The Merits of Non-State Justice: An Effective Mechanism for a Stable Afghanistan

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Executive Summary

Two dominant methods of obtaining justice exist in Afghanistan: a state justice system that is managed by the Afghan government with the support of the international community and considered the supreme legal authority, and a non-state justice system, considered the most effective process for dispute settlement and conflict resolution. The Afghan government and the international community accept the existing duality of the justice system. However, a common perception is that the existence and efficacy of the non-state justice is the result of a lack of resources and widespread corruption within the state judiciary. On the contrary, this paper illustrates the effectiveness of non-state justice as an organic dispute settlement and conflict resolution system in support of local governance, not the symptomatic weakness of the state judiciary. In this direction, this paper sees non-state justice as a tremendous organic resource that can complement the rule of law and local government if its autonomy is recognized by the Afghan government and customs can be distinguished separately from customary law.

State vs. Non-State Perspectives of Justice

Extensive field study and available data, including my own observations of local governance and non-state justice in the last twenty years, reveals sharp differences between the perceptions and experiences of state and non-state justice systems in Afghanistan. These differences shape and reshape Afghan citizens’ attitude toward governance, access to justice, and the rule of law. The Afghan state perceives the rule of law as citizens’ obligation to obey the tenets of Afghanistan’s national constitution. In most cases, officials view non-state justice in contradiction to state authority and instead demand compliance with the laws established by the central government. This

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2 Perhaps, the non-state justice is not a system as such or an organized institution with a fixed mandate or a membership that is sanctioned by local or national authority. Rather, it is more a process that can be observed via its diverse forums in accordance with the matter at hand within families and communities. However, for the sake of discussion in this paper, I will use terms such as non-state justice systems or institutions.
perspective is shared and supported by the international community that is assisting the Afghan government to further improve the capacity and delivery of its court system and law enforcement agencies.

For most Afghans, however, their understanding of the non-state justice system is based on their local experiences, which outweigh the opinion of the Afghan government. They view the system as an affordable and functional mechanism for settling disputes and resolving potentially deep-rooted communal grievances. As a result, this perception of justice, rooted in the local understanding of accepted social norms and mixed with the basics of religious teachings and traditional rituals, has developed, evolving into a system of rights and limitations that guide them to distinguish right from wrong, fair from unfair. This system of rights and limitations acts as an unwritten constitution that confirms the code of conduct of those trusted to adjudicate disputes or mediate a conflict. Indeed, the violations of individual rights due to decades of wars, the rise of armed extremist groups and warlordism remain vivid in the memories of Afghans. In this context, local experience of non-state justice is often perceived as significant, enhancing communal harmony in the form of restorative justice.

In most cases, local Afghans do not consider the non-state justice system to be in conflict with the national constitution, even though the majority may have never seen a copy or been able to read it. However, the existence of high levels of corruption and inefficiency and severe shortages of qualified legal experts, including judges, defense attorneys and law enforcement cadres at the provincial and district levels, causes them to have a negative view of the state justice system. Most recent field studies show that the intention of those reaching out to the non-justice system is not to undermine the efforts of the Afghan government; they view the state’s efforts and the support of the international community as positive. Instead, reliance on the non-state justice system is a reflection of popular will to improve access to justice, good governance and rule of law.

The Structural Duality of the Justice Systems

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3 Field Studies like Tufts University (2003-2004), USAID (2005), USIP (2006) and later in which this author was either a participant or where the team reported that the majority of Afghans did not know much about the national institution and the state legal order.

The core of the state structure in Afghanistan is the organization of the central government, comprised of executive, judiciary, and legislative divisions. In the case of the judiciary, the Afghan court system is the primary institution for seeking justice. The underlying principles for adjudicating legal disputes are the notions of justice embedded within the legal codes that aim to punish and reward. The written laws inspired by the national constitution are the sources of all legal codes and conduct of the court system. Within this system, all Afghan citizens are equal before the law on the basis of individual rights and obligations, which makes the state justice system a universal mandate within the territorial boundary of Afghanistan. The job of the court is to keep individuals in compliance with the established legal system and accountable toward their duty as citizens; violators are punished and victims are provided with justice. The court system can operate only based on the presumption of the citizens’ trust in the laws written in the constitution. The state legal system asks citizens to trust the law and the adjudication of judges, even if they may not know them in person.

