



SPECIAL REPORT

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ABOUT THE REPORT

This report discusses informal justice in Afghanistan and its relationship to state institutions. It draws on a series of pilot projects sponsored and overseen by the United States Institute of Peace (USIP) and on work by other nongovernmental organizations (NGOs), international donors, and the international military in Afghanistan, as well as on field visits by the authors.

Over the past several years, the USIP team that oversaw the projects spoke with hundreds of Afghan government officials, community leaders, citizens, members of the NGO community, international government officials, and military personnel about informal justice issues. The report provides a summary of this research and a series of recommendations for the Afghan government and the international community engaged with rule of law in the country.

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AUGUST 2010

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Informal Dispute Resolution in Afghanistan

Summary

- Faced with difficulties establishing legitimate, effective rule of law and the predominance of informal or traditional justice mechanisms in Afghanistan, the Afghan government and the international community have increasingly focused on engaging informal justice systems to resolve both civil and criminal disputes.
- While informal systems vary across the country, they are generally based upon restorative justice and the preservation of communal harmony. They currently resolve the vast majority of legal disputes and other conflicts in the country, particularly in rural areas.
- Engagement with informal systems and linking such systems to state institutions present some of the more effective opportunities for resolving conflicts and increasing access to justice for all Afghans because they are familiar, locally available, and involve relatively low costs. Such engagement, however, also faces significant logistical, cultural, political, and legal challenges.
- When engaging informal systems and/or implementing programs to link them to the state, it is important to have sound understanding of local power dynamics and how local dispute resolution systems function.
- The United States Institute of Peace (USIP) has been working on informal justice in Afghanistan since 2002 and has run pilot projects in six districts that test ways of designing or strengthening links between the state and informal systems to increase access to justice.
- Some of the best practices identified from the pilot projects include the importance of regular and substantive communication between informal and state justice actors, the promotion of the use of written records of decisions by informal systems, and the monitoring of decisions to ensure applicable Afghan laws and international human rights standards are upheld.

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Challenges to the State Justice Sector in Afghanistan

Despite the more than eight years and billions of dollars in foreign assistance provided to Afghanistan since the fall of the Taliban, the international community's efforts to help create a stable, democratic Afghanistan are in jeopardy. State security, governance, and justice institutions are unable to provide even basic services to much of the population. Sophisticated organized criminal networks, a culture of impunity for powerful commanders, and a growing Taliban insurgency combine to create an insecure environment, which in turn threatens to derail the country's nascent experiment with constitutional democracy. As they did in the mid-1990s following Afghanistan's brutal civil war, the Taliban have capitalized on the lack of good governance, justice, and security in many parts of the country by offering an alternative—albeit harsh—system to provide law and order.

To counter the Taliban and achieve lasting stability in the country, it is essential to have accessible governance and justice mechanisms that allow for the peaceful, accountable, and enforceable resolution of disputes. Without such institutions, progress in security reform will not prove sustainable.

Since 2001, international efforts to reform Afghanistan's justice sector and establish the rule of law in the country have, until recently, focused almost entirely on strengthening state institutions, including the Supreme Court, the Ministry of Justice, and the Attorney General's Office (among others). Fighting crime has been a particular priority, with bodies like a central counternarcotics tribunal and a major crimes task force having been established. Courthouses and prisons have been constructed or modernized in parts of the country, and efforts to streamline the management and administration of cases have been designed. Afghanistan's vast body of law has been distributed to judges and other legal professionals throughout the country, and judicial and prosecutorial training programs have been designed and conducted by various donors. In addition, public awareness campaigns have attempted to elevate people's understanding of their legal rights and how the state justice sector can uphold and protect those rights.

However, for a variety of reasons, the formal justice sector in Afghanistan remains in a severely dilapidated state, unable to reach most of the country and functioning poorly in areas where it is present. Many judges and other legal professionals are illiterate and unable to understand or apply the laws of the country appropriately. Newly built courts and other justice-sector buildings are not being used for their intended purposes.¹ Moreover, competition for resources and power breeds mistrust among the different state institutions and hampers the functioning of the state justice sector. Reform efforts have produced minimal improvements compared with the vast needs of the state justice sector. Part of the problem has resulted from insufficient donor attention to rule of law until very recently, as well as poor coordination among both Afghan justice institutions and their international partners. Other problems relate to Afghans' unfamiliarity with, or resistance to, state justice institutions generally.

Aside from urban areas of the country (some 75 to 80 percent of Afghans live in rural areas), the only state institutions most Afghans approach to assist with resolving disputes are district governors or the police. Officials in these institutions are often corrupt or incapable of handling Afghans' justice needs. At the same time, political interference from the executive branch or others often results in legal disputes being resolved for reasons other than law or equity. Tackling these practical and political problems and creating a state justice sector that meets international standards are endeavors that could take generations.

Instead, most Afghans resort to a diverse set of informal mechanisms to settle their grievances and legal claims. In most of the country, dispute resolution takes place through traditional mediation mechanisms that involve community elders, religious leaders, and

other respected individuals whom parties trust. The types of disputes being resolved in these forums include both civil and criminal matters, including serious crimes, as well as larger intervillage and intertribal disputes over land, water, and other natural resources. Collectively, these mechanisms are referred to in this report as the informal justice system.

What Is “Informal Justice” in Afghanistan?

The informal justice system in Afghanistan is less a system than an array of local mechanisms for resolving disputes. The term informal justice generally includes *shuras*, a Dari word referring to permanent and quasi-permanent local councils, and *jirgas*, a Pashto term usually used for more ad hoc meetings gathered to address a specific dispute.² Both involve groups of community leaders, generally but not always men, who discuss disputes and other political issues within the community.³ At times these processes are referred to as traditional or community-based dispute resolution mechanisms. What is significant is that the authority of those involved exists, at least in part, outside the state. The actual divide between formal and informal justice in Afghanistan, however, is rarely defined, and cases often pass back and forth between the district governor, local courts, other government offices, and local elders.

Across 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. Informal mechanisms frequently assign both parties with the responsibility to compensate for the wrong done and restore communal harmony—rather than assigning a winner and a loser. These mechanisms tend to be voluntary, allowing members of both parties to walk away if they cannot resolve the dispute.

Ranging from small village-level gatherings to national level *loya jirgas* (grand councils), informal mechanisms focus on political, economic, criminal, and social issues of the community. In many communities disputes over land and water are the most vital, though often the informal justice sector also addresses both minor and major crimes, and restitution from criminal acts, particularly in areas where the state has a limited presence. Civil disputes—from commercial and contract matters to land and inheritance claims—are also resolved through traditional forums.

Recent Interest in Informal Justice

The Prevalence of the Informal System

Today projects attempting to build rule of law in Afghanistan must recognize the widespread use and popularity of informal justice in many parts of the country, especially rural villages and districts where there is no other system functioning. The informal justice sector has the potential to play an important role in meeting the short-term goals of stabilizing the country, but also to deliver an effective system of justice in the long term. Afghanistan needs mechanisms that settle disputes peacefully and fairly, both to address individuals’ demands for justice as well as to prevent smaller conflicts from escalating into larger sources of violence that increase instability.

