



# A Holistic Justice System for Afghanistan

December 2009

Deborah J. Smith and Jay Lamey

This policy note accompanies AREU's community-based dispute resolution (CBDR) case studies, which provide detailed information and analysis from the research (see text box below). It provides advice to those working with the "informal justice" sector and its connections to the state, and may also prove useful to those who work more broadly on development and stabilisation issues in Afghanistan. A policy to enhance and regulate the relationship between CBDR and the state justice system is being prepared under the auspices of the Ministry of Justice, and elements of the policy's current draft are referred to.

The advice is structured around the four key themes of the CBDR research:

1. The links and relationships between the state and CBDR processes
2. The processes used to enact CBDR
3. The principles which underlie CBDR processes
4. Gender dynamics in CBDR processes

## 1. Links and relationships between CBDR and the state

### *Key findings*

- CBDR does not operate in isolation from state institutions. At district and village level, state and community actors often work together to resolve disputes and provide justice to aggrieved parties.

- There are strong relationships between CBDR actors and their *woliswal* (district governor), who: often plays a gate-keeping role when disputants want to take cases to the state justice system; may participate in CBDR processes himself; may refer cases brought to him to community elders for resolution; and sometimes receives decision documents from CBDR.
- Village residents make decisions based on experience and knowledge when choosing what approach to take when seeking dispute resolution. Because individuals face varying levels of social and practical restrictions that constrain their choices (gender-based, financial, geographic, etc), they come to different conclusions about which approach is best for them.
- CBDR actors offer local knowledge, which is particularly important when legal documents, such as land deeds, do not exist or are conflicting; this is highly valued by disputants.
- Decision-makers in CBDR usually want there to be an effective state justice system that they can refer serious criminal and civil cases to (such as murder or large land disputes). Such disputes are often harder for them to resolve and enforce, and this can subsequently undermine their authority, as well as prolong conflict. Likewise, when CBDR disputants feel the system is failing them, they want to be able to seek justice through the

### *AREU's Community-Based Dispute Resolution Case Studies*

The Afghanistan Research and Evaluation Unit conducted in-depth research on community-based dispute resolution in Nangarhar, Bamiyan, Kabul and Balkh Provinces. Of these, case studies on Nangarhar and Bamiyan are available (from [www.areu.org.af](http://www.areu.org.af) and AREU's Kabul office), with Balkh and Kabul to follow. The case studies contain descriptions of the study villages and explore: who has power in CBDR and how they exercise it; the processes and relationships that link CBDR with state justice; the practices, principles and outcomes of CBDR and how these change depending on political, social and security contexts; and gender dynamics regarding CBDR. Each case study also contains an annex of individual dispute cases that illustrate the many dimensions of CBDR in Afghanistan. These include cases that became violent, including cases of multiple revenge killings and intra-family murder; cases of disputes over engagement and divorce; large inter-tribal land disputes; resource-based conflict; and disputes which were influenced by powerful ex-mujahiddin commanders.

state. The existence of a viable alternative may also encourage CBDR forums to act within their perceived community mandate.

- In Nangarhar, corrupt practices by state actors were found to be causing corruption in CBDR; programmes working to lessen state corruption may prevent corruption in CBDR processes.
- Disputes of both a criminal and civil nature are resolved by CBDR processes. Indeed, criminal actions often have their root causes in civil disputes and it is often not possible to make a definite distinction of a dispute as either criminal or civil.

#### ***Policy and programme recommendations***

- Conceptualising state justice and CBDR dichotomously as “formal” and “informal” sectors is highly problematic, potentially splitting programmes between them and preventing a holistic approach to justice sector efforts. The aim should be to design programmes and policies that recognise the different justice and dispute resolution forums that Afghans access. The goal of an efficient, fair and accessible justice system for all Afghans can be pursued most effectively by coherently working with each forum’s respective strengths and weaknesses while recognising and enhancing the links between them.
- A formal mechanism for state endorsement of CBDR outcomes would give them more weight, which is particularly important for more complex disputes or those involving powerful actors.
- While not formally part of the state justice system and unlikely to have a role under the national policy, the *woliswal* is the primary state actor who interacts with CBDR and should be recognised in programme design and implementation.
- Alongside state justice, CBDR processes are best placed to address a dispute’s cause and bring a lasting peace. The national policy is likely to be that serious criminal cases should always be handled by the state justice sector. While the state sector should be capable and resourced to provide justice to victims and punish the guilty, many serious criminal cases are rooted in civil disputes, and CBDR processes are best placed to address the underlying cause and end conflict between the different parties to the dispute. Unless an agreed process of forgiveness and/or compensation is enacted at community level, conflict may continue; in cases of murder for example, revenge killings will remain possible.

