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Traditional Dispute Resolution and Stability in Afghanistan

Summary

- Stability in Afghanistan will remain elusive unless disputes between individuals and among communities can be resolved through peaceful and equitable means.
- However, state justice institutions are barely functioning in much of the country and are incapable of meeting many justice and dispute resolution needs of Afghans.
- Instead, the majority of Afghans turn to traditional justice mechanisms—including tribal councils and village and religious leaders—to address both civil and criminal disputes.
- In many parts of the country, including areas recently cleared of insurgents, the best way to make significant, visible, short-term (12 to 18 months) gains in peacefully resolving disputes is to work with community-based structures.
- USIP has drawn important lessons from its work with Afghan partners to implement pilot programs exploring links between the state and traditional justice systems in four provinces across the country (in Nangarhar, Khost, Paktia and Herat).
- Programs designed to create or strengthen existing links between traditional justice bodies and state institutions can build mutual trust and harness the strengths of each.
- Donor-funded traditional justice programs need to involve the Afghan government while also accounting for the practical needs of communities to settle disputes in line with their own traditions and procedures, as well as Afghanistan's laws and human rights norms.

“ [S]tabilizing Afghanistan requires an approach that looks beyond just the provision of physical security and the reform of military and police forces to one that enables local communities and the government to resolve local conflicts. Without stable, trusted justice mechanisms, local disputes will continue to spiral into additional sources of violence and discord that insurgents can effectively exploit.”

Security and Justice: The Chicken or the Egg?

In Afghanistan, as elsewhere, security and justice are closely linked. Commander of the International Security Assistance Force (ISAF), General Stanley A. McChrystal, has noted that improving access to fair justice mechanisms is a key ingredient in defeating the insurgency in the country.¹ Indeed, as ISAF soldiers clear and hold districts, the populations being protected need peaceful, lawful means of resolving disputes—including crimes and civil cases—as well as larger conflicts between villages or tribes over natural resources.

A sound rule of law system must be functioning for the country's long-term security needs to be met, and accountable and stronger security institutions are required if the rule of law is to flourish. Therefore, stabilizing Afghanistan requires an approach that looks beyond just the provision of physical security and the reform of military and police forces to one that enables local communities and the government to resolve local conflicts. Without stable, trusted justice

mechanisms, local disputes will continue to spiral into additional sources of violence and discord that insurgents can effectively exploit.

Why Traditional Justice?

Building the Afghan state justice sector's ability to resolve legal disputes is both necessary and critical. In urban areas, many Afghans access the formal justice system, and the state must retain the exclusive right to mete out punishments in criminal matters. The effort to combat the massive opium trade and other forms of organized crime also requires substantial donor assistance to the state justice sector.

In the short term, however, the formal justice institutions of the Afghan state, including courts, do not function in most rural areas and will not have the capacity to effectively administer justice there for many years to come. State institutions are often seen to be expensive, corrupt and inaccessible, and many judges and other legal professionals lack proper training, resources and security to perform their jobs effectively. There are simply not enough qualified prosecutors, lawyers, or judges to staff all of the required state justice institutions at the moment.

Instead, the majority of civil and criminal disputes in Afghanistan are resolved locally through traditional means, including tribal and community councils that have operated in local communities for centuries. These councils (often called *shuras* or *jirgas*) generally consist of community elders and other respected individuals sitting together to reach equitable resolutions of disputes and to reconcile the disputants, their families and the community as a whole. While not occurring in a government forum, such processes often proceed with or at the behest of Afghan government officials. Submitting a dispute to a group of elders is always voluntary (although family or social pressure to do so is often strong), and both parties must consent to accept the result.

Traditional justice mechanisms have the advantage of being familiar to the population and are less costly and more accessible than courts. Decisions made by local *shuras* and *jirgas* are generally consensual, and therefore reach a final resolution much faster than state courts. They focus more on making the parties whole through equitable outcomes rather than adversarial courtroom processes that have winners and losers or that punish wrongdoers. Also, traditional justice resolutions are also more likely to be enforced than those of state institutions because disregarding decisions of respected local leaders can be disruptive to social harmony.

