

**JUDICIAL REFORM IN AFGHANISTAN**  
**TOWARDS A HOLISTIC UNDERSTANDING OF LEGITIMACY**  
**IN POST-CONFLICT SOCIETIES**

Master of Arts in Law and Diplomacy Thesis

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## INTRODUCTION

A holistic understanding of the rule of law is not mere recognition of relevant issues beyond the judiciary. Rather, practical sensitivity for the ways in which elements are interconnected allows for more accurate analysis of how changes or challenges in one area will impact the status of rule of law as a whole. Such sensitivity is especially essential in post-conflict environments, where most if not all aspects of rule of law demand attention. In particular, judicial independence is a central aspect of rule of law, but its development is not isolated from other issues. This investigation seeks to elucidate the connections between building judicial independence, engagement with customary law, and anti-corruption efforts through an examination of judicial reform in post-Taliban Afghanistan.

The focus of international rule of law assistance in Afghanistan has been very narrow, and the general approach was relatively passive, meaning that not only is judicial independence somewhat de-emphasized, but other issues are underappreciated as well. Not enough attention was devoted to the prevalence of non-state, traditional justice systems in Afghanistan, particularly in light of Afghanistan's history of tension between the state and society. These traditional systems of *jirga* and *shura* represent in each region a different complicated mix of values of law and justice. Afghanistan's history of failed efforts at top-down judicial reform compels rule of law practitioners to explore opportunities for engagement with traditional justice.

Furthermore, not enough attention was devoted to capacity building, particularly at the institutional level. Not only has judicial training been under resourced, but insufficient leadership in developing the permanent institutions of the justice sector has

led to factionalism and territoriality among the Ministry of Justice, the Supreme Court, and the Attorney General's Office. The combination of insufficient training and under developed institutions has largely contributed towards the high perception of corruption in the judicial arena, both in terms of bribery and inappropriate actions at the institutional level.

These failings have rendered the judiciary neither independent, nor accountable, nor culturally viable. Rural communities, which comprise 80% of the Afghan population<sup>1</sup>, continue to exist in varying degrees of isolation from the state, turning to traditional justice and largely rejecting the formal system because they perceive it to be corrupt, slow, and applying laws and values of justice with which they do not identify. Heightened tension between Afghan communities and the fledgling state is harnessed by insurgent forces to further divide the nation as a whole and prevent the state from building legitimacy. However, traditional justice poses its own difficulties, particularly in terms of the rights of women and children, as well as the way in which traditional structures have been frequently co-opted by warlords after thirty years of conflict. The administration of justice as a whole in Afghanistan will not recover unless the formal and informal systems cooperate with each other and achieve a level of popular legitimacy for the formal system that allows it to be simultaneously modern, effective, and genuinely Afghan.

This investigation proceeds by presenting in Section I the conventional definition of judicial independence and exploring the theoretical way in which customary law and corruption issues impact judicial independence indirectly through their impacts on the

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<sup>1</sup> Wardak, Ali. "Building a post-war justice system in Afghanistan." *Crime, Law & Social Change*, Vol. 41, p. 319-341 (2004)(326)

legitimacy of the formal justice system. Section II is a historical analysis of state/society relations and traditional justice, particularly in terms of its leaders. Section III analyzes the impact of the current armed conflict on both the formal and informal justice systems. Section IV examines the narrow and ill-fitting model chosen for judicial reform, the problems with its implementation, and the resulting present conditions of poor legitimacy, contributing to the propensity for violence. Section V evaluates the international agenda for judicial reform, particularly in terms of problematic perspectives that have failed to recognize the interrelated ways in which judicial independence, corruption, and customary law all impact the legitimacy of the formal justice system. Section VI deconstructs prominent definitions of legitimacy in light of current dynamics in Afghanistan, observing that the theoretical hypothesis is supported: effectiveness and appeal to tradition are necessary conditions for building legitimacy. These conditions are satisfied, respectively, through (1) successful anti-corruption and independent, sustainable institution building, and (2) consultation and genuine engagement with all sources of traditional authority. Finally, Section VII articulates a proposed agenda for judicial reform that is based on the prioritization of genuine dialogue among traditional leaders, the formal justice sector, civil society, and international actors in order to build legitimacy for a collaborative justice system from the bottom-up.

## SECTION I: DEFINING JUDICIAL INDEPENDENCE

Judicial independence is considered a central aspect of rule of law because it allows for the administration of justice to occur freely, without inappropriate influence. Judicial independence is best understood as having two types, individual and institutional, because inappropriate influence may occur at the level of individual decision making or at the level of forming and implementing judicial policy. While judicial independence encompasses the minimization of any form of inappropriate influence, the executive branch is considered the primary locus of concern.

Individual judicial independence refers to a judge's detachment from the parties, as well as his or her individual autonomy in legal reasoning.<sup>2</sup> Detachment from the parties is particularly important in administrative cases, in which one of the parties is a state body. Individual autonomy refers to autonomy from other judges and public opinion. Autonomy from the opinions of other judges is certainly limited in common law countries that follow the doctrine of stare decisis, and in both common and civil law systems judges in higher courts can exercise control over the decisions of lower courts through appellate proceedings.<sup>3</sup> However, Burbank reminds us that judicial independence is a "means to an end" and that absolute independence in individual reasoning would leave too much room for mental and emotional deviation from the proper application of the law.<sup>4</sup> Therefore, although it is thought that this difficulty in determining what factors motivate judges limits our assessment of individual judicial independence, the relationship between the judiciary and the general public reveals that

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<sup>2</sup> Fiss, Owen. "The Limits of Judicial Independence." 25 U. Miami Inter-Am. L. Rev. 57 (1993-1994)(58)

<sup>3</sup> Ibid

<sup>4</sup> Burbank, Stephen B. and Barry Friedman, Editors. *Judicial Independence at the Crossroads: An Interdisciplinary Approach*. Thousand Oaks: Sage Publications, 2002. (12)

popular legitimacy can protect the integrity of the judicial process and thereby promote individual independence. Autonomy from public opinion stands somewhat at odds with the notion that the general public needs a better understanding of the judicial process in order for the courts to garner legitimacy. However, strong public opinion on individual court decisions is not necessarily an indicator for judicial independence. Legitimacy and thereby independence comes from respect, even reverence, for the judicial process itself.<sup>5</sup> Therefore, serious deficiencies in individual judicial independence may be perceived as judicial corruption, whether in the form of bribery or some other form of inappropriate influence on an individual judge.

Institutional judicial independence may also be broken down into two types: administrative and political. Administrative independence refers to the operation of the courts as well as an insulated career process of appointing, transferring, promoting, evaluating and disciplining judges.<sup>6</sup> The judiciary as a whole cannot control its own institutional development if the executive or legislative branch substantially controls its budget and general operations. Furthermore, judges are less likely to make independent decisions if they are concerned about how their opinions will impact their careers. Independence in judicial career processes therefore overlaps with political independence, because frequently the executive will directly or indirectly dictate appointments or other career decisions for judges in a way that is not necessarily lawful.<sup>7</sup> Political independence refers to inappropriate political control of the judiciary in general, but the

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<sup>5</sup> Ibid (34)

<sup>6</sup> Henderson, Keith, Violaine Autheman, Sandra Elena, Luis Ramirez-Daza and Carlos Hinojosa. "Indicators for a State of the Judiciary Report: A Standardized Tool for Monitoring and Reporting on the Implementation of Key Judicial Reforms." International Foundation for Electoral Systems (IFES) (Summer 2003)

<sup>7</sup> Henderson et al. (7)

usual concern is the influence of the executive, particularly through the Ministry of Justice. If the public perceives such influence, it may become characterized as corruption. In this sense, judicial independence and judicial corruption refer to assessments of the same elements, but whereas discussions of judicial corruption see the glass half empty, judicial independence assessment sees the glass half full. Neither perspective is more desirable from an academic standpoint, but the terms that the public chooses in describing its judiciary speak to the level of confidence in the judiciary and thereby its legitimacy.

Similar to our understanding of individual judicial independence, total independence or isolation at the institutional level is not desirable. In a democratic society, institutions of government should be responsive to society as a whole, including other institutions of government.<sup>8</sup> The relationship between independence and accountability<sup>9</sup> is therefore highly ambiguous and unique to each society. Garoupa and Ginsberg developed the following diagram for understanding the way in which this tension between independence and accountability generates four poles.

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<sup>8</sup> Fiss (60)

<sup>9</sup> Garoupa and Ginsberg define accountability as “maintain[ing] some level of responsiveness to society as well as a high level of professionalism and quality on the part of its members” *In*, Garoupa, Nuno, Tom Ginsburg. “Guarding the Guardians: Judicial Councils and Judicial Independence.” *The American Journal of Comparative Law*. Vol. 57, No. 1 (Winter 2009) (pp. 103-134)(106).

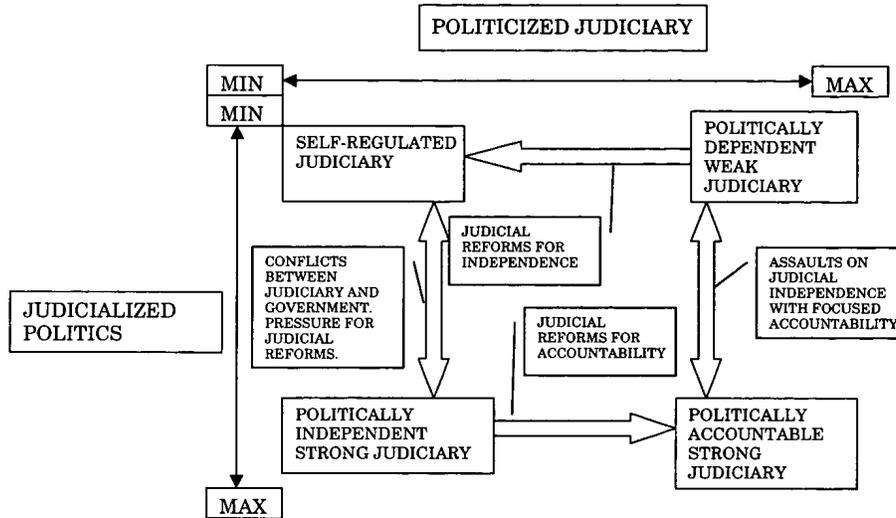
Figure 1<sup>10</sup>

Figure 1 shows “Judicialized Politics” to represent judicial power or independence, and “Politicized Judiciary” to represent political or executive power over the judiciary. The arrows indicate the fluidity with which the status of the judiciary can move from one pole to another when confronted with changes in policy or in its relationship with the government. Although judicial independence and accountability are usually considered to be a direct tradeoff of one another, this diagram displays the potential for a “politically accountable, strong judiciary.”

Navigating this tension between independence and accountability depends on the demands of the particular context. However, most civil law countries have a Judicial Council that acts as a buffer between the judiciary and the government in handling matters of administration, career processes, and other matters of judicial policy.<sup>11</sup> Some judicial councils hold mere advisory roles, while others make binding decisions on all of the above matters. The composition of the judicial council is critically important because

<sup>10</sup> Garoupa and Ginsberg (118)

<sup>11</sup> Henderson et al. (4)

it is supposed to represent a microcosm of the desired balance of independence and accountability. Garoupa and Ginsberg argue that the majority of council members should be judges themselves, because they possess the expertise and the heightened interest in the matters at hand.<sup>12</sup> However, general interest in accountability also means that the Ministry of Justice, Attorney General, and even law professors and expert members of civil society should have some level of representation. The council may provide further nuance to its interpretation of the separation of powers by sharing certain functions with other branches of government (e.g. “managing budget, material resources, operations”<sup>13</sup>) or by excluding certain members from certain council activities (e.g. excluding members of the executive from disciplinary matters). There is no universally ideal model for a Judicial Council, but it is essential to understand the particular independence and accountability issues in a given society in order to design a council with the purpose of addressing these tensions head-on.

In light of the importance of popular legitimacy in promoting the rule of law, building judicial independence requires consideration of other factors beyond the relationship between the judiciary and the executive. Thomas Carothers observes that while the proper structure and operations of the judiciary deserve careful attention, the more fundamental element of rule of law is legitimacy through shared norms: “seeing justice not merely as something that courts and police deliver but as a set of values, principles and norms that define the relationship of citizens to their government and to each other.”<sup>14</sup> In this way, Carothers identifies the beginning of a paradigm shift in the

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<sup>12</sup> Garoupa and Ginsberg (120)

<sup>13</sup> Ibid (119)

<sup>14</sup> Carothers, Thomas. *Aiding Democracy Abroad: The Learning Curve*. Carnegie Endowment for International Peace, Washington, D.C. (1999)(177)

field of rule of law assistance, marked by concern for the ways in which the institutions are “connected in manifold ways with the societies of which they are a part...[making] those connections focal points.”<sup>15</sup> It is therefore critical in Afghanistan to look at the role of customary law and traditional justice because it plays such a major role for most Afghans and thereby holds the key to building the kind of justice that Carothers describes. This emphasis on legitimacy also demands further attention to the causes and consequences of corruption, both in terms of bribery and extortion at the individual level as well as inappropriate influence or control at the institutional level, because perceptions of corruption in the judiciary can seriously weaken its legitimacy. Legitimacy therefore depends on minimized discord over issues of values and effectiveness.

Building judicial independence in post-conflict societies depends especially on the recognition of how seemingly unrelated issues directly impact legitimacy. The current government in Afghanistan is trying to emerge from a history of failed regimes by emphasizing centralization, both in terms of its structures of representation and service provision, as well as in its approach to law and justice. This top-down centralization, almost entirely through the executive, has the potential to alienate predominately rural communities, who have resisted strong centralized authority for centuries. Aggressive anti-corruption programs and the outright refusal to engage with customary legal tradition alienate judges and traditional communities respectively, resulting in rapidly declining legitimacy. Further examination of the history of Afghanistan’s legal history reveals that corruption and customary law are critical issues that, if properly addressed, hold the potential to render a much more independent formal judiciary.

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<sup>15</sup> Ibid

## SECTION II: LEGAL HISTORY OF AFGHANISTAN

This section seeks to demonstrate that if a major portion of today's Afghans understands the proper administration of justice through both traditional and Islamic lenses, then the formal justice system would commit the same errors of past regimes by choosing to ignore or stamp out traditional Afghan authority and practices. The section proceeds by discussing traditional (pre-Islamic) and Islamic authority and practices in Afghanistan, as well as the little acknowledged reality that these domains are blurred in popular present day values and practices. Second, this section exposes some of the perceived difficulties posed by the traditional system for classic Islamic doctrine as well as international human rights standards. Finally, a review of Afghanistan's history of resentment and resistance of centralized regimes demonstrates that legal and judicial themes have been at the heart of these tensions. As this report will demonstrate, the persistence of popular emphasis on tradition, combined with a consistent history of violence in the face of top-down reforms, means that the formal justice system must engage with traditional justice in order to remain stable.

### *A. Traditional Legal Authority and Practices*

Traditional justice is an organic mixture of "folk Sharia"<sup>16</sup>, or popular conceptions of Islam largely influenced by Sufi orders, and tribal law: "...local justice mechanisms have evolved through a centuries-long process of synthesizing text-based Islamic

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<sup>16</sup> Their, Alexander J. "Reestablishing the Judicial System in Afghanistan" *Center on Democracy, Development, and the Rule of Law Working Papers*, Stanford Institute for International Studies, No. 19 (September 1, 2004)(5)

jurisprudence and primarily-oral indigenous Afghan customary law.”<sup>17</sup> Traditional justice is generally administered through shuras or jirgas, which are councils of tribal chiefs (mullahs), religious leaders (ulema), village elders (maliks), and possibly warlords, particularly in the present day in certain regions. “Each of these councils applies its own sophisticated and historically evolved canons of law (adaat) in resolving community problems.”<sup>18</sup> Administration of justice through this mix of custom and Islamic law is trusted and respected by the people, thereby ensuring a certain level of legitimacy and rule of law in the community.

Although there are 55 ethnic groups in Afghanistan with distinct customs<sup>19</sup>, customary practices are studied largely in terms of their connections with Pashtunwali. This code of conduct for the Pashtuns “sets the standards of acceptable behavior both within the tribes and between the tribes, and continues to dominate social relations in marriage, divorce, and property disputes and crimes.”<sup>20</sup> Pashtunwali presents a number of controversies for both classic Islamic and Western legal scholars, particularly regarding child marriage, polygamy, compulsory marriage, and other rights of women granted in both Islamic and Western law.<sup>21</sup> The Women and Children’s Legal Research Foundation (WCLRF) has also taken a stand against *bad*, “the exchange of women as

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<sup>17</sup> Ahmed, Faiz. “Sharia, custom, and statutory law: comparing state approaches to Islamic jurisprudence, tribal autonomy, and legal development in Afghanistan and Pakistan.” *Global Jurist*. Vol. 7, No. 1 (March 6, 2007) (7)

<sup>18</sup> Ahmed (4)

<sup>19</sup> Senior, Amy. “Rebuilding the Judicial Sector in Afghanistan: The Role of Customary Law.” *Al Nakhlah: The Fletcher School Online Journal for Issues Related to Southwest Asia and Islamic Civilization* (Spring 2006)(2)

<sup>20</sup> Kamali, Mohammad Hashim. “Law in Afghanistan: A Study of the Constitutions, Matrimonial Law and the Judiciary.” *Social, Economic and Political Studies of the Middle East*, Vol. 36, E.J. Brill: Leiden (1985) (4)

<sup>21</sup> Ibid

compensation for a crime committed by a family member.”<sup>22</sup> In this way, jirgas throughout the country purport to uphold justice and rule of law in their communities through Sharia law, but what is in fact practiced is based primarily on custom, not on classic Islamic legal interpretations: “The Islam practiced in Afghanistan villages, nomad camps, and most urban areas, (the ninety to ninety-five percent non-literates) would be almost unrecognizable to a sophisticated Muslim scholar. Aside from faith in Allah and Mohammad as the Messenger of Allah, most beliefs relate to localized pre-Islamic customs.”<sup>23</sup> It is still true that Islam is a profoundly influential aspect of Afghan culture, but “Islam was super-imposed on a patriarchal society and did not seek a radical change in many of its institutions.”<sup>24</sup> Islam is a common cultural thread throughout Afghanistan, but further study is needed of how different customary laws and practices have contributed to varying notions of Islam throughout the country.

It is a well-recognized principle of Islamic jurisprudence to incorporate customary law according to the rules of *urf*. This principle reflects the pragmatic intentions of Islamic scholars since the ninth century to adjust to local practice in a way that will allow for further embrace of the Sharia by different cultures. *Urf* refers to “recurring practices that are acceptable to people of sound nature.”<sup>25</sup> In order to constitute *urf*, customary law must meet the following four conditions:

1. “Must represent a common and recurrent phenomenon. ... Custom, in order to be upheld, must not only be consistent but also dominant in the sense that it is observed in all or most of the cases to which it could apply.

