

# A Decade and a Half of Rebuilding Afghanistan's Justice System

## *An Overview*

Dr Ali Wardak



**Universiteit  
Leiden**  
The Netherlands

**Cordaid**  BUILDING FLOURISHING COMMUNITIES



# **A Decade and a Half of Rebuilding Afghanistan's Justice System: An Overview**

**Dr Ali Wardak**

**Reader in Criminology, University of South Wales (UK)**

## Colophon

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## I. Introduction and Background

Afghanistan is often referred to as ‘the heart of Asia’, and it is this strategic geopolitical location that has made the country both a crossroad between cultures and civilizations as well as a battlefield between competing neighbours and global and regional powers. The continued and destructive four-decade long conflict in Afghanistan (1978-present) is closely connected with this geopolitical position. As figure 1 indicates, Afghanistan is a land-locked country that is located at a crossroad between South and Central Asia, which covers a territory of 652,864 m<sup>2</sup>. It is bordered by the former Soviet republics of Uzbekistan, Tajikistan, and Turkmenistan in the North and Northwest; Pakistan in the South and East; Iran in the West and China in the North-East.

Figure 1: Map of Afghanistan



Source: Geographic Guide (<http://www.geographicguide.com/asia/maps/afghanistan.htm>)

Although complete census data do not exist, according to United Nations sources the population of Afghanistan is estimated at around 31,281,000 and comprises of various ethnic (or socio-linguistic) groups (United Nations 2016). These socio-linguistic groups include Pashtun, Tajik, Hazara, Uzbek, Turkmen, *Aimaq*, *Baluch*, Brahui, *Nuristani*, *Pashaie*, *Pamiri*, *Kirghiz*, *Qizilbash*, *Mongols*, *Arabs*, *Gujars*, *Kohistanis*, *Wakhis*, *Bayats* and *Jats*. Also, a sizable population of *kuchi* (mainly Pashtun nomads) and small numbers of Hindus and Sikhs live in Afghanistan. Among these groups, the settled Pashtuns constitute the largest ethnic group, followed by *Tajiks*, *Hazaras* and *Uzbeks* (Dupree 1980; Canfield 1988; Glatzer 1998; Siddique 2012; Wardak 2014; Katzman 2015).

Despite linguistic, cultural and geographical characteristics shaping ethnic identities of these Afghan socio-linguistic groups, shared religion, national ceremonies, cross-regional trade, government

employment opportunities, universities, national military/police service, and inter-marriages have historically resulted in a multi-ethnic fusion that has strengthened a multi-cultural Afghan identity at the expense of ethnic affiliations at the national level (Wardak 2014). Although the exploitation of religion and ethnicity for political aims by warlords and their associated political elites – supported by regional powers – continues to pose a serious threat to Afghan nationhood (Saikal 2012), the aforementioned strong social and religious bonds among ordinary Afghans continue to tie them together as a multi-cultural nation. Importantly, this state of affairs is closely linked to the existence of shared moral/normative order in Afghan society, and a general sense of justice among the population.

It is also important to mention that the overwhelming majority of the population of Afghanistan is Muslim, and mainly divided into an estimated 80-85% *sunni* and 15-20% *shi'ite*. While the majority of *sunni* Muslims in Afghanistan are followers of the *hanafi* school of jurisprudence, Afghan *shi'ite* – by and large – follow the *ja'afari* Islamic jurisprudential school. Thus, the *hanafi* school of jurisprudence (and *ja'afari* jurisprudence in some specific cases) has significantly influenced Afghanistan's formal state justice system (Johnson et al. 2003; Wardak 2004; Kamali 2005).

After this brief background to Afghanistan in section one, this paper consists of a further six sections. Section two describes the process of post-Taliban rebuilding of the country's justice system and its main achievements. Section three spells out key challenges that Afghanistan's formal state justice system continues to face – including corruption, weak systemic cooperation among key justice institutions, inadequacy of resources, limited access to justice, insecurity and lack of trust. Whereas sections four and five examine respectively informal justice and the reasons for its preference by people over the formal justice system, section six focuses on the links between the two justice systems and on a 'hybrid model'. The concluding section seven argues that despite the fact that the efforts of the past decade and a half resulted in a functioning state justice system in Afghanistan, its use as a tool in the "war on terror" compromised the efforts. The successes and failures of rebuilding Afghanistan's justice system over the past 15 years provide important lessons to other fragile and post-conflict countries.

