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AFGHANISTAN RULE OF LAW PROJECT

FIELD STUDY OF INFORMAL AND CUSTOMARY JUSTICE IN AFGHANISTAN AND
RECOMMENDATIONS ON IMPROVING ACCESS TO JUSTICE AND RELATIONS
BETWEEN FORMAL COURTS AND INFORMAL BODIES

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I. INTRODUCTION AND STUDY METHODOLOGY

This study was conducted under the USAID Afghanistan Rule of Law Project to assess the current condition and characteristics of the informal justice sector and make preliminary recommendations on improving access to justice and relations between the formal and informal justice systems.

By the nature of the issues addressed, the study necessarily comprised both a sociological/ethnographic dimension and a juridical one. Normative principles and formal procedures were no more or less important than questions about key actors, questions of social status and local authority, and issues relating to the varying configurations of local power and the place of those local power structures in their regional and national contexts.

The scope of this study is informal justice, defined as a legitimated and more or less institutionalized set of interactions between individuals and groups over matters such as dispute resolution and enforcement of agreements, which take place outside of the government courts system. These matters are most often resolved on the basis of norms and principles distinct from those legislated by government, and enjoy no entitlement to government recognition or enforcement.

This study relies on a literature review of publicly available written research and studies and data and information collected in late 2004 and early 2005 during focus group discussions and interviews conducted in Nangarhar, Logar, Kabul, Herat, and Jawzjan provinces.

Within the formal system interviews were held with active judges, court staff, government heads of districts, and police officers within the districts where focus group discussions were held. In addition, interviews were held with former judges and legal advocates, law school professors, protection officers, civil society and grassroots activists, and donors and donor funded international NGOs. Interviews were held with officials from the Afghan Independent Human Rights Commission (AIHRC), the Norwegian Refugee Council (NRC), the European Community funded Cultural Foundation (CF), the Abdul Haq Foundation (AHF), UN-HABITAT, the International Red Cross (IRC), the United Nations High Commission for Refugees (UNHCR), and the Ministry of Rural Rehabilitation and Development (MRRD). We conducted interviews with clients of both the primary courts and the local Jirga or Shura in the districts of our field studies. The questionnaires utilized for the interviews are provided in Appendixes 1 and 2.

The field study went first to provincial centers, then to districts, and then to the village level. Twenty-nine focus group discussions and 60 interviews were conducted during the period from December 2004 through February 2005. Each interview and focus group discussion is considered a unit of analysis based on quota sampling. Direct observations of Jirga and Shura meetings were conducted by attending one of their regular sessions or through a requested meeting with five to seven members of the local institution. In those Jirga and Shura which have filing systems, such as the Surkh Road District Shura in Nangarhar, a review of their records was conducted. In addition, interviews with one to three clients of a Jirga/Shura were held in order to investigate the level of satisfaction concerning settlement of local disputes. A similar method was followed with the clients and documents of the primary courts. The time period that was reviewed reflects cases that were brought to the primary courts between the first month of the Afghan calendar year Hamal (March 2004) to Dalw (January 2005). Each interview took approximately two hours to conduct, while each focus group discussion lasted for approximately three hours.

Sites were selected to include the variety of local and regional cultural, political and geographical characteristics of Afghan society. The ethnic demography, local and regional systems of governance, and geographical features of Afghanistan have all been determinants of the particular shape taken by the informal legal sector. The large-scale displacement, migration, human losses, and destruction of physical infrastructure during the last 30 years have pushed the local communities to the edge and deprived them of normal institutional development. As a result, new elements (e.g. armed political groups, local commanders with their private armies, and returning refugees) have been added into the local social and political composition of state and society. These new elements have also influenced the development of local customs and traditions as they are applied to legal matters.

Below are summary descriptions of the selected sites:

1. *Kalakan District of Kabul Province*: As the capital of the country, Kabul symbolizes the political power, legal influence, and functioning of the Afghan central government. In addition, Kabul is the main hub for the U.S., UN, and other international organizations. The International Security Assistance Force (ISAF) actively participates in maintaining security and enforcing law and order. Kalakan offered a prime example of informal legal practices in conditions of relative security and close proximity to the power of the Afghan central government and the international security and assistance organizations. At the same time, the ethnic composition in this district is an unrepresentative 92% Tajik and 8% Pashtun.
2. *Surkh Roud District of Nangarhar Province*: Three important criteria were considered in selecting Surkh Roud: it is a Pashtun district representing eastern Pashtun groups; state and society are divided between two powerful factions, one controlled by the military and police, and the second by the civil government executive and judiciary; and it maintains a district Shura that is a part of an organized Shura system operating throughout the province. This Shura system was established and supported by the Abdul Haq Foundation (AHF) in order to build a popular advisory body to the activities of the Afghan government. This Shura system is at odds with the CDCs sponsored by the National Solidarity Program (NSP), and it does not view the emerging CDCs as a positive process.
3. *Enjil and Guzara Districts of Herat Province*: Enjil, a rural district, is being affected by the expanding urbanization of Herat City, and as such illustrates the infiltration of urbanized norms within rural informal practices. In addition, Enjil is not only the largest rural district in the country but is also multi-ethnic and religious. Guzara is a district within close proximity of Enjil, and was chosen because it is the site of a new courthouse built under the USAID-funded Afghan Governance and Law Reform Project, the predecessor of the Afghanistan Rule of Law Project. Ismail Khan, the former provincial governor, established and supported a district Shura system throughout of the province, including in both Enjil and Guzara. The Herat Shura had been viewed with suspicion as maintaining the influence of the provincial government within local communities. However, the emergence of the CDCs via the National Solidarity Program dismantled the district Shura system. Some of the members trusted by the locals were elected into the newly established CDCs while the rest were pushed aside. Herat also features the emergence of women CDCs that function as a women's Shura system, an idea that was not favored under the previous district Shura system. The majority of the population in both districts is Tajik, with the remaining population being Pashtuns, Hazaras, Arabs and Turkmen.
4. *Khaja Du Koh District of Jawzjan Province*: This district is dominated by the ethnic Uzbek with minority populations of Turkmen and Pashtuns. Jawzjan is under the control of the *Junbish-e-Mili* (JM) led by General Abdul Rashid Dostom. The JM is a strong political organization with a central structure that has built a political infrastructure via state and society throughout the province. The Shura system (as a provincial institution) in Jawzjan is the most powerful network compared with other systems included in the study, and from an administrative point of view, the power relationship between the government and Shura is balanced such that the government appears to be serving the

Shura rather than the other way around (and specifically in contrast to the Kalakan District in Kalakan).

5. *Braki Brak District of Logar Province*: This district is dominated by several Pashtun groups who survived 25 years of political crisis without active government interference in local matters. The system of the Jirga symbolizes the traditional pattern of the Pashtun Jirga of the pre-1980s, in which local people are the driving force in convening Jirga when needed. In this regard, the district is avoiding the government's and local power holders' attempts to build a Shura system. Practically, there is no interaction (in comparison with Nangarhar and Jawzjan) between the local Jirga and the government office.

Geography and insecure conditions hinder access to government resources and often impose limitations in availability of scarce resources to the local populations. People living within the deep valleys of the South Central (around Uruzgan province), Northeast (Badakhshan province), and East (Nuristan, and Kunar provinces) regions are more isolated, practice different sets of customary law, and follow a distinctive system of traditions. In most cases, the majority of people rely heavily on customary practices to balance their intra-and inter-group relations as well as to communicate with the central government. Specifically, it was intended during the study to include Kandahar among the sites for study. This proved to be impossible due to threats to personal security, and the related logistical problems of carrying out an accurate study here.

Detailed information on site selection criteria are provided in Appendix 3. Detailed social and political profiles of the field research sites are provided in Appendix 4.

II. BACKGROUND OF INFORMAL AND CUSTOMARY JUSTICE

Although recent general analyses have approached Afghanistan as a recovering failed state and society, a system of governance has not been entirely lacking throughout its years of crisis. A network of local institutions outside the purview of the state provided some system of governance, even as the state has collapsed or struggled under the weight of wars and political violence. This traditional network of civil society developed over centuries, and to some degree it has always been at least as strong as the formal institutions of government. The traditional Afghan civil society offers a model that is different from the western one of formally organized institutions outside the purview of state authority. It is rather one of autonomous, locally based structures of community authority. It is a longstanding characteristic of the Afghan polity, noted by historians, anthropologists, and political scientists alike, that the exercise of central government's power is dependent upon an arm's length relationship and equilibrium with local structures of community authority.¹

A. Definition and Characteristics

The "informal justice sector" or "customary law sector" covers a wide variety of cluster of norms and practices, often uncoded and orally transmitted, usually combined together in varying mixes. This includes customary law (such as the Pashtun code known as "Pashtunwali"), local understanding of Islamic legal traditions (including their sectarian variants and their particular ethnic manifestations), and even some modern laws. It includes both rule-based and more pragmatic approaches to a wide range of

¹ Tapper, Richard (ed.), *The Conflict of Tribe and State in Iran and Afghanistan* (St. Martins, London, 1985)
Kakar, M. Hassan, *Afghanistan The Soviet Invasion and the Afghan Response*, (University of California Press, Berkeley, 1995).

legal arrangements (i.e. signing contracts, resolving disputes, developing social relations) and includes various mixes of punitive and restorative justice, as well as varied emphases on maintenance of community cohesion and exclusion of offenders. These are applied in a variety of institutional settings, through a variety of mechanisms, by a variety of types of litigants and decision-makers (sometimes quasi-judicial authorities, sometimes local political or community leaders). The methods include dispute settlement via negotiation, mediation, arbitration, and to a certain extent adjudication of legal cases. The only thing these methods have in common is that they reflect a level of fairness and justice broadly accepted by the majority of the population and they are all outside the scope of the formal state justice system. Whereas the authoritative purveyors of this decision making and dispute resolution system may enjoy some degree of state endorsement of their authority, including the enforcement of their judgments by the state, the sources of their authority are invariably based in their communities and in local power structures.

The Bonn Agreement recognized the important role of the informal sector, among other established legal mechanisms, specifying that existing laws and regulations of Afghanistan would remain in effect to the extent that they were not inconsistent with the provisions of the 1964 Afghan Constitution or with international legal obligations to which Afghanistan is a party. Under the new Constitution, no laws may be inconsistent with Islam, and the Constitution's rudimentary outline of a court system preserves many of the features of the pre-existing system. These considerations suggest that there are practical benefits to allowing wide jurisdiction to the non-governmental legal system, consistent with the protection of fundamental rights granted in the Constitution. These benefits include more efficient adjudication of cases than in the formal system and assignment of cases to a system for resolving disputes (the informal system) that is more accessible, more credible, and more comprehensible to the majority of Afghans. In addition, and perhaps most significantly, linking initiatives in the informal justice sector to those in the formal sector may redound to the credibility and viability of the latter, and it also offers Afghans a greater access to justice.

In a context of low or absent legitimacy in government institutions, there is some benefit to a fluid juridical framework, with an evolutionary and positivist approach to legal authority and sources of law. The reality of the balance between customary and statutory law in Afghanistan today may be analogized to the early stages of the evolution of the English Common Law.

The segmented nature of the Afghan social fabric finds groups scattered throughout the country without a firmly structured interdependency. This has led local communities to adapt and develop certain rules among themselves and to establish relations with communities outside of their social and tribal groups. Ecology, geo-economics, remoteness, as well as closeness to other social groups have all been contributing factors in the development of certain local traditions and customs that may differ from one location to the next or from one ethnic group to the other.² What is acceptable as a set of customary legal practices and agreement in the Pashtun tribal belt of in the south may differ from those in the east, and both may be distinguishable from what is practiced among the Uzbek, Hazaras, and Turkmen in the north and in central Afghanistan.³ In addition, the ways of semi-urban and city populations may be yet distinct.⁴

² See Mazurana, Dyan, Neamat Nojumi, Elizabeth Stites, "Human Security of the Rural Afghans 2002-2003". Medford: Tufts University, 2004.

³ Canfield, R. (1996) 'Ethnic, Regional, and Sectarian Alignments in Afghanistan'. In the State, Religion, and Ethnic Politics: Afghanistan, Iran, Pakistan, Ed. By A. Banuazizi and M. Weiner, New York: Syracuse University Press.

See Johnson, Chris, William Maley, Alexander Their, and Ali Wardak. Afghanistan' Political and Constitutional Development. London: Overseas Development Institute, January 2003.

⁴ Farhadi, R. (2000) 'Tajikan-e-Afghanistan wa Qadamhaie Ashti Bain Eishan' in Qadamhaie Aashti wa Masauliat-e-ma Afghanan, Kabultee: Falls Church, VA

In this regard, the arrangement of the legal matters within each locality relies—more than anything—on overall local satisfaction with the process and the outcome, without any consideration for the benefit or respect of those who are living in another community. Therefore, what is fair for one person or community may or may not be fair to another person or community. In this sense, the term “fairness” has more a particular than a universal application. Since local arrangements of legal matters are restricted by the local norms that are acceptable among certain groups of people (i.e. tribes, family, and community), it may result in an arrangement which includes limited violations of an individual’s rights for the well being of group, which may seem unfair to the individual but fair for the group.

The irregular nature of customary laws and informal justice comes from reliance on local practices that are highly susceptible to economic, social, and political changes. This susceptibility often occurs regardless of the mandates of the legislated laws of the state. Customary codes such as *Pashtunwali* have a secular nature that is based on local Pashtun norms, especially among tribal communities. *Rawaj* (custom) is the basis for arranging legal matters on a more or less secular basis among other non-Pashtun ethnic groups throughout the country.

The core basis of *Pashtunwali* is the concept of reward and punishment. Newell narrates the *Pashtunwali* as follows:

“It is simple but demanding. Group survival is its primary imperative. It demands vengeance against injury or insult to one’s kin, chivalry and hospitality toward the helpless and unarmed strangers, bravery in battle, and openness and integrity in individual behavior. Much honor is given to Pashtuns who can successfully arbitrate the feuds that are endemic among them. Fines and blood money are devices frequently used to limit violence among rival families. *Pashtunwali* is a code that limits anarchy among a fractious but vital people.”⁵

Local interpretation of Sharia also constitutes a significant source of authority for the informal system. Before a dispute is resolved, one party may ask the other whether he wants to settle the conflict “Shariat-wise” or Pashto [among Pashtuns; non-Pashtuns use the term *Rawaj*].⁶ Establishing legal sources at the outset also affects the composition of the adjudicating *Jirga* or *Shura*. According to Aaqaz Aziz Ahmad Jan, the head of the Konjan village *Shura*:

“If *Rawaj* is chosen as the source of a legal arrangement, then, parties to a contract or dispute ought to conclude their legal arrangement according to the local customary norm. This requires members of a *Jirga* process to be familiar with these norms. However, if Sharia is chosen as the guiding principle of the arrangement, members need effective understanding of this source of law. Otherwise, parties to a legal arrangement may agree in approaching the government primary courts system.”⁷

It is significant to note here that there appear to be varying differences between the “rules” or “principles” that are followed in various groups. In addition, while nominally in line with correctly interpreted Sharia or Islamic principles, it may be that the “rules” and “principles” utilized by some of the informal justice sector is in fact inconsistent with correctly interpreted Sharia or Islamic principles.

⁵ Newell, N. and Newell, R. (1981) *The Struggle for Afghanistan*. London: Cornell University, p. 23

See Carter, L. and Connor, K. (1989) *A preliminary Investigation of Contemporary Afghan Council*

⁶ Khuram, Karim (2004) “The Customary Laws of Afghanistan.” A Report by the International Legal Foundation. Kabul, Afghanistan, p. 7.

⁷ Focus Group Discussion with members of the Village *Shura* in Kunjan, Guzara District of Herat province, December 5, 2005.

B. Recent Studies

A June 2004 Tufts University report on security for rural Afghans, funded by USAID, recognized access to justice as an important component of human security. This report viewed the formation of dynamic relations between the formal and informal justice systems as key to establishing the rule of law in Afghanistan. A report by the International Commission of Jurists found that “the bifurcation of the legal system into an official law and unofficial law has been a hallmark of Afghan legal history ever since attempts were made to introduce statutory laws,” and concluded that “... past experience would suggest that any attempt to implement and enforce secular statutory laws which depart from customary and/or Islamic law is liable to be met with protest and civil unrest.”

A 2004 assessment in four provinces carried out by the International Legal Foundation (ILF) explored citizens’ opinions and knowledge about Afghanistan’s legal system. The sample group included respondents from urban and rural communities, females and males, illiterate to secondary school educated, and a cross section of ethnic representation. The survey findings concluded that respondents were well aware of the formal justice system in their communities, but saw it as a place for bribery and injustice where the wealthy could manipulate the law. Most would refer issues to the elders of the *Jirga* or *Shura*, and only if it could not be resolved there, would they then reluctantly refer the matter to the courts. This preference could change if people saw the formal justice evolve and garner a reputation for being less corrupt than it is currently perceived.

C. Jirga and Shura

Afghan and English literature has viewed Jirga or Shura as a non-governmental institution, with various incarnations, such as village Jirga, regional Jirga (Mantiqha), sub-ethnic Jirga (like Jirga among Eissa Khil, Ahmedzai etc.), ethnic Jirga (like Jirga among Pashtun, Hazaras, Uzbek etc), and Loya Jirga (National Assembly). The consensus among historians, political scientists, and anthropologists is of the Jirga as a communal institution that deals with dispute settlement or conflict resolution and is limited to tribal or semi-tribal communities, especially among the Pashtuns (Watkins 1963; Dupree 1969; Ghobar 1978; Male 1982; Bhabani 1985; Roy 1986; Ma’aroof 1987; Barth 1987; Carter and Oconnor 1989; Elphinstone 1992; Olesen 1995; Kakar 1995; Rubin 1995; Gletzer 1998; Giustozzi 2000; Rafi 2002; Wardak 2003; Khuram 2004). However, the use of Jirga is broader, among various populations and all three components of Afghan society: tribal, semi-tribal, and de-tribalized communities in urban centers.

On a national level, Jirga is a process wherein various members of Afghan local communities establish various meeting-like formations in order to address legal matters, including dispute settlement and resolution. The particular form and composition of a particular Jirga is determined by the nature of the matter or dispute at issue. *Islahi Jirga/Shura* (Judiciary Jirga) allows individuals and groups to seek remedies for dispute settlement and resolutions. The application of Judiciary Jirga/Shura can be different based on the nature of disputes that may range from family disagreements over spousal relationships, disputes over inheritance or property ownership, to intra-group conflict and even murder disputes. *Mashwarati Jirga/Shura* (Consensus building Jirga) takes two principal forms. In the first, people reach agreements over legal, financial, and economic arrangements for everyday issues such as familial inter-marriages, financial credits, loans, sale and purchase of property, business partnerships, livestock, and wills. The other form of the consensus-building Jirga is political and social consensus building at the time of peace or war. During a time of peace, members of one or more communities produce agreements over government policy, solidarity in collective participation in helping community members and neighbors to cope with grave difficulties, the construction of roads, irrigation canals, and small dams, and harvesting. At a time of war, consensus building is initiated in support of one or the other warring factions, or to follow the order of the de-facto government in warding off external threat, or to foment revolt against a rejected *status quo*. Finally, there is *Loya Jirga* that convenes rarely at the national level to allow

delegates from all segments of the Afghan population to build consensus over national issues such as the ratification of a constitution and the approval of a new government.

In the Judiciary Jirga/Shura format, members respond to the pleas of the disputants as their fair and impartial representatives. In this regard, members assume power and authority over the adjudication or arbitration of a legal dispute in civil and criminal cases. This gives members the status of *Hakam* (Trusteeship), which is different than arbitration. An arbitrator acts on the basis of an established agreement of a contract. In the cases of *Hakam*, the concept relies on trust, where parties to a dispute allow their representatives substantial authority on their behalf; respect, which determines the choice of certain individuals to play the role of *Hakam*; and the impartiality of the decision maker.

In cases where there is no dispute over the facts, and the issue is purely one of remedies, this is the sum and substance of informal adjudication. Trust, respect, and impartiality have less to do with the religion, education, or wealth of a mediator, than the fairness that a member of a Jirga/Shura has demonstrated in the past.

This is true for Jirga/Shura members individually or collectively. For instance, members of Stankzai sub-ethnic groups in Braki Brak district of Logar praise the role of Naim Khan Kuchi who has established legendary fame in dispute settlement and conflict resolution among the Pashtun community in Paktia, Logar, and Ghazni.⁸ “Naim Khan uses creative methods and techniques of mediation, thorough investigation of the case in order to reach a fair judgment in ending a serious dispute,” stated Haji Hashim, a member of the Stankzai Jirga.⁹ “Naim Khan brings a large group of local leaders on board and gives them space to participate in the process and share responsibility in reaching a final decision solving a dispute,” stated Mawlawi Laalajan, a distinguish community leader of the Stankzai Jirga. In the southeastern region there are other individuals like Malik Shir Khan, a Stankzai Pashtun, who applies other techniques, and is known for his fairness and recognized as “a highly respected member of their community.”¹⁰

In an economic Jirga/Shura members act more as authenticating witnesses to a contract, e.g. marriage, business partnership, sale and purchase of property, or credit arrangement. Members of economic Jirga/Shura neither profit in playing a witness role nor participate in implementing the outcome of a contract. However, they may be called as witnesses in a Jirga/Shura or in a government primary court at the time of a later dispute or breaking of a contract by one or both sides of the contract.

