STATE AND NON-STATE JUSTICE SYSTEMS IN AFGHANISTAN: THE NEED FOR SYNERGY

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INTRODUCTION

The long Afghan conflict has resulted in an extensive destruction of Afghanistan's state justice institutions that existed prior to the former USSR invasion of the country in December 1979. The destruction has not only included extensive damage to buildings, office furniture, official records, legal resources, and essential office equipment, but it has also included the death, imprisonment and migration of hundreds of professional justice officials, including qualified judges, prosecutors, police officers, and prison wardens.[1] Following the collapse of the Taliban regime, the Bonn Agreement of December 2001 authorized formation of the Afghanistan Judicial Commission.[2] The Bonn Agreement tasked the Commission—with help from the United Nations and other international actors—to "rebuild the [Afghan] domestic justice system in accordance with Islamic principles, international standards, the rule of law and Afghan legal traditions."[3] The Commission, however, which lacked both vision and competence, had difficulty drawing up a roadmap for rebuilding the post-Taliban justice system and working collaboratively with permanent Afghan justice institutions.[4] This situation has had important negative implications for the

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[1] Ali Wardak, *Building a Post-War Justice System in Afghanistan*, 41 J. OF CRIME L. & SOC. CHANGE 319, 328 (2004) [hereinafter Wardak, *Building a Post-War Justice System*].

[2] *See* Agreement on Provisional Arrangements in Afghanistan Pending the Re-Establishment of Permanent Government Institutions, S.C. Res. 1383, U.N. SCOR, 4434th mtg., U.N. Doc. S/2001/1154 (Dec. 5, 2001), *available at* http://www.unhcr.org/refworld/docid/3f48f4754.html [hereinafter Bonn Agreement].

[3] *Id*. at 4.

[4] *See* U.N. Secretary-General, *The Situation in Afghanistan and Its Implications for International Peace and Security: Rep. of the Secretary-General, delivered to the Security Council*, U.N. Doc. S/2003/1212 (Dec. 30, 2003); *see also* Wardak, *Building a Post-War Justice System*, *supra* note 1 (discussing the difficulties of working with Afghan institutions to establish a cohesive justice system).

process of rebuilding a post-Taliban justice system in Afghanistan over the past ten years.

Afghanistan's post-Taliban administrations, supported by, among others, the United Nations, Italy, the United States, Germany, and Canada, embarked on the complex task of rebuilding Afghanistan's rule of law and justice institutions. The various national and international efforts in this process are guided by several strategies, which mainly include the *2008 Afghanistan National Development Strategy*, the *National Justice Sector Strategy, National Justice Program*, and the *2010 Afghanistan National Development Strategy Prioritization and Implementation Plan*.[5] While overlapping, these strategies provide guidance to the Afghan government's rule of law and justice implementation program, as well a framework for international donor support.[6] Key objectives of the Afghanistan National Development Strategy that were to be accomplished by the end of 2010 included completion of the basic legal framework (including civil, criminal, and commercial law), rehabilitation of the physical infrastructure of justice institutions, establishment of fully functional justice institutions throughout Afghanistan, review and reform of oversight of corruption-related procedures addressing lack of due process and miscarriages of justice, and strengthening the professionalism, credibility, and integrity of the justice system personnel.[7]

This paper argues that a post-Taliban justice system, built on a meaningful synergy between state and non-state justice institutions, has a very strong potential for providing accessible, effective, cost-effective and transparent justice to all sections of the Afghan society. The paper is divided into three sections. Section I examines the achievements as well as the problems that have surfaced throughout the process of rebuilding Afghanistan's state justice institutions over the past ten years. Section II discusses non-state justice institutions, focusing on *jirga* and *shura*. After examining positive aspects of *jirga* and *shura*, the negative aspects of these non-state institutions of local dispute settlement are highlighted. In Section III, this paper focuses on the "hybrid model of Afghan justice," which was proposed by the *2007 Afghanistan Human Development Report*.[8] The "hybrid model" recommends the creation of meaningful institutional links between state and non-state justice systems in Afghanistan. The paper concludes by proposing that a post-Taliban justice system that is built on the basis of a meaningful synergy between state and non-state justice institutions has a strong potential to provide accessible, effective, cost-effective and transparent justice to all sections of Afghan society. This would, in turn, provide important channels of communication, trust, and collaboration among ordinary citizens and their state in post-Taliban Afghanistan.

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[5] *See generally* LIANA SUN WYLER & KENNETH KATZMAN, CONG. RESEARCH SERV., R41484, AFGHANISTAN: U.S. RULE OF LAW AND JUSTICE SECTOR ASSISTANCE (2010) (explaining generally the international reform efforts in Afghanistan).

[6] *Id*. at 17.

[7] INTERNATIONAL MONETARY FUND, ISLAMIC REPUBLIC OF AFGHANISTAN, AFGHANISTAN NATIONAL DEVELOPMENT STRATEGY: FIRST ANNUAL REPORT 1387, MAKING A DIFFERENCE: TRANSITION FROM PLANNING TO PRACTICE 10 (2009), *available at* http://www.imf.org/external/pubs/ft/scr/2009/cr09319.pdf [hereinafter AFGHANISTAN NATIONAL DEVELOPMENT STRATEGY].

[8] CENTRE FOR POLICY AND HUMAN DEVELOPMENT, AFGHANISTAN HUMAN DEVELOPMENT REPORT, BRIDGING MODERNITY AND TRADITION: RULE OF LAW AND THE SEARCH FOR JUSTICE 4 (2007), *available at* http://hdr.undp.org/en/reports/ nationalreports/asiathepacific/afghanistan/nhdr2007.pdf [hereinafter AFGHANISTAN HUMAN DEVELOPMENT REPORT].