## II. Formal State Justice System and its Post-Taliban Rebuilding

Afghanistan's formal state justice system – fundamentally based on positive law and Islamic *shari'a* – mainly comprises of the Supreme Court, Attorney General's Office, the police, the Ministry of Justice, and the prison service. This system of justice was largely destroyed by successive wars that started with the invasion of Afghanistan by (former) USSR in December 1979 (Johnson et al. 2003). However, following the collapse of the Taliban regime, the Bonn Agreement (The Bonn Agreement 2001: 3) authorised the formation of a Judicial Commission tasked to “rebuild the [Afghan] domestic justice system in accordance with Islamic principles, international standards, the rule of law and Afghan legal traditions.” Led by Italy until 2006, the rebuilding process has mainly been supported by the USA, Germany, United Kingdom, Canada and the United Nations' various programmes – primarily UNODC, UNDP, and UNAMA.

We have seen some positive efforts with regard to legislation, legal reform, training and professional capacity development of judges, prosecutors, prison staff, and police personnel (Wardak 2015; Wardak 2011). Initiatives also include the administrative capacity development of justice institutions, equipping them with modern office facilities, the digitalisation and the distribution of printed laws and related substantive legal materials among justice and judicial personnel. They also involve the creation of human rights and gender equality units at many key justice institutions, and attempts have been made to simplify the bureaucracy of the justice system and to improve coordination among its different components. Moreover, many justice institutions have been refurbished and many more built from scratch in the capital and in several provincial centres as well as in many districts. Furthermore, an Independent Bar Association of Afghanistan, legal aid departments in Kabul and in several provinces have been established, and the Independent National Legal Training Centre (INLTC) in Kabul created (Afghanistan National Development Strategy 2009; Wardak 2011).

However, these achievements – over the past one and a half decade – have arrived at a huge cost. The 1<sup>st</sup> July 2015 report by Inspector General for Afghanistan Reconstruction (SIGAR) reveals that since 2003, the United States alone has spent over \$1 billion on Afghanistan's justice sector. The SIGAR report further adds that:

The United States faces pervasive corruption, lack of will, and other challenges in trying to improve the Afghan justice sector. After 13 years and over \$1 billion spent, U.S. agencies are still not consistently assessing the sustainability of their rule of law programs in Afghanistan. SIGAR (2015: 21)

Indeed despite this huge investment, Afghanistan's state justice system faces serious challenges in the delivery of effective and sustainable justice to all Afghan citizens. Key challenges currently facing Afghanistan's state justice system are complex and interconnected in different ways.

### III. Key Challenges

After thirteen years of large-scale international efforts to rebuild Afghanistan's post-Taliban justice system at high costs, it continues to face serious challenges. Key challenges include: endemic corruption, influence of warlords/political elites, limited access to justice and lack of trust, weak coordination among key justice institutions, continued inadequacy of physical infrastructure and low level of professionalism among justice personnel. The most significant of all these challenges is endemic and widespread corruption.

#### a. Corruption and influence of warlords/political elites

As mentioned in the SIGAR 2015 report, the most serious challenge which the Afghan system faces is endemic official corruption. Widespread corruption in the Afghan justice system is well documented in the existing literature on the subject. In its 2014 survey, Integrity Watch Afghanistan (IWA) indicates that a large amount of corruption – mainly in the forms of bribery, nepotism, and clientelism – takes place in the police department, the attorney's office and *hoquq* (Ministry of Justice legal department), which may seriously affect judicial outcomes and decisions made by the court. Other studies have, however, found that corruption has been particularly widespread in the judiciary (De Lauri 2013; Wardak and Braithwaite 2013; Tetra Tech DPK 2014; Asia Foundation 2015; Singh 2015). Some of these studies have identified low salaries, weak institutional control, and lack of external oversight as key internal causes of corruption in the Afghan justice and judicial system.

