INFORMAL JUSTICE AND THE INTERNATIONAL COMMUNITY IN AFGHANISTAN

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ABOUT THE REPORT

This report analyzes the array of programs that dealt with the so-called informal justice sector in Afghanistan from 2008 to 2011. It focuses on a series of pilot projects sponsored by the United States Institute of Peace that engaged local Afghan organizations at the district and provincial levels to observe and record how informal justice systems resolve (or fail to resolve) people's disputes, and how informal and formal justice actors relate to each other in practice. It also examines the expanding role of international actors in local dispute resolution and the impact that such interventions have had on local practices and perceptions of justice. The report finds that the informal justice sector provides a pervasive and effective, if sometimes flawed, venue for the majority of the Afghan population to access justice and argues that the international community should commit more fully to supporting local informal justice mechanisms.

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[While few Afghans have confidence in the state's ability to deliver justice through the formal court system, the informal justice sector in Afghanistan provides a pervasive and effective, if sometimes flawed, venue for the majority of the Afghan population to access justice.]

Summary

- Informal justice is an often debated yet poorly understood concept in Afghanistan. Generally, it refers to a series of mechanisms, such as local councils (*shuras* and *jirgas*), that are outside of the state's direct control—though not necessarily beyond its influence—and that are used to resolve disputes and conflicts in a manner perceived as legitimate by local communities.

- While few Afghans have confidence in the state's ability to deliver justice through the formal court system, the informal justice sector in Afghanistan provides a pervasive and effective, if sometimes flawed, venue for the majority of the Afghan population to access justice.

- However, large, internationally sponsored programs attempting to promote rule of law through the informal justice sector have faced serious paradigmatic and programmatic challenges that have made these programs generally ineffective and, at times, counterproductive.

- In particular, failure to understand fragile local power dynamics and efforts to apply a unitary model have changed structures of local legitimacy and accountability and may have emboldened or empowered local actors with limited community oversight.

- Smaller, Afghan-led initiatives have met with more success in increasing predictable dispute resolution, suggesting that certain types of small, flexible, and context-responsive programs focused on linking the formal and informal sectors can promote more predictable access to justice, particularly given the challenges facing formal sector reform.

- These small-scale projects, however, still face serious challenges, particularly when it comes to monitoring and evaluation and coordination with other programs, including the National Priority Programs of the government of Afghanistan.

- The government of Afghanistan needs to be more sensitive to local justice concerns and work in particular with local leaders in a more cooperative manner that is aimed at improving relationships and locally legitimate service delivery and not simply at extending the reach of the state.

- The international community needs to commit itself more fully to increasing access to justice and dispute resolution for all Afghans—on the Afghans' own terms. In doing so, it also needs to be respectful of local cultural patterns and cognizant of local political economies.

- Such a strategy means moving away from funding large projects that take a cookie-cutter approach to rule of law and that rely almost exclusively on outside experts and models and moving toward small, dynamic Afghan-led projects that have to date proven more competent on a small scale.

[**Introduction**]

Every serious recent attempt to analyze the ongoing instability in Afghanistan has included a commentary on the lack of justice as a motivator of grievance and conflict.[1] A number of these analyses have focused on the twin facts that Afghanistan's formal justice mechanisms are seen to be expensive, corrupt, and slow, while "informal" justice mechanisms are preferred by local communities because they are more familiar, more credible, and less corrupt.

In its increasingly fervent search for success in Afghanistan over the past few years, the international community began to pay much closer attention to these mechanisms and try to support existing ones or create new ones based on its understandings of functional, historical models. Approaches have varied from small-scale projects implemented by local partners to multimillion dollar interventions implemented by large international contractors that include the training of local dispute resolution facilitators and the paying of their salaries.

Given the millions of dollars that have been spent by the international community over the past ten years on improving the formal justice sector, the fact that the vast majority of Afghans still prefer informal justice mechanisms raises serious issues about the effectiveness of these programs. These include the practical question of whether the informal and formal systems can be combined, the programmatic question of whether the internationally driven rule-of-law programs were well designed in the first place, and the philosophical question of what "justice" means to Afghans in a continually evolving context.

