



# *Building Peace*

Practical Innovations from USIP

---

*Building Peace no. 3 April 2013*

## Lessons Learned on Traditional Dispute Resolution in Afghanistan

By: Erica Gaston, Akbar Sarwari, & Arne Strand





# Building Peace

Practical Innovations from USIP

---

*Building Peace no. 3 April 2013*

## Lessons Learned on Traditional Dispute Resolution in Afghanistan

### Problem Identified

In many communities across Afghanistan, the formal justice system has proven weak, corrupt, and ineffective. The vast majority of disputes are resolved outside of the formal state system, often by tribal elders, shuras, or other traditional community forums. Where such informal mechanisms are functioning well, they may help prevent and mitigate conflicts by offering means of peaceful dispute resolution, and reduce opportunities for armed opposition groups (including but not limited to the Taliban) to exploit local disputes or grievances against the government. However, these “informal justice” mechanisms also have their weaknesses. The lack of universal or institutionalized processes, along with the variability in traditional actors’ relative influence and enforcement power means that resolution of disputes may not be sustainable. Decisions may not be based on Afghan law, or may reinforce community inequities or power imbalances. In some cases, informal justice mechanisms have resulted in severe rights violations, particularly against vulnerable or marginalized groups including women, children, and minorities.

### Action Taken

Following several years of research on the informal sector, USIP funded a series of one-year pilot projects in 11 districts of Afghanistan<sup>1</sup> that attempted to address some of these weaknesses while also recognizing the important role that informal justice mechanisms can play in making up for challenges in the formal justice and governance system and increasing stability in a community. The pilot projects attempted to do this by strengthening linkages between local Afghan government actors and informal justice providers. These linkages included facilitating a stronger relationship between select elders involved in traditional dispute resolution and local formal governance and justice actors through structured meetings; encouraging certain patterns of referral based on the nature of the case (family law, criminal law, land disputes, etc); and encouraging the community elders to register and record the resolution of disputes with local officials.



The full text of this report is available at  
<http://www.usip.org/files/ROL/TDR.pdf>

United States Institute of Peace, 2301 Constitution Avenue, Washington, DC 20037

USIP then conducted an assessment of three of the projects, spanning five districts in three Afghan provinces: Kunduz, Uruzgan, and Nangarhar. The assessment evaluated whether the linkages projects had contributed to any of the following key areas, or seemed likely to if continued in the longer term (since some benefits might not be fully realizable in one year):

- Did linkages projects improve access to justice in the target communities?
- Did they contribute toward reduced violations of Afghan law or human rights?
- Did they strengthen the role of local government actors (from either the judicial or executive branches) in dispute resolution in their areas?
- Did linkages projects contribute toward either short-term stability or make it more likely that dispute resolution decisions would be more sustainable, thus reducing long-term potential for conflict in the target areas?

### **Lessons Learned**

- Official referral and registration of decisions was often resisted by communities except in small civil cases because formal government participation or records were perceived to offer few tangible enforcement benefits and relatively high social, economic and security consequences. This was particularly true for family disputes (which were considered too private), criminal disputes (because they feared unwanted penal consequences for the criminal), and land cases (where they feared it might lead to land grabbing, bribes or taxes).
- Recording decisions independent of the local government— keeping a copy of how and what was decided with the disputants or the community – was less controversial for civil and land cases, although still resisted for family and criminal cases.
- The presumed benefits of linking formal and informal justice depended highly on broader political, institutional, and social dynamics within each community. The great variance in these community dynamics challenges the notion that any single theory or model of intervention can be universally applied throughout the country.
- For that reason, where future programming is envisaged, it must be based on first conducting a rigorous analysis of the local political dynamics. This community analysis should not only assess whether a linkages project is likely to be beneficial but also, based on the local customs and political situation, which particular mechanisms are appropriate. Interim mechanisms should be established to continue this monitoring and assessment throughout, so that

programming is iterative and responsive to shifting demands with a clear definition and maintenance of objectives.

- Where engagement with the informal sector is envisaged, the programming should be clearer at the outset about the primary motivation. The pilot projects, as well as others that engage on informal justice, pursue multiple goals including expanding governance and stabilization, improving access and quality of justice, reducing rights violations, reducing local conflict drivers. Without a clear prioritization of these goals, these programs ran the risk of sacrificing core objectives unintentionally as local conditions forced ground staff to make trade-offs. The lack of a clear designation of goals also made it difficult to judge the success of projects.
- The current political trends in Afghanistan seem to make it more likely than not that the local context in many communities will not be receptive to externally-driven linkages projects in the near future. In the near-term pressures due to transition and the upcoming 2014 elections make efforts to engage in local sub-governance structures (including dispute resolution) highly sensitive. In addition, these mechanisms may be even more subject to capture by local powerbrokers than before. A longer term challenge for linkages projects is the lack of clarity over the relationship between the formal and informal system. The dominant but still legally undefined role of the informal justice sector makes it difficult for linkages projects to gain traction.

# Contents

---

Introduction	6
Pilot Project Findings	11
Analysis	19
Conclusions	29
About the Authors	43
About USIP	44

*Cover photos: Photos of elders from Nangarhar province involved in traditional dispute resolution, in legal awareness trainings, and other photographs of community members observing these proceedings in Nangarhar province. February 2011 and June 2012 Photos by Erica Gaston and Tim Luccaro.*

*The views expressed in this report are those of the author alone. They do not necessarily reflect views of the United States Institute of Peace*

© 2013 by the Endowment of the United States Institute of Peace. All rights reserved.

---



The Building Peace series reports on innovative work by USIP that has practical applications for peacemakers and peacebuilders. The goal is to get useful knowledge into the hands of practitioners promptly. Some of the work reported in Building Peace is recent, some is ongoing. All of it has been tested, usually in the field, but this is work in progress and feedback is warmly welcomed. Please send all comments on this report to the the Senior Program Officer, Erica Gaston, at [egaston@usip.org](mailto:egaston@usip.org).

# Introduction

---

The formal justice system in Afghanistan is often considered one of the most ineffective institutions in the country.<sup>2</sup> Despite significant donor attention over the last 10 years, judicial institutions remain largely inaccessible to a population isolated from most forms of Afghan government by insecurity, geography, and grinding poverty. Too few judges, prosecutors, and defense lawyers, the majority poorly trained and underpaid, severely limit the capacity of the justice sector. Persistent issues with corruption, and weak enforcement capabilities have compounded these problems. The formal justice system is often the forum of last resort.

As a result the majority of disputes in Afghanistan are resolved by dispute resolution mechanisms outside of the formal justice system, by individual tribal elders, maliks or mullahs who hold a place of respect in the community; by groups of such individuals meeting as a jirga or a shura; or in some places by Taliban-affiliated individuals or courts.<sup>3</sup> Although some of the actors and mechanisms involved in this “informal” justice sector are of recent vintage, most areas of Afghanistan have greater experience and historical memory of such community forums of justice than of formal state-instituted justice.<sup>4</sup>

While the informal justice sector provides Afghan communities with a swift, inexpensive, and accessible means of resolving local conflicts – enhancing prospects for stability by increasing the peaceful resolution of conflicts and mitigating the underlying driver of violence – there have also been significant critiques of traditional dispute resolution bodies and informal justice. Critics have argued that their decisions frequently violate Afghan law and human rights (particularly for women, minorities, and other marginalized or vulnerable groups), and that they may compete with the Afghan government for legitimacy and undermine long-term rule of law development.<sup>5</sup> In the current climate in Afghanistan, they may be easily subject to capture by local powerbrokers and warlords, potentially exacerbating or stimulating long-term roots of conflict (although arguably so too are the formal governance and justice sectors).

While such critiques are valid and raise concerns about informal justice mechanisms, the fact remains that for many Afghans this is the only form of justice available, and is often preferred. Even in areas where the formal justice system is active, it does not necessarily result in a decision that is any fairer, any more rights-protective, or any more consistent with Afghan law than the informal justice mechanisms.<sup>6</sup> Given the prominence of these mechanisms across Afghanistan, it is difficult to meaningfully impact access to justice and rule of law enforcement without engaging to some degree with the informal justice sector.

### **Terminology: “Informal” Justice**

How to refer to dispute and grievance resolution that takes place beyond formal justice mechanisms is itself a point of debate. Though often referred to as “customary” or “traditional” justice, many of the actors, mechanisms, and practices of dispute resolution are relatively new. In addition, though many communities have a long-standing tradition of resolving disputes through influential community members, the terms “customary” or “traditional” may not capture the constantly evolving nature of these practices and denote overly static forums. Thus, for the sake of simplicity this paper will refer to such practices as the “informal justice sector” and actors engaged in it as “informal” justice actors, even though the individuals themselves are frequently also vested with some formal or semi-government function.<sup>7</sup>

Since 2004, USIP has worked with local partners to conduct numerous research studies and pilot projects on issues surrounding traditional dispute resolution.<sup>8</sup> USIP’s early research suggested that developing constructive partnerships between informal and government actors, and other efforts to improve the quality of informal justice mechanisms, might lead to peaceful and sustainable dispute resolution processes. In 2009 USIP initiated pilot projects to test these theories in seven Afghan provinces, working with local Afghan government actors, both in the judicial and executive branches. USIP hired outside consultants to assess the impact and implementation of three of these projects in March 2012, and to compare the projects with two similar projects being implemented by outside groups. This report summarizes the findings from that assessment, and incorporates additional lessons learned from a workshop with all four organizations who participated in the assessment, as well as supplemental research conducted by USIP on dispute resolution in these provinces.

