



Linking formal and informal conflict resolution mechanisms in Afghanistan: A survey of the people's perspective

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List of Abbreviations

AIHRC	Afghan Independent Human Rights Commission
ANDS	Afghanistan National Development Strategy
ANP	Afghan National Police
ADR	Alternative dispute resolution
CPAU	Cooperation for Peace and Unity
CDC	Community Development Council
DDA	District Development Assembly
IDP	Internally displaced person
MoJ	Ministry of Justice
MP	Member of Parliament
MRRD	Ministry of Rural Rehabilitation and Development of Afghanistan
NGO	Non-governmental organisation
NSP	National Solidarity Program
SDO	Sanayee Development Organisation
UNAMA	United Nations Assistance Mission in Afghanistan
UNDP	United Nations Development Programme
USIP	United States Institute of Peace

1. Introduction

In 2008, after three decades of war and turmoil, Afghanistan is still far from a state of peace: parallel to ongoing military clashes and a stagnant reconciliation process at national level, there are conflict dynamics at the ground level that do not only destabilize the communities but also have a negative impact on the overall situation of the country.

Disputes over landownership and water along with family issues are among the most numerous issues of conflict in rural Afghanistan. Considering the climate change that is already tangible by the accumulation of extreme dry and cold seasons within the last 15 years, we cannot assume that the rural conflict situation will ease by itself, i.e. by a reduction of conflict issues, nor can the mere stability of the situation be relied upon. Even more visible is the fact that the number of people who are competing for the scarce resources is growing: although now with lower pace, the number of returnees from countries of asylum (especially Pakistan and Iran) is on the rise and as a whole the population is growing by an estimated factor of 3.85 % per year.¹ The baseline circumstances in rural areas of Afghanistan bear a high conflict potential and are highly challenging. Apart from a need for a comprehensive peace building approach that would include peace education, long-term reconciliation efforts and other violence-reduction measures it is necessary to establish effective and reliable mechanisms of conflict settling and dispute resolution in due time.

At the moment, people who are involved in a conflict and who seek resolution through an external body bring their case either before a governmental institution (including, but not confined to, courts and state's prosecutors) or informal local bodies, especially Shuras and Jirgas². These bodies are still applying traditional law that is not in line with state law, Islamic law and Human Rights. On the other hand, these institutions are rooted in the communities and widely accepted: Jirgas and Shuras settle more than 80 % of all disputes³.

Over the period of several years to come - as long as it takes to rehabilitate the formal judiciary - the circumstances will afford a strategy that brings the two systems together in a way that allows acting as efficient as possible but at the same time provides for the consideration/application of the rule of law. During the last two years, a number of papers dealing with formal judiciary and informal dispute resolution were published.⁴ Besides analyzing conflict dynamics and the actual state of the two systems they make recommendations for future interaction. The recently adopted Afghanistan National Development Strategy (ANDS) as the central strategic paper on the future design of the judicial system takes up some of the ideas and also new ones.⁵ Key concepts are so far:

- A hybrid model combining formal and informal justice mechanisms⁶

¹ United Nations/Department of Economic and Social Affairs (2007), p. 54

² In the following both institutions are referred to as councils or Shuras despite differences.

³ Kabul University/CPHD (2007), p 9

⁴ See bibliography at the end of this report

⁵ See below, 2.1

⁶ Kabul University/CPHD (2007), p 11

- The formalization of the role of the informal and formal mechanisms through the Ministry of Justice⁷
- a bottom-up control of the judiciary through Jirgas and Shuras⁸
- Monitoring of the Shuras'/Jirgas' activities by the Afghan Independent Human Rights Commission⁹ or the establishment of a special unit within the Ministry of Justice, monitoring the dispute resolution activities of the local Shuras
- The use of community development councils (CDCs) as local conflict resolution mechanisms¹⁰
- A prominent role of Provincial Councils as instances of appeal¹¹
- The strengthening of women's basic rights through education campaigns, prosecution of local practices that violate women's basic rights and the creation of female Shuras through the Afghan Independent Human Rights Commission, the Ministry of Women's Affairs and the National Solidarity Program¹²
- The definition of a set of cases that can be referred to the informal system; the assignment of those criminal cases that belong to the *huquq Allah* (rights/claims of God) to the courts and voluntary referral of those cases that belong to the *huquq al Ibad* (rights/claims of the person) to local councils¹³
- The combination of the formal courts' authority and the local councils' capacity to reconcile, mediate and reestablish harmony in the communities¹⁴

The communities' readiness to accept and support interventions from outside is crucial for the feasibility of any structural invention in the field of dispute resolution. The concerned people's view on and their preferred use of both systems are crucial conditions for any approach in the field. They were therefore focused on in a field survey conducted by Sanayee Development Organization during spring 2008 in the provinces of Kabul, Ghazni, Logar and Herat. Based on the survey results, this paper adds to the ongoing discussion a study forwarded by an Afghan non-governmental organization that has worked for many years with local structures on conflict resolution and on improving their mediation methods. Following practical experiences made in the field, the communities' readiness to cooperate with actors from outside and their acceptance of concepts that touch the local councils' role in dispute resolution was given special attention. Considering the rural population's opinions about advantages and drawbacks of the formal and informal systems, their concerns about governmental interventions in local disputes and related aspects this paper also tries to shed more light on what are the values that play a role in people's approach to conflict resolution and how people in rural areas of Afghanistan use or would like to use the different means of dispute settling in the

⁷ The Islamic Rep. of Afghanistan (2008), p 125/126

⁸ The Islamic Rep. of Afghanistan (2008), p 107

⁹ Kabul University/CPHD (2007), p 11

¹⁰ Kabul University/CPHD (2007), p 9

¹¹ Barfield, T. (April 2006), p 11

¹² United States Institute of Peace (Dec. 2006), p 8

¹³ Barfield, T./ N. Nojumi, J. A. Thier (Nov 2006), p 23-24; 28; *Huquq Allah* refer to matters relating to public and collective interests and matters relating to relations between man and god. The *huquq ql Ibad* comprise issues that arise between humans like marriage, divorce, property, contracts, services etc.

¹⁴ Barfield, T./ N. Nojumi, J. A. Thier (Nov 2006), p 23

future. Their statements are supplemented by local shura members' and the answers of other locals who were interviewed in focus group discussions.

Instead of covering all of Afghanistan¹⁵, the presented survey was lead through in four provinces where male and female Peace Shuras had been established as permanent fora for the handling of local disputes. These Shuras have been brought together with institutions of formal justice during the last three years through a community based peace building program aiming at increasing the Shuras'/Jirgas' capacities in conflict resolution and at enhancing the women's participation in conflict resolution processes.¹⁶

Although this survey doesn't cover all regions of Afghanistan and given the diversity of the country's provinces, the results of this survey may still have some validity for these and allow conclusions for a national perspective.

The outcome of the ongoing discussion on the arrangement of the future relationship between state and non-state conflict resolution institutions will have an effect on the support of communities in conflict handling issues as well. Thus, this paper wants to give orientation for governmental institutions, international agencies or non-governmental organisations that are currently engaged or plan to engage in community based peace building programs.

¹⁵ Like the comprehensive surveys by Kabul University/CPHD (2007) or the Asia Foundation (2007)

¹⁶ See below 2.3.2

2. Background

2.1 Formal and informal judiciary in history and today

Alike in other Islamic states where a government's administrative and judicial structures didn't exert power effectively down at the village level, local informal structures took on the task of dispute resolution in the rural areas of Afghanistan during most of the time in the country's history. A first serious attempt to centralize the jurisdiction was undertaken by Amin Abdul Rahman during the last two decades of the 19th century. Until his measures that aimed at an Islamization of the country's jurisdiction, the local Jirgas and Shuras applied the rules of the tribal codes and were mostly unaware of Islamic law. The judicial reform had to be enforced against the opposition of local actors.¹⁷

After his death, tribal leaders and local religious authorities again became the decisive dispute resolution instances, "relying on customary laws as interpreted by the elders and Shari'a as expounded by the mullahs"¹⁸

Amanullah Khan (1919-29) introduced Afghanistan's first constitution¹⁹ which established the principle that "no special court to hear and adjudicate a special case or issue may be established outside the framework of the regular judiciary".²⁰ The *Sharia* should serve as the legal basis of every judicial activity.²¹ This limited severely the role of informal justice. The rural communities used to tribal rules were concerned about the abrogation of their codes and felt that their local autonomy was threatened by the monopolization of judiciary in favor of centralized governmental institutions.²²

The constitution of 1964 enacted under king Mohammed Zahir Shah introduced a constitutional monarchy which pressed for a centralized judicial system.²³ Until the late 1970s the state's court system coexisted with informal dispute resolution through local councils. In the years of war and turmoil that followed the state administration completely eroded with the conflict cases taken on by the courts devolving upon the Jirgas and Shuras as well.

But the local structures were after all not strengthened by this development: The upcoming of new powerful actors such as warlords and commanders and the establishment of a war economy lessened the integrative capacities and authority of the local councils.

The constitution of Afghanistan that entered into force on 26th January 2004 respects Human Rights²⁴ and guarantees the fundamental rights of its citizens. Accused are

¹⁷ Tarzi, p 7-9

¹⁸ Tarzi, p 10 with further reference

¹⁹ The constitution of 1923 can be found on the internet:

<http://www.afghan-web.com/history/const/const1923.htm> An overview of Afghanistan's constitutions and an account of procedural rights guaranteed by the Constitution of Afghanistan of 2004 in Axel Schwarz (2005), p 259-260

²⁰ Art. 55 of the Constitution of Afghanistan of 1923

²¹ Art. 21 of the Constitution of Afghanistan of 1923

²² Tarzi, p 11

²³ Tarzi, p 11

²⁴ Art. 7 of the Constitution of Afghanistan of 2004

guaranteed all modern procedural rights²⁵. It regulates that no person can be punished but in accordance with the decision of an authorized court and in conformity with the law adopted before the date of the offence²⁶ and states that crime is a personal action that cannot entail legal consequences for third persons.²⁷

The courts apply the state's law rules in criminal and civil law cases. The state's law needs to be compatible with the religion of Islam,²⁸ thus, the *Sharia* can be seen as the basis of Afghan law. Islamic law in the form of *Hanafi* jurisprudence and in certain personal matters of the Shia jurisprudence shall be applied subsidiary, if there is no applicable provision found in the constitution or other laws.²⁹

The Afghan state makes serious efforts to put a formal judiciary in place in the rural areas of the country. The rehabilitation process requires more time than expected. Recent surveys have named among other deficiencies of the judiciary³⁰ the limited access of judges to legal texts, including decisions of the Supreme Court (*the Stara Mahkama*) and laws, the lack of physical infrastructure, the lack adequate human resources with proper educational and training background, the public perception of the judiciary as an institution where corruption is wide spread, low salaries and a lack of physical security of judges.

On the London Conference in early 2006 the Afghan government and the international community agreed to a strengthening of civil society and – providing more concrete targets in this respect – of the state's institutions.³¹ In order to establish justice and the rule of law the Afghanistan Compact announced as a priority the rehabilitation of judicial infrastructure, the building of the capacity of judicial institutions and its staff, legislative measures and the promotion of legal awareness and human rights “to ensure equal, fair and transparent access to justice for all based upon written codes with fair trials and enforceable verdicts”.³² By end-2010, the adoption of a legal framework including civil, criminal and commercial law shall be completed, along with the establishment of fully operational justice institutions in all provinces, the reform of oversight procedures relating to corruption, lack of due process and miscarriage of justice and the reform strengthening the credibility, integrity and professionalism of key institutions of the justice system at national level.³³ The average time to settle civil disputes should be reduced until end-2010 and land registration for rural areas should be under way by end-2007 and by this timeline a fair system for settling disputes over land should be in place.³⁴

The above targets and timelines were reiterated by the Afghan National Development Strategy (ANDS) of 2008.³⁵ The document mentions informal dispute resolution

²⁵ Art. 25-31 of the Constitution of Afghanistan of 2004

²⁶ Art. 27 of the Constitution of Afghanistan of 2004

²⁷ Art. 26 of the Constitution of Afghanistan of 2004

²⁸ Article 3 of the Constitution of Afghanistan of 2004

²⁹ Art. 130 and 131 of the Constitution of Afghanistan of 2004

³⁰ United Nations Development Program and CPHD/Kabul University (2007), p 8

³¹ The Afghanistan Compact (2006), p 1 (preamble)

³² The Afghanistan Compact (2006), p 3

³³ The Afghanistan Compact (2006), p 8 (Annex I)

³⁴ L.c.

³⁵ The Islamic Rep. of Afghanistan (2008), p 72-73, 125

mechanisms and announces that the government would consider the use of the CDCs and other non-governmental actors for effective and cost efficient service delivery.³⁶ Besides other addressed problems of the justice sector³⁷, low public expectations for the justice system, its weak or lacking enforcement structures are mentioned³⁸. The ANDS addresses the problem of corruption inside the judiciary in clear words and develops the idea of a bottom-up control of the judiciary through Jirgas and Shuras.³⁹ It announces that the Ministry of Justice would formalize the role of formal and informal justice mechanisms through defining their competencies and that public awareness and confidence in the formal justice system would be increased through a nation-wide campaign.⁴⁰

2.2 Traditional council structures in rural Afghanistan

Article 140 of the constitution of Afghanistan foresees the election of local councils in communities and districts in order to increase the people's active participation in administrative affairs.

This concept ties to the tradition of council assemblies which is rooted deeply in Afghan society. Important community issues and conflicts are normally dealt with through these institutions that differ by region and tribal affiliation. Shura and Jirga are the most common names used for the council structures. The Pashto word of Jirga and the notion of Shura⁴¹ are more and more used in synonymously⁴² although they refer to historically different phenomena. Whereas Jirgas are traditionally convened to deal with one certain issue, Shuras are often institutionalized assemblies that meet more or less on a regular basis.⁴³ Especially tribal Jirgas can have several hundred members whilst the number of Shura members who engage in Shura meetings is easier manageable.