This report begins with the latter question, situating Afghan notions of justice within a specific political and cultural context. While the international community has tended to see "justice sector reform" as a subcomponent of "security sector reform," for Afghans the question of justice plays a far more political role. Perceptions of political legitimacy are derived from judgments on how "justly" political actors behave, while community harmony depends on the satisfactory resolution of disputes. Both the political legitimizing function of dispute resolution and the impact of dispute resolution on community harmony have lodged within the Afghan informal justice system a preference for "restorative" solutions rather than the "punitive" measures of Western formal justice systems. Particularly in times of instability, the cost of not resolving a conflict within a community, or a conflict that involves several communities, affects a population much wider than that composed of only the disputants. This often leads to compromises that, while not perfect, are better geared to long-term stability, whereas the formal justice system tends to render "winner-takes-all" verdicts that leave a lingering sense of injustice on the part of the loser and that may contribute to future conflicts. The emphasis on reconciliation and the promotion of social harmony also reflects the influence of Islam on Afghan perceptions of justice. Some interpretations of Islamic law, like formal justice systems, have their punitive elements. But, as this report describes, the Islamic division between *huqoq-ul-ibad* (individual rights) and *huqoq-ul-Allah* (literally "God's rights" but often legally understood as state or community rights) provides a potential line of demarcation between cases best handled by the formal and informal systems respectively.

The report is divided into seven sections, including this introduction. The second section gives a broad overview of informal justice in Afghanistan. The third section describes some of the efforts made by the international community to engage the informal system. The fourth section analyzes a series of related programs funded by the United States Institute of Peace (USIP) over the past five years that have engaged with the informal sector in Afghanistan. The fifth and sixth sections analyze both paradigmatic and programmatic issues with the international community's engagement with the informal sector. The seventh and final section offers some conclusions about the future of informal justice mechanisms in Afghanistan.

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Sections two through six are written to stand alone, so that readers familiar with justice issues in Afghanistan may choose to skip the second section, while readers interested in government-sponsored programs may wish to read only section three. The recommendations and discussions in section five tend to be particular to Afghanistan, while the sixth section applies lessons from engagements with the informal sector to other countries as well.

The United States Institute of Peace and the Informal Sector

This study emerged from USIP's work since 2002 with the informal justice sector (what "informal justice" actually means, and the limitations of the phraseology, are discussed in the next section). Data in this report come primarily from a series of informal justice projects conducted from 2008 to 2011, including almost one thousand structured and semi-structured interviews conducted by USIP and its partners with Afghan officials, international donors, local leaders, those involved in local disputes, and others in a position to offer a credible assessment of the impact of projects. It also relies on an in-depth reading of the literature on the topic and an extensive review of available sources, including information from other informal justice programs that have been willing to share their data. Throughout the report, names and identifying details in the case studies presented have been changed to protect informants, except for nationally recognizable political figures.

USIP's work in the sector has tended to be small-scale and implemented by local partners with methodologies that have tended to be almost experimental. USIP's early work in the sector helped inform wider efforts that began in 2005 to develop a policy toward the informal sector. The catalyst for much of the recent work on informal justice was the publication of the Afghan Human Development Report, which was dedicated to the question of connecting the formal and informal sectors. Building on this work, in 2008 USIP launched pilot projects in eleven districts across Afghanistan. The implementing partners and the approaches have varied according to the different sociopolitical and cultural features of the area. One of the clearest conclusions from USIP's work is that understanding and accommodating these local features is essential to the success of any informal justice project.