The findings in many ways reinforce those from previous USIP research and pilot projects. While working with informal justice mechanisms can benefit dispute resolution in a given area, success depends highly on the local context, and on having a degree of political will and buy-in from both the key political actors and the community. The findings suggest that while it is possible to use linkages projects to improve rule of law in *some* areas, it depends highly on the local political context. This model will not work everywhere, or even likely, in most communities. The nature of the challenges that the pilot projects faced seem likely to increase during the upcoming transition period, suggesting donors should be cautious and undertake a close, local analysis before replicating these models or practices in new areas.

### **Testing Assumptions: Pilot Project Design**

The primary purpose of the pilot projects, according to the initial terms, was “to create models for collaboration and the development of linkages between the [formal and informal systems] to improve the delivery of justice, the resolution of disputes and the protection of peoples’ rights.” The overall assumption behind these program components was that “linking community dispute resolution with the state system will improve the quality and sustainability of community-based practices, while helping to build trust between the two systems as the state confers legitimacy on decisions of the non-state mechanism.”

It was thought that strengthening the linkages between state institutions and the informal justice forums would marry the accountability (to the law and to the Afghan government) of the formal sector with the accessibility and functionality of the informal sector, addressing some of the critiques of both sectors. Specifically, in theory:

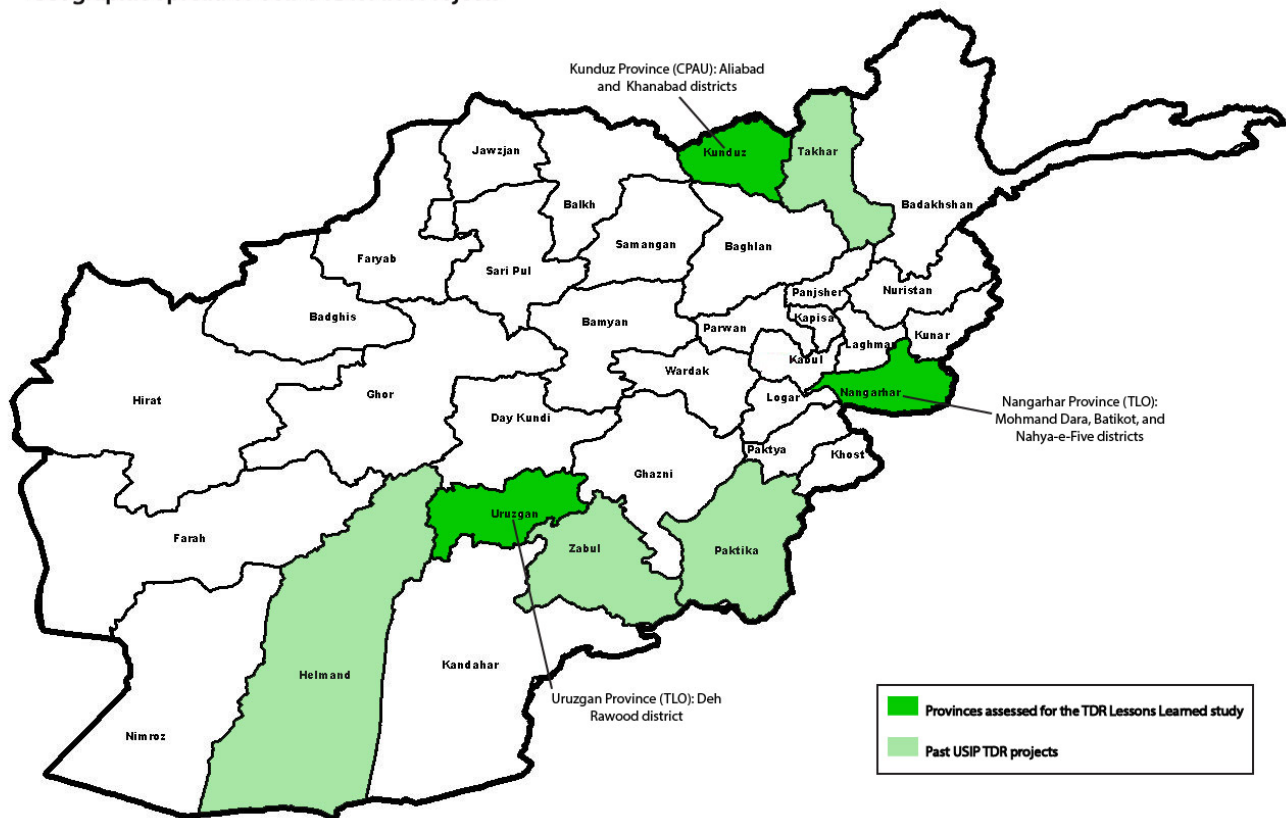
- Ideally linkages between the two systems would ensure that cases or areas of law that might be more appropriately dealt with in the formal sector – for example criminal law cases, human rights concerns, or large commercial or civil disputes too large to be resolved by the informal sector – would be referred to the formal sector, while smaller civil or land disputes would be referred to the informal sector. With regard to criminal law cases, it was thought that stronger linkages between the formal and informal systems (additionally strengthened by registering cases) would ensure that the state maintained its exclusive role in prosecuting criminals while informal bodies might play a part in the broader community reconciliation that must follow such crimes to ensure sustainable dispute resolution.<sup>9</sup>
- Where cases were not resolvable in the informal sector or where violations of law occurred, linkages might ensure that the injured party was able to appeal the case to the formal system.
- Certain aspects of linking the two systems – for example creating more regular written records of disputes and registering these case decisions in the informal sector – might over time improve the sustainability of decisions, as the state might also help in enforcement. In some cases, the written record – for example a property title – might help individuals to assert other rights, which might increase the likelihood of peaceful resolution of disputes.
- With greater linkages, the formal sector might be able to provide some oversight over the informal sector, potentially limiting gross violations of law or abuses of human rights.
- Finally, to the extent that the informal sector is seen as competing with the formal sector for legitimacy, linking the two might reduce that effect by enabling local



justice or governance actors to be perceived as contributing to local dispute resolution.

The pilot projects set out to test whether greater linkages might bring some or any of these benefits. Although some of the above benefits might only materialize after years of developing linkages, it was hoped that in the year-long pilot project, there might at least be some evidence of which project objectives appeared to gain traction or hold promise for improving justice and stability in the target communities.

#### Geographic Spread of USIP's TDR Pilot Projects



The pilot projects that were assessed took place in five districts in the provinces of Kunduz, Uruzgan, and Nangarhar, and were implemented by partners The Liaison Office (TLO) and the Cooperation for Peace and Unity (CPAU).<sup>10</sup> Both organizations formed local dispute resolution institutions (called the “Justice Shuras” and “Peace Councils” respectively),<sup>11</sup> selecting members already prominently engaged in informal justice sector in some way, many of whom also sat on other related informal justice bodies. For 12 months, partner organizations helped facilitate greater communication between government representatives and the dispute resolution bodies, to try and

nurture a functioning relationship of referral and coordination. In addition, the pilot projects monitored decisions by the Justice Shuras and Peace Councils, recorded the decisions made, and attempted to have the decisions registered with formal government actors (See a description of these specific practices below).

### **Referral, Recording, and Registration**

Key objectives were to encourage positive patterns of referral between the formal and informal system and the registering and recording of decisions made in the informal justice system. Although these practices work best in tandem, they each refer to distinct practices:

**Referral** - Referral happens when cases are diverted from the formal system or formal governance actors to dispute resolution mechanisms or persons outside of the state system (or vice versa). The preference is for written or formal referrals, in the hope that this increases overall awareness, transparency and tracking of cases going to the informal system, to further improve linkages and increase the possibility for monitoring and oversight. Efforts to change referral practices also frequently try to ensure that certain types of cases flow from the informal to the formal system, particularly those involving criminal matters or fundamental rights.

**Recording** - Recording refers to keeping a written record of what the dispute was, how it was resolved, and what the rationale of the decision was, either with the disputants or communities themselves, or with local authorities. Keeping a written record of the decision has the potential to ensure the sustainability and enforceability of the decision; if there is a written record it may deter one or more disputants from attempting to re-open or re-litigate it in the future, and may make all parties more likely to stick to the agreed upon terms as there is evidence of a mutually-agreed decision. If taken a step further, such records could then be used as evidence if the case is brought before a judge, or if the parties seek to appeal a decision or renegotiate through a different forum.

**Registration** - Once a dispute is resolved outside the formal system, the local authorities should be notified of the decision, and would formally ratify or acknowledge that a decision was made (typically this happens by stamping a decision notice). Ideally these cases would also be logged in an official registry so that cases are registered in a systematic way. In addition to formally acknowledging that a decision happened, a step further would be for local authorities to keep a written record of how the case was decided.