III. SUMMARY OF FINDINGS AND CONCLUSIONS

This study suggests that the informal system of justice found in Jirgas and Shuras, applying customary norms of dispute resolution, has much to recommend it for providing a wide variety of Afghans access, comprehensibility and legitimacy. However, it is often staffed by ill-educated decision makers, relies on an unclear set of authorities and sources of law, can be inordinately and improperly influenced by local power, wealth or armed presence, and perpetuates norms and practices that are extremely detrimental to women. In all these liabilities, however, it is not alone, and the formal government courts suffer from all of them also, and to much the same degree.

⁸ Naim Khan Kuchi is an Ahmedzai local leader whose fame has spread out through the region in southeastern Afghanistan was arrested by the US forces after the fall of the Taliban and transferred to Guantanamo prison camp in suspension working with the Taliban. He was released after a popular support that involved in President Karzai's intervention in 2002.

⁹ Focus Group Discussion, Stankzai Jirga, Rustamkhil village, Braki Brak district of Logar, January 13, 2004. Ibid.

¹⁰ Focus Group Discussion, Local Jirga, Babukai Village, Baraki Barak, Logar, January 17, 2005.

Thus, the issue should be posed not so much as a choice between systems, at least at this point in time, as to which one will better guarantee enjoyment of universal norms of human rights, and promote the rule of law and legitimacy of institutions, but rather as a matter of bolstering the capacity of both sets of institutions to perform the function that each is best suited to in as professional and uniform a manner as possible.

A common theme in the interview and focus groups with respondents from both the informal and formal sectors was the concept of Sharia. Sharia is a set of principles and legal rules which is variously applied in all types of legal institutions, formal and informal, and according to significantly variant interpretations. Shura or Jirga would report “Sharia” as the source of authority where it was clear that they had in mind established and authoritative local custom, and meant no more than simply “law”, rather than specifically religious law. One government court, when asked the proportions of cases decided by Qanoon (positive statutory law) and Sharia, responded that there was no difference.

Detailed findings of the study are provided in Appendixes 5-12.

A. The Informal System

Shura and Jirga are interchangeable terms for traditional decision making assemblies at the village, district and provincial levels, the former a Persian/Dari term and the latter a Pashtu term. They function as political as well as judicial institutions, and offer an alternative basis of representative government (subject to the same distortions of local power as modern electoral institutions). They also offer an embodiment of the local power which constitutes one pole of the balance of local community and central state power, which scholars have noted as the longstanding hallmark of the Afghan polity.

The Jirgas and Shuras examined by the field study ranged in membership size from 20 to 65 members, and the number of villages represented by each member varied from 1 to 3 in one body, to 5 to 15 in another, to 26 in yet another. For the most part the bodies reflected the ethnic demography of the locality that they operated in. In Herat province, the study looked at the operation of a Community Development Council, which is a creature of contemporary legislation rather than traditional custom, and has assumed the functions of the Shura as successor. That was the sole case where there was direct and secret election of members of the informal legal body. In other locations, the selection of membership was a result of an ambiguous hybrid of selection by “consensus” and loosely defined “election.” In one, it was reported that the basis of membership was hereditary status as “Malik” or head of a village. In some cases, the election or selection appeared to be an indirect system of village Jirga choosing delegates to the District Jirga.

Members of the Jirgas and Shuras received no compensation. In several of the locations, the members had varying degrees of affiliation with former Mujahideen groups (and thus bonds of loyalty with the structures arising from those), but few acknowledged affiliation with currently armed groups. There was hardly any nexus of any kind between the informal sector and NGOs. The members were predominantly shopkeepers, landowners, clergy and professionals such as teachers. In one case their membership included government employees and university teachers.

Shuras or Jirgas meet between once a week and once a month. Matters discussed included administrative and political issues of interest to the community (some by reference from district civil authorities) and disputes brought by community members or referred by civil administration, law enforcement or primary courts. In most instances, the chief administrator of the district and the police chief, though almost never the primary court judge, sit on the body. In one case, in Kalakan District of Kabul Province, the interviews suggested that the informal body would welcome the membership of the primary court judge as well. In some cases, the informal body used the facilities of local administration for their meetings. The CDC for Guzara District meets in a local mosque, though it anticipates having its own offices soon.

The vast majority of disputes subject to quasi-judicial resolution by these bodies were civil (property and water disputes), with a few family disputes and criminal cases, including one case of murder referred by the civil administration. In cases where the body was unable to reach a decision, cases were sent to the formal court. That said, there was little mutual knowledge between the formal courts and informal bodies. In only one case was the local formal court judge also a member of the informal body.

Sources of law for decisions by Shura or Jirga were cited variously as local custom and Sharia, though the latter was not clearly distinguishable from the former. Enforcement of decisions was by a combination of social pressure and referral to the civil authorities, including law enforcement. No advice was requested from judges of the formal courts. Record keeping varied widely, with some bodies keeping records of most but not all disputes, while others were haphazard to say the least.

There was little to no training or education in legal or quasi-legal customary principles among members of the informal bodies. In some cases, when a case appeared to require application of Sharia, the referral was to local clergy (not necessarily religious scholars and not necessarily well educated in Sharia) rather than to the formal court systems. Many asked for training opportunities to improve their grasp of sources of law. Many also cited the need for help with the logistical aspects of judicial administration such as filing or collection and storage of evidence.

Poor transportation was repeatedly cited as an obstacle to the rule of law and administration of justice. Members of Shura and Jirga often had difficulty reaching a district body meeting from their villages, and many complained about the inability of police to provide protection or investigate crimes for the same reason. Transportation difficulties were also cited as a reason that women had relative difficulty in availing themselves of the *fora* for dispute resolution.

Paradigms and frameworks which inform the operation of the informal legal system are distinct from (though not necessarily at odds with) those of the international donor community. As against the international framework of justice as a universal application of rights and obligations, Afghans' prize a notion of "fairness," which is often relative and shaped by local norms. This notion is the driving perception during their everyday experiences in conducting legal arrangements and conflict resolutions outside of the government legislated system of laws. This popular notion of fairness forms the most authoritative basis for building consensus, signing contracts, and resolving disputes throughout Afghanistan.

Contrary to the understanding of even well-informed international observers, informal systems are not limited to nomadic populations and rural tribal groups (especially among the Pashtun ethnic communities), as highly localized experiences not applicable to urban life. Among urban populations, in many cases, financial transactions, marriages, and property managements as well as family and business disputes are settled within the confines of informal legal practices without the involvement of formal government institutions.

Respondents in focus groups and interviews generally have a good opinion of the informal sector. They perceive it as a local practice that they have known about for generations and are familiar with its underlying principles and processes. Legal representation within that system is based solely on the principle of trust. Information collected from focus groups and interviews suggest that the principle of trust has been structured around the personality, experiences, and social positions of the representatives of each party in a Jirga or Shura rather than formal principles of law. Those who sit in on local forums of dispute settlement are often well-known figures of local communities or popular individuals that are famous for their fairness and righteousness. The engagement of these sorts of personalities produces enough weight for making decisions enforceable. Local forums for settling disputes and delivering justice are also perceived as more cost effective, since any member of the community can afford them by selecting a representative that he or she can trust. An informal forum can be held in someone's house, in a local mosque, or in an open space without enduring facility or legal fees or the cost of transportation. The

system is optional; disputants have the choice of going to the government court before or after approaching the informal process of justice. Appeals may also be had through the same informal networks. Results can be reached within one to three meetings, a far faster turnaround than for that of the government courts.

Respondents report concerns about the interference of local commanders, warlords, and powerful government officials in the decision-making processes within the system of informal legal practices. In some areas, members of our focus groups feared to talk openly about the sources of threats and interference during open discussions. However, they were more open during interviews, especially when they were responding to inquiries about the degree of independence in the decision-making processes of the Shura and Jirga.

There was a widespread sense among respondents that local community institutions had been weakened by the effects of war, population displacement, and loss of local resources to drought. However, respondents did suggest that the return of the displaced and refugees to their original homelands in certain parts like rural Herat and Logar has strengthened their ability to reestablish local institutions and good governance at the town and village levels. This suggestion was strongest in Nangarhar.

Property disputes are the largest category of legal disputes among both urban and rural populations. Focus groups suggest that property disputes are rooted in large-scale migration, destruction of residential and farmlands, forced occupation of private, community, and public lands, and the skyrocketing of property values in the urban centers and the rural districts that surround them. Property disputes also include community and public, as well as private, property. In order to resolve disputes over private property among returned refugees, a Presidential Decree resulted in the establishment of the Special Property Courts in Kabul in 2003. However, no legal structures have been initiated to address large-scale disputes over access to community and publicly owned land. These disputes have often caused serious hostilities and human casualties among the local communities. Respondents in Nangarahr, Logar, Kabul, Herat, and Jawzjan reported that disputes over access to community or public properties have not been resolved through Jirgas, as was hoped.

Property disputes present a particular degree of complexity. This is due to multiple claims, obstacles to authentication of customary legal documents, and lack of expertise in authentication. These require specialized training for decision makers in both systems, and careful allocation of jurisdiction and mutual review between formal and informal *fora* to ensure optimal benefit from technical capacity and local knowledge.

Government officials often send criminal cases (including murder) to the Jirga and Shura for informal resolution, rather than to the government courts. This is in violation of legislation, which bestows legal authority over criminal cases to the government judiciary, whereas civil cases may enjoy non-state local remedies if the court permits. This also sets up possible conflict between local practice and Sharia principles of *Haqh-ul-Allah* and *Hagh-ul-Ubd*, although informal local institutions purport to also apply Sharia.

Jirga or Shura in rural areas also on their own initiative handle criminal cases, including murder. No participants in Shura or Jirga have been trained in the application of formal legal standards, and thus rely on traditional notions of fairness, thereby creating inconsistent standards between the formal and informal systems in the ways that defendants are treated. The adjudicators and arbitrators within the informal system often have an ambiguous understanding of the Afghan constitution, including the rights and obligations of the citizens.

The customary principles of *Bad* and *Badal* are still practiced, especial in rural districts and the tribal belt. Under *Bad* the family of a perpetrator gives a girl or young woman without her consent into marriage to a male person of a crime victim's family. Under *Badal* girls or young women are exchanged into marriages

without their consent to male members of two disputing families. These are designed to prevent revenge killing or to bring a permanent end to a hostility that might otherwise lead to bloodshed. Afghan civil codes and Sharia have banned these practices. The informal justice system focuses on ending violence between families and bringing calmness to their community, but neglects the costs and consequences of these practices on the physical and mental state of the girls or young women subjected to carry the burden of a crime or a dispute in which they were not involved.

B. The Formal System

The number of judges found in primary courts was between 1 and 3. Some had “helper judges,” a secretary, and facilities staff, and some counted prosecutors among their personnel. Many possessed only rudimentary libraries of sources of legal authority, and in some cases as many were trained in Sharia as in secular legal traditions. The caseloads of the courts were quite low, particularly in comparison with the numbers of disputes considered and adjudicated in the informal system. In Baraki Brak, repeated attempts to meet the primary court judges were unsuccessful due to their absence from the courthouse. The judges appeared to work short hours on an irregular schedule. Indeed, it appeared that in many cases the members of informal bodies were more available to potential clients of the system than were government court judges.

Many in the court system asked for more training opportunities in sources of law and court administration and logistics, as well as more resources for the day to day functioning of the courts.

Lack of awareness of rights and legal obligations is a substantial obstacle to popular capacity to use the formal legal institutions or to hold the informal sector to basic international standards of justice. This has also been reported by the other studies referred to above. Affecting as it does the popular relationship to both the formal and the informal legal sectors, it clearly also constitutes a substantial obstacle to the development of a productive relationship between the sectors. Most people do not distinguish between the distinct roles of police, army, local executive administrators and judges, nor is there a clear understanding of the boundaries between state and non-state power. This also plays a significant role in the popular perception of the relationship between local and national and customary and formal legal norms and practices.

Consistent with previous studies, our study found that judges in the government primary courts lack adequate legal education and training. That said, several reported having benefited from training programs in the past year. They are poorly trained in, even unaware of, the norms, which govern informal justice, and are often hostile or contemptuous of informal institutions and their decision makers. Ironically, the justification they offer for that contempt and hostility is the lack of legal education of those in the informal system. Many judges in the formal courts professed contempt for customary law as violating Sharia and Qanoon.

According to our interviews with court staff, judges, and Afghan legal scholars, the majority of judges in primary courts within rural and urban districts have theological backgrounds. These interviews suggest that the excessively theological orientation of these judges undermines their capacity to properly apply all the applicable laws. Unjudicial conduct that results from this includes, most significantly, biases against women seeking divorce, or those who are suspected of adultery, as well as draconian approaches to moral vices such as gambling. Their lack of an independent ideological basis for their work also makes them particularly susceptible to the influence of political parties or influential personal connections.

Courts sometimes referred cases (particularly family matters) to informal bodies for adjudication or enforcement.

In some cases judges described difficulty in securing appearance of parties or witnesses, and in securing police cooperation in compelling these appearances. This suggests that the social power of persuasion of Shura and Jirga may be a latent asset for these purposes.

C. The Role and Status of Women

In both the formal and informal sectors women are denied even such rights as they may be entitled to under the civil code, the constitutions, traditional social norms or Sharia. This is due both to social prejudice and to the design of institutions and procedures, such as the requirement that women have their cases presented at Jirga/Shura through a male relative. Our interviews suggest that some judges blame human rights and women's rights organizations and ideologies for an ever-increasing number of divorce cases and family disputes. In response, they often reject women's requests for divorce or for equal inheritance rights with their male siblings. Judges even revoke custodian rights of mothers over their children in order to force them to withdraw divorce cases from the government court.

Informal systems of adjudication were also quite unavailing for women, not only because of the lack of direct access unfiltered by a male representative, but also because of the unwillingness of these Shura/Jirga to consider family and matrimonial matters. Indeed, in many instances family cases were less numerous than criminal cases, over which informal institutions explicitly are denied jurisdiction. It appeared that there was an unwillingness to countenance divorce and an expectation that families should deal with family issues.

The focus groups and interviews suggested that there is a wide range of receptiveness to having a parallel women's Jirga process. In some cases, there is outright resistance, whereas in others the stated concerns are more pragmatic ones such as how women would get to meetings, who would cover their tasks while they do, or how deliberative bodies of women would relate to the larger deliberative process.

D. Political and Military Interference in Administration of Justice

The majority of respondents in Nangarhar, Logar, Herat, Jawzjan, and Kabul provinces reported that both the formal and informal systems are open to pressure from powerful political and military entities and individuals. These entities and individuals are local commanders, warlords, and powerful government officials who interfere in the affairs of the courts, Jirga, and Shura systems in order to influence legal decisions. Members of focus groups of the local Jirga, Shura, and primary courts feared for their life should they talk openly about the sources of threats and interference. However, they were more open during interviews, especially when they were responding to inquiries about the degree of independence in decision-making processes of the Jirga and Shura. Respondents viewed the weakness of the local communities in resisting coercion and dominance to be the result of war, dislocation, and loss of local resources to drought. However, respondents did suggest that the return of the displaced and refugees to their original homelands has strengthened their ability to reestablish local institutions and good governance at the town and village level.

IV. RECOMMENDATIONS

The following recommendations of future project activities are made based upon the findings of this study:

1. Public Awareness of Rights/Civic Education. It is recommended that the project design, develop and implement activities to improve public awareness among potential clients of both legal systems of their rights and legal obligations, paying special attention to outreach strategies for women in order to improve their access to existing local institutions

The majority of the Afghan population cannot read and write, nor do they have access to radio, television, and other kinds of media. The lack of legal awareness about basic rights of citizens and the responsibilities of the government judiciary and law enforcement agencies has resulted in large-scale abuse and violations of basic rights. Citizens have found redress neither in the government courts, nor in the Shura or Jirga, where these rights are an alien concept. Programs to develop rights awareness should be targeted to the particular issues and profiles of particular localities, and the latter should be the subject of a detailed problem identification and mapping in the next phase. Both because the central purpose of the present task is to improve the nexus between the formal and the informal systems, and because most Afghans lead very localized lives, it is at the level of local informal institutions that this awareness program would be best addressed.

A rights awareness program should consider the separation of the sexes in public spaces to promote women's wide participation, and should also develop other targeted outreach strategies especially designed for women, particularly among the rural populations. The data compiled from Nangarhar, Logar, Herat, Balkh, Jawzjan, and Kabul, as well as from other recent studies, show that the majority of rural women do not have access to information outside their homes and/or in specific sections of their villages. Since Afghan women and girls are victims of legal "remedies" such as *Bad* and *Badal* their awareness of their rights is central to the development of a meaningful and responsive system of informal justice, and to establishing a nexus between the formal and informal systems that conforms with universal human rights norms.

2. Dialogue and Joint Trainings. It is recommended that the Project initiate and encourage joint training programs and dialogues between judges of primary courts, prosecutors, law enforcement officials and decision makers in the informal system. Among the most important tasks of this joint training and dialogue will be: to provide education about fundamental legal rights and obligations including those provided in the Constitution; to provide a basic orientation on each system so that each system has a basic knowledge of the underpinnings and processes of the other; and to provide a setting in which relationships and cooperation among the participants can develop.

Focus groups and interviews reveal an almost total lack of understanding on the part of judges of the primary court of the informal system and vice versa. This is despite the fact that the referral of legal disputes by government officials as well as the decisions of parties in dispute results in overlapping jurisdiction between them, or in other instances there is transfer of cases between the two systems. The principles and procedures of the informal legal system are not part of the standard curriculum of the legal education system. In order to establish an effective relationship and appropriate allocation of responsibilities between the two systems of justice in Afghanistan, actors within both systems ought to know the basic legal principles of both systems.

The majority of the urban and rural population is subject to informal justice; often even those who have approached the government courts have also found their cases referred to the informal system. It is customary to view anyone who attended religious schools, even at the primary level, as one who understands Sharia law, and often these individuals, especially within the local clergy, are called into a Jirga convened for arranging matrimonial, inheritance, and property issues including disputes. As a result, decisions affecting the lives of Afghans are often rendered in ways that violate fundamental rights as these are embodied in Afghan law, and often violate Sharia. A proper understanding on the parts of Shuras and Jirgas of the jurisdiction and capacity of the formal courts would also help lend rationality to the current haphazard allocation of disputes between the two systems, allowing for rejection of jurisdiction and referral of disputes as appropriate.

In Nangarhar, Logar, Herat, Jawzjan, and Kabul, where focus group discussions and interviews were conducted with significant numbers of community leaders who were engaged in negotiation, arbitration, and resolution of legal arrangements and conflicts, as well as with the clients of Jirga and government courts, high levels of mistrust toward judiciary organizations and law enforcement agencies were

prevalent. The majority of the respondents viewed the organs of the judiciary and the police as government entities that are paid to harass, arrest, and imprison people, rather than as sources of protection and justice. Judges complained about the lack of cooperation from the public prosecutors' offices and the police in not responding to the official requests of the courts. The police and prosecutors accuse the primary courts of bribery and corruption.

There is already a rudimentary cooperation between the formal and informal sectors. Courts refer cases to jirga or shura for enforcement of judgments, or by way of diversion from formal to informal adjudication, particularly in matters such as family law, which have traditionally been handled by customary rather than formal legal norms and processes. In some instances, cases move in the opposite direction, when informal bodies consider certain matters beyond their competence. This *ad hoc* cooperation and division of labor can certainly be systematized and improved. It may also be susceptible to extension to other matters. In some cases formal courts described difficulty in securing appearance of parties or witnesses, and in securing police cooperation in compelling these. This suggests that the social power of persuasion of Shura and Jirga may be a latent asset for these purposes.

3. Further study to more precisely map the varieties of interactions and linkages in a couple of selected pilot locations.

The current study, which reflects fieldwork that was feasible within a six month period logistically and in view of the security situation, would benefit from a second level of research and analysis that would allow more vertical, in depth of a couple of pilot locations.

4. Research should be conducted to determine what “rules” and “principles” utilized by some of the informal justice sector are inconsistent with correctly interpreted Sharia or Islamic principles. Education of mullahs and other leaders in the community may be useful to exhibit to them the any gap between the “rules” and “principles” they are using and correctly interpreted Sharia or Islamic principles in order to encourage the discontinuation of the practices they thought were “Islamic” but are not.

The study found that there are varied and different “rules” or “principles” that are followed in determining the outcomes in various jirgas or shuras. In addition, while nominally in line with correctly interpreted Sharia or Islamic principles, it has been observed that the “rules” and “principles” utilized by some of the informal justice sector is in fact inconsistent with correctly interpreted Sharia or Islamic principles.

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APPENDIX 1: DETAILED SITE SELECTION CONSIDERATIONS

The field study sought to incorporate a wide variety of the following factors, the existence of which was also tested and confirmed in the course of the interviews and administration of questionnaires:

1. The political characteristics of the government authority in the district and its influence on decision making in the informal justice sector, and on the formal legal sector's or local government's relationship with the informal sector. Among specific elements considered were:
 - a) the level of domination of armed political groups in the district;
 - b) the level of representation of the local armed political groups/commanders in government offices;
 - c) the percentage of local people in the government offices, e.g., head of the district, chief judge, chief of police, and district prosecutor;
 - d) the percentage of appointed officers by the central government and their relations with related ministries; and
 - e) the percentage of former militia commanders in the local government offices.
2. The relationship between the Jirga or Shura and formal government institutions:
 - a) the degree of influence of the government head of the district in the process and decisions of the Jirga/Shura;
 - b) the percentages of government staff in the membership of the district Jirga/Shura;
 - c) the degree of government interference in the election of members to the district Jirga/Shura;
 - d) the degree of interference of government officials in the decisions of the local Jirga/Shura; and
 - e) the level of the Jirga/Shura's support of the government authority.
3. The degree of relationship between the district Jirga or Shura and the primary courts:
 - a) the level of interaction between the primary court and Jirga over legal cases;
 - b) the degree of involvement of the district Jirga in adjudicating of criminal cases (outside of the government courts);
 - c) the level of cooperation or lack of support in managing legal matters, enhancing methods, and building consensus over legal remedies;
 - d) the degree of facilitation of the Jirga's or Shura's work by the primary court, e.g., providing legal advice, equipment, and other resources; and
 - e) the percentage of government judges in the membership of the local Jirga/Shura.
4. Ethnic representation within the administration of the government in a district, and resulting cooperation or friction among the local residents in enhancing the rule of law (in relationship to the ethnic demography of a particular locale, and the strength of particular ethnic systems of local justice (such as Pashtunwali):
 - a) the level of domination of one ethnic group over the government offices in the district;
 - b) the degree of control of security forces by one ethnic group;
 - c) the percentage of judges from one ethnic group in the primary court;
 - d) the level of control of the government's non-military resources by one ethnic group; and
 - e) the degree of treatment of other ethnic groups that are not recruited in the district administration of the government.

