

## Helpdesk Research Report

# Links between the rule of law and conflict and peace in Afghanistan

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## Question

*Identify evidence from the past 5 years, and any major evidence gaps, about the links between the (absence of) rule of law and violent conflict in Afghanistan. Look at both formal and informal structures of law and justice. Does any of these structures affect violent conflict? Conversely, does any of them act as a source of resilience to violent conflict and/or offer opportunities for peace? Present the findings in a short paper (2-4 pages) with a brief overview.*

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## 1. Overview

A plurality of legal and judicial institutions exist in contemporary Afghanistan, but none meet minimal definitions of the rule of law – this is a matter of consensus.<sup>1</sup> In particular, formal and informal laws and mechanisms do not enforce common rules equally over both elites and the less powerful, and men/boys and women/girls. The State only has a very limited presence, especially outside Kabul, and co-exists with other forms of public or hybrid government and administration, and with power exerted by foreign military and civil organisations. In addition, violent conflict involves not only Taliban forces, other Afghan armed forces and foreign armies, but a variety of temporary or longstanding armed groups fighting, with shifting alliances and oppositions. In light of this well-documented state of affairs, the question becomes: **how do partial enforcements of law and justice affect war and peace?**

**In short**, the limited literature available shows no direct causal links from the rule of law to violent conflict or peace. It does show how various problems in law, police and justice feed into factors

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<sup>1</sup> In line with the query, the rule of law refers to the informal and formal norms and institutions meant to enforce public rules and laws equally amongst citizens, and between citizens and public authorities.

conducive to conflict. The ineffectiveness of formal institutions, and the capture of informal and formal mechanisms by powerful patronage networks have generated contestation and weakened dispute resolution. The formal organisation of laws, police and justice has had mixed, at times contradictory, effects. Prime examples are the militarisation of police and justice, and the arming of local militias: both have yielded security in some cases, yet they have simultaneously created problems for the rule of law and peace, such as empowering armed actors over civilians. Objects of contention related to the rule of law include the management of land and water, and women's and girls' rights. People's use of insurgents' justice mechanisms does not automatically mean unconditional support for insurgents. How legitimacy works is changing, especially as people's expectations about law and justice rise.

## 2. Effects from formal and informal laws, police and justice

There is a consensus that the **lack of effective formal rule of law** creates impunity, leaves disputes unresolved and open to contestation, and leads most Afghans to turn towards informal institutions. In a widely noted dynamic, corruption and capture by powerful national and local networks lead the poor to not use State institutions, and the powerful to invest and benefit from them. Many authors stress that official judges and police officers are seen as extremely corrupt, predatory against ordinary people, and arbitrary (see e.g. ICG, 2010; Singh, 2014; Torabi, 2012). The formal justice system has scant resources and qualified staff, and is dysfunctional and disorganised (ICG, 2010).

The government's unwillingness to resolve conflicts between state, Islamic and customary approaches has been destabilising (ICG, 2010). Fundamentalists' legal leverage, gained through the constitution, has deeply shaped formal institutions (*idem*). Weak and partisan formal institutions also make decisions contested, be it from the Supreme Court (*idem*) or electoral bodies (Sharan, 2013). Impunity for crimes committed by foreign forces has also fuelled the insurgency (ICG, 2010). Some efforts to challenge corruption and patronage have been counter-productive. For example, posting poorly paid policeman in distance provinces actually exacerbated survival-based corruption (Singh, 2014).

The **militarisation and paramilitarisation** of police and justice, or the raising of local militias to provide security, are widely documented to have had mixed effects. Widely mentioned examples of such practices and the attending dilemmas include the US-initiated Afghan Local Police (Goodhand & Hakimi, 2014; Hakimi, 2013; ICG, 2015) and the paramilitarisation of the Afghan National Police (Friesendorf, 2011; Murray, 2011). There are political, practical and ethical contradictions with making institutions nominally meant for the rule of law act for military goals, counter-insurgency or stabilisation.<sup>2</sup> Some of the militarised institutions have been more effective than formal non-militarised or military bodies, and have thus gained legitimacy, but many others have worsened insecurity and abuse, triggering violence (Goodhand & Hakimi, 2014; Hakimi, 2013; ICG, 2015). Their existence has made shifting to non-militarised law and justice difficult, in the absence of good substitutes (Friesendorf, 2011; Goodhand & Hakimi, 2014; ICG, 2015). Conversely, empowering local armed militias carries its own risks of escalating the potential for violence in local disputes, and diminishing the accountability that local communities or the State can obtain (Goodhand & Hakimi, 2014; ICG, 2015).