## Pilot Project Findings

---

### Kunduz Peace Councils - CPAU

Through the course of the USIP project, CPAU established 23 Peace Councils in Ali-Abad District, Kunduz Province, and 27 Peace Committees in Taloqan District, Takhar Province (each with 15 to 25 members). USIP also conducted interviews and assessments of a Peace Council project in Khanabad district of Kunduz, which was funded by a different donor but had a similar structure. During the USIP project, the Peace Councils resolved 79 cases.<sup>12</sup> The majority were civil cases (typically disputes over water, inheritance and land), but there were also some criminal cases,<sup>13</sup> domestic violence and other family cases.

CPAU estimated that “members of both the government and the Peace Councils regularly referred between 10 and 20 percent of their cases to one another.”<sup>14</sup> Perhaps because most cases resolved through the Peace Councils did not originate in the formal system, only 8% of cases were later reported back to government actors, and recorded with the formal system, according to CPAU.<sup>15</sup>

Referral, registration, and recording patterns were difficult to assess because of limited case information.<sup>16</sup> In part this may suggest a need for a greater emphasis on case documentation and follow-on tracking in future projects, however, such tracking – and even the recording aspects themselves – was challenging because in many cases neither communities nor the formal justice actors wanted certain types of cases recorded. The lack of documentation about the disputes in question (for example, in land cases)<sup>17</sup> or a desire not to have any resolutions recorded officially by the government or in public (in criminal or family law cases) was often precisely the reason that a customary justice forum was chosen by disputants as the forum of first instance. The independent assessment found that many cases were verbally, but not formally, referred to the Peace Councils by members of the law department because the judges sought to avoid direct involvement. The district governors of both districts said that they were ready to register and stamp cases not contrary to Sharia and Afghan law; however, there were few documented cases where this had actually happened and some of those interviewed in the assessment suggested district governors were hesitant to officially refer cases when there was no established government policy recognizing dispute resolution mechanisms outside of the formal system.

The independent assessment also noted greater resistance among communities to formally registering cases with the government, than purely keeping a record of them within the PC elders or between disputants. For example, in Ali-Abad, decisions were not officially registered with the government, but they were recorded with the disputants and the Peace Committees themselves.<sup>18</sup> In some areas, keeping a local record of the decision is common practice, or was common practice in the past, so it has generally been more readily accepted by disputants and adjudicators.



---

*In Kunduz province, semi-governmental bodies like the IDLG-established District Community Council (DCC) had a significant influence on both formal and informal justice. In this case, DCC approval was required of the decision made by community elders, as indicated by the DCC stamp alongside the governor's. Photo by Anonymous [must be anonymous for security reasons]*

CPAU made efforts to impart greater knowledge of Afghan law and dispute resolution practices to the members of the Peace Councils through a basic training curriculum. It is not clear based on interviews with Peace Council members, however, if this would have a lasting impact or be sufficient to change local practices and existing understanding of law.

Although some government officials expressed support for informal justice bodies generally, there was also some negative feedback. In both Khanabad and Ali-Abad districts of Kunduz, the assessment team noted that the police and the law departments were not fully cooperative with the Peace Committees. Some elders and community members commented that where Peace Committees or other informal justice bodies are active, it decreases formal justice actors' potential to obtain illegal income from

disputing parties through bribes and corruption, and this is why the formal justice officials oppose them.

The assessment found that creating a sustainable mechanism or impacting larger dispute resolution dynamics was also difficult because of competition from more prominent, pre-existing dispute resolution bodies, as well as by the degree of “capture” of informal forums by dominant local powerbrokers. Prior to the establishment of the Justice Shuras, each of the districts had a fully functioning District Community Council (DCC)<sup>19</sup> established through the Independent Directorate of Local Governance (IDLG), and funded by USAID. According to government officials, the DCC members tended to be the most powerful warlords, supported by local defense forces, referred to as “*arbakais*”. In addition, in Khanabad district a local Shura with ties to the Hezb-e-Islami party held significant power over community decisions, and frequently resolved major cases without any government interference. These other dispute resolution bodies tended to dominate the local dispute resolution marketplace, with the result that the Peace Committees tended to engage only on small, localized civil matters. Influence on broader dispute resolution practices was limited. For the few criminal cases or larger civil cases that the Peace Committees were involved in, decisions had to be approved by other more powerful bodies according to the shura members interviewed and to the assessment team’s inspection of records.

### **Uruzgan Justice Shuras - TLO**

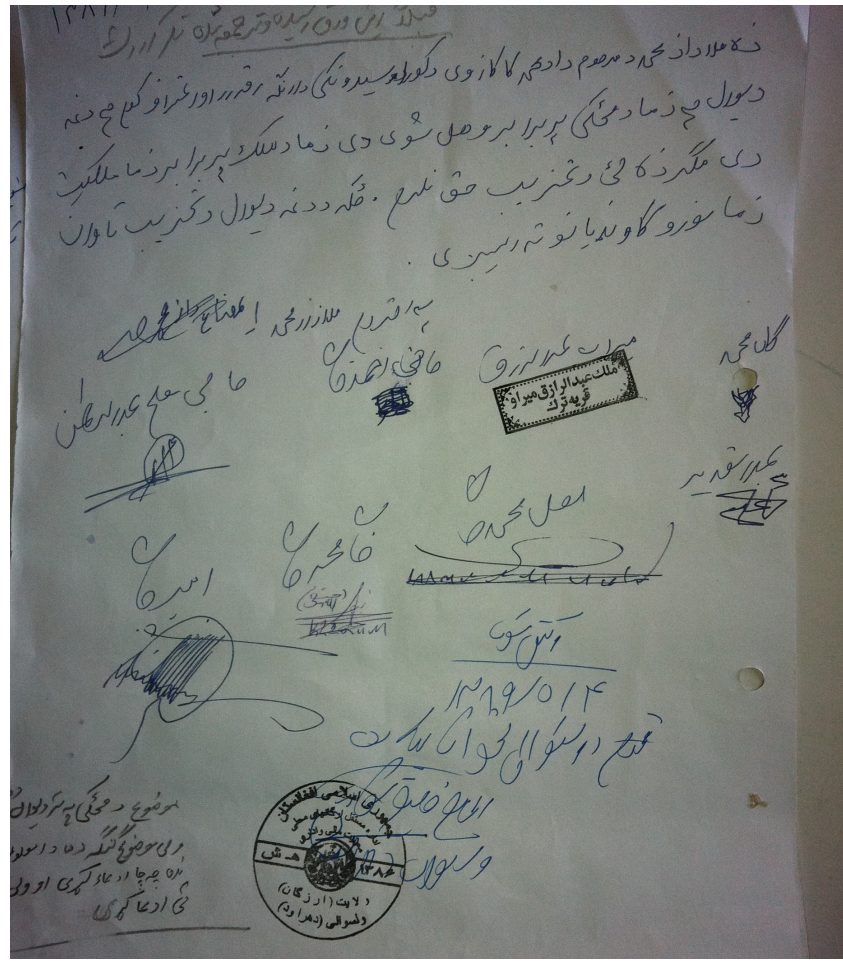
TLO established a Justice Shura (JS) in Deh Rawud district of Uruzgan. The deputy of the Uruzgan Justice Shura reported that between 100-120 cases were resolved by the JS, although this number was difficult to verify given the difficulty of accessing Deh Rawud district, high staff turnover and sparse record keeping.<sup>20</sup>

An important element of the pilot project was to ensure linkages between the informal and formal system, established through “weekly and sometimes even daily informal meetings” with the district government. TLO staff also tried to encourage local officials to officially register or acknowledge decisions made by the Justice Shuras, often symbolized by providing an official stamp on the paper describing the final record of the case (which was kept with disputants and/or with TLO or the elders in question).<sup>21</sup>

In the independent assessment, all formal governance actors interviewed spoke positively about the role of local dispute resolution bodies in contributing to non-violent dispute resolution, even though many had no personal knowledge of the Justice Shura being supported through TLO. For example, the Chief of Police in Deh Rawud, interviewed over the phone, told the independent assessors that the local bodies are instrumental in-terms of dispute resolution, linking the government with the community and helping the police to arrest criminals and report on the security status. He added that there are many civil and criminal cases that arise that the police

and government bodies are unaware of, or cannot reach. Local bodies often resolve these without informing the government, he said.

Referral seemed relatively strong even prior to the pilot project. TLO's own research into broader dispute resolution patterns in Uruzgan suggest that the formal state actors often play a large role in dispute resolution in Uruzgan, particularly in areas under threat or facing localized problems such as large influxes of internally displaced persons (IDPs), as has affected some Deh Rawud villages.<sup>22</sup> According to TLO's research prior to the pilot project, Chiefs of Police and District Governors heard many, if not more, cases than non-governmental elders in the community, and the governmental and non-governmental actors collaborated or acted together.<sup>23</sup>



*This agreement concerning a local property dispute resolved during the course of the pilot project was stamped by the local district governor and local maliks. Deh Rawood, Uruzgan province. Photo by Akbar Sarwari.*

The pilot project appeared to have only a minimal impact in increasing the levels of registration during the pilot project period. Although in USIP's assessment interviews, government and justice officials said they did not oppose registering informal cases, the independent assessment found little evidence that registering took place regularly in Uruzgan either before or after the pilot project. Review of the pilot project files found only one minor civil related case that had been stamped (registered) by the district-governor. The low evidence of registration may have been due to weak documentation – due to staff turnover and lack of records available in Uruzgan it was difficult to do a full assessment based on existing case registration. However, the interviews conducted suggest that registration with government actors was among the least successful

components. It was not sustained beyond the pilot project period because communities perceived no value in registration.