5. Ethnic composition of district Jirgas and Shuras as a guarantor of legitimacy for their decisions (in relationship to the ethnic demography of a particular locale, and the strength of particular ethnic systems of local justice (such as Pashtunwali):
 - a) the level of domination of one ethnic group over the district Jirga/Shura;
 - b) the degree of influence of one ethnic group over the decision making process of the Jirga/Shura;
 - c) the level of representation and participation of all ethnic groups residing in the district's towns and villages;
 - d) the degree of distribution of membership among the major ethnic groups vs. smaller ethnic groups; and
 - e) the percentage of ethnically-based (inter-ethnic) legal disputes that comes in front the Jirga's judicial inquiry.

6. Regional variations in cultural traditions, political configuration (traditional local power and relationship to various levels of state power), and balance of armed power. The relative weakness of the state has provided regional power holders opportunity to shape governance in the areas under their control, with effects on *inter alia* the rule of law and access to justice. Since the beginning of the current political transition in 2001, regional political configurations have become quite distinct from one region to the next.
 - a) Northeastern Region: dominated by the armed political groups, and members of these groups are influential in government offices and Jirgas.
 - b) Northern Region: dominated by powerful regional military commanders, that are in charge of the security forces (within and outside of the central government). The heads of district Jirga/Shura are often the followers or collaborators of these military leaders.
 - c) Western Region: dominated by powerful regional/provincial military leaders that are highly influential in the functions of all government offices. In places like Herat, the Jirga structure is falling under a semi-Taliban model where village clergy is often in charge of the local Jirga/Shura and a unit of the religious police (from the Department of Prevention of Vice and Promotion of Virtue) operates in each district. Notwithstanding this, the districts surveyed for the present study are *loci* for the establishment of the Community Development Centers (CDC) of the National Solidarity Program (NSP) and as such reflect a modernized approach to local governance and dispute resolution, including substitution for the old Shura.
 - d) Eastern Region: divided between major military leaders and civilian leadership in the government while small local commanders are still influential. There are close relations/loyalties between the civilian police and the military leadership in the region. This loyalty is undermining the relationship between the security forces and the civilian leaders of the government. This division is also vivid within the membership of the Jirga/Shura system in districts.
 - e) Central Regions: The central region, especially Hazara Jaat, is dominated by political armed groups, mostly factions of Hezb-e-Wahdat (HW). The influence of members of HW is vivid within the administration of the government and the system of local Jirga. Among the Shia population, the clergy is highly active in arbitration and settlement disputes, which leads to overlap between application of religious decrees and customary sources of law.
 - f) Southeastern Region: Local tribal communities are in the process of forming their system of Jirga closer to the traditional structure. The Jirga has been viewed as the

highest authority of the region wherein the local residents favor autonomy from the direct interference of the Afghan government. The Jirga structure is also geared toward forming a supervisory rule over all the local power holders in order to limit the power of the militia commanders. This is an important region to include because it is part of the Pashtun heartland, and thus representative of the identity and aspirations of the majority ethnic group in Afghanistan.

- g) Southern Region: Due to the high level of insecurity (the existence of the U.S. military base, the concentration of Afghan government armed forces, and the insurgents), there are repeated shifts in the government leadership, especially in Kandahar. In most part of the districts, the local Jirgas are the only sources where locals can find remedies to legal disputes. In most cases, local Jirga are adjudicating both civil and criminal cases throughout the rural districts. This is also an important region to include because it is part of the Pashtun heartland, and thus representative of the identity and aspirations of the majority ethnic group in Afghanistan.

APPENDIX 2: DETAILED SOCIAL AND POLITICAL PROFILES OF FIELD RESEARCH SITES

Kalakan District of Kabul

The district of Kalakan is to the north of Kabul city. It was part of the Shamali Plain that was destroyed by the Taliban forces. Kalakan was also one of the first districts in Kabul that mobilized resistance groups against the communist regime and the Soviet invasion of Afghanistan. Indeed, it was the anti-government armed rebellion from Kalakan that caused the collapse of the communist government in 1992. Kalakan district comprises 26 villages with a population of 56,000 (8,017 families). The population is 92% Tajik and 8% Pashtun, and the groups have lived in harmony since the 1930s. Despite its proximity to Kabul city, security or other political elements have experienced little improvement over the last four years. Political rivalries among armed groups of former Mujahideen continue. The international community's presence and programs in Kabul City have yet to make their influence felt in access to justice, the rule of law, and human security in the nearby rural areas, such as Kalakan district. Local affairs continue to be managed predominantly via informal, non-governmental norms and institutions.

The weakness of the central government has given local armed commanders power to influence matters of governance and society within the district. This influence has overshadowed the independent decision-making processes of the government judiciary. In fact, the armed political groups have threatened judges, and disrupted the legal processes of the court. The primary court is seriously under-funded and lacks all of the basic needs for conducting its routine operations. There are only two judges in the court, and the third appointed judge, a female, fears to come from Kabul to work in this district. The chief of police and almost all of the police officers and soldiers are former Mujahideen fighters who lack professional police training.

After the fall of the Taliban regime, the district Shura that was first established in 1992 was reinstated and influential members throughout the district were selected for it. In general, the Shura has 26 members, one from each village, and it holds two meetings per month. The government district head and the police chief actively participate in the Shura in order to listen to rising issues and also to express their opinions when needed. According to members of the Shura and government officials, the Shura solves 98% of both civil and criminal cases. In the last four years, the Shura has already solved 16 murder cases; this success has given the Shura a highly influential position within the district. Locals believe that it is the Shura that has brought peace and stability to the district by encouraging the armed political groups and commanders toward more cooperative efforts. The respect of the local commanders for the Shura has given the Shura the ability to create a neutral space wherein conflict can be negotiated and possibly resolved.

Surkh Roud District of Nangarhar

Surkh Roud is to the west of Jalalabad, the capital of the province of Nangarhar. Significant numbers of prominent Pashtun intellectuals and politicians have emerged from this district. The University of Nangarhar, which has been an important educational center for Pashtuns living in Afghanistan and Pakistan, is located in the vicinity of Surkh Roud. Political life here has been prejudiced by the conflict between the military/police forces and the executive/judiciary institutions – with executive positions within the district continually switching back and forth between the two. Curiously enough police and military element is the more open and liberal and the latter more rigid and tied by close family relationship of the Chief Provincial Judge to the fundamentalist Chief Justice of the Supreme Court.

The majority of the members of the police force in the district are former militia fighters, who became part of the Afghan regular army once the Taliban regime was removed, and were then transferred to the civilian police to enforce law and order. The civilian police forces in the district are closely tied to the

Afghan military leadership and are more or less backed by them, rather than by the civilian authorities in Kabul. Most of the police including officers have not received professional police training, and are often ignorant of citizens' rights and their own legal obligations. These civilian police forces are also responsible for the security of UN agencies and other international non-governmental organizations implementing projects or assisting local communities. They are directed more emphatically to check "terrorist" and pro-Taliban activities, rather than enforce law and order for the benefit of the civilian population.

Each faction has traded accusations of unlawful activities such as poppy cultivation, illegal trade in timber, narcotic trafficking, extortion, bribery, and interfering in the decision of courts. According to eyewitnesses as well as recent reports, illegal activities at the district level have been routine practices on all sides. Primary court judges have reported that the police have not followed court orders to present clients to the court, and have arrested and released people without judicial authority. The district's public prosecutor has accused the judges of reducing or rejecting proposed sentences. This environment has hobbled enforcement of law and order, and has crippled the formal justice system from serving even those living in proximity to the primary court. This has led many, especially among the highly divided sub-ethnic Pashtun groups, to rely extensively on informal legal practices at the village level.

The district consultative Shura was formed in 1992, and continued its work throughout the Taliban rule. Once the Taliban regime was removed, the Abdul Haq Foundation (AHF), a local non-governmental organization, organized a network of district Shura. The AHF built a community center and an office for the Surkh Roud district Shura on government property. So far, Surkh Roud district Shura has 65 members (some of the larger villages have more than one representative). In addition, 11 voting members were selected and given membership, not by the villagers but by the AHF, and there are two members of the district Shura that represent the two local commanders.

The majority of the members of the district Shura are *Malik* (heads of the village). Each one of these Maliks must receive the approval of the government head of the district in order to officially be registered as such by the primary court. Yet because the district Jirga operates on the property of the government with the membership of the government's top officials, the district Jirga has been under the influence of the executive and the chief of the police.

Enjil and Guzara Districts of Herat Province

Enjil and Guzara districts are located to the south of Herat City. As the largest districts in the province, they have always played a significant role in the stability of the province. During the 19th and 20th centuries, the level of support offered to the central government by these two districts contributed to the viability of central government control over Herat province. The majority of the population in both districts is Tajik, while there are smaller numbers of Pashtuns, Hazaras, Arabs, and Turkmen.

Enjil, with over 380 villages, is the largest rural district in the country. According to the primary court, the court has received 90 criminal cases out of which 85 were solved in the last 12 months. The court has also received 136 civil cases out of that 26 cases were solved, 100 cases were referred to different offices of the government to be completed, and 10 are in the process for receiving hearings. The border between the district and the city has already faded due to rapid urbanization and expansion of the city. This has given a larger number of people direct accesses to all that Herat has to offer. Until recently, the government district head was an appointee of former Governor Ismail Khan, (currently a member of President Karzai's cabinet).. The government district head in Guzara was also a Khan appointee, but he contradicted Khan's policy, which led into his removal.

Guzara and Enjil districts' proximity to Herat City has been beneficial to their populations owing to the economic boom resulting from regional trade via Iran and Turkmenistan. Herat has also become one of the most secure provinces in the country due to the early disarmament of the local armed groups by

former Governor Ismail Khan. Khan's ability to develop cohesion among the armed forces under his command has remained an important factor in the stability of the western region. A distinguishing characteristic of the Herat model was Khan's decision to keep his former fighters in an organization known as the *Ghund-e-Jihadi* (the Jihadi Forces), separate from the regular army, the police, and the *Jandarmary* (border forces). The Jihadi units have served at the forefront of many internal confrontations and suppressions of renegade armed groups as well as other opposition armed forces.

The Jihadi Forces organization is still connected to a number of other institutions such as the *Shuhada* (Martyred), an institution formed to help families who lost members during the fighting against the Soviets and the Taliban. This institution also runs a network of schools and services for orphans of fighters, with a curriculum separate from regular schools. The Jihadi Forces served Khan as a political armed organization of several thousand veteran Mujahideen fighters that took orders only from Khan. They had a separate budget and mandate, and they gave Khan strong leverage over other political or military forces in the province, enabling him to maintain significant influence into Herat's neighboring provinces.

The trade-oriented provincial economy, and the rise of a powerful commerce and business community, have generated significant revenues for the provincial government as well as for the private sector. This development has caused an economic boom, and local residents have been able to invest in both residential and business construction. Several dozen shopping malls, storage facilities for trade, and the exchange of imported goods and small industrial factory imports have developed in the last four years. These developments have attracted hundreds of thousands of migrants from other parts of Afghanistan, as well as returning refugees. Lucrative custom fees enable provincial authorities to invest in city reconstruction, recreation centers, education, transportation, and healthcare. Top officials of the provincial government have also been able to use their executive, military, and judicial positions in government to build profitable businesses through their family networks and partnerships with the private sector. These top officials are now among the richest families in Afghanistan while still directing commercial bids to their local partners. Herat's private sector has become most attractive to those searching for jobs.

Yet in a number of interviews, judges at both the provincial and district court levels complained about the interference of the executive authorities (i.e., the governor and government heads of districts) in the affairs of the courts. The primary courts in both Guzara and Enjil are facing serious shortages of basic facilities, training, and human resources. These circumstances have caused the eruption of an increasing level of corruption and bribery in almost all legal matters, especially commercial and property disputes. Enjil district also suffers a high rate of suicides among young married women due to arranged and forced marriages and domestic abuse in the country, yet neither the formal judiciary nor the traditional justice system has been able to offer an appropriate remedy to prevent the victimization of these women.

Recent developments like the activities of the newly initiated programs by the Afghan Independent Human Rights Commission (AIHR) and other women's rights and protection institutions have helped to decrease the number of suicides among these women. The establishment of a wide range of women's Development Councils (CDCs) (under the National Solidarity Program, NSP), has begun to prompt significant social and political mobilization throughout the province, and is attempting to reduce poverty and improve good governance at the village level. This program has triggered a wide range of women's activities to improve their standard of living throughout the province. According to Safia Sadiqi, the independent evaluator of the NSP throughout Afghanistan, the NSP and especially the women's CDCs in Herat have produced the highest success rates in the country. This success has been particularly vivid in Enjil district.

Even though important district officials such as the government district head, the chief of police, the head of the primary court, and the public prosecutor were all Ismail Khan's appointees, they have often found themselves in conflict. The chief of police and the majority of his soldiers are former Mujahideen fighters that lack police education and training. In Guzara, the court judges have accused the district police of

breaking the law and violating the rights of the citizens, while simultaneously the district police blame the court judges for the same kind of activities. Judges in Enjil have complained about the lack of almost everything, especially human resources, as they have attempted to serve more than three hundreds villages with only four judges and without a head judge.

Khaja Du Koh District of Jawzjan Province

Khaja Du Koh is 35 kilometers from Shabarghan, the capital of Jawzjan province. It comprises 31 villages that are approximately 45% Uzbek, 46% Turkmen, and 8% Pashtun. Like other districts in Jawzjan, the system of governance and politics in Khaja Du Koh is under the direct influence of the *Junbish-e-Mili* (National Movement) political and military organizations. Jawzjan has been the stronghold of the Junbish-e-Mili led by General Abdul Rashid Dustam. Junbish enjoys influence among the organs of the central government as well as within the extended Shura system that begins at the capital of the province and spreads throughout the districts and villages. Among other organizations, the Shura system forms the dominant system of governance and is responsible for maintaining stability and peace among the different ethnic groups.

The extended Shura system is also the dominant organ wherein people seek resolution for their disputes, and the number of cases brought to the Shura and solved by it far exceeds those in the government courts. Members of these Shura view the function of their Shura as apolitical processes wherein people's representatives manage local affairs, advise the authorities, and support peace and stability. The leadership of the Shura has the ear of the Junbish leadership, and receives their respect and acceptance. In most cases, the district Shura has a sound relationship with the local police forces, who to a large extent are former Junbish fighters and commanders.

Each village has a representative at the district Shura, and each district Shura has a representative at the provincial Shura, which is an important consultative organ for provincial government. Within the city of Shabarghan, three districts form three separate Shura, and jointly create a city Shura that is a member of the provincial Shura. The Shabarghan Shura receives cases directly as well as cases that are sent on a regular basis by the governor's office, city court, and prosecutor's office. These cases can be either civil or criminal in nature; even family cases such as divorce are sent by the city court to the city Shura. Since the fall of the Taliban regime, the Shabarghan Shura has solved 25 murder cases. The Shura handles around 20 legal cases monthly, including commercial cases. Members of Shura claim that it is a highly representative Shura that has one director and four deputies, one from each ethnic group in the province. The Shabarghan Shura has official letterhead and a filing and recording system. In contrast to Nangarhar and Herat, Jawzjan represents a more syncretic and inclusive model of governance and politics in Afghanistan, and even the high-ranking government officials give a lot of credit to the Shura and the role it has played. However, some officials have complained about the lack of support the Shura and the local government receives from the central government. In Khaja Du Koh, for example, a local resident donated the property and buildings for the government offices.

The primary court in Khaja Du Koh has only one judge who often does not show up for the job, and low salaries have discouraged other judges from paying for expensive transportation or carrying the burden of the cost of living in the district; absenteeism is common as a result. Because the court is largely moribund, the potential for referral to the active Shura system in the district remains unused. For instance, the district primary court received only six civil cases during 2004. The court was able to rule on only one case, a divorce, during the entire year. The absolute majority of cases, including all criminal cases, have been solved by the Shura system, which hears at least two to three cases per week. In this capacity, the district Shura has been able to bring calm among the residents and prevent infighting and the continuation of hostilities by taking the lead in solving 80 murder cases since the fall of the Taliban in 2001.

The district Shura also handles traffic offenses, but family matters are often taken up within a local Shura, which provides a more private and familial environment. The Khaja Du Koh Shura has 20 members. The

government district head and the police chief are in close collaboration with the district Shura. The government district head often sends legal cases to the Shura, and the Shura solves cases within a short period of time. There is also a *Shura-e-Ulama* to advise on Sharia or complicated legal issues.

Braki Brak District of Logar

Braki Brak district is located to the south of Logar City and is dominated by sub-ethnic Pashtun groups, especially the Stankzai and Ahmedzai and a small minority of Hazaras. Historically, Logar has been an important bridge between Kabul and the southeastern region of the country, which borders Pakistan. Because its geography made it a gate to Kabul for Afghan Mujahideen groups during the 1980s, districts like Braki Brak became part of the route for Mujahideen fighters and ammunition to positions around Kabul.

Braki Brak district fell under the control of the Mujahideen groups in the 1980s, and the Afghan central government lost control over it. During this time, major armed political groups established units of their activists and supporters across the villages and towns of this district. The rivalry of these groups for military bases and a greater share of U.S. and Saudi funding transformed the district into an environment of internecine hostility. Local leaders forced the armed groups to form a local Jirga and include all factional commanders, which resulted in the Jirga being seen as a healthy space to resolve differences via peaceful negotiation and mediation rather than infighting and destruction of the villages, towns, farms, and irrigation systems. The Jirga was even able to prevent the Taliban from persecuting Braki Brak's small Hazara community. The existence of this local system helped the district to make the transition into the post Taliban era without physical destruction.

In the post Taliban era, the central government's influence has never reached beyond the center of the province. The U.N security map designates Logar as "medium risk and uncertain threat." The Braki Brak primary court is extant, but most people rely on the services of their local Jirgas to resolve most disputes. Court officials do show up to work a few hours a day to handle a very small number of civil cases, most often issues regarding inheritance, which usually end up getting sent back to the local Jirga. Each village has its own local Jirga that handles matters locally. A Zonal Jirga comprises representatives from villages within each of five zones. Representatives of each zone form a greater Jirga that covers all villages and towns within the district. In addition, there are *Wolesi Jirga*, sub-ethnic councils representing the Stankzai, Ahmedzai, and other Pashtun sub-groups.

Currently, a dispute over access to community/public-owned land has been the predominant local issue, and risks damaging the cooperative intra-group relationships and peace maintained during years of political crisis in the 1980s and 1990s. A dispute over land claimed by both Ahmedzai and Stankzai Pashtuns has already resulted in a number of deaths and casualties on both sides. Both groups believe that frequent armed clashes are imminent in the coming months, and this current situation has shifted the attention toward the Wolesi Jirgas, through which sub-groups are able to build in-group solidarity at the expense of other groups. Local Jirga members have accused government officials at the center of the province of continuing this conflict so that they might profit from it by offering false promises to each side.

Representatives of the Stankzai local community have gone to Kabul and have asked the central government to intervene by sending a special delegate to review the situation, but Kabul has passed this responsibility over to the provincial authority. So far, the Ahmedzai Pashtuns have been able to produce deeds and documents of ownership for the provincial government, giving them leverage in selling significant plots to private ownership, producing substantial cash, and allegedly bribing provincial government officials.

APPENDIX 3: FINDINGS CONCERNING THE FORMAL JUSTICE PRIMARY COURT SYSTEM

Within the last two years, the formal justice system has become more functional. The Ministry of Justice, the Supreme Court, and the Attorney General's Office are all building administrative interaction by connecting Kabul to provincial and district offices, especially in major urban centers and their surrounding towns. With the support of the donor nations, especially Italy and the U.S., the Afghan judiciary has been regaining the ability to appoint judges, establish short-term training workshops, maintain minimum salary payments, provide printed legal texts, and build courthouses. However, the system lacks legal education and training, as well as basic administrative tools such as management, record keeping, interactive legal discourse, and communication on established laws and policy. These legal, managerial, and organizational inadequacies have limited the ability of the formal justice system to carry the responsibility that the Afghan constitution places on it.

Corruption, inefficiency, unresponsiveness and violations of laws have been the result. This has negatively affected the perception of the local communities about the judiciary and the law enforcement agencies on a national scale. Since government institutions have been the perpetrators of abuse and violations against the citizens for the past 25 years of war, political violence and dictatorship, the current shortcomings in the formal legal system have challenged the legitimacy of the current national government. A recent proverb in Kabul says, "pay attention to the man crossing the street, but if he is a Qazi (judge) or a policeman run him over". This skeptical attitude has developed into a general sense of mistrust for the formal court system, and its members, who once were treated with respect for their truthfulness.

