.

³⁵ USAID, Afghanistan Social Outreach Program (ASOP) Fact Sheet, June 2011 (hereinafter USAID ASOP Fact Sheet). Link to PDF file available at (accessed June 12, 2012): http://afghanistan.usaid.gov/en/USAID/Activity/167/Afghanistan_Social_Outreach_Program_ASOP.

³⁶ *Ibid.* See Preface Chapter, Subnational Governance for a discussion of District Councils.

³⁷ USAID, Afghanistan Social Outreach Program (ASOP)(accessed June 12, 2012):

http://afghanistan.usaid.gov/en/USAID/Activity/167/Afghanistan_Social_Outreach_Program_ASOP

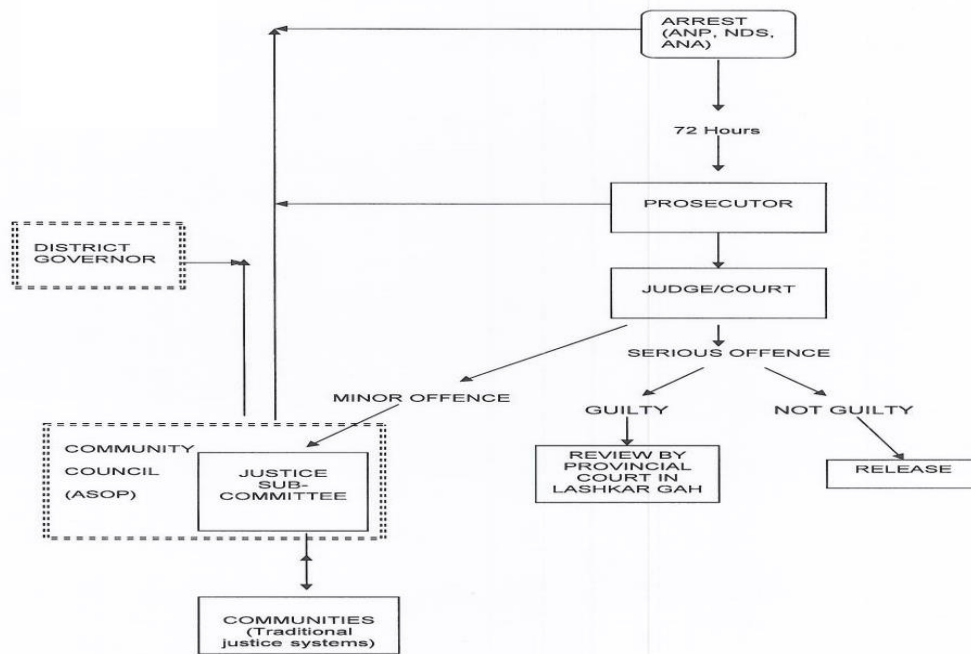
³⁸ USAID ASOP Fact Sheet, *supra* note 35.

³⁹ As of April 2009, Prison Review Shuras were operating in Garmsir, Nad-e-ali, and Musa Qala and Sangin district. No updated information was available at the time of this writing.

mechanism (Figure 1 below).⁴⁰ In districts without a functioning court, the PRS determines if the offense is serious or minor. Serious offenses are directed to the formal system at the provincial level and minor offenses are directed to the community council/justice sub-committee for resolution by the community's TDR mechanism (Figure 2 below).⁴¹

The success of the district councils has depended largely on their composition and the district's security situation.⁴² For example in some districts in Kandahar, "like Maiwand, Zhari, and Shah Vali Kowt, the ASOP-supported councils that were created in more volatile periods have resulted in councils largely made up of elders who are not legitimate in the eyes of the locals and who lack real decision-making authority... These councils have not continued to operate after ASOP funding ended. In other places, such as Dand and Daman, ASOP councils have become effective decision-making bodies."⁴³

Figure 1 - ASOP in Helmand Districts with Function Courts/Formal Justice Professionals



⁴⁰ As of April 2009, Gereshk district had a functioning court and processed cases as described in Figure 1. No updated information was available at the time of this writing.