Given the many problems with the state justice sector, informal mechanisms provide the best prospect of providing sound dispute resolution services to most Afghans today and in the future. Afghans across the country often cite the fact that nonstate mechanisms tend to be faster, less expensive, and more legitimate than dealing with the state. Also, while reports vary, many experts believe that as many as 80 percent of all disputes in the country are resolved in the informal system.⁴

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It is important to note, however, that there is no clear distinction between state and nonstate justice systems. In fact, most disputes are resolved through collaboration or referrals between the state and traditional structures. Therefore, it is not an “either-or” choice when discussing ways to engage the informal justice system in Afghanistan—formal and informal leaders on a local level can and do work together. Regardless, the popularity and effectiveness of informal mechanisms, combined with a growing realization of the long-term nature of building a robust state justice sector, explains some of the recent focus on the informal system by both international donors and the Afghan government.

For instance, through its new Afghanistan Rule of Law Strategy, the U.S. government now focuses much more on informal justice than it did prior to the strategy’s adoption in 2009. Both the U.S. Agency for International Development and the U.S. Department of State are now funding projects designed to improve justice by capturing the strengths of traditional justice mechanisms. For its part, the United Kingdom is expanding work with community dispute resolution mechanisms through the Afghanistan Social Outreach Program in Helmand Province. Also, the international military heavily engages community leaders involved in dispute resolution in areas where it is active to help with immediate stabilization operations.

State Policy on Informal Dispute Resolution Councils

The Afghan government, in recognition of the importance of traditional dispute resolution mechanisms in the country, has also focused more on the informal sector recently. Afghanistan’s National Justice Sector Strategy (NJSS) of 2008 (approved by the Supreme Court, the Attorney General’s Office, and the Ministry of Justice) and National Development Strategy (ANDS) of 2008 both obligate the government to adopt a policy on the Afghan state’s relations with nonstate dispute resolution councils. President Hamid Karzai reiterated his government’s commitment to adopting the policy at the London Conference on January 28, 2010. This policy intends to help better manage relations between the state and nonstate justice sectors, to delineate jurisdictional issues, and to harness the strengths offered by community-led dispute resolution, while addressing some of its deficiencies (e.g., human rights concerns, especially discrimination against women).

Throughout much of 2009, the Ministry of Justice hosted weekly meetings to prepare the draft of the nonstate justice policy. Representatives from the Supreme Court, the Independent Human Rights Commission, and the Ministry of Women’s Affairs attended these meetings regularly, along with interested civil society organizations and international partners. After many months of debate, compromise, and discussion, the members of the policy drafting group reached consensus on the substance and wording of the draft in November 2009. Under its current proposed terms,⁵ the draft policy includes general principles and goals, including an acknowledgment by the state that informal justice bodies have positive aspects that should be strengthened, while recognizing that there are sometimes informal justice decisions that violate the law and should be eliminated.

The draft also discusses specific directives for the operation of traditional dispute resolution councils and how the state relates to them. For example, the draft says that no person shall in any circumstance be compelled to appear before informal justice bodies, that decisions of such bodies may be appealed to the state, and that the state shall promote the practice or recording decisions of informal justice bodies in writing. Moreover, the draft contains provisions that require serious crimes to be prosecuted by the state but that allow petty crimes to be “diverted” from the state to informal justice mechanisms in some circumstances. The draft further requires the state to improve access to justice for women and increase their ability to participate meaningfully and fairly in the informal justice sector.

Despite consensus having been reached on this initial draft, there is still disagreement among Afghan government institutions on both the content of the policy and how it should be implemented. Plans for further consultations on the draft and its adoption by the government are presently being debated. Further engagement by the Ministry of Justice could help to increase “buy in” for a new policy by all sectors of the Afghan government. However, a policy that attempts to overly regulate the informal system could end up undermining some of the very aspects of the system that make it effective, attractive, and legitimate.

Counterinsurgency

Finally, as part of the overall counterinsurgency strategy, the International Security Assistance Force (ISAF), the U.S. government, and others have suggested that tangible progress in improving governance and rule of law must be made in the short term (often defined as a twelve to eighteen month timeframe). For example, General Stanley A. McChrystal’s August 2009 strategic assessment suggests that real gains must be made within a year to reverse momentum in the war, with improved governance and rule of law integral parts of the counterinsurgency efforts. Given the shortcomings of the state institutions and the length of time it will take to develop the state justice sector, Western military and civilians leaders have begun to work with informal mechanisms to provide needed short-term services to the population. The McChrystal report also states that ISAF must work with the Afghan government “to develop a clear mandate and boundaries for local informal justice systems.” In areas where military operations are ongoing, immediate justice needs with respect to suspected insurgents are also often referred to community leaders to address. For example, when suspects are detained, international forces have begun looking to local elders to help decide whether to turn them over to the state for prosecution or to release them back into the community. ISAF troops will engage key leaders in the community and try, when possible, to invite state officials (often an official from the district governor’s office or from the national police force) to sit with the traditional leaders in reaching decisions. If a detainee is released, international forces ask for a pledge from local elders and other community leaders to help ensure that the individual will not engage in insurgent-related activities.

The British in Helmand Province have also tried to systematize community involvement in detention decisions through the creation of prisoner review shuras. These shuras involve community leaders meeting regularly in certain districts of the province (to date, in Musa Qala, Sangin, Nad-e-Ali, Gereshk, Garmsir and Nawa) to discuss the fate of suspected criminals, and they integrate with the state system by referring serious cases to state officials for prosecution. Prisoner review shuras help prevent excessive prisoner detention and allow for their release when there is insufficient evidence to justify their continued detention.

Others express concern that in areas controlled by the Taliban, they often force local residents to accept their system of justice, generally described as harsh, unpopular, and based upon extreme interpretations of sharia law, but also considered transparent and swift. Despite its unpopularity, Afghans sometimes choose to avail themselves of Taliban justice in places where neither the state nor informal justice systems are adequately addressing dispute resolution.

Overall, the pressing need for effective dispute resolution, the failings of the formal system, and the view of Taliban justice as an increasingly attractive alternative in particularly insecure areas have led the Afghan government and international community to seek new ways of engaging the informal system and better linking it to the state justice sector.

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Concerns about Traditional Dispute Resolution

Even though the NJSS and ANDS recognize the importance of informal justice mechanisms, concerns have been raised by some in the Afghan government, the Supreme Court, civil society groups, and the international community about whether working with nonstate dispute resolution mechanisms should proceed. These concerns range from constitutional questions to human rights matters to political objections at the national level (for further discussion, see the “Specific Approaches” section of this report). Also, some groups (e.g., the Supreme Court) seem to fear that increased attention to the nonstate justice system could divert much-needed resources away from assistance to the state courts and other state institutions of justice. The main objections to relying on the informal justice sector to resolve the bulk of Afghanistan’s civil and criminal disputes are addressed below.