Crisis of Judicial Legitimacy

The majority of respondents in Nangarhar, Logar, Herat, Balkh, and Jawzjan were skeptical about the government justice system due to the existence of high levels of corruption, bribery, and police intimidation. Members of the focus groups and those in the Interviews expressed their mistrust toward the work and judgments of their district primary court, and they feared unlawful arrest and harassment at the hands of police. A client of the primary court on Surkh Road explained:

The son of our former farmer claims that he owns our family land. His claim is supported by a local armed militia group and our farmer's son is involved in illegal activities in order to pay this militia group that he was a member of for several years. I have brought witnesses, and my deed, but the former head judge of the primary court did not follow the law, and rejected my case while I had everything that the court asked me. Later, I know that he had received 80,000Afs bribe from this person, and I have eye witness. As people are telling me, this person has also given bribe to the former chief of the police in the district.¹¹

Not surprisingly, judges and court personnel, as well as impartial observers, have a different view from that of the clients of the courts. Judges in Nangarhar complained about the appointment of judges based on personal and political favoritism and especially criticized the appointment of individuals without legal education and training. They also argued that this factor has reduced the legal knowledge and accountability of the judiciary because these individuals are contributing to the problems rather than helping to serve the people and regain the prestige of the justice system. "In addition, who gets

¹¹ Interview with a client of primary court, Surkh Road district, Nangarhar, December 29, 2004.

appointment to work as a judge based on his personal and political affiliation is often the one involved in corruption,” said a judge in Nanagarhar.

Low salary and the lack of housing, benefits, and transportation have forced Afghan judges to live in deplorable conditions, and some argue that this has contributed to the outbreak of corruption within the government justice system. According to Judge Hakak, a legal scholar: “Once, corruption is institutionalized, it is a habitual expectation of certain income that causes the breakdown of work ethics and morality. After that, removing one corrupt person is not enough you need to change the institution, something that we can’t afford now.”¹²

The appointment of judges encourages their impartiality, especially at the primary court level; Afghan judges are not allowed to serve in the place of their origin. Yet this too contributes to corruption. It requires them to work and live far from their own community, something that most of judges interviewed did not mind it. However, the inadequate salary, and the absence of housing and funded transportation have forced them to live far from their family. “Our salary is so inadequate that we can’t rent a place to live here. Two of us have to sleep in the local mosque, supporting our families, forget about it, our salary can’t support us here,” stated two of the primary court judges on Surkh Roud. Another judge in Nangarhar stated, “how can one judge honestly with a hungry stomach and little or no money in his pocket?” when our team asked him about reasons behind the epidemic of corruption in the Afghan judicial system.

There are many old judges in the system; some of them have passed the age of retirement and many have come back to active duty from retirement. Judge Gul Aqha, the first deputy of the primary court in Enjil district, offered the following complaint:

Some judges, especially head judges of the primary courts, are retired civil servants, some either postponed their retirement form more than one time, or they have returned from retirement back to work. Some of my colleagues believe they do this because they can take bribes without anyone supervising them. They are leaving bad examples, and opening the door for others to break the law. This is not fair for the younger generation of judges who would love to learn and serve; and I do believe it is not right for our system of justice and for those looking at us to serve them.¹³

Court staffing in larger districts (*Loy-e-Wolestwali*) is the same as at the smaller ones. For instance, the primary courts in Enjil district of Herat have three judges for a total of 368 villages, and these judges have to handle all of the criminal and civil cases as well as cases that deal with traffic offenses, family issues, and commercial matters.

Available records indicate that processes for handling criminal cases are faster than those for civil cases. The reasons are that “legal directives for criminal cases (e.g. theft, breaking into houses, etc.) are specified in the criminal codes of the Afghan law and this allows the court to reach a decision faster,” says Nasaradeen, the head judge in Guzara district of Herat. However, public prosecutors, criminal investigators, and the primary courts have tremendous difficulties and challenges in any legal matter that requires an evaluation or the opinion of a forensic doctor or a specialist. Forensic medical labs and specialized medical doctors are not accessible to primary courts in Afghanistan, or to any court in Afghanistan. According to a law professor from Kabul University, this lack of availability in forensic medicine and specialists often causes doubts about the ruling of decisions over both criminal cases, if the accused is not confessed, and also the nature of investigation, documentation, and recording of cases.

¹² Interview with former Judge Hakak, director of the Afghan Independent Human Rights Commission, Herat, January 6, 2005.

¹³ Interview with judges at the primary court in Injil district of Herat province, January 9, 2005.

Scarce resources for court personnel are also dissipated by non-judicial and law enforcement tasks. Primary courts have an officer that “promotes virtue and prevents vice” by patrolling the streets to make sure that people attend prayers regularly, and getting local police to enforce such mandates. He also polices against the watching of “bad” movies, women singing or dancing, and anyone gambling. He is responsible along with district police for stopping unrelated men and women seen in public, and pursuing cases of adultery. This officer has no legal training and education and what he does is solely based on his interpretation of his limited understanding in Islamic theology. The association of such officers with the courts undermines their legitimacy.

The Absence of Attorneys or Legal Advocates

Under the new Afghan constitution, Article 31, Ch 2, Art 10 states: “Every person upon arrest can seek a defense attorney to defend his rights or to defend his care for which he is accused under the law... in criminal cases, the state shall appoint an advocate for a destitute.”¹⁴ The majority of our respondents in Nangarhar, Logar, Herat, Balkh, Jawzjan, and Kabul were not aware of this constitutional law and had also never experienced hiring defense counsel privately or being assigned one by the court. Only a small number of legal advocates that were trained and assigned by the international NGOs are accessible to a tiny number of clients in the primary courts located in or near major urban centers, and only those who are aware of the activities of these NGOs avail themselves of them. There is no access to counsel or legal advocates in most of the rural districts’ primary courts and this has contributed to the misuse of the legal system by certain judges and law enforcement agencies, i.e. civilian police and public prosecutors.

Although it is the legal obligation of the courts to provide defense attorneys to clients, and a public advocacy unit has been established within the organizational structure of the Supreme Court, the majority of respondents had no information about this. They also did not know much about the role of a defense attorney and legal advocate in the court system as well as the services that their existence may provide toward the settlement of legal cases. Moreover, the Supreme Court public advocacy unit is an empty shell, months after its establishment, owing to lack of funding, personnel or an institutional infrastructure.

There is also a profound gulf between the judges and the judged in civil cases. The absence of counsel in civil matters has acted to the detriment of economically disadvantaged individuals and families who cannot afford to wait every day at the door of the court, especially if they are in a dispute with the affluent members of the community who have cash to buy judgment and security. A client of the Guzara primary court explained:

I purchased the land for my house before the war, I build a house on it, but once the Soviets came we had to flee to Iran. I have returned when Afghanistan become free from the Taliban, rebuild my house. Now, the person who I purchased the land for my house is claiming that he never sold it to me. I have witnesses, and I have my deed, but I have to come to the court everyday. We are poor people, I can’t afford not to work and stay at the door of the court while the other side owns a business in the city and he is not worried.¹⁵

In the cases of the economically disadvantaged Afghans versus the affluent, the prolongation of the case results in favor of the wealthier side of the dispute. According to data from this study, the outbreak of corruption in the judiciary as well as within the law enforcement agencies has led to the prolongation of cases, especially high value property disputes that are subject to bribery of officials. With the absence of legal advocates to represent the case, parties to a dispute have no option but to spend a significant portion of their lives at the courthouse; otherwise, they are forced by the police to appear in court. In one

¹⁴ Article 31, Ch 2, Art 10, the Constitution of the Islamic Republic of Afghanistan, (Dari and Pashtu version), Kabul, 1382 (2004), p. 9.

¹⁵ Interview with a 65 year old Hazara man, in Guzara district of Herat, January 5, 2005

situation, an appellate court judge in Nangarhar accepted the appeal of one side of the party 140 days after acceptance of an appeal while the civil code allows only 30 days. The original owner had stated that his opponent that had occupied his land by force and since he was in the process of selling his house and acquiring cash, he was unable to even file a petition in the appellate court until the 139th day of not showing at the court.¹⁶ Sometimes the “milking of a client” continues to the point of *bi-khanaman shudan* (Afghan term for economic devastation of a family) affirmed Sayyed Ahmed, the head of the Babukai village Shura. He explained:

Recently we have solved a case in our village Shura that was going back and forth between the district primary court and provincial courts for over three years. This process has cost the disputants to sell their personal assets in fighting to win the case, some say, it cost them more than the prices of the land they were disputing ownership. We have solved this case that its fate was uncertain in the government courts only in one day, probably their resources became very thin, but the good thing is both sides are still happy about our decision.¹⁷

Legal Education and Training

The Afghan judiciary today comprises a wide range of educational backgrounds, and is not a unified professional body.. The 1964 Constitution guaranteed the independence of the judiciary from executive interference, but for the past two and a half decades, it has been seriously politicized by competing ideologies as widely varied as radically secular/communist/feminist and theocratic . The juridical content of training has suffered deeply as a result.

In the 1960s and 1970s, the bulk of judicial staff and judges were graduates of Kabul University’s Sharia and the Law and Political Science colleges.¹⁸ The majority of these had pre-university education within the public education system. Only a small number were drawn from religious schools like *Dar-ul-Olume Arabi* and *Imam Abu Hanifa* in Kabul. Even then, legal decisions and the interpretation of codified laws were not uniform. In order to promote greater uniformity of standards, a nine-month program, including three months of on-the-job training, was made mandatory for all judges.¹⁹

Currently, the court system is staffed by graduates of the Sharia and Law Political Science Colleges of Kabul University. Yet a large number of staff comes from a variety of publicly and privately funded religious schools located in different parts of Afghanistan, and another large group is made up of those who had attended the vast network of religious schools in Pakistan.²⁰ A smaller number of staff and judges that are serving the government justice system have obtained legal/religious educations in Egypt and Saudi Arabia.²¹ This contradictory diversity of legal education and training, with its varying curricula, interpretations of Islamic law, legal systems, and policies has only compounded the post-Taliban judicial crisis.

¹⁶ Interview with a client of the Nangarhar’s appellate court, January 1, 2005.

¹⁷ Focus Group Discussion, Babukai village, Baraki Barak district, Logar, January 17, 2005.

¹⁸ See Weinbaum G. Marvin, “Legal Elites in Afghanistan Society,” *International Journal of Middle Eastern Studies*, 12 (1980).

¹⁹ See Kamali, M H. *Law in Afghanistan: A Study of Constitutions, Matrimonial Law and the Judiciary* (Leiden: E.J. Brill Publishing Co., 1985)

²⁰ See Mazurana, Dyan, Neamat Nojumi, Elizabeth Stites, “Human Security of the Rural Afghans 2002-2003”. Medford: Tufts University, 2004.

²¹ Our team interviewed a number of judges in Nangarhar who obtained their education in Egypt and Saudi Arabia.

In the 1980s, the pro-Soviet PDPA regime made the Revolutionary Council and the People Democratic Party of Afghanistan (PDPA) the highest law making body of the country.²² The PDPA secularized the source of law and disfavored those with Sharia and religious educational and training backgrounds, even expelling them in some situations. Those who remained within the PDPA's justice system had to fully accept the centralized codified laws and legal interpretations. Secular ideology and centralized control became a routine in the professional culture and intellectual cast of an entire generation of Afghan judges and court personnel.²³

After the four year period of chaos under Mujahideen governments, in 1996, when the Taliban came to power, they denounced secular laws as un-Islamic and removed cadres and staff of the judiciary (within all three organs, i.e., the Ministry of Justice, Supreme Court, and the Office of the Attorney General), especially judges. Who appeared to have been trained in other than the Taliban perspective on Islam and Sharia. The Taliban appointed cadres with fully theological educational backgrounds.²⁴

These developments now pose significant challenges in rebuilding the Afghan justice system and implementing judicial reform. Long years of extreme centralization and wildly oscillating sources of law (secular to theocratic) has created a culture and work habit that guides the government staff to view the judiciary through a political lens. Another significant facet of the court system is its staffing by large numbers of individuals who have only a religious education and no legal education and training in Sharia or in the statutory laws. Reportedly, the majority of the judiciary within rural districts and even in sub-districts of urban areas have a theological background that strongly influences legal decisions. For example, one judge categorically rejected any relationship between domestic abuse and divorce in the following terms:

This [filing for divorce] is an “opportunistic” plea by women who are “corrupted” by getting engaged in works outside of their houses. If a women lived with her husband “with honor” for years, what has happened that she suddenly dislike him and wants divorce. It is because he can't afford to buy her fancy clothes or ask her to do her duty at home. No judge and no court should permit this because it would destroy the foundation of our family system and our tradition.²⁵

Judges in Surkh Roud district of Nangarhar complained about their former head judge who had no legal background but only education and training in literature. They complained about a lack of basic office supplies, including legal texts, of which only one of the judges owns privately and he shares them with his colleagues. In an interview in Nangarhar, young judges express their disappointment in the unfair selection of judges to attend legal workshops and receive scholarships. A judge in Nangarhar explained:

“You need to connect personally to people in the Supreme Court in order to receive training and educational opportunity in order to receive scholarship. This happens while the energetic judges, who are eager to serve, are deprived from higher position under those who have less education and qualification, but they are connected to people high up. We have civil servant law, and I challenge the entire system in the province in respect to the appointment of judges, their positions, and promotions. In most cases, the head

²² See Saikal Amin & Maley William: *Regime Change in Afghanistan*, (San Francisco: Westview Press, Boulder, Oxford, 1991).

²³ See M. Hassan Kakar: *Afghanistan The Soviet Invasion and the Afghan Response*, (University of California Press, Berkeley, 1995).

²⁴ See Nojumi Neamatollah, *The Rise of the Taliban in Afghanistan...*(2002).

²⁵ Interview with judges serving one of the rural district courts in Herat province, January 7, 2005.

judges don't give a chance to their helping judges to attend any training and educational programs. The tragedy is that they attend, waste scarce resources, but they don't learn a thing.

APPENDIX 4: FINDINGS CONCERNING THE INFORMAL JUSTICE SYSTEM AND RELATIONS BETWEEN THE GOVERNMENT AND NON-GOVERNMENTAL SYSTEMS OF JUSTICE

The majority of respondents in Nangarhar, Logar, Herat, Jawzjan, and Kabul offered positive opinions about the informal system. Jirga or Shura has a local identity and is a familiar term to a broad spectrum of the population. Norms that are applied to quasi-judicial decisions in the Jirga are patterned in the cultural conditioning of most Afghans.

Local communities are also familiar with the actors, terminology and codes of conduct. The high degree of mobility of the Jirga also lends it more accessible character. A meeting of a Jirga may be in a mosque, a house, or in an open surface under the trees. The participatory nature of the process gives citizens of a local community the ability to select those who they trust to represent their case in a forum in which they have enough information about its members. Members of Babukai village Jirga in Logar explain the function of the notion of *Hakam* as follows:

Two brothers, Nazamadin and Mohammed Azim were disputing their shares over their inherited properties for years, every time there is a new government head of district, head of district's primary court they re-submit their claims to the government and hoping one may win against the other. This case is going on since the government of Mujahideen in 1992, and it also gone through the Taliban and the post-Taliban court system. They have never reached any satisfying remedy. Since they are a part of an extended family in the area, they have involved many people in this dispute. Finally, one of them approached members of the village Jirga two months ago. We knew the history of the case, and we did not want them to upset us. We asked to select their representative and give the *Hakam* role to them. Then, we have stated facts and aspects of the dispute in writing, and asked them to leave the room. We have discussed all aspects of their case, argued their interests in the best possible way, and we come to fair consensus that we have thought both sides would be happy with. After one long session, we wrote our decision under the statement of the dispute and signed it, we called them to the meeting and announced that we have reached a final decision. We asked them, are you ready to put your interest in our trust, they answered yes, and we asked are they willing to accept our decision without reading and knowing it they said yes. They put in writing that they are happy with process and accepted our decision, and then we announced the decision.²⁶

Enforcement of Jirga decisions varies among different tribal groups, and between tribal groups and semi-tribal or non-tribal communities. Non-tribal communities and to certain extent the semi-tribal communities do have an option to seek enforcement from the formal courts, whereas in tribal areas there is often no accessible government court system, and the decision of Jirga are likelier to be viewed as final. However, the most powerful enforcement source of power for decisions of Jirga across the board is respecting accepted local norms, a normative commitment. In the words of Mawlawi Lala Jan: "respecting a decision by respected members of a Jirga in its own merit is honorable."²⁷ In this regard, if a person rejects a "fair" decision of a Jirga recklessly, it is considered unreasonable by members of the local community. This, in turn, would negatively affect that person's local reputation and social position, and it

²⁶ Focus Group Discussion with Babukai village Jirga, Braki Brak district, Logar, January 17, 2005

²⁷ Focus Group Discussion, Rustan Khil village Jirga, Braki Brak district, January 14, 2005.

may cost him a loss of respect in his own community. Abdul Hamid, the head of Qala-e-Rig village Shura, explained:

Rejecting a “fair” remedy for a dispute may bring “shame of disrespect” and causes a person to be known as *Dawa Jalab* (looking for conflict). Such a person is also known as *Quran Khor* (oath breaker)²⁸ and fails to keep his promise. People don’t trust him; they don’t lend him money if he needs, and they avoid signing a contract with him. In an extreme case, people may avoid to take his daughter into marriage and turn down his son *Khwasgaary* (marriage proposal) to their daughters.²⁹

Since most legal arrangements are based on consensual norms of the non-governmental system of rights and legal matters, it would be highly difficult for a person with a *Dawa Jalab* reputation to mobilize resources and manage affairs. Thus, “public shame” is a seriously powerful mechanism of enforcement, sanctioning not only the principal but also his family members, thus adding the family to the chorus urging compliance. Public shame and its consequences can also be applied to government officials who break the law or to someone that has won a dispute unfairly in a government court. Abdul Saboor, member of Tariaak village Shura explained:

People who may win a case via bribery at a government court or with the “kindness” of powerful local actors “unfairly,” they would be viewed by the locals as *Na Haqh* (unjust) and *Ghaassib* (forceful occupation of someone’s assets or property).³⁰ This indicates that if members of a local community know that a decision was favored unjustly to a dispute by a government, they may accuse the court of breaking the law, but they also condemn the unjustly winner of the dispute by norms of “public shame”. Depending on the power-relation of such a winner, he would be viewed in the heat and mind of people as an “unfair” person of the community. Even some may accuse him for being a *Zaalim* (oppressor), one who uses his power or wealth for his own narrow greed against the common goods of his community.³¹

The informal process thus operates relatively unhampered by logistical or budgetary constraints. The sustainability of the system has helped it to evolve over time and survive during years of political crisis and the collapse of the central authority and the absence of its legal system.

Relationship Between the Informal and Formal Systems

Articles 1 and 2 of the Afghan Civil Codes read as follows:

When there is Qanoon [government legislated law], there is no need for seeking a Sharia jurisprudence in ruling a case; when there is no article of Qanoon, the court would apply the Hanafi jurisprudence of the general principle of Islam, and when if there is no article of Sharia, the court can rule a case based on the general customs if they are not in contrary to principles of Qanoon, and Justice.³²

²⁸Such a person would be cursed, and he and his family would be vulnerable to misfortune, such as car accidents or being hit by lighting.

²⁹ Focus Group Discussion, Qala-e-Rig village Shura, Zandajan district, Herat, January 7, 2005.

³⁰ The term *Ghaasib* (noun) comes from *Ghasb* (verb) and has moral and ethical associations in the context of the informal legal system. Under the Afghan Civil Codes, this term is treated as an offense, and such an offender could be tried in the court of law.

³¹ Focus Group Discussion, Tariaak village Shura, Enjil district, Herat, January 11, 2005.

³² Article 1 and 2 of the Afghan Civil Codes, (Pashtu and Dari version) Kabul, Afghanistan, 2004.

Those officials in the formal justice system who were interviewed for this study were not sure how to view legal arrangements outside of the government courts as system. Judges in Nangarhar stated that they have never heard of another system of rights and legal matters beside the government justice system. In Herat, the official position within the provincial courts toward the arrangement of the legal matters as a system was divided. Some judges were defining Urf (custom)-based legal arrangements as a kind of Sharia based decision making process that had mixed with local customs and applied by local clergies “who are not judges,” said Judge Muhammad Aarif. Others, like Judge Nessar Ahmed, argued that people who sit in Jirga and Shura are not trained in legal practices and do not know the legislated laws, so they may impermissibly if imperceptibly cross a boundary. He explained:

We are aware that local Shura are engaged in dispute resolution, which is a good thing because it helps people to live in harmony and peace. However, Shura’s decision is not going to influence our adjudication and legal decisions when we adjudicate a case. We do not recognize their decisions, but if people are happy with it would be their responsibility not ours.³³

The latter opinion was also found strongly among other judges in Nangarhar and Logar. Judges Nassradin, the head of the Guzara primary court, complained about the local Shura in handling legal affairs:

Sometimes the local Shura act as if they are the government court and interfere with legal cases that should be handled by the government courts. Members of these Shura do not know their legal limitations and sometimes even they attempt to interfere with the matters of our courts. For instance, they insist to use their opinions as a legal document against one or the other side of a conflict. When we refuse such a request, and reject their opinion, they began to mobilize local powerbrokers and influential people within the government or outside of the government to influence our decisions. In this regard, they cause us problems and it is not healthy for our justice system. It would be very helpful to put some of the members of the local Shura into programs that help them to understand their responsibilities, but giving the current circumstances, we have been so overwhelmed by the increasing number of cases, that someone needs to come and help us.³⁴

Notwithstanding these concerns, given the current paucity of legal and judicial resources in Afghanistan, the informal legal system has been instrumental in improving the establishment of law and order among the local communities who have struggled to reestablish a sense of community after years of political violence and factional fighting. Primary court judges often understand the dynamic relationship between the two systems. The notion of *Eslaah* (fixing a problem—finding a peaceful remedy) has evolved from the *Judicial Guides for Afghan Judges* as a mechanism for finding remedies outside of the court, but is limited to civil matters only via which a judge may send the case to a local Jirga or Shura to be settled in a way that justice is served. In most cases, the Afghan law leaves this option to the discretion of the judge. Judge Gul Agha, the first deputy of the Enjil primary court, believes that the notion of *Eslaah* has become instrumental in helping his court reduce the pressing caseload. He stated:

There are a number of positive outcomes when use the notion of *Eslaah* in engaging local communities to find satisfactory remedies for legal disputes along, but outside, of our official line of legal inquiry and decision making processes. Amongst, I note the followings: a) the notion of *Eslaah* is a Sharia based principle that contributes to the lives of every man and woman in an Islamic community. Islamic teachings call upon the community leaders and Ulama to encourage people to avoid destructive disputes, hostility

³³ Interview with Judge Nassar Ahmed, first deputy of the Guzara district’s primary court, Herat, January 7, 2005.

