

Institutionalising inclusive and sustainable justice in Afghanistan

Hybrid possibilities

Ali Wardak

Dr Ali Wardak is a Professor of criminology at the University of Glamorgan and Vice President of the South Asian Society of Criminology and Victimology. His main teaching and research interests focus on comparative criminology, the rule of law, and the relationships between state and non-state justice systems.

From September 2006 to October 2008 he worked for the United Nations Development Programme in Kabul, and co-authored the 2007 Afghanistan Human Development Report. He is graduate in law and jurisprudence from Kabul University and obtained his PhD degree from the Faculty of Law, University of Edinburgh.

ABSTRACT

Who is best placed to provide justice effectively and equitably to the breadth of Afghan society?

State and non-state justice providers are both part of the problem and potentially part of the solution. Despite significant strides being made in Afghanistan's formal justice system, it still struggles to deliver an accessible and inclusive service. Widespread corruption and neglect especially in rural areas are among the most serious contemporary challenges.

Informal institutions are the primary justice provider for many communities, resolving disputes through *jirgas*, *shuras* and *ulema* where the formal sector is absent, exclusive or mistrusted. But traditional bodies also

bring challenges, from poor record-keeping to gender exclusion, human rights violations and illicit practices. Taliban justice is also a significant feature of the informal sphere.

A hybrid system that draws on formal and informal institutions can offer a way forward, linked by new institutions that prioritise human and women's rights. A sophisticated hybrid model has previously been developed but has experienced resistance from existing justice institutions. More recently there has been renewed interest in it from the Ministry of Justice and elsewhere.

Justice in Afghanistan has made significant progress since the 2001 Bonn Agreement. But despite advances, the state justice system continues to face major challenges to deliver accessible, transparent and sustainable justice to all Afghans. As reported by the Special Investigator for Afghanistan in 2015, in spite of US expenditure of well over \$1 billion to 2015, Afghanistan's justice sector still struggles to deliver effective and sustainable justice.

The Bonn Agreement set out the terms for the foundation of a Judicial Reform Commission. But when the Commission was established in early 2002, it comprised mainly retired Afghan officials who had returned from long periods of exile and were not familiar either with modern practice or the new legally pluralistic environment. Existing justice institutions prior to Bonn had also been damaged by successive wars since the Soviet invasion, while multiple regimes had introduced new, often inconsistent laws, procedures and practices. The most serious challenges to justice in Afghanistan today are endemic corruption and neglect of rural areas, where the bulk of the population lives.

A potential way forward that remains under-explored relates to engaging non-state justice providers. Until 2009, international efforts largely ignored non-state justice providers, despite the fact that many were popularly perceived as more legitimate than the state's justice system and, in fact, were the main source of dispute resolution for most Afghans. After 2009, international aid agencies began to develop some interest in non-state and traditional justice providers, despite opposition from the Afghan state and the Afghanistan Independent Human Rights Commission (AIHRC). But international support has still allocated only a small fraction of its budget to non-state justice.

Any new political settlement to end the war in Afghanistan needs to acknowledge the breadth of relevant justice institutions – state and non-state – and acknowledge their functions in supporting sustainable peace. Key to developing an equitable justice system is to engage Afghan capacity in women's and human rights. Experiences in advancing a 'hybrid model' for justice in Afghanistan since 2009 point to viable ways forward.

Achievements since Bonn

Internationally sponsored judicial reform since Bonn has supported the development of technical capacity of justice personnel, and thousands of judges, prosecutors, police officers, prison wardens and officials at the Ministry of Justice (MoJ) have been trained. The quality of professional legal education inside Afghanistan has expanded exponentially, with 17 state universities and 96 private institutes of higher education now providing legal training through law or shari'a faculties.

Alongside the expansion of the MoJ's General Directorate of *Taqneen* (Legislation), many existing laws have been amended and new laws enacted. A new, unified criminal code was officially introduced in November 2017, which updates relevant legislation including those relating to the elimination of violence against women, anticorruption, anti-money-laundering, anti-human-trafficking and counter-terrorism. Judicial case management and administration of justice have improved through extensive technical training as well as internal reforms, including new procedures with regard to coordination between the Supreme Court, the Attorney General's Office, the MoJ and the Afghan National Police.

