

Establishing the Rule of Law in Afghanistan: Developing a Just Society

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Abstract:

In transitional societies, the goal should be to establish societal boundaries that are predictable and not just to provide true liberty for the governed. To establish these societal boundaries during governmental transitions, the focus should be on those specific institutions that provide a measure of trust and confidence in the rule of law. These institutions include the legislature to enact laws, a police system to enforce laws, a functioning corrections system, and an independent judiciary to interpret the laws and to provide redress of grievances. In addition to those institutions that are directly related to "law and order," a number of institutions within society reinforce the rule of law that must also be developed, such as family structure, the media, and the educational system. These institutions provide a critical role in society maintaining and encouraging trust and providing stability in the lives of citizens in the transition to democracy, particularly when that transition is rapid and violent, it is critical that these institutions receive immediate attention so that an appropriate form of governance can take hold. Without these legitimate society-maintaining institutions, other competing institutions and players such as radical fundamental religious institutions and corrupt government officials will fill the void. Establishing the rule of law and society-maintaining institutions, therefore, is a critical focus in transitioning societies to set the stage for an enduring form of government that respects the rights of its citizens. This paper will address these efforts in Afghanistan after the fall of the Taliban in 2001, as well as future efforts that are needed.

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Introduction

Solid social institutions and a clearly established rule of law are critical enablers to the development of an orderly and just society. In the "Federalist Paper Number 51," James Madison wrote of the necessity for government to control the governed and for government itself to be under control:

It may be a reflection on human nature, that such devices should be necessary to control the abuses of government. But what is government itself, but the greatest of all reflections on human nature. If men were angels, no government would be necessary. If angels were to govern men, neither external nor internal controls on government would be necessary. In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself. (Madison 1787-1788/1961, 356)

In transitional societies, the goal should be to establish societal boundaries that are predictable and not just to provide true liberty for the governed. To establish these societal boundaries during governmental transitions, the focus should be on those specific institutions that provide a measure of trust and confidence in the rule of law. These institutions include the legislature to enact laws, a police system to enforce laws, a functioning corrections system, and an independent judiciary to interpret the laws and to provide redress of grievances. In addition to those institutions that are directly related to "law and order," a

number of institutions within society reinforce the rule of law that must also be developed, such as family structure, the media, and the educational system. These institutions provide a critical role in society maintaining and encouraging trust and providing stability in the lives of citizens.

In the transition to democracy, particularly when that transition is rapid and violent, it is critical that these institutions receive immediate attention so that an appropriate form of governance can take hold. Without these legitimate society-maintaining institutions, other competing institutions and players such as radical fundamental religious institutions and corrupt government officials will fill the void. The rapid establishment of the rule of law is critical to preventing these other agents from filling that void. As the Organization for Economic Cooperation and Development (OECD) reported in 1998:

[The] rule of law is at the heart of a democratic system of government, ensuring fairness and equality of individual citizens. These cannot be guaranteed in the absence of clearly defined rights in the constitution and laws of a country and in the absence of adequate provisions for their enforcement. (OECD, 1998)

Establishing the rule of law and society-maintaining institutions, therefore, is a critical focus in transitioning societies to set the stage for an enduring form of government that respects the rights of its citizens. This paper will address these efforts in Afghanistan after the fall of the Taliban in 2001, as well as future efforts that are needed.

Initial Efforts in Afghanistan

Quickly establishing the rule of law in Afghanistan was a priority for the international community shortly after the fall of the Taliban. In December 2001, the United Nations hosted Afghan and world leaders in Bonn, Germany to discuss and develop an agreement that would form the basis for international support to establish a representative form of government in Afghanistan. At the conclusion of the Bonn Conference, on 5 December 2001, the conferees adopted a document titled *Agreement on Provisional Arrangements in Afghanistan Pending the Re-establishment of Permanent Government Institutions*, or “The Bonn Agreement.” This agreement included the framework for drafting a new constitution for Afghanistan, established the interim authority for governance in Afghanistan, and established the Supreme Court of Afghanistan (UN 2001).

As a follow on to the Bonn Conference, the US and other nations met in Geneva, Switzerland in April 2002 to discuss the requirements and funding needed to train the new Afghan National Security Force. The conferees established a “five-pillars” approach, with different nations taking the lead for a pillar of the security sector. Using a “lead nation” approach, five nations volunteered to lead efforts in Afghanistan: establishing the Afghan National Army (United States); establishing the judiciary system (Italy); establishing law enforcement agencies (Germany); disarming, demobilizing, and reintegrating the Afghan Military Forces into society (Japan); and counter-narcotics (United Kingdom)(DOS OIG 2006, 5). This “lead nation” approach has changed over time as NATO command and control structures, international coordination agencies and host nation governmental institutions developed in Afghanistan with NATO and ultimately the United States assuming a leading role in police development.