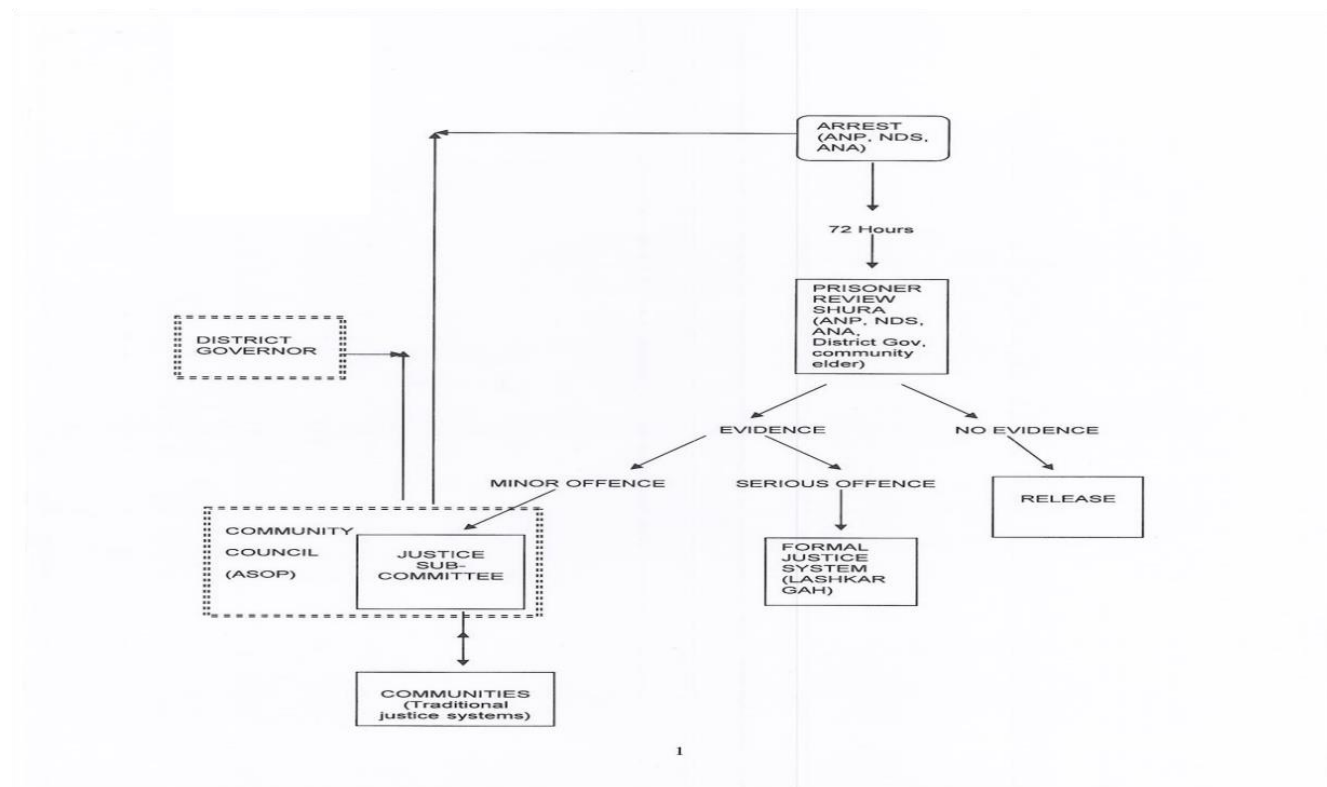
⁴¹ *Support to the Informal Justice Sector in Helmand*, by Fraser Hirst, PRT Justice Adviser (April 2009), Appendix I and II.

⁴² SIGAR Quarterly Report to the United States Congress, April 30, 2012, p. 97:

<http://www.sigar.mil/pdf/quarterlyreports/2012-04-30qr.pdf>.

⁴³ Ibid.

Figure 2 - ASOP in Helmand Districts without Function Courts/Formal Justice Professionals



Department of Defense Village Stability Operations

The Department of Defense (DOD), through its Village Stability Operations (VSO) also “facilitates the establishment of community development councils and *shuras* to connect villages to the districts. In addition to improving the capacity of district centers, the VSO helps villagers stand up against insurgents and provides development assistance.”⁴⁴ In January, the Special Inspector General for Afghanistan Reconstruction (SIGAR) reported: “This quarter, SIGAR requested additional detail from DOD on governance definitions applied to VSO, an assessment of how VSO initiatives have connected local governance to formal government, and the proportion of VSO districts that maintained governance gains compared to those that did not. DOD replied that the group that provided governance responses to the July and November 2013 versions of the *Report on Progress Toward Security and Stability in Afghanistan* (which had similar language to that provided to SIGAR last quarter) does not track governance matters despite past DOD reporting on the governance effects of the initiative.”⁴⁵

⁴⁴ Ibid.

⁴⁵ SIGAR Quarterly Report Jan. 2014, *supra* note 33, p. 121.

USIP

“USIP has been working on informal justice in Afghanistan since 2002, and in 2009 began a series of pilot projects aimed at testing linkages between the formal and informal sectors.”⁴⁶

USIP has supported projects in 13 districts across eight provinces of Afghanistan through local implementing partners to help develop models for collaboration between the formal justice system and TDR mechanisms.⁴⁷ The implementing partners “gathered data on local disputes while testing various approaches that encouraged cooperation between the formal and informal actors. The work of these implementers focused on disputes at the village and district levels – first, attempting to understand how disputes were being resolved within the communities and then testing various ways of strengthening the linkages between the formal and informal justice sectors.”⁴⁸ Based on the data from the pilot projects USIP has written several reports in an effort to provide guidance and best practices to programs engaging local TDR mechanisms.⁴⁹ The most recent report looks at whether the linkages projects contributed to improve stability or access to justice, reduce violations of Afghan law, and/or strengthen the role of local government actors.⁵⁰ Some key findings from the report include:

