



Perspectives on Involving Non-State and Customary Actors in Justice and Security Reform

Editors:

Peter Albrecht

Helene Maria Kyed

Deborah Isser

Erica Harper



International Development Law Organization
Organisation Internationale de Droit du Développement



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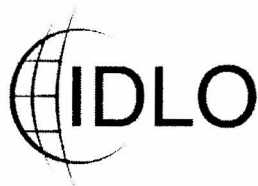
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The International Community and the 'Shura Strategy' in Afghanistan¹

Noah Coburn

The international community in Afghanistan has increasingly come to realize that the failure of the Afghan state to provide citizens with predictable access to justice has contributed significantly to the insurgency in much of the country. As a result, funders, policy makers and the international military have increasingly looked to alternative approaches to justice that rely on informal, non-state actors. While this acknowledgement of legal pluralism in Afghanistan has been an important step in attempting to understand the local context for both rule of law and governance challenges, whether international programs aimed at engaging the informal justice sector are actually effective remains an open question.²

The aim of this chapter is to look at how the presence of the international community has begun to reshape the relationship between the formal and informal justice sectors in Afghanistan. There have been several thorough studies of the informal and formal sectors in Afghanistan, most of which focus on the resilience of the informal system and the corruption of the formal system.³ Several of these reports have looked at the diversity of forms of traditional dispute resolution mechanism, particularly the contrast between the Pashtun south and east, and other parts of the country. Some have summed up these systems – at time competing, and at others harmonized – as the 'clash of two goods'.⁴ The complex, often symbiotic relationship between these systems, has evolved often times in response to dynamics between the state, based largely in Kabul, and communities in the provinces. In the decade of the current international intervention, the situation has become increasingly complicated,

¹ Some of the ideas presented in this chapter have grown out of previous publications by the United States Institute of Peace (USIP). In particular, N Coburn and S Miakhel, *Many Shuras do not a Government Make: International Community Engagement with Local Councils in Afghanistan*, USIP Peace Brief (2010); and N Coburn and J Dempsey, *Informal Dispute Resolution in Afghanistan*, Special Report, USIP (2010) <www.usip.org> at 28 June 2011. The phrase 'shura strategy' has been borrowed from Anne Marlowe of *The New Republic*.

² Throughout this chapter, the phrase 'informal sector' is used to refer to the range of actors responsible for the vast majority of dispute resolutions across Afghanistan that are conducted outside of formal court structures. Also, referred to as 'traditional justice', community-based dispute resolution and non-state justice, all of these phrases are problematic in one way or another. Most notably we find that 'traditional' mechanisms are often very modern reformations of historical practices, non-state dispute resolution involves state actors such as district governors and community based dispute resolution relies on religious figures from other communities. For simplicity's sake, 'informal justice' will primarily be used, which the author finds the least problematic of the common terms, although this is not meant to imply a strict dichotomy between formal and informal justice. Most of the significant disputes actually end up relying on actors from both sectors.

³ See for example A Wardak, 'Jirga: Power and Traditional Conflict Resolution in Afghanistan' in J Strawson (ed), *Law After Ground Zero* (2002); The Liaison Office (TLO), *Linkages between State and Non-State Justice Systems in Eastern Afghanistan: Evidence from Jalalabad, Nangarhar and Ahmad Aba, Paktia* (2009); D Smith and S Manalan, *A Case Study of Community Based Dispute Resolution Processes in Bamiyan Province* (2009) Kabul: AREU; D Smith, *A Case Study of Community Based Dispute Resolution Processes in Nangarhar Province*, Kabul: AREU.

⁴ See T Barfield, N Nojumi and J A Their, *The Clash of Two Goods: State and Non-State Resolution in Afghanistan*, USIP.

particularly as a result of the recent military and civilian surge. As a result, in many districts it is no longer two systems working together and occasionally clashing, but three, with internationally sponsored councils competing with both the state and informal systems for legitimacy.⁵

This chapter will focus on this nexus between the international community, Afghan state actors and informal actors. While many internationally sponsored programs have not been running long enough to have created lasting results, this chapter will argue three points based on some initial observations on the short lives of these projects:

1. Informal dispute mechanisms are highly politicized and adapt to changing political conditions;
2. International efforts to engage the informal system have been too reliant on Western, state-oriented paradigms of ordering society (often emphasizing large formal programs with formidable budgets) to be effective at increasing access to predictable justice in Afghanistan; and
3. Local actors have taken advantage of these shortcomings to increase their own political capital often at the expense of local stability. This is not to argue that internationally sponsored programs cannot be successful in Afghanistan at improving access to justice through engaging the informal system. However, these efforts need to be localized and politically aware, and must ensure that they do not create perverse political or economic incentives, which actually undermine access to justice in the long term. Under the current conditions, with the sometimes contradicting goals of counterinsurgency and state-building, and lack of coordination between international and Afghan government actors, many programs have thus far failed to have their intended consequences.

