The Afghanistan Research and Evaluation Unit

Proceedings of a Roundtable Discussion on Community-Based Dispute Resolution

AREU Board Room, 14 February 2011

February 2011

Following are proceedings of a roundtable discussion on Community-Based Dispute Resolution (CBDR), held in the boardroom of the Afghanistan Research and Evaluation Unit (AREU) on 14 February 2011 with approximately 15 participants. AREU consultant and author Rebecca Gang outlined the comparative findings of two CBDR case studies: one in a rural area in Balkh Province, and another in Kabul City (forthcoming). While AREU staff enjoyed hosting the discussion, the opinions expressed by the participants during the roundtable do not necessarily reflect those of AREU.

Some highlights from Rebecca Gang's presentation

Afghanistan has a long tradition of local self-governance. A historically weak, remote and often corrupt central state has fostered a strong sense of autonomy among local communities. In resolving their disputes, they have thus tended to rely on community-based processes which are seen as legitimate, pragmatic and attuned to local needs over an adversarial, inefficient and often non-existent state justice sector.

AREU's research on CBDR was designed to gain in-depth, qualitative knowledge of:

- Dispute types and processes at the community level
- Principles and sources of authority
- Links between state and non-state actors
- Gender equity and provisions for women in CBDR

Case Studies

The Balkh case study encompassed two relatively isolated and ethnically homogeneous villages with a limited history of displacement. It highlighted the existence of a fairly regular jurisdictional and procedural model: smaller disputes were resolved through family and small scale mediation while larger ones tended to require state-supported enforcement and were seen as needing a greater degree of "formality." The study observed an increasing reliance on formal documentation—especially in land disputes—as well as an expanded space for women to participate in CBDR processes.

By contrast, the Kabul study took place in an ethnically diverse urban area with an extensive history of displacement and exposure to conflict-related violence. The combination of returning refugees from abroad and recent in-migrants from the countryside has created a melting pot of different social norms and systems of dispute resolution. The study documented how CBDR practitioners attempted to combine traditional practices with new and innovative mechanisms to ensure a balance of justice and social stability; this was also influenced by the trend toward institutionalisation by government and non-government actors. In a multi-tiered system, existing *qawm*-based *shuras* were supplemented by a neighbourhood-wide body for resolving disputes across different groups. State and local actors often operated collaboratively to achieve mediated outcomes backed up by the threat of state intervention. However, high-stakes and sometimes intractable cases such as murder or large class actions highlighted persistent and potentially damaging gaps in the system.

Impacts on Women

In both urban and rural areas, the studies showed increased access for women in both CBDR and state process at the district level, although access to knowledge and expectations of deference remained key limiting factors. CBDR practitioners also regularly invoked

Sharia-based rules and real or imagined state laws to protect the rights of women, though these were often dependent on their adherence to expected norms or social obligations.

Key Concepts

In the eyes of community members, dispute resolution outcomes are "just" as far as they are predictable, proportional, and adhere to commonly-shared values, balancing individual rights against community stability. However, an ongoing and uneven shift in these values represents a constant challenge for CBDR practitioners. Although state and community-based dispute resolution operate as points on a continuum as opposed to distinct systems, practitioners on both sides asserted a conceptual split between CBDR, which is seen as "legitimate" but not "legal," and the state sector, which is "legal" or "formal" but often lacks legitimacy. Differences in the perceived value of formal documentation were also observed between Balkh and Kabul. In Balkh, the state's distance lent greater weight to official registration of disputes; in Kabul, people viewed the state with mistrust and placed more emphasis on public recognition of mediated outcomes and the weight they placed on the reputations of those involved.

Conclusions

CBDR is:

- Adaptive to local context
- A balancing between notions of justice and peace
- Somewhat regularised, although less so in Kabul
- Linked to district actors and processes
- Protective of women's rights, with limitations
- A viable form of alternative dispute resolution

Rebecca concluded her presentation by asking what the audience would like to see in the CBDR project's synthesis paper. She also asked for comments on possible lines of future research, outlining an idea for extended research to map out existing procedures within and between state and non-state dispute resolution mechanisms across the country, with an emphasis on dispute type and client type.