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<sup>22</sup> Rowan, Diana N. “Afghan Women Leaders Connect: Profiles in Leadership.” [www.afghanwomenconnect.org](http://www.afghanwomenconnect.org) (2007)(Hangama Anwari)

<sup>23</sup> Louis Dupree, In Jones-Pauly, Christina and Neamat Nojumi II. “Balancing Relations Between Society and State: Legal Steps Toward National Reconciliation and Reconstruction of Afghanistan.” *The American Journal of Comparative Law* (Vol. 52) (Fall 2004) (p. 825) (849-850)

<sup>24</sup> Kamali (1985)(8)

<sup>25</sup> Kamali, Mohammad Hashim. *Principles of Islamic Jurisprudence*. The Islamic Texts Society: Cambridge (2003) (369)

2. “Custom must also be in existence at the time a transaction is concluded.
3. “Custom must not contravene the clear stipulation of an agreement. The general rule is that contractual agreements prevail over custom, and recourse to custom is only valid in the absence of an agreement.
4. “Custom must not violate the nass, that is, the definitive principle of the law. The opposition of custom to nass may either be absolute or partial. If it is the former, there is no doubt that custom must be set aside. ...if the conflict between custom and text is not absolute in that the custom opposes only certain aspects of the text, then custom is allowed to act as a limiting factor on the text.”<sup>26</sup>

Furthermore, considering how many different tribal traditions exist throughout Afghanistan, the rules of urf also allow for the distinction between general and special urf. Special urf refers to “urf that is prevalent in a particular locality, profession or trade. ...it is not a requirement of this type of urf that it be accepted by people everywhere. ...this type of urf is entirely ignored when it is found to be in conflict with the nass.”<sup>27</sup> It seems possible, therefore, for the formal justice sector to use special urf for parties from particular traditions, while still ignoring tradition that is in conflict with the general principles of the Sharia. Unfortunately, there is no clear understanding of how and to what extent the ulema in different regions of Afghanistan, in light of their different customs, have developed their own scholarship on urf, let alone how such scholarship is used by jirgas themselves.

The different leaders in traditional justice bring various interests, expertise and authority that collectively represent the sources of popular values. However, particularly for those leaders who do not have formal education in Islamic law, “There is no organized system to determine the power and influence of the religious leaders. The absence of a centralized structure has meant that religious leadership in Afghanistan is almost wholly governed by local patterns and personal attributes of the ulema and

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<sup>26</sup> Ibid (373-374)

<sup>27</sup> Ibid (377)

mullahs.”<sup>28</sup> It is therefore somewhat misleading to refer to ulema, mullahs and maliks as distinct classes that have uniform characteristics and qualifications. However, Kaja Borchgrevink of the International Peace Research Institute insightfully argues that as a whole, traditional religious leaders play the following roles in their communities:

1. “Socialization and Social Cohesion”
  - “Religious leaders and institutions...have the potential to strengthen internal bonds between members in a community and to act as a bridge between different groups.”
2. “Public Communication and Advocacy”
  - The mosque is a place that is used not only for religious services but also to share information of public relevance and to spread political messages.”
3. “Mediation and Conflict Resolution”
  - “...Because of their knowledge of religious law and general religious authority and standing in their communities, they were often involved in mediation and resolution of local conflicts.”
4. “Intermediation”
  - “The relative independence of the sphere in which ulema and local mullahs operate places them in a position to act as interlocutors between their own communities and external agents...”
5. “Resource Distribution and Social Security”<sup>29</sup>

Mullahs are tribal religious leaders, many of whom have long-standing tension with state authority because the state authority seeks to supplant them with state-selected bureaucratic and judicial officials. In part because most mullahs were educated inside Afghanistan<sup>30</sup>, mullahs are generally more familiar with tribal tradition than with Islamic legal scholarship.<sup>31</sup> However, mullahs are well-known and respected in their communities for their Islamic authority: “The mullahs are closely associated with the people whom they lead in prayer and whose children they instruct in the fundamentals of

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<sup>28</sup> Kamali (1985)(6)

<sup>29</sup> Borchgrevink, Kaja. *Religious Actors and Civil Society in Post-2001 Afghanistan*. International Peace Research Institute, Oslo (2007)(6)

<sup>30</sup> Ibid (34)

<sup>31</sup> Roy, Olivier. *Islam and Resistance in Afghanistan*. Cambridge University Press: New York (1990) (4)

Islam. They also play a significant role in marriage, birth, death, and their knowledge of Islam helps them to serve as arbiters and judges in rural areas.”<sup>32</sup>

Sufi leaders are very influential on popular notions of Islam. “Popular attachment to the [Sufi] orders and shrines is widely observable everywhere, cutting across all lines of division and identity.”<sup>33</sup> Popular appeal of these orders is maintained through oral narratives that “impart an oral history of ethics and morality.”<sup>34</sup> Furthermore, Sufi leaders, notably from the Mujaddidi family, served as judicial authorities in addition to their spiritual activities; they also played a major role establishing Hanafi jurisprudence as the primary source of Islamic law for the official judicial system.<sup>35</sup> Although a significant number of Sufi leaders were killed both in the war against the Soviets and subsequently by the Taliban, Sufism remains an important source of Islamic tradition for ordinary people.

The ulema are considered higher-level religious clergy who “generally hold higher religious degrees from madrasas and Islamic universities in Afghanistan and abroad.”<sup>36</sup> There is a range of degrees to which ulema are connected to and understanding of traditional justice. On the one hand, there are ulema who are considered to be “closer both to the Afghan (non-Islamist) intelligentsia and the state”<sup>37</sup> and who are therefore likely to share the intelligentsia’s frustrations with customary practices. On the other hand, there are ulema who resist the state and see those who cooperate with the state, particularly by serving on the national Shura e ulema, as “political opportunists.”<sup>38</sup>

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<sup>32</sup> Kamali (1985)(7)

<sup>33</sup> Jones-Pauly (847)

<sup>34</sup> Ibid (846)

<sup>35</sup> Ibid (848)

<sup>36</sup> Borchgrevink (27)

<sup>37</sup> Ibid (33)

<sup>38</sup> Ibid (7)

This portion of ulema is likely substantial, as one major impact of thirty years of conflict is that there is a whole class of ulema who lack advanced education.<sup>39</sup> However, there are some ulema who “are supportive of neither the current Afghan government nor the Taliban.”<sup>40</sup> These ulema are uniquely positioned to forge alliances with the state using their knowledge of Islamic approaches to customary law. Ulema are trained in and have experience “consider[ing] and evaluat[ing] local customs in deriving the substantive laws for a community on any given issue.”<sup>41</sup> In light of the pluralist nature of Afghan traditional justice, moderate ulema are in a strong position to address questions of how to evaluate customs according to urf doctrine. The challenge with harnessing these moderate ulema is that they are decreasing in number, as they face targeting by both the government and the Taliban for appearing to potentially side with the other side.<sup>42</sup>

Understanding the different loci of customary and modern legal authority implies that popular perceptions of justice depend upon the inclusion of legal authority outside of intellectualized Islam. “In the non-custom based system, we are used to deferring to the knowledge of the person who pronounces the judgment. ...In the customary law situation, however, it is not only the adjudicators who guard the understanding of the rules, but also the participants, i.e., the parties, the witnesses, and the public audience.”<sup>43</sup> If the foundational legitimacy of the customary system is based on collective understanding, the formal system will not improve its own legitimacy unless the rules it

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<sup>39</sup> Barfield, Thomas. “Culture and Custom in Nation-Building: Law in Afghanistan.” *Maine Law Review*, Vol. 60, p. 347 (2008) (364)

<sup>40</sup> Borchgrevink (8)

<sup>41</sup> Ahmed (24)

<sup>42</sup> Borchgrevink (8): “Mullahs and ulema who are supportive of neither the current Afghan government nor the Taliban are attacked by both militant Islamic groups and the government. Precisely because many of these ‘middle-grounders’ are seen as influential in their communities by both secular and religious actors, they have found themselves in a precarious position.”

<sup>43</sup> Jones-Pauly (851)

applies are understandable and relatively agreeable for the majority of the population. This paper will later show that in light of the prominence of customary law and Sufi traditions for ordinary people, the formal system cannot ignore these perspectives if it seeks to garner their support.

Customary traditions vary across ethnic groups, but are generally based on voluntary participation, the right to revenge, equality among everyone present (women are prohibited from participation), and consensus.<sup>44</sup> A community or *qawm* may be defined according to locality or descent, and “it is among people of the same *qawm* that customary law has its strongest force.”<sup>45</sup> The mechanism for order in these systems, because they are based on consensus, is social pressure.<sup>46</sup> Traditional justice is therefore sometimes limited in inter-communal disputes, especially between “communities of different ethnic groups, particularly if they have an antagonistic relationship.”<sup>47</sup>

Pashtunwali is the customary law of Pashtun communities. “While Pashtunwali is the basis for customary law in these communities, customary law is but one of its components. It is an oral tradition that consists of general principles and practices (*tsali*) that are applied to specific cases.”<sup>48</sup> These principles are *badal* (revenge), *melmastia* (hospitality), *nanawati* (sanctuary), and *ghayrat* (personal honor). *Badal* can lead to blood feuds, particularly between communities. Unlike modern Western legal systems, restorative justice through restitution is emphasized over punishment.<sup>49</sup> Non-Pashtun traditional justice is not as firmly structured and involves “ad hoc village assemblies

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<sup>44</sup> Barfield, Thomas, Neamat Nojumi, J. Alexander Their. *The Clash of Two Goods: State and Non-State Dispute Resolution in Afghanistan*. United States Institute of Peace (November, 2006)(6)

<sup>45</sup> Barfield (2008)(354)

<sup>46</sup> Ibid (358)

<sup>47</sup> Barfield et al. (2006)(7)

<sup>48</sup> Ibid (7)

<sup>49</sup> Ibid (11)

(shuras) that mediate and make decisions.”<sup>50</sup> Although revenge taking is permitted, blood feuds are less common.<sup>51</sup>

*B. Perceived Conflicts Involving Customary Law and Tradition*

There are aspects of customary law that appear to conflict with modern legal systems. For example, “customary rules such as *badal* (revenge) and *baramta* (private seizure of the opponent’s property in pursuit of a claim) impede the enforcement of modern laws.”<sup>52</sup> Modern Western legal systems prohibit the granting of general permission to break certain laws in light of perceived circumstances, and it is difficult to imagine how the judiciary could lawfully permit the traditional system to recognize *badal* and *baramta*.

Of particular concern are the rights of women and children. *Bad* is “part of a 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.”<sup>53</sup> A particular form of non-violent *badal* (revenge) is when “parties involved in a grave dispute agree to each give a young woman or girl in marriage with a man from the other family.”<sup>54</sup> Although women given in *badal* have more flexibility to visit their families, they do not consent to the arrangement. Although *bad* and *badal* are prohibited under both classic Hanafi doctrine

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<sup>50</sup> Ibid

<sup>51</sup> Ibid

<sup>52</sup> Kamali (1985)(4)

<sup>53</sup> United States Agency for International Development (USAID). *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*. (June 2005) (48)

<sup>54</sup> Ibid

and the current Afghan civil code, both practices persist, albeit less frequently.<sup>55</sup> Furthermore, disputes within a family are considered very sensitive and are usually handled privately. Combined with the preclusion of women from participation in the jirga or shura (women have to be represented by a male relative), there is “almost complete disenfranchisement of women from the traditional justice system in many parts of the country.”<sup>56</sup> In general, the traditional system may also be considered unfair “in the inability of a weak party to demand settlement from a much stronger one.”<sup>57</sup>

Traditional justice, although it purports to be Islamic, is considered by many among Afghan elites and the international community to be both violative of the Sharia and incompatible with Western-rooted notions of modern justice. Certainly customary practices based in rigid patriarchal traditions, particularly compulsory marriage and *bad*, contravene the general principles of the Sharia regarding women and girls. However, this should be an opportunity for the ulema to sort out which customs constitute *urf* and which do not in a way that is more authoritative on the ground. In places where the ulema have enough knowledge and authority to designate *urf* and thereby monitor the application of laws and traditions, tensions between traditional justice and the intellectualized Sharia of the formal system would be less profound.

C. *State v. Society*

Afghanistan has yet to demonstrate the critical level of national identity and interest necessary to sustain a state. Barnett Rubin holds that, “For most people in Afghanistan the state remains not the trustee of their common interest, but another

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<sup>55</sup> Wardak (327)

<sup>56</sup> Barfield et al. (2006)(15)

<sup>57</sup> Ibid (17)

particular interest like a tribe or clan.”<sup>58</sup> Indeed, the state came into formation through tribal federation under the leadership of Ahmad Shah Durrani, a Pashtun tribal chief, in 1747.<sup>59</sup> This tribal formation was called the loya jirga (great council) and was formed not on the basis of a common national spirit, but rather on a certain degree of recognized common values.<sup>60</sup> One’s ethnic or community identity was less important than the values shared and upheld in one’s community. In this way, it is not enough to simply be an Afghan – true Afghan identity, successfully promoted by the state, must come from upholding and protecting the basic values held by the people. The challenge with this imperative is that basic Afghan values, while professed in the name of Islam, are highly contested and vary from one community to the next.<sup>61</sup>

Traditional values and practices have persisted more substantially in Afghanistan in part because of its history as a buffer state between British territory and Russia. Although Afghanistan was never a formal British colony, Britain controlled its foreign affairs for much of the mid-nineteenth century, rendering it somewhat isolated from and unaffected by the usual ideological and governmental affects of colonialism. Furthermore, because the Amir was subsidized by the British to maintain the Afghan

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<sup>58</sup> Rubin, Barnett R. “Lineages of the State in Afghanistan.” *Asian Survey*, Vol. 28, No. 11, p. 1188-1209 (Nov. 1988) (1189)

<sup>59</sup> Ibid (1191)

<sup>60</sup> Roy (13)

<sup>61</sup> The International Legal Foundation’s 2004 study of customary traditions throughout each of Afghanistan’s regions demonstrates that there is a wide range of practices, some of which directly oppose each other. For example, the Pashtuns of the South and East give women to the victim’s family in the aftermath of a murder, but Hazaras in the Central Region of Hazarajat, as well as the tribes in Nuristan, condemn this practice. (International Legal Foundation. *The Customary Laws of Afghanistan*. (September, 2004) <http://www.TheILF.org>)

armies, Afghanistan was also largely isolated from and unaffected by the values and practices of capitalism.<sup>62</sup>

The traditional *jirga*, *shura* or *malaka* emphasizes restorative justice as a way towards reconciliation, a value very different from the retributive justice pursued in modern Western courts.<sup>63</sup> Parties voluntarily participate in proceedings, which take place in a mosque or the home of a community leader. The *jirga* is informal, “not a fixed local organization with regular meetings, official membership, a budget, or a recognized system of recording and reporting.”<sup>64</sup> It is therefore difficult to pinpoint the status of justice administered through *jirgas*, and elite urban intellectuals involved in setting the judicial policies of the formal sector do not have a nuanced understanding of the cohesion underlying traditional *jirgas* in each region.

Rural traditional communities are therefore largely ambivalent towards the state because it does not sufficiently embody traditional values and practices that are most relevant and trusted for them.<sup>65</sup> However, when faced with state attempts to penetrate traditional practices, ambivalence turns to resistance and rebellion against the state.<sup>66</sup> In particular, under the reign of Amir Amanullah (1919-1929), cultural revolution was imposed by the state in an effort to centralize power and modernize education by injecting Western enlightenment ideas. These reforms, known as the Nizamiya laws, were instigated by Amir Abdur Rahman at the turn of the century in order to create a uniform system of social administration.<sup>67</sup> However, it was under Amanullah, who

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<sup>62</sup> Rubin (1193)

<sup>63</sup> Jones-Pauly (838)

<sup>64</sup> Ibid (836)

<sup>65</sup> Roy (10)

<sup>66</sup> Ibid

<sup>67</sup> Ibid (15)

sought to follow the staunchly secular reforms taking place under Kemal Ataturk in Turkey, that reforms of the administration of justice were particularly alienating for traditional authorities. Amanullah “embarked upon a course of systematically removing from the village assemblies all their authority, and the qadis [judges] who were not appointed by the government were deprived of the right of making judgments.”<sup>68</sup> This act of stripping traditional judges of their power totally alienated the class of tribal leaders, and Amanullah was forced by resistance and rebellion to flee to Italy, where he died in 1960.<sup>69</sup> Although it was likely a combination of factors leading to the rebellion, Tarzi’s archival research through the United States Institute of Peace reveals that “the main motive for the revolt was ‘to curtail the loss of their authority to the central regime.’”<sup>70</sup> In fact, the rebellion in Khost was led by the ulema (religious scholars), “and their official complaint was that the new laws of the country did not conform to the Sharia.”<sup>71</sup> Christina Jones-Pauly insightfully argues that Amanullah’s agenda failed because it was a top-down effort to force social change, a process she terms “internal colonization.”<sup>72</sup>

The Constitution of 1930, ratified under Nader Shah after the tribal wars following the exile of Amanullah, was the first real modernization of the legal system. These reforms looked to Western standards on matters of administrative, commercial and procedural law.<sup>73</sup> Intellectuals “who had no formal training in Islamic studies reorganized the Islamic law in modern form by grouping the old materials in new

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<sup>68</sup> Ibid (19)

<sup>69</sup> Rubin (1199)

<sup>70</sup> Tarzi, Amin. *Historical Relationship between State and Non-State Judicial Sectors in Afghanistan*. United States Institute of Peace (October 8, 2006)(11)

<sup>71</sup> Ibid

<sup>72</sup> Jones-Pauly (829)

<sup>73</sup> Sirat, A.S. “The Modern Legal System of Afghanistan.” *American Journal of Comparative Law*. Vol. 16, p. 563 (1968) (563)

chapters and articles which would facilitate the finding of specific rules and provide internal consistency.”<sup>74</sup> While internal consistency is an important element of an effective legal system, carrying out this reorganization without the authority and expertise of traditional legal authorities paved the way for today’s judiciary: although it purports to issue jurisprudence according to Islamic law, its Tamasok al Qudat (instruction book for judges created at the time of the 1930 Constitution) lacks juristic legitimacy for the leaders who had preserved and maintained systems of justice in Afghanistan for centuries. The 1930 Constitution did give the ulema a role reviewing legislation and also gave tribal chiefs representative roles in government, but these roles were outside the realm of administration of justice.<sup>75</sup>

Under the Communist regime that came to power in 1978 (PDPA), inclusion of traditional authority was not only ignored but also suppressed. A “Revolutionary Council” was established, which attempted “to dissolve the autonomy of the Afghan legal system and to establish a single system under the total control of the national government.”<sup>76</sup> Again, this system was deliberately “overtly secular.”<sup>77</sup> Just as the Nizamiya reforms under Abd al-Rahman and Amanullah contributed toward rejection of the state and rebellion, the process of establishing the Revolutionary Council produced a similar effect.<sup>78</sup> In an effort to hang onto support after the Soviet invasion in 1979, “the PDPA retreated to the old ‘conformity with Islam formula.’”<sup>79</sup> However, the Soviet

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<sup>74</sup> Ibid

<sup>75</sup> Rubin (1200)

<sup>76</sup> Jones-Pauly (834)

<sup>77</sup> Barfield (2008)(353)

<sup>78</sup> Jones-Pauly (834)

<sup>79</sup> Barfield (2008)(353)

invasion overwhelmed any small gesture by the PDPA, and the resistance of the Soviets expanded into what became known as the Afghan Jihad.