1. The 'Shura Strategy'

On a warm spring day in 2010, inside a hastily constructed Afghan National Army training center on the plains west of Kabul, the International Security Assistance Forces (ISAF) in Afghanistan hosted a gathering of local elders, government officials and international observers. A stage with plush sofas had been set up in the front of the room, on it. On these sofas sat a handful of ISAF officers, the Minister of Justice, four members of Parliament, a State Department representative and a few other Afghan Government dignitaries. A handful of ISAF reporters and other Westerners sat at the back of the room. Between us, around long tables, just low enough below the stage that their heads were at the levels of the feet of the speaker, sat approximately 140 local elders and recently released detainees.

The program was a part of an ISAF strategy to deal with the large number of detainees being held by NATO forces in Afghanistan. Detainees, most of whom were being held at a US constructed facility at the Bagram Airfield, were having their cases reviewed. Those who had a sufficient amount of evidence against

⁵ It is obviously an oversimplification to argue that these three groups of actors are independent and often there is a good deal of overlap of their roles. For example, formal actors, such as judges, may also sit on informal bodies like district *shuras*. For such an analysis, however, considering the three as distinct is a useful oversimplification. In particularly unstable areas, Taliban justice is also a viable option, but will only be briefly touched upon in this chapter. For more on this see S Ladbury in association with Co-operation for Peace and Unity and D Smith, *Helmand Mapping Study*, Coffey International Development (2010).

them were being handed over to the Ministry of Justice. Those on whom they had no evidence or who were accused of lesser crimes were being released at 'Prison Release Shuras'. The use of the term 'shura', from the Arabic for consultation and often translated as council, is intriguing. *Shuras* are found across Afghanistan in a series of different guises, but generally composed of the influential men from a certain community, ranging from neighborhoods to councils that include members of tribes from across the country.

These bodies can be highly formalized or case-specific and many have the tendency to break down and reform quickly. The phrase is often contrasted with *jirgas*, which are generally more ad hoc gatherings of similar elders aimed at resolving a specific dispute or case. In some instances, however, they can be used interchangeably, and the lower house of the Afghan Parliament is called the *Wolesi Jirga*, despite the fact that it is a permanent council. As the international community has come to increasingly recognize the importance of these local mechanisms in rule of law, governance and security, numerous efforts have been made to engage such bodies in a 'traditional' manner.⁶

This Prisoner Release Shura was part of a series of loosely related efforts by different international groups to use local justice and governance mechanisms to strengthen rule of law in Afghanistan. While occasionally at odds with each other and rarely coordinated, all of these efforts were a part of the counter-insurgency shift that included a large surge in troops, but more importantly, also included increased efforts to engage local communities in a more culturally sensitive manner. These programs frequently had rather unpredictable results. This *shura* was no exception and as Afghan and international speakers each made their presentations, one was left with the feeling that a series of very different conversations were taking place simultaneously. There was certainly room for participants to interpret the event in many different ways.

The meeting was opened by the Minister of Justice who called on those who had been released to join the side of the Afghan Government and accept the Constitution. He argued that prayer and respect for religion were the only real reasons that any of them were alive and that the current instability made prayer impossible. At the same time, however, he called on ISAF to provide evidence for those detained or to release them. The Parliamentarians who followed the Minister were more bombastic, calling on ISAF and the Ministry of Justice to immediately release all those who were innocent (the way the criticism was phrased suggested that it was the Ministry's fault when international forces kept innocent Afghans detained). One parliamentarian who was a former Taliban described his own detention and said that reconciliation should have started in 2001, not nine years later. Several participants appeared to be using the gathering as an opportunity to campaign for the parliamentary elections, which were only a couple of months away at the time of the meeting.