In regards to recording, although TLO kept a listing of all cases related to Justice Shura members, the information was often limited and not sufficient to be considered a true record (such that it might contribute to preventing a relitigation of the dispute in the future, or be used as evidence in any formal justice institution). Few decisions were recorded or stored by local decision-makers, or with the disputants themselves.

As will be discussed in greater detail below, there may be significant cultural or economic factors that deter practices like registering and recording from being adopted, particularly for certain type of cases. However, there were also significant external limiting factors on the impact of the Justice Shura due to competition (for both cases and influence) from pre-existing dispute resolution bodies in the area. In Uruzgan province overall, but particularly in the capitol of Tirin Kot, dispute resolution has been heavily subject to capture by local powerbrokers through a number of powerful, standing shuras, including the IDLG-supported District Community Council (DCC), the Correction Council or “Shura-e Eslahee” controlled by the Chief of Police and local strongman Mattiula Khan,<sup>24</sup> and a network of Sufi leaders established and controlled by the Governor of Uruzgan, Mohammad Omar Shirzad. These other dispute resolution bodies appeared to absorb much of the demand for services similar to the Justice Shuras, but with the backing of much larger means of coercive enforcement.

The site for the Justice Shura in Uruzgan was originally selected over other districts in Uruzgan because -- given the remoteness of Deh Rawud district -- the population could not access other pre-existing and well-established informal justice bodies in the province, and thus there would be limited negative disruption.<sup>25</sup> However, over the course of the project, the IDLG supported District Community Council (DCC) started to operate in parallel with the Correction Council (“Shura-e Eslahee”) and became more active in Deh Rawood. In addition, the National Directorate of Security (NDS) established its own councils of maliks in Deh Rawud, which at the time of research had 82 members at the district level. These developments reduced the number of cases brought to the Justice Shura (by referral or by the disputants themselves). While some cases brought to the formal system were referred to the Justice Shura, the independent assessment found that government officials more often referred cases to the DCC or other dispute resolution bodies in Uruzgan (although since many members of the DCC were also on the Justice Shura it was not always clear which “body” to attribute the decision to, or even to the individual elder himself).<sup>26</sup> TLO also reported that the DCC paid elders more in compensation, as opposed to the Justice Shura which was limited to transportation and communication costs. The DCC compensation appears to have further distorted the informal justice sector in the area.

### **Nangarhar Justice Shuras - TLO**

TLO established Justice Shuras (JS) (each with 16-20 members) in three locations of Nangarhar Province: Mohmand Dara, Batikot and Nahya-e-Five of Jalalabad City. Members of the three Nangarhar Justice Shuras provided different numbers of cases settled. For example, with regard to Nahya-e-Five, some



*The pilot projects found that while prevalent throughout Nangarhar province, informal justice was more heavily used in the rural than the urban district of Nahya-e-Five in Jalalabad city. In the urban areas, residents and elders typically have greater access not only to formal justice mechanisms but also to directly negotiate issues with other formal leaders. In this photo residents of a district near Jalalabad raise a concern about the recent arrest of a community member at the district governor's compound in one of the urban districts of Jalalabad. Photo by Erica Gaston*



recalled 30 or 40 cases, while the TLO liaison officer in Nahya-e-Five estimated that during the 12 months of the USIP-supported project, 80 civil and criminal cases had been resolved.<sup>27</sup>

In contrast to TLO's experience in Uruzgan, local political dynamics appeared less obstructive in Nangarhar province. In part this is because TLO was able to play into pre-existing power structures in their selection of Justice Shura members. Before the establishment of the Justice Shuras, a widely respected shura existed and was led by the founder of the Justice Shura, where 95 men represented the three major tribes in the districts and in the province: Mohmand, Khogyani and Shinwari. Some Justice Shura members also served in the NSP-supported Community Development Councils (CDCs),<sup>28</sup> USIP-supported Provincial Dispute Commissions, the IDLG-established DCCs, other local tribal Shuras, and the civil shura at the provincial level (representatives from local trade unions).

Because of these different political contexts, registration, referral, and recording patterns played out differently in Nangarhar than in Uruzgan despite the similar models implemented by TLO in both provinces. In the districts in Nangarhar, there appeared to not only be referral of many cases from the formal system to the Justice Shuras, but also linkages and improvements in recording decisions with formal actors after the dispute was resolved. After deciding disputes (whether referred to them by local officials or brought by the disputants) Justice Shuras generally reported their decisions to formal justice actors: the independent assessment found that most decisions were stamped, or formally recognized, by the local district governor, by the DCC or the Governor's office. Other parts of the formal justice and government system were aware of the Justice Shura and said they formally referred cases to them and had a process for recording their decisions afterwards. For example, the Huqooq (law) Department in Nangarhar said it had officially referred civil cases to the Justice Shura and asked the Shura to register the decision with them afterwards.

Overall, the elders involved in the Justice Shuras in the two rural districts appeared far more prominent in the districts' dispute resolution than those in the urban Nahy-e-Five. For example, TLO's overall dispute resolution tracking in the target districts (which tracked all informal cases in the district, not just those resolved through the USIP-funded Justice Shuras) found 57 cases resolved by shuras and jirgas in Nahy-e-Five in 2010-2011, while over the same period tribal shuras and jirgas solved an estimated 550 cases in Mohmand Dara and Bati Kot, eight times more than the government courts in those areas and almost nine times more than those in the urban Nahy-e-Five. This was not unexpected since even before the project was initiated, preliminary research studies found that tribal justice mechanisms were more heavily relied upon in rural areas where there was less access to formal justice mechanisms.

In the districts in Nangarhar, Justice Shuras generally reported their decisions to formal or semi-formal bodies (such as the DCC). The independent assessment found that

most decisions were stamped by the DCC, and in Bati Kot they tended to be stamped by both the DCC and the district governor. However, in general, the records' text acknowledged the decision made by local elders, without mentioning the Justice Shura. This is in line with the project goals, because the objective was not to create a new, sustainable institution in the form of the Justice Shura, but rather to create linkages between community elders and state actors, with the Justice Shura being a vehicle to aid that relationship-building. Nonetheless, the independent assessment did raise the question whether the lack of recognition for the Justice Shura itself could be interpreted as evidence that the project did not have a significant impact on pre-existing linkages and relationships. The Mohmand Dara district-governor suggested that there was some pre-existing custom for civil and minor criminal cases (e.g. assaults or other violence that does not result in serious injury), to be referred to local elders officially and referred back to the government for further processing and for recording of their decision. Thus, the high rate of referral and recording may not have been due to the TLO/USIP project alone. Despite the seemingly strong linkages during the course of the project, much of the regular meetings and the rate of case referral ceased after the project ended, according to TLO staff, possibly because the transportation and support funds ceased. This suggests that the projects did have some impact, although it suggests that more needs to be done to ensure the sustainability of the linkage after a given project ends. Linkages processes will only endure if they are valued by both the justice practitioners and the disputants themselves.

# Analysis

---

## **Differing Receptivity to Recording, Referral and Registration**

Referrals between the formal and informal system existed in all of the communities in which the pilot projects took place, but to varying degrees. Those interviewed in the independent assessment offered mixed evidence as to whether the linkages projects increased these referrals. Many of the elders directly involved in the project suggested that they had increased contact with formal justice or governance actors about cases as a result of the project. However, not all justice or government officials seemed to agree, and some did not show any awareness of the pilot projects.

Part of the rationale for the varying degrees of referral may have been a result of different compensation structures for both formal and informal actors meant to induce collaboration. In some instances, stipends for travel or other associated costs may have increased the willingness of some government actors to participate in weekly or monthly coordination meetings. In Nangarhar, once the external inducements or coordination for referrals and coordination were eliminated, there was a reduced level of cooperation between formal and informal actors.

Some registration was already happening in communities prior to the pilot, especially in Nangarhar province, where local officials sometimes stamped or ratified decisions resolved outside the formal justice system as a matter of local practice. In some cases, the written summary of the cases stamped by officials might be considered detailed enough to constitute a “record” of the case. However, even though officials stamped, or ratified, some cases, there was no systematic registration of decisions resolved in the informal sector in any of the provinces. During the course of the pilot, efforts to increase registration faced resistance. Communities often saw minimal value from registering cases with the government. There is little evidence to support the assumption that individual disputants valued government recognition as a means of enforcement or protection against future claims.

There was greater evidence that recording was valued by disputants, and pre-existed as a matter of local practice. There were far more cases recorded with TLO and CPAU (which often meant a copy kept with the elders or disputants as well) than cases registered with the local government. Many disputants said they appreciated the additional, structured recording that took place under the pilot projects. Disputants generally found more value in (or at least did not object to) keeping a written record of decisions than in registering those decisions with the government. More rigorous,

longitudinal research would have to be conducted to assess whether this recording in itself contributed toward the sustainability of decisions.