Justice institutions in many regional and provincial centres have been equipped with modern facilities to enhance accessibility of substantive legal material. Institutional support has been developed through a number of channels, including the Independent National Legal Training Centre (INLTC) in Kabul, Afghanistan's Anti-Corruption Justice Centre (ACJC), specialist courts and prosecution offices, the Afghanistan Independent Bar Association (AIBA), legal aid department, and the Human Rights Support Unit (HRSU) at the Ministry of Justice. Many more female judges, prosecutors and police officers have been hired. Local awareness of women's rights has been raised in many areas, for example reflected in increased rejection of the practice of *baad* among Afghan ordinary people, as reported by the Asia Foundation in 2017. *Baad* refers to the practice whereby the family of a murderer offer women in marriage in compensation to the family of the victim.

Key obstacles: corruption and rural neglect

Corruption

Widespread corruption in Afghanistan's justice institutions is closely connected to the post-Taliban political structure, which has relied heavily on pro-government – or more accurately 'anti-Taliban' – warlords to maintain order at both local and regional level, as reported by Jones in 2010. Warlords-turned politicians have staffed important political, security and justice positions with their own factional followers, building networks of endemic corruption, bribery, nepotism and clientelism. Respondents to an *Integrity Watch Afghanistan* study in 2016 named 'courts, municipalities and prosecution offices' as the three most corrupt Afghan institutions.

Judicial corruption has had huge negative implications for trust in the state justice system. Most Afghans look to non-state justice institutions, including in some areas to the Taliban's parallel judiciary. Despite recent efforts to designate some apparently more impartial senior appointees, Houlihan and Spencer have reported that the Ministry of Interior remains largely administered by former Northern Alliance affiliates. The National Directorate

of Security maintains similar links, while other justice sector institutions are mainly divided between political affiliates of the President and the Chief Executive. Efforts to coordinate different components of the justice system have not been effective, reflecting the lack of a coherent vision for fundamental structural reform of the of Afghanistan's justice sector as a whole.

Rural neglect

State justice institutions in rural areas have received scant attention compared with Kabul and other urban and provincial centres. Significant increases in the number of female judges have been largely restricted to Kabul (90 per cent), with the remaining 10 per cent in only four additional provinces, according to Madzarevic and Rao in 2014. Newly established institutions to support the justice sector similarly lack reach throughout Afghanistan, such as INLTC, AIBA and HRSU. Houlihan and Spencer in 2017 pointed out that the Juvenile Appeal Court, High Anti-Corruption Court, the Serious Crimes Court, and all eight chambers of the Supreme Court are situated in Kabul. State justice in rural Afghanistan further remains largely male-dominated, inaccessible and ill-equipped. For example, AIBA under-resourcing means it has struggled to provide assistance to rural litigants.

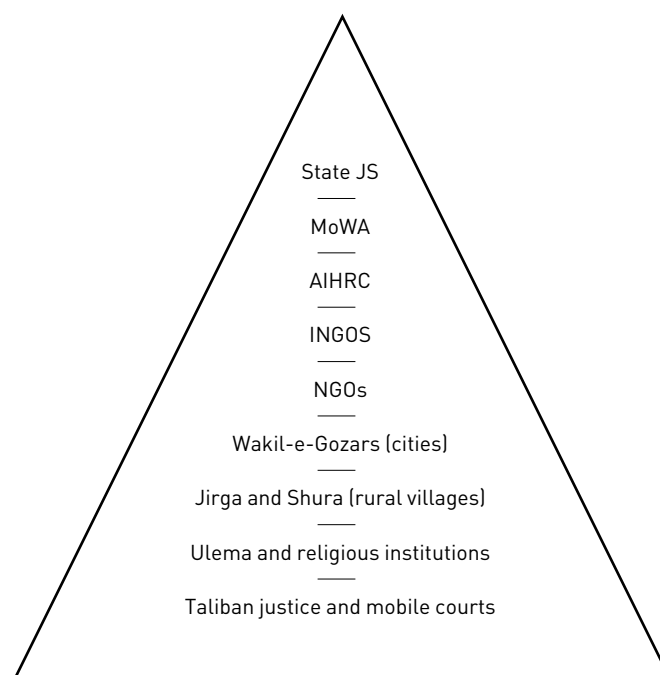
Rural insecurity has hampered judicial reform – although the inability of the state to provide effective and transparent local justice is itself a prime cause of insecurity. Furthermore, according to Swenson in 2017, the relationship between justice and insecurity in rural areas has been further complicated by the fact that international investment in non-state traditional justice since 2009–10 has been framed as a component of US-led counterinsurgency efforts. Also, paramilitary policing has been prioritised over community policing, undermining not only the professionalism and transparency of Afghanistan's justice system, but also local perceptions that justice is for ordinary people's welfare.

