



The Asia Foundation



[ OCCASIONAL PAPER NO. 16, AUGUST 2012 ]

## **JUSTICE AND STATE-BUILDING IN AFGHANISTAN: STATE VS. SOCIETY VS. TALIBAN**

**Reflections on a Survey of the Afghan People, Part 4 of 4**

*Antonio Giustozzi, Independent Researcher,  
The London School of Economics and Political Science and King's College London*



**The Asia Foundation**

[ OCCASIONAL PAPER, NO. 16, AUGUST 2012 ]

## **JUSTICE AND STATE-BUILDING IN AFGHANISTAN: STATE VS. SOCIETY VS. TALIBAN**

Reflections on a Survey of the Afghan People, Part 4 of 4

*Antonio Giustozzi, Independent Researcher,  
The London School of Economics and Political Science and King's College London*

The Asia Foundation's series of Occasional Papers presents a range of ideas and analysis on political, economic, and security challenges facing the Asia-Pacific Region. These are working papers—truly works in progress—meant to spark discussion and debate within the international development community about strategies and approaches that can deliver positive impact on the ground. They are part of the conversation going on daily at the Foundation, and meant to be shared widely in the hope of advancing knowledge and best practices in the field. The views expressed in this series are those of the authors.



## **The Asia Foundation**

The Asia Foundation is a nonprofit, nongovernmental organization committed to the development of a peaceful, prosperous, just, and open Asia-Pacific region. The Foundation supports Asian initiatives to improve governance and law; women's empowerment; economic development; the environment; and regional cooperation. Drawing on nearly 60 years of experience in Asia, the Foundation collaborates with private and public partners to support leadership and institutional development, exchanges, and policy research.

[www.asiafoundation.org](http://www.asiafoundation.org)

© Antonio Giustozzi

## **ABOUT THE SERIES**

*Justice and State-Building in Afghanistan: State vs. Society vs. Taliban* is one of a series of analytical papers on The Asia Foundation's recently released public-opinion survey, *Afghanistan in 2011: A Survey of the Afghan People*. The series of essays provide detailed analysis of the survey data on the opinions and perceptions of Afghans toward government, public policy, democracy, and political and social change as interpreted by specialists who have in-depth knowledge of the region. The contributors comment on trends, patterns, and variations owing to Afghan geography, ethnicity, and other factors, and offer policy advice with a long-term view on the future of Afghanistan.

## **ABOUT THE AUTHOR**

Dr Antonio Giustozzi is an independent researcher associated with The London School of Economics and Political Science and King's College London. He is the author of several articles and papers on Afghanistan, as well as of three books, *War, Politics and Society in Afghanistan, 1978-1992*, *Koran, Kalashnikov and Laptop: the Neo-Taliban Insurgency, 2002-7*, and *Empires of Mud: War and Warlords in Afghanistan*. He also edited the volume on the Taliban, *Decoding the New Taliban*. Dr. Giustozzi is currently researching issues of governance in Afghanistan, from a wide-range of perspectives including understanding the role of army, police, sub-national governance, and intelligence system.

## **TABLE OF CONTENTS**

<b>INTRODUCTION .....</b>	<b>1</b>
<b>THE CRIMINAL DIMENSION OF JUSTICE.....</b>	<b>1</b>
<b>THE DISPUTE DIMENSION .....</b>	<b>14</b>
<b>CONCLUSION .....</b>	<b>20</b>

## **INTRODUCTION**

The functional administration of justice is an essential aspect of state-building and Afghanistan is no exception. A typical pattern of state development sees the state establishing control through the expropriation of the village communities' ability to administer justice themselves;<sup>1</sup> and in a sense, this creates a natural competition between state-administered justice and customary justice. This is particularly the case of criminal justice. Dispute resolution, on the other hand, is somewhat more problematic for the state to monopolise, both because of the huge workload and because if mishandled it can leave too many people unhappy.

In Afghanistan, the process of creating a state judiciary has developed slowly, first through the gradual assertion of state control over sharia courts starting from the reign of Abdur Rahman (1880-1900) and then with the development of a state-trained judiciary during the 20<sup>th</sup> century. On the eve of the 33-years-long series of conflict started in 1978, the state still did not claim monopoly over the judiciary, let alone effectively own it.<sup>2</sup> The series of wars then inevitably reduced the reach of the state judiciary, particularly in the countryside. Much of what had been done in terms of centralising the judiciary under state control for a century was lost during the following quarter of a century.

In early 2002 the judicial sector was in principle quickly re-activated, at least in terms of re-opening state courts and prosecutor offices in the provinces and districts. Staffing these courts and prosecutor offices adequately and even more importantly effectively supervising their work turned out to be a major problem, both because of the lack of qualified personnel, the low salaries being offered and the political interference of lobbies and interest groups. Even successfully re-establishing the pre-1978 system would likely have turned out to be inadequate, as Afghanistan changed rapidly after 2001. The emergence of a much larger business sector than even before contributed to the strain on the judicial system; among other things, the amount of cash circulating in the economy meant the potential for corrupting state officials was much greater than before.

This paper tries to assess where the effort to establish a state judiciary stood in 2011, as far as the perceptions of the Afghan population are concerned. The chapter is split into two sections, one dealing with the fight against criminality and the other with dispute resolution.

## **THE CRIMINAL DIMENSION OF JUSTICE**

### **Crime in Afghanistan**

A discussion of the justice sector should start with an assessment of the level and character of violent criminal activities in the country. Re-establishing a state judiciary in Afghanistan has faced a series of problems, among which the most important ones are the pervasive and widespread presence of non-state armed groups, almost always funding themselves through illegal activities. Mostly deriving from the militias that

---

<sup>1</sup>See A. Giustozzi, *The art of coercion*, London : Hurst, 2011, pp.

<sup>2</sup>Ramin Moschtaghi, "Organisation and jurisdiction of the newly established Afghan courts," in A. von Bogdandy and R. Wolfrum, *Max Planck Yearbook of United Nations Law*, The Hague: Brill, 2006, pp. 531-90.

fought the civil wars of 1992-2001, these illegal armed groups have in many cases turned into criminal gangs dedicated to crime and keeping political connections for the purpose of securing political protection from prosecution. Still, the militia background of these gangs is important because it explains the origins of their political connections: the political organisations behind the militias deeply infiltrated the Afghan state in 2002 and maintain a very strong presence within it. At the same time, faced with an uncertain future, these military-political organisations want to maintain as wide a constituency as possible among armed gangs, hence the willingness to provide protection to unsavoury allies such as pure criminals.

The Asia Foundation's 2011 Survey of the Afghan People provides an insight into whether people have experienced violence or been the victim of a criminal act in a climate where people access both the formal and informal legal systems.