At community level every adult member of a community has the right to speak in the round of a Shura/Jirga although they are traditionally dominated by tribal elders, notabilities and influential community members.⁴⁴ Decisions are taken unanimously.

2.3. New forms of local councils

2.3.1 Community Development Councils

In 2003 the National Solidarity Program (NSP) was launched under responsibility of the Ministry of Rural Rehabilitation and Development of Afghanistan (MRRD) to develop the ability of Afghan communities to identify, plan, manage and monitor their own

³⁶ The Islamic Rep. of Afghanistan (2008), p 71

³⁷ The Islamic Rep. of Afghanistan (2008), p 103 mentions the corruption problem inside the judicial system in clear words.

³⁸ The Islamic Rep. of Afghanistan (2008), p 105

³⁹ The Islamic Rep. of Afghanistan (2008), p 107

⁴⁰ The Islamic Rep. of Afghanistan (2008), p 125, 126

⁴¹ Which has its origin in the Arabic word for "consultation"

⁴² Also in the Pashto and Dari versions of the Constitution (Art. 140)

⁴³ E.g. the central Shura-e-ulama; CPAU (2007), p 35

⁴⁴ About the changes in local societies in Afghanistan caused by war and civil war in the recent past, see Glatzer (2002), p 35

development projects. By empowering the communities to make decisions and manage resources during all stages of the project cycle, the program aims at rural reconstruction, poverty alleviation and inclusive local governance. Development funds derived from international donors are channeled to the communities⁴⁵. The program is implemented in all 34 provinces of Afghanistan⁴⁶ by 27 mostly international partner organisations that initiate and follow up the process. The program's core element are the Community Development Councils (CDC). They are elected and established in each community⁴⁷ and have the function to define the needs of the covered communities, plan hardware development projects and implement these. The net of CDCs, although it still does not cover every corner of the country, reaches almost 90 % of all communities of Afghanistan⁴⁸.

One CDC is established per community comprising of 25-300 families. The 10-30 council members are elected by the people of the clustered area⁴⁹. For fulfillment of their development tasks and for proper administration of the channeled funds the CDCs have executive members to facilitate the decision and implementation processes⁵⁰. The administrative duties and the formal framework as set out by the CDC By-Law⁵¹ pose significant challenges to the CDC members whose education is not a criterion within the election process.

The CDCs main tasks refer to community development activities such as identifying, planning, organizing, implementing and monitoring. The resolution of conflicts does not belong to the main objectives of the CDCs.

Article 17 of that law reads:

“Dispute resolution in Shura shall be as follows:

1. The Shura can mediate to solve the arguments and disputes of community members
2. Dispute resolution by the Shura shall be voluntary and be based on the concurrence of all parties.”

This provision only refers to conflicts that arise in the context of community development projects⁵². Handling of community members' disputes is not foreseen as an activity of the

⁴⁵ NSP is financed through a consortium of donors including among others World Bank/IDA grants, the Afghanistan Reconstruction Trust Fund and the Japanese Social Development Fund and other donors; MRRD (Nov. 2007), p 2

⁴⁶ Although not in all districts.

⁴⁷ Those of the estimated 38.000-42.000 villages that comprise of less than 25 families are merged in clusters of NSP communities; MRRD (Nov 2007), p ix

⁴⁸ Of estimated 24.000 rural communities as per NSP definition 20.782 had elected CDCs in May 2008; MRRD (May 2008)

⁴⁹ The CDCs strongly differ in knowledge, interests and qualification of their members. They shall have an equal

⁵⁰ A chairperson, deputy chairperson, secretary and treasurer; see Article 13 of the CDC By-Law; MRRD (Nov. 2006) p 9

⁵¹ MRRD (Nov. 2006)

⁵² Subtitle of chapter 3 (Articles 16-19) reads: „Roles and responsibilities of the Shura related to community development activities”. Although the development of local dispute resolution mechanisms

CDCs in the operational manual to the NSP. It only mentions possible conflicts between communities and facilitating partners.⁵³ It seems that CDCs are mainly busy with coping with internal conflicts arising from questions of aid distribution.⁵⁴

Accordingly, the CDCs activities in the field of dispute resolution were not a major issue during the National Conference of Community Development Councils in Nov. 2007⁵⁵. But still, it was pointed out that the CDCs could “play a vital role in resolving disputes considering their traditional acts and tribal pacts” and it was suggested that “both tribal and governmental decisions could be implemented through consultation with community leaders and village intellectuals”⁵⁶. Aspects and examples of CDCs’ conflict resolution activities were discussed showing that they are already involved in the handling of disputes and that people refer conflict cases to them for resolution. Some implementing partners already provide trainings in conflict resolution for CDC members although this seems to focus rather on the handling of internal disputes.

Through their wide coverage, CDCs play a central role among the different forms of local councils which was recently underlined by a resolution issued by the CDCs on occasion of the CDCs’ National Conference including the claim that the CDCs should be the central structure in the communities and all other community council structures should coordinate their activities with them⁵⁷. It is neither clear whether this is also the opinion of the MRRD nor other ministries of the Afghan government are content with that strategy. A clear structure of communities that applies throughout Afghanistan seems to have a great advantage: through homogenous council structures the state could be present in every community of the country. The state’ administration could deal with the same kind of body which provided for more transparency of any issues in the communities.

On the other hand, conflict resolution cannot be a side task done by a besides and minor to the management of community development projects. Given that the planning and implementation of these with all formal obligations is already a challenge to most communities, taking on both tasks will necessarily, at least for the time being, overtax the same bodies.

Today, there are numerous forms of council or committee structures established by development agencies in the field. Unlike the CDCs they are not part of nation wide

could be a part of community development this seems not to be the case: both legal documents the By-Law and the Operational Manual don’t mention details in this respect but merely refer to hardware development.

⁵³ MRRD (Nov. 2006), p 50

⁵⁴ The conflict potential shall be a criteria for the CDCs when rating development strategies for their communities: MRRD (Nov. 2006) p. 19; in another context the operational manual outlines how politically driven complaints about the misuse of funds shall be handled: MRRD (2006), p 54; The CDC By-Law mentions the possibility of cooperations of CDCs in cases of inter-communal disputes in Article 33, 2a.

⁵⁵ MRRD, National Conference of Community Development Councils (Loya Jirga tent Kabul, 10-15 November 2007); MRRD (2007/8)

⁵⁶ MRRD (2007/8), p 23

⁵⁷ MRRD (2007/8), p 47:

“‘Historical Resolution of 15th November 2007’

(...)

2. From today onward, CDCs must be recognized as the official structure linking the government and the people.

3. All other existing structure at village level must be merged under the authority of the CDCs and operate according to the CDC rules and regulations as defined in the new by-law. (...)”

programs but especially established in those provinces where no CDCs exist that could function as a counterpart on the community side. Their tasks may be to deal with specific issues (e.g. farmers' associations and village water committees), empower marginalized groups of society (e.g. women self help groups) or, as with the CDCs, provide for a body responsible for the functioning of the development projects.

2.3.2 Peace Shuras

Peace Shuras and peace councils have been established through the peace building programs of different organisations⁵⁸.

Apart from certain differences in approach, all of these male and female councils are intensively trained in conflict resolution skills such as mediation and communication methods, conflict analysis and other peace building related topics. The peace councils most of which are in contact with district authorities include especially village and tribal elders, respected persons and educated people such as teachers and meet regularly. They deal especially with conflict resolution, some of them register all cases dealt with in conflict registration books, others develop peace plans for their communities to address conflict root causes. Certain projects foresaw exposure visits that gave peace Shura members opportunity to exchange experiences with those from other provinces. Peace Shuras have been established preferredly in areas with a high risk of conflict escalations because of inter-ethnic tensions, in areas with returnee settlements and in communities with conflicts around water and land resources.

So far, peace Shuras have been supported in their specific conflict resolution activities in eleven provinces of Afghanistan. As these were not covered completely, the overall coverage remains rather small. Focusing on different tasks Peace Shuras and CDCs are not competing structures. Like CDCs the Peace Shuras profit from the acceptance of council decisions and the reputation of their members many of which are at the same time CDC members.

⁵⁸ E.g. Trocaire's Peace Building Programme (2005-2008); UNHCR's Coexistence Program (since 2005); Norwegian Church Aid's Women and Peace Building Project (since 2008); see also the overview in Oxfam (Feb. 2008); other funders of peace Shura projects are DED USIP and ARD-LGCD.

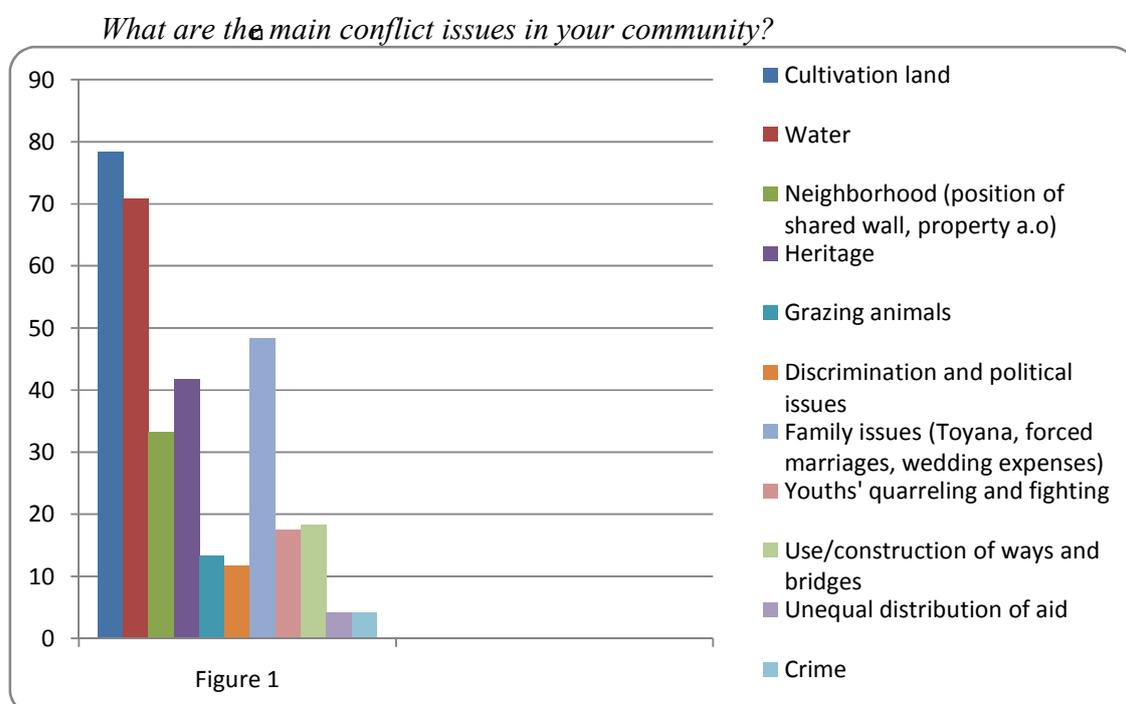
3. Findings of the survey

The interview campaign conducted in the field consisted of individual interviews and focus group discussions. The questionnaires included questions about the conflict situation in the respective community, conflict resolution mechanisms, Shura interventions in conflicts, conflict resolution methods, outcomes, advantages and disadvantages of courts and local structures, coping strategies with special cases, the relationship of different law rules, the perception of different institutions dealing with conflicts, the relationship between them and the role of women. The focus group discussions were based on a different questionnaire that focused on more practical aspects of conflict resolution, e.g. experiences with cooperation with governmental institutions. They were conducted with influential local people, male and female Shura members, most of them experienced in dispute settling, opinion leaders, educated members of the communities and normal people.

In the presentation below, the quantitative data from the individual interview campaign is presented in charts, findings of the focus group discussion are added in cases where they provide for new or different aspects.

3.1 Conflict dynamics

An introduction question about the conflict issues in the respondents' communities was asked to analyze the main conflict issues in the communities. Respondents were allowed to mention more than one issue.

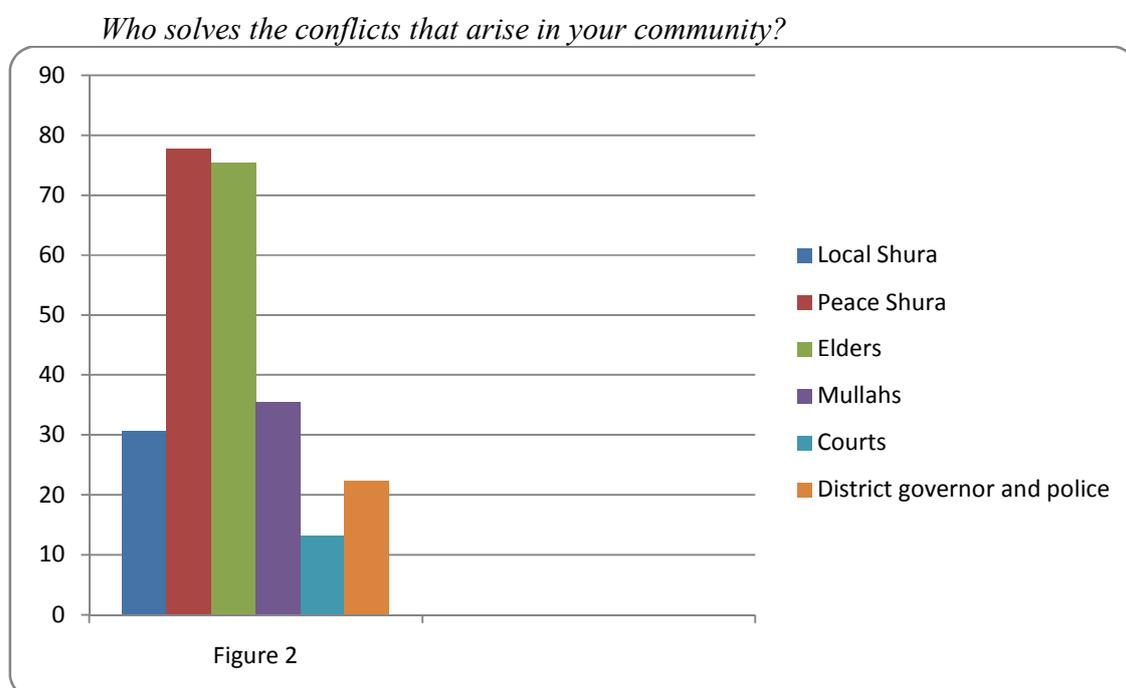


The above figure reveals that in rural areas land and water are the most important conflict issues:⁵⁹ cultivation land (including agriculture fields, plantations and gardens) is mentioned by 78, 3%, water by 70, 8% of the respondents. Other issues with a link to land and resources that were mentioned are grazing animals (13, 3%), heritage (41, 7%), the use and construction of bridges and ways (18, 3%), distribution of assistance from aid agencies (4, 2%) and neighborhood (33, 3%), the latter often specified as conflicts over the position of shared walls and property ownership. Criminal actions were mentioned by 4, 2% of the respondents as a conflict issue, mostly referring to severe crime like murder or abduction.

