

BUILDING LINKAGES BETWEEN THE FORMAL AND INFORMAL JUSTICE SYSTEMS IN AFGHANISTAN

FINAL REPORT

A REVIEW OF COLLABORATIVE APPROACHES IN THE PROVINCE OF HERAT

A PROJECT FUNDED BY THE UNITED STATES INSTITUTE OF PEACE

*NORWEGIAN REFUGEE COUNCIL
AUGUST 2009*

TABLE OF CONTENTS

ACRONYMS AND ABBREVIATIONS

I.	EXECUTIVE SUMMARY	4
II.	SOURCES	5
III.	PROJECT DESCRIPTION AND IMPLEMENTATION METHODOLOGY	6
IV.	FORMAL JUSTICE IN INJIL AND ZINDAJAN	
	Primary Court	6
	Law Department	8
	Prosecutor's Office and Police Department	8
	Formal Justice vs Informal. Perceptions	9
V.	INFORMAL JUSTICE IN INJIL AND ZINDAJAN. COMMUNITY DEVELOPMENT SHURAS	10
VI.	LEGAL KNOWLEDGE DEVELOPMENT IN THE DISTRICTS OF INJIL AND ZINDAJAN	11
VII.	THE PRINCIPLE OF OFFER AND ACCEPTANCE	
	Case Study [Zindajan]: Ownership and Possession	12
VIII.	SUBJECT MATTER JURISDICTION	13
	Case Study [Injil]: Child and Spouse Support, and Assault	13
	Case Study [Injil and Guzara]: Child Rights, Child Custody Rights, Kidnapping and Assault	14
IX.	NETWORKING	15
	CONCLUSIONS AND RECOMMENDATIONS	18
	LIST OF ANNEXES	20

LIST OF ACRONYMS AND ABBREVIATIONS

AEG	Anti-government Elements
AIHRC	Afghanistan Independent Human Rights Commission
BPRM	Bureau of Population, Refugees and Migration
CDS	Community Development <i>Shuras</i>
DoWA	Department of Women Affairs
DQG	Da Qanoon Gushtonky
DRRD	Department of Rural Rehabilitation and Development
ICLA	Information Counselling and Legal Assistance
IDP	Internally Displaced Person
ILF	International Law Foundation
KAP	Knowledge Attitudes Practices
LAOA	Legal Aid Organization of Afghanistan
LC	Legal Counsellor
LOJC	Law on the Organization and Jurisdiction of Courts
LPOR	Law on the Procedure of Obtaining Rights
MoJ	Ministry of Justice
NRC	Norwegian Refugee Council
NSP	National Solidarity Programme
OP	Opposing Party
UNAMA	United Nations Assistance Mission in Afghanistan
UNHCR	United Nations High Commissioner for Refugees
USIP	United States Institute of Peace

I. EXECUTIVE SUMMARY

This report outlines the findings of the USIP funded project titled “Building Linkages between the Formal and Informal Justice Systems” implemented by the Norwegian Refugee Council (NRC) in the province of Herat between the months of March and September 2009.

The primary goal of the activities carried out was to study the durability of linkages between the state and non-state justice systems in the province of Herat, taking due account of the fact that few linkages exist between the two resulting in the application of laws and procedures that are separate and distinct.

Criminal cases and complex civil disputes are being handled by the local village *Shuras* based on the dictates of common sense, understood as the common interpretation by the community patriarchs of local customs and an *ad hoc* interpretation of Islam. As a Law professor stated during one of the focus groups discussions held at the Department of Justice in Herat within the framework of this project, ‘one cannot really speak of a system when speaking of traditional justice, since customs applied to the resolution of disputes vary from town to town.’ Even though the parties are ultimately free to some extent to reach the agreement that best suits their interests in civil disputes, this might not necessarily reflect their actual entitlement according to Afghan statutory law and *Sharia*. Therefore, and in the absence of free or affordable legal representation to guide the most vulnerable sectors of the community through the formal and informal justice systems, many settlements are reached in conflict with Afghanistan’s state laws. The traditional system is in addition prone to undue influence by powerful elders or local warlords, and remains male dominated, which also brings serious concerns about the treatment dispensed to women and girls in the protection of their rights. However, in spite of its multidimensional shortcomings, informal justice is a strong pillar of the justice system in a considerable number of countries with dual legal regimes, and it carries a large case load in Afghanistan dealing with approximately 80% of the legal disputes and dispute settlements across the country.

Afghan courts refer parties in dispute to reconciliation on a systematic basis. Article 230 of the Civil Procedure Code states in this regard, “The court shall recommend the assignment of conciliators in cases where the court senses willingness on the part of the parties for settlement.” However, in most cases, the courts refer to reconciliation automatically without a thorough assessment of the actual willingness of the parties to reach an amicable outcome. Also, the Code of Civil Procedure does not provide a clear set of criteria to determine when and how a dispute should be referred to alternative resolution. Only the Afghan Code of Commercial Procedure provides some guidance to the courts on the steps to be followed and the conditions to be met before a claimant and his opposing party are sent to settle through traditional justice.

In the course of NRC’s field work, examples of seemingly sound coordination between the two systems were also observed, where legal remedy and reconciliation were dispensed by both the state justice and the local *Shuras*. However, it should be noted that, in the examples provided in this report, NRC’s legal advice guided the process towards the most fair outcome according to the law and the rights of the party represented, and therefore the interaction between the two systems was at all times encouraged and supervised by NRC’s legal counsellors (LCs).

What follows is a diagnosis of the health of the justice system in two districts of the province of Herat, and the prescribed measures that can contribute to address the severe and systemic problems of the state justice, while guaranteeing minimum standards of protection at village level.

Along these lines this report is structured in nine sections that review the progress of the project’s plan of action, describe how formal and informal justice are dispensed in the province of Herat, and provide a brief analysis of the existent linkages between the two systems. Finally, a set of recommendations and steps forward are also provided in the last section.

II. SOURCES

This report draws from the following primary and secondary sources:

1) Primary sources:

Knowledge, Attitudes and Practice (KAP) questionnaires were developed and surveys conducted amongst representative samples of the target group of the capacity building component implemented by NRC and Da Qanoon Gushtonky (DQG) –NRC’s partner in the implementation of this activity. 187 members of *Shura* were interviewed in the initial stages of the project to guide the development of the training contents and measure to a certain extent their knowledge of the law or the absence thereof, and 62 workshop participants were interviewed at project end for a review of impact and further background on the traditional system in both pilot districts. The questionnaires used for both surveys can be found in Annexes 4 and 5.