*Table 1. Have you or has anyone in your family been a victim of violence or of some criminal act in your home or community in the past year?*

	2008 (%)	2009 (%)	2010 (%)	2011 (%)
<b>All</b>	16	17	17	22
<b>Central/Kabul</b>	13	12	11	11
<b>East</b>	19	22	18	26
<b>South East</b>	21	26	34	38
<b>South West</b>	22	25	25	31
<b>West</b>	17	25	21	24
<b>North East</b>	15	12	20	23
<b>Central /Hazarajat</b>	4	10	2	7
<b>North West</b>	11	6	6	15

*Figure 2. Victim of violence or some criminal act in 2006 (Q-18)*

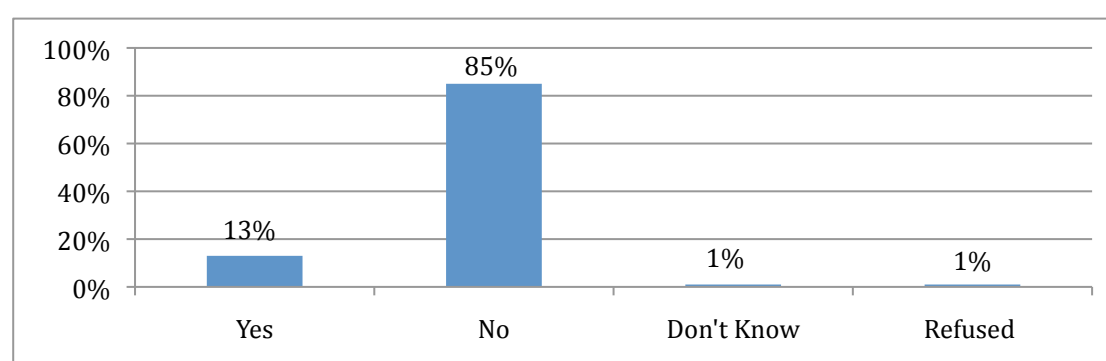
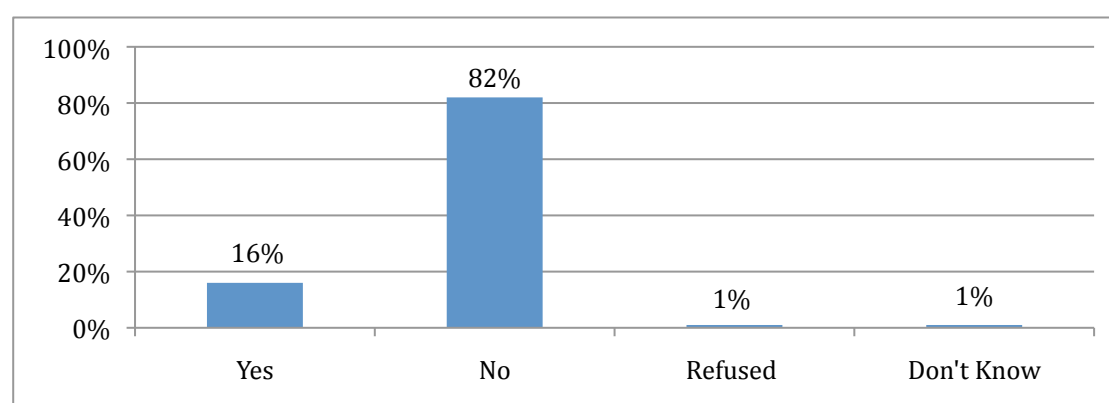


Figure 3. Victim of violence or some criminal act in 2007 (Q-19)



From a quantitative point of view, the data collected through The Asia Foundation survey seems to show a rapid expansion of criminal activities in Afghanistan since 2006, with 22% of the population having been affected in 2011, compared to 13% in 2006 (Tables 1-3).

The level of reported crime is much higher in the rural areas than in the cities, which is unsurprising given what is said above about the presence of illegal armed groups, mostly based in the countryside. However, the increase in 2006-11 has been as strong in the rural areas (from 15% to 22%) as it has been in the cities, where it rose from 8% to 12%. The increase has been uneven between regions, with the central region/Kabul showing a lower incidence of crime in 2011 than it showed in 2008 and all other regions showing strong increases. Considering the strong concentration of police forces (quantitatively and qualitatively) in Kabul, this is not surprising. The South East has seen the steadiest and strongest worsening of the situation, with 38% of the population having been affected by a crime in 2011 compared to 21% in 2008, when it was already one of the worst affected regions. The South West does not seem to have benefited from the much stronger deployment of foreign and Afghan troops from 2010 onward and saw a marked worsening in 2011.

Considering there are about 3.5 million households in the country and assuming one criminal act per household, this would suggest around 700,000 criminal acts being carried out each year against Afghan households. According to Q19, 59% of those victims of crimes reported them and of these (Table 5) in 2011 35% were said to have been reported to the police, which should still leave us with about 140,000 criminal cases reported to the police. This is out of all proportion with the actual number of recorded crimes, shown in Figure 1. Although widespread “burking”<sup>3</sup> exists in Afghanistan as it does in Pakistan and India, it is unlikely that it could reach the proportion of 13 in 14 cases not being filed by the police.

<sup>3</sup>A term used in South Asia to refer to the practice of police refusing to file cases.

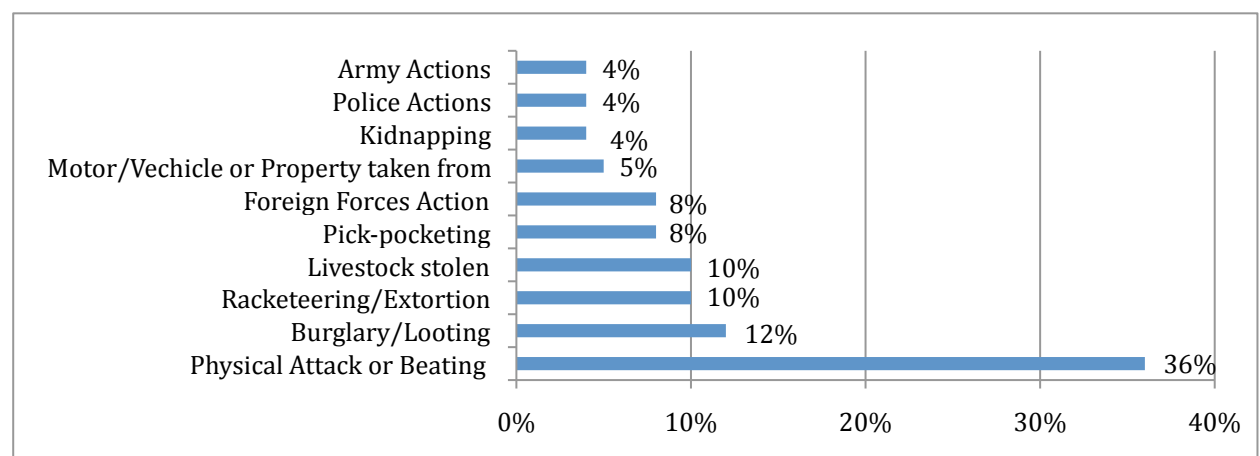


Figure 4. Recorded crimes in Afghanistan, 2002-2010 (1381-1389)



Source: Afghanistan's Ministry of Interior

Figure 5. (Filtered) What kind of violence or crime did you or someone in your family experience in the past year?



It seems clear that there is substantial over-reporting of crimes or over-reporting of filing criminal cases with police, or both. When we look at the breakdown of reported crimes (Table 4), over-reporting becomes even more obvious, for instance: kidnapping is reported by 4% of those surveyed: it would mean 28,000 kidnappings or so a year in Afghanistan, which is not credible. The survey therefore shows a growing perception of insecurity among the population more than the actual incidence of criminal activity.

The growing tendency to report crimes could easily be assumed to be linked to the expanding insurgency. However, reported direct attacks from the belligerent factions stopped increasing in 2010-11 and in fact even started declining. The insurgents were in 2011 reported by the sample as guilty of criminal acts by just 4% of the surveyed individuals, while 13% accused one of the pro-government forces (army 1%, police 5%, and foreign troops 8%). Directly, conflict-related criminality peaked at 25% in

2009, with the lowest percentage being registered in 2006, but 2011 also reported eight percentage points less than in 2009. All other types of crimes declined. The exception was physical beating and aggression, on the rise from 30% in 2006 to 36% in 2011; interestingly this was consistently by far the most common type of crime and seems to suggest a high and rising level of social conflict even beyond the ongoing war. This is in line with the findings about disputes (see below). Otherwise, racketeering, burglary, pick-pocketing, and theft of livestock are the most common types of crimes reported.

Separating these cases from the rest of the crimes is of some importance, because they are not likely to be dealt with by the state judiciary. Since these cases account for a large percentage of all crimes, the inability of the courts to deal with them is a likely factor of deligitimisation for them and of frustration for the population.