**Informal institutions** of law and justice are widely reported to be more pervasive, accessible and credible than formal ones. After 2001, the failure of state justice and security enabled the resurgence of the Taliban (Braithwaite & Wardak, 2013; Singh, 2014). Many Afghans viewed the Taliban's parallel court

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<sup>2</sup> See: Dennys, 2011; Friesendorf, 2011; Goodhand & Hakimi, 2014; ICG, 2015; Murray, 2011; Sedra, 2013; Wimpelmann, 2013.

system as more effective, fairer and less corrupt (*idem*). Law and justice from Taliban or criminal powerbrokers has at times been the last or only venue for justice or resolution for people in territories outside government control, although people do not necessarily adhere to the values and practices of those systems (ICG, 2010). However, informal institutions do not necessarily enjoy deep popularity, have lost some of the influence and authority they enjoyed traditionally, and are highly exclusionary of women and girls (*idem*). Religious institutions can be seen as biased as well (Khan, 2015).

Several references note that some traditions, like an emphasis on reconciliation and community harmony (Coburn, cited in Brown, 2014: 8), and improvements in the delivery of law enforcement and justice, including transitional justice, would offer **opportunities** to strengthen drivers of stability and peace.<sup>3</sup> However, outsiders have typically lacked an understanding of fragile local power dynamics and context specifics, making some of their projects counter-productive (Coburn, 2013; Hakimi, 2013; Wimpelmann, 2013). Some interventions have sidelined national scrutiny about the administration of justice, and eroded local accountability and oversight, which was worsened by subsequent militarisation of justice and governance (*idem*). Some smaller, Afghan-led initiatives have succeeded in increasing predictable dispute resolution by linking the formal and informal sectors (Coburn, 2013).

### 3. Objects of conflict involving laws and justice

#### Management of land and water

Conflicts around the management of land (ownership, use and access) along the lines of community and ethnicity have increased since 2002 and are widely identified as a driver of violent confrontations. The management of water is also a crucial issue (see Vincent, 2013; Wilde & Mielke, 2013). Disputes over land worsen and multiply for a **lack of effective resolution and enforcement** (Gaston & Dang, 2015). Traditional community-based mechanisms have been weakened over the past 30 years. State mechanisms are even less capable to settle disputes sustainably, due to their limited presence, poor enforcement, bad reputation (due to corruption and land grabbing), and the widespread lack of title deeds (*idem*).

The **formal legal system** for establishing and formalising land rights presents substantial problems (Alden Wily, 2012; Gaston & Dang, 2015). Vulnerable groups' land rights are not protected in formal property laws, which offer little recognition for communal and pasture land, and for customary ownership (*idem*). Such lands are vulnerable to being wrongfully classified "as open access public lands or as government property" and appropriated by the state (Alden Wily, 2012: 1). Measures against corruption and land grabbing lack means of enforcement (Alden Wily, 2012: 1). All this gives rise to structural conflict between the state and most landowners (Gaston & Dang, 2015).

**Land administration** remains "over-centralised, unaccountable to ordinary Afghans, and overly dependent" on presidential dictates (Alden Wily, 2012: 1). Formal courts are in a conflict of interest, because they "issue land documents and are then expected to resolve disputes arising from them" (*ibidem*). Opportunities to devolve basic land governments to grassroots levels have been ignored and disconnected from wider decentralisation. However, as of 2012, the Afghanistan Land Authority, which was mandated to lead on a new law, was "refreshingly open to discussion" (*ibid.*).

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<sup>3</sup> See e.g. Coburn, 2013; Gaston, Sarwari & Strand, 2013; Hozyainova, 2014; ICG, 2010 & 2013; Kakar, 2014; Wang, 2014. A number of documents listed under "Further references" discuss transitional justice.

## Women's and girls' rights

**Resistance to Western-influenced programming on human rights**, particularly on women's rights, has been increasing within the Afghan public (Hozyainova, 2014). Laws and programmes associated with the Afghan government are often opposed, because the government is deeply mistrusted, lacks legitimacy, and is viewed as a Western puppet (Hozyainova, 2014: 1; ICG, 2013: i). Conversely, State bodies and warlords seeking popularity may not be willing to enforce Afghan laws that guarantee certain rights to women (Hozyainova, 2014; ICG, 2010). The government and parliament may be tempted to backtrack on women's rights "to assuage conservative power-brokers" within and outside the insurgency (ICG, 2013: i).

In response, Afghan organisations seeking to support women's rights without generating conflict have increasingly looked to **Islamic law and religious leaders** to promote women's rights, because these have greater credibility with communities (Hozyainova, 2014; Kakar, 2014; Khan, 2015). Sharia is more progressive than most customs (Hozyainova, 2014; Khan, 2015), and some local religious leaders have protected women's rights based on it (Kakar, 2014). Engaging religious leaders requires respecting their opinions and involving them in changing norms on women, tolerance and peacebuilding (Kakar, 2014).