The Taliban is generally thought to have been the primary contemporary regime to successfully avoid top-down imposition of “foreign legal values.”<sup>80</sup> However, despite their use of Islam in general as a platform for garnering support, the Taliban initially asserted its own top-down agenda for the administration of justice according to Arab Salafism. However, “in practice they didn’t have people trained in madrasas that used Arabic, so in reality what was implemented was Arab Salafism as well as strict Pashtunwali.”<sup>81</sup>

The mission of the state has been, therefore, to bring its power from the periphery to the center,<sup>82</sup> but power has always rested fundamentally with local power holders. Alexander Thier, in his scholarship on judicial and legal development in Afghanistan, has noted the following:

“The historical reality is that power in Afghanistan has almost always operated through a negotiation between the central authority and local power-holders – and tensions between these two levels have existed for as long as there has been a state. Even the Taliban, which exerted a greater measure of central control than its immediate predecessors, was forced to negotiate with local elites and accept a degree of local autonomy.”<sup>83</sup>

In light of this continuous power negotiation between the state and local power holders, major barriers exist for future coordination between the state and local, traditional institutions. Historically, local leaders have tended to keep state officials unaware of the true nature of their traditional practices, resentful of state attempts to insert its bureaucratic agenda into traditional structures and practices that have evolved over

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<sup>80</sup> Barfield (2008) (367)

<sup>81</sup> Ibid

<sup>82</sup> Roy (14)

<sup>83</sup> J. Alexander Thier, cited by Ahmed (4)

centuries. Therefore, part of the explanation for the Taliban's ability to maintain its strongholds over localities, in addition to its use of force, is its appropriation of local governance traditions, perhaps not intentionally at the outset, through rhetoric that appeals to the kind of Islam that communities are familiar with.

Given the importance of understanding and respecting the administration of justice, it is essential to acknowledge that despite the arguments against the compatibility of the two perspectives, a major portion of today's Afghans understands the proper administration of justice through both traditional and Islamic lenses. Furthermore, the downfall of Amir Amanullah and the PDPA regimes demonstrate that a top-down approach to reforming the administration of justice in particular can trigger destabilization and violence. The above historical analysis indicates that traditional authorities and practices play a major role in the lives of ordinary people and impact their attitudes towards the state. The following section discusses current dynamics of instability, particularly in terms of the current status of the administration of justice.

### SECTION III: CONFLICT ANALYSIS AND RELATIONSHIP TO JUSTICE

This section examines the distribution of authority after the overthrow of the Taliban in 2001, the impact of thirty years of conflict on both the formal and traditional justice systems, and the limits of the traditional system in meeting the conflict-related needs of their communities.

After the Taliban's centralized rule was disrupted in 2001, "an array of factions and local leadership structures reassumed control of the countryside. Several of these factions, notably Jamiat-i-Islami (Rabbani / Ishmael Khan), the Shura-i-Nizar (Masood / Fahim), Hezb-i-Wahadat (Khalili / Adbari), and Jumbish-i-Milli (Dostum) relied on long-standing organizational structures and foreign support to retake their previous domains."<sup>84</sup> The Western strategy was so focused on removing the Taliban, that there was and perhaps still is a willingness to support these factions as a means toward this end, without taking into account the negative impact that this support would have on the consolidation of state authority. Particularly in the Pashtun areas of Southern and Eastern Afghanistan, the local jirga often evolved into shared authority between tribal leaders and local commanders.

The Taliban seeks to weaken and dismantle the Karzai administration, and other warlords at least seek to maintain power in their domains. They often appropriate judicial authority in order to maintain their own hegemony: "Oral evidence indicates that the Taliban's local authorities interfered with the courts and appropriated them for their own purposes."<sup>85</sup> Traditionally disputants request the presence of certain community

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<sup>84</sup> Their, Alexander J. "Reestablishing the Judicial System in Afghanistan" *Center on Democracy, Development, and the Rule of Law Working Papers*, Stanford Institute for International Studies, No. 19 (September 1, 2004) (4)

<sup>85</sup> *Ibid* (835)

leaders in the jirga, but warlords may participate whether or not they have been requested.<sup>86</sup> Although the extent of this usurpation of judicial authority has yet to be researched in detail<sup>87</sup>, it is generally suspected that “as social and power relations mutated with the conflict, leadership based on armed strength and party affiliation began to crowd out traditional authority and practices.”<sup>88</sup> This practice often results in the implementation of extremist ideology in resolving disputes, which may constitute a departure from both tribal law and “folk Sharia.”<sup>89</sup>

Even beyond the usurpation of traditional justice by Talibs and local warlords, the conflict has damaged the integrity of the traditional justice system generally by generating a class of undereducated religious leaders and pressuring the system to handle disputes that it was never meant to deal with. In non-Pashtun areas that did not have a strong tradition of village councils, new shuras have been created to fill the gap in the absence of a state system.<sup>90</sup> In these areas, such ad hoc arrangements do not have a long-standing basis of authority to ensure their effectiveness. Across the country’s various traditional structures, mullahs, qazis (judges) and other traditional leaders rarely have advanced education.<sup>91</sup> In fact, there is a whole class of ulema that is independent of the centralized state and the elites that support it. The ad hoc nature of these councils, combined with the lack of education of the leaders, has led to some instances of bribery, even in the absence of warlords: “[Local traditional leaders] acted as self-appointed arbitrators to resolve a problem without resort to formal adjudication. Unfortunately this

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<sup>86</sup> Ibid (836)

<sup>87</sup> United States Institute of Peace. *Special Report: Establishing the Rule of Law in Afghanistan*. Special Report 117 (March 2004) (10)

<sup>88</sup> Barfield et al. (2006)(3)

<sup>89</sup> Their (2004)(5)

<sup>90</sup> Barfield (2008)(363)

<sup>91</sup> Ibid (364)

was often done by demanding bribes to make a problem disappear.”<sup>92</sup> Because the top priority is efficient, timely justice, these ad hoc structures continue to be solicited.

Conflict-related needs can be beyond the capabilities of both ad hoc and relatively established informal justice, but in the absence of a cooperative relationship with the new state justice system, the informal system continues to handle these disputes. Land disputes are very often handled unfairly when local strongmen have usurped the administration of justice.<sup>93</sup> Furthermore, traditional justice has not “proven able to deal with larger scale atrocities related to the armed conflict of the past 25 years,” due to its limitations in handling intergroup conflict as well as the magnitude of atrocities committed.<sup>94</sup> In some places, traditional authorities sometimes refer cases to the formal system where the matter is “beyond their competence”<sup>95</sup>, but this practice of referral would not take place in areas dominated by warlords or the Taliban. Such ad hoc referrals in general could be streamlined so as to ensure that all disputes have a forum for resolution or adjudication.

However, the formal justice system is also plagued with confusion over applicable law issues owing to thirty years of conflict. “The discontinuity of regimes over the last quarter 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.”<sup>96</sup> Without a coherent system of laws and application in the formal justice sector, coordination with the informal system will remain ad hoc and therefore unable to properly assess needs and explore referral policy options. As explained in

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<sup>92</sup> Barfield (2008)(361)

<sup>93</sup> Barfield et al. (2006)(3)

<sup>94</sup> Ibid (16)

<sup>95</sup> USAID (2005)(15)

<sup>96</sup> USIP (2004)(3)

Section IV, the formal system struggles with corruption and limited training, due in large part to blunders in the planning of international assistance. In this way, “the post-Taliban justice system remains a shambolic array of dysfunctional courts, ad hoc elder’s councils, and rule by local strongmen”<sup>97</sup> – neither of the two systems functions as it is intended.

Because the current administration of justice is highly unstable, a top-down approach to judicial reform has the potential to trigger further instability and resistance of the state. Traditional justice structures have atrophied or been co-opted by strongmen, but the history of distrust between the state and society remains and creates the risk that people may be reluctant to prefer state authority. If ordinary people, guided by their traditional leaders, come to prefer the strongmen to the state, then (1) the state’s efforts to impose reforms from the top-down will be resisted outright, and (2) engagement with traditional justice could prevent such resistance. In this context of delicate and ever-evolving popular opinion, the formal system sought to constitute itself.

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<sup>97</sup> Barfield et al. (2006)(3)

## **SECTION IV: BUILDING JUDICIAL INDEPENDENCE IN AFGHANISTAN: PROCESS AND OUTCOME**

### *A. Introduction*

This section focuses on the domestic process of judicial reform since 2001. It begins by demonstrating that although the Constitution is largely ambiguous on issues of customary law and practices, judicial reform has rejected the traditional system outright. Second, the model for judicial reform officially adopted by the interim administration is outlined, both in terms of institution building and safeguards for individual judicial independence. The model chosen to safeguard judicial independence featured the centralization of all judicial career matters through the Supreme Court, rather than through a separate Judicial Council. Third, problems in implementation are discussed. Regarding institution building, both the Judicial Commission and the later Judicial Reform Commission failed to overcome factionalism within the formal justice sector. Regarding individual judicial independence, centralizing the entire career process through the Supreme Court proved to be particularly problematic under the original Supreme Court, due to very conservative views of the Chief Justice. Furthermore, popular perceptions of the formal and traditional systems of justice are examined, revealing that corruption, lack of independence, and the rejection of traditional justice all contribute towards low levels of usage and popular confidence in the formal justice system. Finally, this section exposes the consequences that these failings hold for the formal system's legitimacy, and the way in which this lack of legitimacy contributes to heightened instability and the propensity for violence in present-day Afghanistan.

*B. Overall Rejection of Traditional Justice*

The formal justice sector tends to hold negative attitudes towards custom, due in part to their limited knowledge of traditional practices.<sup>98</sup> Afghanistan's recent history of codification by decree clearly conveys that the government priority since the mid-1960s is to develop a coherent and comprehensive system of laws, to be implemented in a top-down manner. Since the mid-1960s, "new comprehensive codes of criminal law, criminal procedure, [and] civil law were passed, as well as laws pertaining to civil servants, taxation, and investment."<sup>99</sup>

Much of the formal sector purports to resent the informal sector because it symbolizes resistance to modernization. Rather than the heavily customized Islam applied by the jirgas, the formal sector insists on applying a highly intellectualized version of Islamic law. As early as 1949, the elites, which make up a large portion of today's government officials and judges, produced publications, some of which were banned, expressing frustration over the "ignorance" of the people.<sup>100</sup> Furthermore, the 2004 Constitution (Article 122) specifically disallows cases from falling automatically into the jurisdiction of a traditional jirga, bypassing state courts: "No law shall, under any circumstances, exclude any case or area from the jurisdiction of the judicial organ as defined in this chapter and submit it to another authority."<sup>101</sup>

Among the intellectual class of government officials, as well as internationals involved in judicial reform, there are certain negative perceptions of Afghan customs that

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<sup>98</sup> USAID (2005)(12)

<sup>99</sup> Thier (2004)(6)

<sup>100</sup> Rubin (1205)

<sup>101</sup> Constitution of the Islamic Republic of Afghanistan (Article 122)

fuel the formal sector's stance against the application of customary law. First, traditional justice is perceived to operate in a feudal system. However, power in traditional tribal society generally depends on networks of patronage, in which individuals are not put in a position for life.<sup>102</sup> These traditional power relationships might be compromised in areas that are strongholds for warlords, but the underlying customary system is not fundamentally feudal. The major exception to this is the suppression of women, but to reject customary laws altogether on this basis would compromise legitimacy and the level of rule of law necessary to pursue better protection of women's rights. The authority of village chiefs, including the authority to dispense justice, comes from the consent of the community (qawm). The ulema remain in their role as religious leaders for life. They are respected and revered by the community and are not focused on political power.

Despite these negative attitudes towards traditional justice, judges in formal courts frequently hand off cases to be handled by the traditional system.<sup>103</sup> "In the Supreme Court, judges felt that such an arrangement would reduce their workload to a more manageable level."<sup>104</sup> However, caseloads of the formal courts are much smaller than in the informal system<sup>105</sup>, raising a question as to how this practice of referral is consistent with overwhelming evidence of negative attitudes towards customary law. Although formal judges are generally unfamiliar with the full range of customary practices, they may still share certain traditional points of view with the traditional system and feel comfortable referring certain matters. Particularly regarding family disputes, the tradition throughout Afghanistan, including in urban centers, is for family

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<sup>102</sup> Roy (22)

<sup>103</sup> USAID (2005)(11)

<sup>104</sup> Barfield (2008)(369)

<sup>105</sup> USAID (2005)(12)

matters to be handled privately, which is more feasible in the traditional system.<sup>106</sup>

Domestic violence is sometimes handled in formal courts (e.g. in parts of Herat Province), but the low number of female judges in the formal system makes formal courts less appealing.<sup>107</sup>

The bottom line in current relations between the formal and traditional justice systems is that, despite examples of referral between the systems, coordination is one-sided and the voices of traditional leaders are not being solicited. Kaja Borchgrevink of the International Peace Research Institute argues that religious leaders are being used if not co-opted for the legitimacy they hold in their communities.

“The relationship between religious leaders, the government and other development actors seems to go in one direction only. Government and other development actors seek to use the voice of the clergy to legitimize their policies and programs, and to gain access to project beneficiaries. However, little effort goes into either creating space for an autonomous role on the part of religious actors or establishing genuine dialogue.”<sup>108</sup>

This type of relationship is not sustainable, because although this practice of referral to the informal system may appear to be permissive of traditional authority, it is only intended to be temporary and it does not reflect the attitudes and long-term intentions of the formal justice institutions.

### *C. Model for Institution Building*

Institution building was supposed to be spearheaded by a 16-member Judicial Commission, which was established in May 2002.<sup>109</sup> The Judicial Commission was instructed to “rebuilding the domestic justice system in accordance with Islamic

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<sup>106</sup> Ibid (15)

<sup>107</sup> Ibid (33)

<sup>108</sup> Borchgrevink (7)

<sup>109</sup> Thier (2004)(8)

principles, international standards, the rule of law and Afghan legal traditions.”<sup>110</sup>

Regarding the administration of the judiciary itself, Article 125 of the 2004 Constitution holds that the Supreme Court prepares and implements the judiciary’s budget, and Article 132 calls upon the Supreme Court to establish an “Office of General Administration of the Judiciary.”

Regarding individual judicial independence, all career matters are centralized under the Supreme Court. This role is a central aspect of the structural model of the system of courts as a whole. Rather than having a judicial council that is a separate institution from the judiciary itself, this system names the Supreme Court itself the “Supreme Council of the Judiciary.”

“The highest court, composed of nine constitutionally-mandated justices, is the managerial body for the court system, also known as the Supreme Council of the Judiciary. This body has very few judicial responsibilities, for example deciding questions of jurisdiction, venue, extradition, impeachment, and the constitutionality of laws. Actual appellate review of most cases before the court is conducted by the relevant diwan, or bench, on the Supreme Court. These benches, also referred to as the courts of cassation, are headed by one of the Supreme Court Justices, and peopled with at least four other judges.”<sup>111</sup>

The personnel functions are vested in the Supreme Court under Article 132 of the 2004 Constitution: “Appointment, transfer, promotion, punishment, and proposals for the retirement of judges, carried out according to law, shall be within the authority of the Supreme Court.” Supreme Court Justices are appointed by the President and approved by Parliament (Wolesi Jirga). Lower level judicial appointments are recommend by the

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<sup>110</sup> Bonn Agreement, cited by International Crisis Group. “Afghanistan: Judicial Reform and Transitional Justice” *Asia Report* No. 45 (January 28, 2003)(12)

<sup>111</sup> *Ibid* (7)

Supreme Court and approved by the President.<sup>112</sup> Under the Law on the Organization and Authority of the Courts, the Chief Justice of the Supreme Court personally proposes action on all disciplinary issues to the President.<sup>113</sup> This model of entrusting the Supreme Court with the primary aspects of individual judicial independence can be very precarious in post-conflict contexts, because there is no buffer between the Supreme Court and political interests that may see some of these judicial career decisions as critically important for political stability and the consolidation of state authority. However, Article 116 of the Constitution holds that the judiciary is to be an “independent organ of the state”, meaning that inappropriate political influence on the judiciary could be arguably unconstitutional.

The current constitution takes an ambiguous stance on the role of both Islam and customary law in the formal justice system. Hanafi law is only to be applied according to the Constitution and general concepts of justice, but no further guidance is given as to the source of these general concepts.<sup>114</sup> The Constitution only addresses customary law regarding women, holding that the state is obligated to rule against “traditions contrary to the provisions of the sacred religion of Islam” (Article 54).<sup>115</sup> It is possible for judges to draw upon traditions that are not “repugnant” to Islam, but it is unclear whether judges are doing so and how they are evaluating “repugnancy.” Judges therefore have a great deal of latitude in determining which sources of law to draw upon and in which cases, and it is unclear whether they have enough well-rounded training and guiding framework

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<sup>112</sup> International Development Law Organization (IDLO) Monitoring and Evaluation Unit, “IDLO Italian-Funded Projects (2005-2008) For Legal and Judicial Reform in Afghanistan: Evaluation Report” (August 2008) (15)

<sup>113</sup> Supreme Court, Islamic Republic of Afghanistan. *Law on the Organization and Authority of the Courts of the Islamic Republic of Afghanistan*. (April 18, 2005)

<sup>114</sup> Jones-Pauly (844)

<sup>115</sup> *Ibid* (845)

to use varying approaches in constitutional review of customary laws, “folk Sharia”, and customized Islam.<sup>116</sup>

Furthermore, the modern principle of legality creates tension with the judiciary’s charge to uphold classic Hanafi law. “Whereas the religious law, or at least a part thereof, claims permanent validity, secular law is subject to the dictates of rationality and of changing social conditions, hence replacing one statute by another.”<sup>117</sup> Although it is debatable the extent to which Islamic law is permanent, judges are not given guidance as to how to negotiate this tension. Furthermore, even if such scholarship were carried out, the legal negation of certain aspects of either custom or Hanafi law would not automatically be received as legitimate on the ground.