Court officials of the primary courts of the pilot districts of Injil and Zindajan were also interviewed, and their perceptions and understanding of formal justice at district level is reviewed in Section V.

All cases registered by NRC’s Legal Counsellors (LCs) in the 5 months of implementation covered by this report have informed the analysis of procedural patterns in the districts of intervention. Three of the cases solved in 2009 in Herat are discussed in Sections VII and VIII for an insight into the obstacles to justice, and an analysis on the appealable or nonappealable nature of the decisions reached by *Shuras*, and other questions relating to subject matter jurisdiction.

Focus groups discussions were held at the Department of Justice in Herat, co-chaired by its Director Mr Ghulam Rahmani and NRC. Some of the most relevant views expressed by local legal experts in the course of these discussions are also part of this document.

NRC Database was ultimately used for reference on legal cases registered and solved by NRC through the formal and traditional channels.

2) Secondary sources:

Articles, country reports and research studies have also been consulted, and some are mentioned in this document.

III. PROJECT DESCRIPTION AND IMPLEMENTATION METHODOLOGY

The project design was initially intended for a tentative timeframe of six months in two districts of Herat. Even though some planning activity was conducted in the first two months of the year, actual implementation of the project components and the analysis of the linkages did not start until the third week of March. At the time of the submission of this report, some activities were still ongoing.

In order to set the grounds towards the achievement of the 4 sub-objectives laid out in the original logical framework of the project,¹ the activities were classified into three main components: capacity building and awareness; legal representation and study of resolution patterns; and networking and lobby.²

Two legal counsellors (LCs), a legal trainer, a legal translator and three trainees/paralegals were recruited in the month of March under this framework, and joined the Information Counselling and Legal Assistance Unit (ICLA) of NRC in Herat.³ A national team leader, an international project coordinator and an international area manager supervised the legal team and the implementation of the activities according to the plan of action.

The districts of Injil and Zindajan were chosen for this pilot amongst the 16 that conform the province. Both are located in close proximity to the city of Herat, and are for the most part well connected to the urban center, which affords a higher degree of access to government departments, courts, human rights groups and legal aid providers than what is enjoyed by most districts.⁴

IV. FORMAL JUSTICE IN INJIL AND ZINDAJAN

State justice in the districts of Injil and Zindajan is administered and supported by the following institutions: the district primary court, the law department (*Hoquq*), the prosecutor's office, and the police⁵.

Primary Court

The court system of Afghanistan is comprised of three types of courts: the Supreme Court, the courts of appeals and the primary courts.⁶ The Supreme Court is based in the capital of the country and, in addition to serving as the highest authority in the judicial system it is also in charge of administering the court

¹ See Annex 1. Concept Note, p. 3.

² The introductory letters of support from the Ministry of Justice, the Supreme Court, the Attorney General and the Ministry of Interior - facilitated by the USIP- were delivered to the Court of Appeals, the Police Department, the Prosecutor's Office and the Department of Justice in Herat early into implementation to set the basis for the networking activities to be conducted within this framework.

³ Including the staff hired for the implementation of this project, the ICLA unit in Herat consists of seven legal counsellors, 2 information counsellors, 1 database assistant, 1 caseworker, 2 trainers and three trainees/paralegals.

⁴ Injil houses 12.7 percent of the 1,762,152 inhabitants of the province and has the highest population density of all 16 districts with 193 persons/ Km². The IDP camp of Shaidayee is located in the Eastern part of the district with 2,188 families. Zindajan is located to the West of the city and hosts 3.19 percent of the entire population of the province. The IDP camp of Maslakh was established in this district 16 years ago and currently hosts 3,428 families. See, Afghanistan Central Statistics Office, 2003, *Herat. A Socio-Economic and Demographic Profile*. And IDP data from the IDP Camp Profiling conducted by the United Nations High Commissioner for Refugees (UNHCR) and NRC in the province of Herat in 2008.

⁵ Article 3 of the Police Law establishes that the police shall operate in the form of contingents and units in the capital, provinces and districts under the mandate and supervision of the Ministry of Interior.

⁶ LOJC, Article 2: The Judiciary shall be the independent pillar of the state and composed of Supreme Court, Courts of Appeals and Primary Courts.

system at the provincial and district levels according to the Law on the Organization and Jurisdiction of the Courts (LOJC).⁷ A court of appeals shall be based in the capital of each province and structured in 6 divisions dealing with the following legal matters: criminal, public security, family, public rights, commercial, and juvenile.⁸

The LOJC also requires that primary courts exist alongside the court of appeals in each province. The primary court system at a provincial level must be structured in a central provincial court, a juvenile court, a commercial court, and a family court, based in the provincial capitals, and district primary courts.⁹ The first four courts listed are present and operative in the city of Herat, and Injil and Zindajan have their own primary courts in the district centers, which constitute the first instance for all criminal, civil and family matters. According to the LOJC, the primary district courts do not have jurisdiction over commercial, public rights and public security cases, which shall be dealt with by the provincial central primary court. All cases on civil and family matters can also be filed in the *Hoquq*.¹⁰

The Court of Appeals oversees that all administrative obligations of first instance courts are properly applied. In Herat, the staffing scheme of the Court of Appeals requires the primary courts of all districts to be staffed with at least three judges, one judicial clerk and one administration support staff. Of the three judges one must be appointed as president of the court. The primary courts of Injil and Zindajan are both staffed with the required personnel,¹¹ and all judges are *Sharia* Faculty graduates, and have passed the practical stage of the judicial training course.

In the last twelve months, the district court of Injil closed solved 186 criminal claims, 20 civil law cases (including 7 family disputes), and 258 certificate issuance requests. 13 claims were dismissed. The district court was unable to provide a total number of registered cases.

In the same period, the district court of Zindajan registered a total of 240 cases in the last year of which 236 were closed solved (196 were documentation cases, 23 criminal, 17 civil (including 6 family law cases).)