Discussion

Q: I'm interested in the *shura-e-mahal* [the local governance body seen in the Kabul case study that drew on different sets of dispute-resolution processes to mediate between claimants from different *qawms*, regions, ethnicities, etc.]. Was there a set of agreed common principles between different *qawms* that it used as a basis for resolving disputes, and was there a formal process of agreeing to such principles?

A: I think there were certain universal concepts—the idea that justice needs to be restorative, that people need to feel whole again, a general hostility toward unjust enrichment, a sense that judgements should be equitable according to their context, and that social factors (such as cases involving poor families or widows) should be considered on a case-by-case basis. Against this framework, disputants then negotiate the inclusion of specific, often customary terms to increase the legitimacy of any mediated outcomes (for example, whether regional practices such as incorporating a fine should be used).

Q: How does this work in terms of scale-up—do you think there are a common set of CBDR principles across Afghanistan? Will it always be ad-hoc when involving people from different systems?

A: Again, I think ideas like *islah* [the principle of peace-building through negotiation and reconciliation], equity, pragmatism and other general principles hold, and in that sense things are replicable. But these are just the basis for negotiating terms on a case-by-case basis, which is in itself an important part of the resolution process as it fosters a sense of ownership, consent and voluntary participation among disputants. It's also important to note that the compromises this process entails aren't as much about trade-offs between Pashtun or Hazara practices as they are about balancing out regional/local practices, individual or group needs, and the nature of the dispute.

Q: I think the point you raise about ethnicity is very important—a lot of research makes distinctions between ethnicities that aren't really there, mapping ethnic conflicts over disputes that are more often over water or land, for example...

A: This is a point that came out time and again without prompting in our interviews in Kabul. Informants and focus group participants would repeatedly stress that disputes were not related to ethnic divides, and specifically rejected this kind of ethnic mapping as something that was manufactured and imposed by factional commanders during the civil war. This isn't to say that ethnicity isn't a factor, just not in the ways that people commonly assume it to be. People in the research site definitely see themselves primarily as Afghan, but the instrumentalisation of ethnicity is a legacy of the civil war and remains an issue. This tends to raise its head in issues over group-based claims in particular—cases that take on the form of class actions—which can ultimately result in people rallying round points of ethnic identity. We thus have a situation where ethnicity is quite strongly rejected as a cause of disputes, but can gain traction as disputes progress as a result of practices learned in the civil war and the ease of relying on ethnicity where group-based distribution of resources is at stake. We saw an example of this in the Kabul data, where access to land for the construction of a mosque was transformed into an ethnic conflict, given that ethnicity is a great mobiliser of people as well as popular advocacy mechanism in Afghan politics.

Q: How were the cases you looked at selected? Were you working from legal records?

A: We built up descriptions based on what our informants told us rather than using documents, recorded proceedings, etc. After initial interviews we tried to create a portrait of each dispute by talking to the different parties involved. Although we tried to triangulate as best we could, sometimes our descriptions were based on information from a single informant. Although we couldn't verify these cases, they were still useful to highlight specific points about how disputes are raised and dealt with in the community. Where there was only one, interested informant, this was noted in the text.

Q: A lot of what you've said resonates with attempts in other parts of the world—colonial-era Kenya, for example—to capture customary law within a statutory framework. From the perspective of the formal system, what does the research say in terms of resolving this tension?

A: I think the codification of customary law is a highly problematic concept because one of the elements that makes it so effective is adaptability. Once you freeze customary law or practices, it's no longer valid and loses its meaning. I think we need to recognise that in Afghanistan 90 percent of people don't want to use the state system 90 percent

of the time. The country has a plural legal system and I think this is appropriate, based on people's notions of justice and fairness. For many people, CBDR is an effective, socially meaningful system and critically, it's not necessarily ad-hoc. While there are certainly pragmatic concerns in play, the system is predictable, it is based on certain norms, and people generally know what the likely outcome of disputes will be.

