

Putting the Hybrid Model of Justice in Afghanistan into Practice

Challenges and Prospects

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I. Context

There are two main categories of justice providers in Afghanistan: the formal state justice system - based on Western Positive Law and Islamic Jurisprudence - and informal justice institutions that provide justice outside the state justice system.

Field research have consistently shown that around 80% of crimes and civil matters are resolved through traditional *jirgas* and *shuras* outside the state justice system in Afghanistan (Wardak et al. 2007; Wardak and Braithwaite 2013).

In fact, the prevalence of informal justice is not confined to Afghanistan as *The World Justice Project's* survey (2019: 4) of 101 countries found that: 'More than 5.1 billion people – or approximately two thirds of the world's population – are not getting the justice they need for both everyday problems and severe injustices...'. The survey revealed that most of world's population go to informal justice for resolving civil disputes and crimes. (The World Justice Project 2019)

II. Informal Justice: Strengths & Weaknesses

A. Key Strengths:

Accessibility, cost-effectiveness, speed, community ownership, relative transparency, peacemaking and restorative justice (Kötter, et al. 2015; Wardak and Braithwaite 2013; Coburn and Dempsey 2010).

B. Key Weaknesses:

Exclusion of women, occasional violation of woman's rights and the use of *baad*, occasional influence of local strongmen, non-binding nature of decisions, more emphasis on community harmony than on individual rights.
(Braithwaite and Wardak 2013; Gaston, et al 2013; Coburn and Dempsey 2010).

III. Policy Options

Drawing on Conolly's (2005) work, the four options, below, were discussed with key stakeholders on how to deal with informal justice Afghanistan:

Option 1: Abolition (or suppression and gradual marginalization) of informal justice institutions.

Option 2: Non-interference by allowing informal justice institutions to continue to operate independently.

Option 3: Co-option of informal justice institutions by bringing them under a strict control of the State justice system.

Option 4: Reform through multi-agency engagement that allows informal justice institutions continue to develop, while seeking means to promote their orderly administration, gender equality, monitoring of illegitimate influences and violation of Afghan laws, children's and human rights.