The low numbers of family and civil disputes solved by both courts is explained by the fact that most of these cases are referred to mediation according to article 230 of the Civil Procedure Code. Referrals do not seem to be based on the courts' consideration of the willingness of the parties to settle but rather to be conducted automatically on a systematic basis.

Based on NRC experience in the district courts of Herat, wherever a case is registered with the court, the judge refers it almost automatically to the traditional justice system. The LCs report that judges often act as a mediators between the plaintiff and the defendant and, in many occasions, refuse to hear a case until an attempt to settle through a *Shura* has been exhausted. This might not be a bad approach when dealing with minor claims relating to property law, taking into account the lack of human and material resources of the formal justice system. However, for family disputes with a criminal component (most often physical violence against women), it has been often observed how judges refer cases to the traditional justice system not without first instructing the claimants to exercise patience with their husbands. Many female plaintiffs without access to proper legal representation usually yield to the court's requests and return to domestic settings where further physical and psychological violence is very likely to ensue.

⁷ Ibid., Art 16.

⁸ Ibid., Articles 31 and 32.

⁹ Ibid., Article 40.

¹⁰ The Civil Procedure Code states in Article 12.2: a civil rights petition can directly be addressed to the courts or the *Hoquq*.

¹¹ Article 47 of the LOJC states that in the areas where the required number of members available, the cases can be decided by fewer than three.

Transportation facilities, communication equipment, tape recorders, copy machines, law books and codes are not available to the judges of both districts. Also, officials from both courts told NRC to have been subject to anonymous threats in the exercise of their duties.

Law Department

The *Hoquq* has offices throughout all provinces and districts of Afghanistan, and is in charge of implementing the Law on Procedure of Obtaining Rights (LPOR), which regulates all issues relating to civil and commercial rights including family, labor and property.¹² Wherever a case is filed in the *Hoquq*, this department must issue a letter to the Police who will contact the defendant in the case and require him or her to respond to the plaintiff or appear before the *Hoquq*.¹³ The *Hoquq*, who is primarily in charge of collecting all relevant documentation related to a case in addition to summoning the defendant, will often first try to settle the case through mediation, by bringing the two sides together and encouraging them to agree to a settlement amongst themselves. The Police Department may also encourage the two sides to settle their dispute through mediation.¹⁴ If the dispute cannot be solved through mediation the *Hoquq* will usually transfer the case to the relevant court.¹⁵

After the case has been referred to the relevant court for adjudication, and once the court has issued a final decision, then the case is returned to the pertinent *Hoquq* for enforcement.¹⁶ The *Hoquq* office then sets up an executive committee, which consists of *Hoquq*, police, prosecutor's office, and governor's office who act jointly in the enforcement of the terms of the court's order.

In Zindajan, this department is comprised of two officials as required by the Ministry of Justice (MoJ), and Injil's *Hoquq* has 3 including one support staff. Both officials in Zindajan are high school graduates and have low legal capacity, whereas the head of the department in Injil holds a bachelor's degree in *Sharia* and Law. The law is silent about the minimum qualifications for the appointment of Law Department officials.

In the course of the last twelve months, the *Hoquq* of Injil registered a total of 153 cases (37 family law related; 110 of ownership and possession rights; 6 preemption cases; and 46 money recovery disputes), referred 32 to the district court, 21 to other offices of government and 1 to mediation, closed unsolved 86, and dismissed 11. 2 of the 153 cases registered are still active.

In Zindajan, the law department registered a total of 32 cases in the past 12 months, of which 12 are financial issues, 8 related to property and 12 to family law. This department referred only 3 cases to court, 2 to the City of Herat law department and 1 to the office of the prosecutor. 10 cases were closed unsolved, 11 were dismissed and 5 are still active.

Prosecutor's Office and Police Department

Although the Constitution and the Interim Criminal Procedure Code require the police and the prosecutor's office to play a vital role in crime scene detection and investigation, in the two pilot districts they both lack the resources required to do so. Needless to say, there are no crime scene specialists in the entire province of Herat, including the city.

The office of the prosecutor of the district of Injil registered 145 crimes in the last twelve months, including 12 murders, 2 rapes, 19 traffic accident under investigation for potential vehicular manslaughter-, 37 robberies, 7 cases of adultery, 38 crimes of assault, 21 traffic accidents, 1 case of alcohol consumption, 1 self-immolation, 2 property damage cases, 3 harassment cases, and 2 cases

¹² Law on the Procedure of Obtaining Rights, Articles 1 and 2.

¹³ Foley, Conor. *A Guide to Property Law in Afghanistan*, p.91, Norwegian Refugee Council, 2005.

¹⁴ Ibid.

¹⁵ Ibid., p. 92.

¹⁶ Civil Procedure Code, Article 16.

classified by the office as doubtful deaths. 137 of these cases were referred to the district court and 7 to the police. 1 crime of domestic violence was closed after the victim dropped the charges.

In Zindajan, in the course of the last twelve months, the prosecutor's office registered 24 cases, of which 23 were referred to court, and 1 is still under investigation. These 24 cases include: 2 murders, 8 crimes of assault with injuries, 4 robberies, 2 traffic accidents with injuries, 2 property damage cases,¹⁷ 2 traffic accidents under investigation for vehicular manslaughter-, 2 prison escapes, and 1 case of illegal marriage which could be either early or forced marriage,¹⁸ and one case classified by the office as irresponsible behavior.

Formal Justice vs Informal. Perceptions

The KAP surveys carried out in 23 villages of the two pilot districts, evidenced a high degree of skepticism and negative perceptions about the formal justice system. There was almost consensual agreement amongst those interviewed on the fact that the formal system serves the interests of the most powerful side to a dispute, and of its corrupt, expensive, unfair, and untrustworthy nature. As one of interviewees stated, " a judge's pen is indeed a pick by which he or she demolishes the house of the powerless party in favor of the powerful side in a dispute." Even government officials and professors of the *Sharia* and Law faculties of Herat University hold similar views to those of *Shura* members and local residents. When interviewed about the factors that led up to the increased resort of people to traditional justice, a public official stated the following:

"People are mostly interested to get their disputes resolved through the traditional system because: the traditional system is not as corrupt as the formal system; justice is dispensed quickly in most cases; informal decisions are less prone to serve the interests of local power-holders; and most people are mistakenly convinced that all informal decisions are in line with *Sharia*."