The speeches made by ISAF representatives were slightly more formulaic. They focused on the number of detainees who had already been released and laid out the process of gathering testimony and evidence, such as fingerprints and residue from explosives. An ISAF general, the highest ranking member of the international military speaking, talked about their desire to hand over the system to the Afghan government as soon as possible, so that ISAF could become primarily advisors in the process.

⁶ 'Traditional' is a problematic word, particularly in the Afghan context, where tradition is often cast and recast in order to justify very modern political agendas. Dispute the use of the term, none of the mechanisms discussed in this chapter should be considered static.

The elders and detainees spoke towards the end of the day. They were briefer and a number of them were subdued. Many spoke of their innocence and described how they had been arrested after local enemies had given the international military false information about them. Some were more animated. One elder repeatedly emphasized the fact that we were in the Islamic Republic of Afghanistan and then led the room in three chants of *allahu akbar*, during which the international attendees seemed to shuffle their feet uncomfortably. However, the blame for long detentions was spread fairly evenly. Several speakers pointed out that the international military should not be detaining people, and some emphasized that the Afghan Government did not have the capacity to deal with such cases. A number also pointed out how well they had been treated while detained.

The meeting was not always smooth. As the speeches were being delivered, participants came in and out of the building and attention wandered. Translation was also slow and sloppy. During one more animated speech from a Member of Parliament, the translator commented to the English-speaking listeners that the man was simply repeating himself and that "he looked drunk".

At a lull in the meeting, a series of elders gathered around some of the ISAF officials towards the front of the room. They swamped the overly taxed translators with questions about other neighbors and relatives who had been detained during military operations and not heard from again. The officials dutifully took down names and phone numbers, but did not seem optimistic that they would be able to assist. They tried to convince the elders that even though this meeting was only for those who had already been released, they should stay for lunch. One elder told the official that any information he could give him about those who were still detained would be vital. At the end of the meeting, all of those released received a certificate in a picture frame. It was hard to imagine those who were still living in insurgent-filled areas returning home to hang the certificate proudly on their walls.

The most remarkable aspect of the meeting, however, was the sense that the three main groups in the room, the Afghan Government officials, the members of the international community, and the local elders and detainees, were all talking past each other. In fact, when one takes a wider look at the international community's engagement with the informal justice system in Afghanistan, it becomes increasingly clear how conversations about access to justice, security and formal and informal structures are mired in a series of contradicting goals, visions and rhetoric.

2. Informal dispute resolution and the international intervention

Over the past few years, the international community has come increasingly to recognize the importance of informal dispute mechanisms in Afghanistan. This has resulted in an increased number of programs engaging with the informal sector. The United States Agency for International Development (USAID) awarded US\$10 million to a large private contractor. A concerted effort has been made by the United Kingdom Department for International Development (DFID) to create district-level justice sub-committees in districts where British forces have been fighting against insurgents. A series of ISAF programs aimed particularly at dealing with detainees have been implemented. A nation-wide effort has been made to set up development councils, which sometimes lead to a direct impact on

local governance, and there are a handful of similar, smaller programs run by various NGOs interested in the rule of law.⁷

Additionally, at the encouragement of a number of international donors, including USAID and DFID, the Ministry of Justice has worked to formalize the relationship between the formal and informal justice sectors. This has entailed a rather lengthy and ongoing series of negotiations and working group meetings to draft a policy and later a law, involving Afghan government institutions, such as the Afghan Independent Human Rights Commission, the Ministry of Women's Affairs, the Supreme Court and the Attorney General's office, as well as international donors, such as the American Embassy, the United Nations Assistance Mission to Afghanistan and several smaller non-governmental organizations (NGOs).

The United States Institute of Peace (USIP) has been closely involved in this drafting process as well as in running a series of pilot projects in 13 districts across eight provinces of the country. These pilot projects are meant to both investigate how informal dispute resolution is working in the targeted districts and to improve access to justice by better linking informal bodies with the formal justice system. The data considered in this chapter come from these pilot districts as well as interviews and conversations with Afghan government officials, local leaders and members of the international community working on rule of law and informal dispute resolution. The analysis looks at programs dealing both with the informal justice sector and local governance mechanisms, which have all been reshaped by the recent shift in strategies that attempt to target local political actors in order to stabilize Afghanistan.⁸ Ultimately, the analysis suggests that in order to be successful, the international community must ensure that programs are small, flexible and grounded in local political realities, which – these programs have thus far struggled to achieve.