On the other hand, judgments issued by local bodies are sometimes not recorded, may favor the powerful, and occasionally discriminate against vulnerable groups, including women. Additionally, particularly in less secure areas, traditional mechanisms may have been co-opted by local strongmen, thus losing their legitimacy in the community. In areas under insurgent influence where neither the state nor the traditional systems are able or allowed to operate, Taliban "justice"—which can be far harsher than traditional mechanisms—may provide the only alternative for dispute resolution.

Pros and Cons of the State and Traditional Justice Systems

Benefits of State Justice

- Has exclusive authority to prosecute and punish crimes
- Constitution and legal codes set clear guidelines for resolving disputes, appeals, judicial qualifications, etc.

- Only state is capable of addressing complex crimes, and holding powerful criminals accountable
- Handles cases where the state is a party (including state land disputes, tax cases, etc.)
- Proper record keeping (e.g., in land cases) can lead to more sustainable enforcement

Benefits of Traditional Justice

- Culturally familiar
- Relatively corruption-free
- Quick resolution
- Inexpensive
- Locally accessible and resourced
- Enforceable (in intact communities)
- Trusted
- Focuses on restorative justice rather than retribution—preserving harmony within the community

Drawbacks of State Justice

- Inaccessible
- Unfamiliar/not in line with Afghan traditions
- Widespread corruption
- Untrained/nonrespected judges, lawyers
- Time consuming and expensive
- Unenforceable where state lacks credibility/resources
- Justice professionals lack security and resources
- Human rights concerns and lack of due process
- Focus on punishment more than reconciliation

Drawbacks of Traditional Justice

- Human rights concerns and other violations of the law
- Lack of female participation
- Sometimes not recorded and can't be referenced later
- Sometimes addresses crimes in violation of the law
- Unable to hold commanders and other powerful individuals accountable
- Sometimes 'captured' by illegitimate local strongmen
- Challenges of address inter-ethnic or cross-communal disputes

To address justice reform effectively in Afghanistan, a method is needed to capitalize on the benefits of traditional justice mechanisms to resolve local disputes while eliminating its bad practices. At the same time, developing the formal justice system remains necessary and should receive appropriate donor attention. As part of the reform efforts, promoting links and strengthening existing relations between the state and traditional systems can help to harness the strengths of each, recognize the respective competencies of each and help build trust among communities in state justice institutions. Achieving these goals, however, will take many years.

In the meantime, as work to meet these longer-term goals continues, efforts to assist with immediate dispute resolution should unfold. The justice sector landscape differs greatly throughout the country, and many in the Afghan government, ISAF and other international partners have highlighted the need to focus immediate attention on the more volatile, insurgent-affected areas of Afghanistan as part of the overall counterinsurgency operations.

USIP has worked with local partners to implement pilot programs exploring links between the state and traditional justice systems in four provinces across the country (in Nangarhar, Khost, Paktia and Herat). The following recommendations represent preliminary findings from its work, and provide some guidance for work in areas cleared of insurgents.

Importantly, however, work needs to continue in the rest of the country on justice reform—both to prevent districts from being taken by insurgents, as well as to ensure that dispute resolution needs are met in more stable areas where it is easier to operate.

Recommendations for Traditional Justice Programming in Insurgent-Affected Areas of Afghanistan

As the international military and civilian presence shapes operations and expands into areas cleared of insurgents, certain key principles should be considered, including some of the following:

Good practices to follow:

- Identify local trusted actors (e.g., nongovernmental organizations with local on-the-ground implementation experience) who can help with program design during “shape” phase (i.e., before military operations), and then tailor it and begin implementation during hold phase.
- Encourage relationship-building (e.g., hours drinking tea) among programming implementers, local leaders and community members.
- As much as possible, conduct thorough research to ensure proper understanding of the local power dynamics and dispute resolution context. Speaking to displaced populations from insurgent-held areas during the operational shaping phase can be a valuable source of information.
- Identify primary challenges to stabilizing cleared areas (e.g., local land disputes) and encourage formation of specialized commissions to address these concerns. Membership and duties of such commissions should be determined after initial research conducted.
- Secure government buy-in to traditional justice programs—while also allowing communities to decide who sits on *shuras* or *jirgas* and how decisions will be reached (i.e., a bottom-up approach with government endorsement, if not involvement).
- Encourage respectful, regular dialogue on justice needs between state and traditional actors (but not Kabul-appointed state officials lecturing local leaders on, for example, their proper role in society).
- Recognize that clearing or holding may allow communities to have breathing space to begin resolving their own disputes again (with limited or no need for international programs to facilitate dispute resolution).
- Recognize that members of recently-“cleared” communities may not be willing to cooperate if they aren’t satisfied that long term security will be met (i.e., that the Taliban won’t just return when the troops leave in six months).
- Secure community guarantees for detainees, suspects or prisoners being released after detention operations—building on traditional enforcement of community council decisions.