### **Case Type and Local Preferences Shape Linkages Patterns**

The nature of the cases heavily influenced registration and recording patterns. For certain types of cases, disputants and informal justice actors often perceived a direct harm in formal registration of decisions. Thus referral, registration, and recording patterns – and the pilot projects’ ability to encourage these practices – were heavily dependent on the nature of the case, with these formal markers of linkages more common with small civil cases, and on the other side of the spectrum least common with criminal or family law cases.

Local government officials often went along with or encouraged these patterns. Government officials in all three provinces said they were willing to register the outcome of any cases decided in the informal sector. In practice, though, local officials appeared to resist registering – or even referring with any written record – more contentious cases such as family disputes, criminal disputes, and some land disputes.<sup>29</sup>

**Small civil or small land disputes** that were brought to the formal system or to local government officials were frequently referred to informal justice actors, including the Peace Councils and Justice Shura.<sup>30</sup> Following resolution of the case, registering these cases with local officials was relatively non-controversial. While these were the least controversial in terms of registration, it is worth noting that in all three provinces the number of cases reported back to the government and/or stamped by local officials was a minority of the total cases resolved by the pilot project elders, illustrating the overall weak support for registration regardless of the type of case.

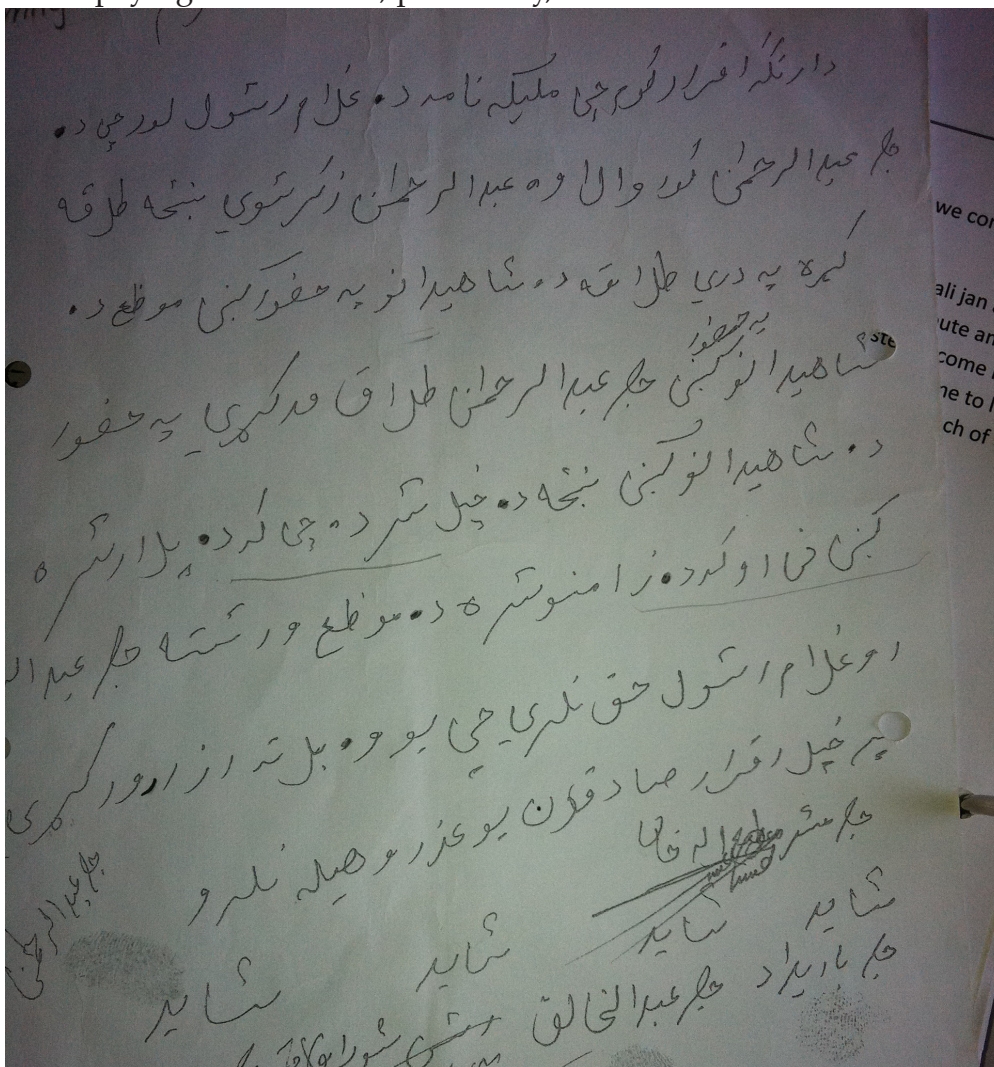
**For more significant land and property cases**, official referral and registration depended on the nature of the property involved, whether any official deeds or other property documents were available, and the reputation of the local government officials. Most elders, community members, and local officials agreed that most land cases could and should be resolved through traditional forums, because that is the customary practice and it eases the burden on the formal system (given the large number of land disputes). Because of this, many of these cases were never initially brought to the formal system, and thus there was limited opportunity for local officials to either refer them to informal bodies or assert jurisdiction over them.

An additional factor in land and property cases was the availability of documentation. Where there was an absence of legal documents for the land or property in question, disputants often avoided government engagement. Government officials, for their part, often avoided officially referring or registering these decisions. District governors in Kunduz and Nangarhar said that if local officials ratified or provided a legal settlement document for land disputes for which there were no papers, it would put the local gov-

ernment under pressure for ruling in cases without legal documents and for possibly, as argued, legalizing the private use of land that might technically be government property based upon Afghan law.<sup>31</sup>

Economic rationales were a predominant factor in disputants' decision making as well. Disputants avoided formal adjudication or registration of informal land dispute resolution in order to avoid paying land taxes or, potentially, bribes to local officials. This

created very different registration patterns and preferences amongst disputants in different provinces. In Nangarhar province, land grabbing and corruption over land is frequently a problem, and there is also a low level of land and property ownership documentation. Perhaps not surprisingly given these provincial conditions, disputants from Nangarhar who were interviewed overwhelmingly said they were not willing to have an agreement registered with the government.<sup>32</sup>



In this record of a divorce case, the family agreed to keep a written record with themselves, with community elders as witness (under Islamic law there must be a witness to a divorce), but refused to have the record passed on or registered with local authorities due to privacy concerns. In many areas of Afghanistan it is common practice for the wife's family to ask for a letter (locally called "TALAQ KHAD") confirming the divorce to avoid any further conflict in case the divorced women wants to remarry. Location: DEHRAWOD district, URUZGHAN. Photo by Akbar Sarwari

In contrast, disputants seemed less sensitive about registering land cases or seeking official approval of property disputes in Kunduz – a province with much lower rates of land grabbing and land disputes, and a higher than average level of registered land and property documentation due to cadastral surveys in the 1970s and 1980s.<sup>33</sup>

**Family law** cases involve personal disputes or details that families considered private and would not want shared in any public forum, or even referenced through public registration of any kind. Both community members and local officials strongly argued that these cases belonged with informal justice mechanisms rather than the formal justice system. The pilot projects did not identify any family law cases that were registered with local officials after being decided through traditional dispute resolution. Even where the pilot projects succeeded in having some internal record of a family law case that was resolved, the details were often so sparing that it defeated the purpose of recording altogether. The social stigma associated with bringing domestic issues into public forums – including before informal actors – continues to present a serious barrier against family law cases being transferred to or monitored by any actors outside the family, particularly representatives of the state.

Government officials interviewed tended to agree that family disputes involve private details that should not be aired publicly. Officials who were interviewed and other community representatives said that family cases that are brought through formal channels are often verbally referred to informal dispute mechanisms, without any official recognition or written referral process. Some comments from government actors suggest they may have also resisted registering these cases because they thought it was inappropriate. Despite their government role or title, the same normative values often prevail amongst actors in the formal justice system. In addition, family law disputes may be resolved in ways that violate Afghan law and international human rights standards (for example, when the resolution involves the practice of *baad*<sup>34</sup>), so local officials may not have wanted to officially stamp or endorse such violations. There is no evidence *baad* was used in any of the pilot project cases.

This suggests that absent a shift in the underlying sensitivities and cultural preferences dominating family issues, it would be difficult to encourage the type of registration and recording that might deter rights violations or prevent conflicts from recurring.

No **criminal law cases** were registered with or referred to formal actors during the course of the pilot projects. Those interviewed suggested that when communities elect to resolve such cases through the informal sector – which was not infrequent – they often do not want them reported to the government for fear that the criminal will be subject to further punitive actions. When interviewed, government officials and police in all three provinces said that criminal cases should be decided only through the formal sector; however, there was evidence that in practice local officials were aware of, and may have verbally referred, the resolution of some criminal cases to traditional dispute resolution. In such cases, they refused to formally stamp or endorse decisions made by

informal actors. For example, in Kunduz, the independent assessors were told that officials frequently referred criminal cases verbally but refused to do so in written form, or to register them afterwards. It was explained that this was because there was no established government policy recognizing dispute resolution mechanisms outside of the formal system, particularly for criminal cases, and that officials were particularly sensitive about contravening this for criminal cases.<sup>35</sup>

### **Rethinking Assumptions about Linkages**

When viewed as a whole, the responses to these three specific linkages practices suggest a need to rethink some of the initial assumptions upon which the pilot projects were based. The original pilot projects were designed based upon a theory that formal linking practices – written referrals, registration when a case is decided, and maintaining a written record of a decision and its rationale – would add certainty and permanency to decisions, particularly in the case of land and property disputes. In addition, it was assumed strengthening these linkages, and enhancing public tracking and recording, might over time reduce violations of Afghan law in the system (for example, a reduction in the informal settlement of criminal cases, or of the elimination of violations of women’s rights in the informal system). The findings offer some push-back to these initial assumptions.