Family disputes, including intra and inter family issues, were mentioned by almost half of the respondents (48, 3%), the main specified issues being the payment of bride price (*Toyana*), wedding expenses, forced marriages and disputes between bride and the groom's family members.

17, 5% of the respondents mentioned quarrels and fights between youths as issues of conflict in their community. These can quickly grow bigger if families, tribes or communities who feel obliged to take the side of their family or tribe member. According to 11, 7% of the respondents discrimination and political strife is an important conflict issue.

3.2 Use of different dispute resolution mechanisms



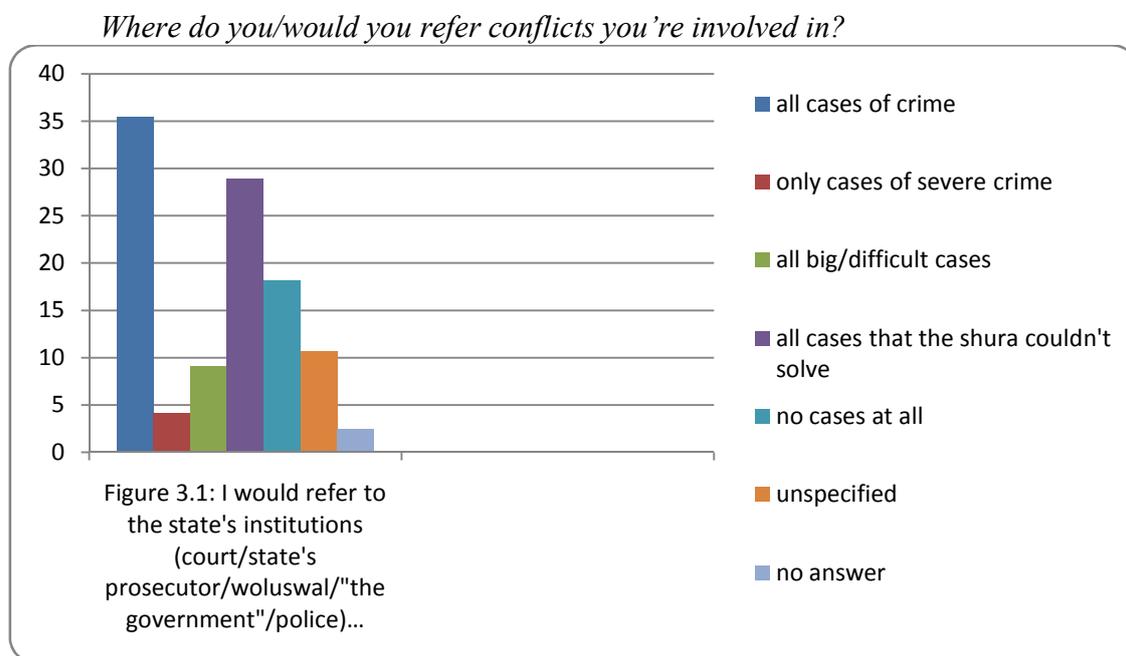
⁵⁹ Similar Oxfam (2008), p 9; see also Asia Foundation (2007), p 72

The respondents were allowed to mention more than one institution. The above graph documents that the community based structures (local Shura and Peace Shura) and their members (elders, mullahs etc) represent the main dispute resolution mechanisms. The present survey was conducted in areas where Peace Shuras exclusively dealing with disputes had been established during the last three years.⁶⁰ These Shuras were mentioned by 77, 7% of the respondents, indicating that they are more popular as conflict resolution bodies than unspecialized local Shuras that were mentioned by 30, 6%. As to individuals that handle local disputes, elders were mentioned by 75, 5% and mullahs by 35, 5%.⁶¹

On the other hand, governmental institutions have the smaller part: only 13, 2% mentioned courts as a relevant conflict resolving body, a figure that indicates that the formal judicial system still isn't judging upon most of the cases that arise in the communities. The district governor and the police were mentioned by 22, 3 % of the respondents, what shows that members of the district administration are involved significantly in the matter of conflict resolution.

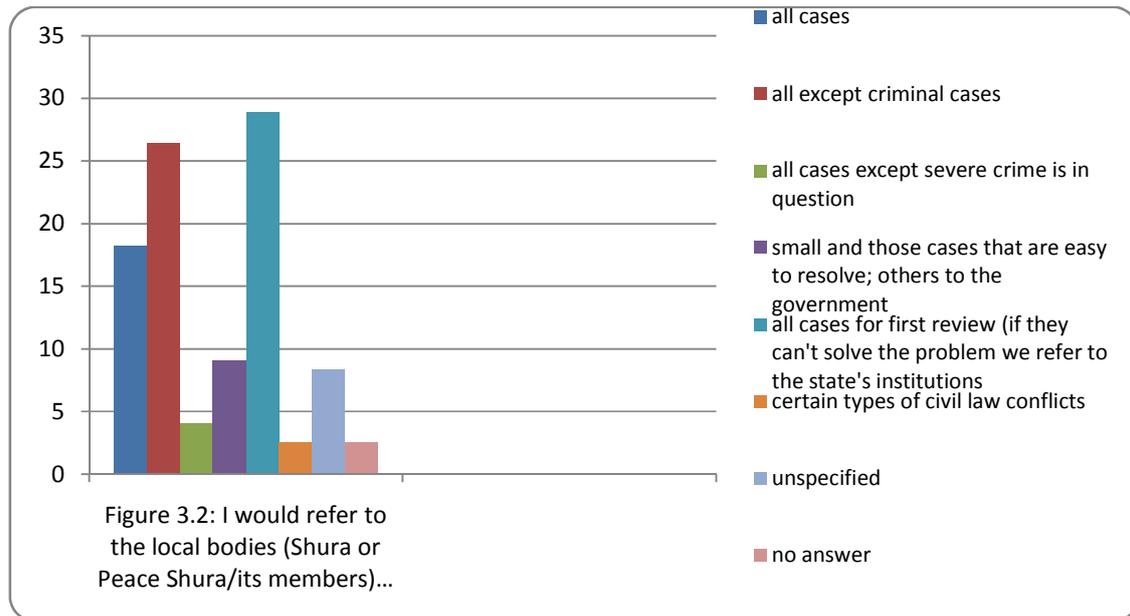
According to answers given in the focus group discussions the share of cases referred to the courts depended on the functionality of the courts. Shura members stated that it was common that Shuras referred cases to the courts and vice versa.

The survey attempted to uncover the community inhabitants' common criteria as to whether a conflict case is brought to a local Shura or governmental institutions are involved. The interviewees were asked openly where they would refer their conflicts.



⁶⁰ See above 2.3.2

⁶¹ Both are regularly members of local Shuras and Peace Shuras



Looking at the answers to that question it is seen that most respondents do not differentiate conflicts by issues but by other categories, such as easy/difficult or small/big. Other, more formal differentiations, such as between *huquqi* and *djeza* (say *civil and criminal law*) were used by some interviewees but it turned out that the meaning or extent of these notions were interpreted differently.⁶²

28, 9% of all respondents seem to perceive the informal local bodies as a kind of first instance where all cases are referred to for first review and the governmental institutions as a second or generally higher instance which the conflicts are referred to as soon as the local Shura structure fails to solve the problem. 9, 1% answered they would refer “small” and those cases that are “easy to resolve” to the local bodies, “big” or “difficult” cases to the state’s organs.

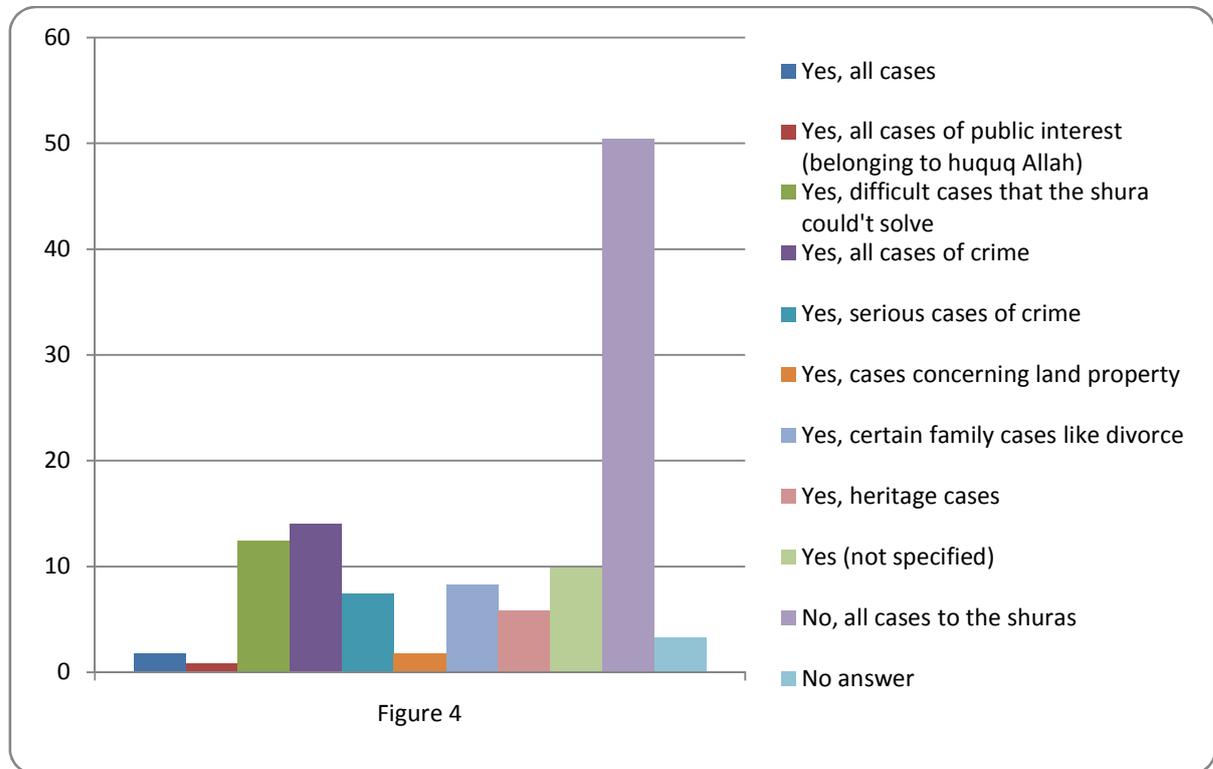
Concerning criminal law there seems to be a significant acceptance of the governmental institutions’ competence and acknowledgement of their capacity: 35, 5% would refer all criminal cases to the governmental institutions for first review. Accordingly, 26, 4% of the interviewees differentiate by this criterion⁶³ mentioning they would refer all conflicts to the Shuras except those concerning crime. Another 4, 1% stated they would bring to the government only cases of severe crime (mentioning e.g. murder, abduction), Shuras still dealt with all other cases, including minor crime.

Finally, a significant part of the respondents (18, 2%) stated they would refer all cases to the local council and no case to governmental institutions at all.

⁶² In certain interviews and in one focus group discussion of this survey bodily harm and threatening were not considered criminal issues whereas they were regarded as such in others

⁶³ The differentiation, like the others, should be viewed with some caution: In some interviews it turned out that interviewees didn’t subsume bodily harm under crime.

Are there certain types of conflicts that you would prefer to refer to an institution other than local Shuras/elders/etc? – If yes: which?



50, 4% of the respondents answered they would refer all cases to the Shura notwithstanding the issue. Most of them explained their opinion with the drawbacks of the formal system⁶⁴, whereas some either stated that there was no need to involve official bodies or even said it was shameful to them to involve people/institutions from outside.

In contrast to this, 46, 3 % said that they would prefer certain cases to be reviewed by institutions other than local councils. These interviewees were asked in a follow-up question to specify the conflict types. They were allowed to mention more than one sort of case.

The above account reveals that in the field of criminal law some people think that cases are in better hands elsewhere: 14 % wouldn't refer any criminal case, 7,4 % wouldn't refer at least serious criminal cases to the Shuras.