One possible way forward is building a system for registering the outcome of disputes mediated at the community level. It's important that this be voluntary, both because of logistical challenges to registering decisions taken in often remote villages at the district centre, and because many people aren't interested in having the state reviewing their decisions. For others, however, it may be a useful or reassuring way to have a record of the outcome of their cases that can be used as evidence in front of the state, especially if the disputes are longer-term or larger in scope. I think there is also space for some kind of mechanism of third-party review over community-based decisions. This could potentially involve state courts, or perhaps more productively more neutral bodies such as human rights groups. This is important because there are some community-level decisions that do violate human rights, or are made under duress. The problem at the moment is that the state is too weak to enforce any judgement arising from such reviews, and does not necessarily see CBDR as an equal arm of a plural legal system as much as something to be controlled or even potentially eradicated.

A final point to mention is that legislating social change has been the downfall of government after government in Afghanistan. There is strong evidence to suggest that the kind of customary practices—such as *baad* (the exchange of one or more women to bring an end to hostilities)—that are the cause of so much concern among the international community are declining anyway. I think that any legislative attempt to force the pace of this shift in normative values would be a huge mistake.

Q: There is a lot of discussion at the moment about ways ISAF might be able to exploit informal justice to achieve its goals. Against this background, what are the processes that make CBDR legitimate, and to whom? Isn't there a risk that this kind of strategy could end up delegitimising existing processes?

A: I think there is a danger that the closer community actors and processes get to the government, the less legitimate they appear, and this is one of the problems with the proposed law to formally link state and non-state dispute resolution processes. As it currently stands, the draft law seeks to formalise a new entity of "dispute resolution committees," the principles according to which community-based decision-making must adhere, as well as processes of registration and review of community-based decisions by the courts. For example, in Kabul people expressed great concern at any prospect of community-based dispute resolution actors being paid as this would erode their legitimacy; similar concerns were expressed relative to these actors becoming too closely affiliated with the state. In the case of quasi-government bodies such as NSP *shuras,* community members in the research site described how they went through the motions required by this program in order to display how "legitimate" these bodies are to donors and the international community, while in reality these bodies are stacked with second or third-tier local actors and have little or no authority. The real power-holders just don't want to be associated with state institutions, as maintaining positive reputation is so critical to the functioning of these systems and state institutions are widely perceived as illegitimate and corrupt. This has obvious implications for any attempt to formalise non-state resolution bodies.

Q: I think it's important to note here that dispute-resolution isn't actually part of the remit for NSP *shuras,* though they may take on that responsibility in some cases. In fact,

I think the idea of bringing dispute-resolution and decisions on resource distribution together under a single body is a potentially problematic concentration of power.

Q: One problem with the current debate over drafting a law formally linking state and non-state dispute resolution bodies is the lack of understanding among many state actors with regard to CBDR. Players in both the Afghan government and the international community tend to dismiss CBDR as falling outside of ideas on "rule of law," as it is understood to be ad hoc, unprincipled, and rife with human rights violations. There is definitely a need for research like this to be disseminated more broadly as this is a debate that needs to be better informed [This point was reinforced by several other participants].

A: I think language and framing are really important. There is often a view of CBDR as a "soft" process, of men with long beards sitting in circles making peace in whatever way they see fit. This misconception in the eyes of state law-makers has the potential to seriously damage CBDR's viability in a future plural legal system. The reality is that for most people CBDR is just as valid, if not more so, as the basis for rule of law as the court system.

Q: The basic fact is that CBDR does work, and that the vast majority of cases do get solved, satisfactorily, at the community level. While some decisions are unjust or violate women's rights, the positive aspects of the system really need highlighting to compete with the discourse that informal justice is unjust.

Q: My concern is that any attempt to explain the system to state actors or funders—people who don't necessarily have the best intentions or are unlikely to be swayed by the facts—will simply equip them with the tools to pick apart the system and ultimately deligitimise it.

A: I agree, I think that people should stay away when systems are working well: tinkering decreases legitimacy and forces the emergence of hidden alternatives. But the money isn't going to stop coming and the linkage law is probably a done deal...

Q: Actually I think there's some question of whether the law will actually go ahead or not.

