

**SHAHMAHMOOD MIAKHEL**

E-mail: smiakhel@usip.org

WHIT MASON

E-mail: whitmason@gmail.com

Rebuilding Afghanistan's Political Immunity

Summary

- Afghanistan is an exceptionally fissiparous country, riven by innumerable conflicts over scarce resources and longstanding enmities between neighboring groups.
- Traditionally, such disputes have been managed by ad hoc groups of elders, known as jirgas or shuras. In the past 30 years, the stature and security of the jirga system and of the elders themselves have been challenged and undermined by all the parties contending for power, including the state itself.
- In the context of weak state institutions, a reinvigorated system of jirgas could make a valuable contribution to resolving the disputes that currently feed the insurgency and make Afghanistan vulnerable to exploitation by groups that destabilize the country and the region, and threaten the West.
- To explore what might be done to create an enabling environment for jirga-like bodies, USIP is piloting Dispute Resolution Commissions in insurgency-affected provinces, and, on the basis of this experience, will recommend principles and actions for a larger-scale program of support.

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Introduction

The national conflict between the Afghan government and its allies and the Taliban-led insurgency is fed by a myriad of smaller conflicts on a provincial and local level. In the insurgency-affected parts of the country, such conflicts traditionally have been managed by councils of tribal elders known as jirgas or shuras. Thirty years of violence and upheaval have disrupted and weakened the jirga system. USIP's Dispute Resolution Project is establishing dispute resolution commissions, comprised of respected elders, to try to resolve inter-group disputes with the potential to contribute to the broader conflict. Through continuous interaction and discussion with commission members and other stakeholders in their respective provinces, the project is identifying challenges and opportunities to reinvigorate and improve the system. These pilot projects will yield a set of concrete, experience-based recommendations for interventions on a larger scale.

Enmity and Insurgency

The strategic aim of the international intervention in Afghanistan is not simply to end the current insurgency but to help create conditions that will prevent the country from ever again being used as a safe haven for terrorists. Al-Qaeda, the Taliban and related insurgent groups can best be

understood as opportunistic infections that take advantage of Afghanistan's immune system, which has been weakened by three decades of conflict. For the international community to achieve its strategic aim, it must not only eliminate these infections, but build up the society's immune system so that in the future it can repel such political pathogens by itself.

The most debilitating of Afghan society's weaknesses is its combination of deep-rooted divisions and scarce resources, which together continuously give rise to fierce enmities. These enmities create an opening for insurgent groups in three ways:

- As long as groups are engaged in intense disputes with one another, they will constantly be on the lookout for allies. Under current conditions, there will always be groups in the world ready to exploit this need for support.
- By providing a system for resolving disputes, however brutal and unjust, the Taliban convinces many Afghans that it is outperforming the state in fulfilling the government's most fundamental responsibilities with the provision of security and justice.
- Some insurgents have enmities with their neighbors and cannot return to their villages unless these are resolved.

State and Customary Systems of Law

More than 30 years of conflict have exacerbated Afghanistan's divisions and enmities while weakening the traditional means for managing them. Jirgas are ad hoc councils of elders to whom disputants voluntarily give authority to arbitrate a dispute. For centuries, jirgas have been at the heart of the decentralized, tribal system of governance of the Pashtuns who make up about half of Afghanistan's population and are the ethnic base of today's insurgent groups. However, over the past 30 years, the authority of jirgas has been challenged and undermined both by the state itself and by other parties who wield authority not by virtue of their reputation for fairness and probity or knowledge of tradition, but through their command of raw force.

In the most insurgency-affected provinces and districts, in the east and south of the country, only a small fraction of positions in the state justice system are filled by people who actually carry out their duties in their assigned areas. Courts seldom operate outside provincial capitals, making the state system hard for many to access. Few criminal trials conform to the law since the accused rarely has defense counsel, as guaranteed by Article 31 in Afghanistan's Constitution. The state system is widely perceived as inefficient and vulnerable to corruption, while the customary system enjoys greater public confidence. A 2009 survey by the Asia Foundation found that 24 percent of Afghans strongly agree and 48 percent somewhat agree that jirgas are fair and trusted. The comparative figures for the state courts are 11 percent and 39 percent.