2.1 Local dispute resolution as an adaptive mechanism

It is often assumed that informal justice mechanisms have survived in Afghanistan solely due to the weakness of the central state. This explanation, however, diverts attention from the actual strengths of the informal system. Informal forms of dispute resolution are adaptive mechanisms that have in turn contributed to a balanced relationship between the state and non-state leaders in many parts of the country. Informal mechanisms have not survived because the state has failed to co-opt them, but because local leaders have adapted them to fit changing local political and economic conditions in order to maintain stability and local autonomy.

In a political setting that values independence, informal dispute resolution has served as a method for maintaining community stability by resolving cases in a way that emphasizes collective rights. The ideal format of both *shuras* (ideally composed of representatives of each group within the community) and *jirgas* (generally composed of an equal number of the kin or close allies of both

⁷ While the international community often makes the distinction between local governance and rule of law projects, in communities in Afghanistan such a distinction is rarely meaningful. The elders, religious figures and commanders in an area who are involved in dispute resolution are the same figures involved in local governance. Similarly, while the District Governor should technically focus only on governance, in practice this figure is often deeply involved in dispute resolution as well. As a result, this chapter will consider both local governance and rule of law initiatives sponsored by the international community that have impacted dispute resolution.

⁸ 'Strategies' are used here since the international community is not as homogenous as many would like to assume. Different organizations in Afghanistan often have very different goals and methods of operation. The most obvious example are the contrasting goals of state-building, often pressed by the US State Department, and counter-insurgency, which defines ISAF's current mission.

disputants) creates social pressure on the disputants to compromise and resolve their dispute in a way that will not further destabilize social relations. In the case of the *jirga*, by relying on patrilineal relatives, who in Afghan society share both honor and legal responsibility, pressure is increased since the honor of those deliberating is also at stake. A failed negotiation would further destabilize the community and lessen the prestige of all those involved in the process. As a result, those involved in informal dispute resolution are often also responsible for the enforcement of their decisions. For example, in one recent case in Nangarhar, the resolution of a case involving multiple murders called on all representatives present to burn down the house of anyone who violated the truce by attempting to extract further revenge.

Informal mechanisms vary across the country. Many assessments of the justice system conclude that these variations are simply the result of cultural differences between Pashtuns (who favor *jirgas*) and non-Pashtun groups (who are more likely to have formalized *shuras*). However, there is also a socio-political logic to these variations. In areas of ethnic diversity, it is more effective to have a recognized body that negotiates relationships between elders from each group. Without direct kin ties between groups, a formal *shura* has political legitimacy that more ad hoc groups lack. On the other hand, in Pashtun areas of the south and east, tribes are still the fundamental method for organizing socially and politically. Therefore, there is less of a need for such a body of oversight that transcends ethnic difference, and disputants use kin-based relations to identify those who can sit on the *jirga*. Such ad hoc bodies have the additional benefit of being difficult to regulate and control. It is much easier for the state or individuals to monitor and regulate a council with a fixed list of members who often meet at specific times than it is to control a group that comes together only for the express reason of resolving a specific dispute.

As a result of these trends, in areas where USIP has conducted research, it is often the most heterogeneous ones where district *shuras* are the most necessary and, as a result, the strongest. For example, the primarily Tajik district of Istalif has a very small and rather informal district *shura*, since kinship ties often ensure that disputes are resolved relatively quickly. In contrast, the neighboring district of Qara Bagh, composed of Pashtun and Tajik communities, in which there are regular tensions over land and water, has a much stronger district *shura* that meets regularly to negotiate relationship and disputes between communities.

Informal bodies also do not directly resist the state as much as they use it when it is to their advantage and many dispute resolution bodies already have formal or informal links with the state. In some cases, once a civil dispute is resolved it will be taken to the Haqooq Office, which deals with civil cases, to have the resolution recorded there. Many groups acknowledge that the stamp of the Government – while not as legitimizing as community consensus – does provide more legitimacy than a document without such a stamp would. Under current Afghan law, the Haqooq has the right to claim a 10 percent fee on any case that the office registers, although in several areas, such as Ahmadaba in Paktya, the Haqooq has come to realize that such a fee makes individuals less likely to register cases with them, and in practice rarely charge more than a consistent two dollar rate.