With regard to policy, the 2002 National Development Framework<sup>118</sup> de-emphasized the justice sector in its priorities, holding major implications for the sector’s future performance. The framework centers around three pillars: “strengthening human and social capital, physical reconstruction and natural resource management, [and] stimulating the private sector.”<sup>119</sup> This prioritization indicates that the government only tangentially recognizes the importance of a legal framework in successfully addressing all three of these areas. Without sufficient recognition of the justice system’s central role in creating room for development, the justice sector will remain under resourced and unaccountable.

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<sup>116</sup> Ibid (855)

<sup>117</sup> Kamali (1985)(46)

<sup>118</sup> “In April 2002, the Interim Administration in Afghanistan formulated a draft National Development Framework in consultation with international assistance organizations and donor governments that reflected many of the same priorities and projects described in [its] preliminary needs assessment.” Montgomery, John D. and Dennis A. Rodinelli. *Beyond Reconstruction in Afghanistan: Lessons from Development Experience*. Palgrave Macmillan, New York (2004)(22)

<sup>119</sup> Ibid (22-23)

The Ministry of Justice’s “Justice for All” needs analysis, which was conducted in 2005, identified engagement with traditional justice as a strategic priority.<sup>120</sup> The assessment estimated that 90% of Afghans rely on traditional justice, and that “this is partly a reflection of trust and confidence in local communities and the justice they give, and partly a question of the physical absence and low capacity of state institutions.”<sup>121</sup> The Ministry of Justice therefore openly acknowledges the importance of engagement with traditional justice. However, their strategy for engagement is one of top-down training and imposition in order to bring the traditional system in line with its standards: “...to seek to eliminate [the traditional justice system’s] unacceptable elements and maximize its positive features. The aim should be to improve the quality of traditional justice, perhaps offering training to elders and others, incentives to follow the best approaches, and linkages to the state system where agreed procedures are followed.”<sup>122</sup> Although it is true that after thirty years of conflict the quality of traditional justice has perhaps strayed from what it once was, this strategy is one of aggressive imposition of authority, a strategy that has repeatedly failed throughout Afghanistan’s history. The content of such training, without consulting traditional leaders in this process, is an inherently political act that will undoubtedly alienate traditional leaders in many parts of the country, possibly fueling the fires of resistance.

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<sup>120</sup> Ministry of Justice, Government of the Islamic Republic of Afghanistan. *Justice for All: A Comprehensive Needs Analysis for Justice in Afghanistan*. Kabul (May 2005)(12)

<sup>121</sup> Ibid

<sup>122</sup> Ibid

*D. Implementation: The Judicial Commission and Judicial Reform Commission*

The Judicial Commission was dissolved four months after its establishment. “Political tension among members, the lack of a clear agenda and the impression of undue conservatism among some in the [Afghan Transitional Authority] seem to be the main reasons for the dissolution of this body.”<sup>123</sup> In particular, the different institutions that held prominent membership on the Judicial Commission rivaled each other for power, and this tug of war resulted in the politicization and ineffectiveness of the sector as a whole: “There was reportedly strong competition and recrimination between the Ministry of Justice and the Supreme Court, as both wanted to control the appointment of judges, and the Ministry of Justice wanted to control the Attorney General’s Office. As a result of the heavy involvement of these two entities, the Commission was reportedly not sufficiently independent of the government to be effective.”<sup>124</sup>

A new commission, renamed the Judicial Reform Commission (JRC), was subsequently established by decree in November 2002. The membership of the JRC was deliberately intended to be less politically partisan and more reflective of the professional legal community: “three former Supreme Court Justices, one former Minister of Justice, two former Attorney’s General, and four law professors.”<sup>125</sup> The main action of the JRC was the creation of a Master Plan, through consultation with all actors in the justice sector, in January 2003. “The Master Plan laid out proposed programs over the life of the Commission, in four categories: Law Reform; Surveys, Physical Infrastructure, and Training; Legal Education and Awareness; the Structure of Judicial Institutions. Within these categories, the Master Plan identified 30 individual projects to achieve objectives

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<sup>123</sup> Thier (2004)(8)

<sup>124</sup> Ibid

<sup>125</sup> Ibid

over an 18-month period.”<sup>126</sup> Although this plan appears impressive, the role of the JRC as outlined in the Presidential decree was not clear, and the JRC found itself unable to take a leadership role in “setting the agenda or facilitat[ing] support for the priorities” of the permanent institutions.<sup>127</sup> Furthermore, Karzai fundamentally undercut the JRC by entrusting the Ministry of Justice alone to “determine which laws were valid” insofar as they “are not inconsistent with [the Bonn Agreement] or with international legal obligations.”<sup>128</sup> In light of the magnitude and sensitivity of Afghanistan’s legal pluralism issues, both in terms of formal and customary laws, one might suspect that this decree was a deliberately political act to limit discourse on these issues. JRC efforts in the area of Law Reform are therefore totally delegitimized and extremely limited.

Despite the JRC’s improved membership, the atmosphere of factionalism in the justice sector as a whole led to negative perceptions of the JRC and eventually converted the JRC into another faction. “The Commission was accused of being too fundamentalist, too liberal, of being composed only of Afghans living abroad, or being controlled by one ethnic group or another.”<sup>129</sup> The reality is that “they lacked modern management skills, and that they all possessed a typical Kabul-centric view of Afghanistan.”<sup>130</sup> It is therefore evident that although the JRC did consultations in constructing its Master Plan, it did not consult the public or do any kind of outreach to explain its role and intentions. Furthermore, this “Kabul-centric” stance contributes to the government-wide tendency to look for top-down methods for consolidating state authority, perhaps explaining why public consultation was never conducted.

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<sup>126</sup> Ibid (12)

<sup>127</sup> USIP (2004)(6)

<sup>128</sup> Barfield et al. (2006)(19)

<sup>129</sup> Thier (2004)(8)

<sup>130</sup> Ibid

Factionalism engulfed the JRC because its lack of capacity, combined with pre-existing divisions in and among the permanent institutions, led to the JRC's total inability to establish any kind of leadership. Factionalism among the permanent institutions is due in part to the equal legal status of the Ministry of Justice, the Supreme Court, and the Attorney General's Office, as well as to "a variety of political, personality, and turf-consciousness reasons."<sup>131</sup> The JRC demonstrated its lack of capacity to lead these institutions through its overall "complacency about the structure of the judiciary and its implementation of the law."<sup>132</sup> Barfield argues that the JRC's complacent attitude towards the tasks at hand demonstrated that it was unequipped to consider real issues of reform:

"They all defined reconstruction as bringing back the same three-tiered court structure (district, province, capital) that existed in the country for most of the twentieth century *without examining whether this model still served the country's needs*. More confounding was their common insistence that (a) the system was already completely up and running, (b) that its size was adequate for handling all of Afghanistan's legal problems, and (c) that the formal system alone was all that was needed."<sup>133</sup>

Although there may be significant attitudinal elements present, these passive viewpoints convey that perhaps the JRC did not have adequate advisors to direct their attention to important issues in a supportive, non-confrontational manner. Lack of capacity in this case therefore refers to both the JRC's lack of funding<sup>134</sup> as well as practical experience. However, even if such dynamic advising were present, the level of factionalism among the permanent institutions, combined with lacking funding and political support, would have still presented major obstacles to the JRC's realization of its Master Plan.

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<sup>131</sup> USIP (2004)(6)

<sup>132</sup> Barfield (2008)(369)

<sup>133</sup> Ibid (emphasis added)

<sup>134</sup> Thier (2004)(12)

*E. Implementation: Problems with Individual Judicial Independence*

The implementation of the judicial career process model through the Supreme Court has in fact exhibited problems related to post-conflict instability. The processes of judicial appointment, according to the U4 Anti-Corruption Resource Center, “are marred with political manipulations and biases, including pressure from armed groups and warlords.”<sup>135</sup> Even when there is no major pressure from armed groups, appointments are “routinely made on the basis of personal or political connections without regard to legal training or other qualifications.”<sup>136</sup> The result is that judges may not have proper qualifications, as one source claims that only 20% of judges are sufficiently qualified.<sup>137</sup> The United Nations Assistance Mission in Afghanistan (UNAMA) found in 2004 that only one third of judges and prosecutors had university-level education.<sup>138</sup> This manipulation holds consequences not only for the political independence of the judiciary but also for the competence of individual judges to refrain from individually corrupt practices. Furthermore, pressures regarding appointments are rooted in the extent to which warlords have obtained public office. The international community neglected proper vetting in the construction of the Afghan state, allowing warlords to hold public positions that influence or pressure the President on judicial appointments. This situation of embedded warlordism in the Afghan state, “sowed the seeds of the culture of impunity that has since flourished.”<sup>139</sup>

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<sup>135</sup> Chene, Marie. “Tackling Judicial Corruption in Afghanistan.” *U4 Expert Answer*, U4 Anti-Corruption Resource Centre, Transparency International (September 12, 2007) [www.u4.no/pdf/?file=/helpdesk/helpdesk/queries/query146.pdf](http://www.u4.no/pdf/?file=/helpdesk/helpdesk/queries/query146.pdf) (3)

<sup>136</sup> USIP (2004)(5)

<sup>137</sup> Ibid

<sup>138</sup> IDLO (17-18)

<sup>139</sup> Ibid (19)

Political influence on the Supreme Court has also impacted the evaluation and discipline of judges. Processes of evaluation and discipline on grounds of corruption are neither transparent to the public nor to the judges themselves. In addition, because of a lack of resources, “the court has had no effective capacity to detect, investigate and prosecute cases of judicial misconduct, especially outside the capital city,”<sup>140</sup> raising questions as to what bases are used for dismissals. Most fundamentally, there is no independent oversight mechanism of all courts, including the Supreme Court itself. Placing all evaluation and discipline responsibilities with the Supreme Court not only opens it up to abuses internally but also compromises its insulated position by inviting political attention.

In 2007 the Supreme Court was reformed due to Chief Justice Fazel Hady Shinwari’s refusal to uphold the new constitution. Shinwari was “the former head of a madrasa (Islamic religious school) in Peshawar, and an ally of the Saudi-backed fundamentalist militia leader Abdur Rassool Sayyaf.”<sup>141</sup> Under Shinwari’s insistence, the Supreme Court “appointed scores of non-university trained Muslim clerics to all levels of the court system.”<sup>142</sup> Shinwari openly failed to apply the constitution by allowing additional judges to serve on the Supreme Court and by issuing rulings that had no basis in law. J. Alexander Thier describes a particularly dramatic disregard for the constitution only days after it was enacted:

“Only ten days after the close of Afghanistan’s Constitutional Convention, Afghanistan’s Supreme Court violated the word and spirit of Afghanistan’s new constitution. Without any case before the court, and based on no existing law, the court declared on January 14, 2004 that a

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<sup>140</sup> Ibid

<sup>141</sup> Thier (2004)(7)

<sup>142</sup> Ibid

performance by the Afghan pop singer Salma on Kabul television was un-Islamic and therefore illegal.”<sup>143</sup>

Shinwari also used the Shrua e ulema, which is the official council of Islamic scholars composed of ulema who share his point of view, as an alternate channel for issuing rulings on questions of Islamic law.<sup>144</sup>

The new Supreme Court instituted in 2007, headed by Chief Justice Abdul Salam Azimi, reflects a change from “Taliban sympathizers” to “more state oriented technocrats.”<sup>145</sup> Although the current Supreme Court is much more deferential to the constitution, it remains to be seen whether judicial appointments are made strictly according to the qualifications outlined in the constitution, or whether career process decisions are made under political influence.

*F. Implementation: Problems with Bribery and Physical Intimidation*

Corruption is considered to be highly pervasive in the formal justice system. Regarding perceptions of bribery in general, Integrity Watch Afghanistan found that “Over the last year, half of the respondents have paid bribes while two-thirds have seen their families suffer financially over the last year due to corruption.”<sup>146</sup> Specific to the judiciary, the sensitive nature of the problem has limited the compilation of concrete data in terms of frequency and magnitude of bribes and judicial outcomes of these transactions. However, Transparency International’s U4 Anti-Corruption Resource Center recognizes that the following does occur:

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<sup>143</sup> Ibid (1)

<sup>144</sup> USIP (2004)(7)

<sup>145</sup> Barfield (2008)(369)

<sup>146</sup> Integrity Watch Afghanistan. *Afghans’ Experience of Corruption: A Study Across Eight Provinces*. Commissioned by UNDP (2007) <http://www.iwaweb.org/Afghanexperienceofcorruption.pdf> (6)

“Judges reportedly ask defendants for money; judges and prosecutors routinely accept bribes for not processing cases. Disappearance of evidence is not uncommon and detainees are frequently asked for money in return for their release. There was even evidence that a prosecutor was bribed by a wealthy business man to secure the arrest of his business competitors.”<sup>147</sup>

These corrupt practices by individual judges formed around shared group dynamics among judges that encourage them to partake in these practices. Integrity Watch Afghanistan found that 43% of civil servants interviewed “thought that corruption was the result of collaboration between colleagues. ...[highlighting] a particular dynamic where individuals (civil servants) are compelled to be a part of a group collaboration in order to indulge in bribery and corruption. This ‘system’ can look unfavorably upon civil servants who resist corruption.”<sup>148</sup> This pressure to partake in corrupt practices is exacerbated by gaps in training for Afghan judges, particularly at lower levels where judges are looking to their senior peers not only for solidarity but also for leadership and guidance. Perhaps related to this relationship between prolonged lack of capacity and internal pressure for solidarity, the public perception is that judicial corruption is increasing: 74% of respondents to Integrity Watch Afghanistan “perceived the judiciary as the sector where corruption increased the most.”<sup>149</sup>

Afghan judges, like all civil servants in Afghanistan, receive no pensions and have no social security benefits. Their salaries are considered insufficient and often not

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<sup>147</sup> Chene (September 12, 2007)(3)

<sup>148</sup> Delesgues, Lorenzo and Yama Torabi. *Afghan Perceptions of Corruption: A Survey Across Thirteen Provinces*. Integrity Watch Afghanistan (March 2007)  
<http://www.iwaweb.org/AfghanPerceptionsofCorruption.pdf> (25)

<sup>149</sup> Ibid (63)

paid on time.<sup>150</sup> This lack of job security is likely a major motivation behind the extraction of bribes.

Physical intimidation by armed groups or warlords takes place not only in the context of judicial appointments but perhaps more often in the context of particular cases. Lack of protection for judges from armed groups themselves limits judicial authority over these actors and allows insurgency to persist. According to the International Development Law Organization (which, as Section V explains, was one of the main organizations funded by the Italian government), judges are “regularly targeted for attack or intimidation both by anti-government insurgents and by criminal gangs.”<sup>151</sup> The Afghan Ministry of Justice also holds that in rural environments, “Often judges, prosecutors and other officials are subject to intimidation by local strongmen.”<sup>152</sup> Armed threat directly compromises individual judicial independence and not only renders the judiciary powerless towards these actors, but also exacerbates public perception that the judiciary is totally ineffective. Both of these effects fuel the fires of insurgency and contribute to increased propensity for violence. Alexander Thier describes an incident in which the Chief Justice of the Provincial Court in Herat was murdered after issuing a ruling against the wishes of Ismael Khan and speaking out about his lack of independence. The incident contributed to wide scale violence in Herat between the government and Khan’s private forces.

“As Chief Justice of the courts in Herat, Mullah Khodaadad labors under the heavy-handed rule of Ismael Khan, the de-facto ruler of western Afghanistan. In 2002, Khodaadad told me about a murder case in a

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<sup>150</sup> Ministry of Justice, Government of the Islamic Republic of Afghanistan. Justice for All: A Comprehensive Needs Analysis for Justice in Afghanistan. Kabul (May 2005)  
<http://www.cmi.no/pdf/?file=/afghanistan/doc/Justice%20for%20all%20MOJ%20Afggh.pdf>

<sup>151</sup> IDLO (19)

<sup>152</sup> Ministry of Justice (7)

nearby village. The perpetrator was convicted by the eye-witness testimony of several villagers. Two days after his conviction, he was released – by order of Ismael Khan. Khodaadad complained of intimidation and lack of independence. In 2003, Khodaadad was hit by a car, an act many suspected was political violence. Then, factional fighting erupted in Herat in March 2004 during which Ismael Khan's son, a central government Minister, was killed and the central government-appointed military commander chased out of the province. Following the fighting, supporters of Ismael Khan burned down Khodaadad's house."<sup>153</sup>

Without the physical security to issue rulings freely, judges are severely limited in asserting their independent legal reasoning.

### G. *Perceptions*

A survey conducted throughout all regions of Afghanistan in 2008 by the Asia Foundation reveals that popular trust and legitimacy rest with the traditional justice system over the formal system. When asked if they were confident in the formal justice system overall, only 8% replied that they were a “great deal” confident, 38% a “fair amount”, 33% “not very much”, and 16% not at all.<sup>154</sup> Figures 2 and 3 show popular views on various aspects of the state and traditional justice systems. Figure 2 shows that state courts are not necessarily thought to follow “local norms and values.” State courts are also not widely considered to be less corrupt, and 51% of respondents reported having experienced corruption in the courts. In a separate survey conducted by Integrity Watch Afghanistan,<sup>155</sup> 52.6% of respondents said that the courts are the most corrupt

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<sup>153</sup> Thier (2004)(1)

<sup>154</sup> The Asia Foundation. *State Building, Security, and Social Change in Afghanistan: Reflections on a Survey of the Afghan People*. (2008)(21)

<sup>155</sup> Integrity Watch Afghanistan is a non-governmental organization dedicated to “increase transparency, integrity and accountability in Afghanistan through the provision of policy-oriented research, development of training tools and facilitation of policy dialogue.” The organization is funded by TIRI, UNDP, Overseas Development Institute (ODI), Open Society Institute, and the Norwegian Embassy. ([http://iwaweb.org/index\\_en.html](http://iwaweb.org/index_en.html))

government institution, and over 20% said that judges are the most corrupt civil servants, followed by public attorneys.<sup>156</sup>

By comparison, Figure 3 shows that traditional justice is rated more highly in following “local norms and values.” Furthermore, the traditional system is rated much more highly for being “fair and trusted.” The traditional system is also rated much more highly on effectiveness and timeliness.