Human Rights

Human rights concerns present some of the most compelling and emotionally charged objections to work with traditional structures. In particular, discriminatory practices in much of the nonstate sector, where women are often not allowed to sit on traditional dispute resolution councils or even be present before them when they are a party to a dispute, are areas of concern. Also, certain customary practices in some parts of the country—for example, *baad*, where girls or women are forcibly exchanged to settle blood feuds, debts, and other disputes—are illegal under both Afghan and international law, as well as contrary to Islamic law principles. Several advocacy groups object to working with traditional mechanisms on the grounds that engaging these bodies will serve to entrench those practices that violate individual rights and discriminate against women and minorities.

It is clear that programs engaging traditional structures must be designed in such a way so as to not legitimate practices that are abhorrent and/or otherwise violate the law. However, most disputes resolved by community-led *shuras* and *jirgas* do not result in violations of the law. Land and property disputes are by far the most prevalent types of cases heard, and these are generally resolved equitably and peacefully by informal mechanisms in accordance with national and international laws. In addition, greater interaction between the state and traditional structures can potentially help build trust in state institutions, improve how disputes are resolved in both systems, and look to harness the strengths of each. Moreover, by working with informal mechanisms, human rights violations that occasionally occur might be better highlighted and referred to the state for it to address. It should also be noted that the state justice system does not have a good track record in respecting women’s rights or other human rights norms, and depending on local circumstances, informal structures may in fact be more respecting of these rights than the available formal justice institutions.

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Constitutional Validity

Some officials, particularly judges, have raised concerns that the functioning and official recognition of informal justice systems may be unconstitutional in certain instances. For example, some suggest that article 122 of the Constitution prevents cases from being removed from the jurisdiction of the judiciary. However, while this article does state that no case may be excluded from the court’s jurisdiction, it does not preclude individuals from *voluntarily* going before other dispute resolution bodies—including both official departments like the Ministry of Justice’s Hoqooq Department or state-sanctioned commercial arbitration bodies, as well as informal *jirgas* and *shuras*.

Some also argue that informal dispute resolution mechanisms should handle only civil cases like land disputes and that they should not be involved in resolving criminal matters,

which would violate a defendant's constitutional guarantee to a fair trial. In particular, judicial officials are concerned with *shuras* or *jirgas* conducting their own proceedings for serious crimes (e.g., murder, rape, robbery, or assault) in which a settlement is reached between perpetrator and victim, as opposed to perpetrators of such crimes being prosecuted and punished. However, while it is the obligation and exclusive authority of the state to prosecute criminals, there is no constitutional obstacle to involving informal bodies in the criminal justice system—for example, through the resolution of the civil aspects of criminal cases, so long as no punishment results. Informal bodies could constitutionally facilitate reconciliation, provide for compensatory damages, propose correctional measures such as seeking apologies and forgiveness, provide for community service, and/or recommend dismissal of criminal actions by the formal system.

Diversion of Resources

Some Afghan government officials, Supreme Court judges among them, express concern that greater engagement with the informal justice sector could undermine efforts to build the state justice sector by diverting to nonstate mechanisms resources that otherwise would have been used to strengthen courts, prosecutors' offices, the Ministry of Justice, and other state institutions tasked with upholding the rule of law. By working with informal mechanisms, they argue, the international community will promote and shift attention to nonstate institutions at a time when the state is in desperate need of support. Some view the issue as a zero-sum game over legitimacy: the more informal dispute mechanisms are praised, the less state mechanisms are respected.

Engaging informal mechanisms need not take away from assistance to the state sector, however. Working with traditional justice does not require substantial amounts of resources. Programs should not spend large amounts of money on strengthening informal mechanisms, which could increase incentives for corruption and would delegitimize some of the very aspects of informal justice that make it attractive—that is, that elders and others involved in resolving disputes are doing so for merit and honor, not for financial incentives. Moreover, work with nonstate bodies should aim to link them more closely with the state.

Linking the State with Traditional Justice Mechanisms: The United States Institute of Peace Pilot Projects

Since 2002, USIP has been working on informal justice issues in Afghanistan. After discussions with the Ministry of Justice, the Supreme Court, the Attorney General's Office, and the Ministry of the Interior, USIP designed a series of pilot projects that would conduct research and test ways of improving access to justice by improving linkages between the formal and informal systems. USIP selected pilot districts to reflect a range of ethnic, political, social, and economic contexts. Since these projects are primarily experimental, they take a series of different approaches based on local political conditions and the strengths of the implementing organizations. These projects are meant to provide concrete results and recommendations that can inform policy and future projects for both the Afghan government and international donors.

After securing permission from the relevant Afghan government institutions, USIP and its implementing partners began its pilot projects in early 2009. In USIP's first year, four pilot districts were selected: Ahmad Aba district in Paktya and Nahia Five in Jalalabad city, Nangarhar administered by The Liaison Office (TLO), and Zindijan and Injil in Herat administered by the Norwegian Refugee Council (NRC). In 2010, USIP also began pilot projects in the district of Aliabad in Kunduz and the district of Baharak in Takhar with Co-operation

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for Peace and Unity (CPAU). It has also expanded to a total of six districts in Nangarhar and Paktya, and plans to add a district in each of the provinces of Helmand, Nimroz, and Uruzgun. This expansion is meant to include a wider range of security contexts, focusing on relatively stable districts, districts in insecure areas, and districts that are considered “teetering.” These “teetering” districts—where there is often a limited government presence, but also the constant threat of insurgency—often have a weak, but not entirely absent, formal justice system, and present some of the most interesting opportunities to test the relationship between increased access to justice and stability.

In each of the four pilot districts already studied, USIP’s Afghan implementing partners began by conducting an assessment of the local justice system. This research traced the way that disputes were being resolved within each community, whether by formal or informal mechanisms, or some mixture of the two. For example, some cases that began in courts eventually were sent by judges or prosecutors to the informal system for final resolution. Similarly, disputes initially brought to local councils were finally resolved outside the council by members of the formal sector, like district governors. USIP’s researchers therefore attempted to first identify what were the major disputes in an area, and then tracked them wherever they were taken until they were ultimately resolved.

Once USIP’s implementing partners gained a clearer sense of how dispute resolution within a community works, they consulted with local communities to design and implement programs that will best increase justice for residents in that district. In most cases this meant hosting a series of roundtables in which members of the formal and informal justice sectors discussed key issues that hindered dispute resolution in the community. The ideas that emerged from these meetings became the basis for further work by implementing partners. For example, in Herat, which has a fairly strong formal system, USIP’s partner, the NRC, emphasized training informal actors to interact more effectively with the formal system. In other areas such as Ahmad Aba in Paktya, where the tribal system is more dominant, USIP’s partner, TLO, focused more on systematizing the work of the informal system by promoting the recording and storage of informal *shura* decisions.

Challenges of Engagement and Implementation

USIP’s pilot projects have identified some practical challenges to engaging with the informal justice sector. In the absence of an agreed upon national policy on informal justice, some actors, particularly those working within the formal system, are hesitant to institute or even discuss changes that they feel exceed their duties or their perceptions of their duties (despite official approval of the pilot programs). In other cases, it requires significant effort to convince formal and informal actors not accustomed to consultative processes that their opinions and the data from the pilot projects will be used constructively and not against their interests. This reluctance to share information must be dealt with by building trust and demonstrating the benefits of cooperation over time.