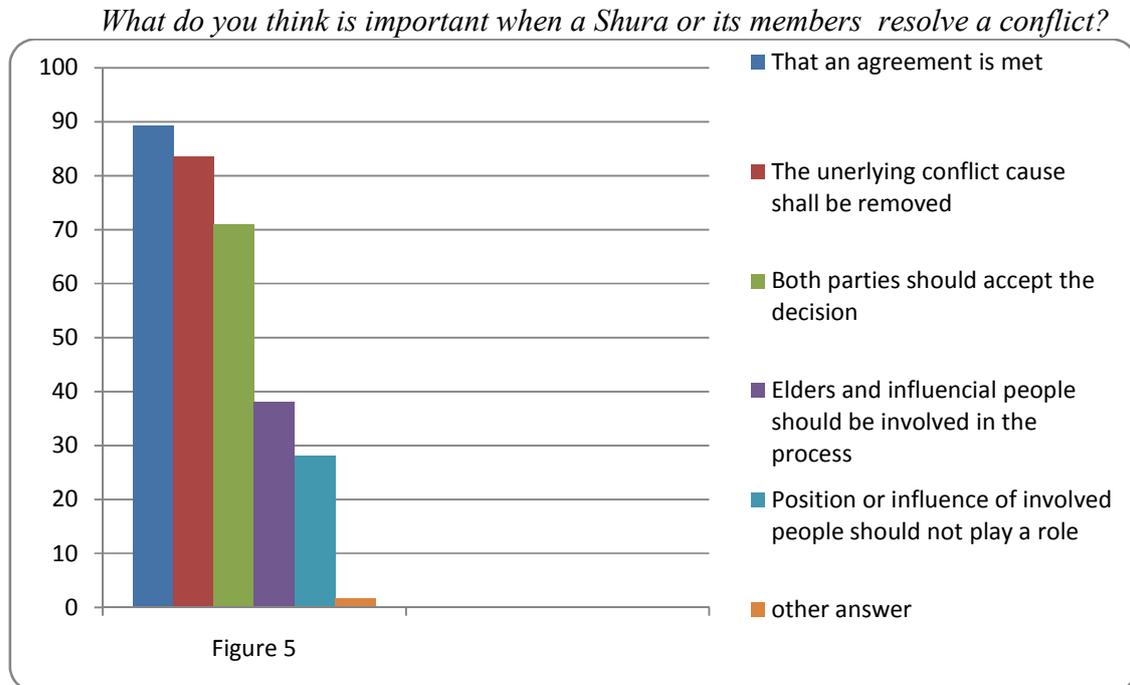
12, 4% of the interviewees mentioned difficult cases that would overtax the local councils, 8, 3% mentioned certain family cases like divorce, 5, 8% heritage cases and 1,7% cases on land property. Another 1, 7 % said they would refer all cases to other bodies, one respondent (0,8%) said he would refer cases of public interest⁶⁵ to the courts.

⁶⁴ See below, 3.4

⁶⁵ Cases touching *huquq Allah* (rights of God) as opposed to *huquq al Ibad* (rights of the person), see footnote 13; It must be mentioned that the interviewees who in the course of this survey resorted to these notions didn't use them uniformly as to their scope

3.3 Expectations towards conflict resolution outcomes

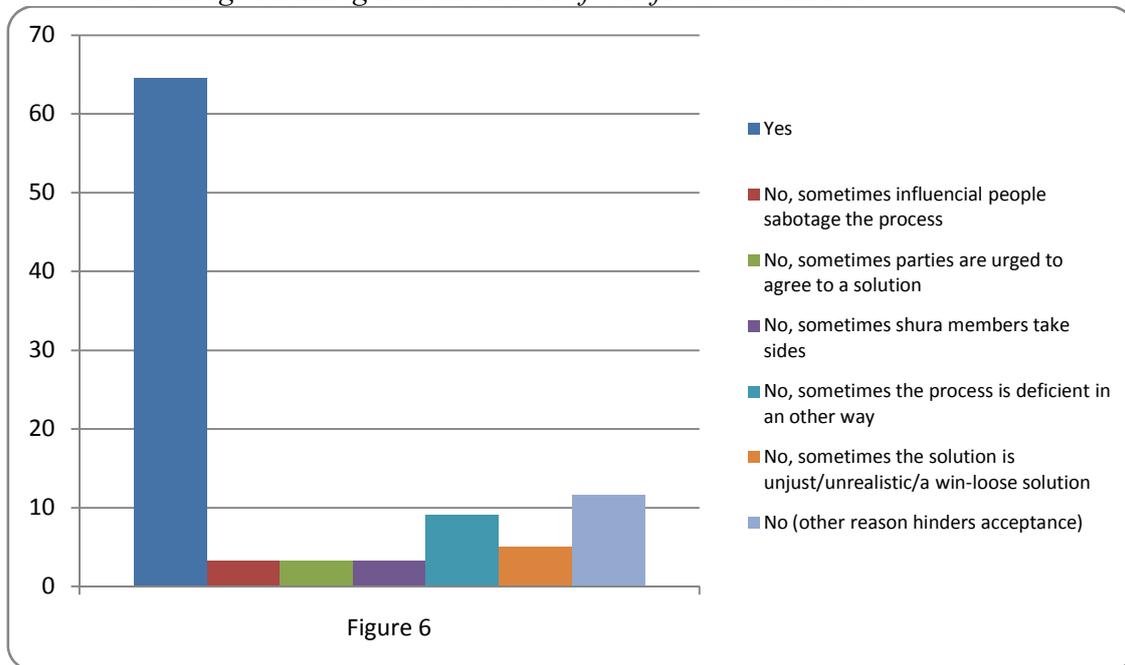
In order to find out the factors that make Shura/Jirga interventions popular among rural population the respondents were asked the following questions:



The question aimed to uncover what procedural aspects of Shura interventions are deemed important by the respondents. Obviously, the rehabilitation of a state of harmony in the community is a priority for most interviewees:

According to 89, 3% the outcome of a Shura intervention in a conflict should be an agreement between the conflict parties, 71, 1% state that an arbitration decision of the Shura should be accepted by both parties, figures that indicate a strong confidence in mediation processes. The addressing of underlying conflict causes should be part of the process in the opinion of 83, 5% of the respondents. This indicates that people do not expect a Shura to focus on single aspects of a conflict or differentiated legal questions but prefer a comprehensive approach that takes into view other relevant aspects of the relationship. 38% find it important that influential local people are involved in the process. 28, 8% mention that the position or influence of the parties should not play a role.

Do people always accept the conflict resolutions facilitated by arbitrating/mediating Shuras/elders? If No: for what reason?



35, 5% mention cases where solutions are not accepted by at least one of the conflict parties because of weaknesses of the solution (5, 0% of the resp.) or shortfalls of the resolution process: sometimes the solution was sabotaged by influential people (3, 3% of the resp.) or a party was urged to express their agreement to a solution (3, 3% of the resp.), shura members were taking sides (3, 3%) or there was an other problem with the resolution process (9, 1%).

Almost two thirds of the respondents (64, 5%) say the solutions arbitrated or mediated through a Shura were always accepted by the parties. But this does not go very well with the answers to the following question:

Does it happen that conflict resolving agreements do not resolve the conflict entirely (e.g. do tensions remain between the parties that can lead to another conflict)?

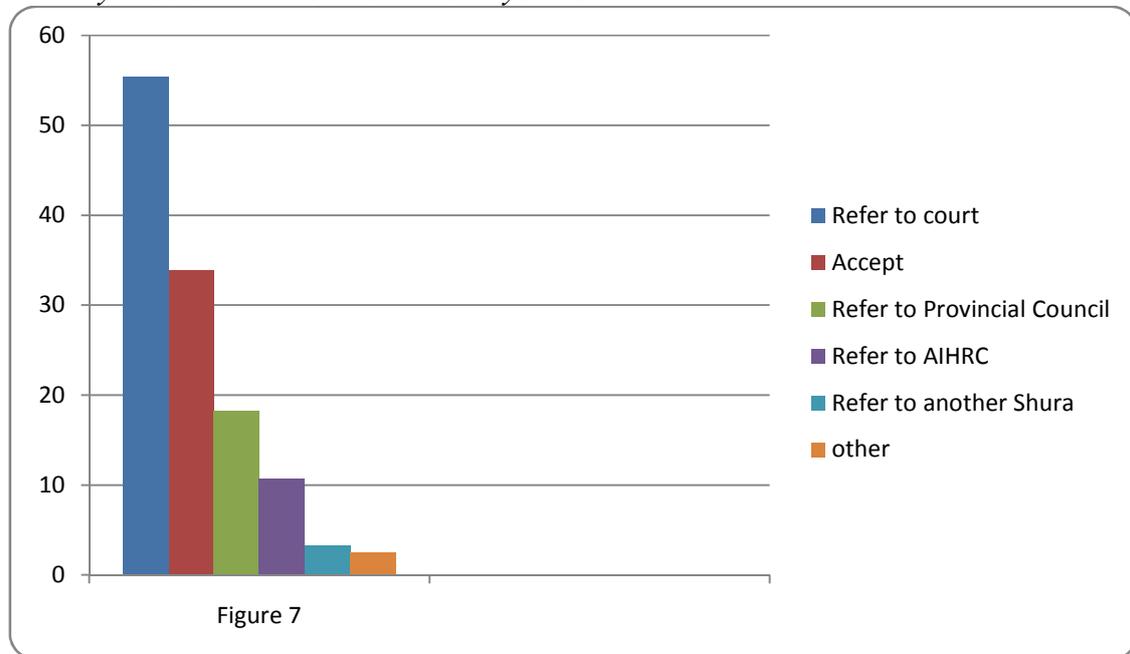
Yes, sometimes, tensions remain	71, 9%
No, there are no tensions left	28, 1%

Looking at the answers to that question it is seen, that the agreements met through Shura interventions do not always settle the conflicts entirely. This may have its reason in the nature of certain conflicts, in the arbitration/mediation techniques used⁶⁶ or in power conditions that cross efforts to achieve equitable solutions. The removal of the underlying

⁶⁶ According to SDO's baseline surveys it turned out that the outcome of several elders decisions were win-lose solutions that failed to restore the relationship between the parties.

conflict cause (mentioned by more than 80% of the respondents as an essential factor of informal dispute resolution, see fig. 5 above) is sometimes not met.

If you were not content with the outcome of a Shura's intervention in a conflict you're involved in: What would you do?

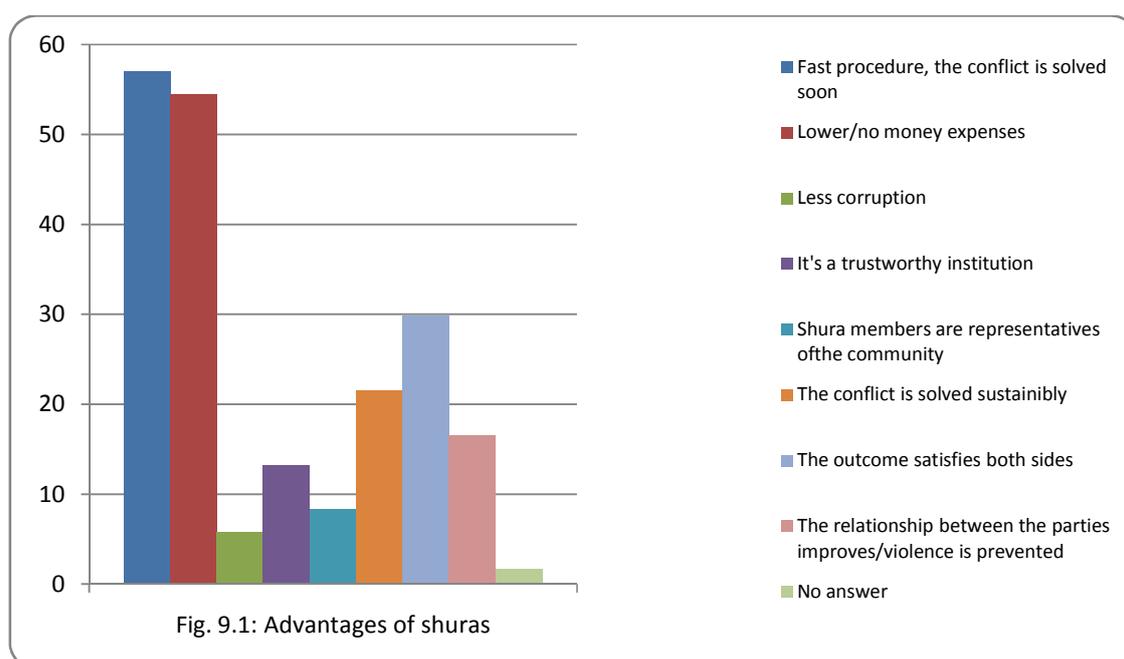


In cases where the interventions of a Shura lead to a not satisfying outcome the majority (55, 4% of the resp.) would seek solution with a court. A third of all respondents (33, 9%) say they would still accept the solution met, 16, 2% say they would refer to the provincial council, 10, 7% answer they were ready to refer to the AIHRC and 3, 3% stated the would refer the case to another shura.

3.4 Perceived advantages and disadvantages of formal and informal conflict resolution mechanisms

Respondents were asked what were in their opinion the advantages and disadvantages of Shuras and courts and were allowed to mention more than one aspect to each part of the question.