³⁴ Interview with Judge Nassradin, head of the Guzara primary court, Herat, January 5, 2005.

via mechanism of Eslaah. This is the reason that a Musleh [one who is committed to Eslaah] has a position of Sainthood in our tradition and history; b) Eslaah brings a dispute to its final closure at once and forever in a way that both sides of the dispute would be able to get over it and move on with their lives. Whilst a decision in a primary court often upsets one side, drags the case to the provincial, then to high appellate in Kabul. Even if there is a decision reached, it is difficult to enforce it, especially in the area that the central government is not strongly active. So, with the verdict of the court, the conflict will continue and even it may drive ones to take unlawful acts of revenge. In addition, the loser would accuse the court and judges for bribery and favoritism; c) disputants have the freedom and opportunity to select their own representatives to discuss their concerns privately and solve it, or they can approach their local Shura and ask them for help, and be happy with their remedy.³⁵

Judges in Nanagarhar, Logar, Herat, and Kabul all reported that there are interactions between the government courts at the primary courts level and the local Jirga and Shura throughout the country. Even though judges do offer different opinions about the function, value and legal principles of the informal system, they remained consistent in the opinion that there is an *ad hoc* relationship between the two systems, and the government system does not recognize the opinions and decisions of any “legal body” outside of the government courts, including local Jirga and Shura. Actors in both systems agree that this unofficial relationship between the primary courts, and the Jirga and Shura, through the Eslaah process is cost effective and that it is difficult to bribe or charge a fee for having an arbitrator, mediator, or negotiator within this process.

The majority of citizen respondents in Nangarhar, Logar, Herat, Jawzjan, and Kabul expressed greater familiarity with codes of conduct in informal system than with the formal system. These respondents also expressed more confidence that the non-governmental system would ensure prompt decision, while such a dispute could take months if not years in the government courts. A local Shura in Siawshan area of Herat holds a record of resolving 193 cases in the last three years. The head of Shura, Aagha Aziz Ahmed explained:

Only in the last two weeks we have resolved four disputes that involved physical assaults, inheritance, and significant financial quarrel. The processes that the Shura are undertaken are prompt and the outcomes are obvious. For instance, in the physical assault case, the offender agreed to go to the victim’s house and, in the presence of respected local leaders, condemn his act, apologize for the injury he has inflicted, asked for forgiveness, and promise it won’t happen again. The Shura imposed the full payment of the cost of all medication and transportation on the offender.³⁶

When we raised the question about the “fairness” of the Shura’s remedy in the above assault case, members of the Shura clearly articulated the positive and negative facets of their decision in a way that draws out the distinction between the approaches of the two systems – essentially application of a quasi-civil approach to what formal courts would consider a criminal matter. They suggested that if this case went to the government court, the offender would have been put in the custody of the police until his case went to trial. If the court convicted him, he would have to pay for transportation to carry him and his guard from police custody to the main jail in the city. The defendant is the main income earner in his family, and therefore, putting him away would devastate his family and the consequences would be unpredictable. Moreover, no one could guarantee that he would not have been the target of revenge once he was out of jail, even if he had “paid his debt to society”. A revenge attack could be fatal. Revenge

³⁵ Interview with Judge Gul Aagha, first deputy of Enjil primary court, Herat, January 8, 2005.

³⁶ Focus Group Discussion, Siawshan area, Herat, January 6, 2005.

killing is a hereditary customary tradition in Afghanistan and the bloodshed would not stop for generations to come. By the current arrangement, the injured victim, who was another economically disadvantaged farmer, was compensated fully for the assault, by the offender to pay in full. Finally, once Eslaah is effected by the Shura and accepted by the disputed parties, it constitutes full satisfaction, and that would be the end of the problem and the individuals and their family could resume their peaceful co-existence.

The majority of respondents in Nangarhar, Logar, Herat, Balkh, Jawzjan, and Kabul stated that they have arranged their legal matters outside of the government institutions and via the non-governmental system. Legal matters within the realm of economic activities such as credit, economic transactions, business partnerships, job hiring in private sector, as well as renting and leasing of residential and farmlands, are occurring without registration with the central government or interference from the local governments.³⁷ The majority of economic contracts among the rural population such as working on farms, the purchase of livestock, farming tools, and fuel, renting, leasing of land, and water management are documented only on customary forms of a contract.³⁸ Stating the matter on a piece of paper that is signed by contracted parties and witnesses without any registration to a government agency is routine. Sometimes financial transactions that deal with lending and borrowing of cash and goods are solely based only on the local reputation and public image of a borrower or the lender.

Marriages and inheritance, especially throughout rural Afghanistan, occurs based on the traditional doctrine concept of “trusteeship”. Marriage agreements often take place without any registration to a government office; at the time of agreement or disagreement, it solely relies on the support of family network. This indicates that fair treatment of a woman after marriage depends on the ability of her familial support if she is in an abusive relationship with her husband or husband’s family. In Afghanistan, spousal relationship is highly private, and discussions about contradiction and spousal disputes tend to be kept within the confines of the family. In this regard, spousal disputes, including domestic abuses, are dealt within the family network and to a certain extent non-family trusted individuals. Abdul Jabaar, the head of the Lingar village Shura in Zandajan district stated that people treat family matters as important parts of their private life. He explained:

When it comes to spousal disputes people try hard to keep them within their family circle. They use the Jirga mechanism to find a remedy and membership to such a Jirga is limited to respected individuals within the family network only. Local norms view spousal disputes and domestic abuses *Sharm Aawar* (bring shame) and *Bi Aabruie* (dishonorin). This not only damages one’s social position, its consequences will affect their family members. If it is woman’s fault, people may not propose to marry her single sisters. If it is man’s fault his brothers would have hard time finding brides in the community.³⁹

Keeping family matters and especially spousal disputes within the territory of the family network was evident in Babukai and Rustam Khil villages of Logar. This trend was also apparent in Miran Qasem Yaka, and Nuqrak, and Mirzayan in Surkh Roud district of Nangarhar. However, in both Guzara and Enjil districts of Herat, the divorce cases due to domestic abuses and spousal disputes were evident in the local primary courts. Yet in comparison to property and inheritance disputes, family cases formed a smaller number. For instance, in Guzara district only two out of 15 clients who were waiting to see a judge were

³⁷ . See Pain Adam, and Jonathan Goodhand, Afghanistan: Current Employment and Social-Economic Situations and Prospects. Geneva, International Labor Office, InFocus Program on Crisis Response and Reconstruction, Working Paper 8, 2002.

³⁸ See Pain Adam, Understanding Village Institutions: Case Studies on water management From Faryab and Saripul. (Draft) Kabul: Afghanistan Research and Evaluation Unit, February 2004.

³⁹ Focus Group Discussion, Lingar village Shura, Zandajan district, Herat, January 6, 2005.

bringing family cases that were related to spousal disputes; the rest ranged from property disputes to traffic offenses. Judge Gul Aagha, first deputy of the primary court in Enjil district, argued that Afghan women are not open in talking to male judges about their abusive relationship with their spouses. “If we had family courts with female judges sitting in it, I assure you we would have received way larger number of cases filed by women.”⁴⁰

It is also a routine of the primary courts to send certain civil cases to the local Jirga or Shura for Eslaah. Half of the village Jirga and Shura in Nangarhar, Logar, Herat, , Jawzjan, and Kabul receive cases from primary courts to resolve them at the local level. According to the focus group discussions, the local Jirga and Shura were able to resolve a good number of these cases, document their decisions, and send the cases back for closure at the government court level. This indicates that an *ad hoc* relationship between the primary court system and the local Jirga and Shura has been emerging as routine even while Afghan laws and judiciary officially do not recognize this relationship. “This month we have received four cases from the primary court, most of them dealt with property inheritance, and we were able to produce remedy and send the result to court for disclosure,” stated Abdul Jabaar, the head of the Linger village Shura in Herat.

⁴⁰ Interview with Judge Gul Aagha, first deputy of primary court in Enjil district, Herat, January 8, 2005.

APPENDIX 5: FINDINGS CONCERNING PROPERTY ISSUES

Property disputes constitute the single largest set of issues among both urban and rural populations. These disputes are the consequences of decades of war, and arise from large-scale migration, destruction of residential, farm, and grazing lands, forced occupation of private, community, and public lands, and the recent skyrocketing of property values.⁴¹ The subject of property and its affiliated rights and regulations in managing, purchasing, and contracting is dealt with in over 800 out of 2,416 articles of the Afghan Civil Code.⁴² Article 130, Ch. 7 of the 2004 constitution allows judges to follow a hierarchy of laws; if there is no provision in the constitution or statute, “the court shall issue a verdict in accordance with the fundamental principles of Hanafi jurisprudence of Islamic Sharia to secure justice in the best possible way.”⁴³ Under Article 2 of the 1977 Civil Code “if there is no provision either in the law or in Sharia then the courts may rely on customary law...provided the convention does not contradict the provisions of the law or principles of justice.”⁴⁴ As Professor Nassrullah Stankzai from Kabul University stated, “with all ambiguity of the Afghan codified laws, there are extensive systems of written law, but the problem is the means of transferring them into practice is very limited.”⁴⁵

Land Ownership

Traditionally, the majority of legal documents related to private or community ownership, the leasing and renting of property, and access to pastures and public land have been crafted within the informal system.⁴⁶ Nevertheless, Afghan governments have for some time established a system of property registration in order to develop a legal standard and expand the writ of the state from the center to the periphery. Serious steps in this direction were taken during President Daoud’s republican government, at which time the main objective was implementation of the law of Progressive Taxation in 1975.⁴⁷

The Afghan republican government was able to conduct land surveys and pass land registration laws and ratings that categorized all lands according to their size in order to generate revenue. Yet the laws and practices that were established by the republican government were annulled by the PDPA government in the 1980s. Instead, the government moved to impose large-scale land redistribution in order to break the economic source of power of the landlord social class. Registration of all lands became a “revolutionary duty” of all land-holding citizens of Afghanistan.⁴⁸ In 2000, the Taliban regime issued and implemented a number of religious decrees on land via their Islamic court system in the areas under their control.⁴⁹

In the post-Taliban era, a number of decrees concerning property rights, registration, and dispute resolution were issued by the newly established government. Within the Afghanistan National

⁴¹ See Liz Alden Wily, *Looking for Peace on the Pastures: Rural Land Relations in Afghanistan*, Afghanistan Research and Evaluation Unit, December 2004.

⁴² See Articles 1554-2416 of the Civil Law of the Republic of Afghanistan, Kabul, Afghanistan 1977.

⁴³ Article 130 Ch. 7, “The Constitution of the Islamic Republic of Afghanistan,” (Dari version) Kabul, Afghanistan, 2004, p. 46.

⁴⁴ Article 2, Articles 1554-2416 of the Civil Law of the Republic of Afghanistan, Kabul, Afghanistan 1977.

⁴⁵ Interview with Professor Nassrullah Stankzai, the director of the Civil Law Department of the Law and Political Science College of Kabul University, Kabul, January 15, 2005.

⁴⁶ See Patterson, M, *The Shiwa Pastures 1978-2003: Land Tenure Changes and Conflict in Northeastern Badakhshan*, Kabul: Afghanistan Research and Evaluation Unit, April 2004.

⁴⁷ Law on Progressive Taxation, the Law Concerning Land Survey and Registration of Settlement Survey 1355 (1976).

⁴⁸ Decree No. 8, Article 31, Land Reform of the Democratic Republic of Afghanistan, 1980.

⁴⁹ Decree No. 57, Islamic Emirate of Afghanistan, Ministry of Justice, Issue No. 795, 2000, Official Gazette, September 2000.

Development Framework, formed by the Afghan Assistance Coordinating Authority (AACA), most recent decrees reassert central jurisdiction and control.⁵⁰ An April 2003 decree emphasizes the right of the government over public lands: “Government properties that are being illegally occupied by persons because of their power and influence should be confiscated.”⁵¹ An estimated 86 per cent of the total land in all Afghanistan is owned by the state of Afghanistan.⁵² This makes the government the biggest landlord of Afghanistan, controlling more than two-thirds of the land, water, and all underground resources in the country. A 2004 decree declares, “properties that have been under the control of the State for more than 37 years shall be considered as real State property. Claims of people with respect to such property shall not be heard.”⁵³

Property Disputes

Disputes between government and private citizens and also between communities over access and control of the state owned properties are commonplace. Since the 1980s, a large percent of state owned property has been given or sold to those associated with factions within the central government by high ranking officials in Kabul and the provinces. The sale and distribution of state owned land is still continuing in parts of Afghanistan. A member of the Surkh Roud district Shura complained:

Currently one of the former Mujahideen leaders who came from Kabul is distributing significant plots of public land in *Ganda Chishma* to his local followers, former commanders, and fighters who are originally from Paghman district of Kabul. He receives Afs 30,000 for each plot in his private account while this land belongs to the state, and its profit belongs to the *Baitulmal* [public welfare]. What this leader does is Ghasb [forced confiscation], and it is *Haram* [forbidden] under *Shariat* [Sharia law] and it illegal under the *Qanoon* [legislated law]. We have many poor people in our district and they have priority in receiving land. We have officially complained to the governor, he promised us that he will stop this, but the sale and distribution of state owned land still continuing. The governor knows about it, and he knows it is state owned land, but he has been keeping quite, and closing his eyes to these illegal activities.⁵⁴

A similar trend was reported in other provinces including state owned properties around Kabul City. For instance, in Baraki Brak district of Logar, the Stankzai and Ahmedzai sub-ethnic Pashtun groups are in serious disputes over access to the state owned land. According to the Stankzai Jirga leaders, influential members of the Ahmedzai have been able to acquire official deeds of large portions of previously owned state owned land that was previously accessible to both Stankzai and Ahmedzai. Recently, the Ahmedzais converted the land into small plots and have been rapidly selling them to members of other ethnic groups including other sub-ethnic Pashtun groups. A Stankzai leader explained:

When we attempted to access the land, like we did for generations, they have blocked our access. As a result, a full blown armed clash took place between the two people that caused two dead and several wounded on our side, and God knows how many on the other side... We have complained to the government for several times in all levels district,

⁵⁰ See Afghan Assistance Coordination Authority, The National Development Framework, Government of Afghanistan, Kabul, April 2002.

⁵¹ Article 1 of Decree 362 of the head of the Transitional Government, Regarding the Illegal Occupation of Government Property, April 8, 2003

⁵² See Liz Alden Wily, Rural Land Conflict and Peace in Afghanistan, Afghanistan Research and Evaluation Unit, Kabul, February 2004.

⁵³ Decree No. 83, Decree of the Head of the Transitional Islamic State of Afghanistan with Regard to Properties, October 2004.

⁵⁴ Focus Group Discussion, Surkh Roud district Shura, Nangarhar, January 1, 2005.

province, and the capital, no one is willing to step forward and prevent another armed clash. We know some people in the government benefit and profit from this here in the province, otherwise who these people can sell the government's land openly and continuously. We are hoping Kabul interferes, so we can save the life of our men in another battle that may come soon. The government must reclaim its property and block access to both groups, or allow both to have fair access to this land.⁵⁵

These sorts of disputes over community and state owned land are becoming widespread throughout Afghanistan. Demographic changes as a result of population growth and large-scale migration and displacement have profoundly affected the local communities' relationships over land access. Patterson and Liz Wily have reported on a wide range of disputes over community and state owned land in northeastern Afghanistan among both *Kuchi* (nomad) groups and settler communities. Ethnic and sub-ethnic groups such as Uzbeks, Arabs, Shughnis, Ali Moghuls, and Pashtuns from the northern province of Faryab to Kunduz and Badakhshan are living in conflict over access to community and state owned grazing and farm land.⁵⁶ The pattern of central and provincial officials profiting from access to and sale of state properties have opened the door to widespread illegality. Although some of the land disputes have been settled among the local communities via the Jirga and Shura mechanism, large percentages of disputes still continue to cause tensions between communities and sub-ethnic groups.

Administrative Processes

Under the formal justice system, the *Huquqh* section (Law of Legal Rights) of the Ministry of Justice is designated to accept petitions regarding property disputes. In this process, a single or multiple plaintiffs file a form directly or via a lawful legal agent to this department in Kabul or in the provinces. The petition must be filed where defendant(s) live or where the property is located. The *Huquqh* Department officially requests the civilian police to collect the defendant and if he or she does not show up, the department issues three announcements/warnings, including one via public media. If the defendant still does not register, the department can make a decision in his absence based on the available documents. The *Huquqh* Department can play the role of mediator by using the process of Jirga to encourage both sides of a dispute to settle their cases even though it is permitted neither to apply any extra-legal principle nor to act as a court or judge in enforcing a decision upon any of the clients.⁵⁷ If disputants agree on a settlement with the mediation of the department it is up to them to register the result to a relevant government office. If the case is not settled, the department will send the case to a primary court.

Special Property Court

The Special Property Disputes Resolution Court was established under the aegis of the Supreme Court in August 2002. The mandate of the court is to address property disputes among "returned refugees in Afghanistan". Yet the increase in the number of cases and other difficulties led to a revision of its rules in November 2003.⁵⁸ As a result, the court began to operate on two fronts: handling cases in Kabul, and handling cases arriving from other provinces. The court that handles disputes from provinces may travel to any selected province to hear cases if the Chief Justice of the Supreme Court permits. Based on the mandates of the court, judges review only property disputes arising since 27 April 1978 (the date the

⁵⁵ Focus Group Discussion, Stankzai Jirga, in Baraki Brak district of Logar, January, 14, 2005.

⁵⁶ See Patterson, M, *The Shiwa Pastures 1978-2003...* (2004); Liz Alden Wily, *Looking for Peace on the Pastures...* (2004); De Weinger F, *Pastoral Vulnerability Study*, Kabul: AFSU/VAM Unit of the World Food Program, 2002; Adam Pain, *Livelihood under Stress in Faryab Province, northern Afghanistan, opportunities for Support*, A report to Save the Children (USA), Paksitan/Afghansitan Field Office, October 2001.

⁵⁷ Article 122, Ch. 7, Constitution of the Islamic Republic of Afghanistan, Kabul, Afghanistan, 2004.

⁵⁸ Article 1 of Decree 89 of the Head of the Transitional Islamic State of Afghanistan, Regarding the Creation of a Special Property Dispute Resolution Court, 30 November 2003.

PDPA seized power).⁵⁹ Property dispute cases may be finalized within a primary branch of the court or continue to go through appeals and up to the Revision Committee of Afghanistan's Supreme Court.⁶⁰ This Special Court was established for the urgent needs of the returning Afghan refugees whose properties were occupied or confiscated by previous governments, local commanders, and warlords. All the Afghan law enforcement agencies are required by law to implement the judgment of these courts. This is a fast-track system: the primary court must enter a decision within two months from the day of filing (extensions possible in special circumstances), and the appellate court within one month. The Special Court faces shortages of physical facilities, and of trained judges equal to the complexity of property disputes, particularly those that have been conveyed several times.⁶¹ Therefore, the primary courts of general jurisdiction remain congested with cases that include property, as well as family and commercial disputes, and traffic offenses.

Non-Governmental Methods and Processes

The data from Nangarhar, Logar, Herat, Jawzjan, and Kabul suggest that the Jirga remains the most popular process for resolving property disputes. A large number of property disputes, including conflicts over water rights, are settled in the informal justice system. Even cases that reach the government courts have often first been tried within the Jirga or Shura. Although the informal legal processes failed to produce satisfying results in these cases, there are also times that the primary court judges resend the cases for *Eslah* (informal satisfying settlement), especially if the dispute is among close family members such as brothers and sisters. The informal systems' inability to reach judgment often arises from the increasing complexity of the cases (multiple claims for ownership, lack of authenticity of customary legal documents, and lack of professional expertise and facilities in examining documents by the government). In addition, those who sit on a dispute resolution Jirga are not adequately aware of the laws, improved methods of legal inquiry, investigation, and adjudication relevant to property cases. Interference by warlords, local commanders, and powerful officials of government also hobbles the work of Jirga and Shura. This circumstance often causes the cases to bounce back and forth between the government courts and local Jirga.