In contrast, the non-state justice system is based on local social structures, which are constructed by social units such as family or mahalla (town or village sub-district). In most dispute resolution cases, mediation and arbitration operates within the disputants’ social boundaries. For example, domestic family issues are considered matters between families, and therefore a dispute settlement forum would be kept within the family. Disputes known to the village or town group are handled locally if impartiality can be maintained; otherwise, respected mediators will be called in from other mahalla, but often still within the proximity of the town or village. The Afghan communal structure relies in most cases on forums that are open to disputants and selected members of the community. Since the unit of analysis within the principle of the non-state justice system is community versus individual, the forums are geared toward producing remedies for reestablishing harmony and solidarity among members of a family or community. This means that the underlying obligation of the mediators is to normalize an individual relationship within a given community. As such, non-state justice is a relational process designed to rebuild broken social relations between members of families and communities rather than impose a universal system of justice and punish the violator, as the state court system does. In this process, families and village and town communities seek fairness to prevent disruption in their familial and communal lives. (See Figure 1.1).

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6 A mahallah is a sub-division of either an urban or rural district. There are a number of different indicators that establish a mahallah’s informal social boundaries. For instance, those who attend a particular mosque, mainly because of its close proximity, can form a mahalla community. Mahallat is the plural form.
In most non-state justice forums, participants do not pay much attention to the norms and intellectual principles applied to settle a dispute, as is the case in state justice forums. Instead, disputants pay more attention to the individual and social characteristics of the mediator or arbitrator and his final deliberation. They want to have a human face with a respected name attached in order to give them the confidence and needed assurance that their rights or interests are not going to be unfairly undermined. For this reason, they trust mediators known with positive individual attributes, for example, a good Muslim, an honest man and experienced arbitrator whose judgment carries weight in the community.

Arbitrators and adjudicators need to use the accepted norms within a given community while settling a dispute to strengthen the outcome and tailor it to each case. In most cases, a mediator or adjudicator attempts to avoid causing a devastating economic or social impact on the party of malamat (the guilty). Such considerations demand an adjudicator to have a firm understanding of the social context of the case and the possible impact of his ruling on both sides of a dispute. The complexity of this process is more obvious in criminal cases, where it can be a challenge to restore justice in a way that is fair for both the victim and perpetrator. The adjudicator determines punitive measures that compensate the victim and his family in a manner to prevent further crimes in the form of retribution. To achieve such a complicated and multi-faceted objective, the offender himself and his family must go through a process wherein they accept guilt in the form of malamat, experience public shame and condemnation, and finally accept the final adjudication. In return, they are given a chance to live in peace without being harmed or revenged. As for the victim or his or her family, they go through a healing process, receive compensation for imposed damages, are given additional respect for forgiving the violator, and are recognized as the party whose deeds returned harmony and peace to their community.
Figure 1.1: The duality of justice systems in Afghanistan: organizational structure and their support of governance.

Access to the state justice system is challenged by the reality that the majority of the population cannot read and write, as well as the fact that the availability of legal defense is highly limited within major urban centers and practically totally absent within the rural districts – where the majority of the population resides. This centralization of the Afghan government has resulted in a one-way road designed to connect the government to its citizens in order to sustain the political authority of the ruling elite. This model was designed by the Western-educated elite in the 1960s and
modified and reinforced with U.S. and international community support once the Taliban regime was forced from power in 2001. As a result, centralization of the state system, particularly within the judiciary, has created growing systematic voids between the citizens and the state.

Such a void is obvious in the structure of the judiciary. The hierarchy of the court system limits adjudication authority at a primary court within a district. Any disagreement at the primary court level must be referred to provincial courts. If it is not resolved at the provincial court level, it is elevated to an appellate court and finally to the Supreme Court, located in the capital city of Kabul. It would be almost unimaginable for average residents within a rural district to afford the means to complete such a process in order to achieve justice. Even if they could afford to complete this process, most local Afghans often do not think beyond the district level to settle legal disputes, because the center of the province, or Kabul, is beyond their reach: the personnel of the court system and the norms applied are too unfamiliar, or they realize that even if they achieve a favorable outcome it might not be possible to enforce without the compliance of local authority and those in power at the district level.