Filling the local vacuum: multiple justice providers

The space left behind by gaps in the state justice system at local level is filled by a multiplicity of non-state justice providers. This includes in some parts of the country, according to Giustozzi, Franco and Baczkowski, the Taliban's parallel judiciary. Field research over the past 15 years by the author and others has shown that the most prevalent non-state institutions for local dispute resolution are the traditional village *jirga* (circle) or *shura* (council). Primarily civil but also criminal local cases are addressed through *speengiri* or *rishsafidan* (greybeards) with a reputation for wisdom, piety, honesty, and local knowledge and dispute resolution expertise. However, recent field

research by the author has revealed various other non-state justice providers. The 'continuum' of justice providers in Afghanistan is illustrated in Figure 1 below:

Figure 1: Continuum of official, semi-official, unofficial and anti-state justice providers in Afghanistan



Source: Wardak (2019–forthcoming). Justice providers cited above include: State Justice System; Ministry of Women Affairs (MoWA); Afghanistan Independent Human Rights Commission (AIHRC); International NGOs; National NGOs; wakil-e-gozaars (local representatives) in urban areas; jirga/shura in both rural and urban areas; religious educational institutions, and individual members of ulema (Islamic religious scholars/jurists); and the Taliban's judiciary. The various justice providers illustrated in figure 1 are ranked according to their level of proximity to the state – from the most official, through official, semi-official and unofficial to anti-state justice structures.

Research indicates that non-state justice providers (especially *jirgas* and *shuras*) are perceived as more accessible, more legitimate, more effective, less corrupt, more trusted, and speedier in resolving disputes than the Afghan state courts. However, Stahlmann has also stressed that *jirga* and *shura* exclude women, do not officially record their decisions, sometimes violate Afghan law and human rights, and can be influenced by warlords. Nevertheless, notwithstanding challenges associated with non-state justice providers, until recently few concrete efforts have been made to use their positive potential as complementary elements of the state justice system.

Institutionalising a hybrid model for justice

Customary dispute resolution in civil and commercial disputes is recognised by Afghanistan's Civil Code (1976). Article Two states that: 'When there is no provision in the law or in the fundamental principles of the *Hanafi* jurisprudence of Islamic shari'a, the court shall issue a ruling in accordance with general custom, provided that

the custom is not contradictory to the provisions of this law and to the principles of justice.’ Various other Afghan laws include provisions on informal mediation between litigants. But customary adjudication is not recognised as legally binding unless cases are initially registered officially. And research by the author to be published in 2019 has shown that despite some pragmatic interaction between formal and informal justice providers, most criminal and civil disputes are dealt with outside the state justice system.