I. STATE JUSTICE SYSTEM

Although it is difficult to draw a clear dividing line between state and non-state justice systems in Afghanistan, the former generally refers to positive law that functions through legal codes and state institutions, such as the courts, prosecutors, police, the prison service, and the bar of law. Thus, in the context of Afghanistan, key state justice and judicial institutions include the Supreme Court (*stara mahkama*), the Attorney General's Office (*loy saranwali*), the police (*sarandoi*), the Ministry of Justice (*wezarate-e-adelia*), and the prison service. Although these institutions are supposed to be closely interconnected, in reality there exists little organic chain-like interaction among them, and therefore, they hardly operate as a "system."[9] Nevertheless, the totality of these justice institutions has historically been referred to as a *nezam-e-adlee wa qazaiee* (justice and judicial order/system), which was central to the maintenance of social and political order in pre-war Afghanistan.

While progress in rebuilding the Afghan state justice system during the past ten years has been slow and patchy, it has nevertheless been noticeable: significant work has been done on legislation; several hundred judges, prosecutors, and prison wardens, and thousands of police personnel have been trained; some justice institutions have been refurbished; and several new ones have been built from scratch.[10] Progress has also been made with regard to building administrative capacity within the existing justice institutions and the publication and distribution of a large body of law to legal professionals.[11] Progress in rebuilding Afghanistan's state justice system has included the establishment of the Independent Bar Association of Afghanistan, legal aid departments in Kabul and in three provinces, the Independent National Legal Training Centre (INLTC) in Kabul, and a committee for the simplification of judicial bureaucracy.[12] Moreover, there has been an agreement between the Attorney General and Ministry of Interior on the development and implementation of measures to improve prosecution processes, and the introduction of common telephone numbers for use by the public to register complaints.[13]

However despite the above-mentioned achievements, the post-Taliban state justice system is far from delivering justice to the Afghan people and faces serious problems. The nature and severity of these problems appear to have heavily overshadowed what has been achieved thus far. These problems include endemic corruption, high levels of professional incompetence, inadequacy of physical infrastructure such as courtrooms and detention/correctional facilities, very low levels of public trust, and the provision of minimal international funding for the rebuilding of justice and rule of law institutions in post-Taliban Afghanistan.[14] Due to the United

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[9] *See* Ali Wardak, *Rule of Law in Afghanistan: An Overview*, *in* 4 PETERSBERG PAPERS ON AFGHANISTAN AND THE REGION 47 (Wolfgang Danspeckgruber ed., 2009) [hereinafter Wardak, *Rule of Law in Afghanistan*] (explaining the development of Afghan political and judicial institutions). *See generally* AFGHANISTAN HUMAN DEVELOPMENT REPORT, *supra* note 8 (discussing generally the social developments in Afghanistan); CHRIS JOHNSON ET AL., AFGHANISTAN'S POLITICAL AND CONSTITUTIONAL DEVELOPMENT (2003), *available at* http://www.odi.org.uk/resources/download/4810.pdf (discussing generally the lack of cohesiveness among Afghan institutions).

[10] *See generally* AFGHANISTAN NATIONAL DEVELOPMENT STRATEGY, *supra* note 7.

[11] *Id*.

[12] *Id*. at 33.

[13] *Id*.

[14] *See generally* STEPHEN CARTER & KATE CLARK, NO SHORTCUT TO STABILITY: JUSTICE, POLITICS, AND INSURGENCY IN AFGHANISTAN (2010), http://www.chathamhouse.org.uk/files/18074_1210pr_afghanjustice.pdf

States' overemphasis on the "war on terrorism" in Afghanistan, the issue of rebuilding justice and rule of law institutions has, until recent years, been largely neglected. According to Lakhdar Brahimi, "The international community, including the United Nations is just starting to pay enough attention to rule-of-law issues. In Afghanistan, the judicial reform process was largely neglected, and I must confess that I personally bear a large part of responsibility for that."[15] This observation, particularly the allocation of insufficient funds to reforming and rebuilding justice and rule of law institutions until recent years, is illustrated in Figure 1, below.

FIGURE 1: U.S. CIVILIAN FUNDING FOR AFGHAN ROL ASSISTANCE FY 2002 - FY 2010 AND FINANCIAL 2011 REQUEST16

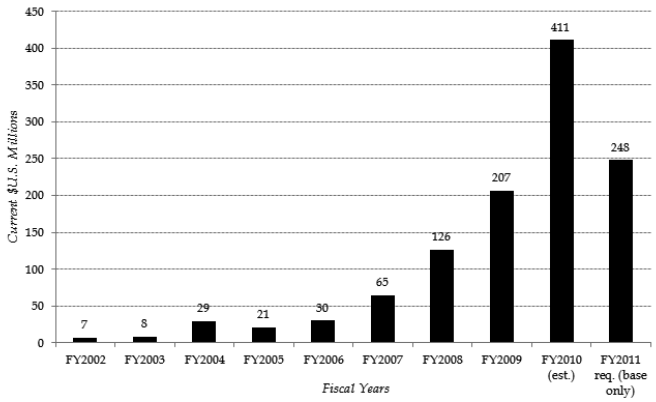

Figure 1, above, indicates that assistance from the United States to Afghan justice and rule of law institutions for fiscal years 2007 and 2008 was only seven million and eight million dollars respectively; the total of this assistance from fiscal years 2002 through 2007 did not exceed $160 million. It was only from fiscal year 2008 on that there was a significant increase in assistance to Afghan justice and rule of law institutions, which peaked in 2010. Some of the problems that Afghanistan's justice system currently faces, particularly the lack of sufficient professional, human, and legal resources, inadequacy of physical infrastructure, and low salaries for justice officials, could be directly traced to the very low level of investment in this sector.

