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Bridging Modernity and Tradition: Rule of Law and Search for Justice in Afghanistan

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A legitimate, functioning and coherent justice system is urgently needed to establish peace and stability in post-Taliban Afghanistan. After three decades of war, continued insecurity, endemic corruption, and lack of resources hobble the formal justice system. Informal, community-based dispute resolution mechanisms, such as -- which are more readily accessible and understood than formal courts by most Afghans, particularly outside urban areas -- are widely used to resolve both civil and criminal matters. These mechanisms are critical to maintaining stability within communities, and at present handle over 80 percent of disputes in Afghanistan. At the same time, informal or traditional practices may fall short of due process and human rights standards.

The need to build a more collaborative relationship between the formal and informal justice sectors in Afghanistan was discussed by a panel convened by USIP on September 28, 2007. The panelists were Dr. Ali Wardak, senior researcher at the Center for Policy and Human Development at Kabul University, and Dr. Barnett Rubin, director of studies and senior fellow at the Center on International Cooperation of New York University. Dr. Wardak introduced the key findings of the *Afghanistan Human Development Report 2007: Bridging Modernity and Tradition, Rule of Law and the Search for Justice*, which was supported by the United Nations Development Program (UNDP) and Kabul University. This report is unique as it was the first UNDP Human Development Report to focus on the linkages between the rule of law and human development. J Alexander Thier, senior rule of law advisor at the U.S. Institute of Peace, served as moderator.

Following is a summary of the views expressed by the speakers and the audience during the discussions. These statements do not necessarily represent the views of USIP.

Rule of Law as the Cornerstone of Progress

In the last two years, there has been a dramatic shift toward an understanding that the rule of law is critical to social, economic and political development as well as the establishment and maintenance of security throughout Afghanistan. This shift was underscored at the Rome Conference in July 2007, where relevant Afghan institutions, international organizations, and donors met to review progress, pledge significant new assistance, and chart the way forward.

The Afghanistan Human Development Report 2007 takes up this theme and proposes a definition of the rule of law in the Afghan context, based on extensive research and consultation with

Afghans from a wide variety of backgrounds and with varying degrees of familiarity with both the formal and informal justice sectors. The proposed definition states that:

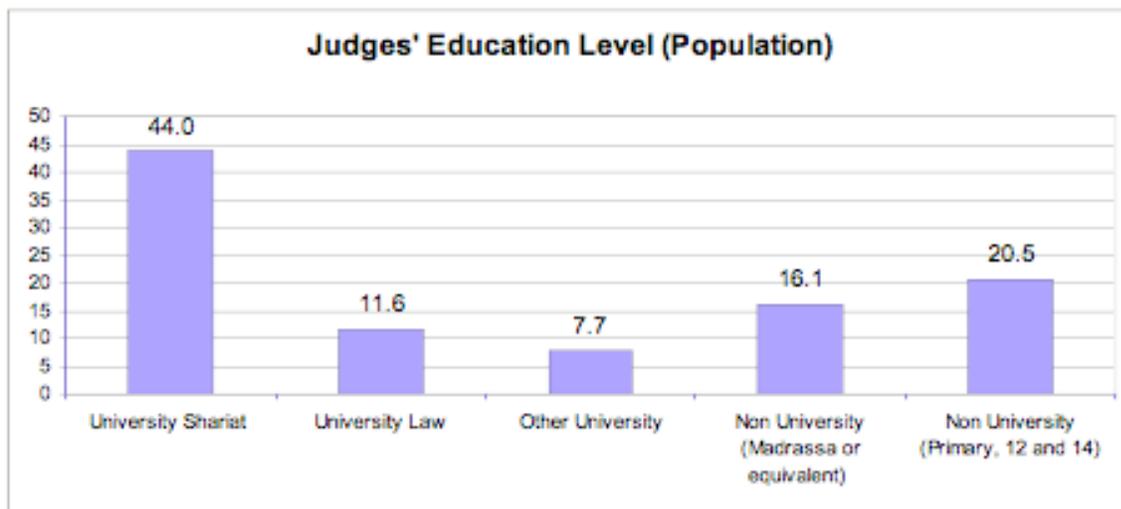
*“For Afghans, the rule of law refers to **all** those state and non-state institutions that promote justice and human development through the application of public rules that are deemed fair, applied independently, enforced equally, and consistent with human rights principles”¹*