The Afghan Interim Government and the international community refined the objectives of the Bonn Agreement at a number of subsequent conferences, including Bonn (December 2002), Tokyo (January 2002 and February 2003) and Berlin (March 2004). The London Conference in 2006 marked a turning

point in Afghan sovereignty. At the 2006 London Conference, world leaders signed the *Afghanistan Compact* and marked the end of the initial Bonn Process. With the adoption of a new constitution in 2004, completion of a presidential election in 2004 and the completion of the parliamentary and provincial elections in 2005, Afghanistan was now ready to transition from the Interim Government through the Transitional Government to the Government of the Islamic Republic of Afghanistan (GIROA).

The *Afghanistan Compact* established goals for the end of 2010 and a mechanism for coordinating Afghan and international efforts to achieve these goals. Three pillars of activity for the next five years were established: Security; Governance, Rule of Law and Human Rights; Economic and Social Development. The delegation recognized that, “Security cannot be provided by military means alone. It requires good governance, justice and the rule of law, reinforced by reconstruction and development (Afghanistan Compact 2006).” The Afghanistan Compact also developed the concept of incorporating both the Afghan National Army (ANA) and the Afghan National Police (ANP) as the Afghan National Security Forces (ANSF), and established benchmark ceilings for both forces. The Afghanistan Compact also recognized Afghanistan National Development Strategy (ANDS), which included benchmarks for the development of Afghan state institutions and sectoral coordination mechanisms.

In July 2007, the international community met again in Rome and held a ministerial-level international conference on the rule of law in Afghanistan co-chaired by the Governments of Afghanistan and Italy and the United Nations. The Conference reaffirmed “the crucial importance of the reform of justice and the implementation of the rule of law for the reconstruction of Afghanistan, recognizing that without justice and the rule of law no sustainable security, stabilization, economic development and human rights can be achieved (UN 2007).” The participating members agreed on several key actions at the Rome conference that included an agreement on priorities for justice sector reforms, the establishment of a national justice program and the

establishment of a mechanism to pool donor funding and manage the national justice program.

Since the 2007, there have been a number of different conferences to establish the “Kabul Process” with collaborative efforts between the Government of Afghanistan and the International Community. These conferences include the London Conference of 2010, the Kabul Conference of 2010, and the NATO Lisbon Summit of 2010. During the Kabul Conference of 2010, United Nations Secretary General Ban Ki-moon made the following comments:

Please be assured: we recognize that the journey from London to Kabul is measured in more than miles. It is measured in the progress that you have made in delivering on the London Commitments. In London, we redefined the relationship between Afghanistan and its international partners. In effect, we forged a new compact – a compact that builds on the lessons we all learned from the past. Henceforth, Afghans would increasingly take the lead in shaping their future. Embracing its own destiny, the Afghan government would take essential steps to deliver on the needs of its people. And that is precisely what has begun to happen. Slowly but, surely, the government has expanded its capacity and scope of governance. It has spelled out what it intends for the future and how it intends to get there. With this conference, we mark the true beginning of a very fundamental transition. (Ban Ki-moon, 2010)

The *Afghanistan Compact* from the London Conference in 2006 recognized the interim Afghanistan National Development Strategy. In 2008, the Government of Afghanistan published the formal Afghanistan National Development Strategy (ANDS), which outlined the GIRoA’s policy objectives and analyzed the obstacles to their achievement for the period Solar Year 1387 to 1391 (2008 to 2013). The ANDS is nested in

the three pillars of the *Afghanistan Compact*: Security; Governance, Rule of Law and Human Rights; and Economic and Social Development. The *Afghanistan National Development Strategy (ANDS) Prioritization and Implementation Plan* addressed the actions to be taken in the next three years to continue the development of Afghanistan – from Mid-2010 to Mid-2013. Included in the plan was the “Vision for Afghanistan,” which stated that by the solar year 1400 (2020), Afghanistan will be:

- A stable Islamic constitutional democracy at peace with itself and its neighbors, standing with full dignity in the international family.
- A tolerant, united, and pluralistic nation that honors its Islamic heritage and the deep seated aspirations toward participation, justice, and equal rights for all.
- A society of hope and prosperity based on a strong, private-sector led market economy, social equity, and environmental sustainability. (ANDS PIP 2010)

The *Afghanistan National Development Strategy (ANDS) Prioritization and Implementation Plan* provided a roadmap for the continuation of the Kabul Process – providing a roadmap for transition to the “common goal of full Afghan ownership, responsibility, and sovereignty.”