*Table 1: Views on State Courts*

	Strongly agree (%)	Somewhat agree (%)	Somewhat disagree (%)	Strongly disagree (%)
a) State Courts are accessible to me	22	46	20	9
b) State Courts are fair and trusted	10	40	33	12
c) State Courts are not corrupt compared to other options of settling a dispute	11	36	33	13
d) State Courts follow the local norms and values of our people	12	38	31	14
e) State Courts are effective at delivering justice	15	37	30	14
f) State Courts resolve cases timely and promptly	10	28	33	24

Source: 2008 Asia Foundation survey

Figure 2<sup>157</sup>

*Table 2: Views on Local Shura and Jirga*

	Strongly agree (%)	Somewhat agree (%)	Somewhat disagree (%)	Strongly disagree (%)
a) Local jirga, shura are accessible to me	31	45	14	6
b) Local jirga, shura are fair and trusted	24	46	21	5
c) Local jirga, shura follow the local norms and values of our people	26	43	21	6
d) Local jirga, shura are effective at delivering justice	25	44	20	6
e) Local jirga, shura resolve cases timely and promptly	23	36	25	10

Source: 2008 Asia Foundation survey

Figure 3<sup>158</sup>

<sup>156</sup> Delesgues (17-18)

<sup>157</sup> Asia Foundation (48)

<sup>158</sup> Ibid

One important nuance in this data is that the opinions of women are less positive on the traditional system than those of men, indicating that women often feel disenfranchised by the traditional system. However, 49% of respondents were female, so the overall preference for the fairness of the traditional system remains valid across gender lines.

The survey also found that even in urban environments, the traditional system is used exclusively by roughly 20% of the urban respondents (whereas 45% of rural respondents exclusively use the traditional system). Barfield reminds us that the emphasis on written documents in the formal system makes the system less accessible for the illiterate majority of the population.<sup>159</sup> Interestingly, 18% of rural respondents reported to using both the formal and informal systems, indicating that both systems hold validity and preference in certain cases.<sup>160</sup> However, when asked about their satisfaction with the outcome of proceedings, more respondents were satisfied with the traditional justice outcomes (65%) than with outcomes in the formal system (36%). This difference is perhaps related to the nature in which traditional justice emphasizes restorative dispute resolution, whereas formal proceedings enact retributive punishment.

The overall indication is that the traditional justice system is perceived by the population as a whole to be faster, more effective, more consistent with popular values, and less corrupt than the formal system. Although perceptions of corruption in state courts are not themselves indicative of actual levels of corruption in the courts, perceptions of injustice render the judiciary weakened as a legitimate institution of the state.

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<sup>159</sup> Barfield (2008)(363)

<sup>160</sup> Asia Foundation (55)

*H. Resulting Conditions*

The present conditions of the formal justice system in Afghanistan are neither independent nor accountable, nor historically or culturally viable. These failings contribute to heightened instability and propensity for violence.

1. Independence and Accountability:

Failure to address corruption leads to both ineffectiveness and lost legitimacy. Judicial corruption, publicly perceived to offend traditional values through a system imposed by a centralized state, reinforces long-time attitudes towards the state as threatening to traditional ways of life. Integrity Watch Afghanistan found in its focus groups that, in fact, “Interviewees felt neglected by the government, or even perceived the government as threatening.”<sup>161</sup> The potential therefore exists for these threats felt by people, including but not exclusively those tied to judicial corruption, in certain areas to escalate to the point that ordinary people would support armed resistance against the state, just as they did under Amir Amanullah.

Those who seek to dismantle the current government can harness this potential for broadened popular resistance against the state. The Taliban and other warlords maintain insurgencies in the Southern and Eastern provinces. These provinces might be more sympathetic to the Taliban and see judicial corruption in the formal judiciary as more pervasive than equivalent corruption in traditional justice controlled by the Taliban: “...in Pashto areas like Logar, Nangahar and parts of Mazar-e-Sharif the Taliban regime was seen with sympathy and was often described as one of the least corrupt periods in the political history of Afghanistan.”<sup>162</sup> Survey results showed that “60% of respondents

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<sup>161</sup> Integrity Watch Afghanistan (34)

<sup>162</sup> Ibid (21)

perceived President Hamid Karzai's administration to be more corrupt than that of the Taliban, Mujahiddin or the Communist periods."<sup>163</sup> While the state is resented and distrusted throughout these regions, the Taliban, actively engaged in resistance, is sometimes seen as relatively benevolent.

In particular, corruption in the current government is perceived to be rooted in desire for money, as opposed to ethnic and political ties, as was the case under the Taliban and previous regimes.<sup>164</sup> This critical difference perhaps underscores the cultural rejection of corruption when perceived to be motivated by personal greed. Such perceptions would therefore hold judicial corruption to be particularly offensive in comparison to corruption within the Taliban and other insurgencies, motivated by ethnic ties and political agendas.

Integrity Watch Afghanistan found in its focus groups that in the Eastern provinces under major insurgency influence, there is indeed heightened propensity for violence as a direct result of government exploitation. "A focus group of several shopkeepers in Logar told researchers that people felt so powerless vis-à-vis the state that they would be willing to support anti-government units in order to stop the exploitation of ordinary people by Afghan officials."<sup>165</sup> Furthermore, riots in Kabul in 2006 served as a warning to the government and the international community that greater attention needs to be paid to state building in order to garner public support, as International Crisis Group stated that "fighting insurgency and nation-building are mutually reinforcing."<sup>166</sup> In February 2009, Taliban members attacked the Ministry of Justice, the Ministry's

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<sup>163</sup> Delesgues (7)

<sup>164</sup> Ibid

<sup>165</sup> Integrity Watch Afghanistan (37)

<sup>166</sup> International Crisis Group. "Countering Afghanistan's Insurgency: No Quick Fixes" Asia Report No. 123 (November 2, 2006)(ii)

Corrections Department, and other government buildings, killing at least twenty people, half at the Ministry of Justice.<sup>167</sup> Although we do not know for sure why the Taliban chose the Ministry of Justice in particular, the attack seems to demonstrate that the Taliban is harnessing perceptions that the formal justice system is illegitimate in order to maintain its resistance. The justice system is a strong symbol of the integrity of the state, and damage to its integrity implicates the government as a whole. Ledwidge points out that “In the absence of legitimate machinery of justice, society will move to fill a vacuum... Justice is a doubly dangerous weapon in the hands of a competent insurgent operation.”<sup>168</sup> In this way, instability in public administration has fueled individual judges to accept bribes and other forms of inappropriate influence, and judicial policymakers find it thereby necessary to further involve the executive. This in turn aggravates public grievances against the state, which militants can harness to prolong the conflict and delay sustainable improvements in public administration.

Another consequence of judicial corruption is that organized drug trafficking networks are able to maintain operations by paying bribes to judges.<sup>169</sup> USAID argues that this de facto official sanction of the drug trade, in conjunction with the drug trade itself, “are the most serious problems the country faces, and they offer the Taliban its only exploitable opportunity to gain support.”<sup>170</sup> Whether facing law enforcement officials or the judiciary itself, the Taliban therefore uses bribery to keep the justice system at bay as it attempts to garner local support around the only major lucrative

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<sup>167</sup> Oppel, Richard A. “20 Dead as Taliban Attackers Storm Kabul Offices.” *The New York Times* (February 12, 2009) <http://www.nytimes.com/2009/02/12/world/asia/12afghan.html>

<sup>168</sup> Ledwidge, Frank. “Justice and Counter-Insurgency in Afghanistan: A Missing Link.” *The RUSI Journal*, Vol. 154, No. 1 (February 2009)(6-9)

<sup>169</sup> Chene (September 2007)(2)

<sup>170</sup> USAID (11)

livelihood available for rural peasants. Although Afghanistan has a special counter-narcotics tribunal, it is extremely difficult to determine how rulings are made and whether convictions are made selectively, only for less powerful defendants.

Corruption therefore results in the alienation of ordinary people from the judicial process. “Ordinary people without shenaz or wassita [connections to officials] or without a sufficient proportion of it often find it difficult to maneuver through the hanging and often arbitrary prerequisites imposed by public officials.”<sup>171</sup> This situation creates the opportunity for a middleman, known as a commissionkar, to further exploit these people and “act as brokers between public officials and citizens or private sector actors.”<sup>172</sup> In this way, what started out as a bribe between two parties becomes a money-making opportunity for a third party, increasing the cost to the bribe-giver, who feels he has no other reasonable option to get through the judicial process. The courts allow this practice to take place, thereby further injuring the reputation of the judiciary.

It is interesting to note that corruption apparently also exists in traditional justice mechanisms, but it is more accepted. In its focus groups, Integrity Watch Afghanistan found that local leaders might be guilty of the same extortion found in the formal judiciary:

“Examples were given of mullahs in villages who used their position of the final arbiter in disputes to extort bribes... Even a highly respected religious scholar working in the Criminal Court in Kabul City indicated that religious institutions in Afghanistan were not free of corruption. Nevertheless, religious institutions enjoyed widespread acceptance despite the oft-mentioned local reality of bribe-taking mullahs.”<sup>173</sup>

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<sup>171</sup> Integrity Watch Afghanistan (28)

<sup>172</sup> Ibid

<sup>173</sup> Ibid (45-46)

The disconnect between acceptance of corruption in traditional justice and rejection of corresponding practices in formal justice is rooted in the history of resentment and distrust between the state and rural society. In fact, 47.9% of respondents to Integrity Watch Afghanistan felt that state corruption “increased feelings of injustice and inequality,” fueling the fires of animosity towards the state. While traditional leaders may not always have the interests of their community members at heart, their desire to protect and preserve their communities offers more support for the individual than that of the state.

Judicial corruption that impacts public perceptions and strengthens grievances against the government prolongs and perhaps aggravates resentment and distrust between the state and society, particularly rural society. Unless the formal sector develops enough institutional integrity and credibility to garner popular support, the grip that the Taliban and other warlords have on tribal areas will continue to fuel resentment of the state and possible escalation of violent conflict.

## 2. The Rejection of Traditional Justice:

The imposition of a centralized and seemingly foreign system of justice has severely alienated traditional authorities for decades and created a long-standing gap between traditional Islamic justice and attempts to modernize Islamic justice. Supreme Court Justices, under the 2004 Constitution (Article 118), are not required to have received higher education in Islamic jurisprudence, meaning that they are operating without full appreciation of the proper juristic role of the ulema: “...shall have higher education in legal studies *or* Islamic jurisprudence.”<sup>174</sup> Instituting new codes that are not

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<sup>174</sup> Constitution of the Islamic Republic of Afghanistan (Ratified January 26, 2004) [http://www.president.gov.af/root\\_eng.aspx?id=68](http://www.president.gov.af/root_eng.aspx?id=68) (Article 118) (Italics added)

directly derived from Islamic jurisprudence is not only a break with tradition, but especially for the ulema it is considered blasphemous: “From the perspective of many ulema, codifying Sharia amounts to imposing human limits on law of the Divine.”<sup>175</sup>

Wael Hallaq has argued that the alienation of the ulema from juristic power has diminished the overall legal weight of the Sharia itself in the formal judicial system: “No longer could the traditional jurists rely on their hermeneutical methods to determine what the law was; the new order had severed the organic link between the divine texts and the positive legal stipulations deriving there from.”<sup>176</sup> In this way, the very development of Islamic law in Afghanistan has become subjected to secular authority.

This alienation of traditional religious leadership in the face of modernization reflects the top-down reform processes that have been the historical trend for Afghanistan long before the current reforms. “Dethroning the masses as depositories of knowledge of custom in order to privilege only a few to act as exclusive depositories of that knowledge can produce resentment and ensuing instability.”<sup>177</sup> Just as the Nizamiya reforms under Amanullah resulted in instability, contemporary top-down reforms of the systems of justice will also contribute to instability. In order to promote reforms while garnering popular legitimacy, a bottom-up aspect of the reform process is crucial. Kaja Borchgrevink argues that repeated alienation of traditional religious leaders is shrinking the space for moderate religious leaders that would be in an ideal position to build positive relationships between communities and the state: “Marginalization of and attacks on religious leaders – along with the government’s inability to offer protection –

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<sup>175</sup> Ahmed (7)

<sup>176</sup> Wael Hallaq, cited by Ahmed (7)

<sup>177</sup> Jones-Pauly (851)

contribute to widening the gap between religious actors and the government.”<sup>178</sup>

Moderate religious leaders have therefore become caught in the middle of the battle between insurgents and the state, with neither side offering them protection. If these religious leaders choose to support the government, insurgents will attack them.<sup>179</sup> If they choose insurgents, the insurgency gains not only their support but that of their communities. It is up to the state to beat insurgents at their own game by employing a similar bottom-up strategy of true collaboration with traditional leaders. The ultimate goal of such a strategy is to ensure that the popular legitimacy gained through mutual cooperation will give individual communities the ability and the desire to abandon their support of insurgent groups.

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<sup>178</sup> Borchgrevink (8)

<sup>179</sup> Ibid (53)

## **SECTION V: INTERNATIONAL AGENDA FOR JUDICIAL INDEPENDENCE AND RULE OF LAW**

### *A. Introduction*

This section evaluates the international agenda for judicial reform, particularly in terms of problematic perspectives that have failed to recognize the interrelated ways in which judicial independence, corruption, and customary law all impact the legitimacy of the formal justice system. Immediately after the Bonn Conferences in 2001, the overall donor model or mindset was too reliant on past experience and not sufficiently attentive to Afghanistan's unique context and local views. In addition, the justice sector was largely neglected in the immediate post-2001 period, both in terms of funding as well as insufficient attention to professional development. The UN "light footprint" approach<sup>180</sup> of assigning Italy as the lead nation for the justice sector was severely misguided, as Italy's approach was too narrow and failed to recognize the importance of public consultation, capacity building, and positive relationships with local institutions. Furthermore, although there was general recognition on the part of many international actors of the importance of engagement with traditional justice, there was hesitation doing so in practice, due largely to concerns about religious extremism and mixed views of customary practices in light of human rights standards.

The present international agenda reflects a shift to arguably prefer the traditional system relative to the formal system, which has proven to be so widely corrupt and ineffective. This shift in focus has had a negative impact on the formal sector institutions

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<sup>180</sup> "The institutional reform in Afghanistan started in Tokyo, on 22 January 2002 at the end of the International Conference on Reconstruction Assistance to Afghanistan. In addition to their financial commitments in the reconstruction, a few donor countries were entrusted with the 'lead' in the reform of specific sectors within the 'security and rule of law' area. ...Generally speaking, the 'lead nation approach' generated a donor-oriented system, with broad bilateralization of planning and programming." *In*, Tondini, Matteo. "Justice Sector Reform in Afghanistan: From a 'Lead Nation' Approach to a 'Mixed Ownership' Regime?" *Transition Studies Review*. Vol. 15, 660-673 (2009) (664-665)

and fails to recognize that the promotion of rule of law in the long-term requires both a legitimate centralized state and its genuine cooperation with traditional justice.

*B. Immediate Post-2001*

1. General:

Overall, Montgomery and Rodinelli argue that the donor mindset was focused on using past experience to guide assistance and nation building in Afghanistan.<sup>181</sup> The approach “concentrated on ends rather than means, and its nation building functions were to be discharged by Afghans themselves with international donors performing only supporting roles.”<sup>182</sup> While this approach is preferred for building local ownership and capacity, this relatively hands-off stance must be balanced with an understanding that with limited capacity comes limited local ability and interest in exploring and addressing the full range of issues. International support is therefore underutilized and ineffective when it is too passive. This delicate balance between passivity and imposition becomes particularly important in situations where Western processes of nation building may not fully apply and the support of internationals seems less useful. Indeed, “the plans for international assistance were driven both by the immediate conditions and needs in Afghanistan and, inevitably although more implicitly, by conceptual models of development and modern society that have generally been embedded in Western foreign aid strategies for more than two decades.”<sup>183</sup> The disconnect in mindsets on the nation building enterprise, combined with Afghanistan’s lack of experience in this area, led to severely incoherent and narrowly focused international support.

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<sup>181</sup> Montgomery and Rodinelli (5)

<sup>182</sup> Ibid

<sup>183</sup> Ibid (15)

2. Neglect of the Justice Sector:

Perhaps due in part to the assignment of a lead nation to support the justice sector, the sector was neglected overall by agencies that would normally play critical roles. The United Nations Assistance Mission in Afghanistan (UNAMA), despite its concern for engagement with traditional justice, has taken no leadership on the issue and has no implementation responsibilities for the justice sector.<sup>184</sup> In response to the Bonn Agreement's recognition that the Judicial Commission should "rebuild the domestic justice system in accordance with...Afghan legal traditions"<sup>185</sup>, UNAMA articulated a clear understanding of the importance of traditional justice, yet never took leadership on the issue: "The issue of Afghan legal tradition refers to the customs, values and sense of justice acceptable to and revered by the people of Afghanistan. Justice, in the end, is what the community as a whole accepts as fair and satisfactory in the case of dispute or conflict, not what the rulers perceive it to be."<sup>186</sup> Lack of UNAMA leadership in encouraging the formal justice sector to engage with traditional justice contributed to international neglect of the justice system in this area.

Another area of neglect is international funding. The UN administers a Law and Order Trust Fund, which was established in 2002, but in the first two years the justice sector "received only \$11.2 million of the \$65 million requested for [that period]."<sup>187</sup> UNDP is the primary source of financial support for the JRC, but in the first year of its existence, a period during which it might have more robustly asserted itself, the JRC

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<sup>184</sup> Thier (2004)(13)

<sup>185</sup> Bonn Agreement (2001)(II(2))

<sup>186</sup> UNAMA (2002), quoted by Wardak (333)

<sup>187</sup> USIP (2004)(11)

only received \$500,000.<sup>188</sup> The United States did support the justice sector directly, but its modest contributions were not matched by other donors: “In 2003, the U.S. spent about \$13 million on rule of law activities other than police, including support for the Judicial Reform, Constitutional, and Independent Human Rights Commissions. (As insufficient as these amounts are relative to the needs of the Afghan justice sector, they made the U.S. the second largest donor to the sector.)”<sup>189</sup>

In the immediate post-2001 period, professional development issues were widely neglected. USIP found that “Virtually nothing ha[d] been done to update the court structure, establish and apply qualifications for judicial personnel... ensure widespread access to legal texts for practitioners and students, develop court administration, improve the poor quality of legal education, or address deep-rooted corruption.”<sup>190</sup> Without attention to the development of quality personnel, efforts to build physical structure will not be effectively utilized and newly developing legal frameworks will not be appropriately applied. A dearth of defense attorneys is also a major issue, particularly in a society where the majority of the population would need representation in order to navigate a seemingly foreign, document-based system. In 2004, USIP found that “Defense attorneys [were] essentially unheard of.”<sup>191</sup> In 2008, the Asia Foundation’s survey found that the lack of defense attorneys remains high: “66% [of respondents who used the formal system] mentioned that they pleaded their case alone or were helped by friends or relatives, while another 22% say they used professional legal services.”<sup>192</sup> The only organization devoted to professional development for defense attorneys in the early

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<sup>188</sup> Ibid (6)

<sup>189</sup> Ibid (5)

<sup>190</sup> Ibid (2)

<sup>191</sup> Ibid

<sup>192</sup> Asia Foundation (55)

years was the International Legal Foundation (ILF), “which launched a small training program in Kabul in August 2003, and which also provides some training through other organizations.”<sup>193</sup>

3. Italy as Lead Nation:

Italy was assigned at the donor conference in Tokyo in January 2002 to be the lead nation to support the justice sector. The assignment of lead nations was part of the UN’s “light footprint” approach of dividing up responsibilities in order to simply support Afghans rather than play any direct role in implementation. Tondini argues that this approach was plagued overall by “limited powers, financial capacities and expertise of the selected ‘lead nations’.”<sup>194</sup> Some of the neglect issues described above, particularly professional development, likely had to do with the lead nation’s focus being too narrow. Because other donors assumed that Italy would play a robust leadership role, there was no development of “a unified strategy and capacity among all international actors.”<sup>195</sup> Furthermore, Italy ignored the importance of public consultation, capacity building and building positive relationships with Afghan leaders so dramatically that what little assistance they did provide has been arguably counterproductive in building sustainable rule of law.