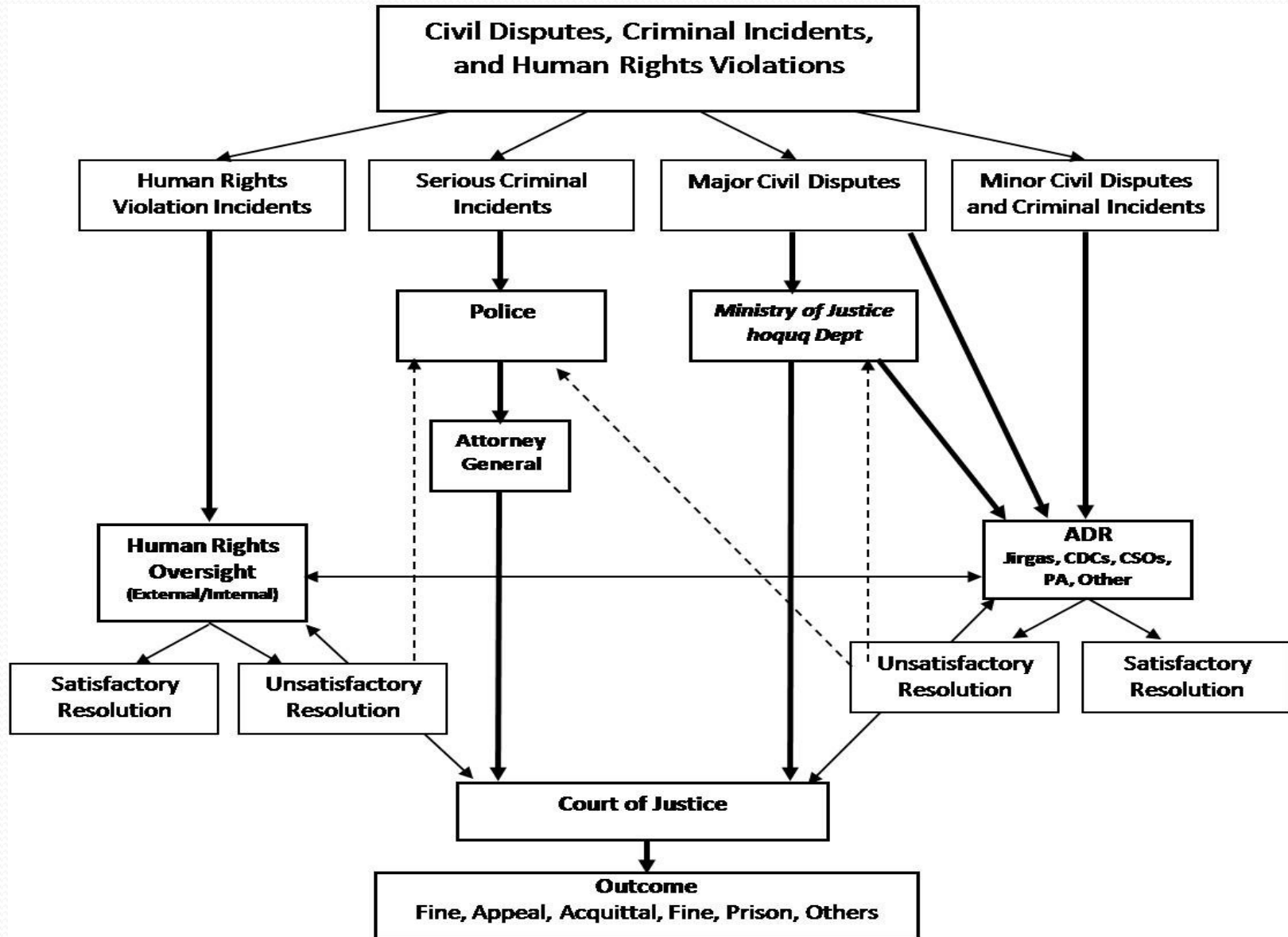
IV. Legal Hybridity

The concept of ‘hybridity’ in sociology of law and legal anthropology is closely connected with ‘legal pluralism’ that (Merry 1988: 870) referred to as ‘...a situation in which two or more legal systems *coexist* in the same social field.’ The phrase ‘legal systems’ in this context also involves informal ‘law-like’ systems that coexist alongside with the state legal system.

When the coexistence of ‘legal systems’ is not formally defined and/or problematic, the need for institutionalized hybridisation between ‘legal systems’ (or their elements of them) arises (Swenson 2022).

Different countries have followed different models of engagement with informal justice systems (Swenson 2022; Forsyth, 2009), and the Afghan model is a new addition .