While the analytical methodology used to generate the observations in this report is not based on an exhaustive analysis of every effort undertaken in the sector, it captures enough of its features to draw general conclusions, many of which have been insufficiently appreciated so far, and most of which have never been consolidated in a single study. Given the reliance on interviews to elicit qualitative assessments, many of the conclusions may seem anecdotal. However, every effort has been made to support data from interviews with observations and follow-up interviews that have been corroborated in many cases by other studies on the subject. In addition, it should be noted that creating precise definitions of what a dispute is, how it can be resolved, and even when it can be considered to be resolved is exceedingly difficult given differences between communities within Afghanistan, which in turn makes comparing data between districts and projects difficult. As a result, the statistics and case studies presented throughout the report in text boxes should be seen as general examples of dispute resolution in Afghanistan rather than as precise measurements of the state and nature of dispute resolution in Afghanistan.

II

[WHAT IS INFORMAL JUSTICE IN AFGHANISTAN?]

Informal justice is an often debated yet poorly understood concept in Afghanistan. Generally, it refers to a series of mechanisms that are outside of the state's direct control—though not necessarily beyond its influence—and that are used to resolve disputes and conflicts in a manner perceived as legitimate by local communities. These mechanisms include ad hoc or standing local councils (both *jirgas* in Pashtun areas and the more institutionalized *shuras* in Pashtun and non-Pashtun areas), as well as opportunities for appeal to respected elders, religious leaders, or informal mediators who may act with disputants' consent to facilitate a resolution. They may also be highly localized commercial shuras that deal with specific business disputes, *ulema* councils (councils of religious scholars), and a range of other potential groups and figures that resolve disputes in a locally legitimate manner.

There is often an assumption that in more urban areas courts are more likely to deal with serious crimes, but even within the Kabul court system, informal bodies are often used to address issues such as compensation in criminal cases.[2]

Informal justice mechanisms tend to apply restorative justice, as opposed to the retributive or punitive justice decisions obtained through most formal court proceedings. They also tend to focus on community reconciliation over individual rights (see box 1). *It is important to emphasize that these mechanisms are not static, centuries-old traditions but dynamic processes that continue to evolve based upon shifting social, political, and economic conditions.* Since they are embedded within communities, these mechanisms are highly reflective of local cultural norms. Similarly, they are often shaped by local political structures, where groups and figures who have the most local political influence, such as military commanders or ethnically based political parties, are most able to influence the selection, composition, and deliberations of informal mechanisms.

Research suggests that a large majority of Afghans use informal mechanisms as their primary means of resolving disputes.[3] Anecdotal evidence and qualitative research methodologies reveal significant complaints that the formal justice system is corrupt, expensive, time consuming, and difficult to access. This report begins with some basic definitions and descriptions of these mechanisms in their ideal type but then looks at some of the ways that history has reshaped and altered them, creating the complex justice landscape seen in Afghanistan today.[4]

Justice in Afghanistan today is inherently linked to the ways in which political power is used and abused. A number of studies based on interviews with Afghans across the country began to establish a clear link between the lack of justice, or the corrupt provision of "rule-of-law" services, and support for the insurgency.[5] These findings led to an attempt by the international community to begin to deal more seriously with the justice sector. But the attempt to address justice quickly became intertwined with a broader counterinsurgency and stabilization strategy in Afghanistan and inevitably led to a search for quick fixes. The existence and apparent effectiveness of traditional justice mechanisms became an obvious focus of attention and resources of both civilian and military actors.

While well-meaning and superficially based on an improved understanding of Afghan culture, the projects that emerged from this new focus sometimes generated perverse results because they were based on a number of flawed assumptions. Two flawed but abused assumptions (not confined to the justice sector) are that local successes are always generalizable across regions and that small-scale successes are always "scalable."[6] These flawed assumptions must be kept in mind even in the cases of the USIP projects discussed later in this report. There are many variations of informal justice mechanisms across Afghanistan, in part due to the many differences between localities. This report also shows that, apart from historical, political, and cultural differences between regions, differences in local stability also affect the effectiveness of informal justice mechanisms.

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Box 1. A Divorce in Nimroz

In a village in Nimroz, Malik Khan engaged his daughter to Abdul's son, Niazi, and Abdul's sister was engaged to Anwar, the son of Malik Khan, in a reciprocal marriage agreement. Later, after the wedding, it became clear that Abdul's sister was unhappy with her husband, Anwar. When Anwar realized this, he denied his wife a divorce, saying that he would only do so if his sister also divorced Niazi. This caused a great deal of enmity between the two families that only grew with time.