## **2. The processes used to enact community-based dispute resolution**

### ***Key findings***

- CBDR decisions are made by a *jirga*, *shura* or *jalasa* that usually consists of local, senior men. The decisions are not legally binding and depend on the cooperation of disputants.
- CBDR processes are not static and do not rest on an unchanging, imagined version of tradition and custom. They adapt to changing social relationships, political structures and emerging problems, and are practiced differently in different places, varying between province, district, village, ethnicity, and *qawm* (a tribe, subtribe or clan, the size of which can vary considerably).
- CBDR may not always or immediately resolve a dispute, but it might regulate or contain it (preventing it escalating, potentially to violence).
- CBDR processes and outcomes are often documented and these records are held by decision-makers, disputants, and sometimes the *woliswal* (who often also provides an initial letter empowering CBDR actors to pursue a solution).
- Decision-makers in CBDR are open to learning about the Afghan constitution and law.

### ***Policy and programme recommendations***

- Programmes must be as flexible and variable as the ways in which dispute resolution, justice, and rule of law are conducted in Afghanistan. One model will not fit every area and programmes should be adaptable.
- Assumptions, stereotypes or badly collected data can dramatically curtail a programme’s impact, and in some cases do more harm than good. It is essential that contextual research be conducted before any programme is implemented, remembering that quantitative research and surveys using structured questionnaires are unlikely to reveal the nuances of CBDR at the local level. Qualitative research may take longer, but it serves the dual purpose of allowing crucial trust-building to occur before more refined programme implementation. It is also essential that women are spoken to as part of the knowledge-gathering process if CBDR is to be understood in a community. In many parts of Afghanistan, speaking to male elders or male community members will not reveal women’s justice needs or desires, or what roles and influence they may already have in CBDR processes.

- Programmes must recognise that CBDR actors are aware of the negative consequences of certain practices, such as is the case with *baad* (the giving or exchange of women to compensate a killing), and are also aware of their un-Islamic nature. Programmes should seek to provide alternatives beyond just explaining that an act is illegal or un-Islamic.
  - To enhance the development of alternative practices, provide opportunities for CBDR decision-makers to meet peers from other parts of the country and from different ethnic and *qawm* groups, to learn processes from each other and discuss CBDR issues.
  - The national policy is likely to recommend that all CBDR decisions be recorded. It is important to recognise the extent to which this already happens and work with the existing system. Due to their current role as gatekeeper, the *woliswal* is likely to be the best conduit for CBDR records into the state system.
  - Overall, avoid upsetting a system that is working relatively well, and work with state and CBDR actors to make improvements that are feasible within the context of that area. CBDR processes are inherently pragmatic and flexible to social circumstances; programming should be responsive to this.
- CBDR has elements of distributive justice (which seeks to address the underlying causes of conflict) and restorative justice (which places strong emphasis on the restoration of dignity, peace, and upholding relationships between offenders and victims), tools which are not generally available in state-based justice. CBDR decision-makers are usually able to employ them because they are in positions of social authority—they are expected to be knowledgeable, just, and concerned for the well-being of the entire community (although reports of corruption and bias were found in certain instances).
  - CBDR decision-makers usually participate on a voluntary basis because it is part of their accepted and expected role as elders.

#### ***Policy and programme recommendations***

- Recognise the enduring advantages of CBDR over state-based justice in certain circumstances; don't view it as stop-gap alternative.
- Don't expect allocations of money or infrastructure to automatically create positive outcomes, as CBDR systems are social. Furthermore, forms of payment such as stipends to decision-makers risk upsetting the existing rationale for CBDR.
- For those wishing to reform CBDR practices, it is essential that this is done within an Islamic framework. Islam is recognised as a guiding force in Afghan communities, whereas international human rights principles are not—and can be perceived as Western and imposed.

### **3. The principles which underlie CBDR processes**

#### ***Key findings***

- The principles underlying and used to rationalise CBDR are complex, drawing on Islamic and customary ideals, negotiation, and pragmatism.
- CBDR is a key way of maintaining peace and social cohesion within a community; “keeping the peace” is usually the primary objective of a CBDR *shura*, *jirga* or *jalasa*.
- According to custom, the power to make CBDR decisions is based on authority (given by the community) and not on coercive power.