The pilot projects have also indicated that there will be significant challenges in implementing a uniform nationwide strategy that can account for a wide variety of justice processes across different regions. In cases such as Ahmad Aba, Paktya, the formal sector is fairly weak. As a result, many officials in the formal sector tend to refer cases to the informal system and regular communication exists between the two. Several officials have pointed out that many members of the formal system in the area also regularly take part in local *jirgas*. At the other end of the spectrum, there are serious tensions between informal councils and the formal judiciary in Jalalabad, resulting in the tendency for these groups to compete for cases, making interactions between state and nonstate leaders much more limited and confrontational.

Any plans for implementing a national policy on informal justice therefore need to keep in mind that in some of the country, official and informal actors have spent years working out informal arrangements with unsystematic, but generally accepted ideas about concepts such as jurisdiction. It is possible that if the policy is implemented with too much emphasis on controlling the informal system, it could actually damage these relations and decrease access to justice.

Understanding the Justice Landscape

USIP's research and pilot projects have yielded findings on the current state of informal justice in Afghanistan, some general themes concerning interacting with the informal sector, and more concrete program lessons with respect to engaging the informal system at the district and village levels. The following conclusions draw from the pilot projects, information gathered in other districts visited by USIP staff, and discussions with other organizations working with the informal justice system across the country.

First, the pilot projects have illustrated the great reach and variety of informal mechanisms, which differ across regions, but can vary within districts as well. Various ethnic groups in Afghanistan have a history of treating community dispute resolution differently.⁶ Pashtuns in particular often rely on Pashtunwali, which is a centuries-old tribal code of conduct that is far more formalized than customary codes other ethnic groups tend to use.⁷ In areas where research was conducted, Pashtuns did tend to have a fairly formalized set of dispute resolution mechanisms. However, Pashtunwali still changes over space and time, and should not be thought of as a static set of customary laws. (In some areas the term *narkh* is used to refer to a community's specific interpretation of Pashtunwali).

Additionally, Pashtuns often rely on *jirgas* in which both sides of the dispute nominate a certain number of elders to arbitrate a matter. In both Ahmad Aba, Paktia, and Nahia Five, Nangarhar, a sum of money called *machalga* (similar to a bond) is often collected to ensure that both parties respect the decision that the *jirga* makes. In other areas, however, no such sum is collected and the *jirga's* decision is considered nonbinding unless both sides agree to it. Enforcement of *jirga* decisions is generally most consistent in rural areas and in areas where local commanders, insurgents, or other figures have not seriously altered traditional patterns of political life. All of these examples demonstrate the difficulty of making generalizations about informal dispute resolution based upon ethnicity.

Characteristics of Traditional Dispute Resolution in the Pilot Districts

Despite the variations in how informal justice is delivered throughout Afghanistan, in nearly all areas of study, it is common to find permanent or semipermanent councils generally referred to as *shuras*. Like *jirgas*, when addressing crimes or other legal disputes, these informal mechanisms are primarily concerned with preserving community harmony, as opposed to punishing criminals or protecting individual rights. While there are differences between ad hoc *jirgas* and more permanent *shuras*, it is common to find in districts, such as Ahmad Aba, both a district-level *shura* and more local *jirgas* that meet to resolve disputes. Many Pashtun areas that use *jirgas* to solve local disputes also have district level *shuras* that perform other tasks, occasionally becoming involved in disputes that have not been resolved by lower level *jirgas*. Many districts have councils of local elders who meet regularly with the district governor and in many cases there are village-level councils as well.

The fact that dispute resolution mechanisms tend to be highly reflective of their local political and cultural context is a strength in some areas but problematic in others.

Village councils, however, are not found in all areas and meet less regularly, and their powers are not always clearly defined. In some cases, *shura* members are appointed by the district governor, though there are instances of informal elections to select *shura* members. Most common, however, is the selection of leaders through informal community consensus, combined with negotiations between local elders and the district governor.

In addition to district *shuras*, many districts have a series of other, typically specific *shuras*, such as an education *shura* and an *ulema* (religious scholars) *shura*. These *shuras* seem to be more active and formalized in districts closer to urban centers, such as in the Shomali Plain area near Kabul. While the power of these councils is not generally well-defined and varies from district to district, they can become involved in disputes related to their work. For example, the *ulema shura* in Qara Bagh has become involved in several disputes relating to the presence of pornography in the local bazaar. Specialized *shuras* relating to development have further complicated the dispute resolution landscape. Village-level Community Development Councils (CDCs), which were created as a part of the National Solidarity Program (NSP) to issue small development grants within communities, have emerged as a force in local politics and dispute resolution. In other areas, however, these bodies collapsed after the initial funding expired.

The composition of *jirgas* and *shuras* depends heavily on a number of variables, including the role of the government in the area, the presence of commanders and former militia leaders, and the extent to which these figures influence daily political life. The fact that dispute resolution mechanisms tend to be highly reflective of their local political and cultural context is a strength in some areas but problematic in others. Members of *shuras* and *jirgas* tend to be local leaders with intimate knowledge both of parties to disputes and of the social and historical contexts of cases, making them uniquely qualified to resolve cases that require local knowledge, particularly disputes involving land.

Over the last three decades of instability in the country, some local power structures have been co-opted by former warlords or other strongmen, and local dispute resolution bodies have also been shaped by these figures. In some areas, local commanders control traditional justice mechanisms, while in others traditional political bodies are dominated by the tribe, subtribe, or even political party (themselves often beholden to local commanders) that tends to dominate politics locally. As a result, in areas where corruption is common in local politics, informal justice may also be corrupted. Of course, as a corollary to this, in these same areas it is very common for the formal system as well to have been penetrated by those corrupting forces that dominate local politics.

In several of USIP's pilot districts, actors such as local commanders have attempted to manipulate the informal system in cases directly involving them. Because informal actors gain their power from the community, acting corruptly or succumbing to outside influence threatens their authority. As a result, such corrupted or unduly influenced informal bodies lose influence, as in the case of Jalalabad where certain *shuras* known to be corrupt are disparaged and avoided by local residents.

Informal justice mechanisms are also not static and evolve over time.⁸ Recent interaction with international groups and the establishment of structures such as CDCs continue to reshape how disputes are handled. In Jalalabad, for example, certain elders are referred to as *tejarati* (commercial elders), who use their external connections to elicit bribes and other forms of patronage. Also, because international donors deliver funds through CDCs, positions on them tend to increase one's political capital. As a result of this, in Kabul and Jalalabad there has been a recent growth of "resident *shuras*," established by local elders in an attempt to extract more aid from the government or international groups.

These groups further complicate the multiple forms of dispute resolution and in Jalalabad there is a significant amount of forum shopping. Faced with an array of formal and

informal mechanisms and groups that resolve disputes, individuals often take their cases to the forum they feel will resolve the case most advantageously. This usually relies on kinship and personal ties. Problems arise, however, when the two parties in the dispute choose different forums. This promotes conflict between the formal and informal systems, as well as between different shuras within the informal system. The competition between various forums and lack of agreement over jurisdiction ultimately leads to many disputes remaining unresolved.