The definition embraces the co-existence of the major legal traditions in Afghanistan today: the formal legal system, the informal system, and the Islamic *Sharia* that heavily infuses both systems. The report recognizes the need for co-evolution of the formal and informal legal systems, and advocates building a more formal relationship between the systems that builds on their mutual strengths. In this sense, the report endorses an approach recommended by USIP’s ongoing work on community-based dispute resolution in Afghanistan, reflected in publications such as [“The Clash of Two Goods: State and Non-State Dispute Resolution in Afghanistan.”](#)

The Challenges of Formal and Informal Justice

Three key areas are discussed at length in the report: the development and status of Afghanistan’s formal justice institutions; the informal dispute resolution mechanisms through which an estimated 80 percent of legal claims are handled; and a proposed hybrid model which would ensure that alternative dispute resolution mechanisms remain important in providing justice, while acting within certain legal parameters.

Efforts by international donors to reestablish the formal state justice system in post-Taliban Afghanistan have faced serious difficulties, including a profound lack of professional capacity and resources for judges, lawyers, police and prison officers; physical infrastructure devastated by years of war; institutionalized corruption, and low levels of confidence in state justice institutions. For example, research conducted for the Human Development Report indicates that little more than half of the judges in Afghanistan have the relevant formal higher education and have completed the requisite one-year period of judicial training. The remaining judges are graduates of madrassas or faculties other than law, with 20 percent having no university education at all. In addition, 36 percent of judges have no access to statutes, 54 percent have no access to legal textbooks, and 82 percent have no access to decisions of the Afghan Supreme Court. In addition to these drawbacks, most Afghans see little benefit in turning to the courts. In recent surveys, only 20 percent of Afghans say they would turn to the formal system to resolve their problems.²



Source: Judges Survey of Training Needs (4 May 2006), the Supreme Court

Modest progress on justice sector development has been made since 2001 through professional training and capacity building programs, the distribution of legal textbooks and materials, rebuilding of damaged buildings such as prisons, and the adoption of new laws by the executive and legislative branches. However, the lack of a coherent, strategic vision for rebuilding the justice system and the lack of effective coordination among donors and Afghan justice institutions, has complicated reform efforts. Moreover, technical reform programs are necessary, but not sufficient, until there is a core of officials and state institutions that regard themselves as bound to uphold the rule of law.

Community-based mechanisms, known as *jirga* and *shura*, which have always played a strong role in Afghan society, have further filled the vacuum left by the formal justice system. These informal processes generally involve an *ad hoc* council of village elders and disputants coming together to find solutions that are acceptable to all parties, including the community. Although customary norms applied by local mechanisms differ somewhat throughout Afghanistan, the goals of restitution, reconciliation, and restoring community harmony are the defining feature of the system. In this sense, practice in Afghanistan also resembles a recent trend towards restorative justice practices. As the informal system depends almost exclusively on consensus of the parties involved, punishment is rare and decisions are self-enforcing. Generally a reconciliation process will include an admission of responsibility by parties, and an agreement on compensation to the victim(s) in the form of money or other property.



Source: Afghanistan Human Development Report 2007

Community-based practices are generally favored because they are undertaken locally, at limited expense, and according to understood and accepted principles. In a rural agrarian society with limited literacy, the formal legal system can be alien and forbidding. However, the informal system has serious shortcomings as well. In some circumstances, this may include the practice of *baad* – the marriage of a woman from the offender’s family to a close relative of the victim, or the habitual denial of women’s legal rights to inheritance. The *jirga* or *shura* might also adopt more extreme methods of requiring the offender to abide by the decision, such as exclusion of the offender from the community, or burning of the offender’s house, but such incidences are reportedly relatively rare today.