How the hybrid model works

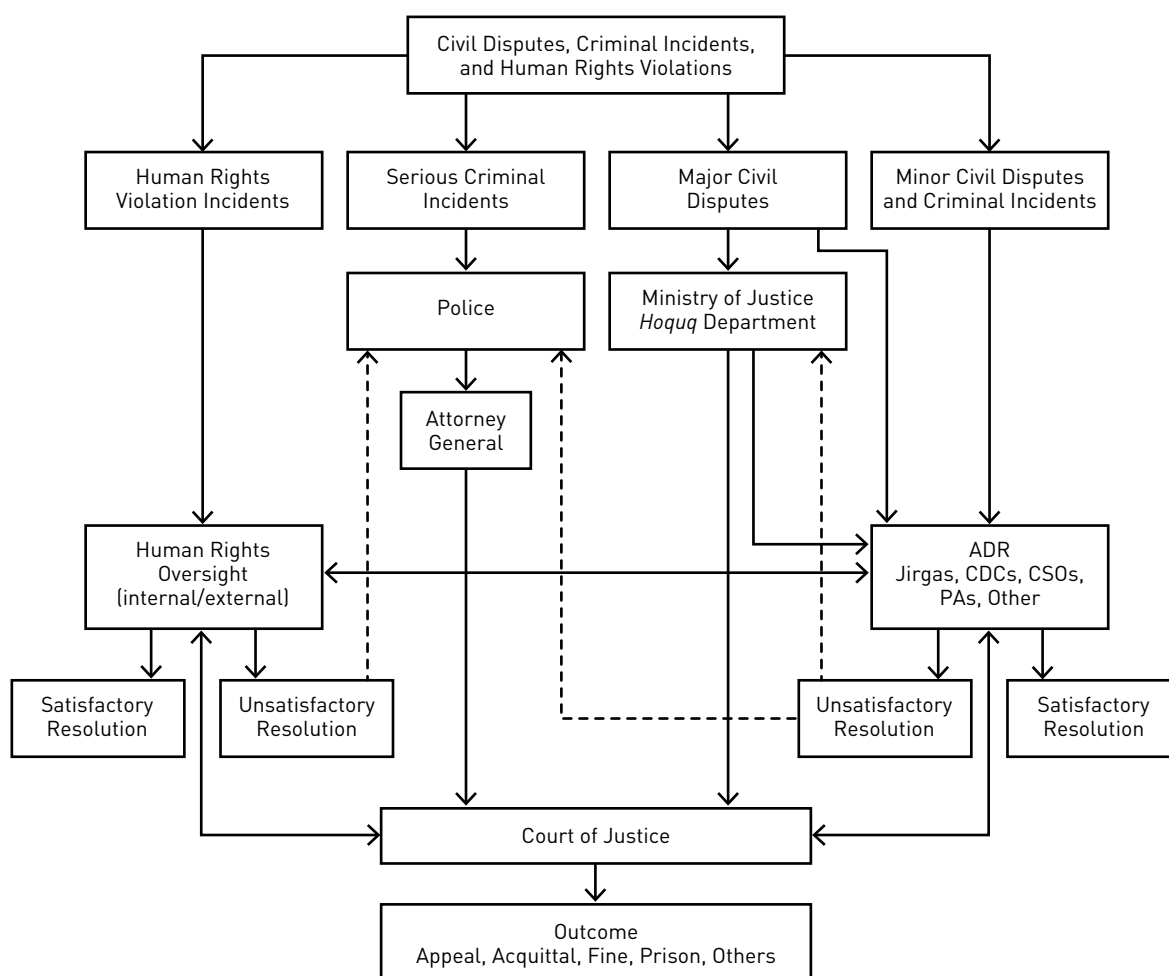
The author along with others developed a *hybrid model of the justice system in Afghanistan*, which was advocated in 2007 in the Afghanistan Human Development Report of the United Nations Development Programme (UNDP). This model proposed a coherent framework for complementary institutional links between the existing state justice system, various non-state justice providers, and women’s and human rights institutions – as Figure 2 illustrates.

The hybrid model advocates alternative dispute resolution (ADR) and human rights units functioning alongside

the state justice system. ADR Units would provide disputants with help and advice to select an existing non-state justice institution appropriate to deal with their case. Disputants would be free to select any appropriate mechanism, excluding in current circumstances Taliban justice as ‘anti-state’ and opposed to interaction with official institutions. ADR mechanisms would handle minor criminal offenses and civil cases, offering disputants the choice to refer to the nearest state court. Serious criminal cases would fall exclusively under the remit of the state justice system.

The proposed Human Rights Unit (HRU) would be mandated to monitor and approve ADR decisions in order to ensure consistency with human rights principles. The HRU would be further empowered to examine issues relating to domestic violence, past human rights abuses and war crimes. ADR decisions would also need to be endorsed by the nearest primary justice institution – a court or relevant rights (*hoquq*) department. This is to ensure that ADR decisions do not violate Afghanistan’s law or the fundamental principles of shari’a.

Figure 2: Hybrid model of the justice system in Afghanistan



Source: Afghanistan Human Development Report (2007)



Alli Wardak interviewing elders in Eastern Afghanistan, 2014. © Ali Wardak

Interactions between state and non-state justice institutions can occur through formal correspondence, physical participation or other appropriate ways. Decisions reached would be officially registered as legally binding. However as Figure 2 illustrates, ADR decisions that failed to be endorsed by either the HRU or the relevant state court, or that were rejected by at least one disputant, would need to be revised or referred to the state justice system for processing and adjudication. In this way, the hybrid framework proposes both a collaborative dialogue between various state and non-state justice providers and local rights organisations, and the empowerment of women through raising awareness of their rights and supporting spaces for contestation.