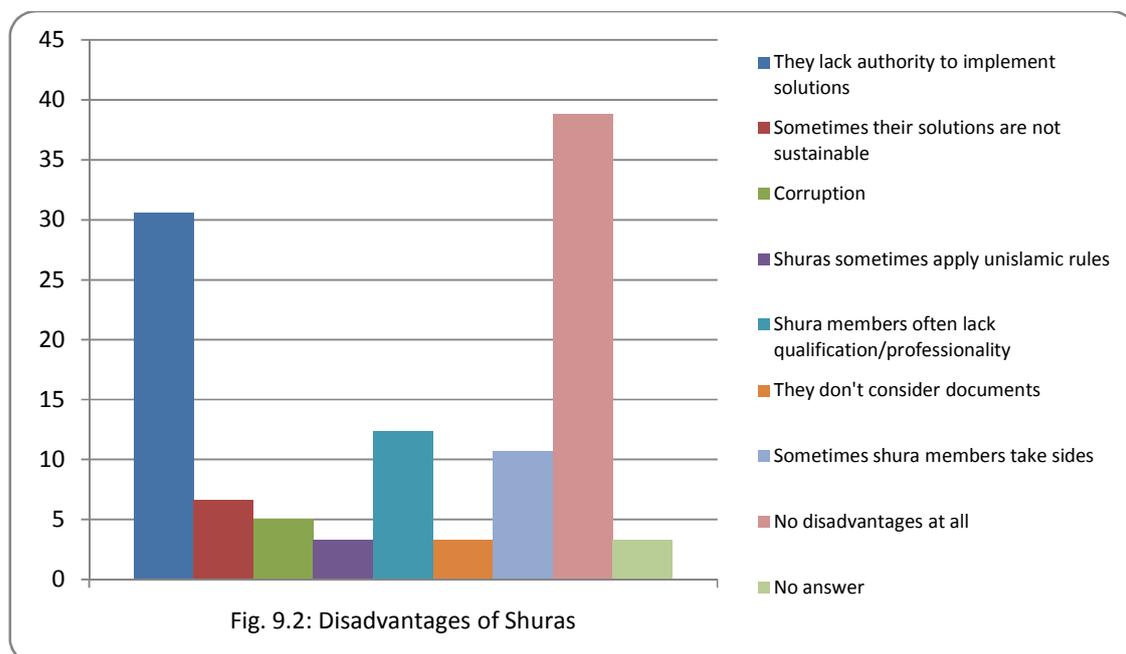
What are in your opinion the advantages of dispute resolving Shuras and what are their disadvantages?



Asked for the advantages of Shuras resolving community disputes the majority of the respondents found necessary to mention the fast procedure (57, 57%) and the saving of money expenses (54, 54%). The way disputes are settled is also appreciated by many people: 29, 29% of the interviewees see as an advantage that the outcome of Shura interventions tended to be no win-lose solutions but satisfied both sides. 21, 21% said their solutions solved the disputes sustainably and 16, 16% mentioned that the relationship between the parties was improved by the Shuras' interventions. Some of the interviewees found noteworthy that the Shuras were trustworthy institutions (13, 13%) and that there was less corruption than with the courts (5, 5%). Still 8, 8% of the respondents referred to the acceptance argument that Shura members were representatives of the community and through their being a local body had the right to interfere in local disputes.⁶⁷

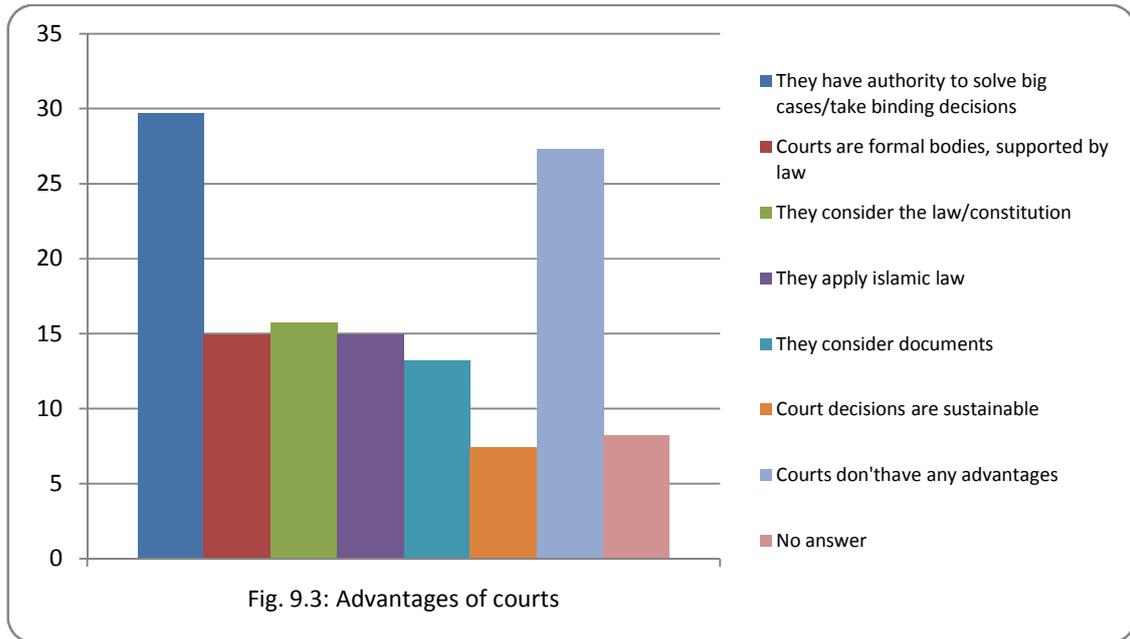
In the focus group discussions it was mentioned as an advantage, that Shura interventions gave both parties the possibility to keep their face and through this prevented conflict expansions or escalations.

⁶⁷ This argument was also mentioned by the working group on conflict resolution during the CDC Conference in Nov. 2007: MRRD, p 23



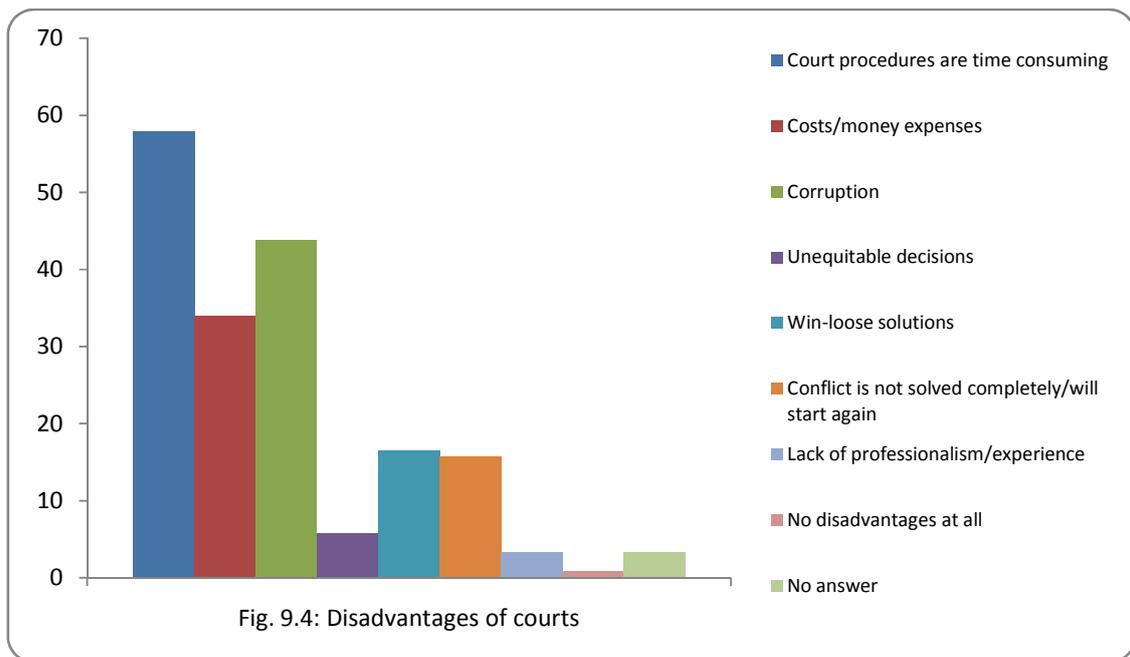
Concerning the disadvantages of dispute resolution through Shuras 38, 8% answered there weren't any which indicates the high acceptance of the Shuras in the function of dispute resolution bodies. The remaining responses point to the shortfalls of conflict resolving councils: 30, 6 % of the interviewees identify the lack of authority as a disadvantage some of them saying the Shuras were informal bodies and not supported by the law. Accordingly, certain informalities were pointed out as disadvantages, too: The lack of Shura members' qualification was mentioned by 12, 4% of the respondents and 3, 3% pointed out that Shuras didn't consider documents. The application of un-Islamic rules was mentioned by only 3, 3%. 6, 6% stated that the Shuras' solutions sometimes were not sustainable and 10, 7% said that there were cases where Shura members took sides.

In focus group discussions with participating Shura members the Shuras' lack of authority was considered their most significant drawback which sometimes lead to their taking the side of the more powerful party.



The perceived advantages of the courts correlate with the perceived drawbacks of the Shuras: 29, 7% appreciate the authority of the courts that allowed them to take binding decisions, 14, 9% mentioned the courts' formal status. 15, 7% appreciate the consideration of governmental law, 14, 9% explicitly the application of Islamic law. The consideration of documents is seen as an advantage by 13, 2%. 27, 3% found that courts didn't have any advantages.

The focus group discussions mentioned the formal authority of the courts as their greatest advantage and some of them also referred to the professionalism of the court staff.



In many cases, the opposite forms of those aspects that were identified as advantages of the Shuras are seen as the weak points of the courts: the time consuming procedure by 57, 9% of the respondents and the costs by 33, 9%. As to the outcome, 16, 5% criticize the win-loose character of court decisions of which 5, 8% say they were sometimes inequitable. 15, 7% criticize that conflicts often started again because the court didn't solve them completely. 43, 8% mention corruption as a drawback of the courts, this high figure indicating the low esteem of the judiciary among the rural population.⁶⁸ But in contrast to the results and statements of recent publications of the Afghan government and national/international organisations, only 3, 3% of the respondents mentioned a lack of professionalism in the courts' work.

In the focus group discussions it was also mentioned that court procedures lacked transparency.

Shura members were asked some follow-up questions were asked about possibilities to combine the perceived advantages of the systems and on cooperation between both.

How could the advantages be combined?

A strongly supported idea was that Shuras/Jirgas should obtain specific legal advice from the courts on certain legal questions. Other suggestions ranged from regular meetings between Shura members and courts staff to an increased referral of cases from Peace Shuras to courts and from courts to Peace Shuras with the reference to the fact that this was already being practiced in several of the surveyed areas. Shura members suggested that Shuras should be acknowledged as formal bodies and be supported by the coercive power of the local governmental bodies.

Does your Shura, Peace Shura or CDC cooperate with courts or other governmental bodies to work on conflict cases? If yes: in what way? What could improve and how?

The survey found that in some cases judges and attorneys were members of locally established Peace Shuras that deal exclusively with disputes and conflict matters. Some of these councils also comprise district governors or other members of the administration. Cases are often referred from the councils to the courts and then referred back to the councils which can entail a more formal mandate to deal with a conflict case.

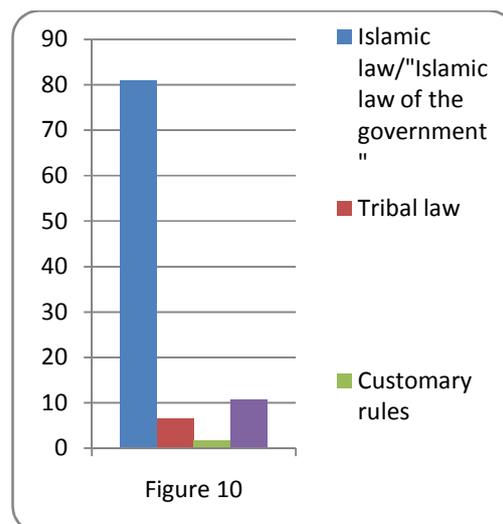
There are information exchange and consultations between Shura members and court officials to deal with single cases. Shura members stressed that the facts of many cases needed to be explained by them to the courts. There is a strong wish for a closer cooperation with the formal judiciary among members of all Shuras that were involved in the survey. Meetings on a regular basis are wished by members of many councils who would like to involve the formal system more in the following-up of cases after their

⁶⁸ At least to some extent, this bad image seems to be owed to other factors than own experience or knowledge: in urban areas, where people have a better access to and presumably more experience with governmental courts they refer more cases to them: see Asia Foundation (2007), p 71

resolution in order to ensure the parties' compliance with taken decisions or agreements. Several of the respondents mentioned that there should be capacity building measures for Shura members that could facilitate cooperation.

3.5 Values and priorities

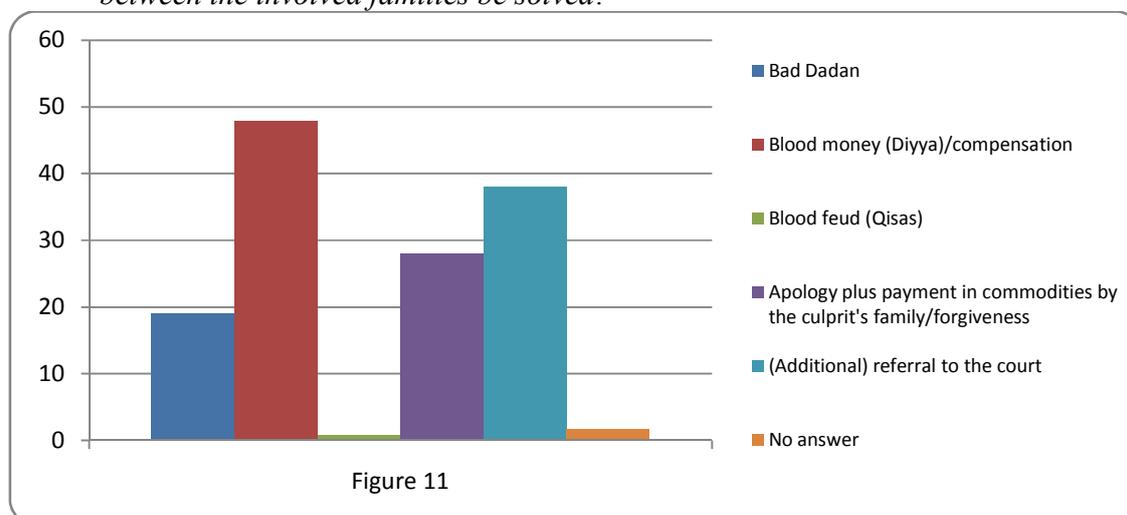
In Afghanistan different rules are applied to resolve conflicts, e.g. traditional law, Islamic law, governmental law. Which law should prevail?