Italy operated through two channels. Its multilateral channel entailed financing projects through a range of international organizations, particularly UNDP and the International Development Law Organization (IDLO), on issues including administrative reform, penitentiary reform, juvenile justice, gender and justice, and the development of a National Legal Training Center. IDLO also provided training for all actors in the sector,

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<sup>193</sup> USIP (2004)(9)

<sup>194</sup> Tondini (665)

<sup>195</sup> USIP (2004)(2)

including judges, attorneys, judicial police officials, staff of the Ministry of Justice, members of parliament, civil servants, and professors.<sup>196</sup>

Through its bilateral channel, Italy bilaterally set up the Italian Justice Project Office (IJPO) to (1) conduct research on conditions and legal frameworks, and (2) “[draft] three legislative texts, aimed to guarantee basic protection of human rights.”<sup>197</sup> This approach was “widely seen as focused mainly on implementation of its own projects, rather than coordination of broader efforts,”<sup>198</sup> including collaboration with their Afghan counterparts. Italy’s most major contribution was the development of an interim code of criminal procedure, which President Karzai promulgated into law by decree in 2004. “This interim code has been the subject of some controversy, as it was prepared by Italian officials *with help from U.S. military lawyers but relatively little input or support from the Afghan justice institutions*, and was reportedly adopted under strong *foreign political pressure*.”<sup>199</sup> Not only was this code generated without regard for local buy-in and ownership, but it was also promulgated into law in the least legitimate manner (decree) without any kind of broad Afghan support. The tendency to make similarly faulty assumptions may also be present in the U.S. Government. Currently, all USAID rule of law programming must go directly through Ambassador Holbrooke. Unfortunately, USAID finds that its hands are tied when it comes to developing projects with a more nuanced and balanced approach towards legitimacy, because “the response is that we just need good laws.”<sup>200</sup> Wade Channell of USAID explains that while

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<sup>196</sup> Conference on Rule of Law in Afghanistan, Rome (July 2-3, 2007)

[http://www.rolafghanistan.esteri.it/ConferenceRol/Menu/I\\_rapporti\\_bilaterali/Cooperazione+culturale/](http://www.rolafghanistan.esteri.it/ConferenceRol/Menu/I_rapporti_bilaterali/Cooperazione+culturale/)

<sup>197</sup> Ibid

<sup>198</sup> Ibid (5)

<sup>199</sup> Ibid (8)(emphasis added)

<sup>200</sup> Channell, Wade, USAID. Phone Interview (March 3, 2010)

responding to urgency and building legitimacy are often at odds, missteps such as the above hold negative implications in the long-term:

“Lawmaking and regulation are unavoidably political. Normally, laws derive from the surrounding culture and power dynamics, with strong historical underpinnings as well. Unlike a machine in which parts can simply be exchanged, the legal system is dynamic, much more akin to a human body in which parts *cannot* simply be exchanged because of the complexity of factors involved in the transplant. Urgency is sometimes required, but it must be accompanied by long-term program of support to ensure that the transplant functions.”<sup>201</sup>

This disregard for the importance of positive relationship building as the key to capacity building and sustainability severely limited Italy’s ability to address factionalism in the justice sector. In particular, the Italian Embassy found itself unable to lead in coordinating other donors because it struggled in its relationship with the JRC, it became another faction in the justice sector.<sup>202</sup> Despite their unwillingness to collaborate with Afghans in the creation of the interim code of criminal procedure, the Italian Embassy became frustrated with the JRC when it discovered that “The work on the Master Plan was hurried, and several important actors, especially the Supreme Court and the Government of Italy did not feel that they had sufficient opportunity to give input to the final draft. Particularly galling for the Italian Embassy, which was funding the JRC salaries and offices, was that the plan had largely been written by American consultants.”<sup>203</sup> Although these American consultants should not have written the entire plan for the JRC, this outcome seems to point to the JRC’s need for more “hands on” assistance in light of their limited experience in such a role. Rather than seeking to

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<sup>201</sup> Channell, Wade. “Urgency and Legitimacy: Tensions in Rebuilding the Legal Structure for Business in Post-Conflict Countries” (June 2007) (Prepared for USAID internal training on economic growth in post-conflict countries) [http://bizclir.com/galleries/expert\\_opinion\\_files/Channell%20-%20Urgency%20and%20Legitimacy.pdf](http://bizclir.com/galleries/expert_opinion_files/Channell%20-%20Urgency%20and%20Legitimacy.pdf) (2-3)

<sup>202</sup> USIP (2004)(6)

<sup>203</sup> Thier (2004)(12)

ameliorate the situation by providing for further consultation of justice sector officials before the plan was to be adopted, “The Italian Ambassador publicly welcomes the document in a coordination meeting hosted at their Embassy, but in private they expressed their displeasure to the JRC leadership.”<sup>204</sup> In fact, the Italian Government attempted unsuccessfully to have the JRC dissolved.<sup>205</sup> The negative dynamic that developed between the JRC and the Italian Embassy served to hurt both of them: the JRC remained under-capacitated and decreasingly respected, and the Italian Embassy came to be “seen as a threat to Afghan leadership in the sector.”<sup>206</sup> Local ownership in close collaboration with international advisors should yield plans and tools for reforms that are more likely to succeed. In this way, the partnership between local actors and international agencies is meant to be one in which each side brings something to offer, and neither side can accomplish sustainable reform on its own.

The International Development Law Organization (IDLO), in collaboration with the Italian government, was the main organization involved in professional training. Their approach to training was overly simplistic and failed to recognize the complexity of the unresolved legal pluralism issues at hand. By late 2004, IDLO had provided “50 days (300 hours) of training to 450 persons over a 16-month period.”<sup>207</sup> However, language barriers in the context of highly specialized legal vocabulary proved to be a major challenge.<sup>208</sup> Furthermore, legal pluralism and the unresolved “patchwork of differing and overlapping laws [and] elements of different types of legal systems” made it unlikely that graduates of these trainings would be able to successfully apply their training. In

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<sup>204</sup> Ibid

<sup>205</sup> Ibid (13)

<sup>206</sup> Ibid (12)

<sup>207</sup> USIP (2004)(10)

<sup>208</sup> Ibid

fact, in these early years, “to a great extent, the written law in Afghanistan [was] not applied – or even widely known, including by judges and lawyers. As one senior Afghan judicial official put it, Afghanistan ‘has many laws, but no implementation.’”<sup>209</sup> Meeting the demands for training and legal development simultaneously would entail direct engagement with judges themselves on these issues, a process which is discussed extensively in Section VII.

4. Hesitation to Engage with Traditional Justice:

Although many agencies, such as UNAMA, recognized the importance of working with Afghan customary laws and practices, there was significant hesitation to engage with traditional leaders in practice. Hesitation was due in part to complicated views of religious leaders in a climate of anxiety about religious extremism, failing to recognize the important role that these mullahs and ulema play as leaders of their local civil society: “Religious organizations are generally viewed with skepticism by the government, the international community and modern civil society.”<sup>210</sup> While the Bonn Agreement and the ‘Afghanistan Compact’ agreement in London in 2006 recognized the importance of strengthening civil society, interpretation of this idea is vague and only modern Afghan civil society is consulted.<sup>211</sup>

Perhaps the fundamental aspect of this hesitation is the quandary that donors feel in having to choose between building legitimacy through engagement with traditional justice, and protecting and promoting human rights standards. Practices such as *bad* and *badal*, although they are less frequently practiced and occur primarily in Pashtun areas of the South and East, are in direct violation of international human rights standards for

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<sup>209</sup> Ibid (5)

<sup>210</sup> Borchgrevink (25)

<sup>211</sup> Ibid (44)

women and children. Barfield reminds us that the “light footprint” approach has served as an excuse to avoid this dilemma, for to engage directly with traditional justice would be to put oneself in a role that should be held by Afghans themselves: “In Afghanistan this dilemma is at one remove: the actual administration of justice remains under the control of the Afghan state (such as it is) and foreigners serve only as advisors...

Therefore, most of the focus has been on ensuring that the new constitution and law code are in accord with international standards set out in treaties and conventions that previous Afghan governments have ratified.”<sup>212</sup> We are therefore left with the same conclusion that the “light footprint” approach missed an opportunity to direct the attention of state officials and societal elites to an issue that must necessarily be addressed in order for the state to garner any level of sustainable legitimacy.

International focus on the formal over the traditional justice system has had the effect of siding with the formal system in pre-existing tensions between the state and predominately rural communities, thereby exacerbating these tensions. For example, USAID has seen too many minefields in potential engagement with traditional justice, in part because the agency tends to be so focused on deliverables rather than long-term processes. Their 2005 report observes that “[A jirga or shura] 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.”<sup>213</sup> While all of these statements are true, this analysis fails to recognize the critical role of traditional justice in supporting community cohesion through a system that very often carries more

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<sup>212</sup> Barfield (2008)(371)

<sup>213</sup> USAID (2005)(9)

legitimacy than the formal justice system. The report's recommendations call for a top-down approach to engagement by educating rural mullahs in Islamic principles<sup>214</sup>, a tactic that would likely generate resentment, as these mullahs and ulema believe that they are already applying Islamic principles. Imposing trainings on religious leaders would deliberately seek to invalidate their voices, giving further credence to Borchgrevink's argument that "Religious actors are rarely given a voice; rather, their voices can be seen as being used."<sup>215</sup> Afghanistan's traditional leaders have historically resisted and rebelled in the face of such alienation and imposition. Given the shrinking space for moderate religious leaders in the context of the current insurgency, there is little reason to believe that attempting similar imposition in the present context would produce a different outcome.

*C. Present*

The present international mindset, particularly among U.S. actors, has shifted to show greater concern for engagement with traditional justice. However, as the formal sector has proven to be increasingly corrupt and ineffective, focus may be shifting to traditional justice at the expense of much needed support for the formal sector. Broader strategic concerns might play a role in this shift. U.S. Special Representative Richard Holbrooke, concerned both for rule of law but perhaps more importantly with finding an exit strategy in the area of rule of law, has shifted gears to take a huge interest in the informal or traditional justice sector, creating a trend of international donor interest in

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<sup>214</sup> Ibid (15)

<sup>215</sup> Borchgrevink (48)

informal justice.<sup>216</sup> This misguided aspect of Holbrooke's diplomatic agenda, while stemming from the intention to be realistic about rule of law in a largely tribal society, has substantial potential to (1) aggravate political influence and corruption in the formal judiciary, (2) fortify the sociopolitical hold that the Taliban and other warlords have on certain provinces, and (3) result in the failure to promote rule of law in the long-term, as such sustainability would require both a legitimate centralized state as well as genuine cooperation with traditional justice in order to garner such legitimacy.

Because this trend does not seem to reflect an intention to coordinate with the formal justice system, the formal justice sector is now concerned that they are about to lose international money and support, and the formal sector therefore resents the informal sector because they see it as a threat to their institutional survival. If cases may be brought before local jirgas rather than using the formal system, the fear is that the formal system will not be utilized and the institution will fail in its duty to modernize and centralize the administration of justice, jeopardizing the continued existence of the formal institution and possibly the government itself. It is therefore possible that judges will feel pressure to make corrupt decisions in order to compete with the efficiency of the informal justice system, and that the Supreme Court will be more inclined to allow the political influence of the executive in order to maintain unity in the face of dwindling support. It is up to international actors to not only continue their support of the formal system, but also to lead the way in bridging the gap between the two systems, both in terms of their coordination with one another and their underlying attitudes towards each other.

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<sup>216</sup> Interview: Jasteena Dhillon, State-Building and Human Rights for Afghanistan / Pakistan Program, Carr Center for Human Rights Policy, Kennedy School for Government & South Asia Initiative, Faculty of Arts and Sciences, Harvard University (October 21, 2009).

## **SECTION VI: DISCUSSION: TOWARDS A MORE HOLISTIC THEORY OF JUDICIAL INDEPENDENCE AND RULE OF LAW**

The formal justice system of post-2001 Afghanistan is slow, corrupt, and foreign. This result has been largely exacerbated by the unwillingness of international actors to develop a contextually relevant approach that would directly address long-standing tensions between the state and society, particularly rural communities. Defining legitimacy allows for a discussion of why these failures in the administration of justice are so significant. By deconstructing foundational understandings of legitimacy, it becomes evident that pervasive corruption, failed independent institution building, and the rejection of customary law all combine to generate a profoundly negative impact on the justice system's legitimacy. In this way, these three issues must be addressed simultaneously so that lost legitimacy through one issue does not generate a downward spiral by detracting from the legitimacy pursued through another angle.

Weber defines "tradition, charisma, and legal-rational procedure as potential sources of legitimate authority."<sup>217</sup> The strategy in post-2001 Afghanistan was to garner legitimacy primarily through legal-rational procedure. This approach was misguided because, in a context where such procedure does not have a history of popular acceptance, and where charisma is limited due to a long history of skepticism towards the state, appeal to tradition becomes critically important.

However, appeal to tradition is not sufficient to garner legitimacy. Because tradition is dynamic and evolves over time, appeal to tradition is a means to an end and not an end in itself. "Far from being timeless and unchanging, [customary practices] are

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<sup>217</sup> Asia Foundation (13)

subject to a great deal of manipulation and internal contest”<sup>218</sup> precisely because the mechanism of both authority and compliance is the community itself. Indeed, even classic Islamic legal development through fiqh carries meaning not just through the judges who apply them and the scholars who develop them, but also through the perceptions of ordinary people. Christina Jones-Pauly reminds us that although in many educated countries the ulema have appropriated Islamic scholarship for themselves, Islamic legal development is meant to be a public process: “The very non-state origins of Islamic fiqh contain the seeds of a three-way interaction – an interaction with the state, with the people’s customs, and with popular understandings of Islamic rights and duties. The fiqh is the product of a multitude of non-state actors: scholars, adjudicating mediators, and individual Muslims.”<sup>219</sup> In this way, both for customary practice and classic Hanafi fiqh, social well being, in this case through some form of rule of law, is a more fundamental goal than mere compliance.<sup>220</sup>

In light of this observation, a social-eudaemonic understanding of legitimacy brings the focus in post-conflict environments back to effectiveness. Social-eudaemonic legitimacy is grounded in “the actual performance of power holders, in their ability to meet key demands of a population.”<sup>221</sup> Particularly in war-torn environments where individuals and communities are in dire need of a system of justice to handle disputes and

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<sup>218</sup> Barfield et al. (2006)(6)

<sup>219</sup> Jones-Pauly (857)

<sup>220</sup> In assessing the impact of local Community Development Councils (CDC) in Herat Province, USAID encountered experiences such as that of the following woman, demonstrating that compliance with tradition, while important, is not the supreme priority for households: “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 became used to and also tries to help me to look at the projects from different perspectives” (USAID (2005)(43)).

<sup>221</sup> Asia Foundation (14)

crimes of all scales, it is essential for building legitimacy that the government judicial system be perceived as effective.

There are undoubtedly mixed factors that contribute to legitimacy. Appeal to tradition and demonstrated effectiveness are both necessary conditions for garnering legitimacy in Afghanistan, and therefore neither should be addressed at the expense of the other. Making this general observation more operational means understanding that (1) successful anti-corruption and independent, sustainable institution building are necessary conditions for effectiveness, and (2) consultation and genuine engagement with all sources of traditional authority is a necessary condition for successful appeal to tradition. All of these sub conditions are necessary to build legitimacy for cooperative administration of justice in Afghanistan. As such a system garners legitimacy, sustainability becomes more feasible because the permanent institutions are more secure and thereby have greater flexibility to pursue the strongly independent and accountable judiciary that Garoupa and Ginsberg theorize.

Converting these requirements into proscriptive objectives generates two observations. First, at the institutional level, anti-corruption efforts should be addressed in direct coordination with judicial independence strategy so as to minimize the independence/accountability tradeoff. Alexander Thier argues that independence requires legitimacy, which in turn requires transparency and accountability, which in turn requires the right people leading the justice sector's permanent institutions:

“The judiciary must begin a long battle for legitimacy, for only once it is trust as a non-partisan institution will it have the support to become genuinely independent. This requires creating systems of oversight and transparency. Judicial procedures and decisions must be clear, public, and

based on law. Fundamentally, this process requires judicial leaders who share this vision.”<sup>222</sup>

If independence requires accountability through its dependence on legitimacy, then in a place such as Afghanistan where politics is highly distrusted, Garoupa and Ginsberg’s theoretical concept of a strong, accountable judiciary is not an ideal but an *imperative*. Without independence, legitimacy is lost due to suspicion of politics, and without accountability, legitimacy is lost due to lack of credibility. If Afghanistan’s judiciary does not become more accountable under the planning and implementation of institutions whose leaders share this understanding of the need for both accountability and independence, then legitimacy will be lost through one or both of these channels.