Other links are less predictable, and many bodies have close relations with their district governors who occasionally certify decisions. Some district *shuras* also meet in the district governor's compound (for example in Qara Bagh or Istalif), further blurring the line between state and non-state actors. The relationships

between local officials and informal leaders vary in the districts where USIP works. However, in the districts where the informal and formal systems work together, respondents generally tend to be more satisfied with dispute resolution, than in areas where district governors have distanced themselves from local elders. Such relationships clearly vary over time, and in Ahmadaba in Paktya, a district that became less stable in 2010, elders, perhaps threatened by insurgents, began to pull away from the district governor, who in turn has become less willing to negotiate with local leaders.

It should not be assumed, however, that these mechanisms only work in one direction. The district governors described above also have an incentive for maintaining relationships with informal leaders who provide them with insight and political reach into the community that they would otherwise lack. This is particularly useful since following historical governance patterns in Afghanistan, most district governors are assigned to areas other than their own. Such patterns, however, do not only reflect the weakness of the state, and even in areas with a relatively strong formal judiciary, the state often relies on informal actors. After extensive tracking of cases in both the primary criminal and civil courts of Kabul city in the summer of 2010, USIP observed that almost 50 percent of all cases before the court had some form of informal dispute resolution aspect to them. Most often the judge would refer the compensatory aspect of the case to a group of kin of the parties to determine how much should be paid.

As these cases suggest, informal bodies are far from static, but respond to shifting political and economic conditions. Some have even argued that the presence of *shuras* in Afghanistan has expanded significantly over the past decades, mostly due to the preference of international groups to engage with such 'representative bodies'.⁹ These changes, however, are minor compared to the other ways that the international presence in Afghanistan has deliberately attempted to reshape informal governance and dispute resolution bodies across the country.

3. Adapting to post 9-11 conditions

Since the collapse of the Taliban Government following the international invasion of Afghanistan in 2001, there have been significant political and social changes. On a local level, these changes have become increasingly significant during the recent 'surge' of both international troops and civilians as the United States has increasingly embraced a counterinsurgency model aimed at 'winning hearts and minds' at the local level. The increased emphasis on local development, governance and rule of law projects has reshaped the political landscape in many areas and has particularly increased the access to resources for local leaders. In turn, on a national and local level, individuals have shifted their approaches to both formal and informal mechanisms in order to adapt to these changing conditions. The following sections focus specifically on places where we see the formal and informal systems interacting with international programs and actors.

3.1 Informal justice on the local level

The international community has sponsored several programs, large and small, aimed at interacting with informal political leaders in order to strengthen rule of law and local governance. These programs have had varying degrees of

⁹ See C Johnson and J Leslie, *Afghanistan: The Mirage of Peace* (2008) 41-2.

success. USIP has used a series of approaches in 13 different districts in eight different provinces and has tested certain approaches primarily aimed at linking formal and informal mechanisms. For example, in districts with some government presence, USIP has found that creating forums in which the elders and government officials can discuss ways in which to facilitate cooperation has helped improve dispute resolution and cut down on tension between the two groups. At the same time, programs that encourage recording and storage of dispute resolutions have helped to formalize this process and to promote predictable and effective linkages between the formal and informal systems. In Paktya, for example, even in communities with high illiteracy rates, there are written records being kept of a majority of significant disputes that have been resolved. There are, however, several steps can be taken to make such recording and storage more effective, such as standardizing the ways in which informal decisions are recorded. In other areas, however, USIP has focused on more formalized training of elders in order to approach the formal system. With countless community leaders across the country, this approach yielded some positive results, but ultimately does not appear to be a cost-effective way of creating real change at the local level. The approach does not address the central political issue of why the elders sometimes choose to approach the formal system and at others, keep cases strictly within the informal sphere. Ultimately, it appears that for many community leaders, choosing whether to access the formal system is based more on whether they feel that such a venue would or would not be in their best interest, than whether they have the necessary knowledge to access the formal system.