It is important, however, to mention that internal causes of corruption in the Afghan justice system cannot be separated from its strong external causes. Official corruption in the justice system is closely and intricately connected with warlords and their associated political elites who have a strong influence over the Afghan state. The illegitimate influence of warlords and their associated political elites is directly related to the post-Taliban political ordering of Afghan society. According to Jones (2010: 130), the post-Taliban regime in Afghanistan and international forces "heavily relied on pro-government or more accurately 'anti-Taliban' warlords to maintain order at the local and regional level." Indeed, warlords were appointed as provincial and district governors, police chiefs and other high-ranking officials who played a significant role in structuring post-Taliban political and legal order at the sub-national level. As a consequence, networks of warlords and their associated political elites have become an omni-present fixture of post-Taliban Afghanistan's legal and political landscape (Marten 2006). This polito-legal ordering, in turn, resulted in the development of strong networks of endemic corruption (Braithwaite and Wardak 2013).

Importantly, this situation has had serious implications for judicial independence in post-Taliban Afghanistan, where courts are strongly influenced by the warlords in the executive and outside it. While it is beyond the scope of this review to fully examine all the internal and external causes of corruption in the Afghan justice 'system', weak systematic interconnectivities among its constituent components further facilitate corrupt activities.

#### b. Weak systemic cooperation among key justice institutions

In order for a modern justice system to deliver justice effectively and efficiently, its key component – mainly the police, prosecution judiciary, and the prison/correctional service – must work together in a chain-like relationship; they must operate as a system (Cavadino and Dignan 2007). However, low-level inter-institutional cooperation among Afghanistan's key justice institutions has led to

them not operating as an integrated ‘system’. Other than structural and communicative difficulties (especially between headquarters in the capital and provinces), different justice institutions are allocated to political rivals who prioritise the interests of their respective factional networks over the delivery of transparent justice to all citizens. Within this politico-legal environment, efforts to promote inter-institutional cooperation among justice institutions seem to have had little impact. Braithwaite and Wardak (2013) found that the Afghan justice system hardly operates as a ‘system’.

One of the main reasons for the ineffectiveness of these efforts seems to be closely related to the initial lack of effective collaboration among different international donor countries that focused on reforming/rebuilding specific components of the post-Taliban justice sector in Afghanistan (Wardak et al. 2007; Wardak 2004). The various USA agencies (mainly the State Department, Department of Defence and USAID) from which the bulk of international support to the Afghan justice sector had come, hardly coordinated their programmatic activities. According to Conor and Diesen (2015), each of these agencies focused on its own programmatic goals that were not necessarily coordinated with those of the other agencies. This problem has been further exasperated by a problematic cooperation between donor countries and their Afghan counterpart institutions, as Tetra Tech DPK’s final report (2014: 3) says: “Leadership at counterpart institutions continues to demonstrate a lack of commitment to justice sector reforms by delaying the approval of tools and technologies that will increase the efficiency and transparency of courts.”

The low level of cooperation among international donors, and the donors and Afghan state institutions seems to be closely related to the continued absence of a coherent vision for rebuilding and reforming the Afghan justice system. The outcome of these efforts and investments has thus far been a badly repaired justice ‘system’ with patchy legal engineering and quick fixes (Wardak 2004). It is structurally fragmented and hardly operates as a ‘system’ (Johnson et al. 2003; Wardak et al. 2007; Wardak 2011; Wardak and Braithwaite 2013). These situations, as well as various levels of contract-based corruption in the rebuilding process of Afghanistan’s justice system, seem to have had serious negative impact on the huge investment in enhancing its infrastructural and professional human capacities.

### **c. Continued inadequacy of physical and human resources**

The enhancement of human and physical capacities of Afghanistan’s formal justice system has been the cornerstone of international support since 2004. This support has been more centrally focused on building professional, technical, and infrastructural capacities of the system – rather than on structural issues focused on fighting corruption, links between formal and informal justice and on community policing that helps maintain social order and a sense of security among citizens (Wardak and Braithwaite 2013).

However, despite many tangible improvements discussed in section two, according to De Lauri (2013) courts continue to be under-resourced (both financially and in terms of human resources), costly, slow and have limited capacity to enforce judicial rulings. An important dimension of these expensive internationally supported capacity building programmes has been the training and inclusion of female juridical personnel in the justice system. Progress in this area has been limited: according to Madzarevic and Rao (2014: 32), “The number of female judges has increased from 41 in 2007 to 180 in 2013, meaning they now make up 10 percent of the judiciary. The large majority (90 percent) are based in Kabul, with the rest in only four other provinces.” While this increase in the number of female judges in the Afghan judiciary is important, Rafi (2014) argues that it is largely symbolic. Indeed, most female judges are based in Kabul, and the High Council of the

Supreme Court does not include a single female justice as its member.