Similarly, a professor of Herat University mentioned 'corruption and bureaucracy' as the two main reasons that deter claimants from approaching the formal justice system. Another scholar attributed the increased resort to traditional system to the fact that the concept of nation-state does not have profound roots and is not yet prevalent in Afghanistan's culture.

This is further illustrated by NRC's own data relating to the disputes resolved through both channels by its LCs.

Of the 827 civil disputes represented and closed by NRC's legal counsellors from its seven field offices in 2008, 12% were administrative procedures, 72% were resolved through alternative dispute resolution and only 16% through state justice.

In Herat, from January 1 until August 30, 2009, the breakdown of legal cases from all districts yields the following figures:¹⁹

Total number of registered cases: 118
 Closed solved cases: 58
 Closed unsolved: 43
 Cases referred to other legal aid providers: 21

¹⁷ In both districts, the property subject of damage was the harvest in all cases recorded.

¹⁸ Specific details were not provided.

¹⁹ The NRC Information, Counseling and Legal Assistance Guidelines establish minimum lawyering and case management standards to be followed by all offices in the country. According to the Guidelines, NRC considers that a case is closed solved, wherever a decision or an agreement has been reached and the dispute is resolved. The case is also to be considered as closed solved, when the decision is not for NRC's client but is based on the proper application of the existing laws, and the client agrees with the outcome. In this case the dispute is over and therefore the case is closed and considered solved. Wherever the client withdraws or contact is lost the case is closed unsolved.

Active cases: 161 (including previous years)

Of the 58 cases closed solved, 5 were administrative procedures, village *Shuras* mediated in 21 and NRC also directly in 21 without the assistance of a *Shura*. Only 11 of these cases were resolved through formal justice.

V. INFORMAL JUSTICE IN INJIL AND ZINDAJAN. COMMUNITY DEVELOPMENT SHURAS

In Herat, informal justice is dispensed predominantly by the community *Islahi* (reconciliation) *Shura*, although the *Pashtunwali* applies in the districts of Shindand, Adraskan and Gulran.

The main differences between the two:

-Whereas in the *Pashtunwali* it is the *Jirga* ultimately responsible for rendering a final decision, the *Shura* is purely a mediation body in charge of overseeing that a final agreement is sought by the parties or their representatives themselves.

-Unlike in the *Shura* system, the *Pashtunwali* guarantees enforcement and may bring punishment –in the form of fines or forced displacement upon those that contravene or refuse to abide by a decision taken by a *Jirga*.

-*Pashtunwali* decisions can be ‘appealed’ whereas a settlement reached through mediation is considered to be irreversible.

The Community Development *Shuras* (CDS) in Injil and Zindajan are the only informal bodies of decision making over legal matters. Taking the traditional village *Shuras* as its basis, the National Solidarity Programme (NSP) established the CDSs in 2003. These *Shuras* operate as multi-functional institutions addressing different needs and problems originated in the villages, including legal disputes. The CDS members are selected by the male population of each village through a ‘no candidate’ voting system organized and facilitated by the Department of Rural Rehabilitation and Development (DRRD). A member can only be removed from a CDS by the majority vote of the male population of the village, regardless of the member’s capacity to render sound judgement about all matters affecting the community. There are also religious *Shuras* available in very few villages, but they are not involved in dispute resolution and matters discussed are entirely related to religious affairs. 100 percent of the 62 *Shura* members interviewed for the post-KAP survey in both districts claimed to have registered their CDS with the district authorities.

The elected members of the CDSs are mostly *Mullas*, village leaders (*Arbabs*), village elders (*Mosafidan*), landowners and, in few instances, those who held close ties with the *Mujahideen* in the past. However, the size and exact composition of each CDS differs from one village to another.

Women representatives are not allowed in the CDS, and have developed *Shuras* of their own in some villages. Surprisingly, 71 percent of the CDS members interviewed for the post-KAP survey would agree to female membership. Only 29 percent responded negatively to this question, basing the prohibition on cultural tradition and Islamic principles. It should be noted that Islam does not forbid women participation in community councils as long as the husband or guardian authorizes it. Furthermore, such authorization would not be required if inclusion of the female member is a matter of public interest.²⁰

Unlike *Pashtunwali Jirgas*, the CDSs in Injil and Zindajan districts are not decision-making bodies and can only guide the parties in disputes towards a mutual agreement and reconciliation. 100 percent of those interviewed during the post-KAP survey agreed to this fact.

²⁰ E.g. if the female candidate is the only person who can read and write in the village.

Finally, the vast majority of cases dealt with by the CDSs are civil disputes –including amongst the most commonly mentioned family, land ownership and possession, water rights, inheritance and money recovery. 33.9 percent acknowledged the involvement of their *Shuras* in the resolution of criminal matters. However, 59.6 percent also indicated that in theft cases, only where the value of the item stolen is high the matter has to be reported to the police and resolved through formal channels. 40.4 percent would report these cases to the police regardless of the value of the item or the amount of money stolen.

VI. LEGAL KNOWLEDGE DEVELOPMENT IN THE DISTRICTS OF INJIL AND ZINDAJAN

16 3-day training sessions were conducted between the months of April and August in 64 villages of the pilot districts of Injil and Zindajan. The training curriculum focused on questions relative to the hierarchy of domestic laws in Afghanistan, and jurisdiction and procedure in both civil and criminal law. The contents of the trainings are laid out in Annex 2, and a progress sheet with a complete breakdown of participants and villages of origin can be found in Annex 3.

For the implementation of the criminal law module, a contractual agreement was entered in April 2009 between NRC and the Afghan NGO DQG.²¹

The training sessions reached to a total of 503 participants with a final turnout of 28.6 percent of female participation from local women *Shuras*. In terms of coverage, and in addition to the legal awareness campaigns conducted by NRC with other projects -primarily in the form of radio broadcasts-, the capacity building component has the biggest potential for conveying a new perception and understanding of rights amongst those in charge of dispensing justice in the traditional and state systems.²² Also, within the framework of this project, NRC designed and printed 1,000 copies of a poster describing the procedure to follow for the registration with the courts of agreements reached through the mediation of an *Islahi Shura*.²³

As it has been mentioned, a representative sample of 187 persons primarily chosen amongst members of *Shura* was interviewed as part of the pre-KAP survey carried out in villages of the district of Zindajan in the initial stages of implementation.