- Create regular mechanisms that build links between the state and traditional systems (e.g., formal recording and storage process for traditional justice decisions, registering decisions with the state, the designation of a respected individual as a liaison between the state and community *shuras*, etc.).
- Recognize that district and provincial governors have historically played and continue to play an important role in resolving disputes. These governors can work with community elders to facilitate equitable resolution of disputes (including larger, inter-tribal disputes).
- Encourage follow-up by ISAF and/or community leaders on cases that they hand over to the Afghan state to ensure they are resolved and that decisions are enforced.
- Encourage state institutions to involve communities in the reconciliation (i.e., civil) aspects of crimes it is prosecuting to ensure sustainable resolutions.
- Understand that individuals should never be forced to participate in traditional dispute resolution against their will.
- Be patient and keep expectations realistic in terms of how quickly programs designed to foster improved dispute resolution will see measurable impact. Implementation will not always meet COIN timetables and often can progress very slowly.

Approaches to avoid:

- Do not pour money into traditional justice (e.g., don't build *shura* "courthouses," don't pay *shura* salaries); the system generally works well without much money in it. Financial reward can create perverse incentives and undermine the very aspects of traditional justice that make it legitimate.
- Do not assume you'll know the right people to engage (i.e., just because someone has a long white beard and/or speaks English doesn't mean he's the respected community leader).
- Do not think what works in one district will necessarily work in the next. Understanding local power dynamics and demographics is key.
- Do not be seen as biased in favor of one group, tribe, etc. over another. Again, understanding local power dynamics and demographics is key.
- Do not think that traditional justice bodies just need to "learn the law" to change how they resolve disputes. Their approaches are cultural more than legal, and must adapt over time.
- Do not assume that all disputes are ripe for traditional justice resolution. Some, like serious crimes and crimes against members of other communities, are better resolved in courts.
- Do not create programs where expatriate advisers are the primary focal point in the communities. Afghans must lead the work and must not be seen as simply acting on behalf of foreign donors or militaries.

Conclusion

The Taliban often exploit the absence of law and order to promote their own brand of harsh justice. Therefore, international military and civilian programs must focus on both improving security and access to fair dispute resolution in areas where they operate. Working with Afghans to address these needs in line with their own traditions is likely to be the most effective approach. At the same time, a modern state justice system must be developed to encourage the growth of a system based on the rule of law.

At the national level, the Afghan state recognizes that it must engage community dispute resolution mechanisms—both to capitalize on their strengths while addressing their limitations

ABOUT THIS BRIEF

John Dempsey is a lawyer and director of USIP's rule of law programs in Afghanistan, where he has worked on legal development since January 2003. Noah Coburn is an anthropologist and traditional justice specialist with USIP in Afghanistan, where he has worked since 2005. This report reflects the preliminary findings of pilot projects USIP has sponsored in four provinces to explore positive linkages between the formal and informal justice systems in Afghanistan.

and bad practices. The 2008 National Justice Sector Strategy for Afghanistan requires the development of a national policy on state relations with community dispute resolution mechanisms. At the request of the Ministry of Justice, USIP has facilitated work on this draft policy, which addresses criminal jurisdiction, protecting women's rights and other key concerns. The draft has advanced considerably, perhaps allowing a final policy to be adopted in the near future.

In the meantime, immediate steps must be taken to ensure that ongoing conflicts and disputes can be settled peacefully and fairly. The above checklist of recommendations provides basic principles for those working in this area to consider. With these in mind, and by proceeding cautiously but deliberately, access to legitimate and effective dispute resolution can be maximized.

Endnote

1. General McChrystal's opening remarks to USIP-led workshop for ISAF on traditional justice, November 27, 2009.



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