All this would seem to indicate that despite expensive capacity building programmes (with some tangible progress), Afghanistan's justice system continues to lack full human and infrastructural capacities to deliver fair justice to all Afghans. Under-representation of professionally trained female judges and other justice professionals in rural areas continues to have an adverse impact on Afghan women's (and other disadvantaged groups') access to justice.

**d. Limited access to justice, insecurity and lack of trust**

Like 'capacity building', 'access to justice' has also been a central element of most US, UN and other international programmes that focused on (re)building Afghanistan's justice sector. However, limited access of people to formal justice institutions continues to be a serious challenge in Afghanistan as Coburn (2010: 2) observed: "[T]he formal justice sector in Afghanistan remains in a severely dilapidated state, unable to reach most of the country and functioning poorly in areas where it is present." This observation is confirmed more recently by Madzarevic and Rao (2014: 32). They say that despite the fact that courts and other justice institutions that have been built/refurbished throughout much of Afghanistan, "... they are often inoperative due to insecurity and insufficient material and human resources ... especially in rural areas." What is especially important is that even in relatively secure areas, formal justice agencies struggle to implement court decisions.

Although limited access to formal justice in Afghanistan has complex causes – including judicial elitism, costs/corruption, long delays, and the high level of illiteracy among the Afghan population – insecurity makes access to the state justice system especially challenging. This situation appears to have created a justice vacuum in many rural parts of Afghanistan that has been effectively filled by the Taliban (Giustozzi and Baczko 2012). According to Johnson (2013: 9), the Taliban operates "a parallel legal system that is acknowledged by local communities as being legitimate, fair, free of bribery, swift, and enduring." Indeed, in areas that are fully or partially controlled by the insurgency, according to a New York Times report (2015), Taliban's judiciary continues to fill the vacuum, and gains favour - a situation that poses a serious threat to the state's political authority itself. This and all the challenges discussed, in turn, appear to have led to a very low level of public trust in the state justice system (Wardak and Braithwaite 2013; Asia Foundation 2014; Asia Foundation 2015). Thus, the use and preference of informal justice by most Afghans – who perceive it as fairer than the Taliban's courts (Wardak and Braithwaite 2013) – would seem a totally rational choice.

## IV. Informal Justice and Local Dispute Resolution

The concept of ‘informal justice’ has been described differently in different contexts in comparative socio-legal literature (Cohn 1965; Baxi 1981; Mani 2002; Wojkowska 2006; Albrecht and Kyed 2010; Albrecht et al. 2011; Kerrigan et al. 2012), and there does not seem to be a consensus among scholars and practitioners over a formal definition of the phrase. The Afghan situation is not only an exception, but it is more complex. As will be discussed later in this section, other than the traditional customary institutions of dispute resolution – *jirga* and *shura* – a wide variety of non-state justice providers started operating in the country in the post-Taliban era. And in this context, it is often difficult to draw a clear line between ‘formal’ and ‘informal’ justice in Afghanistan. Nevertheless, scholars continue to use this dichotomy, and one legal anthropologist describes informal justice in the Afghan context in this way:

Generally, it refers to a series of mechanisms that are outside of the state’s direct control – though not necessarily beyond its influence – and that are used to resolve disputes and conflicts in a manner perceived as legitimate by local communities. These mechanisms include ad hoc or standing local councils (both *jirgas* in Pashtun areas and the more institutionalized *shuras* in Pashtun and non-Pashtun areas), as well as opportunities for appeal to respected elders, religious leaders, or informal mediators who may act with disputants’ consent to facilitate a resolution. They may also be highly localized commercial shuras that deal with specific business disputes, *ulema* councils (councils of religious scholars), and a range of other potential groups and figures that resolve disputes in a locally legitimate manner. (Coburn 2013: 11)

Indeed, the existing body of literature indicates that most disputes in the country are resolved through various informal mechanisms and institutions at the local level (Wardal 2002; International Legal Foundation Report 2004; Wardak 2004; Barfield, Nojumi, and Their 2006; Wardak et al. 2007; Coburn and Dempsey 2010; TLO 2010). This literature also indicates that the most prevalent of these institutions of dispute resolution are the informal village *jirga* (‘circle’) and *shura* (council) that mainly operate at village and inter-village levels. According to this literature, local disputes (mainly civil, but also criminal) are resolved by *speengiri* or *rishsafidan* (greybeards) with a reputation for wisdom, piety, honesty, local knowledge and expertise in dispute resolution. Decisions made by the greybeards seeking to reconcile disputants and restore communal harmony have morally and socially binding effects.