### **4. Gender dynamics in CBDR processes**

#### ***Key findings***

- While women's access to and participation in CBDR is constrained, spaces can be found in which women do access, influence and participate.
- It is usually easier for women to access CBDR than state justice, for reasons such as restricted

#### ***The Taliban and Community-Based Dispute Resolution***

The Taliban are administering a separate justice system in some areas of Afghanistan. It is unclear how their processes work alongside CBDR, but it should be noted that Taliban-style justice does not necessarily use traditional CBDR processes. CBDR draws heavily on the Islamic concept of *Islah* (peace and social cohesion sought through negotiation and reconciliation) and is pragmatic in how this outcome can be sought. When the Taliban were in power, most prominent was their interpretation of Sharia, which prescribed harsh punishments for crimes. AREU research found that the Taliban regime undermined CBDR, as they viewed it as inconsistent with their own authority. For a range of local opinions on the Taliban justice system in the 1990s, see the Nangarhar case study.

- mobility or family connections to CBDR decision-makers.
- Although their CBDR decision-making roles are very limited, women are recognised by the community as important decision-makers in disputes of a domestic nature and on rare occasions, in certain villages, in more general disputes.
- Some people in the communities studied spoke highly of women who had in the past played significant roles as decision-makers in CBDR, and many were not opposed to women playing a greater decision-making role in these processes.
- CBDR can provide recourse for women to assert their rights.
- Women's lack of access to CBDR and decisions that do not uphold their rights are not an outcome of CBDR or customary law itself, but are instead a consequence of prevailing gender roles and relations in Afghanistan.
- As discussed, there was an awareness of the un-Islamic nature and potential harm to women of the practice of *baad*, and its use was reported to be in decline.
- Women should not be viewed as a homogeneous group; it is unlikely that younger women participate in CBDR, but older women and particularly older widowed women may.
- The gender dynamics of a particular community should be investigated, and the urge to simply set up a women's *shura* (as has often been done) resisted until it is clear that it would benefit them.
- There exists an assumption among some actors in Afghanistan that CBDR processes always go against the interests of women. They sometimes do, but finding the cases of extreme abuse within these processes will not necessarily improve them. It is important that organisations find the spaces in which women are already influencing CBDR and build on what exists.
- Find out how those women with influence became so and whether it can serve as a model for encouraging further participation by women.
- If practical, form networks with women from different villages, or even different districts and provinces, who already participate in CBDR and allow them opportunities to share their experiences and learn from each other. AREU research has shown the capacity of travel and exchange to catalyse social change.

### ***Policy and programme recommendations***

- Attention to gender dynamics in CBDR, and more specifically the justice needs of women and their unequal participation in these processes, particularly as decision-makers, should be integrated in every aspect of programme design. Do not assume that women do not or could not have a role.
- As gender discrimination exists within the state justice system as well as CBDR, giving women more access to state justice will not necessarily mean better outcomes for them. Programmatic responses to gender discrimination should be provided to both state and CBDR actors.

### ***About the Afghanistan Research and Evaluation Unit (AREU)***

The Afghanistan Research and Evaluation Unit's Mission is to inform and influence policy and practice through conducting high-quality, policy-relevant research and actively disseminating the results, and to promote a culture of research and learning. AREU was established in 2002 by the assistance community working in Afghanistan and has a board of directors with representation from donors, the United Nations and other multilateral agencies, and nongovernmental organisations.

### ***About the Authors***

A Senior Research Manager at AREU, Deborah J. Smith has managed a research portfolio that includes: community-based dispute resolution, the representation of women's interests in the *Wolesi Jirga*, gender mainstreaming in government ministries, the problem use of psychotropic drugs, family dynamics and family violence, transitional justice, and gender and women's participation in development initiatives.

Jay Lamey is Senior Publications Officer at AREU. He was a previously a journalist and development worker based in Thailand and Cambodia, where he managed tsunami relief and income-generation programs.

### ***Contact AREU***

Flower Street (Corner of Street 2), Shahr-i-Naw, Kabul  
Tel: +93 (0) 799 608 548, [www.areu.org.af](http://www.areu.org.af), [areu@areu.org.af](mailto:areu@areu.org.af)