81, 0% of the respondents are of the opinion that *Sharia* should enjoy primacy. The identification with traditional and tribal law is lower: only 6, 6% want tribal law to prevail, 1, 7% find other traditional rules most appropriate. Obviously, Afghan state law is identified widely with Islamic law and doesn't represent in a similar way high ranking values for most of the respondents.

In order to elaborate more on the respondents' relationship to the different legal systems, they were asked about their opinion on suitable solutions for two standardized community conflict cases that stand for typical Human Rights sensitive conflict constellations in rural areas:

Imagine there was a homicide in your community: how should the conflict between the involved families be solved?



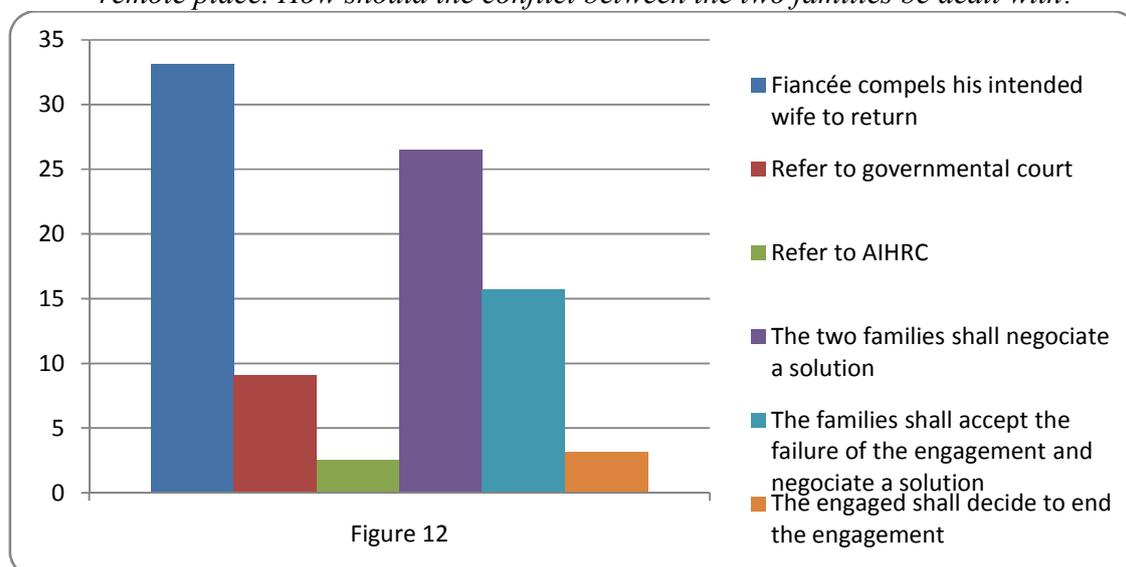
The respondents were allowed to give more than one answer. 19, 0% say that the situation should be solved through the transfer of a daughter to the victim's family (*Bad dadan*), If asked directly about the *Bad dadan* tradition respondents tend to condemn it and state it was applied only in other areas or among other ethnic groups of the country⁶⁹. In contrast to that the above figure indicates that this tradition is still common in many rural areas. Compensation through payment of blood money (Diyya) is supported by 47,9%, the other solution provided by Islamic law, the blood feud (Qisas), seems to be unpopular (0, 8%). Reconciliation through traditional apology rites (female members of the culprit's family visiting the victim's family; symbolic delivery of sheep and other) are part of an appropriate solution for 28, 1% of the respondents.

A consequent distinction between civil and criminal aspects of a crime is not common in Afghan customary laws which as to the legal consequences concentrate on compensation of interests of the victim's family. As reality doesn't reflect the idea of the state's monopoly on using force the understanding of a general state's claim to punish is limited. The accumulation of legal consequences can have impact on the aggrieved party's compensation and lead to a failure of the reconciliation process.

Still, 38% of the respondents would refer the case (also) to a governmental court which shows that there is a widespread feeling of the state's responsibility in such cases. It also indicates that there is space for the combination of compensation according to customary rules and legal consequences according to formal law.

⁶⁹ SDO Peacebuilding Project evaluation report 2006/2007 (*not published*); Barfield (April 2006), p 2

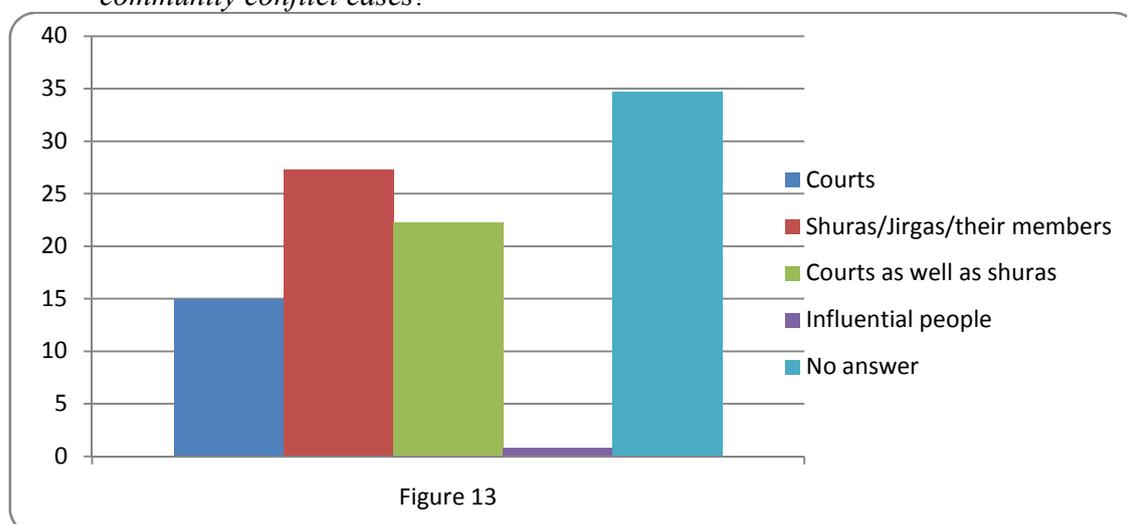
Imagine another case: a girl doesn't want to marry the man to whom she was engaged by her parents during her childhood and escapes with another boy to a remote place. How should the conflict between the two families be dealt with?



This quite common type of conflict is seen as an inter-family issue that should be negotiated upon between the two families by 42, 2% of the resp. half of which found that it had to be accepted that the marriage had to be dissolved (26, 5% of the resp.). 12, 4 % of the resp. mentioned that under Islamic law a marriage was not possible against the girl's will whereas 9, 1% of the resp. stressed that the bride price had to be paid back to the boy's family. Such obligations between the families may be the reason why only 3, 3% of the respondents find that the engaged persons should negotiate and decide.

3.6 Relationship between the systems

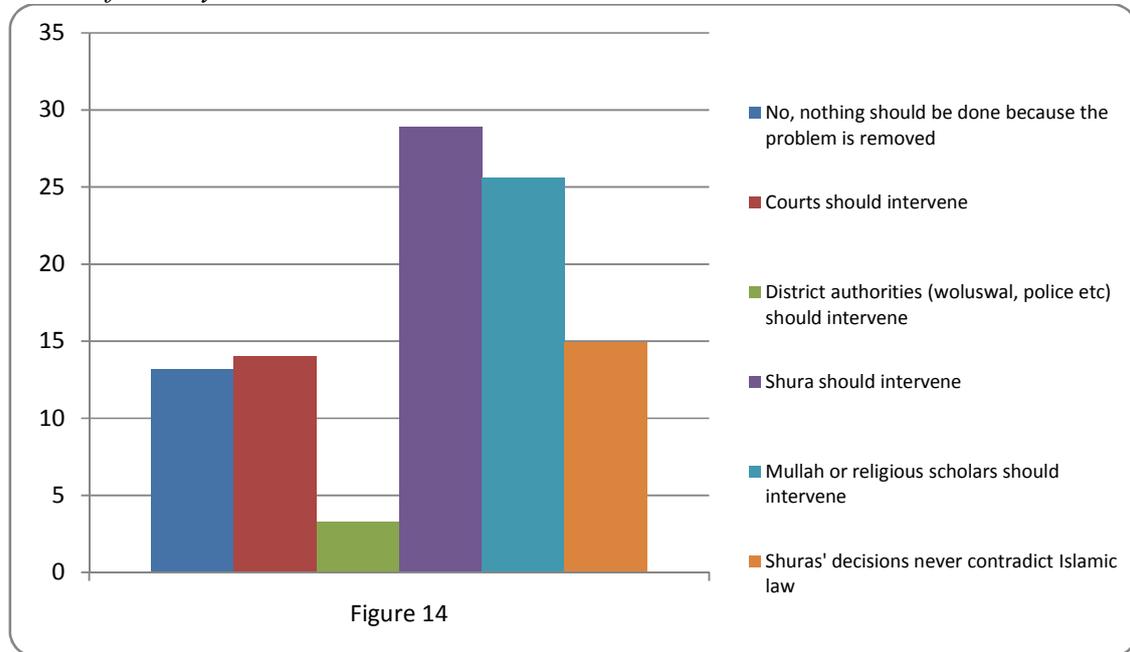
Who do you think can best ensure the consideration of Islamic law in resolving community conflict cases?



Because of the high identification with Islamic values and *Sharia* law, the interviewees were asked whom they considered the most eligible body to ensure the application of Islamic law.

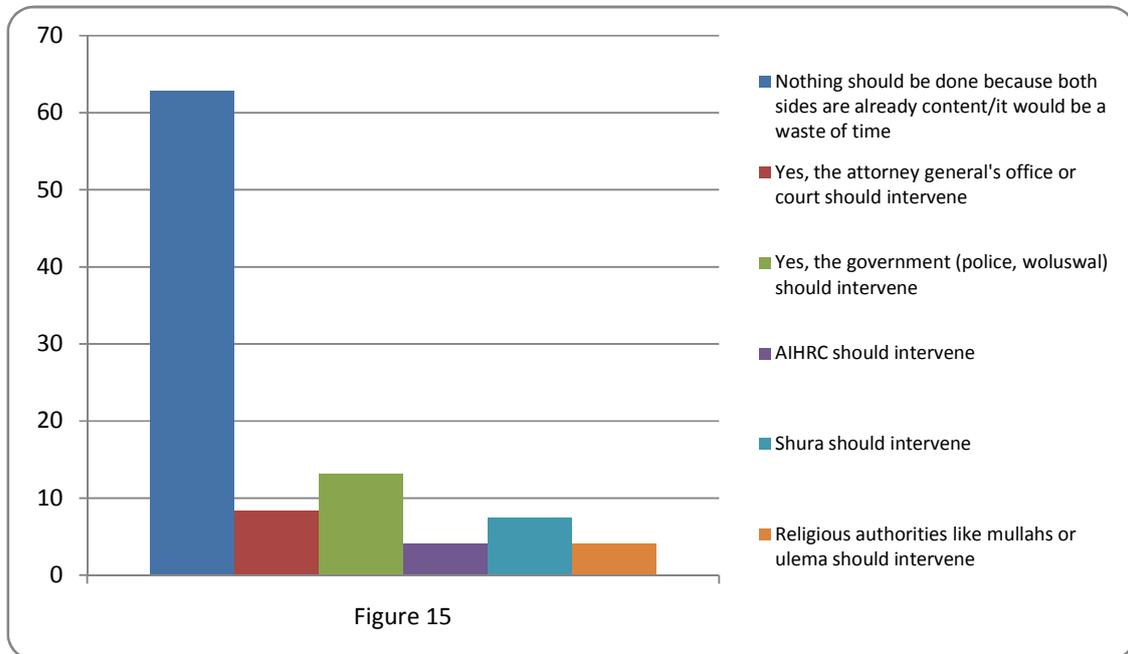
37, 2% of the respondents see in the courts an instance that is capable to ensure the consideration of Islamic law. Around one half of the respondents (49, 5%) are of the opinion that the Shuras can best ensure the application of Islamic law some of them explaining that in general the governmental courts were more knowledgeable but due to their actual state it was not properly applied. Thus, there seems to be an understanding that the courts staff rather possesses the necessary skills but people obviously don't expect that this knowledge is actually applied.

Sometimes conflict resolutions achieved by Shuras are not in line with Islamic law but the conflict is solved. How do you think about that-should something be done? If Yes: by whom?



13, 2% have a practical approach and don't see the need for an intervention. 14, 9% believe that Shura's solutions were always in line with Islamic law. The remaining 71,9% who deemed an intervention necessary were asked who should interfere. 28, 9% find the local Shura should intervene, 25, 6% think religious authorities should deal with that matter. Not as many respondents found that governmental institutions should take care of that: courts were mentioned by 14%, other institutions by 3, 3%.

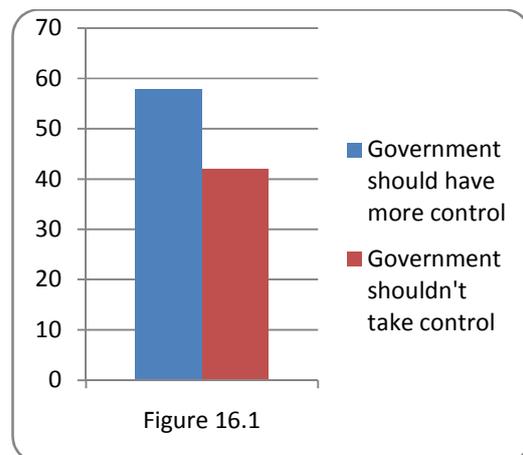
Sometimes conflict resolutions achieved by Shuras are not in line with governmental law or human rights but the conflict between the parties is solved. How do you think about that – should something be done?