The co-existence of the state and non-state paradigms has broadened the scope of governance and the rule of law in Afghanistan. Recent policy developments on the side of the Afghan government as reflected in the 2008 National Justice Sector Strategy (NJSS) and 2009 efforts by the Ministry of Justice toward developing national policies regarding the relationship between the two systems of justice have been positive steps forward. This has enabled international donors to commit minimal resources in this direction and a few local organizations began to pilot programs connecting state and non-state justice mechanisms. However, the interactions between the government judiciary and non-state justice have still been limited. The interaction that has taken place has only occurred at the lowest level of the government judiciary – the hoghoogh, the public prosecutor, and primary court judges at the district level. Since Afghan judiciary officials have not been educated and trained about the non-state justice system, such an interaction has been viewed as a matter of convenience; it is not an integrated component of the applicable laws and the structure of the formal judiciary. This has continued long after customary law was accepted as the third pillar (after statutory and Sharia) of laws in Afghanistan. Similarly, the non-state actors who deal with dispute settlement and conflict resolution often do not know much about the written laws, the procedures of the courts, and the legal obligations of law enforcement agencies. This reflects – among other issues – a lack of structural relations between the two systems of justice in Afghanistan. Yet the two different perspectives of justice, while nearly diametrically opposed, can co-exist. One does not invalidate the other, but rather both are accurate and realistic. Developing policies to increase complementary
relationship between the two systems of justice would offer Afghan citizens greater access to justice and a sense of community under the rule of law, essential to the advancement of stable governance.

**Local Governance and Non-State Justice**

Non-state justice in Afghanistan is rooted in traditional governance as an informal institution developed to settle disputes, promote non-violence, and prevent the escalation of conflict at the community level. If governance is defined as the ability to self-rule, the non-state justice system as a participatory process enables members of a local community to sustain it. As an informal process, the non-state justice system is structured to correspond fluidly with normative codes and can be set in motion only if members of a community agree that it is needed. The use of customary law – set on norms that are unofficially but collectively determined by members of a community – depends on the configuration of the types of disputes. What sustains the institution of customary law is the social character of individuals who mediate, listen to disputants, and deliver judgment. Their past history of being fair and delivering a just, honest judgment is a key determining factor in supporting a successful outcome. Restoring the normalcy of a relationship in the aftermath of judgment between disputants is the litmus test of a successful or failed non-state justice forum.

Non-state justice in Afghanistan operates much like arbitration in the United States and other Western countries. Different types of arbitration exist. Arbitration and mediation within both traditional and codified dispute settlement mechanisms are often favored both in Afghanistan and the U.S. because they are effective alternatives to long and costly court cases. What makes customary law in Afghanistan more attractive is its ability to be trusted and reinforced locally, at a time when the state legal system is either inadequate, disabled by corruption, or the instrument of abuse by a political regime in power.

Afghanistan’s social structure is highly diverse across three main segments of the population – urban, rural and tribal – and each contains its own mechanisms, norms, and methods of settling disputes. There is also a growing diversity of legal disputes within each of these areas. The rapidly growing urbanization and overpopulation of the urban center, for instance, has led to a fast-growing number of property and

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commercial disputes, while disputes over water distribution are more common within rural districts and disagreements over grazing land are frequently seen within tribal communities.

Looking at the dynamic relationship of those involved and the functionality of non-state justice mechanisms such as *jirga, shura or majless (getting together)* in Afghanistan, the fairness factor in adjudicating disputes is based neither on majority nor minority ruling, nor is it a form of Hobbesian political order under which rights are given up for protection. From a political theory context, the impact of the non-state justice system in building or influencing social contracts and its interconnectedness with traditional governance is closer to that of Jean Jacques Rousseau and John Locke of the social contract or principles of political right. Under this traditional governance system, disputants as sovereign citizens participate freely in an empowering process that aims not to punish, but to be fair. Mediators are empowered to act only where participating disputants accept their role as members of the community entrusted to end a dispute in order to heal a broken relationship. The holistic and healing aspect of an effective dispute resolution mechanism, particularly in criminal cases, requires the participation of not only disputants, but sometimes whole communities, through an evolving process that combines judgment, rituals and healing for weeks, if not months. The ability to settle disputes prevents local disagreements from escalating into violent offenses that often disrupt civil order at the local level. Non-state justice can play a role in preventing violence and improving social interactions.

**Non-State Justice and Conflict Resolution**

In cases of communal grievances rooted in individual or group disputes, the non-state justice system uses a conflict resolution process involving key community leaders and state authorities to endorse an informal settlement or resolution. This process became particularly relevant in post-Taliban Afghanistan when many communities realized that they needed to put the violent past behind them and seek remedies for their disputes.

This system has been used to end thousands of communal conflicts rooted in the four decades of war in Afghanistan. In the midst of regime changes and foreign military intervention, Afghan social groups took sides between the warring factions, sometimes to settle disputes. This often placed communities and families in open armed conflict

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9 The term *jirga*, originated in Pashtu, means getting together, and has also been adopted by other ethnic groups. *Shura* originated in Arabic and is widely used across all different populations. However, *jalssah* is a Persianized Arabic version of council.
against each other, resulting in the killing of a significant number from each side. Resolving extended bloodshed that continued for decades has emerged as a challenge once the guns have been silenced.