First, most disputants did not value local government officials’ recognition of their case resolution. The arguable value of such linkages from a disputant’s perspective would be that formal registration and recording the outcome of the decision would decrease the chance that one of the disputants would later try to re-open it, or might increase the chances of enforcement, either from the community or from the government itself. Though these initial assumptions were reasonable, for the most part, they did not play out. Communities did not view formal registration as likely to guarantee sustainability or enforceability.<sup>36</sup> The government did not have the credibility or capacity to enforce decisions in many areas and so offered no added protection value.<sup>37</sup> Meanwhile, for certain types of cases, formal registration would bring with it significant adverse financial, penal, or social repercussions. Any future linkages project must more carefully consider the underlying cultural preferences, the local community dynamics,<sup>38</sup> and the resulting cost-benefit calculus for certain types of cases if these practices are to be expanded, altered, or otherwise shifted.

The second set of assumptions suggested that government officials, or even higher levels of the Afghan government and judiciary, might play a monitoring role over time if given greater access and information about cases resolved outside of the formal system, and a stronger relationship with those deciding these cases. In addition these pilot projects were initially designed during a period when it was thought that a policy establishing the respective roles (and boundaries) of the formal and informal system would soon be promulgated, and that the formal justice system and the Afghan state

would continue to develop and expand. In contrast, following deadlock between national institutions over the role of traditional dispute resolution, efforts to develop a policy on the role of the informal sector failed.<sup>39</sup> As a result, many local governance and justice actors at a local level remain uncertain as to whether and when they can legally work with non-government actors on local dispute resolution.

Perhaps given these two large caveats, it is not surprising that the evidence from the pilot project reflects negatively on the possibility of local officials playing a policing or oversight role, at least in the short-term, until their own capacity and credibility increases in local communities. In many cases, government officials were not capable of policing certain divisions of labor between the formal and informal system because they lacked sufficient influence or knowledge, or in other cases because they were tacit in the “violations”. These findings suggest that any policing role by the formal system would hinge on broader legal awareness and strengthening of the formal system actors as much as those in the informal system, and we would only see meaningful change in a long-term time frame.

### **Local Politics as External Limiting Factors**

The overall ability of the pilot projects to influence the development of linkages, or specific referral, registration, or recording patterns, was highly contingent on the local political context. In the current climate in Afghanistan, many dispute resolution bodies (both formal and outside the formal sector) have been subject to co-option by local powerbrokers, limiting the ability of any justice project to provide neutral or independent advice, and ensuring that practices are often adopted based on whether they are supported by key powerbrokers not on whether they serve the interest of the community or prevent disputes in the future. The proliferation of “shuras” created by other outside actors, often through donor-funded programming and the Afghan government, further complicates local power dynamics.<sup>40</sup>

The first key limiting factor was that it was difficult to build new linkages or change existing ones in communities because of a proliferation of local bodies with some role in traditional dispute resolution. Rather than working with existing bodies, implementing agencies and other local actors have often found it easier to create their own preferred bodies – with the common practice of introducing new incentive structures and mechanisms for accountability. Many of these have a quasi- or semi-governmental function because they are directly established by government ministries or given charge of development funds. These include:

- the District Development Councils (DDCs) and Community Development Councils (CDCs);<sup>41</sup>
- the provincial Ulema Councils;<sup>42</sup>
- the provincial branches of the High Peace Council (PPCs);<sup>43</sup> and



- the District Community Councils (DCCs).<sup>44</sup>

Many of those interviewed during the assessment – including implementing partners, the members of the Justice Shuras and Peace Councils, and other community members and justice actors – said these “semi-governmental” groups play a dominant role in local dispute resolution, often to the exclusion of other informal justice actors.

The USIP assessment also found a number of dispute resolution bodies created at a local level by non-governmental organizations and international donors that include the European Commission, GIZ, Counterpart International, and others, including USIP; by local powerbrokers (for example, the Eslahi shura in Uruzgan province supported by Matteullah Khan); or even other Afghan government institutions, for example, the presence of shuras or councils supported by the National Directorate of Security in Uruzgan.

The prevalence of these multiple dispute resolution bodies – particularly some of the new “semi-governmental” bodies (the CDCs, DDCs, PPCs, etc.) – have limited the operational space for new dispute resolution forums like those in pilot projects. The semi-formal bodies tended to be better funded, with specific compensation for elders taking part in some bodies.<sup>45</sup> The Justice Shuras and Peace Committees competed with these mechanisms, without the same level of external funding. As TLO noted in its report on one of the pilot projects:

Deh Rawud Justice Shura members in turn stated that, if the Justice Shura had provided them with more resources (e.g. salaries and dedicated meeting space), they would have worked more actively on the Justice Shura’s behalf. However, TLO, while taking Deh Rawud elders at their word, notes that elders in other districts occasionally echoed this statement (for example, in Chahar Borjak), but nevertheless continued their role on the Justice Shura. Thus the presence or absence of salary may constitute an issue in some, but not all, districts.<sup>46</sup>

In addition, the sheer proliferation of dispute resolution bodies meant that even if the projects successfully changed patterns of registration or referral vis-à-vis the Justice Shuras or Peace Committees, they represented only one small slice of the dispute resolution mechanisms in the given community, diluting the overall impact.

The potential impact was not only limited by the number of competing dispute resolution mechanisms but by the way some of these other institutions played into local power dynamics, frequently co-opted or used by local powerbrokers. In Khanabad district of Kunduz province, most of the members on the “semi-governmental” bodies held positions on multiple bodies. Many had a reputation for being former commanders or warlords who had commanded armed groups or militias in past periods of conflict. These elders were also frequently linked to younger commanders of militias in the

area through kinship or tribal linkages. As a result, in places like Khanabad, particular political parties or tribal groups hold a disproportionate influence (if not outright monopoly) on informal justice. Residents have little option but to go to the informal justice body with members who hold the most power in their area and to abide by their



---

*Militia commanders like those pictured played a prominent role in formal and informal dispute resolution in Khanabad district, Kunduz, even supporting the police and court to enforce decisions or to make arrests, according to local officials and community leaders. Photo by Anonymous [name must be withheld for security reasons].*

decisions, regardless of whether they deem them to be fair or legal. When asked about their ability to access fair forums or seek a just resolution to a dispute, most community members interviewed said that they would find the same people in whichever body they approached. As a result, their best strategy was to seek support from powerful individuals in order to have a dispute decided in their favor.<sup>47</sup>

Where local power dynamics constrict choice in this way, it can limit the ability of any alternate models to gain traction because in these areas, individuals have little choice but to take their problem to the most powerful group, not the one that has the most just or equitable model for dispute resolution. These dynamics strongly limited the impact of the pilot projects in all three provinces assessed, but especially in Kunduz and Uruzgan provinces. During the field visits it became evident that there were powerful local dispute resolution bodies in place prior to the establishment of the Peace Councils and Justice Shuras, among them some of the new, comparatively well-financed “semi-governmental” bodies.<sup>48</sup>

Informal dispute bodies disproportionately influenced by these local power dynamics may be more likely to decide cases unfairly or in contravention of Afghan law. The aim to reach a compromise that (at least temporarily) settles the conflict and is acceptable to the most powerful party can override importance placed on how “fair” or, more simply, legal a decision will/can be. For this reason, such decision-making may reinforce existing local power (im)balances. At times this means a least-bad solution for the weaker party: the informal justice body, even if predisposed toward the more powerful party, may offer the only means of trying to apply social pressure to stronger parties to do what might be considered locally appropriate, but not necessarily legal or just by any external standards. At a minimum they may be able to mitigate how badly the weaker party is deprived of their rights in the absence of a state system that can protect them.<sup>49</sup>

However, these dispute resolution patterns may not be sustainable, and so may not promote long term stability in an area. In districts where decisions are enforced primarily because they are backed by a powerful stakeholder (particularly one with significant military power in an area) but not because they are perceived as fair or legitimate, there may be a greater likelihood that disputes will be relitigated at a later period when the power dynamics shift. Examples of this ‘temporal forum shopping’ are prevalent throughout Afghanistan – when power dynamics shift (as can happen frequently and dramatically at a local level in Afghanistan) parties to a dispute may re-open old, previously resolved disputes if they think the changed dynamics have increased their standing or power in the community vis-à-vis the other disputing party.

These local power dynamics not only constrain the pilot projects’ influence on the communities; they may also directly influence the pilot projects in ways that undermine some of the goals. Both the Peace Councils and Justice Shuras chose individuals in the communities that already had some experience in dispute resolution and/or some level of influence. Such actors are not immune to or distinct from the broader

political dynamics. Thus, not surprisingly, the USIP assessments found that both the Peace Councils and Justice Shuras were influenced by local powerbrokers. The Peace Councils in Kunduz were influenced by the *ulema*, the DCC and a local commander's shura. Some Peace Council members were also local militia commanders. The Justice Shura in Deh Rawud maintained independence for many of the lower level decisions, but obtained approval for their decisions in sensitive and criminal cases from the Eslahee Shura, founded by the Chief of the Police in Uruzgan, and the Maliks' Council established by the National Security Department in Deh Rawud.