In other cases, programs that utilize such 'traditional' mechanisms have been successful at promoting both rule of law and accountable governance mechanisms. For example, the National Solidarity Program (NSP) set up over 20,000 Community Development Councils (CDCs) across the country, with the goal of increasing community involvement in the development process.¹⁰ While some of these CDCs have met with mixed results, in other places, such as some communities in Nangarhar, other CDCs have become liaisons between the community and international actors, and have expanded their roles into governance and dispute resolution issues. These bodies have actually replaced some other local *shuras* as forums for dispute resolution. This program has been effective in part because of how it adapts to local conditions and relies on local implementing partners who have a history of working in Afghanistan. For example, based on cultural norms, in some areas, CDCs are composed of both men and women; in others there is a council for men and a separate council for women, and in more conservative parts of the country the councils are male-only. Such acknowledgements that the current political and social context in Afghanistan may not allow programs to instantly install Western ideals make this program more flexible and successful than numerous other programs that tend to disregard local norms.

In some cases, however, attempts to engage informal actors have had more problematic results. Internationally sponsored *shuras* in other areas complicate the justice landscape. Since resolving disputes creates political capital for those involved in the process, in some areas there is significant tension over who should be involved in dispute resolution. In some quasi-urban areas where USIP has conducted research, mosque-level *shuras*, neighborhood *shuras*, CDCs,

¹⁰ See National Solidarity Programme <<http://www.nspafghanistan.org>> at 28 June 2011. While CDCs were not designed to be involved directly in rule of law issues, due to the size of the program and their reach into communities, it can be argued that the NSP has reshaped rule of law on a local level more than smaller programs that are meant to deal with the issue more directly.

unions, police chiefs and the courts are all in open competition to resolve as many disputes as possible. Two sides in a dispute will often choose two different venues to resolve their dispute based on their personal connections, which brings other political actors from those bodies into conflict and increases tension. This minimizes cooperation between these bodies, encourages forum shopping among justice consumers, and ultimately undermines the resolutions being made.

More worrying is the fact that in response to recent concerns about the legitimacy of the Afghan Government, multiple, occasionally conflicting, internationally sponsored programs have been established, which threaten to further complicate local politics and undermine the informal structures that are effective. For example, a large USAID program is setting up district-level *shuras* in 80 key districts, while an Independent Directorate for Local Governance (IDLG) program is attempting to increase local government presence in many of the same districts. These goals, if not in direct conflict, are at least sure to increase local tensions. At the same time, it is unclear what the relationship between these projects and previous projects such as the NSP will be or, more importantly, what will happen with these programs if district-level elections are ever held, as mandated by the Constitution. In some cases, these conflicts of interest may be resolvable on paper, but in reality, each new program generates new sources of political and economic capital at a local level, often with destabilizing results.

In some cases, the consequences of international involvement with local justice mechanisms have been more immediate and dire. Assassinations of government officials in the south of the country have become commonplace, but the Taliban has also targeted informal leaders who have been associated with internationally sponsored programs. In the months following the set-up of an internationally sponsored district council in Helmand, the head and deputy head of the council, together with two other members and the family of a third member were assassinated by the Taliban for what most described as their affiliation with the *shura*.¹¹ In another case, a suicide attack killed 40 people at a wedding party in the pivotal district of Arghandab, targeting members of a local defensive initiative who were part of an ISAF program that attempts to incorporate local militias into the security structures.¹² These attacks undermine the long-term stability of the entire country by potentially eliminating an entire generation of leadership and weakening informal dispute resolution structures that have been effective.

Informal mechanisms have also been undermined in more subtle ways. For example, it is now increasingly common for *shuras* associated or working with international groups to receive a stipend for their time, travel or both. Community leaders in areas where USIP has conducted research who are not associated with these programs receive no payment for their services. In fact, simply being a member of an influential council should generate enough political capital to make it worthwhile to attend. Furthermore, since class is an important social marker in much of Afghanistan, a rural elder too poor to pay for transport to the district center is probably not influential enough to sit on that district *shura*. However, in much of the country the precedent that international groups will pay elders to attend community meetings, training and other events has been established. Indeed, representatives from both large government-sponsored projects and small NGOs now complain that it is extremely difficult to convene such a meeting of elders without some sort of financial compensation.

¹¹ Information from informants in Helmand.

¹² See Anon, 'Afghan Wedding Attacks Aimed at Anti-Taliban Guests', *The Hindustan Times*, (Delhi) 11 June 2010, *The Hindustan Times* <<http://www.hindustantimes.com/Afghan-wedding-attacks-aimed-at-anti-Taliban-guests/Article1-556140.aspx>> at 28 June 2011.