Of those interviewed, 37 percent claimed to base their advice to the parties in the resolution of disputes at community level only on *Sharia*, 29 percent on *Sharia* and the opinions of the village elders, 1 percent only on custom, and the remaining 33 percent on a combination of *Sharia*, custom, elder's opinions and the laws of Afghanistan. The value of these figures is purely informative about the perceptions of *Shura* members as to the framework applied to alternative dispute resolution, taking into account that *Sharia* has been customized in all districts of the province, knowledge of Afghan law is almost absent –as evidenced during the training sessions-, and the line that separates local custom from the opinion of a village elder is one difficult to draw.

²¹ See Annexes 6 and 7, Implementation Agreement NRC-Da Qanoon Gushtonky.

²² In 2008, 15 radio shows of 20 minutes of length were aired by NRC with funds provided by the Bureau of Population, Refugees and Migration (BPRM) on the local radio station Faryad on the following topics: 1. Prohibition of gender based violence in Sharia and national laws; 2. Hereditary shares of legal heirs in Sharia and the Afghan Civil Code; 3. Property rights in Sharia and the Afghan Civil Code ; 4. Family Law and the significance of marriage; 5. Inheritance rights of women in Islam; 6. The right of women to work outside their homes; 7. Marriage contracts; 8. Patrimony shares; 9. The right to marry and divorce; 10. Illegal occupation of land; 11. Women's rights and prevention of self-immolation; 12. Inheritance history and rights in Sharia and the Afghan Civil Code; 13. Marriage contracts and dowry; 14. Positive value of property rights for man and women; 15. Nafaqa- living expenses of women and children-.

In addition to one of NRC's legal trainers, who took part in the 15 shows, expert speakers from the Faculty Boards of the Sharia and Law Schools were selected and commissioned by NRC for each specific subject. The 15 shows were broadcasted on prime time. Radio Faryad has an estimated audience share of 35 per cent of the total population of the province, approximately 1,800,000 inhabitants. In Herat, access to radio is almost universal -98 percent of the population either has a radio set or lives in a village that has it.

²³ See Annexes 8 and 9, Poster Design and English translation.

The hierarchy of domestic law in Afghanistan is basically clear. The courts are required first to apply the Constitution and then they shall look to applicable statutory law in rendering their decisions. Where no provisions can be found in either the Constitution or other statutory laws for a case under consideration, the court shall follow *Sharia* using the *Hanafi* jurisprudence.²⁴ Finally, where there is no provision in the law or in the fundamental principles of *Sharia*, the court may turn to public convention.²⁵ However, in practice, Statutory Law or *Sharia* provisions are applied in the initial stages of dispute resolution by neither the formal nor the traditional justice systems.²⁶

Of the 503 participants in the training sessions, 98.2 percent claimed to have never undergone any kind of relevant legal training in the course of their lives. The remaining 1.8 percent is the total of court, *Hoquq* and Prosecutor's Office officials and members of the police department who attended the workshops imparted by NRC and DQG -all with previously acquired legal background.

100% of the *Shura* members interviewed during the post-KAP survey stated to never consult books or codes for legal reference. Also 100% would if the possibility was made available to them.

VII. THE PRINCIPLE OF OFFER AND ACCEPTANCE

There is consensus amongst legal experts in Herat about the nonappealable nature of agreements reached by the parties through alternative dispute resolution, in the absence of undue influence or duress. Only when a party is dissatisfied with the outcome of mediation can the claim be brought through official channels. However, according to articles 11 and 12 of the Civil Code, an agreement reached by the parties is not binding until the parties get the official endorsement from government or the state justice.

The following illustrates how a case can bounce for years between formal and traditional justice regardless of the will of the parties involved as to the procedure of choice. The case also shows some degree of cooperation between both systems in the collection and exchange of documentation relevant to the subject matter at dispute. Finally, it exposes the inefficacy of the district court to afford expedient and reliable justice in the absence of proper legal representation.

Case Study [ZINDAJAN]: Ownership and Possession

Type of claim: land ownership and possession

Client: IDP; male

Opposing party (OP): local resident from the district of Zindajan

Resolution mechanism: *Shura*

The client, an internally displaced person (IDP) from the district of Kohsan, bought a 390 sqm plot of land in the village of Mamizak, Zinda Kan, for 20,300 AFA on 27 January 2006. The OP brought a right of preemption claim over the land on 29 March 2006. The client refused and the claim was brought to the district court of Zindajan in April 2009. The district court referred the case to mediation.

The *Shura* informed the parties that the preferential right to purchase the land had not expired and therefore the OP had a valid claim. The claimant did not accept the *Shura*'s ruling and brought the claim back to the district court of Zindajan. The court summoned the OP, who did not appear, and the case was dismissed in April 2006.

In April 2009, the OP approached the client with the same claim over the land. The claimant sought legal representation from NRC in April 2009.

²⁴ Foley, Conor, *A Guide to Property Law in Afghanistan*, p.19, Norwegian Refugee Council, 2005.

²⁵ *ibid.*, p.109.

²⁶ Article 230 of the Civil Court Procedure Court states that the courts shall recommend mediation where they sense willingness of the parties to settle.

The dispute was first brought to the district's law department. After collecting evidence in the form of affidavits, title deeds, interviewing the *Shura* members, and unsuccessfully trying to bring the parties to an agreement, the law department referred the case to the district's court. It should be noted that, according to the Law on the Acquisition of Rights, articles 13 through 19, the law department is not legitimized to mediate between the parties; its responsibilities are limited to the registration of the case, summoning the parties and serving the defendant with the claim. If the defendant accepts the claim, the law department must facilitate the procedure of redress to the plaintiff by the defendant within 10 days. If the plaintiff's rights are not restored, the law department must refer the dispute to the courts according to the letter of the law. However, NRC's experience shows that in most cases, the law department also refers the parties to informal justice almost systematically. The Court summoned the OP, who did not appear, and the case was dismissed again. This time, the claimant requested a confirmation letter from the law department as the rightful owner of the land and the case was closed.