Finally, the families took the case to a local shura composed of five elders and complained about the situation. The elders on the shura asked the wives of Anwar and Niazi how they felt about their husbands. Anwar's wife said that she did not like her husband, but Niazi's wife said that she was happy. After some discussion, the shura convinced Anwar to divorce his wife and accept a payment of 120,000 afghanis to allow him to remarry someone else, as long as he allowed his sister and Niazi to remain living together happily. Both the families accepted the shura's final decision and were satisfied that all social and economic obligations had been met.

Source: The Liaison Office [TLO], unpublished field research.

What's in a Name?

As several international groups have started rule-of-law programs aimed at engaging informal actors, increasing research has been done, and a number of policy papers have been written, on how these mechanisms can work more cooperatively with the state. Despite these attempts, there remains a serious misunderstanding of how the informal system works. One of the key reasons why the international community's attempts to engage the informal justice system has been so ineffective is the difficulty of translating the phenomenon into concepts that are more recognizable to those primarily familiar with formal Western justice systems. Informal systems have been characterized as "nonstate mechanisms," "traditional justice," "community-based dispute resolution mechanisms," or "alternative dispute resolution mechanisms." Each of these names is in some way flawed and, more importantly, reflect different aspects of the deep political issues surrounding the phenomenon.

The term "nonstate," for example, is misleading because government officials, particularly district governors, are often highly involved in these practices. "Traditional justice," on the other hand, wrongly connotes a static, idealized (or sometimes backward) past that does not take into account the way that these mechanisms have adapted to changing political conditions, or how they have interacted with very modern groups like nongovernmental organizations (NGOs) and international military forces (see box 2). The term "community-based dispute resolution" ignores the fact that in many cases those resolving the disputes are not always from the community affected, particularly when religious or tribal leaders are brought in from other areas due to their reputations as conciliators. It also overstates the degree to which "communities" are coherent and isolatable bodies in Afghanistan.

What to call these mechanisms is not merely an academic or semantic debate. The choice affects policy decisions and perceptions about how to engage them—or even whether they should be engaged at all. Human rights groups, for example, oppose associating the word "justice" with these mechanisms, arguing that the only way individual rights can be protected is through the support of the formal system. This is because, as will be described, informal mechanisms tend to emphasize community rights over individual rights in rendering their decisions.[7] On the other hand, international contractors that receive funds from donors to work with these mechanisms often refer to them as alternative dispute resolution (ADR) based on tenuous parallels with systems found in the United States and other Western countries where disputes can be resolved outside of the court system. The equation implies that international contractors who have ADR experience in the West are well positioned to send foreign experts to build the capacity of Afghan elders for dispute resolution. In reality, ADR in most Western

Informal mechanisms tend to emphasize community rights over individual rights in rendering their decisions.

Box 2. The Student Council in Chaprahar, Nangarhar

A fight between two neighbors turned violent, with one neighbor accidently killing the other with a stick. The attacker and his male relatives fled the area before the police could arrive.

The attacker's family was eager to reconcile with their neighbors to end the feud and allow the men to return. The attacker's family took the case first to the village shura, then to the local police, and finally to the district *ulema* council. In each case, however, the victim's son, a student, refused reconciliation, stating that he wanted revenge instead. Finally, respected members of the local student council, of which the victim's son was a member, convinced him that taking revenge would jeopardize his future.

The victim's son finally agreed to a jirga involving members of the student council and several former students from Jalalabad. The jirga decided the attacker should give his house to the victim's family, one million Pakistani rupees, two sheep, and oil. In addition, the attacker and his male relatives could not return to the village for the next two years.

contexts consists of an organized system that augments the formal system. This is very different from the informal system found in Afghanistan, if only because in the West the formal system is preponderant, while ADR is a secondary but neatly fitting system. In Afghanistan, the informal system is preponderant, while the formal system seeks preponderance but remains secondary. Afghans themselves tend to refer to the entire process simply as "reconciliation," though in many cases they may just refer specifically to certain concepts rooted in *sharia* (Islamic law) (see box 3) or *Pashtunwali* (Pashtun tribal code) that are a part of the reconciliation process.