Because informal justice is community based, and authority within most communities is based upon honor and reputation, individuals within the informal system are under constant pressure from their local communities to resolve disputes in the manner that most benefits the entire community. Ultimately, these informal mechanisms of social pressure make it easier for the community to monitor the informal system for corruption—a key reason that the informal system in much of the country maintains its legitimacy in the eyes of most residents—whereas they have no such recourse with the formal system.

Interaction between the Formal and Informal Sectors

While often discussed as separate systems, in practice the lines between formal and informal systems are quite blurred and there is significant interaction between the two. USIP pilots and field visits demonstrate the extent to which the formal and informal systems have integrated across Afghanistan. This includes judges and prosecutors who routinely pass cases to the informal system, informal communication between the two groups, and even government officials who also sit on informal bodies. In areas like Gardez where there are established courts, a study of court documents shows officials are often simply certifying the decisions that local elders have made, particularly regarding land.

In some areas the relationship between local *shuras* and the government has become even more formalized. In Zindijan district of Herat Province, for example, it is common for village *shuras* to have one member who has the express duty of communicating with the district governor, and this individual is registered at the district office. In other areas, such as the Shomali Plain, *shura* members are not officially registered, but the district governor's office still keeps a contact list of heads of local *shuras* and consults with them on issues such as announcing new government policy. Some programs, such as the Afghan Social Outreach Program (ASOP), supported by the British development agency DFID in Helmand, have further encouraged this binding of formal and informal systems by creating district *shuras* that meet directly with the governor and other district officials to resolve various types of district-level disputes.

It is also important to note that in all of the areas where USIP has pilot projects, the key government figure in dispute resolution is the district governor and not the district judge or prosecutor. In other words, the executive branch, and not the judiciary, is often the key to government intervention in a legal dispute. The district governor in many areas determines how most cases will be addressed, deciding whether cases should be resolved by a local *shura* or *jirga*, be referred to the court, or solved more quickly within his office. Here the two central variables seem to be the distance from the district center of those involved in the dispute and the relative strength of the district government.

In a district such as Ahmad Aba, there is significantly more compromise between the district governor and local officials, whereas in both pilot districts in Herat, with stronger district governments and judicial systems, the governor has more direct authority. The relationship between the district governor, the chief of police, and local elders often significantly shapes interactions. In Ahmad Aba, where these groups have a fairly stable working relationship, a recent dispute following a fight brought local elders to the district governor's

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office to discuss the case. On the recommendation of the elders, the chief of police arrested all of the men involved, even though it was clear that they were not all guilty. This approach allowed the elders and district governor to resolve the dispute between the families without allowing it to escalate and potentially cause additional violence.

Such cooperation is common, although it can vary depending upon the personalities involved. In some districts in the Shomali Plain, where the relationship between the district governor and chief of police is more antagonistic, cooperation between the two systems is more difficult, with the chief of police sometimes refusing to enforce decisions made by the district governor. Even in areas where there are court officials, the district governor continues to be highly involved in most major disputes that are not resolved quickly and locally. In areas such as Garmsir, in Helmand, this is further complicated by difficult security conditions and the fact that the district prosecutor relies on local police and international military for protection, further limiting his independence.

As these cases demonstrate, dispute resolution in Afghanistan takes on numerous forms, tends to be shaped by a series of factors, such as the role of the district governor in an area, the relations between local social groupings, the strength of local commanders, and security conditions.

Informal Justice—General Lessons

Based upon its understanding of the informal justice sector, USIP's pilot projects suggest several general lessons concerning work with the informal system.

The Importance of Understanding and Adapting to Local Context

As a result of the great diversity of informal mechanisms and the variation in the Afghan state's involvement in dispute resolution, it is important that the Afghan government and international donors understand the local context when they engage the informal system that shapes these mechanisms. Important political, social, economic, and historical questions must be asked. These include, but are not limited to, the following:

- What are the major disputes in the area and how are they currently being resolved (or not resolved)?
- What does the formal system look like in the area? Is there a local judge or prosecutor? What is the role of the district governor in disputes in an area? What is the general public opinion of the district governor, the police, and other officials? Are they from the area? Where are their loyalties?
- What is the social history of the area? Beyond simple questions of ethnicity, how heterogeneous or homogenous is the area? Is there one tribe, subtribe, or other group that tends to dominate local politics? What is the history of the relationship between these groups? This is particularly important in areas with longstanding land issues.
- What are the major sources of income in an area and who controls them? Is there a drug economy, or is the economy based upon other illicit activities, such as smuggling? Are resources concentrated in the hands of certain individuals?
- What is the role of local commanders in the area? Are they considered benevolent by the local residents? Do they involve themselves in low-level disputes? What is their relationship to the district governor?
- To what extent does the insurgency shape local politics? What is the history of the Taliban in the area? What does the local population think of Taliban justice?

Process Matters

Only when a group understands how disputes are resolved in the area can programs be designed to effectively address some of the problems encountered in access to justice. Process, however, is critical. Programs dealing with the informal system need to have an intimate knowledge of the local political landscape, which often demands a long period of research before beginning more active engagement. The districts in which USIP's implementers have been the most successful are also the areas where research was done most thoroughly and where organizers had the best understanding of local conditions. Hiring researchers from the local community also proved particularly helpful.

The trust of informal leaders is imperative. These individuals often gain their authority from the fact that they are not a part of the government or working with the international community. However, these actors can gain prestige if the community sees them as able to access government and international funds. How this relationship is perceived by the local community will shape the outcome of the project. For example, councils created to resolve disputes may be considered illegitimate when held in a district office, while considered legitimate when held in the local mosque. Relationships with informal actors can also be undermined by government officials who speak disparagingly of their counterparts in the informal system. As a result, it is important to meet with governmental officials and local elders both separately and together.

Informal leaders who are not currently engaged with the state system usually avoid the system because there are no clear incentives for cooperation. Programs dealing with the nonstate system need to take this into consideration and create obvious incentives for both state and nonstate actors. However, these incentives should generally not be monetary. A well-designed program will increase the number of disputes resolved in an area, increasing the political capital of those involved, which should incentivize cooperation. At the same time, if the program is perceived negatively by the community or if people think it likely to fail, it may be very hard to get any local "buy in" whatsoever.

The Politics of Informal Justice

It is important for those working with the informal justice sector to realize that resolving disputes is an inherently political issue and that actors will always have certain political motives. On a local level, the process is in many ways cyclical: individuals who become known in their communities for resolving disputes gain political capital, while local actors with significant political capital are likely to be brought into the dispute resolution process. The political capital gained from resolving cases means that in some areas, such as Jalalabad, formal and informal actors actively compete to resolve more cases. In other areas, local leaders and government officials have achieved more of a balance and thus programs that target the informal sector without also working with the formal sector may destabilize the local political situation.