Second, popular legitimacy for the judiciary, as cultivated through mutual cooperation with traditional justice, promotes its independence. Facilitating not only coordination but also cooperation between the formal and informal systems will promote, over time, sustainable independence for the formal judiciary because it will have its own channel of legitimacy that is distinct from the executive and legislature. Lacking legitimacy contributes to a tendency to see the judiciary as political, not as independent. A 2005 Assessment by USAID argues that “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.”<sup>223</sup> Improved legitimacy through decentralized cooperation with traditional justice would allow the judiciary to distance itself from political pressures. The same USAID assessment holds that lacking legitimacy requires a more dynamic framework: “In a context of low or absent legitimacy in government institutions, there is some benefit to a

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<sup>222</sup> Thier 2004 (11)

<sup>223</sup> USAID 2005 (5)

fluid judicial framework, with an evolutionary and positivist approach to legal authority and sources of law.”<sup>224</sup> In this sense, building legitimacy is a process, not the mere institution of structures and rules, and this process start with the values and practices held by society as a whole. Legal development and institution building post-2001 was a top-down, centralized process that eluded the importance of custom to the people whose perceptions matter most, because it was assumed that clear rules and structures would automatically be understood and effective. Defining the pursuit of legitimacy as a decentralized, bottom-up process of collaboration directly targets the reality on the ground that there is a profound lack of understanding between the state, including the elites supporting it, and the majority of society. Such collaboration with international assistance would allow for the promotion of culturally relevant rule of law in societies that do not have strongly Western legal tradition, and thereby for the evolution of a judicial system that is perceived by all to be modern, effective, and genuinely Afghan.

The bottom line, therefore, is that relationship building is critical for both the formal sector to lead the way in bridging the gap with traditional justice, as well as for the formal sector institutions to perform in a way that lives up to the level of legitimacy they seek to build with the general population. Thomas Barfield observes that the debate between the formal and informal systems is a social one, not a religious debate: “Such opposition was not based exclusively on the secular modernizing content of the new codes, but rather on the impact all such state-imposed systems were perceived as having on Afghan society.”<sup>225</sup> In this sense, the real opposition over judicial reform exists between the more traditional ulema and the secular officials and judges of the formal

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<sup>224</sup> Ibid

<sup>225</sup> Barfield (2008)(349)

system, not between the rural communities themselves and the state. Roy reminds us that whereas the peasant is concerned primarily with his own affairs, “both [the ulama and the state] claim to be vehicles of knowledge which can unify society.”<sup>226</sup> The peasant “has little knowledge of the intricacies of the Sharia and they do not interest him; for him it is sufficient that a concern with justice should characterize the ‘Muslim’.”<sup>227</sup> The notion that ordinary people look to their traditional leaders as they shape their opinions on justice is complicated by the reality that tensions also exist among ulema, particularly regarding those who serve on the Shura e ulema and are thereby better understood as elites than as traditional authorities: “The Shura e ulema is not above the power game currently being played out in a number of forums. ...[it] is therefore seen by many religious leaders as a political body, attracting pro-government and populist religious leaders.”<sup>228</sup> The extent to which mullahs relate or consult with the Shura e ulema depends on the viewpoints of the particular mullah.<sup>229</sup> Without relationship building to bridge gaps between the state and traditional leaders, as well as within the nominally Islamic authorities, the formal system will remain irrelevant if not resented by the majority of Afghan society. Wade Channell of USAID reminds us that “Laws regulate one thing and one thing only: human relationships. When restructured without sufficient regard to relationships... laws will be ineffective at best or damaging at worst.”<sup>230</sup> Relationship building between the formal and informal justice systems is therefore the nexus of building legitimacy.

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<sup>226</sup> Roy (28)

<sup>227</sup> Ibid (29)

<sup>228</sup> Borchgrevink (28)

<sup>229</sup> Ibid (30)

<sup>230</sup> Channell, Wade. “Urgency and Legitimacy: Tensions in Rebuilding the Legal Structure for Business in Post-Conflict Countries” (June 2007) (Prepared for USAID internal training on economic growth in post-conflict countries) [http://bizclir.com/galleries/expert\\_opinion\\_files/Channell%20-%20Urgency%20and%20Legitimacy.pdf](http://bizclir.com/galleries/expert_opinion_files/Channell%20-%20Urgency%20and%20Legitimacy.pdf) (3)

## **SECTION VII: RECOMMENDATIONS TO IMPROVE JUDICIAL INDEPENDENCE AND RULE OF LAW IN AFGHANISTAN**

### *A. Introduction*

This section proposes a new agenda for judicial reform that is based on the prioritization of genuine dialogue among traditional leaders, the formal justice sector, and civil society, supported by international actors, in order to build a system that is not only coherent but also simultaneously modern, effective, and genuinely Afghan. By distinguishing between coordination and cooperation, it becomes evident that what is needed to bring the formal and traditional justice systems to work together collaboratively, without resentment or competition, is genuine dialogue about intentions, practices, values, priorities, and interests. Workshops on these issues should be piloted in communities where they are more likely to yield positive relationships that may be maintained through a Legal Development Working Group, then replicated in more challenging areas. A similar model of dialogue may be employed at the national level, with the hope that an effective and legitimate task force might encourage the government to amend the Constitution so that such a body may be converted into a Judicial Council, formally serving as a buffer between the judiciary and the executive. Although prospects for realizing this strategy at the national level depend on questions of political will, successes at the local level should have a strong impact on the mindsets of the political leaders and social elites of Afghanistan.

### *B. Coordination v. Cooperation*

The general principle behind coordination between formal and informal justice systems is that “It is important to give legal recognition to the outcomes of informal

dispute resolution that is definitive but that does not compromise the rights of individuals to use the formal system if they so choose.”<sup>231</sup> Barfield explains that a long-term approach to engagement with the two systems allows for the preservation of community cohesion aspects of traditional justice, while discouraging over time practices that are considered problematic:

“Some ways of keeping order, such as blood feud, will never be acceptable and should disappear as state authority expands. Others, such as the use of jirgas or shuras to hear local disputes, are grassroots democratic institutions that should be encouraged. But precisely because such institutions give priority to the community over the individuals, disputants should always have the right to the formal legal system where they can get a hearing by (hopefully) more dispassionate judges, or demand enforcement of their rights through national law codes that apply to all citizens equally.”<sup>232</sup>

In this way, the formal justice system provides the basic recourse to justice that all citizens are entitled to, but recourse through the traditional system should be formally permitted, recognized and upheld by the courts. This formalization of the relationship between the two systems of justice allows the state to develop a record-keeping system in order to better assess the status of rule of law for Afghanistan as a whole. Such a system would require a major public education campaign to acquaint communities in all regions, including and particularly women, with their rights and remedies in the formal system.

Fortunately, the 2004 Constitution already allows for some legal pluralism. Under Article 131, the courts are allowed to use Shia jurisprudence for Shia parties.<sup>233</sup> This means that the formal judiciary is already posed to deal with legal pluralism and should be able to receive guidance from the ulema regarding customary law that constitutes *urf*. Not only are traditional leaders in an appropriate position to contribute to

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<sup>231</sup> Barfield (2008)(351)

<sup>232</sup> Ibid (373)

<sup>233</sup> Constitution of the Islamic Republic of Afghanistan (2004)

the development of Islamic law in both the formal and informal sectors, but there may also be constitutional openings for them to do so.

Furthermore, although the current constitution prohibits disputes from automatically falling to traditional jirgas, it “leaves open the question of whether state courts possess, or must maintain, a monopoly over adjudication and justice.”<sup>234</sup> It is therefore a matter of interpretation whether the formal system will permit the existence of non-state courts and whether it would supervise these courts. Involving traditional legal authorities in the development of formal judicial policies would allow for informed decisions on coordination with informal justice, particularly regarding women’s cases, rather than denying adjudication to traditional jirgas altogether.

Afghan ex-patriot and Professor Ali Wardak proposes the following model for coordinating the traditional and formal justice systems (Figure 4). His “integrated model” calls for the division of jurisdictions according to case type, with only civil incidents and minor criminal cases permissible in the jirga or shura. If the jirga were unable to reach a satisfactory resolution, the dispute would be referred to the formal district court. The Human Rights Unit is supposed to be the public education arm of the system, focusing on the preparation of “educational and human rights awareness materials, and disseminat[ing] them in culturally sensitive ways.”<sup>235</sup> In addition, the Human Rights Unit would also have the power “to pro-actively investigate serious past human rights abuses and war crimes; it would liaise closely with the Independent Afghan Human Rights Commission, compiling serious past human rights abuses and war crimes and reporting them to the Special Court of human rights of Afghanistan (or Truth

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<sup>234</sup> Jones-Pauly (830)

<sup>235</sup> Wardak (337)

Commission) that Afghanistan would need to establish.”<sup>236</sup> To “counterbalance the male-dominated jirga”, Wardak argues that officers in the Human Rights Unit should be mainly female.<sup>237</sup>

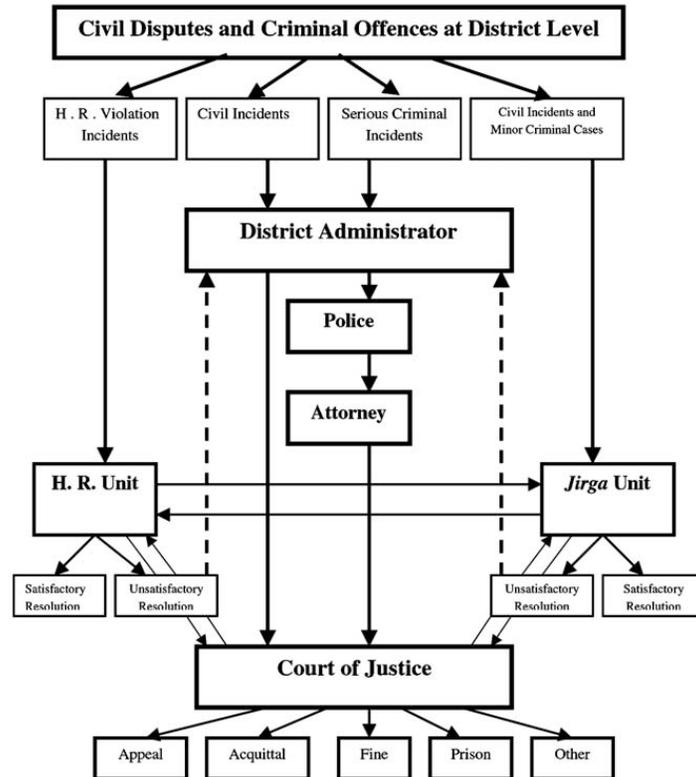


Diagram 2. An integrated model of a post-war justice system (District level) in Afghanistan.

Figure 4<sup>238</sup>

The difficulties with this model are numerous. First, the limitation of case types that are permissible in the traditional system is still an inherently political act that imposes limits on traditional authority and may be met with reluctance to comply if not active resistance. Indeed, any attempt to build a unified system of justice from more than one tradition will face tensions or dilemmas of hierarchization. There is no way around the reality that when laws conflict, one system will have to trump the other. “In

<sup>236</sup> Ibid

<sup>237</sup> Ibid

<sup>238</sup> Wardak (336)

Afghanistan, this means asking whether the statutory or constitutional law [or customary law] trumps the Hanafi Sharia, or vice versa. ...Hierarchization necessarily leads to confrontation.”<sup>239</sup> Furthermore, questions also arise as to when the formal sector should supervise the informal sector, raising sensitive issues of “internal colonization” for tribal leaders.

Second, the creation of a Human Rights Unit staffed mostly by women would undoubtedly lead to a disparity in legitimacy between the unit and the other institutions. While women require channels for dispute resolution that are accessible and comfortable, it would be a disservice for Afghan women in the long run to not have equal access to the formal justice system. Furthermore, assigning full investigative power to a unit that is also charged with public education is not likely to be implemented appropriately, given that the model depends on the creation of a truth commission. In the event that no truth commission is established, the unit might turn its information over to the formal system for prosecution, violating the trust of the communities that did not necessarily intend to bring about prosecutions.

Finally, and most importantly, Wardak’s model is one for coordination, not cooperation, and the distinction between these two concepts is critical for the success of any effort to bring the two systems together. There is no mechanism or strategy in Wardak’s model for preventing the courts, jirgas/shuras, and the Human Rights Unit from competing with each other for legitimacy and resources. Competition in this way is a major concern, as demonstrated by the current relationship between the two systems, in which they co-exist without advancing the protection of rights or building legitimacy for

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<sup>239</sup> Jones-Pauly (852)

a partnership: “At present, the formal and informal systems co-exist, but without official sanction or mutual recognition.”<sup>240</sup>

Genuine cooperation means to “establish a mutually beneficial link between the two systems, without threatening the integrity of either.”<sup>241</sup> Rather than top-down division of jurisdictions without consultation or collaboration with traditional leaders, referral should be agreed upon on both sides and be seen as mutually beneficial not only to both parties in the dispute, but also to both systems. Regarding the review of decisions in the traditional system, Barfield et al. argue that individual rights under the constitution are the basis according to which legality of informal decisions are evaluated.<sup>242</sup> Enforcement of informal decisions, they argue that the formal system may play a role in enforcement only if both parties agreed to the formal system at the outset of proceedings.<sup>243</sup>

The United States Institute of Peace currently funds and oversees a pilot project through the Tribal Liaison Office of Afghanistan that, while promoting cooperation with the state, poses major concerns for stability and rule of law. “At the request of the Khost Provincial Governor, Arsala Jamal, The [Tribal] Liaison Office facilitated the formation of the Commission on Conflict Mediation (CCM) in Khost in November 2006.”<sup>244</sup> Composed of six permanent members (who are traditional leaders nominated to the CCM by their peers) and additional local members connected to the case at hand, the CCM was created primarily to resolve the province’s most serious land conflicts. The CCM has

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<sup>240</sup> Barfield et al. (2006)(3)

<sup>241</sup> Ibid (25)

<sup>242</sup> Ibid (26)

<sup>243</sup> Ibid

<sup>244</sup> The Liaison Office (United States Institute of Peace). “Between the Jirga and the Judge: Alternative Dispute Resolution in Southeastern Afghanistan.” *TLO Program Brief/1* (March 2009)(1)

made significant progress: out of 31 cases heard in the CCM's first 18 months, "18 of these conflicts have been successfully resolved, with no reported resumption of hostilities; 3 conflicts have been referred to the provincial court; and 10 conflicts are in the process of being arbitrated by the Commission."<sup>245</sup> However, because the CCM coordinates traditional justice with the Provincial Governor, and not with the Provincial Courts, it must be understood as ultimately another form of informal rule, and not the rule of law. It is Governor Jamal, and not the court, that oversees and registers the CCM's proceedings, severely limiting the CCM's own independence. The Provincial Court therefore "tends to see the Commission as competition, and has in some cases blocked the CCM's request for land title documents. The mistrust of the Provincial Court can be partly traced to *the CCM's ambiguous status within the Afghan judicial system.*"<sup>246</sup> The cooperation described by Barfield et al. concerns the relationship between traditional justice and the formal *judiciary*, not the executive branch. Because "it remains to be seen what legal weight a CCM decision, even when signed by the Governor, actually carries"<sup>247</sup>, the potential exists for profound destabilization in the face of Provincial Court refusal to uphold decisions made in highly volatile land disputes outside of and in direct disregard for the Provincial Court's authority.

A positive example of successful cooperation according to the terms laid out by Barfield et al. is the Norwegian Refugee Council's "Information Legal Assistance Centers." Made up of attorneys and judges who have formal training and often professional experience in the formal system, "the program attempts to use the processes of *jirga* as a means of conflict resolution for returning refugees and internally displaced

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<sup>245</sup> Ibid (2)

<sup>246</sup> Ibid (7)

<sup>247</sup> Ibid

persons.”<sup>248</sup> This is an example of genuine cooperation because representatives of the formal justice system are helping traditional structures fill the gaps in order to properly handle an influx of disputes beyond a jirga’s intended capacity. Program reports have found that “the role of informed judges and attorneys have created more durable remedies.”<sup>249</sup> Both sides recognized the need for collaboration on issues directly related to armed conflict, each side recognized each other’s positive roles, and international actors encouraged and facilitated this collaborative effort.

However, this example demonstrates that bringing about genuine collaboration and cooperation between the formal and informal systems as a whole would require not only a functional administrative model as outlined by Wardak and Barfield et al., but also relationship building in order to overcome decades of tension, distrust, resentment and resistance. It is therefore critical that before any administrative model is put into place, a call for dialogue must begin the process of adjusting the attitudes of stakeholders – traditional leaders, formal sector officials, and other civil society leaders – in order to better understand each other’s intentions, practices, priorities, interests, and fundamental values.

*C. A Call for Dialogue: The Legal Development Working Group Model*

Religious leaders have the authority and the respect to lead their communities in exploring and defining the values and practices they want to build for the future.<sup>250</sup>

Ulema are not only considered by some to be “the custodians of Islamic law”<sup>251</sup> in

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<sup>248</sup> Barfield et al. (2006) (28)

<sup>249</sup> Ibid

<sup>250</sup> Borchgrevink (6)

<sup>251</sup> Ibid

Afghanistan, but they are also the only people with sufficient knowledge of *urf*, used “for listening and responding to ordinary men and women’s everyday problems.”<sup>252</sup> Sufi leaders who have survived the thirty years of conflict, in addition to their connections to popular beliefs and values, have their own history of judicial authority and leadership. Mullahs and maliks, although they do not necessarily have formal training, bring further knowledge and understanding of the values of their communities on issues of justice. In this way, “the relative independence of the sphere in which ulema and local mullahs operate places them in a position to act as interlocutors between their own communities and external agents, such as the state, aid agencies and NGOs.”<sup>253</sup> Traditional leaders have the knowledge and the legitimacy to articulate and explore future paths for the administration of justice in their communities.

In this way, a group of ulema, Sufi leaders, mullahs and maliks could collaborate with formal justice sector officials in their locality to leverage the gap between customary and state institutions, both in terms of the law they use and coordination of the administration of justice in both sectors. Placing these leaders in such a role would allow for the development of Afghan Islamic law applied by the formal courts to include customary laws, constituted through *urf*, as well as popular Islamic values. This collaborative process is a way of improving uniformity of justice while respecting the pluralism of values and traditions in a way that garners popular legitimacy for the formal justice system.

Indeed, such collaboration with traditional authorities, had it been permitted, might have been successful under the Nizamiya reforms of Amir Amanullah. The ulema

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<sup>252</sup> Ibid (25)

<sup>253</sup> Borchgrevink (6)

wanted to be a part of Amanullah's State Council, the body which set judicial policy, "so that adherence to Islamic principles could be ensured in government activities."<sup>254</sup>

However, Amanullah excluded the ulema from involvement on the grounds that "it is fundamentally incorrect to assume that members of the State Council or of the Cabinet are ignorant of Islamic principles."<sup>255</sup> Disregard for the importance of popular legitimacy paved the way for the distrust and rebellion that drove Amanullah from Afghanistan.