Like the justice systems of Western countries, Afghanistan's state justice system is retributive, assigning culpability exclusively to one party and punishing that party accordingly, whereas the customary system seeks to establish a new basis for harmonious relations within the community.

Challenges and Opportunities of the Customary System

There are a number of steps that could help improve the environment in which traditional dispute resolution mechanisms operate:

- The decisions of jirgas and shuras need to be clearly and consistently documented, so concerned and government authorities have a precise record of decisions that disputants have accepted, and so the processes and decisions can be critically scrutinized for possible violations of human rights. Both precision and transparency are preconditions for a more

systematic recognition of jirgas' and shuras' decisions by the courts and other parts of government.

- Jirgas and shuras need to be recognized by other aspects of society—by the political administration in their district or province, by the public and by the formal legal system. Recognition of the legal validity of jirga decisions by the state justice system is pending acceptance of a policy and/or law that is now under consideration by the Ministry of Justice. Therefore, for now, programs like USIP's Dispute Resolution Project should emphasize recognition of the customary system's contribution by the government and the public.
- The prestige of elders who serve on jirgas needs to be enhanced. Prior to the 1978 coup and the succession of contested regimes (communist, mujahideen, Taliban and the current government), elders enjoyed such respect within their tribes that all tribesmen protected them and followed their decisions. Conditions over the past 30 years have undermined the authority of elders and consequently the esteem in which they are held, as well as compliance with their decisions.
- Recognition of the jirga system as a legitimate part of Afghanistan's political and legal system entails finding ways to prevent systemic abuses of human rights, including decisions that are prejudicial to women and those that give undue influence to local powerbrokers, such as warlords. These are challenges to both the formal and informal justice systems in Afghanistan. As noted, systematic documentation would facilitate this process.
- Some elders also require help with their personal security. Many highly respected elders have either been killed or feel estranged by political developments since 2001.
- Different ministries and agencies—the Ministry of Tribal Affairs, the Ministry of Rural Rehabilitation and Development, the Independent Directorate of Local Governance and provincial councils—all occasionally set up their own jirgas/shuras. These activities must be coordinated so jirgas/shuras with overlapping mandates don't undermine one another's credibility and authority.
- The credibility of a jirga depends on the reputations of the individual elders who make it up. The members of the pilot Dispute Resolution Commissions supported by USIP are chosen after consulting different parties with independent points of view, including the governor, Ministry of Tribal Affairs, members of the provincial council and elders themselves. In extracting lessons from the pilot commissions, consideration will be given to the process used in choosing members of customary dispute resolution bodies.
- By working with both provincial and national bodies, the commissions will contribute to strengthening the constructive links between Kabul and the provinces. The project will consider how to replicate these links in a larger scale system.

Pilot Conflict Resolution Commissions

USIP's Dispute Resolution Project has helped establish Dispute Resolution Commissions in the provinces of Kunar and Nangarhar. These provinces suffer from high levels of insurgent activity, but jirgas can and do already operate in them and the provincial governors have welcomed support from USIP and the Ministry of Tribal Affairs for the jirgas' work.

These commissions are comprised of respected elders representing the main groups in their respective province. The elders are chosen in consultation with the provincial director of the Ministry of Tribal Affairs and the governor's office as well as ulema (Muslim religious scholars), provincial council members and elders themselves. Approval from several sources helps ensure that commission members are widely respected and that membership as a whole will reflect the population of

the province as a whole rather than favoring one tribe over others. The provincial director of tribal affairs and, where possible, the governor or his representative, will be *ex officio* members.