Other than insufficient investment in the justice sector, national and international efforts have primarily focused on strengthening the pre-war state justice institutions in Afghanistan—they have mainly focused on patchy "legal engineering" and quick-fixes, and on meeting targets and the technical aspects of reform at the expense of its normative dimensions. [17] Different donor

(discussing the fundamental role of justice to stability in Afghanistan); WYLER & KATZMAN, *supra* note 5, at 5 (describing public perceptions of corruption in Afghanistan).

[15] LAKHDAR BRAHIMI, 7TH GLOBAL FORUM ON REINVENTING GOVERNMENT BUILDING TRUST IN GOVERNMENT, STATE BUILDING IN CRISIS AND POST-CONFLICT COUNTRIES 15 (2007), *available at* http://unpanl.un.org/intradoc/groups/ public/documents/un/unpan026305.pdf.

[16] WYLER & KATZMAN, *Supra* note 5, at 27.

[17] *See generally* Wardak, *Rule of Law in Afghanistan*, *supra* note 9 (explaining the development of Afghan political and judicial institutions); Astri Suhrke & Kaja Borchgrevink, *Negotiating Justice Sector Reform in*

countries concentrated on different aspects of the justice sector without effective coordination among them and with the Afghan state institutions.[18] This situation also seems to have resulted in the continued absence of a coherent vision for rebuilding and reforming the justice sector in Afghanistan. The outcome has been a fragmented justice "system," the key components of which (the judiciary, police, prosecution, and prison service) do not operate as a system at all.[19] All these problems, combined with a growing insurgency and persistent institutionalized corruption, have further complicated the task of rebuilding an effective justice system in post-Taliban Afghanistan.

The most serious among the problems which Afghanistan's justice (and many other state) institutions face is corruption. Although corruption in the Afghan justice system is not a new phenomenon,[20] recent studies reveal a much gloomier picture. A 2010 United Nations Office on Drug and Crime (UNDP) survey reveals that in 2009, Afghans paid around $ 2.5 billion U.S. dollars in bribes—a figure equivalent to twenty-three percent of the Afghanistan's gross domestic product (GDP).[21] The survey, which is based on real experiences of Afghan men and women (in both urban and rural areas), reveals that judicial and criminal justice officials topped those public officials who took bribes during 2009.[22] This picture is illustrated in Figure 2, below.

Afghanistan, 51 J. OF CRIME L. & SOC. CHANGE 211 (2008) (discussing the post-2001 justice sector reforms in Afghanistan); CARTER & CLARK, *supra* note 14 (suggesting that aiming for rigid short-term solutions to problems plaguing Afghanistan's justice system will undermine its long-term stability).

[18] *See generally* AFGHANISTAN HUMAN DEVELOPMENT REPORT, *supra* note 8; Wardak, *Rule of Law in Afghanistan*, *supra* note 9 (detailing a lack of communication between Afghanistan and its international partners in redeveloping Afghanistan's justice system).

[19] *See* Wardak, *Rule of Law in Afghanistan*, *supra* note 9 (discussing the absence of a broader institutional framework to coordinate different parts of Afghanistan's developing justice system); *see also* JOHNSON ET AL., *Supra* note 9 (discussing generally the lack of cohesiveness among Afghan institutions). *See generally* AFGHANISTAN HUMAN DEVELOPMENT REPORT, *supra* note 8.

[20] AFGHANISTAN HUMAN DEVELOPMENT REPORT, *supra* note 8, at 60-64; *see also* Wardak, *Building a Post-War Justice System*, *supra* note 1 (discussing the history and development of corruption in the Afghan justice system).

[21] UNITED NATIONS OFFICE ON DRUG AND CRIME, CORRUPTION IN AFGHANISTAN: BRIBERY AS REPORTED BY THE VICTIMS 25 (2010), *available at* http://www.unodc.org/documents/data-and-analysis/Afghanistan/Afghanistan-corruption-survey2010-Eng.pdf.

[22] *Id*.

FIGURE 2: PERCENTAGES OF ADULT POPULATION WHO PAID BRIBES AFTER CONTACT WITH SELECTED TYPES OF PUBLIC OFFICIALS, BY TYPE OF OFFICIAL AND URBAN/RURAL AREAS[23]