The above account shows that unlike with Islamic law, the breach of Human Rights is by the majority of the (62, 8% of the respondents) not seen as an incident that makes necessary an intervention. Most of those who deem an intervention necessary (37, 2%) feel that this should be done by any governmental institution (13, 2%) or explicitly by the courts (8, 2%). 4, 1% think that the issue was in good hands if referred to religious authorities and 7, 4% say the problem should be dealt with by the local Shura. 4, 1% mentioned the AIHRC.

Some people say the government should take more control to ensure correct application of the law in the communities; others say it should not – what is your opinion about that?

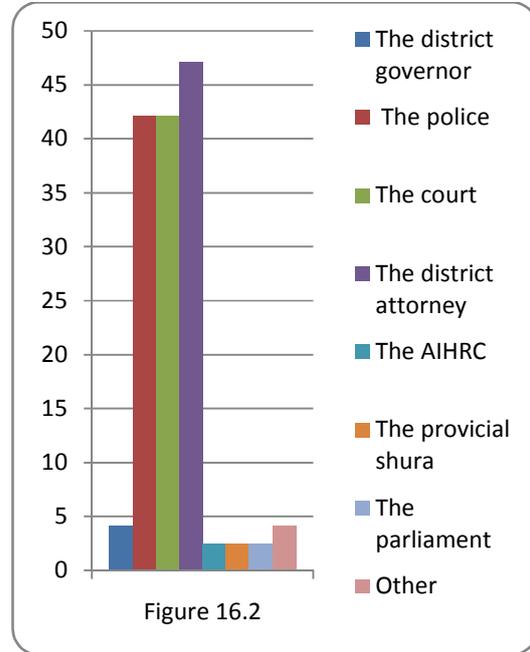
A clear majority of the respondents (57, 9%) would appreciate if the state would be more present in the communities to have an eye on local dispute handling. 42, 1 % state they would not like the government to take more control over this.



A follow-up question was then put to those interviewees who had mentioned there should be more governmental control:

Which institution should take more control?

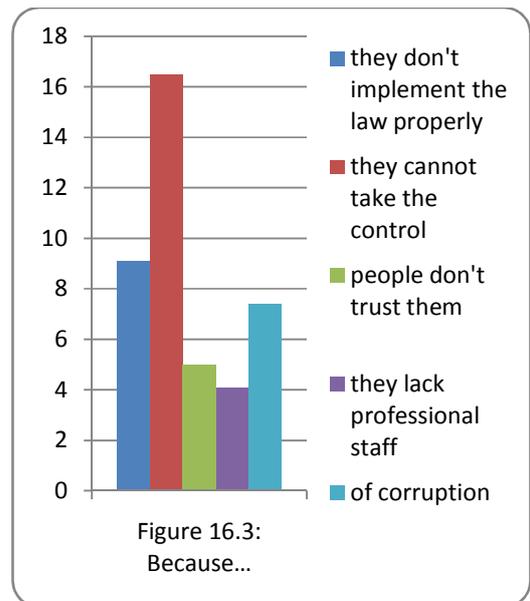
The interviewees were free to mention more than one institution. The account alongside shows that especially the attorneys office (47, 1% of the respondents), the courts (42, 1%) and the police (42, 1%) are seen as appropriate correctives to the local conflict handling. The district governor was mentioned by 4, 1% and the AIHCR, the provincial council and the national assembly were mentioned each by only 2, 5% of the interviewees.



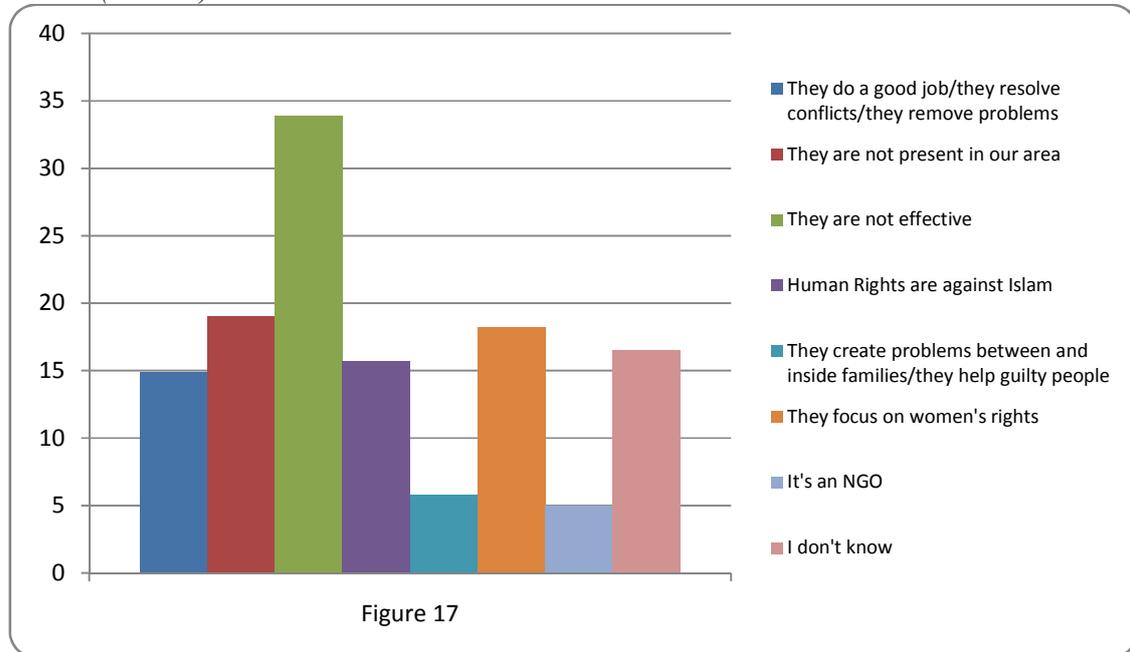
Another follow-up question was put to those respondents who disliked the idea of a stronger control through the government:

Why should the government institutions stay out of this?

The interviewees were asked to mention only one main reason. 16, 5% of the interviewees are of the opinion that the government institutions simply aren't able to take effective control. 4, 1% mention in this context the lack of professional/skilled staff in these institutions. 9, 1% think that they didn't apply the law properly, 7, 4 mention corruption and another 4, 1% people's mistrust as the main reasons why they deem them ineligible to control the informal dispute resolution in communities.



What do you know about the Afghan Independent Human Rights Commission (AIHRC)?



The above account reveals a rather negative reputation the AIHRC has among the population in the rural target areas. The interviewees were allowed to mention more than one feature. Only 14, 9% of the respondents make positive statements about the AIHRC some of them mentioning their role in the resolution of conflicts. A good third of 33, 22% mentioned that it was not effective in dealing with local problems, and 5, 3% even stated that the activities of AIHRC were causing problems and trouble in the communities. Especially the (necessary) protection of Human Rights through interference in family affairs was condemned by these interviewees. The negative reputation of the AIHRC seems to be closely linked to the value system it stands for: 16% of the respondents stated their view that Human Rights were against Islam and/or a tool of foreigners to change culture. The low awareness of the institution and its mission might also account to some part for some of the negative opinions: 16, 11% of the respondents didn't know anything about this institution, 5% think it was an NGO. 19% said AIHRC was not present in their area.

Shura members and educated members of the target communities were more although not fully aware of AIHRC as an institution and its role. Several criticisms were mentioned by all focus groups some of which indicate reluctance to cooperate with this institution: Like in the individual interviews, it was mentioned that AIHRC didn't respect the culture of the villages. Criticism was extended to Human Rights, which were claimed to be not in line with Islam or Islamic law. Furthermore the participants' assumptions on "very high" or "too high" salaries of the AIHRC's staff seems to lessen the readiness to cooperate. Other participants claimed the institution's work was focused on the cities, some people said AIHRC only worked on statistics or said their activity was just symbolic.

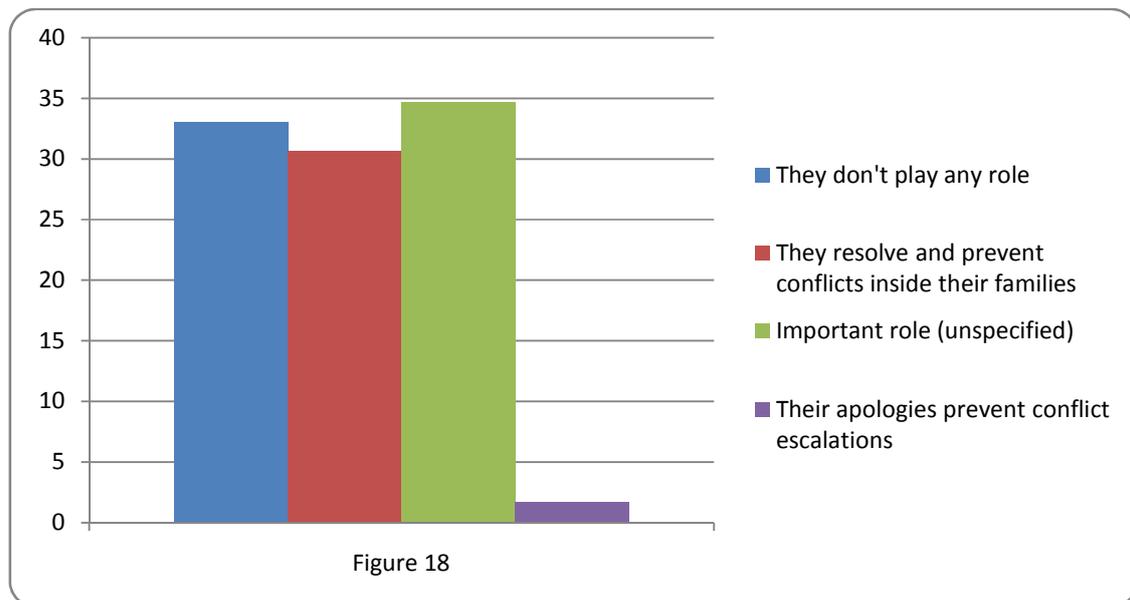
The focus group discussion participants were asked about the role of CDCs in conflict resolution⁷⁰:

CDCs: Some people say the CDCs should deal with local conflicts, others say they should stay out of conflict handling. –What is your opinion about that?

It was mentioned that many (male) PS members were at the same time CDC members. Many participants expressed their view that it was better if the CDC concentrated on village development issues and through this contributed to the decrease of conflicts. The ability to deal successfully was rather attested to the Peace Shuras. Some participants found that CDCs could handle conflicts and should participate in that field if this were accepted by the locals. Others stated they should cooperate with the Peace Shuras/local Shuras.

3.7 Women's role in conflict resolution

What role do women play in the field of conflict resolution in your community?



⁷⁰ In 2007, the awareness of the existence of the CDCs was rather low: according to the Asia Foundation's survey only 32 % of the respondents knew about a CDC in their area. The question about the CDCs was therefore not part of the individual interviews.

33, 1 % don't see that women play any role in conflict resolution. In the field of family conflicts women are attested a significant role by 30, 6% of the respondents most of which described the role as influencing male family members. Some of these respondents also pointed out that women's role in conflicts could be a positive/deescalating one but also have a dividing/escalating effect. In public life the role of women in conflict resolution seems to be very limited. 34, 7% feel that women play a significant role in conflict resolution not specifying where and 1, 7% of the respondents mentioned cases where women deescalate inter-family conflicts arising from murder cases: apologies expressed by female members of the culprit's family weigh higher than those of the male.⁷¹

In some focus group discussions it was stressed that especially literate and educated women contributed to the resolution of disputes through their activity in peace Shuras. It was also mentioned that conflicts between women could only be solved through women, therefore the women's part in the resolution of conflicts could not be taken by men. But still, it becomes evident that women's marginalization in public community life mostly confines their influence to family issues.

What is your opinion about that?

It's good that they engage in conflict resolution/they should play a bigger role in this	86, 0%
Women should stay out of this	9, 9%
No answer	4, 1%

In a follow-up question interviewees were then asked about their opinion on women's actual role. 86, 0% welcomed women's engagement in local dispute resolution whereas 9, 9% see conflict resolution as a men's business.

Such rejection was not expressed in the focus group discussions where female engagement on the issue was welcomed widely. Female Peace Shura members mentioned the lack of visibility of women in public as a reason for a low acceptance of female interventions in conflicts concerning other than intra-family issues. The establishment of female councils and the implementation of capacity building programs were mentioned as promising measures to strengthen women's role.

Where do you think women can best take more responsibility in conflict resolution?

Asked where they thought women had best conditions to contribute to dispute resolution in the communities (in female Shuras, CDC or other mixed Shuras?) the answers of participants in the focus group discussions tended to female peace Shuras rather than

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This was endorsed by the focus group discussions where a tradition was mentioned according to which women belonging to the culprit's family spread their Tshadar over the victims body as a sign of apology. It was pointed out that this kind of apology had a stronger meaning and effect than apology expressed by men.

mixed structures because of social dynamics that restricted their active participation. Women would often not dare to speak or act in a shy way. Several times the transfer of conflict resolution skills was mentioned as an important factor to increase women's role within the framework of any conflict resolution mechanism.

4. Conclusion

At least for the next years to come there is no realistic alternative to a hybrid model combining formal and informal dispute resolution mechanisms. People refer most cases to the informal system represented by local Shuras and Jirgas.