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How the hybrid model has progressed

The UNDP Report was rejected by Afghanistan's Supreme Court in 2007. Senior judges saw it as a threat to their authority, and its recommendations as a potential avenue to divert international aid away from the state. Still, the report's hybrid model nevertheless stimulated debate and practical interest in operationalising some of its recommendations. Some international organisations strongly supported the Report, including the Norwegian Refugee Council (NRC) and some other national and international actors, as reported by the NRC in 2007.

The idea of the hybrid model also began to get some traction within the Afghan state, although progress has been slow and strenuous. Recommendations of the hybrid model were strongly reflected in the 2009 *National Policy on the Relationship between the Formal Justice System and Dispute Resolution Councils*, drafted by the Ministry of Justice in conjunction with the United States Institute for Peace. The policy was not officially endorsed and various international organisations resorted to programmes focused on other initiatives such as training traditional local mediators, raising legal awareness, promoting women's rights and coordination between state and the state justice systems.

The MoJ revisited the hybrid model's recommendations in 2010, producing a draft *Law on Dispute Resolution Shuras and Jirgas*. The AIHRC, MoWA and other powerful officials rejected the inclusion of minor criminal offenses in the draft law, however, and it was withdrawn from Afghanistan's Council of Minister's meeting in 2010. In 2015–16, the Afghan government, with the support of UNDP, produced a new draft *Law on Conciliation Jirgas in Civil Disputes*. This was forwarded by the MoJ to the Council of Ministers in 2016, which has now approved the draft following minor (but unwarranted) amendments proposed by the government's Legislation Committee.

The new law is useful. But because it focuses exclusively on civil matters, it only partly represents the hybrid model. Full implementation of logic of the hybrid model can link all justice providers illustrated in Figure 1, and thereby provide inclusive, sustainable and restorative justice to all citizens. In time, this may also include some of the

Taliban's parallel justice mechanisms. It is hard to imagine linking Taliban justice to Afghan state justice institutions while the war continues. However, in practice Taliban justice already has links with *jirga*, *shura* and *ulema* based structures of local dispute resolution in specific ways and contexts. Capitalising on these local links may provide for a potential peacemaking mechanism between the Afghan State and the Taliban. More broadly, as the justice vacuum is most acutely felt at the local level, institutionalising links between male-dominated *jirgas* and *shuras*, religious institutions, women's and human rights organisations, and state justice institutions could provide more accessible, transparent, fairer and humane justice to all.

Conclusion

International investments in Afghanistan's post-Taliban state justice institutions over the past 16 years, have resulted in the (re)building of a functioning modern justice system, including reconstruction of justice infrastructure, creation of new justice institutions, enactment of new laws and reform of existing ones, capacity development, equipping justice institutions with modern facilities and emphasising women's rights. However, overemphasis on quick fixes, prioritisation of urban centres, the use of justice institutions in counter-insurgency efforts and the failure to understand or engage with the multiplicity of justice providers have undermined fundamental structural reform. All this has resulted in a justice system that is less accessible and more corrupt, and that lacks full capacity to address the complex new justice needs of the Afghan people. This situation has created a justice vacuum that is filled by multiple non-state justice providers, including the Taliban judiciary.

In its aim to provide accessible, sustainable and inclusive justice to all Afghans, the hybrid model offers a coherent framework for institutional links between the official state justice system, semi-official and unofficial local justice providers, as well as existing bodies promoting human and women's rights. By interlinking composite capacities, the model not only has the potential to extend justice to all Afghans but also promises greater transparency by empowering the HRU as a check and balance on rights abuses by both courts and *jirgas*, which in turn would offer checks and balances on one another. This is enhanced by the fact that women would be in the majority in the composition of the HRU. Indeed, research reveals that selective implantation of elements of the hybrid model by NGOs has resulted in the reduction of *baad* in Afghanistan.

Due to initial opposition from the state and the AIHRC, translating the hybrid model into policy has taken over a decade. However, in collaboration with UNDP and the MoJ, the author's recent field research on exploring applicability of the model to civil disputes has facilitated a new draft law on *Conciliation Jirgas in Civil Disputes* in Afghanistan. There is more work to be done to realise fuller implementation of the hybrid model. However, this cannot be fully achieved in isolation from achieving inclusive and sustainable peace. Justice and peace are inextricably linked in war-torn Afghanistan and require a multifaceted response. As local traditional dispute resolution mechanisms place strong emphasis on restoring community harmony, dignity and relationships between parties, the hybrid model can support social reconciliation and inclusive peacemaking among warring parties across the country.