According to the Afghan Minister of Border and Tribal Affairs, “[n]on-state justice mechanisms, not statutory laws or Sharia jurisprudence, helped communities to end hostilities and restore peace. Since both state laws and Sharia utilize forms of punitive justice, it was impossible to arrest so many perpetrators and reward victims and more importantly, prevent people from using retribution.”

In this sense, non-state justice is more a sociological evolutionary process that offers informal authority to sets of norms via an evolving mechanism for restoring order by settling disputes or sometimes, ending bloody conflicts. Indeed, the effectiveness of this mechanism, to a large degree, depends on the restoration of civil order at the local level. Numerous case studies on Afghanistan show that the restoration of civil order is strongly linked to the de-militarization of social relations and the restitution of local livelihoods. This means that communal conflicts can end once members of a community collectively realize that the era for violent confrontations is over, the social authority for reinforcing such a collective will is in place, and the decisions made with respect to settling disputes or ending conflicts are seen as fair. If they are not satisfied, disputants must have the ability to challenge proposed decisions via various mechanisms, including the formal justice sector, the Independent Human Rights Commission (IHRC), or other rights advocacy groups. The presence of these institutional forums within the formal system also means that there is (direct or indirect) government conformity with non-state mechanisms of settling disputes or transforming conflicts. With these capabilities in place, the non-state justice system offers Afghanistan a system of conflict resolution at the sub-national level and the space needed for government justice system to further build its infrastructure, particularly its capacity for preventing the abuse of women and the violations of their rights once they seek justice from the government. This will allow local governance to manage violent confrontations and eliminate violations caused by customs that harm both individuals and communities.

**Customs and Non-State Justice**

There has been a continuous misunderstanding of Afghanistan’s non-state justice system, particularly within the human rights and women’s rights communities, both in

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10 Interview with Abdul Karim Barahawi, Afghan Minister of Border and Tribal Affairs, in Kabul, Afghanistan (Jan. 15, 2006).
Afghanistan and internationally. At its core, this misunderstanding comes from the lack of clarity between customs and customary law. In most cases, customs are norms accepted within a family that may or may not have a similar application in another family due to a host of factors including social status, economic conditions, level of education and the ratio of male to female roles and authority within a family. In the case of Afghanistan, customs can be broken into two very general terms – negative and positive – due to their impact on the well-being of members of a family. Two negative practices in Afghanistan, for instance – “honor killings” and retribution – are often committed by immediate family members. In these examples, the decisions to act, plan and execute are often made secretly and without the involvement of other members of the community.

In contrast to the practice of family customs, non-state justice exists in a public forum and its mechanism is designed in consultation with members of the forum who are often not immediate family members. In addition, the delivery of judgment is public, although it can be open to challenge. A key component in the customary legal process is to not eliminate one side but to reach a kind of middle ground that is “fair” for both sides. In this case, the mediator negotiates on behalf of both sides of the dispute and helps them to understand their positions by collecting convincing evidence confirmed by individuals who are familiar with the case. For instance, in a property dispute, the mediator will bring the neighboring landowners into the process in order to establish boundaries and assess the validity of the claim. Agreeable adjudication by the mediators will be offered based on the acquired evidence – mainly community members’ testimony. A successful adjudication, particularly in criminal cases, will result in a host of sanctions placed on the violator (the guilty party), including monetary or in-kind payments, admission of guilt, acceptance of responsibility, and abandonment of retribution. In both civil and criminal cases, disputants’ acceptance of the proposed adjudication is sometimes also confirmed by the government’s primary court or relevant district or provincial authorities. In the absence of this processes, or the breakdown of civil order, people are forced to take the matters into their hands, which can cause a civil dispute to escalate into a criminal offense resulting in bloodshed via retribution. Indeed, the possibility for negative customs such as baad (forced-marriage of young women and girls) to influence decisions for ending retributions or paying off debts is significant if armed militia groups take control of a community, civil order is broken, or government officials become loyal to local warlords. A functioning civil order within a community will increase the possibility of reducing gender-based violence. A civil order upholds within it the needed civic space wherein the voice of women’s rights advocates, IHRC and the government can reach people who are struggling to reestablish a sense of community after decades of militarization and displacement. Within improving civil orders, community leaders adjudicating disputes
or assisting their communities in ending a conflict will have the needed space to acquire the legal awareness essential to the well-being of their communities. The exposure of these leaders to the sanctity of the constitutional rights of individual citizens, particularly the rights of Afghan women and girls, can produce positive outcomes in deterring gender-based violence. It is essential that the IHRC and other rights advocacy groups reach out to and involve these respected community leaders in order to broaden access to justice and build a complementing relationship between state and non-state justice in Afghanistan.