While the bulk of scholarly works and empirical research categorises justice institutions in Afghanistan into ‘formal’ and ‘informal’, Wardak’s (2015) recent field research challenges this dichotomy as simplistic and reductionist and rather reveals a complex multiplicity of justice providers in Afghanistan in recent years. This field research has found that due to the huge influx of foreign aid money to Afghanistan since 2002, multiple justice providers have emerged that actively provide justice services to the Afghan people outside the state justice system. These justice providers include:

- Ministry of Women Affairs (MOWA)
- Afghanistan Independent Human Rights Commission (AIHRC)
- International NGOs
- National NGOs
- *Shura -e- gozars* in urban areas
- *Jirga/shura* in both rural and urban areas
- Religious educational institutions, and individual members of *ulama* (Islamic religious scholars/ jurists)
- Taliban justice and their mobile courts

This list of justice providers indicates that while *jirga* and *shura* (including *shura -e- gozars*) continue

to be the most prevalent forms of informal justice in Afghanistan, religious educational institutions, and individual members of *ulama* (Islamic educationalists/scholars) have been increasingly involved in the resolution of disputes outside the state justice system. More importantly, international NGOs (and some national NGOs) are also actively involved in the provision of justice through employing competent lawyers, computerised systems and professional processing of cases. While agreements reached in the context of these specialist NGOs are efficiently processed and registered, they are not formally recognised and therefore not legally binding. Thus, it may be more meaningful to refer to these justice providers as 'semi-formal' (Wardak 2015). To further complicate the dichotomy between 'formal' and 'informal', Afghanistan's Ministry of Women Affairs (MOWA) is a formal state institution that has increasingly become involved in dispute resolution outside the state formal justice system. However, the formalised agreements reached in the context of this state institution are not legally binding as they take place outside the state justice system. Similarly, Afghanistan's Independent Human Rights Commission (AIHRC) plays a very similar role in dispute resolution outside the state justice system. Thus, it is important that scholars, policy makers and practitioners seriously take into account this complexity of what is uncritically referred to as 'informal justice'.

## V. People's Preferences

The bulk of empirical research on informal justice in Afghanistan has focused on *jirga* and *shura* and on their equivalents in different parts of the country. The existing body of research indicates that *jirga* and *shura* exclude women, their decisions are not officially recorded and recognised; and decisions reached within the contexts of *jirga* and *shura* sometimes violate Afghan law, *shari'a* and human rights principles (Wardak 2002; Wardak et al 2007; Coburn 2013; Braithwaite and Wardak 2013; Gaston, E., Sarwari, A. Strand, A. 2013). Moreover, when these strong sub-national institutions are powerful enough and not meaningfully linked to a weak state, they could function as potential spoilers of state building efforts (Migdal 1988). *Jirga* and *shura* have been the subject of much empirical research, and there is a near-consensus among researchers about their weaknesses that are summarised by Wardak as:

- Exclusion of women from most *jirga* and *shura* processes;
- Occasional violation of *shari'a*, Afghan Law, and human rights principles;
- Occasional violation of the rights of vulnerable groups: minorities, children, and displaced people;
- Influence of warlords/local strongmen on some *jirgas/shuras* in some parts of Afghanistan;
- *Jirga/shura* decisions are not registered officially and therefore not legally binding;
- Limited knowledge of traditional justice actors of *shari'a*, Afghan laws, and human rights principles (Wardak 2015: 10 – 11).

However, despite this dark side of *jirga* and *shura*, the existing body of empirical research on the subject also indicates that these informal justice institutions promote restorative justice that helps mend broken relationships among victims, offenders, and the community, and to restore peace and dignity among them (Wardak 2004; Wardak et al. 2007; Smith and Manalan 2009; Coburn and Dempsey 2010; Wardak and Braithwaite 2013). Other than these important restorative justice qualities, their other positive aspects are summarised by Wardak (2015: 10) as:

- Accessibility;
- Cost effectiveness;
- Peacemaking, reconciliation and the restoration of community harmony;
- Flexibility;
- Speed;
- Efficiency and enforceability of decisions;
- Community ownership;
- Following community norms and customs;
- Relative transparency;
- Confidentiality and protection of women's reputations.