Defining the Rule of Law

Defining the concept of the rule of law is ambiguous; there is no universal definition for the rule of law. The concept is commonly used in Western, democratic literature to describe the institutions of a government, particularly the judicial and legislative branches of government. However, the term also describes the conditions in society that equate to civil order, or the *ends*, of the rule of law strategy. According to Rachel Kleinfeld Belton, there are two approaches to defining the “rule of law.”

Definitions of the rule of law fall into two categories: (1) those that emphasize the ends that the rule of law is intended to serve within society (such as upholding law and order, or providing predictable and efficient judgments), and (2) those that highlight the institutional attributes believed necessary to actuate the rule of law (such as comprehensive laws, well-functioning courts, and trained law enforcement agencies) (Belton 2005, 3).

Defining the “rule of law” from an institutional perspective focuses one on the formation and performance of legislative, executive and judicial organizations. This perspective helps bound how a government controls the governed. An example of an institutional definition for rule of law comes from the US Department of State Office of Inspector General (OIG):

Rule of law includes “the entire legal complex of a modern state – from a constitution and a legislature to courts, judges, police, prisons, due process procedures, a commercial code and anticorruption mechanisms (USDOS OIG 2008, 7).”

The institutional perspective provides a framework to measure the performance of government, but not the effectiveness of governance. A more comprehensive use of the term rule of law refers to the level of civil order in a society, or an ends-based definition. A definition that emphasizes the ends that rule of law is intended to serve provides a framework that bounds the effectiveness of governance. Rule of law in this perspective is evident when government officials and the citizens exhibit principled behavior and have confidence in the redress of grievances. Within this framework, a nation achieves rule of law when the government and the governed have a common understanding that they share in the responsibility to establish and maintain civil order. Below is an example of an ends-based definition for rule of law:

“The rule of law refers to a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced, and independently adjudicated, and which are consistent with international human rights norms and standards (UNSC Report 2004, 4).”

Of course, both definitions and perspectives are necessary to consider when establishing a rule of law strategy; the institutions must be developed, and the ends – such as providing redress of grievances – must be met. For transitioning societies, focusing on the institutions becomes a necessary priority, but these institutions must be developed with a close eye on the ends to be achieved by those institutions.

Afghan Rule of Law Strategy

The history of the last 100 years in Afghanistan created a difficult environment in which to establish a rule of law strategy. After the withdrawal of British forces in 1919, King Amanulla Khan modernized the secular Afghan government, which included participation of all ethnic minorities. King Mohammad Zahir (Zahir Shah) reigned from 1933 until 1973, a time of relatively strong constitutional government, with a national legislature and increased women’s rights. Zahir Shah’s cousin, Daoud Khan, overthrew him in 1973. In April 1978, Afghan military officers executed a coup, assassinated Daoud Khan and established the Democratic Republic of Afghanistan. A little over a year later, Soviet forces invaded Afghanistan under the premise of restoring stability. The Soviet occupation lasted until 1989, during which time neither the Soviet occupation forces nor their Afghan proxy could extend governance beyond the major cities. Shortly thereafter, tribal warlords vying for control plunged Afghanistan into a civil war. The Taliban emerged from this conflict in a position of power, and established control over most of Afghanistan between 1994 and 2000. The Taliban

imposed a strict interpretation of sharia law and ruthlessly enforced it (Katzman 2011; Jones 2010) until they were overthrown in 2001.

The current Afghan rule of law strategy is maturing gradually with both an institutional and ends approach, but the focus has been on establishing security and building the institutions of government. The Afghan government, with international support, had to develop and reform national legislation and multiple institutions simultaneously to establish rule of law after a 30-year period of conflict. Starting with the Bonn Agreement in December of 2001, the Afghan leadership, together with the international community agreed upon an interim structure that provided the basis for governance. This established an interim administration, legal framework and judicial framework and provided for international security forces that would give the interim and transitional governments the security necessary to form Afghan legislation and policy and begin the development of institutions. On 4 January 2004, a national grand council (*Loya Jirgah*) ratified the Afghan Constitution and by October, the Afghan people elected Hamid Karzai president under the provisions of this new Constitution. By the end of 2005, Afghanistan had an elected parliament (UN 2001; USDOS OIG 2008, 3).