Critics of the informal system generally compare the actual informal system with the idealized formal one. For instance, although on paper the formal system guarantees legal representation for criminal defendants, in reality few receive any form of aid. The situation of women is similar. While women are rarely present at a *shura* or *jirga*, they are also a rare presence in rural courts despite legal guarantees of their equality. Finally, it was noted that at present in Afghanistan, only decisions made by consensus, as opposed to an adversarial process, are enforceable.

Developing a Hybrid Model of Formal and Informal Justice

Given the respective strengths and weaknesses of the formal and informal justice systems in Afghanistan, the report proposes an innovative hybrid model that aims at harnessing the positive aspects of the informal system, while ensuring that their decisions are supervised for consistency with the Afghan Constitution, Afghan legal norms and international human rights standards. These recommendations are consistent with those proposed by USIP following a national conference on the subject in Afghanistan in December 2006.³

The hybrid model proposed in the report would involve the creation of two new units within the state justice institutions: an Alternative Dispute Resolution (ADR) Unit and a Human Rights Unit. The ADR Unit would identify appropriate mechanisms to settle disputes outside of the courts, including referral of appropriate cases to *jirgas* and *shuras* and to Community Development Councils (CDC). While the ADR Unit could address minor criminal matters and all types of civil disputes, disputants would have the choice to process these cases through dispute resolution or through the courts. Serious criminal cases (including serious crimes committed in the past) would be dealt with by the formal justice system. The second element of the proposal is a Human Rights

Unit (perhaps located within the Afghanistan Independent Human Rights Commission) mandated to monitor decisions made by ADR institutions (for example, *jirgas*, *shuras* and CDCs) to ensure their consistency with human rights principles and Afghan law. Once approved, the decisions could be made legally binding by the courts or other institutions of the formal justice sector.

It is important to note, however, that this hybrid model does not suggest the integration of informal dispute resolution into the formal justice sector. Instead, it proposes the establishment of institutional links between the formal and informal sectors so that the outcomes of informal processes are monitored and recorded, and so that justice is more widely accessible, efficient, cost-effective and humane. The proposal to share authority, while still operating under the broad Afghan legal framework, provides each sector with an incentive for cooperation.

USIP and others are preparing to implement pilot projects in Afghanistan in the coming year that will test a hybrid approach. Most parties concerned acknowledge that developing a collaborative relationship between the formal and informal systems must begin with practical experience, and proceed slowly from there.

About the Authors:

This USIPeace Briefing was written by J Alexander Thier, senior advisor, Rule of Law Program and Leigh Toomey, Leigh Toomey, facilitator, Rule of Law program and research director, International Network to Promote the Rule of Law at the U.S. Institute of Peace. The views expressed here are not necessarily those of USIP, which does not advocate specific policies.

About the Rule of Law Program:

The Rule of Law Program, builds upon and refines principles on the rule of law articulated by various international bodies and provides practical guidance for their implementation. The program is based on the premise that adherence to the rule of law entails far more than the mechanical application of static legal technicalities; it requires an evolutionary search for those institutions and processes that will best bring about authentic stability through justice.

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¹ Afghanistan Human Development Report 2007: Bridging Modernity and Tradition [<http://hdr.undp.org/en/reports/nationalreports/asiathepacific/afghanistan/name,3408,en.html>] and Rule of Law and the Search for Justice (Center for Policy and Human Development, 2007), p. 43

² “A Survey of the Afghan People” Asia Foundation, 2006.

³ See Barfield, Nojumi, and Thier, The Clash of Two Goods: State and Non-State Dispute Resolution in Afghanistan [www.usip.org/ruleoflaw/projects/clash_two_goods.pdf] (USIP, 2006) and Briefing Paper: Conference on the Relationship between State and Non-State Justice Systems in Afghanistan [www.usip.org/ruleoflaw/projects/conference_summary_paper.pdf] (USIP, 2006).