Haji Hafizullah, the head of Kufon village Shura in Herat,:

I was not feeling well when one of our village residents appealed to me to attend a Jirga meeting to solve a family dispute, otherwise it would tear apart the family. After sunset I attended the meeting and we were able to solve the dispute, and see everyone happy at the end. I began walking back home—which was a farer distance—my condition had worsened. I had to stop every five minutes and I thought I won't make it to my house. I was worried that I would be eaten by wild animals and I would not receive an honorable burial. In addition, we receive lots of petitions from the court, and sometime it prevents us to do anything else. We are bit far from the city and government facilities; therefore, we have to handle most of legal arrangements for two villages.⁶²

A similar scenario exists in the Surkh Roud district Shura, where members complained about paying for transportation from their own pockets. Abdul Sattar Aagha, the head of the district Shura, talked about sitting in the court several days a week and using his private vehicle for transportation to attend meetings with the provincial Shura and the court, and mediation meetings. "Sometimes, a delegation of us has to go to a far distance village in order to investigate, review, and adjudicate a case, and all these costs," the head of a Shura stated.

⁵⁹ Article Six of Decree 89... (2003).

⁶⁰ Article Three of Decree 89... (2003).

⁶¹ See Mazurana, Nojumi, Stites, Human Security of Rural Afghans... (2004)

⁶² Focus Group Discussion with Kufon and Esfughon villages' Shura, Guzara district, Herat, January 7, 2005.

APPENDIX 6: FINDINGS CONCERNING SPECIAL SYSTEMS FOR REPATRIATED REFUGEES AND RETURNED IDPS

Since the establishment of a new government in December 2001, millions of Afghan refugees have returned home after years abroad. These returned refugees and thousands of Internally Displaced Persons (IDPs) had suffered significant loss of access to their property and access to farm and grazing land, and a significant number of them were unable to return to their villages and towns. Massive forced migration and dislocation during the Soviet invasion, civil war, and the Taliban regime forced millions to have no control over their property and maintain access to resources that traditionally they had access to. Furthermore, complete destruction of private and business property had erased established legal norms and boundaries, and this lack of demarcation has become a source of conflict within many neighborhoods. Forcible occupation of land by returned refugees and IDPs has become another major source of property dispute, which has compelled the Afghan central government to take special measures such as the establishment of special NRC processes (below), as well as reinforcing the need for more general measures such as the Special Property Court described above.

NRC Dispute Resolution Initiatives

The NRC is providing legal services to returned refugees and IDPs living within urban districts of Kabul and a few other provinces. The core focus of the NRC's legal services is on resolving local disputes, including property disputes. The NRC's trained judges and attorneys fully rely on the Jirga processes of the non-governmental system of rights and legal matters by utilizing community based resources in facilitating negotiation, mediation, and conflict resolution. To a certain extent, the NRC's methods of conflict resolution involve a legal support for disputants to settle their cases via the Afghan government court system. Practically, the NRC judges and attorneys do not play the third party role; instead they provide legal assistance to the Third Party Intervener, respected members of the disputants' community.⁶³

Once a client approaches an NRC ILAC, the appointed officers will review all available evidence and evaluate statutory and Sharia legal issues looking toward a remedy. They record case history, case development, and the nature of dispute, and once they take the case, it is registered. The NRC informs the defendant of the case, and explains to the parties the availability of two options: a) solving their dispute via the traditional process of Jirga; or b) bringing their case to a government and settling it in a court. The NRC informs disputants about the cost and consequences of solving the cases via the local forum of the informal system, compared with reaching resolution in a government court. If disputants agree to resolve their disputes via the Jirga process, the NRC asks each side to choose three trusted people to represent his or her side of the dispute in Jirga meetings. The NRC provides the required information to members of the Jirga that are chosen by each side as the Third Party Intervener, and eventually the process may develop into a situation in which the parties agree on *Eslaah* (peace building and conflict resolution) with the participation and presence of the disputants. Or, they may decide to apply the *Hakam* rule, in which trustees are empowered by the parties to make a binding decision in a session closed to the parties. From this point on, disputed parties may accept the final decision, or take the case to court.

The NRC sends a delegation of three judges and attorneys to observe the process and its outcome without having a right to vote. In this regard, most of the negotiation, bargaining, and decisions are made by the representatives of both sides of the dispute, and the NRC delegation contributes if legal and procedural clarification is needed. Through the Jirga system, the NRC has been able to develop a network of local

⁶³ Meeting with NRC's judges and attorneys, NRC No. 2nd Information Legal Assistance Center (ILAC), Kabul, December 27, 2004. Led by Director Sayyed Mohaiding Rahaie.

activists and respected individuals within city districts. In addition to playing the role of a Third Party Intervener, these local activists hold Jirga meetings in their homes. This local involvement among the urban population has resulted in using Jirga to solve 30 percent of the 317 legal disputes accepted by the NRC during the current year of the Afghan calendar, compared with only 10 percent that have been sent to the government courts.

United Nations High Commissioner for Refugees (UNHCR)

The United Nations High Commissioner for Refugees (UNHCR) has been the international body responsible for helping and facilitating volunteering repatriation and relocation of the IDPs. It is the lead agency for safe return and settlement of returned refugees and IDPs.⁶⁴ According to Abdul Aziz Rahju, Assistant Protection Officer, “the returned refugees and IDPs are facing the following multi-layer dilemma that prevents their safe return and settlement in their original towns and villages: a) They are faced with illegal occupation of their property and denial to access farms and grazing land; b) Forced labor of those who have returned back to their communities; c) Illegal taxation of the agricultural products and its transportation.”⁶⁵ These problems are often caused by commanders of local armed militia groups, as are obstacles to hundreds of refugees and IDPs from going back to their place of origin in Saripul, Balkh, Kapisa, Kunduze Jawzjan, Maimana, Zabul, Uruzgan, Nimrooz provinces.

The UNHCR has already helped establish forums for dialogue between representatives of the returned refugees and IDPs and the local armed militia leaders. Joined by the Afghan government, and officials from Provincial Reconstruction Teams (PRTs) of the International Security Assistance Force (ISAF), these efforts have relied extensively on Jirgas and Shuras.

One model is found in the UNHCR-facilitated Return Commission in Bamyan Province to solve disputes between different ethnic groups over the new returnees. UNHCR is also working to facilitate the establishment of a Consultative Group comprising local leaders to handle disputes in Bamyan, especially property disputes at the local level. In this regard, the UNHCR has utilized local non-governmental institutions, especially the processes of Jirga, to achieve mediation, arbitration, and consensus building. “It is based on our experiences in facilitating processes that employ local resources, i.e. vigorous participation of community and local leaders in resolving community based disputes...with all difficulties and complexity of wide range of disputes. I am personally convinced that community based models of dispute resolution that we previously have used in other parts of Afghanistan were effective,” said Hagju. UNHCR is also facilitating dispute resolution processes in areas such as Daikundi, which recently became a new province of Afghanistan without administrative and budgetary preparations, and therefore lacks almost everything, including infrastructure and buildings that are needed to function as a province.

⁶⁴ See “Housing and Property Restitution in the Context of the Return of Refugees and Internally Displaced Persons,” progress report of the Special Rapporteur, Paulo Sergio Pinheiro, Submitted in Accordance with Sub-Commission Resolution 2003/18, UN Doc. E/CN. 4/Sub.2.2004, 1 May 2004

⁶⁵ Interview with Abdul Aziz Rahju, UNHCR Assistant Protection Officer, Kabul, December 26, 2004.

APPENDIX 7: FINDINGS CONCERNING WOMEN'S RIGHTS AND ACCESS TO JUSTICE

Afghan women are often denied access to both the formal and informal justice systems..⁶⁶ Women do not have any direct access in approaching informal forums, instead presenting their cases via a male relative. Women are not allowed to join the membership of traditional local institutions, especially during dispute settlement. Influential women may participate in the traditional dispute settlement on an individual basis, but may rarely associate with men that are not family members. The fate of women's legal claims within the informal system depends on who represents their case. Respondents suggested that the majority of family disputes are still solved through the processes of Jirga.

The majority of respondents in Nangarhar, Logar, Herat, Balkh, Jawzjan, and Kabul reported that they settle most family disputes within their local family network. The main reason stated for this is that family matters are private and should be handled privately; approaching the local established Shura or government court makes a private matter public and this is something that people avoid. Since most of the government judges and law enforcement agencies, especially in the rural districts, are men, the local norms view them as *Naa-Mahram* (men other than family members that are not allowed to associate with women). The term *Naa-Mahram* is used both by men and women and enforces similar restrictions on both genders. In addition, years of war during which local armed groups took the law into their hands and sometimes violated the rights of the local communities by way of forced marriages, rapes and sexual assaults on women, girls and young boys has created an environment of fear of authority.⁶⁷

The transformation of local militia into the government law enforcement agencies and the appointment of members of armed political groups into the local government offices, especially in the rural districts, have negatively affected women's access to justice and has limited their capacity to enjoy their rights.⁶⁸ Since the local norms view women as the source of honor of a family, *Naamusdary* (upholding family honor) has been perceived as the responsibility of male members of a family.⁶⁹ The violation of family honor is considered the most serious crime by the local norms and its consequences can cause fatal retribution.⁷⁰ The culture of armed conflict has negatively affected gender relations, making men more protective, while isolating women's public participation and social space.⁷¹ Lack of access to justice has already disadvantaged Afghan women seriously.

Under the Afghan Civil Code, if a woman or a girl leaves her house without the consent of her husband or her father, the man could complain to the authority and the law enforcement agencies have the right to arrest that woman or girl on the basis of "running away from home," which is an offense. According to recent reports, there have been significant numbers of women in Afghan jails for this "crime." The rigidity of the local cultures, combined with the lack of access to formal or informal legal systems has stymied enjoyment of rights guaranteed in the new Afghan constitution. Judge Hakak, the director of the Afghan Independent Human Rights Commission (AIHR) in Herat, explained:

⁶⁶ See Amnesty International, Afghanistan: "No One Listens to us and No one Treats us as Human Beings": Justice Denied to Women, London: Amnesty International, October 2003.

⁶⁷ See Human Rights Watch, *Humanity Denied: Systematic Violations of Women's Rights in Afghanistan*, Vol. 13, No. 5, October 2001, New York: Human Rights Watch.

⁶⁸ See Mazurana, Nojumi, Stites, *Human Security of Rural Afghans...* (2004)

⁶⁹ Rubin Barnett R, *The Fragmentation of Afghanistan*, 2nd ed, (New Haven: Yale University Press, 2002), p. 24

⁷⁰ International Crisis Group, *Peacebuilding in Afghanistan*, ICG Asia Report #64, Kabul/Brussels, September 30, 2003.

⁷¹ See Moghadam Valentine M, *Modernizing Women: Gender and Social Changes in the Middle East*, 2nd ed, (Boulder: Lynne Rienner Publishers, 2003)

Limitation in enjoying their rights led hundreds of women to one of the most tragic era of Afghan women history. Hundreds of young women mutilate themselves by pouring ceresin over their body and ignite it with fire to escape domestic abuses, forced marriages, and violations of their rights. They did not have any consultative legal or psychological support and they could go nowhere to seek help or justice and grant their rights. It took lots of coordinated effort via Radio Sahar [a women local radio], AIHR and other organizations to improve the environment and reduce the number of self-mutilation of women in Herat.⁷²

The lack of women judges and family courts has been detrimental to women's access to justice, at least in the urban centers and their immediate rural districts. The data collected in this study suggests that the majority of judges, especially in primary courts, are supportive of the establishment of family courts or the membership of women judges in their courts. Judge Gul Agha, first deputy of the Enjil primary court explained:

Having women judges in our primary court system fits within our cultural requirements. Based on our cultural norms, women restrict them to talk to a man who is not a family member about their legal family and personal matters, or they are fearful of police, and retributive actions of their family members, accusing them for associating with strangers. We need to adopt the establishment of family courts served by women judges as it was adopted by the organization of judiciary during President Daoud. The existence of family court along to our primary courts or the availability of women judges within the current primary court system would enable our people to have greater access to justice.⁷³

Yet despite support from the majority of judges toward the employment of women judges in the primary courts in the urban centers and rural districts close to these centers, some were skeptical of such a development because of the inadequate salaries, office space, transportation, and basic office supplies they already face. A judge in Surkh Road stated that having women judges in the court system is a good idea, but given that the men cannot afford transportation cost and live in a local mosque, how could a women judge agree to work and survive in this depressing condition.

A head judge in a rural district's primary court in Herat who has attended a number of legal workshops in Kabul, including those on Human Rights, rejected the notion of equal rights for men and women before the law. He and his assistant judge have accused the "women's rights advocates" and the "human rights crowd" for corrupting women's minds as well as contributing to the rise of divorce cases. This head judge explained:

A while back a woman who married happily a couple years ago filed a divorce in my court. First, I tried to take disciplinary action against her husband and warned him to treat her with dignity and take care of her needs. The husband accepted, but the woman was stubborn and irrational. I ordered her to join her husband and go home; she rejected and continued to live with her parents. I threatened her that I will remove her custody over her 2 year-old boy if she disobeys my order; she was still rejecting and pushing for divorce. I finally, took her child from her and gave him to her husband in order to pressure her; she may change her mind and join her husband. But she did not show up in

⁷² Interview with Judge Hakak, the director of the Afghan Independent Human Rights Commission (AIHR), Herat, January 8, 2005.

⁷³ Interview with Judge Gul Agha, first deputy of the Enjil primary court, Herat, January 8, 2005.

my court again, and probably she had a heart made of stone to forget about her child. Now you know what I mean by corruption of women's mind.⁷⁴

Another judge that was approached supported women judges' service in the court system, but only in family and civil matters, because women as judges are not qualified for handling criminal cases. "In order to handle criminal cases you have to have strong attitude, and mind, women don't have these qualities, for instance, they never going to issue a capital punishment verdict."⁷⁵

According to Nassrullah Bayalai Aarsalai, director of AHF, the possibility of women's participation in public affairs, especially women's social affairs, is great in Nangarhar, but the infrastructure for such participation is highly limited. "For instance, we have 1500 registered women with AHF, but we couldn't develop any significant program to engage them in the betterment of their conditions because we did not have funds."⁷⁶ In Logar, Mohammed Sharif, director of the International Red Cross and the chief facilitator in establishing Community Development Councils (CDCs), lamented the severe shortage of educated personnel, especially women. However, he explained that the role of women in different districts can vary. For instance, he said, there is a woman activist in Mohammed Aaqgha district who has her doctorate degree. "She is a highly respected member of the district and is also the most active member of both men and women CDCs."⁷⁷

In Herat, women's community development councils (CDC) have been formed along with the men's councils throughout districts that are covered by the National Solidarity Program (NSP). Despite the fact that women's CDCs are the most active within the NSP throughout the country and their opinions and perspectives in initiating development projects have been influential, women still have difficulties when it comes to dispute resolution and access to justice. Aamena, the head of the women's community development council in Eshaq Suliman village found it difficult to maintain regular meetings of the women's CDC at the beginning. A member of the council explained:

At the beginning my husband was very suspicious and was not trusting me to participate in the meetings of the council, once I brought the discussion of building developmental projects for our village home and began to discuss with my husband, he could see that our activities are highly beneficiary to our families. Now, discussing community issues is a part of our regular discussion at home, he become use to and also try to help me to look at the projects from different perspectives.⁷⁸

Another member of the council added, "Both my husband and my father were questioning my participation at the beginning, he was telling me to go and learn something that can help your family economically. Once they knew that I'm learning how to develop a raw idea into a project proposal, they become encouraging."⁷⁹ Aamena, a highly respected woman in the community and a woman activist, complained about the extreme shortages of resources and infrastructure that could otherwise help them to bring their idea to practice:

We can involve all women members of our village in variety different projects that improve their health, hygiene, economic productivities, and their role in decision-making process within their facilities. Since we have established our women council, we were

⁷⁴ Interview with anonymous judges in a rural district in Herat, January 2005.

⁷⁵ Ibid.

⁷⁶ Interview with Nassrullah Bayalai Aarsalai, director of Abdul Haq Foundation (AFH), Jalalabad, Nangarhar, December 30, 2004.

⁷⁷ Interview with Mohammed Sharif, Director of IRC, Logar, January 16, 2005.

⁷⁸ Focus Group Discussion, Women's Community Development Council, Eshaq Suliman, Herat, January 10, 2005.

⁷⁹ Ibid.

able to form a collective action in organizing transportation for our girls. Even though, many of us are financially not well off, but our community pays for the cost of the transportation for our girls who attend high schools in the city, because we have only girls' primary school in the village. We are proud of our membership and serving our families, and we are thankful of our community leaders who support us wholeheartedly. We are hoping to establish girls' sport teams in our school where I'm serving as a teacher, and teach them how to become a good citizen and help their community in the future.⁸⁰

In village Jebrail, west of Herat City, men and women CDCs sit in a joint meeting, though in two separate groups on distinct sides of the council's meeting hall. Women members express their opinions on development projects and other community related issues. The women's council has a large number of educated women; the formation of CDCs has given them the added opportunity of having direct access to public information and has raised their level of awareness regarding their basic rights and responsibility.

⁸⁰ Interview with Aamena, the head of Eshaq Suliman women council, Herat, January 10, 2005.

APPENDIX 8: FINDINGS CONCERNING CRIMINAL LAW AND JURISDICTION

There have been problems in the formal court system with fundamental principles of procedural justice such as fair trials, the presumption of innocence or the prohibition against self-incrimination. There has been a high level of mistrust between the police and the courts; each side accuses the other of breaking the law. The local police have taken advantage of their unchecked power to either avoid enforcing order of courts or to prevent cases from reaching the courts.

The majority of respondents in Nangarhar, Logar, Herat, Jawzjan, and Kabul reported that most criminal offenses, especially murder in rural districts, are handled by Jirga and Shura. Often the executive branch of the government at the district level diverts murder cases from the government primary court and sends them to be solved by a local Jirga or Shura. For instance, members of the Shura district in Kalakan claim that they have investigated, negotiated, and resolved 16 murder cases. Haji Abdul Samad, a member of the district Shura and the head of Pir-e-Ghaib village, explained:

We know that a murder is itself a crime, but we are as concerned about its consequences, which would lead to more murders and crime [in retaliation]. Therefore members of the Shura and heads of villages do their best to resolve a murder in order to stop further bloodshed and the involvement of larger numbers of people. Respected members of the district Shura open a dialogue with the families of the offender and victim and encourage them to do not take any violent retribution act against the offender or his family. Once both sides are agreed to negotiate, we form meetings in a place of one of the negotiator [third party]. Most of our time spends on convincing the parties to peacefully end their animosity and once we achieve this difficult part, we call for a ceremony. We invite religious and local leaders, and government officials to ceremony and the party would state publicly their desire for a peaceful ending of the violent. We write their statement on a paper that we call it *Eslaah Naama* [peacemaking document], we ask the two sides to endorse, then all the influential people present in the ceremony endorse it, we register that to our record-book and give them a copy.⁸¹

There is no doubt that resolving bloody disputes such as murder at the district level would strengthen solidarity, cut short indefinite continuance of hostility, and prevent more crimes. However, unclear jurisdictional boundaries between the formal and informal systems remain a source of confusion. Properly speaking, the latter have no jurisdiction over criminal offenses, especially murder.

The majority of respondents in Nangarhar, Logar, Herat, Jawzjan, and Kabul reported that the majority of cases, both civil and criminal, never reach the government courts. In civil cases, people look to traditional justice systems because the courts may not exist, and if they do, there is a lack of trust within the courts. In criminal cases, bribes to the police ensure that certain cases never reach the court. Judges in a rural district of Nangarhar complained about police illegality. One judge explained:

A woman client of our court filed a petition against her brother who was denying inheritance right to her. We officially requested the district police to present the defendant to the court, but the police rejected our official request, and we repeated our official request, still the police ignored it. We couldn't do much, and the plaintiff filed a plea with the Afghan Independent Human Rights Commission office in Jalalabad, they send us a statement and we included it with another official request to the chief of the

⁸¹ Focus Group Discussion, Kalakan's district Shura, Kabul February 12, 2005.

police, but he did not bother and no one could do any justice to her, and it was not the first time.⁸²

The majority of respondents in Nangarhar, Logar, Herat, Jawzjan, and Kabul expressed a preference for the informal system. The main supporting argument was the fact that the locals know the norms, respect the actors, and are dealing with members of their communities who, in most cases, do not gain any profit by serving people via the processes of Jirga. Therefore, it is difficult to violate clients' rights and abuse them to the level that is happening by some members of judicial and law enforcement agencies. "The process of Jirga is the fairest system of conflict resolution and arranging legal matters that I have ever known," said a member of the Stankzai Jirga in Baraki Brak district of Logar. One of the Stankzai Jirga member explained further:

During years of war, with no government in place while the entire district were divided into different armed political groups, none of the military commanders—even those that their leaders were hostile and ordered them to fight against their opponents—have followed orders from Peshawar, and they maintained peace and respect. In addition, we have several different sub-ethnic Pashtun groups as well as non-Pashtun groups, including a village that is resided by Hazaras. All these good developments have happened because we had a Jirga, and respected the opinion of the Jirga.⁸³

Solving a murder case is a serious task that requires massive allocation and mobilization of local resources, i.e. respected community leaders, religious figures, and even the officials of the central government, in order to help the victim's family to offer forgiveness and avoid revenge killings. In addition, to convince a victim's family to offer forgiveness often involves a large number of both men and women offering apologies to the victim's family, and also a similar number of men and women offering forgiveness. Haji Hashim, a member of Stankzai Jirga explained:

In order to resolve a murder dispute, often number of respected community leaders began a negotiation process with victim family, and also with the offender's family in two completely separate tracks. Once they soften the victim's family, they organize a large group of people, around 15-20 men and 15-20 women from the offender's family and relatives. Men while the respected leaders, religious figures are leading the way toward a mosque where the victim family and their relatives are waiting. The men from offender families while holding a copy of Quran in their hand would sit in front of the victim family, condemn the murder, and ask for forgiveness. Women with the wives of the noted community members at the same time go to the victim's residence while holding copies of Quran over their heads, again condemn the murder incident and plea for forgiveness. It is often highly emotional process and people often cry. Once the victim family accept apologies and offer forgiveness, the offender's family and relative would allow themselves to have tea or food at the residence of the victim. In the mosque, the offender's family through a feast, and an Eslaah Naama would be formed, signed by all, and a copy may be sent to the government office in the district. Indeed, in convincing victim family for signing Eslaah Naama, there may have been financial arrangement too.⁸⁴

Handling criminal cases via the processes of Jirga with the consent of government officials or even the government court violates formal rules of jurisdiction. This raises concerns about the relationship between

⁸² Interview with anonymous judges, Jalalabad, Nangarhar, December 29, 2004.