Furthermore, in many cases, local actors have taken advantage of the lack of political knowledge of international groups to manipulate programs. Perhaps the most notorious example of this was the attempt in the spring of 2010 by ISAF to co-opt the Shinwari tribe in southern Nangarhar. The military gathered together 130 elders at a *shura* where a deal was announced that would supply the tribe with US\$1 million in aid, whose ultimate destination would be determined by the elders in exchange for their united opposition to the Taliban. Other leaders, however, not invited to the *shura* meeting took offence, as did neighboring tribes. A series of local land disputes turned violent, and the entire deal collapsed as the area further destabilized.¹³ While the scale of this case is significant, there are numerous other accounts of military funding going to local supporters destabilizing areas. Taliban insurgents often take advantage of local rifts over land, which are exacerbated by the allocation of funds to one group, but not the other.¹⁴ This is particularly true of Commander Emergency Relief Program (CERP) funds, which are earmarked for providing American commanders with quick access to development funds in order to generate community support. Complaints that this money has led to further insecurity are increasingly common, particularly as these loosely regulated funds have grown to US\$1.2 billion in 2010. Due to security in the areas where many of these projects are taking place as well as the political nature of the projects, it is extremely difficult to access their overall impact. USIP researchers have been forced to rely on accounts by ISAF, which tend to be overly positive, and accounts by local communities, which are much more negative.

Ultimately, at the local level, international attempts at interacting with leaders and informal councils have met with several problems. The most severe are the fundamental differences in goals between international and local actors. The primary goal of local dispute resolution mechanisms in the ideal case is to ensure long-term community stability. Programs, particularly those supported by the international military, despite their ability to create short-term stability, threaten to destabilize local politics in the long term. The influx of funds at a local level can generate tensions between local government officials and community leaders, driving these two groups further apart. These tensions are even more serious at the national level.

3.2 The politics of informal justice at the national level

On a national level, international attempts have also met with mixed results when attempting to more systematically and effectively engage the informal system. The most notable is a Ministry of Justice-led effort to create a national stance on informal justice that has been supported by the international community. This policy, and now draft law, was meant to create links between the formal and informal systems that would improve access to justice, but the drafting process has become mired in a political morass.

At the time of writing, for over two years, work has been done, at first on a draft of a national policy and more recently, on a national law. The slow speed has less to do with the substance of the policy or law and more with the variety of conflicting goals that those involved in the drafting have. With respect to the international community, many are frustrated with the amount of money spent

¹³ J Partlow and G Jaffe, 'U.S. Military Runs into Afghan Tribal Politics after Deal with Pashtuns', *The Washington Post*, (Washington) 10 May 2010 (among other accounts).

¹⁴ Based on conversations with tribal leaders in Paktya and Kabul, and NGO employees in Paktika and Paktya.

on a formal system that is slow, corrupt and perceived by local communities as illegitimate. Linking the informal justice system to the formal system is seen as a cheap and effective alternative to help state-building in Afghanistan. Furthermore, international concerns have grown that local perceptions of the Afghan Government as corrupt and inefficient are fueling the insurgency.

The argument is that the Taliban, by providing justice that is often brutal, but also swift and effective, has increased their appeal in insurgent areas of the country. Thus, counterinsurgency theory argues, if the informal system linked with the formal system is seen as a viable alternative to Taliban justice, fewer communities will turn towards the Taliban to resolve their disputes.¹⁵ There are other reasons that many in the international community support the policy, however. Certain programs, for example, involving the international military rely on internationally sponsored *shuras* to deal with prisoners brought into military bases, currently do not have a legal basis. In such cases, with no formal system in the area to hand prisoners over to, these *shuras* have been the only way for the military to deal with detainees despite their questionable existence under Afghan law. Attempts to regulate and streamline detention have been made, but process has been slow.

With respect to the Afghan Government, motives in creating this law are very different. While bodies such as the Ministry of Justice and Attorney General's Office have promoted engaging the informal system in order to decrease the backlog of cases and to provide justice faster, other government institutions have different priorities. The Afghan Independent Human Rights Commission, for example, sees the purpose of the law as regulating the power of informal actors. At the same time, however, perhaps aware that the Afghan State lacks the capacity to efficiently oversee these informal mechanisms, it has, at other stages in the drafting process, refused to acknowledge the existence of justice mechanisms outside the formalized state system, in some cases publicly claiming that informal justice simply does not exist.