In this case, the *Shura* took the local resident's side to the detriment of the IDP with the wrong legal arguments since, according to *Sharia*, the preemptor has a period of 30 days to claim his or her right from the time the seller announces the intention to sell.²⁷ Also, in article 2233, the Civil Code gives the preemptor 30 days -from the date of his or her declaration of intention in exercising the right- to submit the claim to Court prior deposit of the price of the object of sale in a treasury or bank in the area where the property is located. The OP had not followed procedure according to the law, but the CDS ruled in his favour.

VIII. SUBJECT MATTER JURISDICTION

There are currently no jurisdictional limitations generally accepted and respected by actors of the traditional justice system.

Legal obligations in Islamic law are initially divided into two main categories: a) God's rights (*Hoquq-ullah*), meaning the rights of the public; and b) Right's of men (*Hoquq al-Ibad*), meaning the rights that individuals have *vis-a-vis* each other. Contrary to the rights of men, the rights of God entail all non-negotiable obligations enforced and ruled by the state regardless of whether the victim wants or not to press charges.²⁸ The traditional system can authoritatively deal with those legal matters related to the victim's rights, but not with those civil claims that involve public and state interests. The formal justice system must in all instances deal with and focus on retributive justice in all *Hoquq-ullah* related matters.

The following two cases expose the following shortcomings of the state justice system: first, a mediation conducted by the Prosecutor's Office of Injil's district; and second, undue influence exerted on the formal justice system by a powerful defendant:

Case Study [INJIL]: Child and Spouse Support, and Assault

Type of claim: child and spouse support, and assault

Claimant: refugee returnee; female

Opposing party (OP): father in law

Resolution mechanism: office of the prosecutor

The claimant is a female returnee from the village of Badallu, of the district of Injil, who had been forcibly married in 1989 at the age of 16. In 1991, her husband left to Iran. She did not join him until 1997.

While in Iran, her husband seriously beat the claimant, and she had to be taken to the hospital in at least one occasion. To escape violence, she returned to Afghanistan in 2008 with her 3 children. The agreement

²⁷ Articles 1033 and 1034 of the Sharia Procedure Code (*Mojatulahkam*)

²⁸ *Fequ-hul Islami ve Adellatuhu*. Dr. Wahbe Zuheili. Islamic Jurisprudence. Vol. 4, p. 369

was for her husband to provide financial support to the claimant on a regular basis in the form of maintenance money sent from Iran to her father in law.

In February 2009, the claimant approached the OP for payment. The OP refused, violently attacked the claimant for not wearing the *burka* -breaking several of her ribs, and kept by force her 16-year-old male child. On March 26, the claimant approached the district court of Injil with a threefold claim for the release of her child, the assault charges, and the recovery of the amounts of money owed to her.

On 28 March, the district court referred the charge of assault to the prosecutor's office and the other two claims to be resolved through the informal channels. The claimant approached NRC for assistance on March 29.

A negotiation meeting was held at NRC's office in Herat prior to the *Shura* held in the village of Navin, in the district of Injil, on April 1. No agreement derived from both attempts at mediation. The district court was again approached and the OP summoned to appear on April 7. The case was referred to the prosecutor's office, despite the fact that the charge of assault had already been previously referred.

After hearing the case, including a confession from the OP to the assault, the prosecutor encouraged him to release the claimant's son, pay all outstanding amounts owed for child and spouse support, and advised him not to inflict physical violence on the claimant in the future. The prosecutor mediated between the parties regardless of its jurisdictional limitations, considered the assault claim as not pertaining to public interest –which gives the prosecutor the capacity to dismiss it according to article 117.1 of the Criminal Procedure Code- and closed the case. The decision was officially recorded and confirmed by the district court.

Case Study [INJIL and GUZARA]: Child Rights, Child Custody Rights, Kidnapping and Assault

Type of claim: child rights and child custody rights

Claimant: IDP; female (mother of the victim -also female of 14 years of age-)

Opposing party (OP): warlord from Guzara district of Herat

Resolution mechanism: *Shura*

The claimant has three daughters and a son. In 1995, after her husband's passing she was forced to move in with her brother in law, the OP, a local warlord fighting alongside Gulam Yahya in the East of the districts of Guzara and Injil.

In 2005, the OP forcibly offered the claimant's eldest daughter in marriage, aged 14 at that time, to a man residing in a neighbouring district. The claimant has not seen her daughter ever since although she has managed to keep regular contact by phone.

In 2006, the OP initiated preparations to give in marriage the 11 year old daughter of the claimant, the victim, at which point the claimant decided to flee from the OP's house with her two daughters and son. She managed to hide at her brother's house located in the district of Injil for two years, until 2008, when she was found by the OP and the 13-year-old daughter taken by force.

On February 16, 2008, the claimant approached the district prosecutor's office and the Department of Women Affairs (DoWA) for assistance. The DoWA subsequently referred the case to NRC.

NRC made several failed attempts through the head of the OP's village and the district of Guzara police to summon the OP, who issued repeated death threats against anyone who dared to make an attempt at serving him with court papers, including the police.

On September 23, 2008, NRC's LC filed a claim on behalf of the claimant through power of attorney with the Guzara District Court, which issued an unofficial notification to the OP and the head of his village –Dashan, East of Guzara- to appear before the court. The OP not only did not appear, but restated his death threat and extended it to any court or government official who tried to send him notice in the future.

All the barren attempts at solving the claim through the formal justice system called for a change in the strategy and, on October 16, 2008, a *Shura* took place in the village of Rawashan –East of Injil- upon request of NRC's LC. Rawashan was chosen as a neutral location for the resolution of this dispute due to the fact that the most influential elders of the district are originally from this village. The elders of both families in dispute, the *Mullah* of the local mosque and the head of the claimant's village decided that a representation of the *Shura* would be sent to mediate for the release of the claimant's daughter. This was the first of several *Shuras* held in the district of Injil between the months of October and December 2008, where the custody rights of the claimant were argued according to the *Sharia* principles that state that in every case when the husband passes away the mother has priority for custody over the rest of the members of the family. The OP was never present during the discussions.

In January 2009, after learning of the OP's departure to the mountains of Guzara to join the Anti-Government Elements (AGE) under the command of Ghulam Yahya, the LC called for a *Shura* to be conducted at the claimant's brother's house. The OP's mother unexpectedly appeared with the claimant's daughter and, after some discussion, the child was returned to her mother. The outcome was recorded by letter of confirmation issued by the *Shura*.