⁸³ Focus Group Discussion, Rustam Khil village, Braki Brak district, Logar, January 14, 2005.

⁸⁴ Interview with Haji Hashim, a respected member of the Stankzai Jirga in Baraki Brak district of Logar, January 15, 2005.

written laws and the actual administration of justice. This murkiness of legal territory causes confusion within the local communities with regard to the respective responsibilities of government and informal institutions. The uncertainty of the legal space and responsibility between the two justice systems causes people to think of courts and the police as institutions that are made for arresting and putting people in jail rather organs to protect the legal rights of the citizens and serve justice. Therefore, once they compare and contrast the outcome of the police and court involvement in a case to that of the process of Jirga, they would prefer the second, despite the fact that the adjudicators within the informal system have not been educated or trained in any legal standards relevant to formal adjudication. Rather, the negotiators, arbitrators, and adjudicators often have an ambiguous understanding of the Afghan constitution, the rights and obligations of the citizens, the role of the state, the relations between executive, legislative, and judiciary branches of the government, and the responsibility of these institutions to serve the people. Furthermore, actors of the informal system each may have a different interpretation of the Sharia. However, they understand—to a higher degree—the nature of a dispute, the local involvement, the cost, and the consequences.

APPENDIX 9: FINDINGS CONCERNING *BAD*, *BADAL*, AND *ALISHUNI*

The principle of *Bad* is part of a customary process for solving bloody disputes such as murder committed by one member of a community against another member of the same or another community. In this case, *Bad* is a part of collective punishment that is imposed upon an offender's family, in which they are required to give away one of their young women or girls into "marriage" to a man from the victim's family without the woman or girl's consent. Additionally, members of the offender's family carry the burden of financial and other kinds of payment to the victim's family. Even though it is viewed as a collective punishment imposed on the offender's family, it is the young woman or girl that must live within a group of people that lost one of its members at the hands of her brother or father. Sometimes the man who has been nominated to marry a girl as the result of *Badal* is also an unwilling party to the arrangement. Indeed, the practice of *Bad* as part of a blood price has been a customary practice among communities living in remote areas of the country, where the system of governance is predominately based on especially the customary norms of *Pashtunwali* among the *Pashtun* sub-ethnic groups.

Badal is also a customary practice wherein the parties involved in a grave dispute agree to each give a young woman or girl in marriage with a man from the other family. Indeed, neither the woman nor the girl has consent in this process, and their treatment depends on the treatment of the other by the receiver families. In contrast to *Bad*, girls given into marriages as the result of *Badal* enjoy a greater flexibility in certain areas, e.g. visiting her family.

According to statutory law and *Sharia*, the permissible age for marriage for men is 18 and for women is 16.⁸⁵ The marriage of a girl under 16 requires consent of her father or the permission of a relevant court,⁸⁶ although Article 72 of the Afghan Civil Code forbids the marriage of girls under 15. Yet throughout Afghanistan child brides have become even more numerous over the past 30 years.

The data from Nangarhar, Logar, Herat, Jawzjan, and Kabul provinces illustrate that *Badal* is more common than *Bad*. Members of the Kalakan district Shura reject *Bad* as a tradition that has never been popular in the district. Instead, they use other rewards and punishments.⁸⁷ The Surkh Roud district Shura in Nangarhar considered *Bad* an un-Islamic practice that violates women's rights, even while it had reported its occurrence in parts of the district. In the Stankzai Jirga, some agreed that they practice *Bad*, while others denied it.⁸⁸

Abdul Sataar Aaqhaa, the head of district Shura in Surkh Roud, states that years of war and political violence have raised the number of killings that often follow an initial killing, which made the practice of *Bad* an alternative in dispute resolution throughout eastern Afghanistan. However, unintended consequences are also a consideration. "Last year the government head of the district requested us to mediate in a dispute that was caused by the practice of *Bad*," stated the head of the Surkh Shura. He explained:

There was murder in the past, and the victim family and offender's family agreed to resolve it by given Gul Chehra, a-five-grade school-girl to the family of the victim living in another district. The mother of the girl whom she was her only child rejected the deal

⁸⁵ Article 70, Part 6, the Civil Codes of the Islamic Republic of Afghanistan, Kabul, Afghanistan, November 2004.

⁸⁶ Ibid, Article 71, Part 6, the Civil Codes of the Islamic Republic of Afghanistan, Kabul, Afghanistan, November 2004.

⁸⁷ Focus Group Discussion, district Shura, Kalakan, Kabul, February 12, 2005.

⁸⁸ Focus Group Discussion, Stankzai Jirga, Braki Barak district, Logar, January 14, 2005

and calls it inhumane. She supported the fact that her daughter should continue going to school, and once she is old enough she can decide herself over this issue. But the father was disagreed, and excluded his wife's plea and finalized the *Bad* principle with the victim family. But he told his wife that the other side agreed to wait until their daughter Gul Chehra grows up enough and then they will come to collect her. After a while, the victim family who were not sure about the enforcement of the agreement approached Gul Chehra's family that they want to have the little girl for a day to show her to their relative. In reality, they wanted to make an announcement that she is their bride in order to prevent her given to another man. However, they kept the girl in their residence and did not allow her to return to her parents. According to Gul Chehra's father, once her mother became aware of what has happened to her daughter, she was beyond herself and hung herself from the ceiling of her room. The father has buried her body within the next two days without informing her family. Once the brother of this woman got the news, he filed a petition to the district primary court and accused the husband for killing his wife and fabrication of the story. The Woleswal [government's head of district] and the court that found the case highly sensitive and may cause further bloodshed, requested the district Shura to send a delegation to investigate, and see if they can solve the conflict. We send a delegation, and we could not find any evidence to prove that the man has killed his wife. However, we imposed a punishment based on *Haq-ul-Udd* on the husband to pay his wife's brother Af\$5000, and a sheep because he failed to inform them before burying his wife's body. We also made sure that Gul Chehra would come to visit her father anytime.⁸⁹

Afghan civil codes and Sharia prohibit *Bad* and *Badal*. In Sharia the consent of a woman entering into marriage is required. A *Wakil* (legal representative) must ask the woman three times and hear her consent three times before *Nekaah* (permission to lawfully become husband and wife). In the informal justice system the focus is more on ending violence between families and bringing peace to their community.

Another customary practice that is widely applied throughout Afghanistan among urban and rural populations is *Alishuni*, or the engagement of young girls and boys before they reach the permissible age of marriage.⁹⁰ *Alishuni* can take place right after birth, during childhood, or throughout the teenage years of girls and boys. The rationale for *Alishuni* is to avoid "bride price," which is often way over the limit of *Mahar* (dowry) permissible under Sharia or the civil code. The bride price often either prevents many young men from marrying or places them in long-term debt. Despite 50 years of central government attempts to regulate bride price, almost all attempts have proven unsuccessful.⁹¹

The data from Nangarhar, Logar, Herat, Jawzjan, and Kabul shows that the practice of *Alishuni* has become a serious source of dispute among local communities both within the urban centers and the rural districts. Since the whole notion of *Alishuni* and its widespread practice fall within the realm of the customary norms of the informal system, people use the *Jirga* mechanism to resolve related disputes. Accordingly, the Afghan primary courts find *Alishuni* something that should be resolved at the local level via the mechanism of *Eslaah*, and thus they often refer *Alishuni* cases to the local *Jirga* and Shura in order to be resolved. Aaqha Aziz Ahmed, the head of Kunjan village in Herat, explained:

Two families were named their boys and girls for *Alishuni* when they were child, once the time of marriage came, one of the girls rejected to marry the boy that the families

⁸⁹ Interview with Abdul Sattar Aaqhaa, the head of the district Shura, Surkh Roud district, Nangarhar, January 1, 2005.

⁹⁰ *Alishuni* is also variously described in various parts of Afghanistan: sometimes *Badal*, sometimes *Mukhi*.

⁹¹ See Kamali Mohammed Hashim, *Law in Afghanistan: A study of the Constitution, Matrimonial Law, and the Judiciary* (Leiden: E.J. Brill Publishing, 1985).

agreed while the other girls was happy with that selection. Since the boy's family has already paid some cash as gift or advanced dowry, they sued girl's family at the primary court. The primary court has sent the case to our village Shura, we called a meeting and suggested the girl's family to return the cash back to the boy's family, and that was the end of the dispute.⁹²

Some of the villages Shuras have regulated the marrying age for girls to Kabarat (post-puberty), and she must have a legal representative to declare her consent openly in front of families. Abdul Humid, the head of a village Shura in Herat, explained:

The practice of Alishuni still going on in our village, but once there are disputes, especially if the girls don't want to marry the boy she was named for, we solve that by respecting her plea. Only in the past month we had two cases that girls did not wanted to marry the boys that were chosen for them, we respected and resolved both cases peacefully. Our village Shura solves most of the cases and people don't go to the government courts.⁹³

According to Judge Suraya Ahmedyar, Commissioner of the Afghan Independent Human Rights Commission, Bad, Badal, and Alishuni cause as many disputes as they settle.⁹⁴ The common occurrence of Alishuni in areas like Saripul and other provinces of northern Afghanistan have suppressed the voice Afghan law has nominally given young women. In some areas the absolute majority of marriages are based on Alishuni and the families are forcing their boys and especially their girls to stick to agreements, despite the fact that this often causes serious marital problems and disputes between families.

⁹² Interview with Aaqha Aziz Ahmed, the head of Kunjan village, Enjil district, Herat, January 7, 2005

⁹³ Interview with Abdul Hamid, the head of Qhala Reeg village Shura in Zandajan district, Herat, January, 5, 2005.

⁹⁴ Interview with Juge Suraya Ahmedyar, Commissioner of the Afghan Independent Human Rights Commission, Kabul, December 26, 2005.

APPENDIX 10: FINDINGS CONCERNING PUBLIC AWARENESS, ACCESS TO JUSTICE, AND THE RULE OF LAW

The public has extremely limited awareness of basic principles of the rules and procedures governing the operations of, and limiting the authority of, government agencies such as police, the army, the court, and prosecutors, resulting in abuse of authority. For example, an old man seeking to file a petition on a property dispute found that “The head of the district rejected the petition and accused the old man of lying. When the man insisted on his claim, the head of district ordered the police chief to put him in jail until changes his mind,” reported an eye witness.⁹⁵

A judge in a rural district of Herat criticized the lack of respect for legal space and responsibility, especially as pertaining to law enforcement agencies. He explained:

We don't have a constitutional based law and legal guidance to arrest and stop men and women because they are sitting in the same vehicle or seen in public together. The police viewed a man and women traveling on a road in the district, ordered them to stop, the men avoided police's order and the police opened fire on the car and wounded the women. They brought the women to the hospital, and put the men in police detention, the man and women were engaged and in the process of getting married, and they were doing nothing illegal. People are afraid of armed people in areas out of the city, especially if they are with female members of their family. But they have to pay the burden of medical expenses, pain, and psychological trauma, and men spending several days in jail, I think it is not right.⁹⁶

The lack of legal awareness at the public level is becoming more and more evident within Afghan society, and requires serious commitment and funding. Hullah Khatibi, Executive Director of Women Activities and Social Service Association (WASA), who has been a frontline activist for the improvement of civil society in Afghanistan, especially in the western region, commented regarding the shortage of resources:

With other activists for improvement of the condition of women as well as the improvement of civil society were facing tremendous challenges in the last four years. We have formed an alliance of activists in order to provide public awareness to our community, especially preventing young women from committing suicide by pouring ceresin over their body and set it fire. Still, our resources are way smaller than the local demands. The donors need to pay attention in the improvement of civil society because it would be the most productive vehicle for public awareness. People are victimized because they are not aware of the rights that the constitution has granted them, government offices make mistakes because there is no public monitoring system over their actions, and a peaceful and democratic Afghanistan can be built once our people could enjoy a healthy and lawful public space.⁹⁷

⁹⁵ Focus group discussion, Kalakan district, Kabul, February 12, 2005

⁹⁶ Interview with anonymous judge in a rural district in Herat, January 10, 2005.

⁹⁷ Interview with Hullah Khatibi, Executive Director of Women Activities and Social Service Association (WASA), Herat, Afghanistan, January 12, 2005.

APPENDIX 11: THE EVOLUTION OF SHURA AND JIRGA IN MODERN AFGHANISTAN

The term Jirga is used predominantly by Pashtun communities throughout the country.⁹⁸ Non-Pashtun communities often use the term Shura, which has a similar meaning. Both signify a council to make decisions on a wide range of political, legal, social and quasi-legal matters. There are no written norms or principles for establishing a Jirga or Shura in Afghanistan and its formation is based on the local requirements and the agreement of the participants. The informal nature of these institutions renders them highly susceptible to evolving social and political developments. High level of changeability in many aspects of the non-governmental legal practices has been vivid in recent decades, especially during the massive political mobilization of the 1970s-1990s. In this regard, “what was customary in the 1960s may not be customary today.”⁹⁹

Jirga and Shura Until 2001

1. Before the 1970s: The pre-1970s institutional structure comprised two identical models: the Pashtun tribal Jirga and non-Pashtun Shura, in particular among Uzbeks and Hazaras. The system relied predominantly on customary law, such as Pashtunwali, which was widely practiced among Pashtun tribal groups, especially the Kuchian (nomads).¹⁰⁰ The process of Jirga was also common among the semi-tribal Pashtun communities, who applied revised local variants of Pashtunwali. The Shura model while similar in institutional structure, offered some differences. Depending on its location and the local demographic mix, it might be influenced to a greater or lesser extent by Pashtunwali, but otherwise relied on other local customary codes.¹⁰¹ Pashtun Jirga often adjudicated criminal cases such as murder, while a Shura often stayed away from murder cases. A Shura may convene upon the request of the perpetrator’s family to mediate in encouraging and convincing the victim’s family to withdraw charges from the government court system. In this case, the intervention of Shura could cause a significant reduction in charges and the duration of the imprisonment.¹⁰² It also offered a means for reducing the burden on caseloads in the court system.

2. Soviet Occupation, PDPA government and the Mujahideen, 1979-1992: In the 1980s, the Jirga and Shura became more institutionalized by the Mujahideen groups as well as by the armed militia supporting the pro-Soviet central government. This process directed local communities into a new system of governance upon which community leaders formed a local institution that had fixed membership and regular meetings. There was also limitation of the legal authority of both Jirga and Shura in the mid 1980s. The Mujahideen armed political groups and major military commanders established separate courts to handle all legal matters, especially criminal matters, including captured government soldiers, security forces, and pro-government political activists. Sometimes, they tried suspects for spying or

⁹⁸ See Wardak Ali, “Jirga: Power and Traditional Conflict Resolution in Afghanistan” in John Jonathan Walter (ed.), *Law after Ground Zero* (London: Gavendish, 2002b).

⁹⁹ Alden Wily Liz, *Looking for Peace on the Pastures: Rural land Relations in Afghanistan*, Afghanistan Research and Evaluation Unit (AREU), December 2004, p. 29.

¹⁰⁰ See Barfield J. Thomas, *Nomadic Pastoralists in Afghanistan: Reconstruction of the Pastoral Economy*, Boston University Press, April 2004.

¹⁰¹ See Khuram Karim, *The Customary Laws of Afghanistan*, International Legal Foundation, September 2004.

¹⁰² See M. Nazif Shahrani, ‘Islam in Afghanistan and Turkistan in the Modern Period in Turko-Persian Historical perspective,’ ed. by Robert Canfield, (New York: Cambridge University Press, 1991).

treason, and enforced capital punishment for crimes against “religion and the Muslim nation of Afghanistan.”¹⁰³

Similar attempts were made on the side of the Afghan government, especially during Najib’s government (1985-1992), to ward off Mujahideen threats against the government. Although the Jirga and Shura established by Mujahideen groups and those by the pro-government militia had an identical political motivation in mobilizing political resources for the sake of military victory, the sources of law in Mujahideen courts were based solely on the interpretation of Sharia law that was often applied by individuals with a background in Islamic theology, while the government courts applied statutory secular law. In the government controlled areas, many legal cases were those of convicted political prisoners who were sentenced to death for the “crime against the Afghan state and revolution.”¹⁰⁴ The mechanism of Jirga and Shura as a process became a substitute for the absence of a functioning government court system, particularly in matters such as family law, economic contracts, financial transactions, and sale and purchase of property.

3. Mujahideen Government, 1992-1996: In the post-PDPA period of governments led by various combinations of Mujahideen forces after 1992, and especially during the leadership of Burhanadin Rabbani, the state took an active role in establishing a national system of Shura, so labeled, operating in close coordination with the government. This development institutionalized the idea of Shura that was formulated during the 1980s in the Mujahideen controlled areas.. Under this national system of Shura, armed political groups and local commanders transformed the already established local Shura into this new nationally oriented structure that was included within the draft of the constitution. The core idea of this system was geared toward large-scale political mobilization for the support of the central government. Toward this end, most of the political armed groups and local commanders integrated their own consultative bodies into this government led system at the village, district, and provincial levels. These Shura coordinated to a degree with government courts.¹⁰⁵

4. The Taliban, 1996-2001: The Taliban, considering the term Jirga un-Islamic, continued to use the Arabic term Shura. They declared Sharia the law of the state, the Islamic Emirate of Afghanistan (IEA). They also declared the state as the highest authority of the land with a monopoly over all legal arrangements, especially criminal cases. The IEA adopted the Mujahideen government’s model of a government-led national Shura system. Government had a strong hand in selection of Shura leadership at the village, district, and provincial levels. A formal network of clergy (mullah) was established in tandem with this system, and the village Shura led by clerics. Each Shura leader was enrolled on the government payroll and authorized to select other members of the village Shura. At the district and provincial levels, members of each Shura selected the head of their Shura while the Taliban *Wali* (governor) or *Woleswal* (head of district) reserved the right of acceptance or removal. Practically, the Shura system became an integrated part of the government structure, working in conjunction with the Taliban intelligence toward the implementation of their religio-political verdicts, the reporting of “un-Islamic” behaviors, the collection of taxes, and military recruitment.

The Taliban Shura also became an instrument of political intelligence and moral censorship, giving rise to some conflict between the traditional and the contemporary political impulses in local bodies.¹⁰⁶ This development also affected the secular customary norms of Pashtunwali among the Pashtun tribal groups, especially in southern Afghanistan, where thousands of youngsters on both sides of the border with

¹⁰³ See Nojumi Neamatollah, *The Rise of the Taliban in Afghanistan: Mass Mobilization, Civil War and the Future of the Region*, (New York: Plagrave Press, 2002).

¹⁰⁴ Ibid.

¹⁰⁵ See Rubin, R Barnett, *The Fragmentation of Afghanistan: State Formation and Collapse in the International system* (New Haven: Yale University Press, 1995).

¹⁰⁶ See Rashid Ahmed, *Taliban* (New Haven: Yale University Press, 2000).

Pakistan were recruited into religious seminaries and indoctrinated in the Taliban's interpretation of Islam, state, and politics. During schooling and after graduation, these large numbers of students carried what they had learned to their town and villages in close cooperation with the status quo. This constant systematic reinforcement throughout villages and towns destabilized the more plural and evolutionary legal regime that had long functioned with only minimal interference by the central government. Nonetheless, a system of informal adjudication outside of this government sponsored system continued to function throughout the country, particularly in the areas of economic and financial activities that relied even more on more pragmatic norms than allowed for by the Taliban's extreme interpretation of Sharia. This included large scale transactions, among them *Hawala*.

Post-Taliban Jirga and Shura System 2001-2005

The downfall of the Taliban led initially to chaos in the legal system. What was left of the local administration of the government was reorganized by the local power-holders, i.e. war lords, armed political groups, and local commanders. These local power-holders appointed their supporters to adjudicatory functions, regardless of lack of professional education and training. The recovery of Afghanistan appeared as a challenging task and it became a donor-led stability program. A March 2004 study by the United States Institute of Peace (USIP) summed up the situation thus:

The discontinuity of regimes over the last quarter of century has resulted in a patchwork of differing and overlapping laws, elements of different types of legal systems, and an incoherent collection of law enforcement and military structures. Provincial governors, militia commanders, police chiefs, and other power brokers now exercise control through fear and intimidation, and through manipulation of the traditional shuras (village councils).¹⁰⁷

The predominance of armed power in the political environment undercut the rule of law.¹⁰⁸ A functioning judiciary remains a far prospect Afghans, and the system is plagued by weaknesses, shortage of funding, human resources, and widespread corruption. The crisis of government institutions has led people to rely even more than before on the informal system.