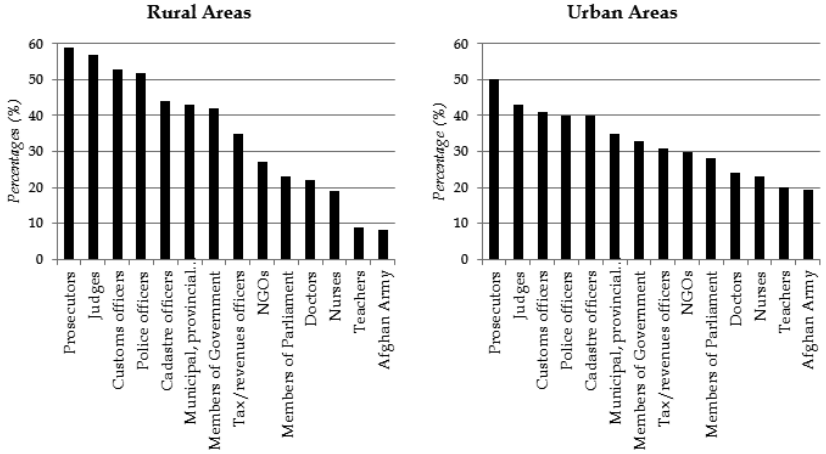

Figure 2, above, reveals that urban area police officers, custom officers, judges, and municipal officials ranked highest (respectively) in the receipt of bribes. And in rural areas, prosecutors, judges, custom officers, and police officers ranked highest (respectively) in the receipt of bribes. What is important to notice is that, in both urban and rural areas, it is mainly judicial and criminal justice officials who are seen as the most corrupt public officials, and it is these same officials who are entrusted with upholding the law. The 2010 Integrity Watch Afghanistan (IWA) survey reached a very similar conclusion:

> The survey indicates that Afghans perceive the main institutions responsible for security and justice as the most corrupt. 42% of the respondents consider the Ministry of Interior to be the most corrupt, while the Ministry of Justice and the Directorate of National Security are perceived as the most corrupt by 32% and 30 %, respectively. Moreover, households paid the highest numbers of bribes for the provision of security and justice by the police and the courts.[24]

In response to endemic and widespread official corruption, the Afghan government—with the support of the international community—has devised various anti-corruption strategies and bodies during the past six years. The most important of these is the creation of the High Office for Oversight for the Implementation of the Anti-Corruption Strategy in July 2008.[25] The new body, which is referred to as the High Office for Oversight (HOO), has devised an ambitious agenda for its activities. To date, HOO and some key relevant ministries and state institutions have taken important practical steps in the right direction, including the simplification of bureaucratic

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[23] *Id*.

[24] INTEGRITY WATCH AFGHANISTAN, AFGHAN PERCEPTIONS AND EXPERIENCES OF CORRUPTION: A NATIONAL SURVEY 11 (2010), *available at* http://www.iwaweb.org/ Reports/PDF/IWA%20corruption% 20survey%202010.pdf.

[25] SPECIAL INSPECTOR GENERAL FOR AFGHANISTAN RECONSTRUCTION (SIGAR), TENTH QUARTERLY REPORT TO THE UNITED STATES CONGRESS 108 (2011) [hereinafter SIGAR REPORT].

systems in some government institutions, and the creation of a specialized anti-corruption criminal unit. While HOO and its initiatives appear promising, the January 2011 Special Inspector General for Afghanistan Reconstruction (SIGAR) Report to the U.S. Congress says that, "In an audit report released in December 2009, SIGAR found that the HOO suffered from a limited operational capacity. The audit also found that the organization lacked the independence required to meet international standards for an oversight institution . . . ."[26] Indeed as a young institution operating in very difficult circumstances, HOO has a long way to go. In order to become an effective and independent institution, HOO will need strong financial and professional support from both national and international agencies in the years to come.

Afghan anti-corruption initiatives do not seem to have had a noticeable impact on reducing corruption in the country, or on changing its perception among Afghan population. The 2010 Transparency International's Corruption Perception Index ranks Afghanistan jointly with Myanmar as 176th out of 178 countries—making it the second most corrupt country in the world.[27] All this would seem to indicate that the Afghan government has failed to implement its anti-corruption strategies and initiatives. One of the main reasons for this failure is that the Afghan government has been very reluctant to take decisive actions against high ranking officials suspected or accused of corruption. Corruption investigations against high-ranking government officials have been repeatedly blocked, and honest anti-corruption officials have been demoted or fired. According to a *New York Times* report, on August 28, 2010 Fazel Ahmed Faqiryar—the former deputy attorney general of Afghanistan—was sacked after he repeatedly refused to block corruption investigations against high-ranking government officials.[28] The article adds that:

> The dispute began last year, Mr. Faqiryar said, when he went before the Afghan Parliament and read aloud the names of at least 25 Afghan officials who were under investigation for corruption. The list included some of the most senior officials in Mr. Karzai's government, including Mohammed Siddiq Chakari, the former minister for hajj and Islamic affairs, and Rangin Spanta, who is now the national security adviser.[29]

Similarly, high-ranking officials within the justice and rule of law institutions are hardly ever investigated and/or sanctioned for corruption, although several dozen judges and other judicial officials have been punished for corruption recently.[30] However, there is no evidence indicating that those who are punished include high-ranking judicial officials.[31] This situation goes directly against a key principle of the idea of rule of law—accountability of all citizens before the law, and the equal enforcement of laws. However, the immunity of those with political power and money from accountability is likely to result in the persistence and institutionalization of corruption. This indeed seems to be the case in Afghanistan today.

As will be examined in the next section, persistent corruption within the state justice

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[26] *Id*. at 109.

[27] TRANSPARENCY INTERNATIONAL, TRANSPARENCY INTERNATIONAL CORRUPTION PERCEPTIONS INDEX 2 (2010).

[28] Dexter Filkins & Alissa Rubin, *Graft-Fighting Prosecutor Fired in Afghanistan*, N.Y. TIMES, Aug. 28, 2010, http://www.nytimes.com/2010/08/29/world/ asia/29afghan.html.

[29] *Id*.

[30] CARTER & CLARK, *supra* note 14, at 32.