Several aspects of the *Afghan Constitution* are noteworthy. The *Constitution* establishes the foundation for rule of law within three contexts of democratic governance: rule according to law, rule under law and rule according to a higher law and it acknowledges Afghan tradition. It recognizes Islam as a higher law in Article 3, which states, “In Afghanistan, no law can be contrary to the beliefs and provisions of the sacred religion of Islam.” It further clarifies in Article 130 (Chapter 7, Article 15) that the preferred jurisprudence is Hanafi (Sunni) Islam. The *Constitution* states, “While processing the cases, the courts apply the provisions of this Constitution and other laws. When there is no provision in the Constitution or other laws regarding ruling on an issue, the courts’ decisions shall be within the limits of this *Constitution* in accord with the Hanafi jurisprudence and in a way to serve justice in the best possible

manner.” The *Constitution* “observes” the United Nations Charter and “respects” the Universal Declaration of Human Rights in the preamble; in Article Seven the *Constitution* states that Afghanistan “shall abide by the UN charter, international treaties, international conventions that Afghanistan has signed, and the Universal Declaration of Human Rights” (Constitution 2004).

Article Six of the *Afghan Constitution* emphasizes the *ends* of the establishment of effective governance: “The state is obliged to create a prosperous and progressive society based on social justice, protection of human dignity, protection of human rights, realization of democracy, and to ensure national unity and equality among all ethnic groups and tribes and to provide for balanced development in all areas of the country.” The Constitution of Afghanistan also includes several provisions for the assumption of innocence and the protection of accused according to law. In line with rule under law, it specifies that government offices are bound to carry out their work with full neutrality and in compliance with the provisions of law (Constitution 2004). Finally, the Constitution of Afghanistan established a strong presidency with considerable emergency powers but gave parliament significant powers to compensate.

As the Afghan government started to build its executive, judicial and legislative branches of government, it also had to develop the resources to instill civil order in order and achieve rule *according* to law. These included establishing the armed forces, the police, the correctional system, the courts and the laws and regulations that form the basis of the legal system. Law enforcement is the basic expression of rule- according- to- law. Once the military establishes security, it is incumbent on the civil police to hold the security gains and build the trust and confidence of the people by interacting with and protecting them in accordance with the nation’s laws.

With the focus on security – and the rapid development of the Afghan National Police, efforts to develop the correctional and court institutions have lagged. The correctional system still faces the greatest challenges; without adequate facilities and a

system to hold and process those convicted of crimes, there is very little incentive for the police to hold people accountable according to the law. According to the Afghan Constitution, the courts are an “independent organ of the State” which “discharges its duties side by side with the Legislative and Executive Organs (Constitution 2004).” Finally, the establishment of a comprehensive framework of laws relates to the critical role played by legislative bodies to develop laws, an area that is also lagging.

Afghanistan Today

Critics of the efforts for the rule of law in Afghanistan cite lack of progress with the laws and institutions or “ways and means” that enable rule- according-to-law and rule under law. The GIRoA’s slow to develop institutions and the performance of the officials in the institutions have come under scrutiny for corruption. Regarding the government’s ability to enforce the law, arrest suspects and order civil damages or criminal punishment in accordance with the law, critics cite environmental conditions that hinder civil police operations such as the security environment and the Afghan government and the prioritization of security operations over policing operations. Concerning judicial capacity in Afghanistan, there is a notable lack of a coherent rule of law strategy between GIRoA and the contributing nations who provide resources to Afghanistan. The lack of leadership or “unity of effort” to synchronize the multiple bilateral initiatives coupled with the tenuous security situation has resulted in a lack of development in the corrections system and a lack of judges and prosecutors in the rural districts away from Kabul.

One of the more demanding challenges for GIRoA is linking sub-national governance structures (tribal, provincial and district) with national level structures. This is particularly true in developing a working “rule of law” system with functioning courts. GEN (Ret) Barry R McCaffrey identified some of these issues in his December 2009 *After Action Report*, which was based on his visit to Kuwait and Afghanistan from 10-18 November 2009. He commented on “the problems facing 40,000

Afghan Villages” to highlight the problems at the subnational level – away from Kabul:

Afghanistan is the second most corrupt nation in the world after Somalia. Their adherence to tribal and Islamic values has been shattered by endless civil war and foreign oppression. There is almost no civil or criminal justice. Court trials last only minutes in many cases and lack juries. Human rights violations are endemic: extrajudicial killings, official impunity, restrictions on freedom of the press and religion, and severe and widespread child abuse. The nation's 34 provincial prisons and 203 detention centers are appalling. Prisoners are consistently subject to torture and police frequently rape female and male detainees. (McCaffrey 2009, 7)

GEN (Ret) McCaffrey also noted the “Afghanistan now has hope” with the establishment of government institutions – and particularly with the rejection of the Taliban:

The Taliban are politically rejected by nearly the entire non-Pashtun population. Even among the Pashtun they command polling support of less than 6%. The Taliban were the spiritually pure, they held the moral high ground, they dispensed immediate dispute resolution, they normally were disciplined and anti-crime. They were also a malignant virus in this sick society. They were the uneducated, murderous, rural hicks who destroyed the culture and invented a cruel form of Islam not normal to this devout but tolerant society. They were anti-history. They turned Afghanistan into a nightmare for women, for other ethnic minorities, and for the Shia Hazaras. They were senselessly cruel and destructive. Only the Soviets were worse” (McCaffrey 2009, 9).