### Seeking justice

Having assessed the growing fear of insecurity and crime, the next step is to look at which agencies people are reporting crimes to, if at all. The degree to which the state approaches a monopoly over crime-management demonstrates the strength of its claim to legitimacy and its territorial control. As we have indicated in the previous sub-section, the survey refers more to the perceptions of the Afghan population than to the reality of criminality in the country; the same should be the case concerning any findings in the recourse to justice mechanisms.

*Table 6. (Filtered) To what agency or institution did you report the crime?*

	All	Central/ Kabul	East	South East	South West	West	North East	Central/ Hazarajat	North West
<b>Afghan National Army</b>	12	6	25	18	17	6	6	0	7
<b>Afghan National Police</b>	35	46	40	25	32	26	48	30	32
<b>Shura/elders</b>	25	18	15	29	30	35	18	20	25
<b>District Governor/ Woleswal</b>	12	18	14	11	5	15	11	10	13
<b>Tribal leader / Malik</b>	10	1	14	16	9	6	9	10	12
<b>Mullahs</b>	6	1	0	10	5	9	3	0	12

Table 7.

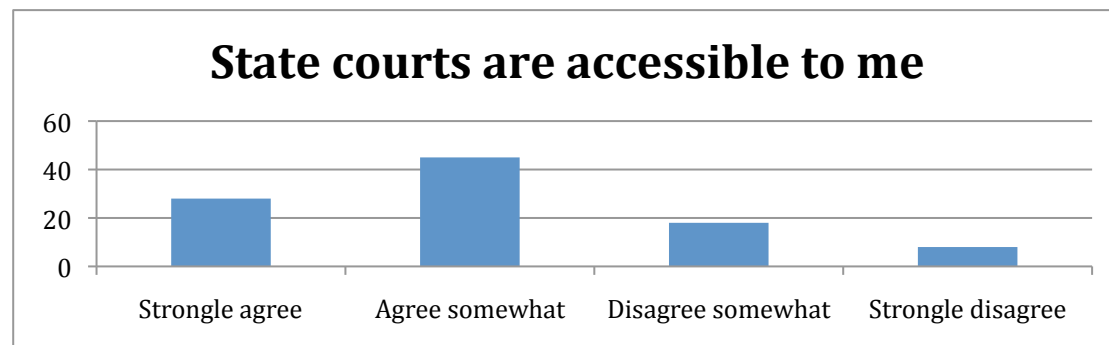
Reported Crime (to) decreased	Different Years Compared			
	2006	2011	2007	2011
To police	63%	35%	-	-
To local State Administration	-	-	25%	12%
To public Prosecutors	7%	1%	-	-
To the Central Government	4%	0		

While the police remain the prime recipient of crime reports, the percentage of those claiming to have reported a crime to the police fell from 63% in 2006 to 35% in 2011. Similarly the number of those claiming to have reported a crime to the local state administration has fallen from 25% in 2007 to 12% in 2011. The role of tribal leaders and *maliks*, usually identified as influential individuals linked to the government, has also been declining from 21% to 10%; local pro-government militias similarly declined from 6% to 2%. The decline of crime reporting to the public prosecutor has declined even more dramatically according to the survey: from 7% in 2006 to 1% in 2011; “central government” has decreased from 4% to a negligible number. Local warlords and commanders, who generally speaking also tend to be (loosely) aligned with the government, have also seen their role decline from 6% to 1%. Only the Afghanistan National Army (ANA) has remained stable in terms of the number reporting crimes to them; the ANA, however, has grown in size five times and expanded its operations geographically so dramatically between 2006 and 2011 that the stable percentage indicates a declining propensity to report crimes to them (Tables 5-6).

Overall this suggests a massive decline in reporting to government agencies or anybody connected to the government (overall from 132% in 2006 to 77% in 2011). Because responses to multiple agencies were included as options in the survey, the totals do not mean much, but the trends do seem to suggest a very strong loss of faith in the government. By contrast, *shuras* of elders seem to have risen in popularity, as the percentage of claiming to report crimes to them rose from 16% in 2006 to 25% in 2011. The role of mullahs and sharia courts seems to have remained more or less stable during the period, although with big fluctuations (4-11%).

One factor that may explain the decline in reporting crimes to government agencies and at the same time explain the rising tendency to rely on *shuras* could be the loss of territorial control by the government, which we know from other sources occurred at an accelerated pace from 2006 onward. However, according to Table 7, the accessibility of state courts to those being surveyed has not declined during 2007-2011, which seems to contradict the impact of territorial control. If we view this finding as accurate (more on why this is problematic below), the only other explanation for the declining reliance on state agencies is a reduction of trust in them, which also clashes with other findings of the survey.

Figure 8. Tell me, do you strongly agree, agree somewhat, disagree somewhat, or strongly disagree with the following statements about State Courts? ...State Courts are accessible to me.



It is worth noting that the percentage of those who admit to report crimes to the Taliban is negligible: in 2011, of those surveyed only 2% of Hazaras reported having done this. This is surprising since the Taliban's presence in areas inhabited by Hazaras is very modest, especially compared to areas inhabited by Pashtuns, and the Taliban are far less popular among Hazaras compared to all other Afghan ethnic groups. At the same time, when answering other questions Hazaras have shown a rather high degree of "political correctness," avoiding criticism of the government (see on this point Table 14 and the discussion below). It may be a problem of access: the surveyors could not reach out to areas under Taliban control but could reach out to areas on the edge of Taliban control, such as the southern fringes of Hazarajat. A 2010 survey by Integrity Watch Afghanistan found that 2% of all the respondents admitted having taken a case to a Taliban court, more reported than in The Asia Foundation survey but still likely an underestimate. Integrity Watch too acknowledged access difficulties, in particular not being able to survey Paktika and Nuristan.<sup>4</sup>

The access problem is also confirmed by a look at Table 4: crimes committed by militants are reported with greater frequency in the North East (where Taliban activity was mostly limited to 10 districts) than in the South West, which is the region with the strongest Taliban presence, with all districts affected: here merely 1% of those surveyed mentions crimes by the militants. Similarly there is a greater percentage reporting militant crimes in urban settlements than in villages, which should not be the case if the surveyors had complete access.

Since areas of strong Taliban presence are not really being surveyed, it could be inferred that the number of those reporting crimes to the Taliban is largely underestimated. Because the Taliban judges are mullahs, even if not always fully trained ones, it might also be that some of the 4-11% of respondents claiming to have reported the crime to a mullah might in fact have used a Taliban court; however it is worth noticing that the practice of reporting crimes to mullahs is weakest among Pashtuns and strongest among Hazaras, which seems to indicate that Taliban courts do not account for a large portion of these "mullah sahib" indicated by the respondents.

<sup>4</sup>Integrity Watch Afghanistan, "Afghan Perceptions And Experiences Of Corruption, A National Survey 2010," Kabul, p. 77.

Figure 9. If you were a victim of violence or any criminal act, how much confidence would you have that the governmental law-enforcing organizations and judicial systems would punish the guilty party?