[31] *Id*. at 33.

institutions has not only weakened trust in them, but has also driven many Afghans to take their disputes to the Taliban for resolution, where the Taliban courts are "the only effective and trusted tribunals of justice. Above all, unlike the state courts, 'their decisions are not dependent on the ability to pay bribes and will be enforced."[32] However, the Taliban's courts operate only in the areas that they control, or where they enjoy significant support. In many other parts of the country, most Afghans continue to take their disputes to non-state local justice institutions for resolution.[33]

II. NON-STATE JUSTICE SYSTEM

As mentioned in the previous section, the overwhelming majority of disputes in Afghanistan are resolved outside the state justice system. They are resolved by community or village-based local institutions and processes, which operate even less as a "system" than the state justice "system." Although these local institutions and processes may interact with state justice institutions in different contexts and to varying degrees, the interaction occurs outside of a regulated framework.[34] The most important non-state institutions in Afghanistan are *jirga* and *shura*. The particular form and composition of a *jirga* or *shura* are determined by the nature of a dispute at hand, but typically by a body of respected *marakachian* or *rishsafidan* (local elders and leaders) who refer to customary laws in order to reach a settlement that is acceptable to disputants and to the community. *Jirga* and *shura* address issues ranging from minor bodily harm and agricultural land boundaries to serious and sometimes violent conflicts concerning communal lands and murder.

Jirgas and *shuras* place strong emphasis on reconciliation and making peace among disputants. Thus, unlike the state justice system, which creates losers and winners, *jirgas* and *shuras* reach community-led decisions that promote restorative justice (as opposed to retributive justice), and help to restore peace and dignity among the victims, offenders, and the community.[35] These local Afghan institutions also aim to reintegrate offenders back into the community after holding them accountable for a wrongdoing.[36] As a form of alternative dispute resolution (ADR), these practices can also reduce strain on a capacity-deficient state justice system.[37] In addition, *jirgas* and *shuras* are shown to be more accessible, more efficient (in terms of time and money), perceived as less corrupt, and more trusted by Afghans compared to formal state courts.[38] A more

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[32] Frank Ledwidge, *Justice and Counter Insurgency in Afghanistan: A Missing Link*, 154 THE RUSI J. 6, 7 (2009).

[33] *Id*. at 8.

[34] NOAH COBURN & JOHN DEMPSEY, UNITED STATES INSTITUTE OF PEACE, INFORMAL DISPUTE RESOLUTION IN AFGHANISTAN 3-4 (2010), *available at* http://www.usip.org/files/resources/sr247_0.pdf. *See generally* AFGHANISTAN RESEARCH AND EVALUATION UNIT (AREU), COMMUNITY-BASED DISPUTE RESOLUTION PROCESSES IN NANGARHAR PROVINCE (2009), *available at* http://www.unhcr.org/refworld/docid/4b3870cf2.html [hereinafter COMMUNITY-BASED DISPUTE RESOLUTION PROCESSES] (discussing community-based dispute resolution in Afghanistan).

[35] COBURN & DEMPSEY, *supra* note 34, at 3; *see also* AFGHANISTAN HUMAN DEVELOPMENT REPORT *supra* note 8, at 10.

[36] COBURN & DEMPSEY, *supra* note 34, at 3.

[37] *Id*. at 2-3.

[38] *Id*. at 2; *see, e.g.,* THE ASIA FOUNDATION, AFGHANISTAN IN 2010: A SURVEY OF THE AFGHAN PEOPLE 134 (2010), *available at* http://asiafoundation.org/resources/ pdfs/Afghanistanin2010survey.pdf [hereinafter ASIA FOUNDATION]; *see also* Wardak, *Building a Post War Justice System*, *supra* note 1.

recent national survey by the Asia Foundation strongly confirms these findings.[39] Figure 3, below, compares respondents' perceptions of state courts and local *shura* and *jirga* with regard to five key issues.

FIGURE 3: PERCEPTIONS OF THE STATE AND NON-STATE JUSTICE SYSTEMS: PERCENTAGE OF RESPONDENTS WHO AGREE (STRONGLY AGREE AND SOMEWHAT AGREE) WITH FIVE STATEMENTS RELATED TO STATE COURTS AND JIRGA AND SHURA[40]

Strongly Agree and Somewhat Agree	**State Courts (%)**	***Jirgas* and *Shuras* (%)**
Are accessible to me	73	86
Are fair and trusted	53	73
Follow the local norms and values of our people	51	70
Are effective at delivering justice	54	69
Resolve cases timely and promptly	42	66

Figure 3, above, illustrates that *jirga* and *shura* are perceived by respondents to be performing better than State justice institutions. These non-state institutions are shown to be more accessible, more trusted, in accord with accepted local norms, more effective, less corrupt, and more prompt in the resolution of disputes than state courts. These results would seem to indicate that most Afghans continue to perceive non-state justice institutions more positively than state courts. However, male elders (*rishsafidan/marakachian*) usually dominate gatherings of *jirgas* and *shuras*, and women are largely excluded from participation in the decision-making of these bodies as Figure 4, below illustrates.

FIGURE 4: REPRESENTATION AT LOCAL JIRGAS AND SHURAS[41]

How frequently are people from various community groups present at a village- or neighbourhood-based *Jirga* or *Shura*? (Values given in percentages based on a sample size of 2339 individuals)						
	Always	Sometimes	Rarely	Never	Don't Know	Refused
Ordinary elders (*Rishsafidan*)	65	25	7	3	1	*
Mullahs	36	43	15	6	1	*
Local leaders (*Khan* or *Malik*)	31	36	22	9	2	*
Commanders	12	25	34	26	3	1

[39] ASIA FOUNDATION, *supra* note 38, at 134.