It appears that due to the numerous and strong positive aspects of *jirga* and *shura*, they are often preferred over the state formal justice system in Afghanistan. Field research also indicates that *jirga* and *shura* are perceived as more trusted and effective in resolving disputes than the Afghan state courts. (Wardak 2011; Braithwaite and Wardak 2013; Asia Foundation 2015). These findings are further confirmed by the most recent survey conducted by the Asia Foundation as figure 2 below illustrates:

**Figure 2:** Preferred institution and authority of dispute resolution and type of dispute

	FAIR AND TRUSTED	EFFECTIVE AT DELIVERING JUSTICE	FOLLOW NORMS OF THE PEOPLE
	(%)	(%)	(%)
HUQUQ DEPARTMENT	68	56	52
STATE COURTS	60	49	48
LOCAL JIRGAS / SHURAS	80	68	68

Source: A Survey of the Afghan People (Asia Foundation 2015)

According to the above figure, 80.0 percent of respondents who used *shuras* and *jirgas* for the resolution of their disputes say that they are ‘fair and trusted’ institutions, compared to 68.0 percent who used the *huquq* department (Ministry of Justice legal department) and 59.9 percent who used state courts of justice. Similarly, larger percentages of the respondents report that they perceive *shuras* and *jirgas* as more ‘effective in delivering justice’ and ‘following accepted local community norms’ when compared to the *huquq* department and courts. Both effective delivery of a public good and following of cultural norms have long been recognised as two important sources of legitimacy in Afghanistan.

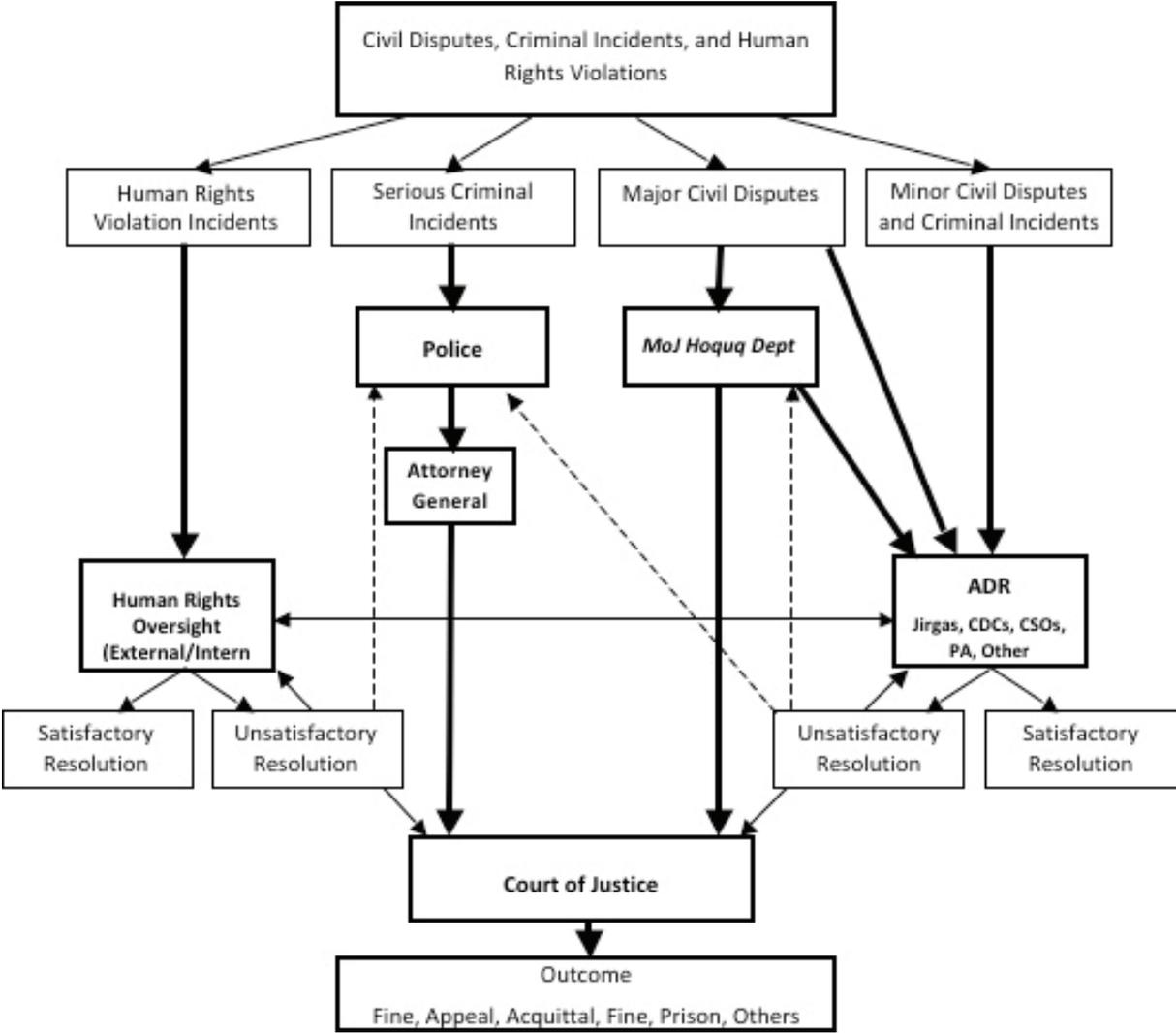
Despite the preference of informal justice over formal state justice by ordinary Afghans, little attention was paid to the former by international donors and the Afghan government until 2009. For example USAID’s assistance to Afghanistan’s justice sector – through its Afghanistan Rule of Law Programmes (2004 - 2009) – mainly focused on strengthening the court systems, capacity building of legal personnel, legislative reform, women/human rights and expanding access to justice (Checchi and Company Consulting 2009). It was only towards the end of the Afghanistan Rule of Law Programme that its implementers realised (Checchi and Company Consulting 2009: 3) that “...the linkage between the formal and informal justice sectors [is] essential to improving the rule of law in Afghanistan.”