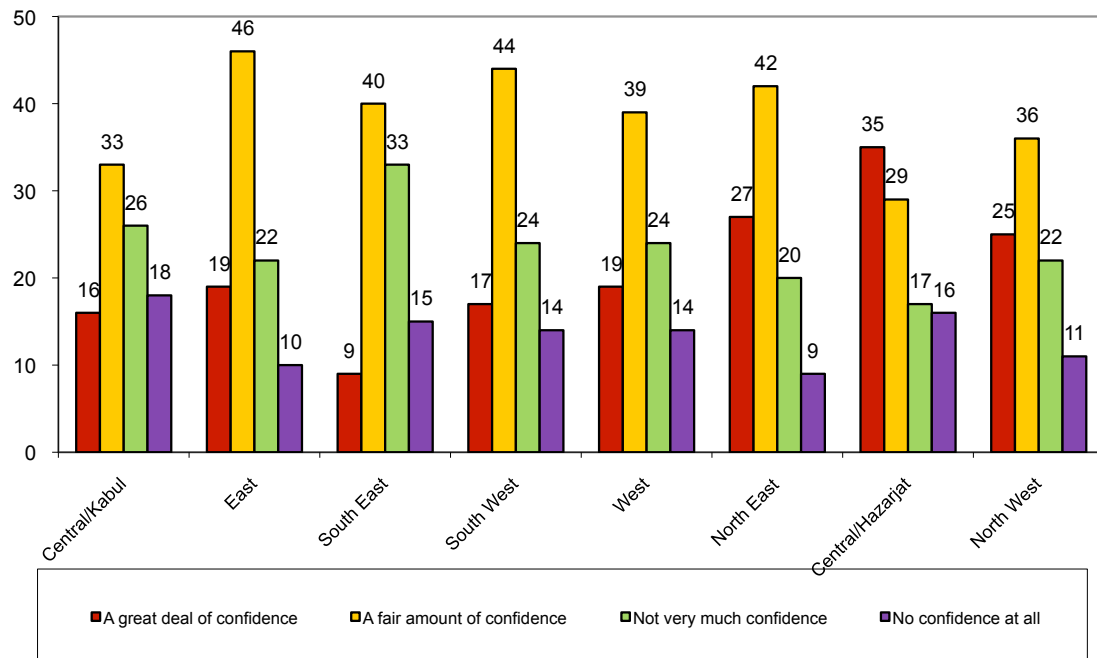


Figure 10. Tell me, do you strongly agree, agree somewhat, disagree somewhat, or strongly disagree with the following statements about State Courts? ...State Courts are fair and trusted.

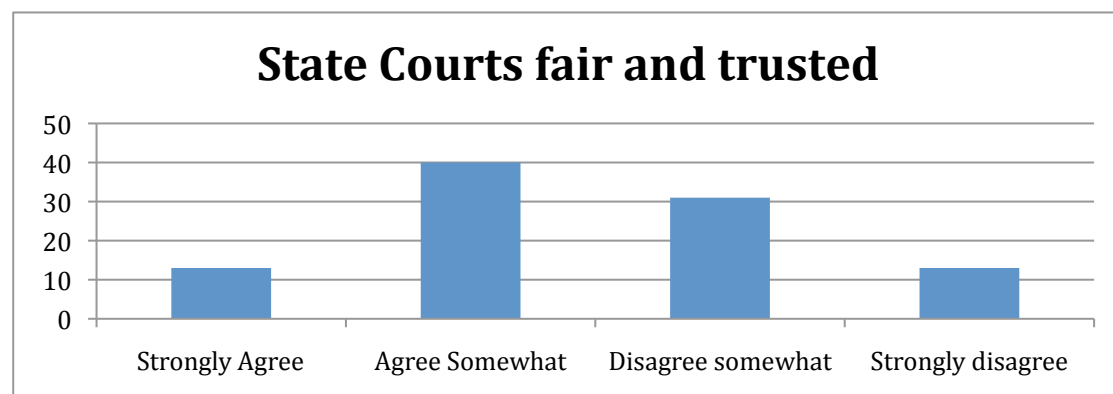


Figure 11. Do you strongly agree, agree somewhat, disagree somewhat, or strongly disagree with the following statements about State Courts? ...State Courts are not corrupt compared to other options of settling a dispute (informal systems such as local jirgas and shuras)

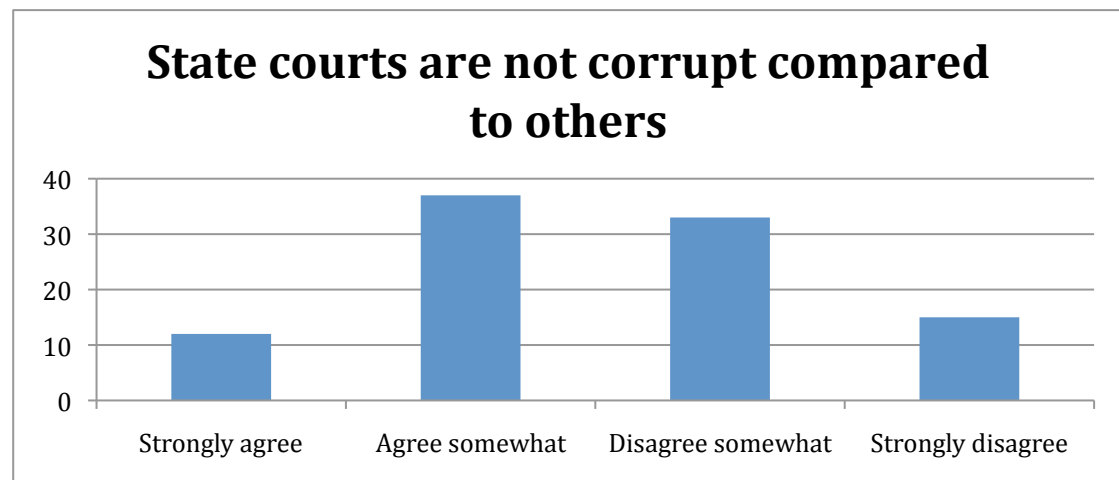


Figure 12. Tell me, do you strongly agree, agree somewhat, disagree somewhat, or strongly disagree with the following statements about State Courts? ...State Courts are effective at delivering justice.

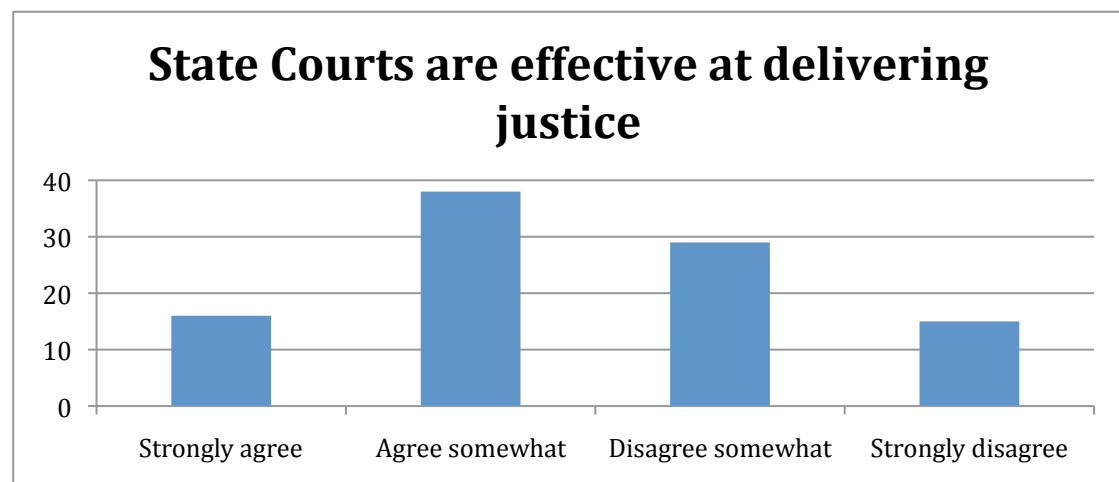


Figure 13. Tell me, do you strongly agree, agree somewhat, disagree somewhat, or strongly disagree with the following statements about State Courts? ...State Courts resolve cases timely and promptly