Among national officials, many opponents of engaging the nonstate system are concerned that by doing so, they will lose political power. This is why some national officials refuse to publicly acknowledge benefits of the nonstate system and the role that it plays, even while discussing in private conversations how they take part in the system when they have personal disputes. Additionally, some court officials express concern that if international funding gets directed toward the informal system, it is likely to decrease the amount of funding that the state system receives and the number of cases it addresses (which, in turn, could reduce the amount that officials can extract through corruption).

Programs dealing with the informal system need to have an intimate knowledge of the local political landscape.

Strikingly, however, government officials on a provincial and district level area are almost always willing to engage the informal system to an extent rarely seen among national figures. On one hand, this is a pragmatic approach since these officials already live in communities where the majority of cases are being resolved by the informal system. On the other hand, it reflects the way in which international funds are distributed overwhelming at the national level where officials often oppose engagement with the informal system because it could mean less aid going to their ministry or department.

First, Do No Harm

Finally, it is important for international donors and the Afghan government to understand that the informal system is functioning and resolving disputes in a fairly just manner in many parts of the country already.⁹ Engaging the system and creating programs that potentially spend vast sums of money on the informal system could create perverse incentives that distort mechanisms that are already functioning effectively.

The legitimacy of local elders in many parts of the country is based partially on their distance from the government and international actors. In more stable areas, such as the Shomali Plain, local elders often try to maintain their independence from the government and NGOs while demonstrating to their community that they have the ability to access these bodies in order to bring funds to the area. On the other end of the spectrum, local leaders in insurgent-affected areas who associate with the government and international military may lose local legitimacy, face intimidation, and even risk being kidnapped or killed. Thus, in some places, attempts to link the formal and informal sectors more systematically could be counterproductive, since the distance between the two is one of the reasons the informal system continues to work. Programs that make the informal system appear to be controlled by or a part of the formal system threaten to do more harm than good.

Also, when engaging local leaders, donors should try to ensure that the introduction of international funds does not add to local tensions or fuel disputes. There are numerous examples of international military or aid groups entering areas and favoring the dominant tribe or ethnic group, leading to an imbalance in local power and potentially reigniting or exacerbating old feuds. Similarly, appointments by the Afghan government that favor one tribe or group over another can serve to increase resentment and tensions in certain areas.¹⁰ In other areas, groups currently favored by the international military are using their status to resolve longstanding disputes in their favor.

This is particularly true for the U.S. military's Commander Emergency Relief Program (CERP), whose FY 2010 budget amounts to more than \$1.3 billion. Through CERP, field commanders fund short-term cash-for-work projects and other quick-impact community development initiatives, some of which may unintentionally favor one tribe or subtribe over others in the area. Interviews with both local elders and members of the international community suggest that in the south, southeast, and elsewhere, the Taliban have been effective at exploiting this uneven distribution of assistance by appealing to the disaffected groups. Likewise, an injection of cash to the informal system favoring one party could lead to a similar result.

Conclusion: Specific Approaches and Recommendations

Based on USIP's pilot project work performed to date, a number of preliminary conclusions have emerged that should be considered at the national policy level and by Afghan and international actors working with informal justice mechanisms. Results of the pilot projects also suggest several more concrete steps for strengthening and creating links between the

Engaging the system and creating programs that potentially spend vast sums of money on the informal system could create perverse incentives that distort mechanisms that are already functioning effectively.

formal and informal systems. Because these projects are ongoing and the program will continue to expand in 2010 to cover more districts around the country, the findings and recommendations listed below (which also draw on information gathered on field visits to similar programs, such as the ASOP program in Helmand and the USIP conflict resolution programs in Kunar and Nangarhar) are preliminary and subject to change as the projects unfold.

Recording and Archiving Cases

One of the key aims of the pilot projects is to test ways of making informal justice decisions more transparent, sustainable, and predictable. Among other benefits, having proper records of decisions may prevent the same claim from being brought repeatedly, which happens occasionally, particularly in land cases. Records of informal land dispute resolution, while not necessarily dispositive in a court of law, can be used as evidence and may provide greater certainty as to land ownership or access rights. Research in several districts reveals that a surprising number of *shuras* and *jirgas* already do maintain written records of their proceedings. In Ahmad Aba, for example, in some areas up to 50 percent of some types of cases are being recorded. In some cases, these records are highly detailed, outlining evidence, the reasoning behind the decision, and the final verdict. Some of these informal documents even appear to mimic some of the basic formats of formal court documents.

In general, however, recording *shura* or *jirga* decisions is not systematic. The names of parties to disputes are usually recorded, but other details, such as the names of witnesses and dates are left out. TLO has begun working with members of the state and nonstate justice sectors to better understand how records of nonstate decisions can be maintained in an effective manner. It is unlikely that the informal sector will ever record with the level of detail required by the formal system (nor should it necessarily). However, by creating dialogue between the formal and informal actors it seems likely that a more effective and systematic method for recording cases can be agreed upon at the district level.

Among the informal bodies that record their decisions, there is little systematic storage of cases. Generally, parties on both sides are given a copy of the agreement, as is the head of the *shura* or *jirga* deciding the case. However, without more organized storage processes, locating these written records when questions arise later can be difficult. In many areas, the district governor's office is viewed as the most influential state institution and could serve as an effective location for compiling records of district-level disputes. In larger districts, however, it might not be realistic for logistical reasons to gather all cases in one place. It may be that the Hoqooq Department of the Ministry of Justice, which addresses civil disputes, can store land and property case records, while courts, governors' offices, or other bodies compile other district-level informal dispute resolution outcomes.

Literate observation and recording liaison officers (designated by the government, community leaders, and/or a civil society organization) could also be tasked with maintaining records of district-level *shura* or *jirga* decisions in their respective areas and with filing such decisions with the proper state body (which would not officially approve the informal decision by agreeing to store it, but would simply serve as a repository for the records). One solution might be to store cases at a certain level with the formal system (for example, all cases resolved by the district *shura*), while *shuras* at a lower level maintain their own storage of records. USIP's pilots plan to test some of these ideas this year.

Promoting Better Communication

Some of the most basic ways of improving access to justice and effective resolution of cases begins simply by improving communication between the formal and informal actors. In many areas, regular communication already exists between members of the formal and

informal justice sectors. In some areas, government officials, particularly district governors, tend to organize regular meetings between formal and informal leaders, such as in Zindijan, where one member of each *shura* is assigned a position as liaison to the district governor. Generally, however, this communication is not very systematic, meaning that areas where government officials and community leaders have good personal relationships tend to benefit from stronger linkages than those where there is more tension between the two. Since these links are often personality based, the process of rotating district officials regularly also inhibits the creation of permanent partnerships.

In pilot districts several approaches have been used for improving communication. In Zindijan, NRC has sponsored roundtable discussions between local elders and district officials. Hosted by the district governor, issues such as jurisdiction and human rights have been discussed. In Jalalabad, the use of a liaison-type position (like that mentioned above) is being tested and a local elder has been selected who has a good working relationship with both community elders and local officials. In the coming year this role is expected to expand. Other programs attempt to use Afghan law school students in similar roles, though their ability to access or influence informal leaders may be limited since much of respect in rural areas is age based.