This report uses primarily the term "informal justice," because while being perhaps the least descriptive it is also the least politically charged. It is important to note that "informal" in this sense refers to the relationship of these mechanisms to those of the state and is not meant to suggest that these mechanisms are ad hoc or haphazard. While these processes are rarely as unpredictable as they may appear to external observers, they have their own internal coherence that is well understood by the parties involved. They may also take a variety of surprising forms, even including the use of young, educated men rather than groups of elders. This flexibility is part of what makes these bodies so effective in dealing with a range of disputes, but it also creates complications when it comes to trying to fit them into the Afghan legal code or a framework for adjudication that is readily familiar to foreign donors.

Shuras and Jirgas

The most commonly used mechanisms for dispute resolution across Afghanistan are shuras and jirgas. "Jirga" is a Pashto word, deriving from the Turkic word for circle,[8] and typically denotes gatherings in which the parties to a dispute are represented by members of their patrilineal kin, who deliberate on the issue. These types of jirgas are related to, but not to be confused with, "Loya Jirgas," which are national-level "grand councils" that have periodically been convened to decide upon questions of major national importance (for example, the 2003–04 Constitutional Loya Jirga that ratified the current Afghan Constitution), imparting the impression of a nationally representative referendum on a given issue.[9] Jirgas are most common in Pashtun areas in the south and east. In contrast, "shura," a Dari loanword from Arabic, is often translated as "council" and is generally a standing body assumed to be representative of the community.[10] Such bodies can exist at various levels. It is common to find mosque or neighborhood shuras, for example, as well as, at higher political levels, district and provincial shuras. These councils deal with dispute resolution, as well as a wide range of other local governance issues, in the continuing absence of a number of formal deliberative bodies called for by the constitution but not yet created.[11] Shuras are found across the country with varying levels

> **Box 3. Reference to Reconciliation in the Quran**
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> "And if you fear dissension between the two, send an arbitrator from his people and an arbitrator from her people. If they both desire reconciliation (*islah*), Allah will cause it between them. Indeed, Allah is ever knowing and acquainted [with all things]." —Ayah 35 of Surah Annesa

of influence and play a particularly important role in some ethnically divided areas where they help manage relationships between ethnic groups.

The terms *jalasa* and *majlas*, both generally translated as "meeting," are also used in some areas to refer to gatherings that address disputes. The use of these terms, however, varies across the country. In some places, shura and jirga are used interchangeably, whereas in others a single term refers to both fixed councils and ad hoc bodies convened to resolve a specific dispute.[12] While there is a great deal of variety in the composition of these bodies, they tend to function in similar ways and promote similar values, in particular those of restorative justice, reconciliation, and equality among male members of the community.

These points of commonality are evidence of a long history in which shuras were an important consultative body for communities. This is not to say, however, that all shuras, because they are called shuras, are necessarily old or rooted in tradition. Chris Johnson and Jolyon Leslie suggest that many local-level shuras, often described as timeless entities by local community leaders, were actually set up in recent decades, many at the instigation of the international community.[13] In other cases, given the Afghan peoples' experience with foreign involvement, communities were acutely aware that international development funds were more likely to go to those areas with a "representative council" than those not as organized politically, giving them an external incentive to establish such bodies.[14] In recent years, too, shuras and jirgas have become a key aspect in the ways that international actors, ranging from humanitarian groups and foreign embassies to the international military, attempt to interact with local communities, with these interactions further changing them. Despite questions about the true historical roots of these types of bodies, it is clear that the concept of shuras and jirgas as representative bodies, vested with decision-making authority over disputes and other political issues, has become firmly embedded in how most Afghans describe local politics and dispute resolution processes.