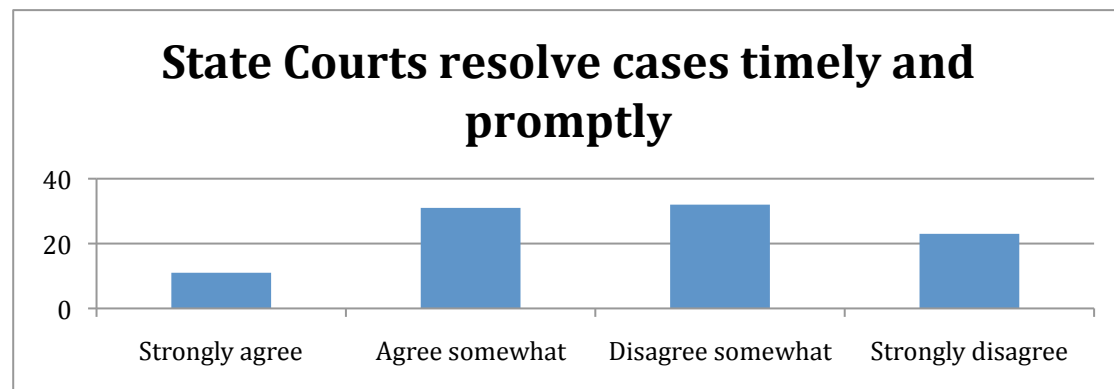
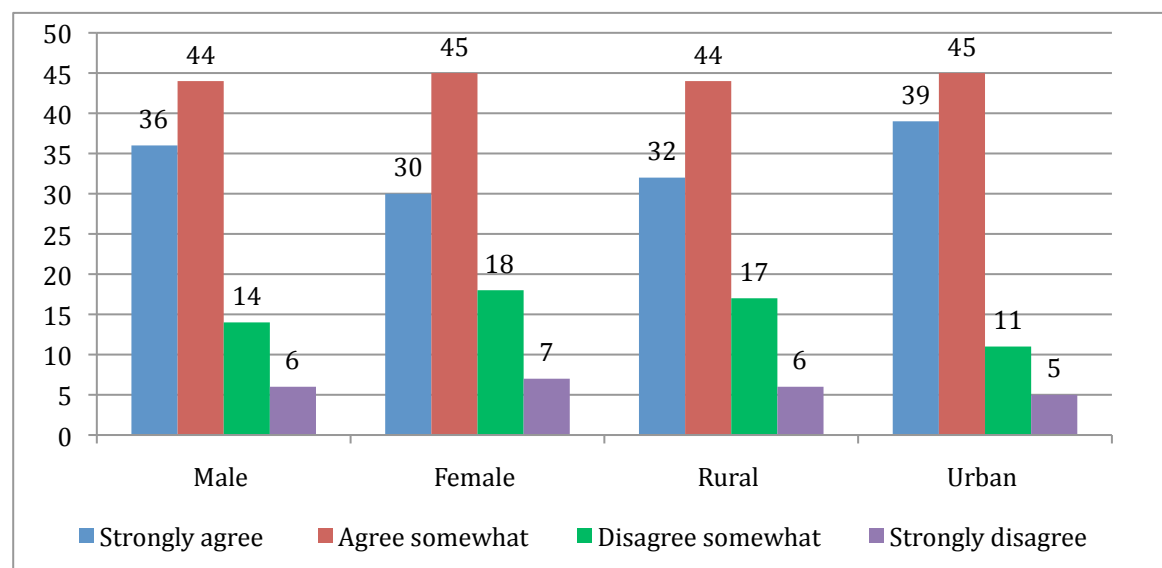


Figure 14. Tell me, do you strongly agree, agree somewhat, disagree somewhat, or strongly disagree with the following statements about State Courts? ...State Courts are accessible to me.



As mentioned already, the trends shown in Tables 5-6 and discussed above seem to show a massive decline of the reliance in government institutions. However, when asked directly about the confidence they have in government law enforcing institutions, respondents showed a significant increase in such trust, from 14% claiming to have much trust in 2006 to 20% in 2011. If we look at Table 9, those agreeing or “somewhat agreeing” that state courts are “fair and trusted” are a large majority and roughly stable in 2007-2011, at 50-58%. Even Table 10 (“state courts are not corrupt compared to other options”) elicits positive answers for the courts, around 50% for each year from 2007-2011. Other surveys have instead found a different picture when they asked whether bribes had been paid: in a United Nations Office on Drugs and Crimes (UNODC) survey, about 18% reported to have paid bribes to judges, and about 14% reported having paid them to prosecutors over a period of 12 months. The percentage of those reporting they have paid bribes to

judges and prosecutors over the years was well over 50%; considering that not all those surveyed will have needed to deal with a judge or a prosecutor in their lives, this is a high percentage indeed.<sup>5</sup>

The same can be said of Table 11 (“state courts are effective at delivering justice”). Perhaps the most surprising answer is Table 12 (“state courts resolve cases timely and promptly”), which is not only at odds with Table 5 but also with evidence of courts taking years to resolve even simple cases.<sup>6</sup>

Similarly, it has to be considered that although most of those surveyed say that state courts are accessible or somewhat accessible (77% in 2011, Table 7 above), in practice we know that in some of the districts throughout the period the courts were not active because of staffing problems (69 in 2010)<sup>7</sup> and that many villagers had to travel for days to reach the nearest state court even in districts where courts were operational. Even among Pashtuns, among whom most unstaffed courts are found, 75% said in 2011 that they had access, practically in line with the national average. The difference in the responses given by urban and rural residents is modest, which adds to the perplexity (see Table 13 for 2011): access should be much greater in urban areas.

The findings in Table 5 and in Tables 7, 9, 10, 11, and 12 clatter, but the explanation for this contradiction may be found in Table 14. Here we see that from 2007 onward consistently almost 70% of those interviewed stated that they see criticising the government in public as unacceptable (29% in 2011) or somewhat unacceptable (39% in 2011). There is therefore a built in cultural and political bias toward expressing negative views on government organisations, which comes out stronger whenever direct questions were asked. Vice-versa, when the individuals surveyed were asked practical questions about how they behave and what choices they make when sorting out problems, such bias is weaker, as we have seen in Table 5.

If only 30% of the respondents are ready to criticise government institutions and another 40% or so hesitates, the approval rates of state courts have an altogether different meaning and as shown in the tables they are strongly inflated. In this regard, Table 5 probably portrays a closer picture of the average Afghan’s attitude to state courts, particularly where this trend is concerned. It should be added that uncontroversial evidence such as the number of cases processed by the attorney general’s office show that in fact only a small portion of all crimes committed in Afghanistan actually gets reported to state agencies. This might lead one to surmise that when those surveyed indicated reporting crimes to state agencies they were often giving the “politically correct” answer to the surveyors.

Indeed if we filter the data according to the questions provided to the question ‘It is generally not acceptable to talk negatively about the Government in public’, we see that those willing to criticise the government in public express a lower opinion of state courts (Table 14b).

---

<sup>5</sup>UNODC, *Corruption in Afghanistan: Bribery as reported by the victims*, Kabul, 2010.

<sup>6</sup>Thomas Barfield, “Informal Dispute Resolution and the Formal Legal System in Contemporary Northern Afghanistan,” Washington, USIP, 2006; Martin Lau, “Afghanistan’s Legal System and its Compatibility with International Human Rights Standards,” International Commission of Jurists, n.d.

<sup>7</sup>International Crisis Groups, “Reforming Afghanistan’s Broken Judiciary,” Asia Report N°195, Bruxelles, – 17 November 2010, p. 24.



Table 14b. Please tell me how much confidence you have in each organization and official to perform their jobs...the Government Justice system? Cross-tabulation

	A great deal of confidence	A fair amount of confidence	Not very much confidence	No confidence at all	Don't know (vol.)
Strongly agree	18	44	25	11	1
Agree somewhat	12	44	31	12	1
Disagree somewhat	11	37	35	17	1
Strongly disagree	12	27	28	32	1

The fact that few crimes or disputes are processed through the attorney general's office (12,869 in 2006-2007 according to official statistics) and through the courts means that relatively few Afghans see corruption in these institutions as a major problem (Table 15), as they rely on some alternative justice system, take matters into their own hands or resign to being abused. In 2011, a modest 7% of the respondents indicated the corruption in the courts as the worst form of corruption, a low percentage even taking into account the pro-government bias mentioned above: 39% in fact did not hesitate to mention "administrative corruption" as a problem affecting them. What seems to be a plausible explanation for this difference is that (in contrast with the judicial system) Afghans have often no alternatives to going through the government administration (for an ID, passport, etc.) and therefore see administrative corruption as a bigger problem because it cannot be avoided.