While challenges exist, in each pilot district improving communication has shown to be a simple and surprisingly effective means of addressing justice issues. Repeated interaction and communication can build mutual understanding and trust between the state and communities. While there is no one approach that can be applied uniformly in the country, the general idea of open, regular communications in neutral settings (e.g., pilot project implementer offices) between state officials and *shura* and *jirga* leaders can lead to stronger links and cooperation between the two. The new national policy on state relations with dispute resolution councils should recommend institutionalizing this practice on a national scale.

Negotiating Jurisdiction

Competition for jurisdiction over different types of disputes is a central issue in improving linkages between the state and nonstate justice systems. USIP has facilitated roundtable discussions on jurisdiction and the relationship between the formal and informal sectors, where formal actors fiercely defend their self-perceived roles, while informal leaders accuse the government of corruption and ineffectiveness. The central aspect to most of these roundtables has been discussions about delineating jurisdiction of cases. Historically, the state has typically ceded low-level disputes to the informal system, while national government officials, particularly the shah, president, and governors, have often negotiated with informal tribal leaders on major issues, such as land disputes involving multiple tribes. In one recent high-profile case, the attorney general refused to release a prominent man from prison even though he had been found innocent of the murder charge against him until the families of the victim and the accused had held a *jirga* to resolve the civil aspects of the case. While a technical violation of Afghan law, this approach was accepted by both parties as the proper way to settle, bring closure to the case, and avoid violence.

In most of the pilot projects there was some agreement between government officials and local leaders as to which cases should be addressed by the formal system and which were better addressed by the informal system. Generally, it is understood that prosecution and punishment of serious crimes should be handled by the formal system, while issues such as individual land claims are better addressed by the informal system. However, it is critical to note that the issues beyond simply punishment, such as reconciliation and compensation associated with violent crimes, are essential to the resolution of a case, and here the informal sector plays an essential role. A community-based reconciliation between parties

is often required to prevent retribution and the emergence of a blood feud that can spiral into a larger conflict. At the same time, incarceration, which can lead to the temporary loss of head of household income, may be considered a negative outcome by all sides, and at a minimum will fail to resolve the honor issues requiring retribution. Thus tensions often emerge about how to handle these issues between the two systems.

Thus far, both TLO and NRC have been successful in initiating discussions about the jurisdiction of such cases in both informal discussions and at roundtables. Frank, open conversations often confront the fact that on-the-ground practices in Afghanistan currently have little to do with the precise wording of the law and are based primarily on local power structures. While difficult on a national level, it seems possible that following the acceptance of the national policy on informal justice, formal and informal actors could work productively on a local level to create a consensus on what types of cases the court typically refers to the informal system and what cases the informal system brings directly to the formal system. This would allow cases to be dealt with more quickly and effectively, while eliminating tensions created when formal and informal actors compete for authority of certain types of dispute resolution.

Creating Hybrid Dispute Resolution Bodies

Provincial level councils that include members of the state and nonstate system have in some instances been an effective mechanism for resolving larger disputes such as land conflicts between tribes. A current example is the Commission on Conflict Mediation (CCM), which USIP implements with TLO in Khost Province. There the provincial governor refers intertribal disputes over land and other natural resources to a group of eight or nine elders representing each of the main groups in the province.

This project differs from district and village level pilot projects in that it focuses on large-scale disputes between communities, some of which may be decades old. Also, it does not involve or attempt to strengthen the state justice sector by linking prosecutors and judges with community leaders. Instead, it looks to more immediate practical means of settling disputes that periodically spiral into violent conflict (and which, if unresolved, can be exploited by local insurgents to further their own antigovernment aims). To date, nearly twenty of these intercommunal disputes have been settled by the CCM in Khost Province (with a handful of other cases referred to the state justice system when the CCM has been unable to reach a peaceful settlement). The CCM model has recently been expanded to Paktya Province, and may be expanded to other provinces and the district level in the near future as well. USIP is also implementing a similar model in Kunar and Nangrahar provinces in cooperation with the provincial governors and the Ministry of Tribal Affairs.

Another hybrid model is being used in Helmand Province, where justice subcommittees of the ASOP bring together the district governor, prosecutor, and local elders appointed to the council through local elections to address various legal disputes within the district. These councils are effective partially because they combine the legality of state rule with the legitimacy of local leaders. As with many such initiatives, they continue to be driven by personal relations, making them difficult to sustain as officials are rotated.

In other areas, particularly in the southeast, there is a history of tribal contracts that regulate activities, such as land use or police activities, which are endorsed by local government officials on behalf of the formal system. These contracts could also be used to address certain justice issues. One recent agreement between two tribes in Paktya penalizes anyone hiding a thief in his compound by fining them 50,000 afghanis. The questionable legality of many of these agreements needs to be addressed, but these informal mechanisms and councils have been successful in addressing justice concerns that the state has not.

Hybrid institutions work in areas where there is currently a lack of similar political structures, such as areas recently cleared of insurgents.

It is possible to scale successful provincial council interventions that have happened on a largely ad hoc basis up to a national scale (as some are discussing in the form of reconciliation councils) or down to the district or village level. But because the process is often personality driven, doing so in a systematic fashion requires a larger policy discussion at the central government level, a discussion that can occur in the Ministry of Justice–led working group on state relations with dispute resolution councils.

There is also a danger that the establishment of an increasing number of hybrid institutions by donors, the Afghan government, and the international military will undermine the legitimacy of both state and traditional power structures and would further blur the lines of authority for both. This is already visible in some areas where local *shuras*, CDCs, and other councils create a set of overlapping institutions that local leaders can use to extract funds but that confuse ordinary citizens. In general, hybrid institutions work in areas where there is currently a lack of similar political structures, such as areas recently cleared of insurgents. In other areas, however, programs should look to engage mechanisms that already exist as opposed to creating new ones.

Monitoring for Human Rights Abuses

One of the most contentious issues in dealing with the informal sector is the potential for human rights abuses, such as *baad*. Currently such violations are monitored unsystematically by a few NGOs, usually based in Kabul, and government ministries, but methodical monitoring of the formal system has proven difficult and nearly impossible in the informal system, due to lack of resources and planning, among other things. A more effective monitoring system would allow the government to address human rights concerns in a much more direct, proactive manner.

Designing a system that can more thoroughly look for human rights abuses within the informal system may be most effective if done in conjunction with a program encouraging increased documentation of cases in the informal system. This system could hopefully grow naturally out of the recording and storage process of decisions within the informal sector, by training those tasked with recording cases to also look for certain violations or to alert the human rights commission to the outcomes of certain types of disputes.

There are several challenges to creating such a system. In remote areas that already lack basic government officials, monitoring will be impossible without community participation. Thus there is a need to provide an incentive for the nonstate system to assist in such monitoring. Because of the contentious nature of many of these issues, USIP's pilot projects have primarily addressed human rights concerns through conversations with both formal and informal actors about issues such as jurisdiction and the incorporation of human rights issues in training programs. In one pilot district, however, informal actors have already created an arrangement with the district governor, whereby he has granted them more autonomy, particularly on land issues, in exchange for elders monitoring their communities more closely for certain violations of national laws and international human rights standards.