## VI. Links between Formal and Informal Justice

As the overwhelming majority of disputes in Afghanistan are resolved through informal justice institutions outside the state formal justice system, custom and informal customary dispute resolution in civil matters is explicitly recognised by Afghanistan's Civil Code (1976) and Civil Procedure Law (1977). Also mediation and arbitration outside the state justice system are recognised in the country's Commercial Law and Commercial Procedure Law (2007), Commercial Arbitration Law, Land Law and the (draft) Law on Obtaining Rights (2015). More importantly, the Law on Elimination of Violence Against Women (2008) also includes provisions on mediation between the offender and victim in different phases of a criminal adjudication. While all these laws and legal provisions provide links between formal and informal justice, a case first has to be registered in the state justice system and then referred to informal justice providers. None of these laws recognise agreements as legally binding that are concluded solely (without first being registered in the state justice system) through informal dispute resolution institutions. This issue is especially important, as the majority of Afghans prefer to resolve their disputes outside the court system informally.

In order to address the issue of linking formal and informal justice, an 'integrated model' for building a post-Taliban justice system in Afghanistan was first proposed in the *Journal of Crime, Law and Social Change* in 2004 (Wardak 2004). Following this, international researchers emphasised the importance of linking formal and informal justice in Afghanistan and proposed policy options (Barfield, Nojumi and Thier 2006). But it was not until 2007 that a new 'hybrid model of a formal and informal justice system in Afghanistan' was advocated in the UNDP's *Afghanistan Human Development Report* (Wardak and Braithwaite 2013; Supreme Court of Afghanistan 2007), which created a serious debate on the subject. The 'hybrid model' proposes the creation of institutional links between *jirga/shura*, formal justice and existing human rights institutions within a new coherent framework. As illustrated in figure 3, the 'hybrid model' proposes a framework that facilitates a synergy between formal 'state' and informal 'non-state' justice institutions and a female-dominated human rights unit as a check and balance on rights abuses by both courts and *jirgas*, while courts and *jirgas* would also carry out checks and balances of the other.

Figure 3: Hybrid model of the justice system in Afghanistan



Source: Afghanistan Human Development Report (2007)

The hybrid model, which reflects deeply held Afghan moral and cultural values as well as most recent thoughts in contemporary criminal justice – such as restorative justice – provides a coherent framework for the delivery of more transparent, accessible and speedy justice to all Afghans. The model promises the development of a sustainable justice system that is central to the ‘Afghanisation’ of rebuilding the Afghan state and promoting its channels of communication with ordinary people at the local level (Wardak 2011).