The Supreme Court has also opposed the law at several stages, but almost always in a way that avoids direct confrontation over the substance of the law. While Supreme Court officials will acknowledge the importance and strength of the informal system in private conversations, any public declaration would admit to the shortcomings of the formal court system and, from their viewpoint, could lead to a decrease in international funding for their programs. As a result, the Supreme Court has repeatedly refused to send representatives to the working group meeting, or has sent lower-level officials who do not necessarily speak for the court. These tactics have greatly stalled the drafting process, without forcing the Supreme Court to ever directly admit to the strength of the informal sector or directly angering those international donors eager to work with the informal system.

There are other cases where motives are less clear. For example, certain human rights groups have been active in opposing any law that would address the informal justice sector. However, these groups have done little to provide input to improve the drafting process. Part of this is the economic incentives that dictate the ways that international NGOs attempt to secure funds. For example, while there is currently a vibrant human rights community in Kabul, these organizations

¹⁵ Very little research has been conducted on public perceptions of the Taliban justice systems in areas where it is actually an effective and viable option. Most anecdotal evidence, however, does seem to support these points, although caution should be taken in unquestioningly accepting all of these assumptions.

tend to be small and rarely cooperate, particularly in comparison with NGOs in other sectors, such as public health. One of the reasons for this appears to be that funding for human rights NGOs often comes from private sources, which results in a serious competition for limited funds. The result in the case of informal justice is that human rights groups often protest the treatment of women and children by the informal system in the media, because this is a topic that appeal to international donors. However, no human rights group has yet implemented a program that would attempt to limit these violations before they occur.¹⁶

This is not to argue that Afghan government institutions and international groups are intentionally derailing programs that could improve access to justice. Rather, the chapter aims to show how the numerous economic and political incentives surrounding the national-level approach to informal justice has led both Afghan and international groups to act in conflicting ways that have complicated the politics of access to justice.

4. Informal justice, the international community and stabilization in Afghanistan

While international efforts to improve access to justice and engage with local leaders have thus far met with fairly mixed results, some initial conclusions can be made that suggest how and when such programs may actually increase access to justice. First, many of the programs that are set up to promote the agendas of the international community fail to take into account local realities and motives for actually participating in such programs. Thus, a donor such as USAID who oversees billions of dollars in aid has an incentive to award all of their funds for informal justice to one private contractor, making it significantly easier for officials to administer and oversee. In fact, smaller programs that are more flexible and deal with local realities are more effective, but under the current USAID funding structures, which currently favor large scale contracting, are unlikely to be funded.

Furthermore, due to the complexity of the current political landscape in Afghanistan, donors are simultaneously interacting with government officials and local leaders who have very different agendas. Government officials have considerable reason to deny the strength of the informal system. Any legitimization of the informal system is a tacit admission that the formal system is currently failing to supply all Afghans with access to justice and could potentially divert international funds from the formal system. Frustrated with the poor performance of the state judiciary, the international community has become more careful with unrestricted funding going to the formal system. Simultaneously, officials at the Supreme Court and the Ministry of Justice complain about independent contractors who have been brought in to support the judicial system.

The programs that have been most successful are those that motivate all actors to participate using incentives that are sustainable and not potentially disruptive, such as cash payments. For example, the NSP has been effective because the international community benefits from the way that it distributes funds at a local

¹⁶ It is also indicative that human rights groups often protest the treatment of women and children who are often protected within the informal systems by their families, but rarely mention the treatment of ethnic or sub-tribe minorities who are far more disadvantaged in a system that focuses on community consensus.

level. In turn, local actors benefit from the political capital that they acquire by having access to such funds and a voice in the direction of local development. It is unsurprising, however, that those who have been most critical of the NSP are those in the ministries that are being bypassed through such funding mechanisms.

For internationally sponsored programs to be effective at promoting access to justice, they must move beyond Western paradigms of ordering society and deal with local political realities. Furthermore, while taking advantage of informal mechanisms, they need to consider how they could be destabilizing in the long term. Most importantly, the ways in which these programs are creating political and economic resources that increase tensions and actually limit access to justice must be considered. While the current approaches often favor large-scale projects with sizable budgets aimed at creating short-term stability, such programs can be manipulated by local political leaders and government officials to solidify their own power in ways that prevent many poorer Afghans from effective access to justice. Less money and more local political knowledge could go a long way in improving the situation, but currently, during this period of military and civilian surge in Afghanistan, many programs threaten to do more harm than good.