USIP will play a facilitating role to help the commissions provide a combination of training, dialogue and problem-solving led by experienced Afghan elders to help pave the road to wider reconciliation. The disputes that these commissions deal with belong on a continuum with those involving individuals or families, which are handled by the traditional mechanisms supported by USIP's longstanding traditional justice program. The Dispute Resolution Commissions, however, will deal with disputes on a larger scale that have a more direct impact on the security situation. The commissions, for instance, might deal with a land dispute pitting two clans against one another or address grievances against an insurgent who wants to reintegrate into his community.

In creating these commissions, USIP seeks to address the following key questions:

- How can the customary law system recover the stature and vitality lost during three decades of turmoil?
- How can elders' security be enhanced?
- How can the customary and legal systems be linked in ways that prevent or mitigate the customary system's violations of human rights without undermining the perceived legitimacy the customary system derives from being independent of the state and grounded in venerated tradition and the reputations of respected elders?

The program will develop insights concerning these issues by reflecting on the experiences of the Dispute Resolution Commissions over the coming months and incorporating lessons from previous dispute resolution projects sponsored by USIP.¹

Future Direction of the Pilot Study

The experience of the pilot commissions will inform a set of recommendations for an expanded program for traditional dispute resolution mechanisms. To be considered legitimate by the disputants and the wider community, jirgas must be grounded in local custom or *narkh*. Such knowledge cannot be taught by people outside the community and the local jirga system. Therefore, rather than interfere with the mechanics of how the dispute resolution commissions work, USIP will focus on helping to foster an environment within which jirgas can play their traditional role more effectively.

The recognition of dispute resolution by jirgas is systematically undermined by an absence of documentation. Only the resolution of the largest scale of disputes is usually recorded. Even when a decision is recorded, the record is short on detail and not reliably filed with any particular government office. The Dispute Resolution Project's officers will act as recording clerks in each pilot province and liaisons with the Ministry of Tribal Affairs. They will be responsible for recording all decisions of the Dispute Resolution Commissions, and, when possible, those of jirgas with which commission members are in contact, and the decision-making processes leading to the decisions, including elements of *narkh*, sharia and considerations specific to each case. The dispute resolution officers will then file them with the Ministry of Tribal Affairs and other interested bodies, so both the decisions and reasoning will be accessible for future reference.

The project will also seek other ways to secure political recognition of the worth and decisions of the commissions, including helping to prevent conflicts with jirgas or shuras sponsored by other ministries and government bodies. The project will help to secure public recognition of their worth and their decisions through various means, such as media training for commissioners so they can better explain their work to the public. It will help defray members' modest transportation and

ABOUT THIS BRIEF

This Peace Brief, written by Shahmahmood Miakhel and Whit Mason, highlights the importance of Afghanistan's customary system of dispute resolution, and the need to increase recognition of and support for its work. Miakhel is chief of USIP's office in Afghanistan. Mason is an adviser to USIP's Dispute Resolution Project in Afghanistan, editor of "The Rule of Law in Afghanistan: Missing in Inaction," forthcoming from Cambridge University Press, and head of the project on justice in peacebuilding and development in the Centre for Interdisciplinary Studies of Law, University of New South Wales, Sydney. The views expressed here are not necessarily those of USIP, which does not advocate specific policies.

communications expenses. It is important to minimize potential unintended negative consequences by making the financial support modest; an injection of significant money into a sphere in which elders have typically served without being paid would risk creating distortive economic incentives.

What can already be foreseen is that no single, rigidly prescriptive model would be appropriate for every part of the country and the very different customs native to each of those regions. What the project will seek to develop, rather, is a set of guiding principles and best practices that maximize jirgas' contributions to resolving disputes between groups in a way that is respected and durable. In this way, empowered jirgas can make an important contribution by depriving the Taliban and their allies of a key source of support, and pre-empting potential insurgencies in the future.

Endnote

1. "Between the Jirga and Judge: Alternative Dispute Resolution in Southeastern Afghanistan." The Liaison Office, March 2009.



UNITED STATES
INSTITUTE OF PEACE

1200 17th Street NW
Washington, DC 20036
202.457.1700

www.usip.org

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