The Ministry of Justice, the Supreme Court, and the Attorney General's Office are now fairly functional, equitable and efficient. A series of official initiatives has sought to simultaneously serve the objectives of local demands for "fairness", community empowerment, delivery of prompt and transparent justice, international insistence on human rights protection, and the establishment of government authority¹⁰⁹. These include:

1. Shura-e-Ulama (Council of Clergies and Religious Scholars): There has been a tradition of an organized association of *Ulama* (religious scholars) in Afghanistan. During the monarchic system of government, the central government had officially established the Jamiat-al-Ulama (Society of Religious Scholars) who also served as jurists and Qadi (judge) in the legal system. This was similar to the systems that existed in Turkey, Egypt, and Iran, where the ruling elite desired the approval of a group of leading religious scholars for their public policies.¹¹⁰ Members of this association were on the government's payroll and had access to the ruling elite and royal family. The term Shura-e-Ulama was introduced by the Afghan Mujahideen groups based in Peshawar, Pakistan. This reflected a more active political presence

¹⁰⁷ "Establishing the Rule of Law in Afghanistan," Special Report 117, United States Institute of Peace, March 2004, p. 3 www.usip.org

¹⁰⁸ See "Amnesty International, Afghanistan Restoring the Rule of Law, London, August 2003.

¹⁰⁹ The Provincial and District Shura, which are political institutions, representative in the broad sense of the term, are not discussed here in the context of an assessment of informal local adjudication.

¹¹⁰ See Oslen Asta, *Islam and Politics in Afghanistan* (Curzon: Surrey Press, 1995)

among refugee populations. In the Mujahideen controlled areas inside Afghanistan, the Shura-e-Ulama network became the main official body for handling religious and legal affairs. In 1996, the Taliban government institutionalized and codified the Shura-e-Ulama on a national basis by appointing members of the Afghan clergy into ministerial, governorship, and military positions.¹¹¹

The Shura-e-Ulama network has lost much political ground in post-Taliban Afghanistan, although Ulama Councils continue to function, and to complain (as did those in districts of Herat, and Nangarhar) about lack of financial support from the government and loss of presumptive leadership in Shura and Jirga. The Karzai administration has supported the formation of Shura-e-Ulama, and his government has integrated leading members of the clergy into the government as individuals rather than collectively as an organ of the government.

There have been attempts by the Afghan Supreme Court Chief Justice Shinwari, to reorganize the Afghan clergy network and establish an active national Shura-e-Ulama. According to a 17 September 2003 report in *Nan*, a Jalalabad newspaper, the Chief Justice stated that President Karzai had approved the establishment of a 2,600-member Shura-e-Ulama to contest enemy propaganda and preach Islam. According to the Chief Justice, “each province will have an 80-member Shura-e-Ulama in order to support the Karzai administration.”¹¹² However, the government has not been pro-active on this front, and members of Shura-e-Ulama in Herat, Guzara district, have stated that they have financial and logistic difficulties in convening their regular meetings and engaging in public affairs (political activities). However, they are busier with serving the local community through leading prayers, teaching primary religious principles to children, and sometimes working as teachers in the government funded schools.¹¹³ In Baraki Brak district, clergy are working in conjunction with the activities of NGOs, and some are helping in implementation of the government-led National Solidarity Program.¹¹⁴

2. Ethnic Jirga and Shura System: The growing public resentment toward armed groups and government corruption have led public opinion to seek¹¹⁵ which has resulted in the reemergence of ethnic bodies. One example is in Paktia and, according to the Tufts University Study, one of the contributing factors in this reemergence in Paktia is the fact that local tribal groups have moved to bring the situation under their control and build a supervisory mechanism in order to subdue the armed militia commanders. These Jirgas are also suspicious of the Afghan government and are in favor of their communal autonomy in to establish harmony and prevent killing.¹¹⁶ In Logar, the ethnic Jirga was the cornerstone of local solidarity throughout the 1980s and 1990s.

3. Shura-e-Inkashafi Qarya (Community Development Councils, CDC): Recently launched by the National Solidarity Program (NSP) of the Ministry of the Rural Rehabilitation and Development, in furtherance of the NSP’s objectives (described as follows in the NSP Manual):

The goal of the NSP is to reduce poverty through empowering communities with regard to improved governance, and social, human, and economic capital. The objectives of the program are to: (1) lay the foundations for a strengthening of community level

¹¹¹ See Nojumi Neamatollah, *The Rise of the Taliban...* (2002)

¹¹² “Council of Ulama to ‘Fight Enemy Propaganda’ in Afghanistan,” Interview with Afghan Chief Justice, Mawlawi Fazl Hadi Shinwari, *Nan*, September 17, 2003.

¹¹³ Interview with Mullah Abdullah, Gu zara District, Herat, January 5, 2005.

¹¹⁴ Interview with Mawlawi Samiaullah, Baraki Brak district, Logar, January 16, 2005.

¹¹⁵ “Views on the Afghanistan and Justice Sector: An Assessment of Citizens Opinions and Knowledge Regarding Justice and Law in Afghanistan,” *Afghanistan Governance and Legal Reform*, July 2004.

¹¹⁶ See Mazurana Dyan, Nojumi Neamat, Stites Elizabeth, “the Human Security of Rural Afghans 2002-2003,” (June 2004).

governance and to (2) support community-managed sub-projects comprising reconstruction and development that improve the access of rural communities to social and productive infrastructure and services.

The establishment of CDCs has created a new wave of self-remobilization of village communities in areas that have been selected as field study sites for this study. Focus group discussions and interviews of Afghan villagers suggest that these communities have been able to engage in a process of self-governance, discuss their community problems and build consensus over development projects. “Establishing a CDC comprises 18 steps and takes about 4 months during which teams of social workers, both men and women, coordinators, and technicians are working closely with the local community to understand, learn, and fully participate in a totally free election.”¹¹⁷ The formation and expansion of CDCs is weakening the system of “political Shura” as well as ethnic boundaries because its composition is geographically based.

The establishment of CDCs in Guzara, Enjil, and Zanda Jan districts of Herat has already dismantled the Shura-e-Hambastagi-e-Islami supported by former governor Ismail Khan.¹¹⁸ Many members of Shura-e-Islami-e-Hambastagi have now been elected during local elections as members of the newly established CDCs. These elected individuals are those that local residents could trust to be honest in project management, financial and banking matters, and required purchases of needed items for the projects, and must report back to the members and community. According to the focus group discussion with members of the CDCs in Herat, former members of the Shura-e-Hmabastagi-e-Islami as well as provincial government officials were not happy with people’s positive participation in the NSP program and the establishment of CDCs. They reacted by causing problems, distributing propaganda, and intimidating locals and even members of the local clergy network. Shura-e-Ulama publicly announced the suspensions of these former members.

In Nangarhar province, the CDCs directly clashed with a vast network of Shura-e-Mashwarati-e-Nangarhar that was established by the Abdul Haq Foundation (AHF) and supported by Governor Din Muhammad; this struggle is ongoing. In Logar province, the CDCs are already making headway even while people in general are suspicious of government activities. According to the focus group discussions here though, the traditional informal system has not been displaced by the CDCs, as it has in Heart. The legal arrangements are handled via the local processes at the village level. Membership in these local processes of Jirga depends on the nature of the cases. In most cases, people approach respected village leaders; in Rustam Khil village of Baraki Brak district, for instance, it is Mawlawi Lalajan that often heads the local disputes within the village. If they have a dispute that involves large group of people or more than one village, they may also ask a popular mediator like Malik Shir Khan to participate.

In principle a CDC comprises two equal chambers, male and female. For the first time in Afghan history, the CDCs are organizing women Shura throughout Afghanistan. However, the establishment of these Shura is not progressing in different parts of the country equally. The rate of women’s activities was the highest in Herat and the lowest in Logar. In the Jabrail village of the Enjil district of Herat, both men and women Shura have joint sessions every 15 days; in these sessions, women can express and defend their opinions over the selection of developmental projects and community issues. In the Ishaq Sulaiman village of Enjil district, women form their Shura sessions on a regular basis even though their husbands may resent their public activities. In most cases, women’s support for projects like public bathhouses and girls’ schools has overtaken men’s interests in building roads and electricity grids. In contrast, male communities in parts of Logar have predominantly rejected the formation of women Shura and the IRC,

¹¹⁷ Interview with Engineer Najia, NSP Program officer, Ministry of Rural Rehabilitation and Development (MRRD), Kabul, December 26, 2004.

¹¹⁸ Focus Group Discussion with members of the Shura-e-Hambastagi-e-Islami in Guzara and Enjil, Herat, January 5, 2005.

the implementing agency of the NSP, was unable to convince them otherwise. This has made the women's role within the establishment of the CDCs marginal.¹¹⁹

4. Shura-e-Naahia (Urban District Council): Afghan towns and cities have a long-standing tradition of Shura-e-Mahal (sub-district council), wherein most of a family's legal matters, including disputes, are resolved. Afghan cities are divided into Naahia ha (districts), and each district is divided into several Mahalla or Mahal (sub-districts). Each Mahalla considers itself a community unit, often with its own mosque and a Shura process of respected individual from both public and private sectors. Local religious leaders as well as the educated elite and intellectuals are highly active in building a strong sense of community. The active engagement of the elite helps the community to maintain an atmosphere of communal charity toward members that are economically disadvantaged, as well as solidarity and support for other communal-based public services. The Shura often meets in a local mosque or at the residence of a respected community leader. In the case of a dispute resolution, it follows a path similar to that of village Jirga, convening in a neutral place, often the residence of the third party intervener. Each city sub-district has a representative that is directly engaged with the Mayor's office over any local matters that require registration in a government office.

Recently, the Cultural Foundation (CF), in conjunction with UN-HABITAT's Civil Society Empowerment Program, has received a significant grant from the European Community toward the support of civil society in Afghanistan.¹²⁰ The CF in a partnership with Bunyaad-e-Jaame-ah-e-Medani-e-Afghanistan (Foundation for Afghan Civil Society), based in Kabul, have supported the formation of highly active District Councils in 6th, 7th, and 8th districts of Kabul city. Although the scope of this is much broader than just dispute resolution, as with almost all Shura, "Since dispute resolution is an area where local communities pacify relational contradictions, launching programs that achieve this would greatly contribute to the common good of a community."¹²¹ The CF/UN-HABITAT with the European Community funds are working to expand their activities to other provinces of Afghanistan.

In the early 1990s, UN-HABITAT, with the support of the UNDP, launched an extensive civil society empowerment in Mazar-e-Sharif, the capital of Balkh province. They helped the local residents form a district Shura system throughout the city, which received overwhelmingly popular support among the local residents. Through this Shura system, city district representatives formed a city-wide Shura which included participants representing each city district. While these district Shura performed many civic functions, such as health awareness, clean and safe neighborhoods, vocational training for women, computer classes, sport teams, and art and theater groups,¹²² most relevant to this study is that they engaged in conflict resolution among the local residents, and that this process has been active in the post Taliban era. Also of note is the Women's Shura-Community Development Program in Faizabad, the capital of Badakhshan, in the early 1990s. With UNDP and UNOPS support, women Shura mobilized significant numbers of women in the Faizbad and rural districts around the town, though this process has slowed in recent years.¹²³

The rapid increase of population in Afghan urban centers, especially in major cities such as Kabul, Herat, Kandahar, Jalalabad, Mazar-e-Sharif, and Badakhshan, has brought unprecedented ethnic, linguistic and religious diversity. This new urban population growth is the result of rural-urban migration for economic and security reasons. Returning refugees have often remain in cities because they have undergone

¹¹⁹ Focus Group Discussion, Babukai Village CDC members, Baraki Barak district, Logar, January 16, 2005.

¹²⁰ Interview with Farid Bahman, Technical Advisor, Civil Society Empowerment Program, UN-HABITAT, Kabul, January 18, 2005.

¹²¹ Ibid.

¹²² See Mazurana, Dyan, Neamat Nojumi, Elizabeth Stites, "Human Security of the Rural Afghans" (2004).

¹²³ "Badakhshan" SMU Area Report, the Strategic Monitoring Unit Afghanistan, UNDP, May 2001, p. 17.

occupational transformation from rural to urban in the course of exile, and because they fear poor security conditions and are apprehensive about lack of economic opportunities in their town and villages of origin.

Because this rapid urbanization is taking place without benefit of national or provincial planning, the Afghan government is unable to serve the needs of this fast growing population, and the city level informal systems assume great importance. Arranging legal matters and resolving dispute within neighborhood communities (Mahala) and district remains highly acceptable to local residents. City Mahal (sub-district) are connected to specific mosque/s, while each Nahia (city district) has a representative to the government. These representatives are highly active in dispute resolution within their communities. Urban District Councils operating as Jirga or Shura can help urban communities resolve disputes and form contracts without having to navigate the *arcana* and other bureaucratic obstacles of central government institutions.

APPENDIX 12: REPRESENTATIVE TRANSCRIPT SHOWING LIMITS OF FORMAL JUSTICE

Case Number 7

Name: Parwin daughter of Niaz Gul

Resident: Nuqrak village, Surkh Roud district of Nangarhar

My father and his only sister [her aunt] inherited 5 jaribs of farmland and a Qala [residential compound]; once my father passed away, I and my aunt became the owner of the property. We have happily done Sharai Taraka [establishing ownership over inheritance in accordance with Islamic legal traditions]. Since my aunt was aged and could not take care of the property, she agreed to sell her portion in public to me and my husband and we paid her cash publicly and we have all the documents. Soon after the Taliban regime, a strange man, Baba Jan son of Abdul Sataar along with 16 armed men came to our property and said that he is ordered to establish two military posts in order to protect the underground historical heritage of Shashpar area. Once we complained that it is our private property, they began beating me and my husband. Baba Jan with local militia commanders established two military check points and destroyed our familial burial that was holy to us. They forced me and my husband to serve them and provide them food. They began cutting down our trees and every time we complained and asked them why they offended us and beat us violently. Finally they cut down around 100 of our trees and they looted all the results of our harvest. I have ended to be heart severely for several times and as a result I have to seek medication. I kept my medical records, copy of all diagnoses and prescriptions. One night my husband who was wounded from beatings by these militias cried and told me that he is failed to protect his family's honor, and he is ashamed, he was just disappeared at that night and never returned home.

I had no other option rather than come to the Woleswaly [government office in the district] to file complaint against Baba Jan and the armed militia. The head of district rejected my petition, when I insisted they beat me and put me in police detention for 7 days. Once I was out, I went to the governor office in Jalalabad, they order the government office of the district to investigate the matter. The district officials ignored governor's official request. I even approached the district Shura, but three of their members who also represent our village have stood against me for the support of these armed militias; they were either threatened or bribed, because they knew the truth. I went back to the governor officer several times, but I found the government is not helping me. I even gone to the military headquarter of the Afghan Regular Army to seek help. Finally, I went to the office of the Independent Human Rights Commission in Jalalabad. I told my story; they took notes and wrote a plea to the government office in the district. They ignored it again. I was beside myself, and was telling myself this life is not worth to live in shame and accept so much Zulm [atrocities] for no reason. I thought that these armed militias took away my husband from me, and they are taking away my property now...crying and moaning...it is correct that I'm a woman, but I'm a human being too, where is justice? And, where is Islamiyat?...

After all these years, finally the governor office has sent a delegate from the Attorney General Office to investigate the case. They approved that I have a valid case and assigned the case to the district's primary court. It is now three months that we are waiting, but the defendant is not showing to the court, and no one can remove him from my property and help me to reach justice, no one hear my plea, I mean no one, and it is not fair.

APPENDIX 13: DISTRICT JIRGA/SHURA QUESTIONNAIRE

District_____ Date_____

Province_____ Education_____ Title_____

Respondent _____ Age_____ Ethnic_____

1. How many members this Jirga has?

Names and age:

Education:

Ethnic:

2. Did any of members of the Jirga have legal education or training?

3. How many villages each member represents?

4. What are the names of the villages and their ethnic compositions?

5. How a member of the Jirga is elected?

6. What are the requirements of becoming an elected member of the Jirga?

7. How many of the members are selected and how many are elected?

8. Do members of the Jirga receive salary? If not, how they pay their expenses?

9. How many member of Jirga are employed by the government offices?

10. How many member of Jirga are employed by NGOs?

11. How many members of the Jirga are members of political parties?

13. How rich are members of Jirga?

14. What are the occupational-income members of Jirga?

15. How often the Jirga convenes?

16. Did the Jirga have any emergency meeting/s in the last 12 months, and why?

17. Do Jirga working relation with the government district court? Please describe.

18. What kinds of issues do you discuss during Jirga's sessions?

19. Is there are lots of disagreements among members? If yes, over what issues?

20. What are major problems facing the process of Jirga?

21. What kinds of complains have members and what are the sources of complains?

22. Do the head of the government district, chief judge, chief of the police, and prosecutor sit in Jirga? If yes why?

23. Where the Jirga holds its session and how is it funds activities?

24. What kind of donation and financial resources the Jirga receives?
 25. What kind of working relation the Jirga has with the head of the district, and the chief of the police?
 26. Has ever any of members of Jirga was arrested, harassed, or threatened by any sources? If yes what kind?
 27. Did any members of Jirga resigned, forced to resign and why?
 28. What types of cases and how many are brought in front of Jirga in the last 12 months?
- Civil:
- Family:
- Criminal:
29. How many and what types of cases are solved in the last 12 months?
 30. How many and what types of cases are unsolved in the last 12 months and way?
 31. What were the sources of law for those cases that are solved in the last 12 months?
 32. Name the legal texts and references that re used for solving cases in the last 12 months?
- What percentage Shari'a?
- What percentage Rawaj (Customary law)?
33. What kind of punishment the Jirga enforced on convicted individuals?
 34. Are you practicing "Bad" or "Badal"?
 35. How murder cases were solved, and how many "Bad" or "Badal" (giving away young girls to victim's family or exchanging women between the disputed families) in the last 12 months? If yes how many, what were the age of girls, and what was the nature of the case?
 36. Do women directly bring their cases to the Jirga? If yes, please describe the process, and if no why?
 37. Did the Jirga handle any divorce cases in the last 12 months?
 38. Did the court ask the advice the judges, the court, the head of district, and the police in the last 12 months?
 39. How many cases came to the Jirga and are not solved, and what was the problem?
 40. Do you keep any records of the cases? Where do you keep them?
 41. Do you report your decisions to the primary court?
 42. Do you get any approval for your final decision from the government head of the district, the chief judge or the police?
 43. Did the head of district, the court, and the chief of police disagree with any of your decisions in the last 12 months? If yes, please elaborate why?
 44. How is your cooperation with the NGOs, and what do you thing about their services?
 45. What do you think about the services of the government? Are they enough? If not, please tell us what they should do?

46. Are you happy with the decisions of the primary court? If not, please describe why?
47. What are your suggestions for improving the work of the Jirga?
48. What are your suggestions for improving the working relations with the government authority?
49. What are your suggestions for enhancing the working relations between Jirga and the government court?
50. Do you think women should have their own Jirga—separately from males? If yes, how they should establish it. If not, please describe why?
51. If women establish their Jirga with the help/support of the men Jirga, how should they communicate their messages, and how should they contribute in the decision making processes?
52. How often should there be an election for members of a Jirga?

APPENDIX 14: DISTRICT COURT QUESTIONNAIRE

District _____ Date _____

Province _____ Education _____ Title _____

Respondent _____ Age _____ Ethnic _____

1. What is the number of Judges, Court Staff, and Prosecutors in this primary court?

Names and age:

Education:

Ethnic:

2. Did any of the judges, court staff, and prosecutors attend legal training in the last 12 months? Please name the program, place, and the duration.

3. What types of cases and how many are brought in front of court in the last 12 months?

Civil:

Family:

Criminal:

4. How many and what types of cases are solved in the last 12 months?

5. How many and what types of cases are unsolved in the last 12 months and why?

6. What were the sources of law for those cases that are solved in the last 12 months?

7. Name the legal texts and references that re used for solving cases in the last 12 months?

What percentage Shari'a?

What percentage Qhanoon?

What percentage Customary?

8. What kind of punishment the court enforced on convicted individuals? Hudud or Jiza, and why?

9. How money women are convicted in the last 12 months?

10. Did the court handle any divorce cases in the last 12 months?

11. What is the status of court's relationship with the district Jirga?

12. What kind of cases the Jirga is handling?

13. What kind of cases the Jirga should handle and why?

14. In the last 12 months, how many and what types of cases the court has sent to the district Jirga and why?

15. Are the judges and members of the court safe in this district?

16. Are you being offered housing, transportation, and security?

17. Do you live with your families?
18. Do you have independence in your court and your final verdict over the cases being brought in front of you?
19. In handling what kind of cases do you have more independence and why?
20. Do you or any other judges are member of the district Jirga or any other Jirga?
21. Do you sit in the meetings of district Jirga and why?
22. Do members of Jirga approach you for legal advice?
23. Do you think your legal advice to the Jirga will help the conformity of the rule of law?
24. Did the court have requested the opinion of the district Jirga in about a legal case?
25. What role the opinion of the Jirga has in process a case in your court?
26. What do you think about the decisions of the district Jirga?
27. What is your opinion about the customary law?
28. What is the opinion of the law in your court is about customary law?
29. Do you think the decisions of the Jirga over legal dispute are just and fair?
30. How do you enforce the decision of your court?
31. Do you have a functioning working relation with the chief of police, and the head of prosecutor office?
32. What the chief of the police and the head of the prosecutor office think about your legal decisions?
33. What methods, policy, and relationship will enhance the function of your court?
44. What is your expectation from the head of district, chief of the police, head prosecutor?
45. What is your expectation from the Supreme Court?
46. What is your expectation from the members of the district Jirga?

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