Shuras and Jirgas are the central mechanisms of dispute resolution in the rural communities. People refer all kinds of conflicts to the local councils notwithstanding the type of issue and notwithstanding how serious the cases are. Rather than being mechanisms for certain types of cases they often function as a first instance: most conflicts are first referred to them, in case they are not able to settle the dispute the case might be referred to formal courts or local institutions of the executive.

Cooperation between the two systems is already practiced e.g. by courts that officially refer civil and criminal cases to local Peace Shuras and vice versa. But this doesn't follow any general concept so far and is practiced only from case to case.

The use people make of the two systems doesn't follow general rules.

People make different use of the courts and the informal local bodies. Some people differentiate civil and criminal cases and would refer the later to the courts. But the categories differ: other people would use other categories and e.g. differentiate by easy and difficult cases. Still, a huge part of the rural population would not refer their disputes to a governmental institution at all.

A formalization of the Shuras'/Jirgas' role within the judiciary is a viable method to gain control over local dispute handling.

Although there are reservations against the formal judiciary in its present state the majority of the rural population would in general accept a greater control of the local councils' dispute handling through state's institutions. Alike, Shura/Jirga members don't claim responsibility for all cases that they actually handle and in general would welcome a formal definition of their role within the judiciary. The vision of the ANDS to enhance the legitimacy and efficiency of both systems through formalization of their roles⁷² as such will therefore most probably find a high level of acceptance among local council representatives.

As to the acceptance of such a formalization strategy, much will depend on the responsibilities assigned to the councils and the concrete rules that are going to shape the substance of the cooperation.

An attitude common in many rural areas rejects governmental interference in local affairs as a threat to the communities' long tradition of self administration. A new definition of

⁷² Islamic Republic of Afghanistan (2008) , p 125

the roles of the formal and the informal judiciary needs to observe that sensitivity through leaving a core field of responsibility to the local councils.

A restriction of the local councils' handling of criminal law cases to a bare reconciliation part will probably lessen the possibilities to use their capacities to reconcile conflicting parties. Punishment by a governmental institution doesn't have a proper function in the customary system of compensatory rules which is at the basis of local people's understanding or misunderstanding of legal consequences of crime. The enforcement of an exclusive responsibility of the courts for dealing with serious criminal cases affords an understanding of the governmental claim to punish which will be established no sooner as the rehabilitation efforts show effect. Until then, instead of parallelizing formal punishment and informal reconciliation certain customary mechanisms of compensation should be integrated into the sanction system of criminal law. This would not overtax the wrongdoer party's readiness to compensate nor endanger the aggrieved party's right to compensation and should therefore be a basis for dividing up the competencies of formal and informal bodies in criminal cases.

A clear and workable distinction of case categories is a prerequisite to formalize the relation of formal judiciary and local councils.

Given that the councils are the institutions that review conflict cases first their members need to be able to distinguish the dispute categories that obligatorily need to be brought before the state courts. At the time the commonly used distinctions between civil and criminal cases or between the scope of *huquq Allah* resp. *huquq al Ibad* are not being used uniformly (e.g. as to where to cases of severe crime belong to?) neither by normal locals nor by Shura members. The latter should therefore be trained in this competency issue as soon as the categories have been defined.

Time consuming procedures and money expenses are the most important reasons for the low number of cases that are referred to governmental courts.

The reputation of the courts is not high among the local population, many people think of the formal judiciary as of a corrupt institution. So far, most people think that local councils rather than courts provide for a fair process. But it must be noticed that this alone cannot explain the low share of cases that is referred to them: in urban areas, where the access to courts is better, people refer more cases to them. Even more crucial are the time consuming procedures that don't meet the expectations of the locals who are used to achieve timely resolutions to their disputes. The costs caused by formal procedures are a crucial aspect for most people because of which the ongoing increase of living costs probably provides more reason not to refer to the courts. Besides measures to counter corruption and increase the personal and physical capacities ways to improve the reputation of the formal judiciary can be found in the strengths of the courts as they are perceived by community members: People hold them more than the local Shuras able to resolve the difficult cases, especially those which influential community members are involved in and where authority and ability to enforce decisions or solutions is crucial. The enforcement structures and the formal judicial system that are mentioned to be weak

or lacking in the ANDS⁷³ are interestingly noticed in another way by the people: to them their formal status as a state body and the fact that they are supported by the law provides their decisions with an authority that is missed many Shura decisions. Furthermore, many people hold the courts rather than the councils capable to handle the complicated cases.

People appreciate Shura-initiated mediation processes with compromising agreements as their outcome but many are concerned about the lack of authority.

Local people appreciate to have their disputes settled through compromising agreements that are no win-lose solutions and leave the parties an opportunity to keep their face. The traditional methods of mediation lead in most cases – from the normal locals’ point of view – to equitable solutions. The review of the underlying conflict causes is to most people an important aspect of conflict resolution. Conflict resolution through Shura/Jirga interventions considers the overall situation between the parties and leads in most (although not all) cases to agreements that remove the tensions. In case people are not content with a Shura’s decision cases are often referred to the formal judicial system.

The Shuras solve disputes quickly and in an uncomplicated procedure that causes no or only low costs. They are widely trusted by the rural population and their aiming at compromising solutions and stronger focus on the relationship between the parties goes well with the people’s cultural expectations. But what many people are concerned about is the lack of authority. Although the local ownership of the handling of community disputes is appreciated there is a strong wish for a competent body that is backed by enough authority to deal with the big cases, i.e. whose solutions are accepted by or, if this is not the case, enforceable against influential and powerful members of the community.

Human Rights sensitive family disputes and criminal cases are going to be referred to the state’s courts rather in favor of a correct application of Islamic law than due to explicit advocacy for Human Rights.

There is a strong will to comply with Islamic rules and their contempt by local Shuras who apply tribal law justifies from the local people’s perspective an intervention from outside. Whereas the importance of Islamic values is strongly emphasized there is a high level of mistrust towards the concept of Human Rights that are by many people deemed to be contrary to the value system of Islam. Accordingly, the readiness within the communities to cooperate with the AIHRC is low. It seems that this institution’s engagement to protect individuals from violations of their basic rights through local traditions entails a critical and often deprecatory attitude on the community members’ side. With regard to that mistrust a linkage between formal and informal system through this body is not very promising. Especially the explicit application of Human Rights is unpopular among normal locals and council members and often entails reluctant to hostile reactions. Capacity building measures for council members and basic legal education for community members should therefore, wherever possible, avoid this argumentation path in favor of a primacy of Islamic law before customary law. By this, most urgent problems like the *Bad Dadan* tradition can be addressed more effectively.

⁷³ E.g. in the ANDS, p 105

Remaining inconsistencies between the concepts of Human Rights and Islamic law both of which are at the basis of Afghan state law⁷⁴ will have to be dealt with by the courts and the AIHRC and finally the legislator.

The establishment of female fora and capacity building measures in the field of conflict resolution can mitigate the marginalization of women in the field of dispute handling.

Until today, women don't have a visible role in the resolution of community disputes and are mostly confined to the settling of quarrels inside their families and certain reconciliation traditions. Whereas there is only little open opposition to women's growing activities in this field a major obstacle is the general limitation of women's visibility in public life. The provision of special fora for women and implementation of capacity building measures can increase their visibility and the acceptance of their handling of conflicts.

Peace Shuras that are specialized in the handling of disputes are rather than normal local Shuras/Jirgas or CDCs able to take a counterpart role to the courts in the formalization process.

Advice on certain legal questions and on types of cases from courts that would be highly appreciated among Shura members enhance the formal judiciary's influence on conflict resolution in the communities. Local Peace Shuras that deal exclusively with conflict resolution seem to be the most effective forum for such cooperation: through meetings on a regular basis judges and attorneys that are members of such specialized councils have a possibility to monitor informal conflict resolution and facilitate the transfer of information on single cases and the referral of cases between the two systems. Parallel male and female Shura sections increase the possibilities of women to gain access to justice and enhance their role in conflict resolution matters. Peace Shuras and other permanent bodies dealing with disputes and other aspects of conflict⁷⁵ are eligible counterpart mechanisms on the community side for the courts, preferable to the CDCs⁷⁶ which concentrate on the distribution of funds and the coordination of community development because conflict resolution and the consideration of rights principles (state's law, Islamic law as well as Human Rights) profit from routine.

Capacity building measures can address problematic aspects of customary law and facilitate the coordination of formal and informal judiciary.

For the near future it cannot be assumed that state justice units or other institutions could be able to record the outcomes of local Shuras' dispute resolution activities countrywide and monitor them as to their consistency with Afghan law or Human Rights principles. Until this is the case, these law principles need to be fostered through an approach that focuses on the Shura/Jirga structures themselves. Capacity building measures for Shura

⁷⁴ See Axel Schwarz (2005), p 267 on the unclear relation between the two legal concepts in the Constitution of Afghanistan of 2004

⁷⁵ E.g. sub-committees to the CDCs dealing with conflict resolution

⁷⁶ and other forms of development councils like village water committees, farmers' associations etc.

members who are mediating conflicts can facilitate a formal coordination with the courts, e.g. through introduction of formal case recording customs or clear case referral rules. Basic training on the law system and on the consistency/inconsistency of traditional law rules with Afghan law can help to avoid Human Rights violations. Joint seminars of council members and court officials can produce practical terms of competencies, referral and coordination.

Explicit interest of the local Shuras to cooperate more closely with the formal judiciary.

There is an explicit interest of local Shura members to get linked more closely to the formal judiciary in order to enhance their authority and the acceptance of their solutions with view to influential members in their communities and to increase their professionalism. A formalized coordination would not only strengthen both systems' efficiency but also provide a better control of the council activities for the courts – and by that strengthen the rule of law.

Methodology of the survey

General survey conditions

In rural Afghanistan communication habits pose several challenges to those who conduct a survey about the people's opinions and attitudes.

Generally, harmony plays a crucial role and is strived for in interviews alike all other forms of communication. Apart from a rather indirect communication style which results from this obligingness, courtesy and good understanding dominate especially the beginning of a conversation in order to prepare a common ground and a positive atmosphere between the communicating people. Often, interviewees tend to accommodate the interviewer with their response of which they assume it will please him the most.

In order to avoid pleasing replies, questions were put in a form as open as possible. The question form confronting the respondent with a statement and leaving him the choice to either strongly agree, somewhat agree, somewhat disagree or strongly disagree, despite its advantages in providing quantitative data, was avoided in favor of more open questions ("Some people say... others say... -what is your opinion about that?"). In an introduction to each individual interview respondent (and at the introduction round to each focus group discussion), broad explanation about the survey was given and any questions about it from interviewees' side answered. Emphasis was given on that there were no right or wrong answers to any of the questions and that the interviewees' personal views were counting.

Towards outsiders who are conducting interviews the population in rural areas of Afghanistan is generally not very open. Information about community issues or own opinions is not always frankly shared and there is often a general mistrust towards outsiders who are collecting information. Experience with previous research projects in rural Afghanistan shows that especially an interview setting in which a respondent faces two interviewers one of whom is noting her/his answers leads to a shy behavior or even mistrust. It seems that many people are not comfortable with the feeling that other community members may spread rumors after having noticed them speaking with interviewers from outside the community.

Therefore, special precautions were taken to promote an open interview atmosphere and to receive answers as frank as possible: The individual interviews were conducted less individual than usually but open to others. The initiated communication process made community members familiar with formal conflict resolution bodies and presumably enhanced their ability to rate advantages, shortfalls and further potential for cooperation/coordination.

Coverage

Ethnically divers, the surveyed areas include communities with a background of heavy combats during the civil war in the 1990s that today are confronted with refugee return (Qarabagh), communities with strict gender segregation where women could not be

involved in any form of council structures so far (Logar province), target areas with relatively high education level and greater possibilities for women to participate in community issues (Robatsangi and Karokh in Herat province) and areas where men and women are active in mixed Shuras. The survey findings give a reliable picture of the situation in these four provinces which can be translated to other provinces of the Central, East Central, Western and Northern regions. However, it must be kept in mind that the findings do not reflect the situation in all regions of Afghanistan which differs significantly and that the role of traditional council structures in urban centers of Afghanistan is different (see, e.g. The Asia Foundation (2007), p. 71).

121 interviews were conducted, 30 per province (31 Kabul province). The interviewees were randomly selected among the community population. Starting at gathering places in the village centers a route through the village was followed by the interviewer teams. Passers-by and working people met on the way were selected as interviewees, houses next to that way were chosen to interview local residents. Care was taken that a representative number of women and youth was achieved among the interviewees, at the same it had to be reflected the fact that the decisions on how to deal with conflicts a family is involved in is taken by male members in most of the cases: of the 121 individually interviewed people 30 were women, 91 were male. Care was also taken that the interviewees were educated enough to answer the questions.

Additionally, 11 focus group discussions were moderated in the covered districts, 6 with male, 3 two with female, another 2 with participants of both sexes. The participants were selected among Shura members with experience and knowledge in dispute resolution in respective communities and educated people (e.g. teachers). Each focus group discussion had 14-30 participants. Altogether 218 people participated in the focus group discussions (131 male, 87 female). The focus group discussions were moderated on the basis of a questionnaire less comprehensive than the one for the individual interviews. Certain questions that would most probably have overtaxed randomly selected interviewees, e.g. about the perspectives of a future cooperation of informal and formal judiciary, were only asked in the focus group discussions where Peace Shura members' and Shura members' knowledge could be brought in. Serving also as a control tool, the focus group discussions were additionally asked questions identical to those in the individual interviews. Answers to these questions were mentioned in the findings only if they contained different aspects.

Each interview and focus group discussion was conducted by a team of two interviewers. During a preparatory workshop, a survey strategy was developed focusing on interviewing and moderation techniques and the random sampling method. Here, field staff experienced in field research were chosen for the survey and made familiar with the questionnaires. The random sampling methods were harmonized here as well.

The survey in the field was conducted from 6 - 30 April 2008.

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