Table 15. Turning to another subject, tell me, do you strongly agree, agree somewhat, disagree somewhat or strongly disagree with the following statements? It is generally not acceptable to talk negatively about the Government in public.

Turning to:	A great deal of confidence	A fair amount of confidence	Not very much confidence	No confidence at all	Refused	Don't know	Total
Strongly agree	18	44	25	11	0	1	100
Agree somewhat	12	44	31	12	0	1	100
Disagree somewhat	11	37	35	17		1	100
Strongly disagree	12	27	28	32	0	1	100

Figure 16.

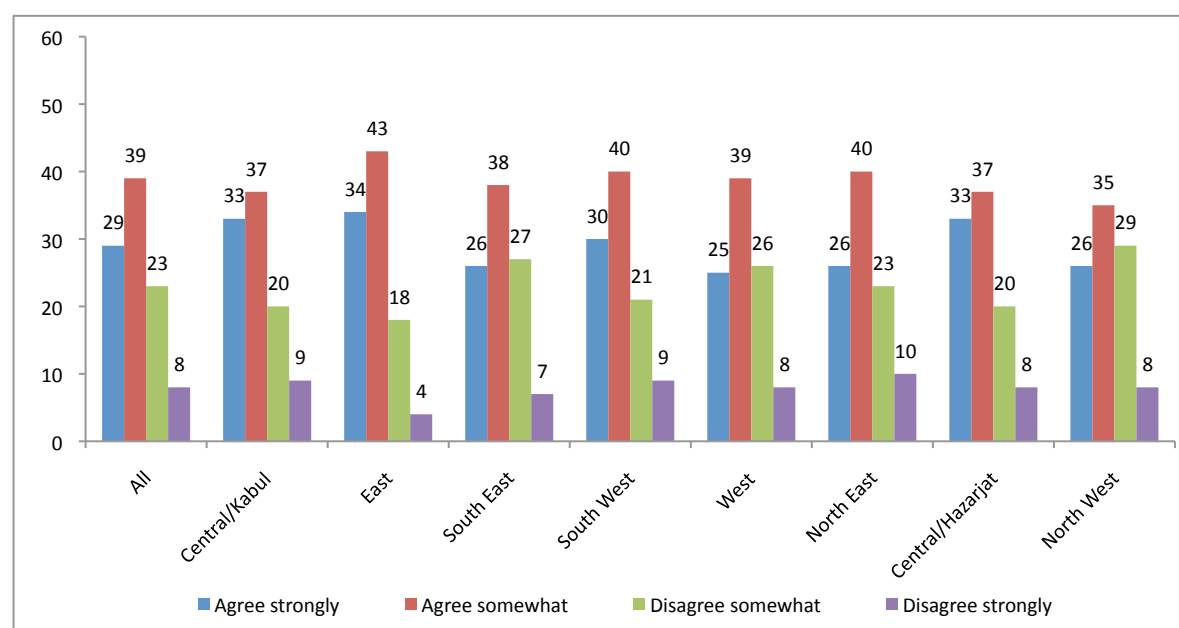


Table 17. On another subject, please, tell me what kind of corruption affects you personally the most? Please give me two examples? - Cumulative of two mentioned

Kind of Corruption	All	Central/Kabul	East	South East	South West	West	North East	Central/Hazarajat	North West
Administrative corruption	39	32	43	41	46	44	45	29	32
Bribes	17	21	19	14	28	15	8	16	13
Moral corruption	13	8	4	16	1	24	27	15	6
Corruption in the police	8	7	5	16	6	4	9	7	8
Corruption in the court	7	5	8	10	5	3	10	0	10
Corruption in education systems	5	3	8	5	2	2	6	9	9

Corruption in the prosecutor's office appears to attract even less attention among the respondents; this is not so surprising if we take into consideration the point made above, because while citizens will come in contact with courts to settle disputes, prosecutors are only in touch with citizens when criminal cases are investigated. The alternative explanation, that prosecutor offices are not seriously affected by corruption, does not hold: When the 12 prosecutors in the attorney general's anti-corruption unit were asked in a 2009 polygraph test whether they had either taken a bribe or had worked for insurgent groups within the last two years, results indicated that 90% probably had been involved in graft schemes or were linked to insurgents.<sup>8</sup>

<sup>8</sup>ICG p. 26.

Because of what has been argued above about access, we can estimate that the findings of the survey apply really to those parts of Afghanistan that are not under the control of the insurgents. At this time, it is speculated that would include perhaps three-quarters of the population.<sup>9</sup>

Ongoing research in insurgent-controlled or heavily influenced areas of Afghanistan suggests that approaching government or pro-government organisations for justice is not possible because the Taliban enforce a strict ban. In such areas, even accessing customary justice is difficult, because the Taliban tend to see justice on criminal matters as within their purview, particularly when serious crimes have taken place. They are happy to leave dispute resolution to *shuras* and elders. It should be kept in mind that, as it emerges from the tables as well, some types of crimes are also considered “disputes” and not crimes; in the case of the Taliban, they also tend to leave these types of petty crimes or misbehaviour to the resolution of elders.<sup>10</sup>

In sum, the reach of the Afghan state in terms of administering criminal justice appears to have contracted during 2007-2011, even faster than the expansion of the insurgency would have led us to think. In particular, the contraction affected urban areas as well, which with a few exceptions (mainly Kandahar) are rarely affected by the presence of insurgents.

## **THE DISPUTE DIMENSION**

### **Disputes in Afghanistan**

Dealing with criminality is a key issue for any state, as argued above. However, it is far from exhaustive among the judicial tasks assigned to state courts and other government agencies. Dispute resolution is important not just because it is essential to maintaining a degree of public order, but also because it allows the state to build up influence and create a link with local communities. A dispute resolved by the state risks falling apart if state influence wanes; therefore, the local beneficiaries have a vested interest in supporting the state. On the other hand, if the state was perceived to interfere in disputes unfairly, this could backfire badly and give rise to strong opposition.

More than 30 years of war in Afghanistan has inevitably led to an explosion of conflicts between families and between communities, as millions of returnees flowed back to the country and tried to recover abandoned property, or the changing economic situation provided incentives for material and financial accumulation that were not there before the war.<sup>11</sup>

---

<sup>9</sup>See map on p. 7 of Anthony H. Cordesman, “The Afghan War -Part One: Shaping the Campaign,” Washington: CSIS, 2010.

<sup>10</sup>This ongoing project is going to be published by Integrity Watch Afghanistan in 2012.

<sup>11</sup>“Land and property disputes in Eastern Afghanistan” ([http://www.internal-displacement.org/8025708F004CE90B/\(httpDocuments\)/3E2AD065B3616B2D802570B7005876F4/\\$file/Land\\_disputes\\_NRC\\_june04.pdf](http://www.internal-displacement.org/8025708F004CE90B/(httpDocuments)/3E2AD065B3616B2D802570B7005876F4/$file/Land_disputes_NRC_june04.pdf)), Norwegian Refugee Council, Oslo, 2006; “Land and property disputes in Northern Afghanistan,” Norwegian Refugee Council, Oslo, 2006.

Figure 18. In the past two years, has your community had such a problem in your area that you had to ask for help or cooperation to resolve it?