Both of these sections highlight the perception of poor grievance resolution on the part of the Afghan Government, whereas the Taliban have at least developed a system of dispute resolution. GIRoA has had little success integrating the traditional dispute resolution customs with central judicial processes (USDOS OIG 2008; Hagerott, et al. 2010). To close this gap, the GIRoA must address its capacity shortfalls and leverage its traditional customs of dispute resolution to establish confidence with the Afghan people. A way forward for linking the formal and traditional justice systems will be discussed in the next section.

Establishing rule of law must go beyond building the institutions to make and enforce the rule of law. As Madison wrote in 1788, “*Those who govern must also be governed.*” In the context of rule under law, the government is not above the law and no public official may act outside the law. GIRoA has faced criticism of corruption within the Afghan judicial system, corrections system and the police force. Low pay and the lack of security make officials susceptible to corruption such as accepting bribes and extending leniency. A lack of enforceable ethic codes, transparency and accountability reinforce corruption. The US State Department OIG noted in 2008, “Corruption is a major problem that pervades every aspect of public life in Afghanistan.” The Afghan Attorney General is quoted as stating “Corruption is the mother of all crimes in Afghanistan (USDOS OIG 2008, 20).” The international community must continue to assist GIRoA establish a system of checks and balances, with tension between the divided powers of government. Afghanistan must create *rule under law* by creating a balance of power between its branches of government and by developing a system of oversight to ensure transparency and accountability. A step in this direction is included in the ANDS, which created a National Justice Program and National Justice Sector Strategy that set priorities and goals in the justice sector (ANDS 2008). These programs are intended to develop the systems that the Afghan public can rely on for transparent and accountable justice institutions.

The GIRoA and the international community have recognized the need for a unified approach to rule of law. The Kabul Process reinforces international support to the goals set forth in the ANDS as well as supporting the mechanisms to provide international support to the National Priority Programs. A key step to support GIRoA efforts by “unity of effort” within the international community was the establishment of the US-led Rule of Law Deputies’ Committee, led by an ambassador-level Rule of Law Coordinator at the US Embassy. The success of the Rule of Law Coordinator, however, is dependent on the spirit of cooperation between the various US entities operating in Afghanistan, as he has no direct supervisory authority over many of them.

Institutional growth continues to develop rule of law processes within the branches of the Afghan government and the international community is continuing to improve cooperation through better coordination. However, in order to realize rule of law, the Afghan society must understand and choose to abide by the law. The GIRoA must address the issue of principled behavior by extending rule of law from the central government to the rural districts. Development of a criminal justice system that impartially determines guilt and imposes sentences is critical. Surveys of the Afghan population in key districts reflect a continued lack of governance at the subnational level. Afghanistan’s Director for Local Governance Programs assesses some 100 of the country’s 400 districts, across 16 of its 34 provinces, to be without either a public prosecutor or a judge. This lack of governance directly contributes to a lack of confidence in the government’s ability to deliver justice, resolve civil disputes and address the perception of impunity among the powerful.

NATO implemented a new initiative in July 2011 to facilitate the GIRoA extending governance into the rural districts- the NATO Rule of Law Field Support Mission. This new organization is charged with the responsibility to furnish essential field capabilities, liaison and security to Afghan and

international civilian providers of technical assistance. These experts, deployed in Afghanistan's provinces and districts, seek to build Afghan's criminal justice capacity, increase access to dispute resolution services and improve Afghan governance (Martins 2011; Martins 2011a). All of these contribute to enhancing GIRoA's ability to enforce the law at the local level.

The military judicial system is the most successful justice system developed to date in Afghanistan. This system includes functioning courts, judges, prosecutors, defense counsel and appellate review. It includes the capacity for pretrial detention and long-term post trial confinement. As a measure of the maturing military justice system, in the last three years the Afghan National Army (ANA) has adjudicated approximately 400 cases per year, with over half of those cases adjudicated within the last year. In addition to the ANA prosecutors, defense attorneys and judges that exist in every ANA Corps headquarters compound, courthouses built on secure ANA installations provide justice officials with a level of protection from attack that is still lacking in most civilian courts. Although an example of success, the degree to which the ANSF are establishing and exercising rule of law within their authorities could be an indicator of a widening imbalance of power within the GIRoA.