[40] *Id*.

[41] For a partial representation of this data, see AFGHANISTAN HUMAN DEVELOPMENT REPORT, *supra* note 8, at 98-99 (2007). The Centre for Policy and Human Development survey was commissioned by the UNDP-supported Centre for Policy and Human Development (CPHD), Kabul University, and was carried out by ACSOR in February 2007. The survey's sample consisted of 2339 men and women, which covered thirty-two out of Afghanistan's thirty-four provinces. The full dataset from this survey is on file with the second author, to whom any questions can be directed.

Women	2	6	21	67	3	1
Other	2	3	5	9	81	1

As Figure 4, above, illustrates, two-thirds of respondents said that ordinary elders (*rishsafidan*) were always represented on the *jirga* or *shura*, and another quarter said that they were sometimes represented. A third of the individuals surveyed said that *mullahs* were always represented, and more than a third said that they were sometimes represented. There was a similar response regarding local leaders (*Khan* or *Malik*). Commanders were much less likely to be represented on local *jirgas* or *shuras*. More importantly, these data indicate that women had the least representation in *jirg*as and *shuras*: only eight percent of the respondents said that women were always or sometimes represented in *jirgas* or *shuras.* This confirms—as in most other spheres of life in Afghan society—that women are largely excluded from the structure and processes of *jirgas* and *suhras*. This situation not only has serious implications for gender equality within these local institutions of dispute settlement, but for the actual delivery of justice to women at a local level.

Another serious problem is that some settlements made by *jirgas* and *shuras* may include *baad*—the practice of offering a woman into marriage as a means of dispute settlement. This practice violates Afghan state laws, *shari'a*, and fundamental human rights.[42] Although recent field studies reveal that the practice of *baad* is increasingly rare, even among Pashtuns in eastern Afghanistan,[43] its mere occurrence has serious implications for the human rights of women in Afghan society, and for their fundamental freedoms. However, it is important to recognize that *baad* and the exclusion of women from participation in *jirgas* and *shuras* are not inherent characteristics of these non-state justice institutions; they are the characteristics of Afghan patriarchal society. According to a recent field study:

> Women's access to these [community-based dispute resolution] processes and participation in them is constrained and at times decisions are made which do not uphold women's human rights. However, this is not an outcome of community-based dispute resolution or customary law itself, but is instead a consequence of prevailing gender roles and relations in Afghanistan more widely.[44]

Indeed, women's rights are widely violated in Afghan society, and the state justice system does

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[42] *See generally* AFGHANISTAN HUMAN DEVELOPMENT REPORT, *supra* note 8 (exploring the importance of rule of law to human development); Ali Wardak, *Jirga*: *Power and Traditional Conflict Resolution in Afghanistan* in LAW AFTER GROUND ZERO 187-204 (John Strawson ed., Cavendish Publishing Ltd. 2002) (exploring the institution of *jirga* as a traditional mechanism of conflict resolution in Afghanistan); Ali Wardak, *Structures of Authority and Local Dispute Settlement in Afghanistan* in CONFLICTS AND CONFLICT RESOLUTION IN MIDDLE EASTERN SOCIETIES: BETWEEN TRADITION AND MODERNITY 347-370 (Hans-Jörg Albrecht et al. eds., Duncker & Humblot 2006) (discussing structures of authority and local dispute settlement in Afghanistan); Wardak, *Building a Post-War Justice System*, *supra* note 1 (examining *sharia, jurga,* the Afghan interim legal framework, and human rights principles).

[43] UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT, AFGHANISTAN RULE OF LAW STABILIZATION PROGRAM ASSESSMENT (INFORMAL COMPONENT) 21 (2011); *see also* COMMUNITY-BASED DISPUTE RESOLUTION PROCESSES, *supra* note 34.

[44] COMMUNITY-BASED DISPUTE RESOLUTION PROCESSES, *supra* note 34, at 4.

not fare better than non-state justice institutions.[45] Furthermore, it is important to point out that women's access to the state justice system, where approximately three percent of the judges,[46] and less than once percent of police personnel are women, [47] is severely limited. Another problem with non-state justice institutions is that in some parts of Afghanistan *jirgas* and *shuras* are influenced by local strong men and warlords, and, therefore, may produce biased and unfair outcomes.[48] However, other studies indicate that because many local strong men and warlords have been appointed to key government positions in recent years, their influence over *jirgas* and *shuras* has significantly been reduced in rural areas.[49] Nevertheless, like the state justice institutions, *jirgas* and *shuras* also have serious problems in resolving local disputes transparently. These problems need to be addressed in imaginative and prudent ways.

III. THE NEED FOR SYNERGY

What has been examined in the previous two sections of this paper indicates that both state and non-state justice "systems" in Afghanistan have serious problems in delivering justice to the Afghan people. This examination indicates that Afghanistan needs a new coherent "Afghan" vision for re-building a post-Taliban justice system—a vision that is deeply rooted in Afghan culture and society, and is capable of meeting the new complex needs of the Afghan population effectively, cost-effectively, and in humane ways. The new vision should be capable of envisaging a sustainable justice system that bridges Afghan cultural and religious values into modern ideas about justice and its delivery in post-Taliban Afghanistan. Such a vision—in terms of a meaningful synergy between state and non-state justice—is proposed by the 2007 UNDP-supported Afghanistan Human Development Report.[50] This vision is formulated in the form of a "hybrid model for Afghan justice," which is illustrated in Figure 5, below.