- The local dynamics of a community determined the success of a linkages project. As a result, many of the underlying assumptions about linkage programs did not turn out to be true in all localities and need to be revisited. Linkage projects, therefore, must be tailored to every community and models “cannot be scaled out to a countrywide level.”⁵¹
- A strong formal system is needed to provide a rule of law framework to support other dispute resolution mechanisms. “[W]hether a contract is resolved through a village elder or through a court system, it is more likely to be enforced if there is a climate of enforcement in the community, which is most often the case if there is a functional formal system that enforces the law.”⁵² Without a policy on the role of informal dispute mechanisms, programs attempting to link the mechanisms to the formal system are unsustainable.⁵³
- Informal dispute mechanisms are not in themselves necessarily a tool for creating stability.⁵⁴ “The evidence suggests that informal justice operates most effectively against an existing baseline of security.”⁵⁵
- Linkage programs are not necessarily tools for state-building nor do they prevent Taliban dispute resolution mechanisms.⁵⁶ “Individuals went to the forum that had the highest local legitimacy, often predicated on power of enforcement in the community, whether that be the

⁴⁶ *The Politics of Dispute Resolution and Continued Instability in Afghanistan*, *supra* note 6, p. 2.

⁴⁷ *Ibid.* The eight provinces included Helmand, Nimroz, Uruzgun, Herat, Paktya, Nangarhr, Kunduz and Takhar.

⁴⁸ *Ibid.*

⁴⁹ See *infra*, *Resources* at the end of this chapter.

⁵⁰ See USIP Lessons Learned on TDR in Afghanistan, *supra* note 3, p. 3.

⁵¹ *Ibid.*, pp. 32, and 29-30.

⁵² *Ibid.*, p. 30.

⁵³ *Ibid.*

⁵⁴ *Ibid.*, p. 32.

⁵⁵ *Ibid.*

⁵⁶ *Ibid.*, p.35.

Taliban, a local powerbroker, the local district governor, tribal elders, or others. Linking credible informal actors to state systems will not in itself improve trust and confidence in the latter, and does not risk harming the credibility of the former.”⁵⁷

- If the “main motivating goal is to improve compliance with Afghan law and international human rights, working with the informal system alone will not be successful unless coupled with broader community education strategies, including legal awareness and strengthening the formal system.”⁵⁸
- “The political instability and general problems in governance throughout the country seriously mitigate the space and opportunity for scaling-up innovative, local reform in the justice sector. ... Thus, proposals for future linkages projects should be treated with skepticism and not undertaken without a rigorous analysis of the political context in the target communities.”⁵⁹

Conclusion

TDR in Afghanistan, and U.S. support in the informal justice sector, is complex. In addition to U.S. support and engagement, other international organizations and donor countries are implementing TDR programs.⁶⁰ There are differing opinions and strategies within the international community regarding what constitutes an appropriate TDR mechanism and how to support the process. Some strategies focus on creating a secure environment allowing TDR mechanisms to develop naturally by the community. Other strategies allow for more involvement in creating the TDR mechanism. Due to the complexity of the issues as well as the political and legal implications of being involved or supporting a TDR mechanism, it is important to be well informed and seek official guidance before engaging in on any TDR project.

⁵⁷ Ibid.

⁵⁸ Ibid, p. 36.

⁵⁹ Ibid, p. 31.

⁶⁰ By way of example, The World Bank has a TDR component in Phase II of the Justice Sector Reform Project (JSRP); The French Embassy funded IDLO for TDR trainings; the British Embassy has been very involved in the TDR mechanisms in Helmand Province and DFID funded the AREU Community Based Dispute Resolution research.

Resources

- Draft National Policy on Relations between the Formal Justice System and Dispute Resolution Councils
- Draft Law on Dispute Resolution Shuras and Jirgas, 4 Oct. 2010.
- United States Institute for Peace (USIP), Memorandum Re: Comments on Draft Law on Dispute Resolution Shuras and Jirgas, January, 20, 2010.
- USIP, Building Peace No. 3, *Lessons Learned on Traditional Dispute Resolution in Afghanistan*, by Erica Gaston, Akbar Sarwari, and Arne Strand, April 2013: http://www.usip.org/sites/default/files/Traditional_Dispute_Resolution_April2013.pdf.
- USIP Special Report 285, *The Politics of Dispute Resolution and Continued Instability in Afghanistan*, Special Report by Noah Coburn, August 2011: <http://www.usip.org/files/resources/sr285.pdf>.
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- The Afghanistan Research and Evaluation Unit (AREU)'s Community-Based Dispute Resolution (CBDR) series (2006-2011): <http://www.areu.org.af/ResearchProjectDetails.aspx?contentid=2&ParentId=2&ResearchProjectId=8>.
- USIP PeaceBrief No. 50, *Many Shuras Do Not a Government Make: International Community Engagement with Local Councils in Afghanistan*, by Shahm Mahmood Miakhel & Noah Coburn, September 2010: <http://www.usip.org/files/resources/pb50.pdf>.
- USIP Special Report 247, *Informal Dispute Resolution in Afghanistan*, by Noah Coburn and John Dempsey, August 2010: http://www.usip.org/files/resources/sr247_0.pdf.
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