Positive practices of customs may transform themselves over time into norms acceptable by the broader community. Supporting a needy relative, for instance, can encourage other families to do the same. Providing a collective labor assistant called a hashar to a family without the manpower required to build a mud-house, plow the land, or harvest is an accepted custom practiced by some families. These customary practices are not part of the non-state-justice system and “individuals and families are not sanctioned to participate or practice.” Still, the routinization of such norms can form the basis for their collective acceptance. Within a non-state justice forum, these norms can shape socially accepted principles, and can be enriched with other cultural concepts, including relevant religious teachings.

Conclusion

Non-state justice in Afghanistan is deeply rooted in the local governance system, forming an organic process for dispute settlement and conflict resolution at the local level. In other words, the informal justice system is a reflection of a popular consensus to restrain personal attitudes and social behaviors that can harm and disrupt lives and livelihoods. Non-state justice is predominantly used to settle local disputes across the modernist urbanites, traditional rural population, and more conservative tribal communities, and especially now that, thirteen years since the U.S.-led international intervention, space has been created for the Afghan population to recover from the imposition of rigid social codes by both the Taliban in the 1990s and the communist regime in the 1980s. The recovery of local livelihoods has enabled many Afghans to reinstate their sense of community and manage their everyday matters regardless of who rules in Kabul. As a result, non-state justice is once again becoming instrumental to bringing calm and restoring order in support of non-violence and good governance in Afghanistan.

11 Interview with local community leaders Gul Mohammed, Atta Mohammed, Khawaja Karim (and six more local leaders), in Guzara District, Herat Province, Afghanistan (Nov. 3, 2006).
Still, there are concerns about violations of women’s rights, mainly due to the practice of customs held within families. The absence of women from mediation and adjudication roles is something that can be addressed within the social structure of local communities in Afghanistan. Already, international organizations such as the Norwegian Refugee Council (NRC) and national NGOs such as Co-operation for Peace and Unity (CPAU) and The Liaison Office (TLO) have piloted programs that aim to strengthen the effectiveness of the non-state justice system. These efforts, along with a greater availability of knowledge about the non-state justice system, has encouraged a larger number of civil society groups and legal advocates, including women, who lead legal awareness programs and mediation forums, to understand the utility and value of the system. Indeed, women’s councils and civil society activism can be effective in promoting an increased role of women in non-state justice forums.

Ultimately, a complementary relationship between state and non-state justice fits well within the broader mandates of the Afghan constitution and international human rights norms. Otherwise, a citizen who has faced justice at government courthouses and served his or her jail time will not be safe from retribution and the cycle of violence may simply continue. The efficacy of non-state justice can be increased only if it is granted legal autonomy without codifying its functions under the control of the state judiciary. This means that the IHRC and other rights organizations must reach out to community leaders to inform them of the individual rights of Afghan citizens, particularly in response to gender-based violence cases. This ought to be separate from efforts that aim to ‘sell’ the Afghan government to its population or reinforce the political authority of the government. Programs that enhance the legal awareness of the rights of citizens, including women and girls, among non-state justice actors have had particularly positive responses. For instance, the NRC’s facilitated dispute settlement method involves a trained legal advocate who informs adjudicators about their legal obligations in respecting citizen’s constitutional rights.

One of the most critical policy areas related to improving justice in Afghanistan is to remedy gender-based violence. It is key that prominent actors are informed about the rights of Afghan women and girls and the inhumane nature of customs that victimize them. The government must improve the effectiveness of non-state justice rather than undermine it, and to do so must differentiate between non-state mechanisms and unjust customs. National policies can enable communities to rally against the practice of inhumane customs in the name of culture and religion. Enhancing the efforts of community leaders to counter unjust customs via creative and inspiring informal means can tremendously improve the state of justice in Afghanistan. As part of this process, those who are facilitating violations of individual rights and contributing to gender-based violence must be held accountable via both the state and
non-state justice systems. At its best, a non-state justice system can effectively redress violence against women and girls and a whole host of other human rights issues, and even prove a competitive alternative to the congested courts within the formal justice system. A healthy competition between the two systems can reduce bribery and complement counter-corruption efforts by the government and international community. Ultimately, an increased number of venues for settling disputes and ending local conflicts is crucial if local governance is to be furthered, particularly at the time when Afghanistan is facing a draw down of international engagements and resources by the end of 2014.