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[45] CENTER FOR INTERNATIONAL GOVERNANCE INNOVATION, 4 THE SECURITY SECTOR REFORM MONITOR: AFGHANISTAN 6-7 (2010), *available at* http://www.humansecuritygateway.com/documents/CIGI-SSR-Afghanistan-September2010.pdf.

[46] AFGHANISTAN HUMAN DEVELOPMENT REPORT, *supra* note 8, at 71.

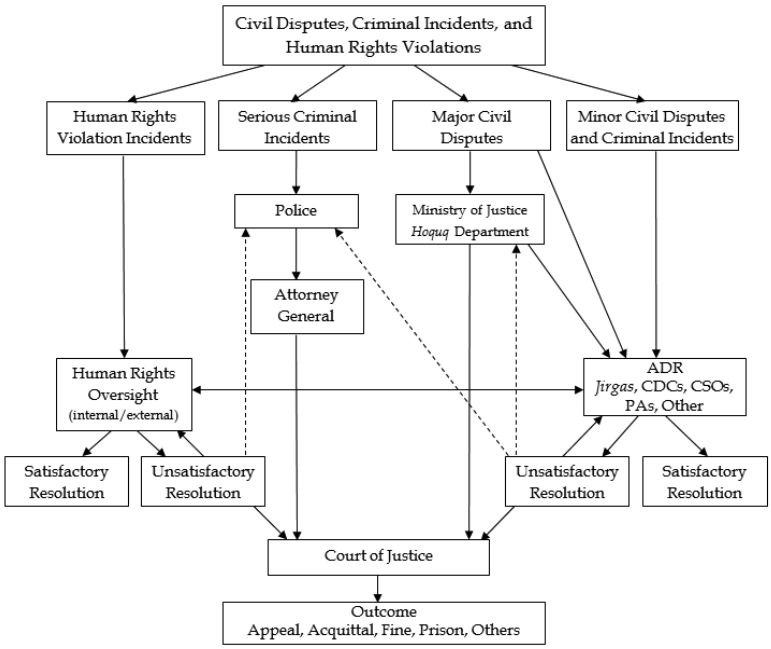
[47] *Id*. at 83.

[48] FEINSTEIN INTERNATIONAL FAMINE CENTER, TUFTS UNIVERSITY, HUMAN SECURITY AND LIVELIHOOD OF RURAL AFGHANS (2002-2003) 7 (2004), *available at* http://www.cmi.no/pdf/?file=/afghanistan/doc/Mazurana2.pdf.

[49] AFGHANISTAN HUMAN DEVELOPMENT REPORT, *supra* note 8, at 97-98.

[50] *See generally* AFGHANISTAN HUMAN DEVELOPMENT REPORT, *supra* note 8 (proposing a hybrid model of formal and informal justice).

FIGURE 5: HYBRID MODEL FOR AFGHAN JUSTICE[51]



The "hybrid model" proposes the creation of Alternative Dispute Resolution (ADR) and Human Rights Units alongside the state justice system at the district level. The model envisages that the ADR Unit would be responsible for selecting appropriate mechanisms to settle disputes outside the courtroom. This would mainly include *jirga* and *shura*, but also other appropriate civil society organizations such as Community Development Councils (CDCs) that have been established by the Afghan government's National Solidarity Programme in recent years. ADR mechanisms would handle minor criminal offenses[52] and civil cases, while giving people a choice to have their cases heard at the nearest state court. All serious criminal cases, on the other hand, would fall exclusively within the jurisdiction of the state justice system.

According to the "hybrid model," the proposed Human Rights Unit would be staffed by officials from the Afghanistan Independent Human Rights Commission (AIHRC),[53] or from other Human Rights and Civil Society bodies in Afghanistan. In order to counterbalance the dominance of men in *jirga* and *shura* within the ADR Unit, the Human Rights Unit would be staffed by female personnel to the extent feasible. The Human Rights Unit would be mandated to monitor decisions made by ADR bodies in order to ensure their consistency with human rights

[51] *Id*. at 129.

[52] The existing Penal Code of Afghanistan categorises *Ta'zeer* offences (acts/omissions that are prohibited in Islam, but for which specific punishments are not prescribed under *hadd* or *qisas* and *diyah*) into: *jenaiat* (felonies), *jonha* (misdemeanours) and *qabahat* (obscenity). It is the first category of offenses—punished by death or long imprisonments—that are considered as serious crimes. Most of the other categories are considered less serious offenses.

[53] Afghanistan Independent Human Rights Commission (AIHRC) has regional offices throughout the country. Through its "Monitoring and Investigation Unit," the Commission receives and investigates human rights violation complaints from the people of Afghanistan.

principles. The Human Rights Unit would also carry out educational and training activities, and would examine domestic violence, past human rights abuses, and war crimes.

In addition to the approval of ADR decisions by the proposed Human Rights Unit, ADR decisions would also need to be approved by the district state court, or by a concerned *mahkama-e-shahri* (urban court) in Afghan cities. This is to ensure that ADR decisions do not violate Afghan legal norms and/or the fundamental principles of Islamic *Shari'a.* The model proposes that when ADR decisions fail to be approved by either the Human Rights Unit or the concerned state court, they would need to be revised or referred to the state justice system for processing and adjudication. Also, when ADR decisions are not satisfactory to one or both disputants, they can be taken back to the formal state justice system for processing and adjudication. It is important to mention that the "hybrid model" does not specify the actual "mechanics" of the interactions between the ADR Unit, Human Rights Unit, and the state court, as these are to be decided in accordance with the nature and the circumstances of a specific dispute. This interaction may be conducted through formal correspondence, through the participation of representatives from the Human Rights Unit and the state court in the final decision making session of the ADR Unit, or through other innovative ways.