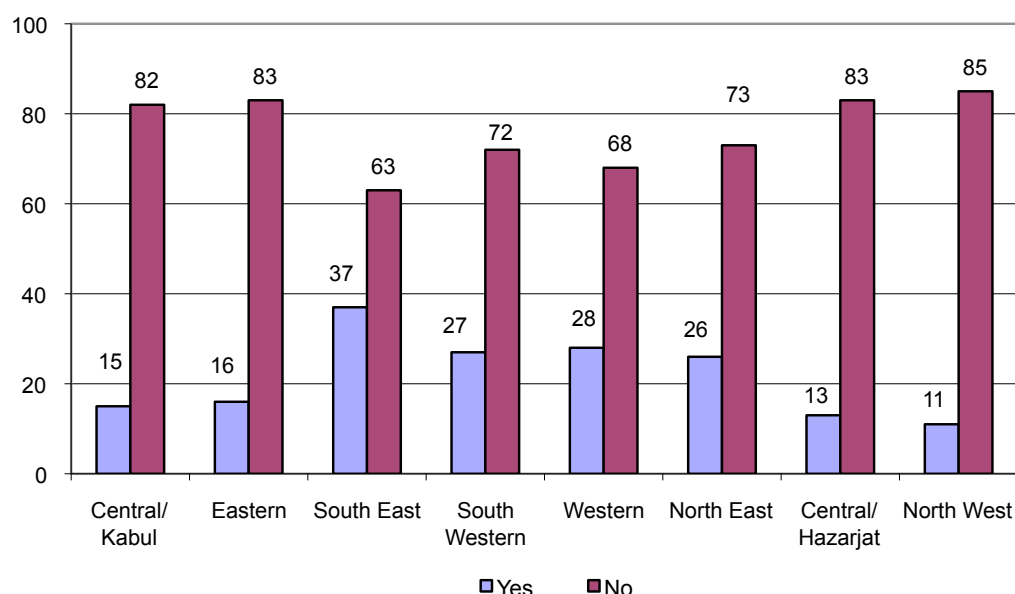
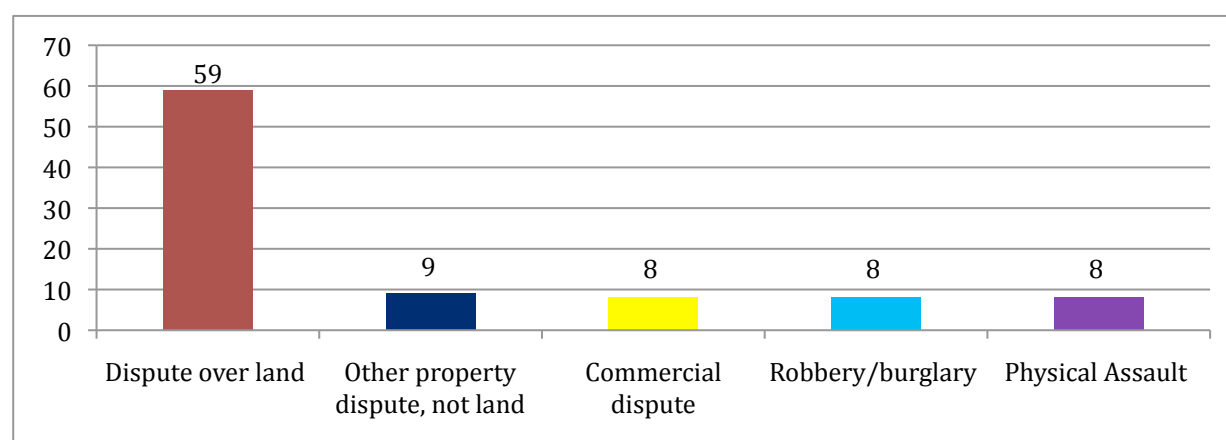


Figure 19. (Filtered. Ask all with case or dispute, answer "1" in Q-73) What kind of a case or dispute was it? (If More Than One Case Or Dispute, Ask For The Most Recent One)



According to the survey, the trend appears to have been (among ups and downs) an increase in the frequency of disputes: 20% reported having been involved in a “problem” in 2011, the highest percentage since 2007. Of these, about 27% were disputes (strictly defined) of various types, but predominantly over land (Table 16). Many disputes are among communities (as opposed as to between families) and therefore a single dispute can involve hundreds and even thousand of families. There is no hard data to compare these findings, but anecdotal evidence suggests that disputes are frequent in Afghanistan and can last several years, so these percentages do not appear to be unrealistic.<sup>12</sup>

<sup>12</sup>See footnote 11 above.

It is worth noting that even when asked specifically about disputes, respondents include murders, theft, and physical assaults among the types of disputes they had to face (Table 17). Together, in 2011 they accounted for 20% of so-called disputes being reported by those surveyed. Arguably, when criminal acts are rated as ‘disputes’ the rule of law is weak or absent: crime is a concept that only makes sense when the state has established itself and imposed a legal order.

## Seeking resolutions

Table 20. (Filtered. If answered 'Yes' to Q-73) Where have you taken this case or dispute?

	Central/ Kabul (%)	East (%)	South East (%)	South West (%)	West (%)	North East (%)	North West (%)
State court	33	43	39	55	41	29	45
Village, neighbourhood- based-shura/jirga	47	44	51	38	43	43	36
Both	15	10	7	5	11	20	16

Contrary to criminality, states rarely assume the burden of dispute resolution; even in industrialised, economically developed countries much dispute resolution takes place without involving the state at all. Therefore, we should not set the bar for dispute resolution as high as we do in the case of crime management in Afghanistan.

According to the survey, those who had disputes (note that not all included in Table 18 had disputes, as indicated above) claimed to have predominantly taken action through a state court (41%), with another 12% claiming to have used both state courts and *shuras*. If true, these would be high levels of state involvement in dispute resolution if compared worldwide. *Shuras* accounted for 43% of the answers. Unfortunately this is not plausible, as the caseload of state courts is nowhere near comparable to the number of disputes that this would imply (tens of thousands). We should therefore assume that these are “politically correct” answers again: respondents provided the correct answer from the state perspective, even if in practice they were behaving otherwise. According to the answers given, the role of state courts would have been enhanced from 2006 onward: in 2006 those responding positively about state courts were just 20%, although at that time the question was formulated in a different way and the answers are not directly comparable.<sup>13</sup>

<sup>13</sup>In 2006 more alternatives were given and not just state courts/shuras; tribal elders, mullahs, local elders, and shuras were all given as options.

Table 21. (Filtered, if "VILLAGE, NEIGHBORHOOD BASED SHURA/JIRGA" in Q-75) What made you decide to take your dispute to the shura/jirga vs. state court?

Base: Contacted village/ neighbourhood Shura/ Jirga 537	%
Because local shuras are honest	16
Are not related to the courts	6
Security problems	3
Land dispute	1
Corruption in government courts	21
Resolve disputes efficiently	26
Decisions of shuras are based on Islamic laws	1
Local elders are members of the shura	10
No government courts in the area	4
My family and friends recommended it	1
Refused	*
Don't know	12

Table 22. Percentage of respondents who agree (combination of strongly agree and somewhat agree) with various statements related to state courts and shura/jirga

	Agree	
	State Court %	Shura/ Jirga %
<b>Are accessible to me</b>	77	87
<b>Are fair and trusted</b>	59	79
<b>Follow the local norms and values of our people</b>	57	75
<b>Are effective at delivering justice</b>	58	73
<b>Resolve cases timely and promptly</b>	47	72

Table 23. Multi-year. (Filtered, if "VILLAGE, NEIGHBORHOOD BASED SHURA/JIRGA" in Q-75)  
What made you decide to take your dispute to the shura/jirga vs. state court? A comparison of shura/jirga vs State Court in 2007, 2008, 2009, 2010 AND 2011.