Linking Formal and Traditional Justice: The Problem

Afghanistan has never had a strong central government extending its influence unilaterally across the diverse tribal regions of Afghanistan. As a result, Afghans have traditionally resolved civil and criminal disputes at the village and tribe level through a council process based on customary law and traditional authority, an approach that continues today. This approach continues not only due to the history of Afghanistan, but also due to the security situation, which has resulted in insufficient numbers of judges and prosecutors and the population's perception of corruption within the central government.

The absence of an adequate dispute resolution process in the rural districts provides the Taliban with a means to appeal to the people. The Taliban have successfully exploited this lack of governance by providing civil and criminal dispute resolution in a manner amenable to, of not completely consistent with, Afghan traditions. This efficient, yet brutal form of rural justice meets a local need and indirectly reinforces support for the Taliban. GIRoA has made several efforts to address the coexistence of informal, tribal dispute resolution processes. These efforts have spanned from tacitly recognizing the value of the local systems to integrating the local systems with district and provincial capabilities. A lack of legislation recognizing the tribal customs and a lack of a common central process to connect tribal dispute resolution processes with governmental judicial processes have limited the effectiveness of these initiatives to date.

Although the *Afghan Constitution* established a monopoly of power in the central government for judicial actions in Article 27 (“No person can be punished but in accordance with the decision of an authorized court and in conformity with the law adopted before the date of offense”), the Constitution also recognized the role of informal councils at the subnational level in Article 140 (“In order to organize activities involving people and provide them with the opportunity to actively participate in the local administration, councils are set up in districts and villages in accordance with the provisions of the law (Constitution 2004).” In the rural areas of Afghanistan, local councils have formed to address security concerns, project development, and (in limited instances) conflict resolution. In the instances where local councils formed to resolve disputes, individual linkages with district and provincial officials and councils provided formal recognition of the process and decisions rendered.

The specific customs for dispute resolution vary from tribe to tribe and village to village in Afghanistan; there is not a common procedure. However, certain generalities about the traditions can be made to explain the process. The tradition includes a “private” dispute resolution set and a “public” dispute resolution set. Private dispute resolution is typically oriented on

preserving the honor of a family. Extended families settle many types of minor disputes that never enter public scrutiny. Types of disputes resolved privately include domestic violence, divorce, inheritance and marriage issues. Because these disputes do not become common knowledge, little is known of the specific procedures for these processes. If the dispute cannot be resolved within a family, then it enters the “public” dispute resolution custom.

The public dispute resolution process takes the form of one of two councils. These public councils are commonly referred to as the *jirga* and the *shura*. The term *shura* originates from the gathering of Islamic dignitaries ranging from *mullahs* to *ulema*. During the Afghan War and the emergence of the *mujahedeen*, the term *shura* expanded to mean gatherings with official character. The *shura* and its members are of more long-term character. Afghan communities have established *shuras* to address long-term issues such as security concerns, development projects and over-arching community based dispute resolution processes. To address short-term issues, or a single case, the community forms a *jirga*.

The *jirga* (or *marakha* as it is known in southern Afghanistan) is a traditional decision-making body created on a temporary or ad hoc basis for solving disputes among tribes, sub tribes, clans, families or individuals. It is also used to resolve disputes between the government and the tribes (El Saman 2008, 8; TLO 2009). In common use, the term *jirga* refers to a local/tribal decision-making body focused on dispute settlement. It incorporates the prevalent local customary law, institutionalized rituals and a body of village elders whose collective decision about the resolution of a dispute is binding on the parties involved (Wardak 2004, 326). Unlike western judicial systems, Afghan traditional dispute resolution centers on restorative justice, not punitive justice. Traditionally, the communities seek to restore equity, not achieve retribution. For example, one important form of tribal *jirga* is *nanawate*, which means seeking forgiveness/pardon. It results in the obligatory acceptance of a truce offer. According to findings reported by the US Institute for Peace International, “The fundamental goal

of a *shura* or *jirga* process is to restore community harmony, which is generally achieved by arriving at an equitable settlement that corrects harm done to honor and/or property (Barfield, et al. 2006, 7).” In many cases, this is the only method available for a plaintiff to gain restitution, as the formal process tends to focus on punishment. As Barfield notes, “Unlike state law, the customary system sought compensation for the wrong done and social reconciliation, not the punishment of the perpetrator (Barfield, et al. 2006, 8).”