The "hybrid model," which reflects deeply-held Afghan moral and cultural values as well as most recent thoughts about contemporary criminology and criminal justice (restorative justice), provides a coherent framework for the delivery of effective, cost effective, accessible, and speedy justice to the Afghan people. As an innovative formula synergising state and non-state justice institutions, the model envisages an Afghan justice system that is less bureaucratic, and therefore, less corruptible. Moreover, since it is deeply rooted in Afghan culture and society, the "hybrid model" promises the establishment of a sustainable justice system that is central to the "Afghanisation" of rebuilding Afghan state institutions. Despite an angry and threatening response from Afghan judicial and state justice institutions, and the opposition of some Afghan women and human rights organizations to the hybrid model, it has created an important debate among Afghan and international circles concerned with justice-related issues in Afghanistan. However, opposition from some influential Afghan circles had resulted in slowing down government policy responses to the recommendations of the *2007 Afghanistan Human Development Report* and to its proposed "hybrid model of Afghan justice:"

> Although the Afghan government signalled its willingness to engage with traditional justice in the Afghanistan National Development Strategy of 2008, and again at the London Conference in early 2010, pressure from the human rights community and some members of Afghanistan's legal establishment has slowed efforts to codify a clearly defined relationship between formal and traditional systems into Afghan law.[54]

The unhelpful response of Afghanistan's legal establishment in terms of its *perceived* vested interests may be understandable. Opposition from some Afghan women and human rights organisations—including the Afghanistan Independent Human Rights Commission (AIHRC)—to the "hybrid model" is not fully comprehensible. One of the key aims of the "hybrid model" is the reform of *jirga* and *shura*. As mentioned earlier, a key proposal of the model is that the decision made by *jirga* and *shura* would only have formally binding effects, when they are in line with human right principles, Islamic *shari'a* and Afghan laws.

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[54] CENTER FOR INTERNATIONAL GOVERNANCE INNOVATION, *supra* note 45, at 11.

Nevertheless, in recognition of the importance of synergizing state and non-state justice systems, the Afghan Ministry of Justice—with the help of the United States Institute on Peace (USIP)—drafted a National Policy on Relations Between the Formal Justice System and Dispute Resolution Councils. The draft Policy, which was subjected to weekly discussions by a complex "working group" for a very long time, is now drafted as *The Law on Dispute Resolution, Shuras and Jigras*, by the Ministry of Justice.[55] However, the draft law, in its current form, severely limits the scope of non-state justice institutions and overregulates them. Moreover, it imposes unrealistic restrictions on *jirga/shura* membership and criminalizes non-compliance with provisions of this law. All these have huge negative implications for the flexibility, accessibility, local ownership and the "restorative" characteristics of non-state justice institutions. The draft law needs to be debated openly and objectively; it needs to be discussed in the framework of the original logic of the "hybrid model," and in the light of the results of recent empirical research. It is important to mention that the ideas derived from the "hybrid model" have been piloted in some parts of Afghanistan. Preliminary results of the pilot studies in selected districts in Afghanistan indicate that the "hybrid model" (or the ideas derived from it) provides workable solutions to most of the problems that Afghan state and non-state justice systems currently face.[56]

IV. CONCLUSION

This paper focused on a brief examination of national and international efforts to rebuild the justice system in post-Taliban Afghanistan. As indicated in the paper, progress in the process of rebuilding Afghan judicial institutions has been slow, patchy and problematic. The lack of effective coordination among national justice institutions, and between national and international actors, lack of a coherent "Afghan" vision, and the focus on reviving the old (pre-civil war) justice system with some patchy "legal engineering" seem to be the main contributing factors. Furthermore, endemic corruption, high levels of professional incompetence, inadequacy of detention/correctional facilities, and, more importantly, a very low level of public trust in the state justice system continue to pose serious problems in the rebuilding of judicial institutions in Afghanistan. Thus, the overwhelming majority of the Afghan population continue to take their disputes to non-state justice institutions—*jirga* and *shura*—for resolution. Drawing on the *2007 Afghanistan Human Development Report* and on its proposed "hybrid model," it is maintained that creating a meaningful synergy between state and non-state justice and civil society institutions within a coherent framework could provide effective, cost-effective, accessible and restorative justice to the Afghan population. Empirical evidence based on recent pilot studies has confirmed this. This could, in turn, strengthen the Afghan population's trust in its justice system and in the current national and international efforts to stabilize Afghanistan.

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[55] *See* Abdul Qadir Siddique, *Informal Justice System to Have Legal Cover*, PAJHWOK AFGAN NEWS, Oct. 25 2010, http://www.pajhwok.com/en/2010/10/25/ informal-justice-system-have-legal-cover.

[56] See generally Ali Wardak, A Field Assessment: Linking Formal and Informal Customary Justice Mechanisms in Ahmad Aba (Paktia) and Zone 5 of Jalalabad: An Exploratory Project (2010) (unpublished report, on file with author) (commenting on a study which demonstrated the strengths and weaknesses of a collaboration between the informal and formal sectors in Afghanistan); UNITED STATES AGENCY FOR INTERNATIONAL DEVELOPMENT, supra note 43 (documenting the success of a study which sought to increase stability in targeted areas of Afghanistan through strengthening the ability of Community-Based Dispute Resolution mechanisms).