These findings offer a note of caution to working on informal justice in communities that are subject to "capture" by one or more groups. The problem is not with the informal justice sector per se; the same issues would present themselves with other governance, justice (formal sector), security sector support or development projects in the same area. USIP's review found no evidence that the informal justice sector was particularly targeted by powerbrokers for co-optation (as opposed to, for example, international military or donor initiatives that dispensed community funds or supported militia groups). However, this issue nonetheless raises the dilemma of whether it is worthwhile to create new mechanisms or otherwise put inputs into the informal justice sector if such tools are then used by local powerbrokers who might be engaged in predatory practices. This point was vigorously debated in the workshop with partner organizations, with some arguing that working with such predatory actors would make the projects guilty of violating the "do no harm" standard of outside assistance projects. Others argued that this is the reality in most communities in Afghanistan, and it is nonetheless necessary to work with some influential leaders or powerbrokers if the project is to have any success. If improvements are to happen over time – in terms of improving fidelity to Afghan or sharia law, or improving rights enforcement or access to justice for minority groups – it would have to be through working with these individuals. Those in favor of continuing to work in such communities (despite political capture issues) argued that civic education, and creating forums in the community that acted on a slightly more equitable or rights-oriented basis could at least improve the chance that community members could find alternatives, and that powerbrokers might consider interests other than their own. However, none suggested that these mitigating strategies would be enough to solve the problem entirely.

## Conclusions

---

In all three provinces the disputing parties were happy to approach the pilot project resolution bodies with disputes rather than take their case to the government, arguing that the government judicial system is too time-consuming, bureaucratic and corrupt, while the local system was faster and cheaper and attuned to cultural values and traditions. The findings from the pilot project and independent assessment affirmed many of the rationales for engaging in this project to begin with – that for many communities, traditional dispute resolution mechanisms maintain a high degree of credibility, and are often the most accessible and sometimes the only, means communities have to resolve disputes. In this context, supporting positive models of informal dispute resolution is important because it may provide communities with access to some form of justice while the formal system develops.

However, the results of the pilot project and the assessment suggest that though these forums exist, changing or altering practices in order to improve access to justice, rights protection, or stability, may be challenging. While there were some implementation issues and on-the-ground challenges that prevented the programs from achieving the anticipated results, it also appears that some of the underlying assumptions about linkages projects need to be revisited. At a minimum, these assumptions do not hold in all localities (as revealed in the different responses in each province), and thus suggest that they would be difficult to scale-up to have a widespread impact in Afghanistan.

The ability to fundamentally impact referral, registration, and recording practices was not as high as USIP and its partners would have liked or had anticipated. While such resistance may not be insurmountable, the findings suggest a need for greater attention to how elements of the broader legal structure and cultural preference – as well as the practices of local justice or governance officials – incentivize or discourage these practices. Depending on these local dynamics, intentional programming alone may not be enough to significantly change long-standing practices on these issues, at least not over a short period of time.

### **Local politics matter**

Local political dynamics predominantly determined the impact of the pilot projects. Where the local communities were receptive to the projects and the models were able to complement local dynamics (as in Nangarhar), they were able to increase the number of cases resolved. Where other existing dispute forums competed with the projects

for influence, or political powerbrokers were resistant to increased dispute resolution through the mechanisms established or were resistant to change (as in both Kunduz and Uruzgan), it was more difficult for the projects to make headway.

Local community dynamics also strongly influenced the degree to which specific practices were adopted for certain types of cases. For example, the local practices surrounding land disputes – ranging from the prevalence of land disputes in the area to the reputation of local officials for soliciting bribes over land tracts – heavily influenced registration and recording.

However, in some instance, resistance to linkages aspects went beyond local norms or experiences and is indicative of a deeper challenge within the Afghan rule of law system or cultural norms. For example, with regard to registering family law disputes, cultural resistance to sharing even basic details of what was considered to be a private matter in a public forum seemed to trump any other potential value or consideration when it came to registration. Even if all the other issues with formal systems were resolved – the capacity was improved; corruption was decreased and public trust gained; the state demonstrated stronger enforcement mechanisms – registration of family cases would still likely face resistance.

### **Success Depends on the Formal Sector**

The results from the pilot projects also suggest that many of the benefits of linkages projects depend ultimately on the formal sector. For projects like this to succeed, there should be a defined role for the formal versus the informal sectors, acknowledgement under Afghan law of cases resolved outside the formal system, and a common understanding of what weight such decisions should be given legally. Absent that, it is difficult for practices like registering decisions with local officials to have any value for litigants, for local officials to feel comfortable ratifying such decisions, and thus for linkages projects to succeed. Efforts to develop a policy on the relationship between the formal and informal system failed over the course of 2009 and 2010 and appear to be at a standstill. Unless this fundamental issue is resolved, many aspects of linkages projects are likely to face resistance, and ultimately will not be sustainable beyond the duration of the project.

In addition, these projects will only achieve the full benefits in the long-run if there is an increasingly strong, relatively functional formal sector that has the trust and confidence of litigants. A strong formal system provides a rule of law framework against which other dispute resolution mechanisms can interact. For example, whether a contract is resolved through a village elder or through a court system, it is more likely to be enforced if there is a climate of enforcement in the community, which is most often the case if there is a functional formal system that enforces the law. In addition, a stronger

formal sector might be able to play a valuable monitoring role to check egregious rights abuses or violations of the law (in either the informal or the formal system).

This strong formal system currently does not exist in most communities. A linkages project should only be attempted if there is evidence to suggest that the existing issues in formal justice and governance would improve over time, in terms of both strength and quality. Given the overall political situation in Afghanistan, this seems less likely now than might have been assumed when these projects were initially conceived. Already in 2012, the anticipation of international troop drawdowns, and the uncertainty surrounding the 2014 national elections, and President Karzai's successor, increased competition for influence and the tendency toward political capture by local powerbrokers. At a local level, the formal state is waning in influence, rather than gaining. Given the declining Western appetite and budget for engaging with Afghan formal state development in the near term, the formal justice system seems more likely to shrink in terms of capacity and outreach, than to expand its presence and accessibility. Moreover, the trends do not suggest that the formal sector is on track to overcome the trust deficit it has with the Afghan public. Corruption in the judiciary has been on the rise in recent years. The political instability and general problems in governance throughout the country seriously mitigate the space and opportunity for scaling-up innovative, local reform in the justice sector.

All of these factors make it more likely that the negative local political dynamics that obstructed the linkages projects in Kunduz and Uruzgan will be present in more communities. Thus, proposals for future linkages projects should be treated with skepticism and not undertaken without a rigorous analysis of the political context in the target communities.

## **Future Programming Guidance**

### **1. Linkages projects are unlikely to succeed in the current political climate, and absent formal government policy**

The political instability, and the decentralization and fracturing of power that is likely to characterize the transition period (and potentially beyond 2014) may make it even more difficult to develop country-wide solutions that engage the informal justice sector. This does not mean that engagement with informal justice is impossible or completely undesirable. If anything, the likely reduction in Afghan government presence and status in the coming years may create a greater need for fair, peaceful dispute resolution mechanisms in communities. However, solutions will likely be highly dependent on local conditions. The space for overtly political engagement – standing up semi-formal shuras with authority over significant political or economic funds – may be shrinking.

Resources to continue the proliferation of externally funded shuras is dwindling. As such, it will become ever more important to ensure that external interventions or engagements mitigate the negative impacts that they have had on local power dynamics in the past 10 years. A decrease in funding may actually mean an opportunity to redefine the relationship of local communities, and shift the source of credibility and accountability so that community leaders gain legitimacy from the constituents they serve rather than the funders who support them.

Of the different linkages components that were attempted, the most promising related to improving or expanding recording. In many communities, disputants were already engaged in some level of recording, and did not resist recording decisions in greater detail or in different ways (so long as the record did not go to government officials). A deeper analysis or pilot projects that fleshed out how recording contributes to dispute resolution and enforcement would be valuable. In particular, it is worth exploring the value of encouraging deeper recording practices in stable communities versus in those that are unstable, or in which the justice and dispute resolution mechanisms are subject to capture by predatory individuals. The pilot projects illustrated that in communities subject to political domination by warlords, militias, or other unsavory characters, the decisions that result from both formal and informal dispute mechanisms can be highly inequitable, and may violate rights or have other long-term consequences. In these cases, recording mechanisms that give some permanence to decisions, and thus reinforce the inequitable decision-making may not be the best for the community in the short- or long-term. Instead, communities might benefit most from maximum flexibility to forum shop or re-litigate disputes when the power balance shifts.

Alternately, the most beneficial types of engagement may be lower level, longer term civic education or legal awareness initiatives. These might range from mentoring or educating elders engaged in traditional disputes resolution – as some components in the USIP pilots and others have attempted to do – to broader community legal awareness initiatives, to simply investing in civic education at all levels even down to primary education. While the results of such grassroots civic and legal education would not be seen for decades, many of the problems in the current Afghan justice sector (both the formal and informal) are generational. At this highly charged, politically unstable point in Afghanistan’s development, such programming or funding support may be the most likely to deliver tangible results.