## 4. Effects of weak rule of law on power and legitimacy

### Power, inequalities and domination in law and justice

Many authors emphasise that both formal and informal institutions of law and justice are **dominated by networks of powerful actors and patronage**, to the detriment of poorer and less powerful Afghans. As a result, such institutions may well provide stability and reduce conflict, but they (re)produce stark inequalities and exclusion, raising questions about the quality of the peace being achieved (see Wilde & Mielke (2013) for an example state capture by local networks in rural north-eastern Afghanistan).

Many authors therefore call for understanding the political economies of legal and judicial institutions and of their underlying political, economic and **social orders**. For instance, Koehler (2012) looks at institutions that can enforce collective security, conflict regulation, and distribution of collective goods, against actors' self-interest. He finds social control to be the only functional equivalent to a State. But social control has a limited geographical and social scope, and cannot be scaled up without increasing patronage and domination (*idem*: 12-13).

Koehler identifies six **patterns or zones of local governance** in Afghanistan, depending on whether social order results from state involvement, local social control, or arbitrary strongmen with no local embeddedness (2012: 16-22). They are: governance by government; hybrid governance; arbitrary rule; self-governance; contested governance; and Taliban governance. They each have a different effect on stability and conflict or peace. Specific dynamics can limit the functioning of any governance: a lack of will or ability of the State; informal political interference by the government that damages local capacities for governance; violent confrontation between governmental, foreign and competing forces (especially the Taliban); the limited scope and scale of enforceable social control (*idem*: 23).

### Complex and variable implications for legitimacy

Justice and security remain predominant concerns for most Afghans. Since 2001, foreign military and civilian actors have assumed that, if the Afghan State provides goods and opportunities, the population will give it their support and loyalty in return. They approached government legitimacy as a pacifying

social contract, and implemented a myriad of projects on rule of law as part of this. However, this failed to secure the expected legitimacy and peace.<sup>4</sup>

To begin, **legitimacy** was not historically built around the idea or experience of services, especially among rural Afghans, so expectations were low (Brown, 2014: 5-6; Lamb, 2012; Samuel Hall, 2011). At the same time, foreign actors raised expectations over the years beyond historic precedent or local capacity (Brown, 2014: 6). They inadvertently conditioned popular support for the government on the new services. Yet, once services met local demand, expectations simply rose, without automatic support for the government (*idem*: 6-7). Further, continuity in service provision seems necessary to government legitimacy (*idem*: 7). Lastly, for many Afghans, no amount of goods and services outweighs the problems created by the government's presence, viewed as foreign and extortive (*idem*: 9).

Credible opinion **surveys** are often cited in studies about the legitimacy of legal and judicial institutions, but call for complex interpretations (e.g. Asia Foundation, 2014; Eureka Research, 2014). Positive approval ratings for formal justice or police may simply signal extremely low expectations (Samuel Hall, 2011: i; see also Lamb, 2012). Corruption does not necessarily detract from approval (*idem*). The Taliban's role in administering justice is likely to be under-reported in surveys (Giustozzi, 2012: 7, 10-14, 20).

## 5. State of knowledge

Rigorous academic and grey literature on the effects of the rule of law on war and peace is limited. It is based on a combination of qualitative, quantitative and mixed methods, and many findings are consistent (though there are areas of disagreement). However, knowledge is produced by a small number of sources. There are significant **gaps**, notably on: the most insecure rural areas; the effects of foreign armed forces' actions that breached the rule of law (humanitarian and human rights law); and a systematic disaggregation of findings by socio-economic class, location (province, urban/rural), religion, ethnicity, gender, age (including youth and the elderly), migration and displacement, and disability.

Some findings offer indicative correlations more than conclusive **causalities**. The literature shows that causalities between rule of law and conflict or peace are indirect, context-specific, hard to verify, and differentiated by socio-economic group. They are also mixed and complex: while the absence of rule of law has been conducive to violent conflict in some regards, progress towards the rule of law can also trigger a backlash from groups challenged by economic, political or social change.

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<sup>4</sup> Source for this paragraph: Brown, 2014: 4-5, 8; ICG, 2010; Lamb, 2012; Suhrke, cited in Brown, 2014: 4.

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## Key websites

- Afghanistan Research and Evaluation Unit (AREU): <http://www.areu.org.af/Default.aspx>
- Asia Foundation – Publications – Afghanistan: <http://asiafoundation.org/publications/index.php?q=&x=31&y=6&searchType=country&country=1&program=0>
- Central Asian Survey - *The Afghan conundrum: intervention, statebuilding and resistance* (Special Issue), 2013, vol. 32, No. 3: <http://www.tandfonline.com/toc/ccas20/32/3#.VaUjGfmKlxE>
- International Crisis group – Afghanistan: <http://www.crisisgroup.org/en/regions/asia/south-asia/afghanistan.aspx>
- USIP – Publications – Afghanistan: <http://www.usip.org/category/countries/afghanistan/publications>

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