The OP inflicted severe psychological and physical violence on the victim on a regular basis. According to articles 407 to 413 of the Afghan Criminal Code, an individual adjudged guilty of a crime of assault shall be punished by imprisonment for 24 hours to 3 years depending on the extent of the injuries caused. The maximum of 3 years applies wherever as a result of the assault, the victim suffers a permanent disability.

The OP has not been indicted for kidnapping and assault, and will not for the following reason: according to *Sharia* the uncle of a child becomes its guardian upon the death of the father and in the absence of a grandfather. The guardian is allowed to keep in his dwelling those under his guardianship, and will not be prosecuted for physical abuses inflicted on them unless the victim or victims press charges. The claimant in this case did not for fear of retaliation from the OP; also, the OP is under the protection of the mentioned AGE linked to the Taliban, which makes his apprehension and conviction a very difficult if not impossible task.

The claimant and her daughter live now in a house loaned by the claimant's brother. Although the OP is aware of the claimant's whereabouts, he has not tried to approach the claimant since the resolution of the dispute. The claimant's daughter presents symptoms of post-traumatic stress and has been referred to Medica Mondiale psychosocial programme for treatment.

IX. NETWORKING

In the city of Herat, the Department of Justice is fairly active considering its evident lack of resources, and its director, Mr Ghulam Rahmani, also a law professor at Herat's *Sharia* Faculty, willing and open to discussion. The three focus groups discussions conducted since April 2009 co-chaired by Mr Rahmani and NRC, were successful at bringing together representatives from most legal sectors in the city and generating debate, although a final consensus relative to the creation of linkages between both systems and the way to move forward has not yet been achieved. Judges from the court of appeals, professors from the Law and *Sharia* Faculties of Herat, representatives of legal aid organizations such as the International Law Foundation (ILF) and the Legal Aid Organization of Afghanistan (LAOA), the head of the Department of *Haj* and Religious Affairs, the Chief of the Herat police, the Prosecutor's Office and

the Afghanistan Independent Human Rights Commission (AIHRC), participated in the review of the current and potential linkages between the formal and traditional justice systems. A networking structure was not otherwise formally established on this subject.

UNAMA recently launched the legal working group in the city, which will be better positioned in the coming months to lead the discussions on the needs of the formal justice system, and the best approaches to guarantee that strong linkages with the traditional system are developed in those areas under the Government's control where implementation of initiatives such as legal capacity building or awareness campaigns are feasible.

One of the sessions held at the Department of Justice was entirely allocated to the review of the availability of the nine links suggested for examination by NRC in the original project proposal to the USIP.²⁹ The main difficulties and opportunities in the application of the linkages are briefly outlined in this section to reflect the opinions expressed by local legal experts in the course of the roundtables.

1. Appeal of informal justice system decisions to the formal justice system:

The majority of the participants agreed that appeals were not to take place in Injil or Zindajan, on agreements entered by the parties at reconciliation *Shuras*. This is partially based on article 1312 of the Civil Procedure Code, which states, “*when peace (understood as reconciliation, also mentioned in article 1556 of the Mojatulahkam³⁰) puts an end to disputes, no one has the right to turn away from it*”.

However, reconciliation and the compromise aimed at restoring friendly relations between the parties do not necessarily mean that justice has been achieved. Islam urges Muslims to establish peace even if it causes unilateral sacrifice and patience. The concept of justice in Islam does not only refer to relational situations of harmony and balance existing between one person and another, between society and the state, between the ruler and the ruled but rather, in a more profound and fundamental sense, justice refers primarily to the harmonious and rightly balanced relationship existing between the person and fellow human beings, the ruler, the state and society at large. In other words, Justice in Islam refers to a harmonious condition or state of affairs whereby everything is in its right and proper place.

2. Review of informal justice system decisions by the formal justice system to assure consistency with the Constitution and Islamic Law:

The district courts do not review the agreements reached through alternative dispute resolution, even when the parties approach for official registration, in spite of being bound by the Afghan Constitution to guarantee that all cases are processed according to the provisions of the law and the dictates of Islam. Inconsistent review conducted by the courts is yet another consequence of a weak system, and calls for resources not available at the moment in the pilot districts.

3. Cooperation and assistance in arrest, summons of persons, or enforcement of decisions between the two justice systems:

Cooperation and assistance in arrest and summons exists to some extent in both pilot districts. However, village leaders or *Shura* members are also often involved in obstructing justice and preventing police from conducting arrests by either hiding or aiding to escape those being sought by the police.

In terms of the enforcement of decisions, cooperation is almost nonexistent in both pilot districts of intervention.

²⁹ See Annex 1, Concept Note, p. 5.

³⁰ Sharia Procedure Code

4. Resolution meetings held between two justice systems to clarify opinions and rulings and assure smooth operation between the two systems:

Most legal experts agreed that these consultation meetings would contribute to a well-informed referral mechanism and build the capacity of both systems for a faster resolution of disputes.

Formal system actors, however, were reluctant to the measure and claimed that they would not be able to attend if such meetings were put in place due to their workload. The need for a special authorization from the MoJ was also mentioned as an excuse.

5. Recording and registration of informal justice system decisions by the formal system:

The 10 percent tax levied by the formal justice on the total value of the movable or immovable property subject of an informal agreement is considered to be one of the main deterrents to registration of settlements in Injil and Zindajan. The tax applies to all cases except criminal and family disputes. Reducing or abolishing it would encourage an increase in the formalization of settlements reached through village *Shuras*.

6. Assurance that the same case will not be tried by both formal and informal justice system:

The resolution meetings previously discussed would also contribute to avoid the same cases being tried more than once.

7. Establishment of criteria as to what cases, and what elements of those cases, can be handled by the informal justice system:

Criminal cases must be the sole responsibility of the formal justice system regardless of the nature of the crime. At present, most *Shuras* in the pilot districts deal on a regular basis with the resolution of misdemeanors. The establishment of a monitoring system was suggested to prevent the *Shuras* from dealing with criminal matters, and to limit their involvement to the reconciliation between victim and offender.

8. Agreement by both justice systems not to take payment for cases unless called for under the law:

Only the courts request payment at the moment, which has derived in all kinds of illegal practices conducted by court officials. The main concern raised by most legal experts is that a higher degree of formalization of the informal justice would contaminate this system with some of the severe problems that affect the state justice in the country. The *Shura* must be kept as a reconciliation body managed by the community rather than regulated by the state.