However, due to vested interests and complex Afghan politics, the proposals of the ‘hybrid model’ were strongly opposed by the Government of Afghanistan, and ignored by the international community at best. As mentioned earlier, it was only several years after the large investment in Afghanistan’s formal justice system that attention was paid to informal justice in the country and to the recommendations of the ‘hybrid model’. Sadly, US interest in Afghan informal justice was not motivated by its inherent strengths that could be utilised in building an effective post-Taliban justice system. The main reason, instead, was countering increasing popularity of Taliban’s justice system – especially in southern Afghanistan – as US Mission in Afghanistan (2010: 9) revealed: “Justice and rule of law programs will focus on creating

predictable and fair dispute resolution mechanisms to eliminate the vacuum that the Taliban have exploited.” Thus according to Checchi and Company Consulting (2014: 1), the USAID-funded Rule of Law Stabilization-Informal Component Program (2010 to 2014) emphasised the inclusion of informal justice in its activities through “...(1) improving and strengthening the traditional dispute resolution system, (2) bolstering collaboration between the informal and formal justice systems, and (3) supporting cooperation for the resolution of longstanding disputes.” Although these ideas have close resemblance with some of the original recommendations of the 2007 Afghanistan Human Development Report proposed within the framework of the ‘hybrid model’, they seem cherry-picked.

Thus, as the international community (especially the USA and the UK) attempted to use informal institutions as a means to weaken Taliban insurgency (Wimplemann 2013), it did not truly seek to translate the logic and recommendations of the ‘hybrid model’ into programmes. The international community failed to invest in informal justice as a means to promote a more accessible, cost-effective and sustainable justice system envisaged in the 2007 *Afghanistan Human Development Report* and in its proposed ‘hybrid model’. This failure was further compounded by the unwillingness of the post-Taliban Afghan state to effectively coordinate its activities with international donors in the establishment of an effective and transparent justice system in Afghanistan. Nevertheless, an outcome of national and international efforts of engagement with informal justice was the 2010 ‘Draft Law on Dispute Resolution Jirgas and Shuras’ – a bad law that other than its other weaknesses overregulated informal justice (Wardak 2011). Even the 2010 draft – due to opposition by Afghanistan’s Ministry of Women Affairs and the Independent Human Rights Commission – was suspended by the Council of Ministers from its agenda indefinitely. Thus, both national and international efforts of engagement with informal justice resulted in little progress, and in some cases it proved counterproductive (Coburn 2013).

However, despite dismissive claims by some researchers (Wimplemann 2013), interest in the development of a legal framework that linked formal and informal justice systems never faded. In September 2015, the Afghan government with the support of the UNDP drafted a new law entitled *Law on Conciliation in Civil Disputes*. The exclusive focus of the draft was to accommodate the demand of Afghanistan’s Ministry of Women Affairs and some vocal human rights organisations that opposed the inclusion of offences in the draft law. This new draft law provides a legal framework for the linkages between formal and informal justice in civil matters only. The law, which is drafted in the light of findings of a field study of civil dispute resolution in Afghanistan, is scheduled to be forwarded to the Afghanistan Council of Ministers and the Afghan Parliament. This development may be a first step towards a fuller utilisation of restorative justice capacities of non-state justice institutions in Afghanistan.

## VII. Conclusion

The one and a half decade of national and international efforts and the investment of well over \$1 billion in (re)building Afghanistan's formal justice sector have resulted in some tangible achievements. These achievements could be summed up in the fact that post-Taliban Afghanistan has acquired a functioning modern justice system. However despite the huge human and financial resources invested in the country's state justice system, it continues to face major challenges in the delivery of effective, transparent and sustainable justice to all Afghans. Other than weak coordination among national and international efforts, over-emphasis on technical quick fixes, and the lack of a coherent vision, policy-makers failed to engage fully with the sources of normative order in Afghanistan – religion, cultural traditions, and an effective provision of public goods – as key dimensions of a structural reform of the justice system. Justice and its effective delivery are closely linked to these sources of legitimacy in Afghan society. The use of 'informal justice' as a tool in the 'war on terror' rather than as a complementary element of a post-Taliban justice system in Afghanistan seriously compromised the efforts of the past one and a half decade. The case of Afghanistan provides important lessons to other post-conflict countries that emerge from the ashes of war.

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