V. A Hybrid Model of Justice in Afghanistan



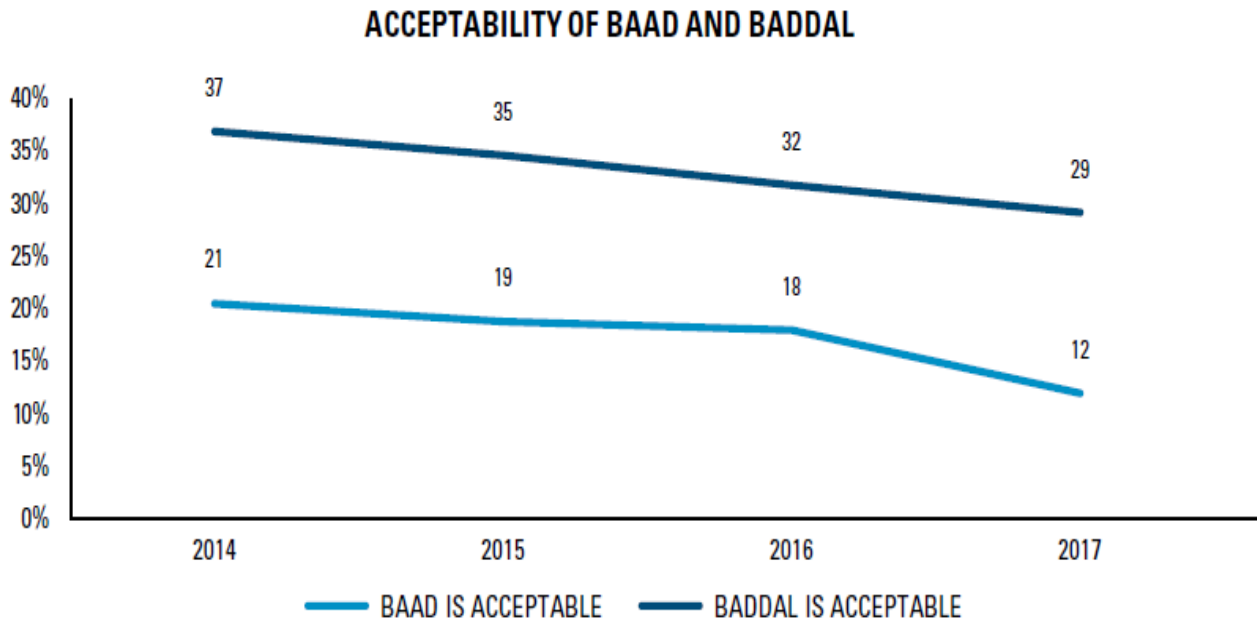
VI. Challenges

- 1. Bann:** The 2007 *Afghanistan Human Development Report* (Wardak et al 2007) was banned by Afghanistan's Supreme Court in 2007, its authors summoned and threatened by prosecution.
- 2. Corrupting spirit of the 'hybrid model':** In 2009, the 'hybrid model' was revisited by Afghanistan's Ministry of Justice and selectively used for the 2010 **overregulated** draft '*Law on Dispute Resolution Jirga and Shura*'.
- 3. Politicisation:** Due to pressures from Afghanistan's human and women rights organisations, the draft law was further revised by Afghanistan's Ministry of Justice, in 2016, 2017 and 2019, and became draft '*Law on Conciliatory Jirgas in Civil Disputes*'. The draft was waiting to be enacted into a law by the Parliament.
- 4. Regime change:** With the seizure of power by the Taliban on 15 August 21, Afghanistan's Parliament was suspended – and the fate of the draft is law unknown.

VII. Prospects

Despite the challenges stated earlier the draft law '*Law on Conciliatory Jirgas in Civil Disputes*' is a step forward in a partial translation of the original hybrid model into practice.

More importantly, the United States Institute of Peace (USIP) incorporated key recommendations from the 'hybrid model' into its '*National Policy on the Relationship between the Formal Justice System and Dispute Resolution Councils*', which it implemented in different parts of the country between 2009-15. USIP's projects, focused on training of traditional mediators, legal awareness, and on co-ordination between local state justice, human rights and informal justice institutions to safeguard women's rights and to expand their access to justice. The effectiveness of these programs has been instrumental to the rejection of *baad* in Afghanistan (*Asia Foundation Survey 2017: 140-141*):



VIII. Conclusion

Despite the politicisation of putting the ‘hybrid model’ into practice by Afghan state authorities, the 2019 draft *‘Law on Conciliatory Jirgas in Civil Disputes’*, and the impact of USIP’s *Policy* on the reduction in cases of *baad* show that it has the capacity to protect women’s rights.

Despite regime change(s) in Afghanistan, the ‘hybrid model’ continues to be relevant as it reflects the realities of a traditional society facing the demands of the 21st century: through bridging modernity with tradition, it provides a framework for the dispensation of accessible, equitable, affordable, and restorative justice to all men and women in Afghanistan.

IX. References

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