Such bargains, however, will naturally need to provide the nonstate actors with certain incentives or powers. Otherwise, it is unlikely that they will be inclined to take part in such a system, and violations will continue. Afghan officials at the national level are currently resistant to such changes even while their counterparts on the local level have already made many such informal arrangements. Given the emphasis that both Afghan officials and international donors have placed on the monitoring of human rights abuses (and the limited success in doing so to date), more regular engagement between the state and nonstate systems¹¹, though potentially costly both economically and politically, can help better monitor abuses in both systems.

Training Local Leaders to Access the Formal System

In pilot districts in the province of Herat, USIP has also sponsored a series of training days for members of the informal system on Afghan law, sharia, international human rights standards, and accessing the formal system. NRC has provided training for more than five hundred participants, focusing on questions related to the hierarchy of domestic laws in Afghanistan, jurisdiction, and procedure in both civil and criminal law.

While these training days were successful (as shown through knowledge, attitude, and perceptions tests provided both before and after the training), the success may have more to do with the fact that in these semiurban pilot districts, the population is more accustomed to dealing with formal government institutions than those in more rural areas where literacy is low and contact with government officials happens infrequently, if at all. Therefore, training programs will likely be noticeably effective in relatively limited areas.

Avoiding Corruption of the Informal System

In USIP's pilot projects it is clear that one of the main reasons that the informal justice system continues to be effective is because successful dispute resolution and the restoration of community harmony create political capital for brokers and mediators, which in turn reinforces their status within the community as honored individuals who are the most effective at resolving disputes. Thus, there exists a natural incentive for elders and council members to find workable solutions to community problems.

These incentives tend to be undermined when outside incentives are brought in, such as cash payments for services. In some cases there is a need to pay elders modest stipends to cover the cost of transportation, for example. Most community leaders, however, already devote a good deal of their time to dispute resolution and other community issues for little or no compensation. Providing payments for their services threatens to monetize the system and to undermine the very reasons that these leaders choose to sit on *jirgas* and *shuras*—for example, for honor and to make decisions for the good of the community. This report therefore recommends that payments to participants in traditional justice systems be as limited as possible to maintain their natural legitimacy and integrity. If a stipend is given, it is important to make sure that the community also sees this payment simply as a fair reimbursement for costs, lest they suspect that money is being given to decision makers as a payoff for biased decisions.

USIP believes that its pilot projects have been successful primarily because they rely on local NGOs with extensive on-the-ground knowledge and implementing experience in the respective districts and do not involve foreigners or others who are seeking to “reinvent the wheel” or who are starting from scratch in an area. USIP's Afghan partner organizations all have long track records of working at district and other subnational levels in Afghanistan, and USIP has funded them to work in areas of the country that they know best. Consequently, that those implementing the projects already have established relationships with the local elders and government officials generally means that they will not be viewed with suspicion as other organizations might be. This approach is both cost effective and increases the likelihood of making lasting changes.

An online edition of this and related reports can be found on our Web site (www.usip.org), together with additional information on the subject.

Notes

1. Authors' visits in Badakhshan, Parwan, and Paktya revealed courts being used to house livestock and/or as a residence for the families of the chief judges.
2. Any generalization made about informal justice mechanisms in Afghanistan, even about terminology, has numerous exceptions. For example, the Wolesi Jirga (lower house of parliament) is a permanent council, not ad hoc as most *jirgas* are. The term *jalasa* is used in some parts of the country the same way that *shura* is often used. Depending on context, these mechanisms are referred to in English as *nonstate dispute resolution mechanisms*, *community-based dispute resolution mechanisms*, *informal mechanisms*, or *traditional mechanisms*. Traditional justice implies a static system, but in reality local actors constantly adapt versions of traditional, idealized mechanisms to create what this report refers to as the informal justice sector. In certain instances, the term nonstate justice sector is used to highlight separation from state actors, but in Afghanistan today, informal justice mechanisms are rarely independent of the state.
3. For more on the role of women in informal justice mechanisms, see Deborah Smith and Shelly Manalan, *Community Based Dispute Resolution Processes in Bamiyan Province* (Kabul: Afghanistan Research and Evaluation Unit [AREU], December 2009).
4. The percentage of cases resolved by the informal sector is disputed and difficult to quantify. Different studies define disputes differently and gaining a comprehensive understanding of how local disputes are resolved is challenging, particularly since many such disputes are addressed away from the eyes of local officials and outside researchers. In 2007, the Center for Policy and Human Development (CPHD), in one of the most comprehensive assessments of the nonstate sector, argued that 80 percent of all disputes are being resolved by the informal system, though certain other groups claim this number is lower. In the districts that USIP has focused on, the percentage of cases resolved by the informal system appears to be approximately 80 percent, if not higher. See *Afghanistan Human Development Report 2007: Bridging Modernity and Tradition—The Rule of Law and the Search for Justice* (Kabul: CPHD, 2007).
5. It is important to keep in mind that this draft policy is not yet finalized—thus, the provisions discussed herein may change before its adoption.
6. For more recent reports and articles demonstrating some of these differences, see Deborah Smith, *Community Based Dispute Resolution Processes in Nangarhar Province* (Kabul: AREU, 2009); Smith and Manalan, *Community Based Dispute Resolution Processes in Bamiyan Province* (Kabul: AREU, 2009); and the International Legal Foundation, "The Customary Laws of Afghanistan," 2004, www.theilf.org.
7. The International Legal Foundation has conducted a particularly interesting survey of Pashtunwali (see "The Customary Laws of Afghanistan"), which implies that Pashtunwali is more static than USIP's pilot-project results suggest.
8. Several good historical studies of the informal justice system have been done demonstrating the way that various mechanisms have evolved over time. For example, see Thomas Barfield, "Afghan Customary Law and Its Relationship to Formal Judicial Institutions" (draft report, United States Institute of Peace, Washington, D.C., June 26, 2003); Amin Tarzi, "Historical Relations between State and Non-State Judicial Sectors in Afghanistan," (paper, United States Institute of Peace, Washington, D.C., October 8, 2006); and Ali Wardak, "*Jirga*: Power and Traditional Conflict Resolution in Afghanistan," in *Law After Ground Zero*, ed. John Strawson (New York: Routledge-Cavendish, 2002).
9. This is true even though some decisions, particularly ones involving family matters, do not always protect the rights of vulnerable individuals.
10. For example, as Tom Coghlan writes, "the government's appointment of Alizai leaders to many of the district governor positions, Noorzais to police chief posts, and Alikozais and others to key intelligence positions appears to have angered their Ishaqzai rivals, exacerbated the tribal fissures in the area, and facilitated the co-optation of marginalized tribes by the Taliban." See Tom Coghlan, "The Taliban in Helmand: An Oral History," in *Decoding the New Taliban: Insights from the Afghan Field*, ed. Antonio Giustozzi (London: Hurst, 2009).
11. As mentioned, this could include written records and formal discussions between state and nonstate actors, among other things.



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