Indeed, religious leaders currently express their concerns but overall willingness to engage with outsiders, including international actors and the state itself. Regarding development, Borchgrevink found that the main concern in some areas is "the protection of Afghan and Islamic values and traditions. As long as these were respected, the work of NGOs was generally welcomed and mullahs were keen to participate."<sup>256</sup>

Furthermore, these traditional leaders openly acknowledge that there is "a need for mutual trust and confidence building to collaborate in development."<sup>257</sup> With regard to the state, mullahs are open to being consulted but feel that their voices are not being solicited: "[Mullahs] believe they could play a role, particularly in encouraging people to participate [in civil society and governance], but are not consulted. Many voice concerns that the gap between the government and the mullahs may increase if the government does not consult them."<sup>258</sup>

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<sup>254</sup> Roydad, cited by Kamali (1985)(218)

<sup>255</sup> Ibid

<sup>256</sup> Borchgrevink (49)

<sup>257</sup> Ibid

<sup>258</sup> Ibid (47)

1. The Inclusion of Women and Broader Civil Society:

In light of the areas of controversy in customary law regarding women and girls, there is also tension between modern Afghan civil society and religious leaders.<sup>259</sup>

Involving female leaders in formal justice reform would allow for the legal development endeavor to account for the experiences and values of women, thereby not only garnering legitimacy through appeal to tradition but also embracing progressive development at the grassroots level. The inclusion of the Ministry of Women's Affairs, female judges, and other leaders in the Afghan women's rights community in a Legal Development Working Group would allow for better engagement not only with customary law but also with the needs and values of Afghan women. Such inclusion would bring a truly bottom-up aspect to what has to date consisted of further top-down judicial reforms.

Current efforts in the Afghan women's rights community have only limited success, and inclusion of these leaders in a Legal Development Working Group would bring their values into the discourse. Judge Marzia Basel is the founder and director of the Afghan Women Judges Association, which "provides legal training to women judges, runs legal aid services for women, and promotes legal rights awareness to women and girls."<sup>260</sup> Capacity building, legal aid, and rights education are critical, but the Afghan Women Judges Association ought to be directly involved in legal development itself in order to shape the system in which they practice to better protect the rights of women. The current limits of women's rights advocacy are particularly evident in the work of the Ministry of Women's Affairs. The Ministry's Legal Department advocates in cases of

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<sup>259</sup> Oates, Lauryn. "A Closer Look: The Policy and Law-Making Process Behind the Shiite Personal Status Law." *Afghanistan Research and Evaluation Unit Issues Paper Series* (September 2009) (24)

<sup>260</sup> Rowan, Diana N. "Afghan Women Leaders Connect: Profiles in Leadership." [www.afghanwomenconnect.org](http://www.afghanwomenconnect.org) (2007)(Judge Marzia Basel)

domestic violence, divorce, compulsory marriage, financial claims, and other cases in which the rights of women have been violated under the Ministry's interpretations of Islamic law and international conventions.<sup>261</sup> However, the courts do not accept their legal arguments. Without direct involvement in official legal development processes, leaders and scholars on women's rights in Afghanistan will depend solely on individual judges, particularly female judges, to bring justice to women.

The Women and Children's Legal Research Foundation holds community dialogues with tribal leaders on tribal practices that are not only harmful to women, but bring discord to the community as a whole. These dialogues are sometimes successful, indicating that the use of similar techniques in the justice arena, eventually at the national level, could be fruitful.<sup>262</sup> At the end of a workshop in Khost, a jirga member came forward to express his changing views on the traditional practice of *bad*:

“I am the one who has been in such meetings several times and decided to give women as *bad* to settle a dispute. My intention was always to bring peace back to the family. But I never thought about how harmful this tradition could be.”<sup>263</sup>

Workshop leaders were able to give this man copies of their report on the consequences of *bad* so that he could explain it to the other members of his jirga. A similar process could take place in an official Legal Development Working Group, bringing about national impact on the protection of women's rights. The needs of children and the elderly, particularly as victims of conflict, could also be better understood and addressed through this process.

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<sup>261</sup> Ministry of Women's Affairs, Legal Department. “Report of Legal Department on the Violence Against Women.” (January 2005) <http://afghanistan.unifem.org/prog/GJ/pub/evaw.php>

<sup>262</sup> Rowan, Diana N. “Afghan Women Leaders Connect: Profiles in Leadership.” [www.afghanwomenconnect.org](http://www.afghanwomenconnect.org) (2007)(Hangama Anwari)

<sup>263</sup> Ibid

2. Challenges for Implementation:

The most significant initial challenge will be to identify the right traditional leaders to act as members of a Legal Development Working Group and as liaisons between formal and informal justice. They must be sufficiently independent of corruption, knowledgeable of custom, and able to work with the state in a positive way, without animosity. The main challenge is how to deal with warlords who have been controlling traditional justice in their dominions for over a decade. Although these warlords are often personally responsible for acts of violence contrary to many if not all sources of Afghan values, excluding them from the process of legal development could mean that those communities are unrepresented. Warlords should be included only if they are fully participating in an effective disarmament, demobilization and reintegration (DDR) program and only if they are deemed to be able to participate in a constructive debate with the group. Warlords facing prosecution should not be included. It would therefore be most effective to pilot this 'working group' model in areas where it is more likely to succeed, and then transplant it to areas more deeply affected by warlords and the Taliban.

Once these leaders have been identified, building trust between them and the formal judiciary will mean working against decades of mutual ambivalence and distrust. The relationships built between the traditional leaders and the formal sector should be used to (1) allow the judiciary to incorporate customs from different regions into its rulings, (2) to develop Afghan Islamic law according to both intellectualized Islam and popular Islam, and (3) to coordinate between the formal and informal systems and promote the formal system to rural communities. In order to debate and collaborate

productively, members of the group should educate each other on customary laws, popular Islam, customized Islam, intellectualized Islam, and modern (Western) legal systems. The role of international actors should be to assist in forming this diverse group of collaborators, collecting field research on customary law and popular values in different regions, and facilitating healthy debate. The recent report by the International Legal Foundation is a good example of research that can be used to improve the development of *urf* in the formal sector.<sup>264</sup>

Regarding issues of hierarchization, international actors can facilitate healthy dialogue on these questions, ensuring that all voices are heard throughout decision-making processes. These legal questions are inherently cultural and must be tackled by Afghans themselves in order for the resulting justice system to garner popular legitimacy. In this way, international collaboration, not imposition, can not only advance rule of law more sustainably, but also engage Afghanistan's central legal thinkers in a historically and culturally appreciative dialogue about the role of global standards, particularly women's rights, in Afghan legal development.

The Legal Development Working Group Model should be piloted in localities that are more open to dialogue, given that there is a spectrum of views towards the state depending on the region. "The path forward for the justice sector, one for the Afghan state in general, is to slowly establish pockets of effective, fair, and accountable government."<sup>265</sup> Not only is this more feasible than starting with collaborative enterprises at the national level, but the process and resulting arrangements are more

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<sup>264</sup> International Legal Foundation. *The Customary Laws of Afghanistan*. (September, 2004) <http://www.TheILF.org>

<sup>265</sup> Barfield et al. (2006)(21)

likely to garner the legitimacy of the local community. Once the model has been successful in a few initial communities, it may be transferred to more challenging areas.

*D. Linking this Model to Institution Building and Reform at the National Level*

Linking the process of relationship building on issues of history and culture to improved legitimacy and rule of law means that the formal sector institutions will have to perform effectively and accountably. The agenda for building the independence of the formal judiciary should balance immediate and long-term needs by simultaneously focusing on direct judicial training and sustainable institutional relationships.

There is an immediate need for judicial training, particularly in terms of ethics, but there is no applied code of ethics for judges. Training for judges and clerks should focus not only on ethics but also on other standard areas of training: procedures, legal analysis, decision writing, etc. Afghanistan needs a Code of Ethics for judges (which USAID has apparently already worked on<sup>266</sup>) and a separate Code of Ethics for clerks, specifically outlining proper procedure and conduct for those particular positions. Practical training on these codes of ethics, both for students and practicing judges and clerks, better ensures that judges and clerks understand the rules against bribery, clientelism, and other forms of altered impartiality. Training on the codes of ethics must be accompanied with enforcement, which is central to the need for institutional reform. Other areas of training such as procedure, legal analysis and decision writing are relevant to a comprehensive anti-corruption strategy because each of these areas could be inappropriately influenced so as to compromise impartiality. Furthermore, better judges

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<sup>266</sup> USAID (18-19)

have a more sophisticated understanding of their role as impartial guardians of the rule of law.

The content of training remains a sensitive issue, however. As explained above, the constitution allows for the incorporation of arrangements agreed upon in local Legal Development Working Groups in terms of the application of customary laws (through *urf*) and formally incorporating referrals with the traditional system into formal procedure. As more communities develop arrangements through their Legal Development Working Groups, these solutions become more readily adoptable at the national level.

The sequencing of addressing local and national needs therefore becomes complex, as both the national and local levels have immediate needs, but the fundamental issues that require resolve in order to move forward must be effectively sorted out first at the local level. USIP rightfully argues that legal pluralism issues and factions in the justice sector must be resolved in order for the administration of justice as a whole to be coherent:

“It is imperative that organizational arrangements ensure that Afghans, with international assistance, decide how their judicial system should look and function, but addressing such issues as the role of Sharia and tribal traditions and respective roles and authority of the various institutional actors in the justice sector. Until such issues are addressed, any new commission or advisory body – in all likelihood involving personnel from the various institutions – will continue to be fractious.”<sup>267</sup>

Fortunately, much of the factionalism in the formal sector has very recently dissipated, largely due to (1) new officials in the Ministry of Justice, Supreme Court, and Attorney General’s Office, and (2) finding themselves too busy with implementation

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<sup>267</sup> USIP (2004)(18)

responsibilities for factionalism to continue.<sup>268</sup> Some progress has been made in discussing the role of traditional justice. The U.S. Institute of Peace has convened a task force on engagement with traditional justice, composed of representatives from the three permanent justice institutions, as well as the Ministry of Women’s Affairs, the Afghan Independent Human Rights Commission, and UNIFEM, among others.<sup>269</sup> According to Alexander Thier, the group agrees on the importance of engagement with traditional justice, but the Supreme Court is reluctant.<sup>270</sup> A particularly promising sign for the effort as a whole is that these representatives and a range of international advisors signed a “Draft National Policy on Relations Between the Formal Justice System and Dispute Resolution Councils”, or traditional justice bodies.<sup>271 272</sup> However, this draft policy arguably continues to invoke top-down intentions towards engagement. In particular, no traditional voice was present in the development of the draft policy. The guiding principle of the policy directly asserts an intention to exercise coercive authority over the traditional system: “Informal dispute resolution decisions need to be consistent with Sharia, the Constitution, other Afghan laws and international human rights standards.”<sup>273</sup> According to the draft policy, the government will have oversight of traditional justice<sup>274</sup>, harkening to the reforms of Amanullah that alienated traditional leaders and resulted in exacerbated social tensions and violence. Therefore, although the reduction of

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<sup>268</sup> Thier, Alexander J. Interview (February 25, 2010)

<sup>269</sup> Ibid

<sup>270</sup> Ibid

<sup>271</sup> Ministry of Justice, Government of the Islamic Republic of Afghanistan. *Draft National Policy on Relations Between the Formal Justice System and Dispute Resolution Councils*. (November 18, 2009)

<sup>272</sup> “The 2008 National Justice Sector Strategy for Afghanistan [a document signed by all of the permanent institutions] requires the development of a national policy on state relations with community dispute resolution mechanisms.” In, Dempsey, John and Noah Coburn. “Traditional Dispute Resolution and Stability in Afghanistan.” *Peace Brief, United States Institute of Peace*. (February 16, 2010) (6)

<sup>273</sup> Ibid

<sup>274</sup> Ibid

factionalism in the formal sector and discussion of relations with traditional justice are positive developments, “the role of Sharia and tribal traditions”<sup>275</sup> cannot be addressed solely at the national level without reproducing alienation and resentment on the part of traditional leaders at the community level.

It is only after a number of local Legal Development Working Groups have been successful that an official National Task Force should move forward with discussions of genuine cooperation with traditional justice. Rather than being entirely composed of either current or former justice officials, a proper task force should be made up of both current sector officials as well as respected members of the legal community, such as former justices, sector officials, accomplished attorneys and law professors. This would expand USIP’s current task force to include additional Afghan stakeholders, rather than limiting the group to only those who are deemed to have implementation responsibilities. In order to build its own legitimacy as the effective leader of institutional reform, the National Task Force should start out as another working group, with direct international facilitation to generate dialogue that strives to overcome intra-group differences and establish goals, objectives, and programming plans that are agreed upon by all perspectives. In particular, international actors should strive to bring traditional leaders who have emerged as particularly capable, understanding of the purpose of dialogue, and representative of their regions to become members of the National Task Force.

The content of these plans is limited by the reality that building long-term sustainable judicial independence requires that judicial career process decisions be located outside the Supreme Court, a change that would require constitutional reform. Indeed, Alexander Thier argues that part of the intention behind the current model of

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<sup>275</sup> USIP (2004)(18)

limited judicial independence is to uphold the central role of the executive according to the classical notion of an Islamic state:

“The head of an Islamic state has the duty to administer the sharia, and is therefore the highest judicial authority under Islam. The head of state delegates judicial jurisdiction, wilaya, to the qazi, who then administers justice. This jurisdiction can also be removed. Therefore, ‘a consequence of the doctrine of wilaya in Islam is total lack of separation between the judicial and executive powers.’”<sup>276</sup>

However, just as traditional justice values and practices are not static, the above conception of the role of the executive may be similarly dynamic, particularly in the face of the state’s desperate struggle for legitimacy. If international support and facilitation can keep factionalism issues at bay, further dialogue and genuine collaboration will allow the National Task Force to emerge as an effective leader of reform. If the executive and legislature come to recognize and respect this body, there may be sufficient political will to amend the constitution in order to form a Judicial Council based on this group.

#### *E. Concluding Thoughts*

The bottom-up approach of convening a group of religious leaders to collaborate with the formal justice sector and local human rights organizations will require a certain amount of professionalization for all in order to better understand the legal traditions and scholarship on all sides. However, the purpose of such professionalization is to find compatible fundamental values of justice, not to negate certain perspectives. Christina Jones-Pauly explains that, “One way to achieve this is to understand the ethical assumptions underlying the interacting justice systems. ... The same approach would

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<sup>276</sup> Kamali, cited by Thier (2004)(10)

apply to the differences in the respective procedural processes.”<sup>277</sup> Issues of hierarchization will arise, but finding commonalities can mitigate these tensions. In this way, transformation of the relationship between the state and society, and the legitimacy that is gained through such a transformation, depends on both ownership and pace of the process. Returning yet again to Afghanistan’s historical lessons, Barfield reminds us that “Governments like those of King Amanullah or the PDPA that demanded rapid, universal changes found that this undermined their political power because they were accused of abandoning true Afghan values” – these regimes lost sight of the importance of popular legitimacy in consolidating centralized state authority.

The ultimate objective is the perception of legitimacy and justice for all sides of the debate in Afghanistan: intellectuals, human rights groups, ulema, tribal leaders (maliks and mullahs), ordinary people both rural and urban, and ultimately militants themselves. Achieving such legitimacy depends not only on the handling of traditional values but also on the effectiveness of the judicial system in meeting the needs of the population, particularly those most vulnerable and affected by the conflict (women, children and elderly). Shifting ground in asking who and what represents Afghan values brings feelings of tension and frustration to the surface. Lauryn Oates of the Afghanistan Research and Evaluation Unit reminds us that “When ideological confrontations erupt over laws that speak to religious values, the ownership over religious doctrine and thus the political and cultural dominance of traditional power-holders is challenged.”<sup>278</sup>

However, this initial reaction to such an enterprise makes dialogue even more important.

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<sup>277</sup> Jones-Pauly (852)

<sup>278</sup> Oates (15)

It is the task of internationals leading the process to facilitate dialogue in order to work through these tensions, rather than letting them block the process.

Western involvement in such projects tends to raise suspicions that these actors are trying to impose their own values and traditions, so it is critically important for these actors to constantly reiterate their intentions and remain mindful of their behavior. International perceptions of justice, particularly in terms of human rights protections, should not be discounted, but need to recognize the value of a contextually relevant approach. Many hold the opinion that it would be impossible to create a legal system that would please all groups at once, but without bringing these leaders together, the approach to judicial reform will continue to be top-down. Afghan scholar Mohammad Hashim Kamali argues that “If the future government is to be a mixed orientation to combine both conservative and reformist elements, reforms in family law may be slow to begin with but might subsequently follow a mild trend as is experienced in some of the Muslim countries of the Middle East.”<sup>279</sup> It is therefore critical that judicial reform through broad collaboration prioritizes not only legitimacy, but also progress and engagement in Muslim and global discourses on human rights, in order to build a judicial system that is perceived to be simultaneously modern, effective, and genuinely Afghan.

Recalling the necessary conditions for legitimacy outlined in Section VI, effectiveness and appeal to tradition are satisfied, respectively, by (1) successful anti-corruption and independent, sustainable institution building, and (2) consultation and genuine engagement with all sources of traditional authority. The Legal Development Working Group Model would achieve an appeal to tradition and contribute towards effectiveness, as collaboration with the formal system would better ensure that the needs

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<sup>279</sup> Kamali (1985)(248)

of individuals are met. Dovetailing the success of Legal Development Working Groups with the formalization of a National Task Force would address anti-corruption measures and sustainable institution building at the national level. If this model is implemented successfully, the state as a whole should begin to garner popular legitimacy.

Even if local Legal Development Working Groups are successful and the National Task Force emerges as a leader of reforms, questions of political will remain as to whether top government leaders and the elites who support them are open to social transformation. For example, the Karzai administration's current stance on property disputes pits the state directly against the people and seems to reflect a disregard for popular legitimacy:

“An April 2003 decree emphasized 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.’ An estimated 86% of the total land in all Afghanistan is owned by the state of Afghanistan. ...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.’<sup>280</sup>

The deprivation of legal rights to challenge these land claims in an administrative court is a dramatic form of top-down encroachment that would only be addressed by the judiciary through a decisive act of judicial review. With the Supreme Court under the direct influence of the executive, such review is unlikely to say the least. However, as the Karzai government's legitimacy weakens and the struggle against insurgency continues, successes at the local and national levels may show the way to an executive looking for answers even in the face of ostracism by the elites. Such an evolution would bring about political will for bringing this model for bottom-up transformation of the administration

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<sup>280</sup> USAID (2005)(36) Furthermore, Provincial Governors are turning a blind eye to state sale and distribution of properties in their districts to others.

of justice to the national level such that the judiciary, as a powerful symbol of governance, achieves a level of legitimacy that is truly sustainable.

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