Cultural Values and the Informal System

There are several key concepts that define the way informal justice functions across Afghanistan. One of these is *islah*, or "reconciliation," which is mentioned at several points in the Quran as an important religious virtue (see, for example, box 4).[15] Beyond simple resolution of conflict, the concept implies the promotion of social harmony and justice. This religious value, as well as the fear of *fitna*, or social division or disorder, does much to shape the language and practice of informal dispute resolution. Elders often refer to these religious and social values during the deliberation process, and these values form a key element of the social pressure that motivates participants to accept certain decisions. This pressure is in ideal cases unspoken but nonetheless sufficiently present and accepted in order to ensure compliance. Any increase in coercive enforcement observed over the past forty years, often in the form of a threat of social isolation, is very much a reflection of the changing relationship between the individual and the group in Afghanistan, in which the implicit pressure from the community has become less coercive in making individuals conform to group norms. This has often been the result of the dislocation of communities through migration, as well as the rise of the influence of local military commanders.

Box 4. Another Reference to Reconciliation in the Quran

"If two parties among the believers fall into mutual fighting, make peace (*islah*) between them."
—Ayah 9 of Al-Hujurat Surah

Another important cultural basis for nonstate dispute resolution in some parts of the country is Pashtunwali, a cultural code found in Pashtun areas. Pashtunwali often dictates specific procedures and punishments in dispute resolution. While sometimes referred to by both Afghans and outsiders as a "tribal code," with the implication that it applies to all Pashtuns in the same way everywhere, in actuality it varies in interpretation and application from area to area and over time.[16] This system is often combined with notions of what it means to be a "good Muslim," despite the fact that the two diverge on some key issues. The core values of Pashtunwali, such as honor and hospitality, do much to shape how decisions are made in Pashtun areas and even have certain resonances in non-Pashtun areas.

These two value systems—sharia and Pashtunwali—can create tension when they are at odds with each other. For example, in most Pashtun traditions, a woman does not receive any inheritance from her father, despite the fact that the Quran clearly states that she should receive a half of the share that her brothers receive. In general, however, such distinctions are usually made by religious scholars and urban elites, while local communities generally manage to conflate the two systems.[17] For example, a woman might receive a half share of the cash that the family has but none of the land that is divided among her brothers. In some instances these differences may actually create some space for negotiations within the dispute resolution process. Thus, a particularly poor woman may receive a share of the inheritance to ensure her economic survival, but if her family is well off, she might be denied this right. In the latter case people may be well aware that this violates sharia principles but will not bring the point up unless they disagree with it for some other reason. Ultimately these religious and cultural ideals are constantly negotiated depending on the case. They are not ossified principles that are consistent in each case.[18]

Two other concepts, rooted in Islamic jurisprudence, are also often discussed as shaping informal mechanisms. These are *haq alabd* and *haq allah,* described respectively in the Quran as the rights of individuals vis-à-vis each other and the rights of God or the rights of the community.[19] According to most interpretations, haq alabd are individual rights, and offenses against them therefore are forgivable through negotiation or compensation to the victim. The rights of God, however, are those offenses against the entire community, such as murder, that cannot be compensated or forgiven and instead require punishment. A single incident, such as a homicide, can represent both aspects; resolving one element, such as imprisoning the killer in satisfaction of the haq allah obligation, may not resolve the need to pay compensation to the victim's family in fulfillment of haq alabd requirements.

This distinction has proven useful in helping to delineate the jurisdiction of informal mechanisms. In many areas, local leaders and government officials agree that informal mechanisms should deal with haq alabd issues, while the state should deal with haq allah cases. In reality, however, there is often disagreement on how to divide these concepts (an issue discussed further in section six). Participants might agree conceptually that the state should be involved in haq allah issues, but disagree on what the precise definition of a haq allah issue is. In such instances, these differences have to be negotiated.

Informal bodies deal with a wide range of cases from small-scale civil disputes to serious criminal issues. While many observers will point out that informal mechanisms must adhere to certain religious and social values, and while certain types of cases may be more likely to

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