9. Agreement to report human rights violations or acts of corruption observed in either justice system to a reporting body:

The relevant monitoring and reporting body is the AIHRC in theory, but in practice little has been done to address corruption in the court system.

CONCLUSIONS AND RECOMMENDATIONS

The formal justice system in Afghanistan must co-exist with the predominant traditional dispute resolution system. Both of these systems suffer from serious deficiencies, which result in the incapability to deliver justice and stop ongoing violations of human rights.

Formal justice system in Afghanistan has protractedly been suffering from a lack of professional capacity, resources and accessibility, inadequate physical infrastructure, institutionalized corruption, and strong influence of power-holders and factional leaders over justice institutions. Moreover, the formal justice system is not properly functioning in some geographical areas and is almost absent in many others.

The traditional justice system is more frequently approached for the resolution of disputes -as opposed to formal justice- because decisions are taken quickly, it is financially and geographically accessible, and it is trusted and perceived as less susceptible to improper influence and corruption. Furthermore, according to tradition, seeking justice outside of the community boundaries is not well regarded, especially for family related disputes, and an agreement reached through mediation has better chances to guarantee that future disputes between the parties are prevented. Finally, the traditional system has managed to survive through decades of war in the absence of government and formal administration of justice.³¹

However, the traditional justice system in Afghanistan suffers from serious shortcomings including lack of legal professionalism and the inability to impose innovative sanctions that facilitate and guarantee the enforcement of the decisions taken -decisions that are also highly patriarchal and discriminatory against women since they are entirely rendered by men based on improper customs, misinterpreted norms and traditions, rather than national and international laws and principles.

At present, there is not the opportunity nor should there be the intention to abolish the traditional justice system, taking into account its historical background and acceptance in Afghanistan. However, any effort aimed at strengthening this system will have to be meticulously scrutinized to avoid putting at risk the development of the state justice and ultimately weaken the rule of law in the country. In this regard, capacity building to the traditional system shall focus on enhancing the knowledge of the laws of Afghanistan, the jurisdictional limitations and applicable general customary law amongst members of *Shuras* and *Jirgas*.

In order to build a more effective and collaborative relationship between the formal and traditional justice systems in Afghanistan, that would serve the principles and norms of national and international laws, enhance access to justice and strengthen the rule of law, NRC recommends:

1. To increase the number of courts and qualified personnel at district and provincial level. The referral to reconciliation by the courts -to reduce their workload- reduces in fact the status and importance of the formal justice system;
2. Judicial training for both the formal and traditional justice system actors –this recommendation should not be read as an intention to promote the traditional justice system, but as an emergency measure to prevent violation of rights at village level;
3. To increase the access to legal reference [books and codes] for judges and *Shura* members, and enhance awareness of the need for legal reform. The creation of pilot legal libraries at district level is currently being studied by NRC, based on the overwhelming lack of knowledge of the applicable laws identified in the course of the trainings conducted with this project;

³¹ For a brief review of the history of the justice system in Afghanistan, see Annex 10. Formal and Traditional Justice. Past and Present, A. Kabir Salehi Baqi, NRC Herat, 2009.

4. To develop a standardized legal curriculum for the legal education system;
5. To enhance the mechanisms of control in the appointment of judges, and the supervision of their efficiency and professionalism, accompanied by competitive salaries based on qualifications and experience;
6. To establish qualification criteria for *Shura* members. The absence of a set of qualifying criteria makes it open to membership to ineligible persons, who might endanger rather than promote peace within the community;
7. To develop a set of regulations with a clear framework for the traditional justice system and its jurisdictional boundaries.

Furthermore, all criminal cases must become the sole responsibility of the formal justice system, including misdemeanors. This will bring a need to amend the Interim Criminal Code in order to guarantee that punishment is proportional to the offence committed. The traditional system could still engage but be limited to reconciliation between victim and offender.

The traditional justice system should act as a complement to formal justice as opposed to being formalized and brought under the state judicial structure. Formalization of the traditional justice system and its integration into the state system would risk the creation of parallel and redundant judicial structures, and increase the chances of corruption, inaccessibility and untrustworthiness of the judicial sector.

8. To compile general customary law. Even though article 2 of the Civil Code includes "general custom" (*urfe a'am*) in the hierarchy of applicable laws in Afghanistan, it is silent about what general custom is. This article also states that specific and improper customs are not applicable sources of law, but fails to provide a clear definition of what constitutes proper customary law;
9. To create a monitoring system for settlements reached through the informal justice to guarantee their compatibility with the Constitution, *Sharia* law, other Afghan legal norms and international human rights principles;
10. To mainstream gender equality and gender sensitivity within the framework of the traditional justice system. As mentioned earlier, the traditional justice system is male-dominated and most of its decisions are based on "void and improper customs" which are excerpted from the prevalent culture of discrimination against women within the social order of tribes. Therefore, some of the practices of the traditional system are extremely harmful for women and children. Engagement of female *Shuras* in dispute resolution or the admission of female members in male *Shuras* can be encouraged in some districts as the post-KAP survey showed;
11. To increase the representation of women in both the formal and traditional justice systems, law enforcement forces, district and provincial governments, and prison administrations;
12. There has been some discussion regarding the deployment of mobile courts to the districts where insecurity prevents access to justice. Instead, tight security in the district centres under government control where courts are located, and investment in human and material resources to bring all district courts up to the requirements listed in the LOJC, should avoid the need for the creation of parallel judicial structures that could only add confusion and weaken and corrupt the formal justice system even further. Also, an increased focus on legal awareness campaigns in the form of radio broadcasts on relevant issues of Afghan Law could also help rule of law to reach out to inaccessible communities.

END

List of Annexes

Annex 1. Concept Note

Annex 2. Training Curriculum

Annex 3. Training Plan

Annex 4. Pre-KAP Questionnaire

Annex 5. Post-KAP Questionnaire

Annex 6. Implementation Agreement between NRC and DQG

Annex 7. Contract Budget. Implementation Agreement between NRC and DQG

Annex 8. Poster Design. Registration Procedure

Annex 9. Poster Translation

Annex 10. Formal and Traditional Justice System. Past and Present