Q: I'd like to take a moment to stress how useful the kind of information AREU's producing is for us [the US Department of State]. For better or worse, the US is sending about 140,000 18-30 year-old military and civilian personnel to this country, many of whom have quite a limited understanding of Afghanistan in general, and CBDR in particular. What really struck me were actually the descriptions of individual cases in the appendices of these CBDR case studies. This kind of thing is potentially very useful in that it helps dispel people's preconceptions of CBDR as men with white beards trampling on women's rights and reveals the complexity of the systems involved. The only issue is that these people don't necessarily have the time to read 70 pages to get to this information.

Going back to an earlier point, do you think there's any way to codify the basic common denominators of CBDR practices across Afghanistan?

A: As I said, broad commonalities do exist across the country, yet are layered with distinct practices across different regions. These latter are used as part of a toolkit that disputants and dispute resolution practitioners use to increase the legitimacy, efficacy, and durability of mediated outcomes. I don't think we can, or should, codify them to any greater degree than they already are.

Q: At what point do you think the state itself will be ready to legitimate or enforce informal decisions?

A: I'm not sure people necessarily want that in all cases—they want the state to enforce state decisions, not local ones. What does and doesn't constitute a state decision is often an issue of degree rather than type. We're not talking about trying to draw the line between civil and criminal cases—the more pertinent division is at the point that communities recognise they cannot manage the dispute internally. Examples of such cases include highly contentious or destabilising cases—large land cases, murder, severe or chronic domestic violence—these are the instances where people start to reach out elsewhere. People aren't looking for enforcement of decisions they can't enforce on their own. In this respect, they want both a strong formal justice sector and a strong informal sector because they represent two different types of resolution processes.

Q: I think the issue of demand is key. At the moment, most of the funding from the international community is being channelled into prisons, courts and so on. We should really be asking what the demand is among communities themselves. This is good practice even from a COIN [counter-insurgency] perspective since so much of COIN revolves around working out what communities want.

A: I think one of the reasons why trying to work out the state's role in all this is problematic is that different people want different things from the state. From the point of view of some aggrieved parties, putting someone in jail for life is helpful, but others see it as pointless because they don't get anything out of it. This relates to an interesting point from our Kabul data on the different use of *haq-ul-allah* and *haq-ul-ibad*, loosely translated as public and private law. Often a single dispute will have both elements. Take one example where a cab driver struck and seriously injured a young man. The state made sure the driver paid his debt to society by jailing and fining him, but then turned him over to the family of the aggrieved party in the interests of resolving the dispute he had created. The families then mediated a resolution, in this case compensation of lost wages, in order to remove the possibility of any hostility in the future.

Q: One thing missing at some levels of the debate over the linkage law is a realistic understanding of state capacity. Under current law, the state has exclusive jurisdiction over all criminal cases in the country. This is not coherent with current practice, but it's also not something the formal system has even the remotest of capacity to handle at the moment.

Q: I think it's also important for anybody involved in this debate to keep in mind that justice in Afghanistan is deeply rooted in Islam. We are currently seeing competing notions of what constitutes "justice" and "the good," and I think people trained in western jurisprudence are often in danger of missing the point. *Sharia* is not just a justice system but a lived experience, an ethics that people enact, a way of being. This has a very strong bearing on how people want their disputes resolved.

Q: Did you talk about the significance of distance in determining relations between the community and the state? Much of my research in rural areas in Nangarhar suggested that people actually consider the *jirga* [a process where mediation sessions are called to manage specific disputes] to be a form of state law.

A: Actually in our Balkh study, the communities we examined were far enough away from the state (both real and perceived) that it increased people's respect for state law—the state's very remoteness created a certain aura around it. In Kabul, by contrast,

people did their best to avoid interaction with the state in any regard. In Balkh, people barely mentioned the distinction between state and customary law—both were seen as Sharia, the difference being whether rules evoked were from "formal" or "informal" Sharia rules.

Q: It's important to recognise that the informal system is not static but is constantly changing and adapting. If the state actually starts to offer a court system that people value, they will start using it. Local systems and local leaders are dynamic and respond to changes.

A: This is why looking at context is so critical. In Kabul, the whole system we saw was designed as a response to new social conditions. We need to be aware of the local dynamics involved, such as experiences of displacement or influxes of new ideas, in order to be aware of how they feed back into the evolution of these systems.