One significant limitation of the *jirga* and *shura* is its lack of executive arm to enforce rulings. Historically, the worst punishment a community could inflict on transgressors was not death but permanent exile because it severed the individual from the community, a form of social death. However, outside of ostracizing a member of the community, honor or the avoidance of shame is the enforcement mechanism. Most Afghan traditional dispute resolution processes require the parties agree to accept the possibility of a peaceful settlement before the mediation begins and provide a *baramta*, security deposit, to ensure that they will accept the final decision (Barfield, et al. 2006, 10). The basis of restitution instead of punishment also supports voluntary acceptance of the decision. To restore harmony in the community this could include demanding the offender return the goods stolen or their cash value in cases of theft or make payments for wounds inflicted. Historically it could even include arranging a marriage settlement and blood money in the case of a revenge killing, although recent evidence demonstrates that these practices are in decline. A Pashtun customary law also makes the accused publicly and personally accountable for his deeds forcing the wrong doer to apologize publicly to the victim and make payments to compensate for insults to honor (Barfield, et al. 2006, 11).

Since the restoration of central governance in Afghanistan, a majority of local disputes continue to be resolved through the non-state customary law processes. Researchers estimate that communities resolve approximately 80% of disputes, both civil and criminal, through a *jirga* or similar process. In the rural districts, the population still views the

central judicial system as expensive, lengthy and corrupt (Barfield, et al. 2006; El Saman 2008). The central government is well aware that these processes continue but has been unable to develop and deploy an adequate formal process to replace them and counter the rural perceptions. Instead, there is a growing relationship between some formal courts, at the provincial and district levels, and the local councils. In these instances, the courts refer cases to the local councils and vice versa. In a few areas, district and provincial leaders have worked to build a semi-formal relationship between the local councils and the district courts.

Linking Formal and Traditional Justice: Current Approaches

The Government of Afghanistan does not formally recognize these non-state judicial systems and has not yet approved a legislative solution that would empower constitutional local councils to arbitrate disputes. *Jirgas* remain an extra-judicial solution to a local condition. There have been, however, a number of efforts to address the linkage between formal and traditional justice systems. These initiatives include the expanded use of Community Development Councils, the Commission on Conflict Mediation in Khost Province, and GIRoA initiatives to extend services to the rural districts.

In 2006, Khost Provincial Governor Arsala Jamal requested assistance to facilitate the formation of the *Commission on Conflict Mediation* (CCM). Similar to western out-of-court arbitration processes, the CCM provides an alternative dispute resolution process officially authorized by the Provincial Governor. However, its decisions are formally non-binding. The CCM consists of a council of six respected tribal elders. During its first 18 months, it worked on 31 conflicts consisting mostly of land disputes. The CCM resolved 18 of the cases in this initial 18 months and referred three to the provincial court. Several advantages of this approach have been noted: It is collaborative in nature, ensuring both parties have an opportunity to accept or deny the decision without penalty; It is impartial and accessible as the CCM's services are provided free of charge;

and finally, it is effective. CCM bridged the gap between formal and informal systems by allowing the government to have oversight of case selection while the process remained accountable to the community (TLO 2009a).

In November 2009, the Ministry of Justice (MoJ) and members of the international community signed a draft policy to enhance and regulate the relationship between *community-based dispute resolution* (CBDR) initiatives and the state justice system. Signatories included a broad range of Afghan and international partners, including the Afghan Ministry of Justice, Afghan Independent Human Rights Commission, Afghan Ministry of Women Affairs, US Justice Sector Support Program, United States Institute of Peace, United Nations Office on Drugs and Crime, Afghan Women Network, UK Department for International Development, United Nations Development Fund for Women, and United States Agency for International Development. This draft policy represented consensus between the international community and the Afghan Ministry of Justice (GIRoA MoJ 2009).

In December 2009, after extensive field research in Nangarhar, Bamiyan, Kabul and Balk Provinces, the Afghanistan Research and Evaluation Unit (AREU) identified that across Afghanistan CBDR initiatives were not working in isolation from state institutions and provided recommendations to the GIRoA for policy consideration. They reported, “At district and village level, state and community actors often work together to resolve disputes and provide justice to aggravated parties (Smith and Lamey 2009).” Furthermore, they reported that there were strong relationships forming between CBDR actors and their district governors, or *woliswal*, and that CBDR decision makers wanted an effective state justice system to which they could refer serious criminal and civil cases. Their recommendations covered defining limits of jurisdiction, state endorsement of CBDR decisions, formal recognition of the *woliswal* as the primary state actor, and reinforcement that the CBDR councils are the better-placed organization to address the cause of a dispute and bring a lasting peace. Of their recommendations, the most insightful one stated, “Conceptualizing state justice and CBDR dichotomously

as “formal” and “informal” sectors is highly problematic potentially splitting programs between them and preventing a holistic approach to justice sector efforts (Smith and Lamey 2009).”