	2007 %		2008 %		2009 %		2010 %		2011 %	
	Shuras/Ji rgas	State Courts	Shuras/Ji rgas	State Courts	Shuras/Ji rgas	State Courts	Shuras/Ji rgas	State Courts	Shuras/Ji rgas	State Courts
a) are accessible to me	83	78	76	68	79	68	86	73	87	77
b) are fair and trusted	78	58	70	50	72	50	73	53	79	59
c) follow the local norms and values of our people	76	57	69	50	70	49	70	51	77	57
d) are effective at delivering justice	76	58	69	52	69	51	69	54	75	58
e) resolve cases timely and promptly	72	51	59	38	64	40	66	42	73	47

Given the tendency of those surveyed to respond "diplomatically," there is probably more value in observing trends than in taking percentages at face value. Between 2010 and 2011, opinion seems to have changed greatly among respondents concerning the rationale for preferring *shuras* to state courts: the "honesty" of the *shuras* lost prominence (down from 35% to 16%, Table 19), while their efficiency and speed and the corruption of state courts were cited much more often. It is not clear what could have motivated this shift within just a single year. It is however worth noting that these two questions might be seen as interchangeable to a large extent.

The corruption of the courts seems to be more of a problem among Pashtuns than among other ethnic groups (Table 20). The attempt to expand the reach of state courts in 2010-2011 in the South West, both by staffing some of the vacant positions and by reclaiming territory through a stronger military deployment, does not seem to be the cause of this worsening perception (citizens finally obtaining access to courts and finding an unexpected level of corruption there): in the South West the corruption of the courts was cited least often as a motivations for opting for the *shuras*. It was eastern and south-eastern Pashtuns who were strongly critical of the corruption of the courts.

Figure 25. Tell me do you strongly agree, agree somewhat, disagree somewhat, or strongly disagree with the following statements about the village/neighbourhood based jirgas/shuras?  
... Local jirgas, shuras are fair and trusted.

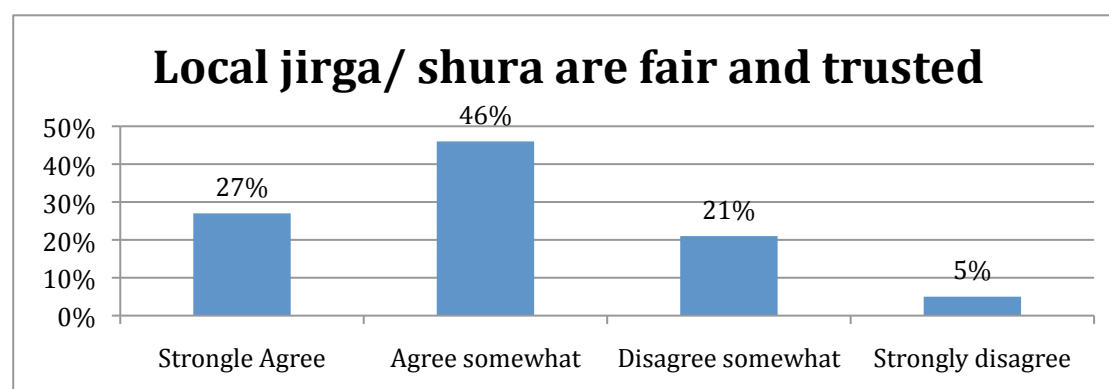
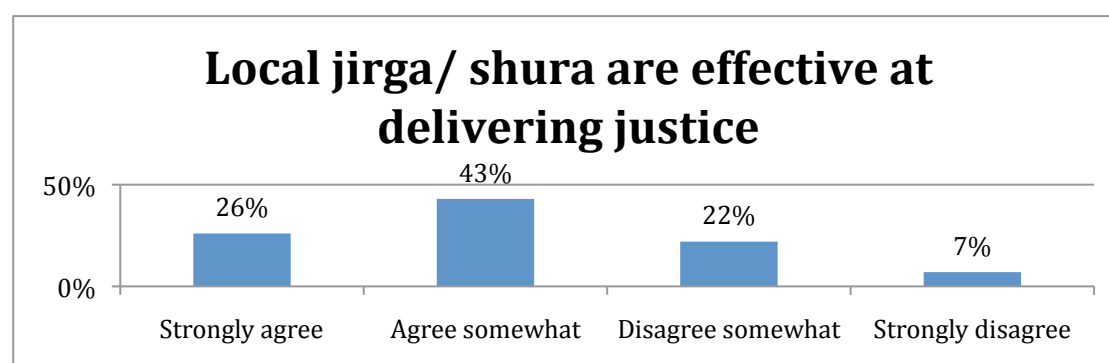


Figure 26. Tell me do you strongly agree, agree somewhat, disagree somewhat, or strongly disagree with the following statements about the village/neighbourhood based jirgas/shuras?  
...Local jirgas, shuras are effective at delivering justice.



The gap between those answering that local *jirgas/shuras* are “fair and trusted” and those saying the same about state courts was about 20 percentage points in 2011. The same gap is 17 percentage points when the question asked is whether the two are “effective at delivering justice” and rises to 26 points when the question asked is “resolve cases timely and promptly.” The two gaps remained steady at around those levels throughout 2007-11. The same stability in the gap is found when the question concerning the effectiveness of the courts and of the *shuras* was asked. This gap is probably the best indicator of the relative attractiveness of state courts and customary justice mechanisms to Afghans. (Tables 9, 12, 21, and 22).

In sum, there is little evidence that the attractiveness of state courts has changed much since 2007; given that Afghans were not relying on them very much in 2007, this is not particularly good news for the Afghan state.



## CONCLUSION

This survey has shown us that there is a growing sense of insecurity among Afghans; crime is probably on the rise, even if not as much as perceived by the respondents. Perhaps the spread of modern mass media has contributed to generate this sense of insecurity, as people are hearing about crimes being committed in different parts of the country and that leaves them with the impression that crime is everywhere and very near all the time. During a 2011 research project that covered 10 provinces throughout Afghanistan, researchers (who included the author of this chapter) asked about cases of attacks on schools. Most of those who answered positively mentioned the same case, which occurred in a province not included in this survey (Nangarhar), and which had been extensively reported on television.

Otherwise, if superficially read, the survey appears positive for the Afghan state and its agencies: the level of positive appreciation is generally high, particularly for a country that is undergoing an armed conflict. As this chapter has shown, however, there is clear evidence of a pro-government bias in the answers provided by the respondents; the clearest evidence comes from the sample concerning their own willingness to criticise the government. The more neutral questions such as where people report crimes (and no value judgement is asked) show instead a steady decline of the propensity to report crimes to state agencies over the years.

Furthermore, like all surveys of this type carried out in a country at war, there are access issues, which appear clearly in the answers to some questions. While all provinces in Afghanistan might be accessible to some degree, in several of them rural areas are mostly under Taliban control. This fact tends to twist the responses to some questions, although it is not possible to say exactly to what extent. The most obvious example of this is the under-reporting of the Taliban's role in administering justice.

There is a discrepancy in the indicators discussed in this chapter, between crime management and dispute resolution. As far as crime is concerned, the trend toward a declining role of the state seems clear. In the case of dispute resolution, instead, the role of the state seems to have been stable from 2007 onward. This discrepancy may be explained with the greater role that customary justice was playing from the beginning in dispute resolution, leaving little ground to the Afghan state to lose.

Probably the strongest indicator of some form of influence of the Afghan state in this survey is, paradoxically, the bias found in giving pro-government answers. After all, the state needs to be feared as much as it needs to be trusted in order to be viable. The unwillingness to criticise the state is a left-over of Afghanistan's undemocratic regimes, but is also a base on which some sense of the state could be re-established if what is now mostly a hollow shell was filled with a functioning bureaucracy. Even the over-reporting of criminal acts could be read as a cry for more state intervention and effectiveness in the justice sector.