At the Kabul Conference in July 2010, the international community and GIRoA reaffirmed their commitment to linking the informal and formal systems as outlined in the ANDS National Justice Sector Strategy (NJSS). The Kabul Conference Communiqué states that the Afghan government will “improve access to the delivery of justice throughout Afghanistan by...completing the informal justice strategy in alignment with the National Justice Sector Strategy to link it with the formal justice sector and begin implementation in the next twelve months (GIRoA 2010).” That statement established a goal date of July 2011 to have this commitment complete – which was not met. In a continuation of the draft policy effort, the Afghan Ministry of Justice established a working group on traditional dispute resolution in September 2010 and drafted a implementing law that has not yet been approved.

Linking Formal and Traditional Justice: Potential Approach

One approach to linking formal and traditional justice is to address six different considerations for the traditional justice organizations, with a focus on addressing civil and minor criminal cases. These six considerations are:

- Formal Recognition.
- Clear Lines of Jurisdiction.
- Vetting of Court Officials.
- Formalized Filing of Decisions.
- An Appellate Process.
- A Linkage of Courts, Cops, and Corrections – and the Law.

These six considerations could provide an approach to create an effective linkage between local, traditional dispute

resolution processes and the formal justice system. This could result in a complementary system that meets the needs of the people and provides dispute resolution at all levels in Afghanistan.

Formal Recognition. Before going further, GIRoA must consider formally recognizing the traditional dispute resolution process as a legitimate form of arbitration. In doing so, it opens the discussion to define the local council's level of authority, the limits of their jurisdiction and their administrative obligations as part of the national judicial system.

Clear Lines of Jurisdiction. The GIRoA must establish clear lines of jurisdiction. Although there will be difficulties as noted above, framing jurisdiction by both geographic limits and by terms of severity of the accused infraction will facilitate framing a jurisdictional limit. Geographic boundaries are critical because traditional dispute resolution varies based on the tribe, religion or ethnicity of the parties involved. Sub-national courts (such as tribal courts) should have the authority, within the overall system, to arbitrate local issues, such as property disputes.

Issues such as capital crimes are more difficult to address. While the execution of the trial should be handled only within the formal system, the formal system must recognize the need for restitution at the community level. As Barfield notes, "Courts do not concern themselves with reconciliation, which means that even where the state system does intervene, non-state practices are needed in addition to reconcile parties and prevent further conflict. A person convicted in a state court and sentenced to prison remains a target for retribution even after serving time. The non-state legal system reaches reconciliation as a result of complex processes of public condemnation, forgiveness, and acceptance (Barfield, et al.2006, 16)." Jurisdictional bounds should also place limits on potential judgments and sentences. In keeping with the Afghan Constitution, judgments and sentences that have been traditionally administered, but violate fundamental human rights must be formally forbidden in a manner consistent with *Sharia*.

Vetting of Court Officials. Court officials at the sub-national level require some level of vetting. There have been cases resolved by “tribal elders” that have, after the fact, found to be made by those presuming to be the “power brokers” in a certain area. Local courts should be established by the true leaders and vetted as the true authorities for dispute resolution. Influence of warlords, insurgents and persons of extreme means must be checked against the desires of the community. The *Afghanistan Constitution* allows for the establishment of local councils. By democratically electing the council from elders considered eligible by local custom with district oversight of the proceeding could mitigate the influence of power brokers.

Formalized Filing of Decisions. All decisions made by courts at all levels should be recorded and filed. Filing with the next higher appellate level will help ensure the preservation of documents. Informal decisions should still be available for reference after decisions are rendered as well.

An Appellate Process. Within certain parameters (such as timeliness or a sub-national court exceeding jurisdictional authority), there should be a provision for appealing lower level decisions at higher levels.

A Linkage of Courts, Cops, and Corrections – and the Law. Within the broader context of the “rule of law,” sub-national courts should also have explicit structural linkages to executive authorities (police) and to the correctional systems. The basis for decision rendered, whether a formal written decision or an informal verbal edict of tribal law and traditions, should be clearly understood by those subject to their decisions. Although traditional customs bind the disputing parties by honor and the provision of *baramta*, linking the civil police to the restitution process will add a measure of confidence to both the judicial and executive processes.

Summary

In transitioning societies, it is critical to establish a state of order in which the acts of the government and the governed conform to the rule of law. A rule of law strategy must look beyond the establishment of institutions and the codification of legislation, but should also look at the results, or the ends. For Afghanistan, this is a particularly challenging issue based on the history of Afghanistan, the security environment, and the lack of a formal linkage between formal and traditional justice systems. Without the establishment of the rule of law, the tenuous security provided by the Afghan military and police will only provide temporary stability and a fading illusion of governmental legitimacy.

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