While the findings of this study suggest that linkages models cannot be scaled out to a countrywide level and that, in the near term, there will be fewer communities with a political environment receptive to these projects, there may nonetheless be some communities that benefit from them. Thus, if a linkages project or other project engaging with the informal justice sector is going to be attempted the following guidelines should be heeded.



## **2. Informal justice projects must be tailored to the local context, and flexible to ongoing adaptation**

Once the primary purpose of the project is made clear, the implementing partner should be given funding and time to engage in a rigorous analysis of the local political dynamics, the quality and strength of local formal governance and justice actors, existing customs with regard to the relationship between the formal and informal system, and how these broader dynamics incentivize or disincentivize certain practices. This analysis should inform the site selection for the project, and the types of linkages practices or mechanisms that are encouraged, in addition to providing general operating guidance. For example, if particular local officials are known to be predatory or corrupt, such that any linkages with that actor would go against the community's interests, then linkages may not be possible (perhaps recording only would be attempted) or at least not with that actor. Another example of how such local knowledge should inform program design would be if the prevalence (or lack thereof) of land registration records in a province increased or decreased incentives for recording land, either with disputants or with local officials.

Assessing the local conditions should not stop at the preliminary phase. As illustrated by the pilot in Uruzgan, the situation can change dramatically during the course of a project.<sup>50</sup> Thus program design should also build in continued analysis and monitoring of the local situation, as well as some mechanisms for community feedback to be able to assess how the project components are being received and to change them if need be. Should the political dynamics change so significantly that minimal impact is expected (as happened in Uruzgan), alternatives – to include halting the project – should be available.

## **3. Lessons learned must be emphasized in addition to project accountability**

Any future projects should encourage an emphasis in learning, and real-time evaluation of the context and objectives, both among the implementing partners and among the community participants themselves. As noted above, where local contexts or other factors change, it is important to adjust the program objectives and methods to suit. More importantly though, efforts to improve traditional dispute resolution, or broader governance, rule of law, or formal justice issues, will not be possible without greater honesty and transparency in which methods are working and which are not. Although these pilots were explicitly designed to test models and to contribute toward lessons learned, it was often difficult to obtain honest appraisals, particularly during the course of the project. Fear that negative results would lead to funding cuts were too great of a disincentive. Upon completion of the project, USIP learned more about challenges that had arisen during the course of the work, but too late to either have tweaked the model or assisted the project partners.

In recent years, many donors in Afghanistan have emphasized monitoring and evaluation processes. While one of the larger purposes of such monitoring and evaluation may well have been to develop stronger lessons learned, implementing partners in Afghanistan have tended to perceive these processes as accountability checks alone. An equal emphasis on both oversight and collaborative learning may improve information about successful models.

#### **4. Project goals should be limited or prioritized, and clearly identified**

In the past, projects like USIP's linkages pilots have often pursued different goals at the same time. For example, the USIP linkages projects hoped to contribute to local stability, improve access (and equality) of justice, and help improve compliance with Afghan law and human rights. Any one project may make some headway on all of these goals. However, in a particular case, these goals often conflict. Decisions that abide by Afghan law may not have community acceptance or may spark further conflict, and vice versa.

In addition, at a macro-level trying to adjust projects to meet local expectations, cultural preferences, and other local dynamics may frequently result in trade-offs. For example, working directly with the most influential community leaders to resolve disputes may result in decisions that are more sustainable and have stronger enforcement capacity, possibly improving stability and reducing instances of conflict. However, in many communities in Afghanistan, the most powerful community leaders may not be the most savory, and working with them could mean supporting decisions that violate the Afghan Constitution. Alternately, those influential leaders could be biased in deciding cases in favor of their individual tribe or ethnic group. In this hypothetical, if the goal of the project was to improve short-term stability, the project might be considered a success – though such inequitable decision making might increase local animosity amongst marginalized groups and further undermine stability in the longer term. But if the primary goal was equal access to justice or rights improvement, the same project might be considered largely a failure. Because most of the project interventions (not only by USIP but also by other actors working in the justice sector) have developed projects on the basis of multiple goals, it can be hard to evaluate whether the results can be considered a “success”. Donors and implementing actors must be clear about what the *main*, motivating goal is (where there is more than one), and whether that goal is likely to succeed given the local context (down to a district or even community level).

#### **5. Treat informal justice projects aimed at short-term stabilization with skepticism**

If the main motivating goal is short-term stabilization or counter-insurgency, the project should be treated with extreme caution. One of the past goals of linkages projects and other work with the informal sector has been stabilization. The absence of peaceful means of dispute resolution in a given area creates a highly unstable situation easily exploitable by militant groups or other insurgent elements – unresolved disputes

may lead to violence or broader conflict and be more difficult to resolve when they do arise. In addition, in many areas, the lack of government services – including dispute resolution functions – has provided an opportunity for insurgent groups to build popular support and tolerance by providing these services. The existence of informal justice in these areas has been thought to potentially provide a way to address immediate gaps, enhancing opportunities for peaceful resolution of disputes and also taking away the Taliban’s ability to provoke local conflict or drive a wedge between the local population and the Afghan government by providing dispute resolution services themselves. In addition, it has been theorized that linking these successful, credible means of informal justice with the formal government might over time lend some credibility to the formal government and contribute toward state-building.

The pilot projects and research largely do not support these assumptions in the environments in which they were tested. The evidence suggests that informal justice operates most effectively against an existing baseline of security. These mechanisms are not in themselves necessarily a tool for creating that level of security. Further, as noted earlier, linking credible informal justice actors to local officials only works as a state-building tool when the government actors themselves are credible, fair and reasonably functioning. The current political climate makes this less likely, rather than more likely. Thus donors should treat with skepticism any linkages project premised on stabilization, at least in the near-term.

The evaluation found very little evidence that strengthening the informal justice sector and linkages with the formal system in themselves help prevent insurgent groups from capitalizing on the population’s resentment toward the government. In the communities examined, Taliban dispute resolution mechanisms co-existed peacefully alongside other traditional dispute resolution mechanisms. (The Taliban did not threaten the dispute resolution mechanisms established in the pilot projects; however, they did oppose the semi-governmental dispute resolution bodies in the district.) Individuals went to the forum that had the highest local legitimacy, often predicated on power of enforcement in the community, whether that be the Taliban, a local powerbroker, the local district governor, tribal elders, or others. Linking credible informal actors to state systems will not in itself improve trust and confidence in the latter, and does risk harming the credibility of the former.

#### **6. Informal justice programming aimed at reducing violations should be linked to broader and longer-term engagement**

One of the flaws of past efforts to use linkages projects or other engagement with the informal system to reduce violations of Afghan law is that these informal actors do not operate in a vacuum. Decisions that are in violation of Afghan law are frequently encouraged and reinforced by the surrounding community, by the disputants themselves, and even by local government officials, who themselves often have an equally poor understanding of Afghan law. Some projects have attempted to

overcome this by identifying specific “monitoring” individuals or structures within the surrounding system who might act as enforcers, such as the local representative of the Afghanistan Independent Human Rights Commission (AIHRC) or local members of the justice and legal community. However, even if these actors had the requisite knowledge and understanding themselves (which is often not the case), they generally do not have the resources, power or influence sufficient to monitor and prevent the much larger body of informal decision-making from enforcing violations of Afghan law. In addition, the absence of a formal policy recognizing and defining the role of informal decision-making impedes the development of stronger monitoring mechanisms within the Afghan state.

Projects whose primary goal is to limit violations of Afghan law or individual rights should more carefully weigh whether engagement with the informal system alone is likely to correct these past roadblocks. Traditional dispute resolution issues can not be addressed in isolation. They are often influenced (negatively) by broader rule of law and governance shortfalls. Addressing issues such as the weak respect for codified Afghan law in either the informal justice mechanisms or in the formal system requires a much broader, longer-term strategy of norm change, and legal awareness. Attention must be given not only to the supply side – whether there are forums in a community with sufficient capacity, knowledge and willingness to apply the law fairly – but also to the demand side: do citizens themselves have sufficient legal awareness and autonomy to demand rights enforcement? Thus, if the main motivating goal is to improve compliance with Afghan law and international human rights, working with the informal system alone will not be successful unless coupled with broader community education strategies, including legal awareness and strengthening the formal system.

# Notes

---

1. Paktia (Ahmadabad, Saeed Kareem, Mir Zaka); Nangarahar (Jalalabad, Nahy-e-Five, Mohamand Dara, Bat-i-Kot); Helmand (Gereshkt) Uruzgan (Deh Rawood); Nimruz (Chahar Burjak); Kunduz (Khanabad) Takhar (Taloqan).
2. See United Nations Office on Drugs and Crime (UNODC), *Corruption in Afghanistan; Bribery as Reported by the Victims* (Kabul: UNODC, January 2010). The average value of bribes paid to public sector officials is highest amongst judges, prosecutors, members of the Government and customs officers, who on average asked for bribes of more than US\$200 per instance. For more on attitudes toward justice institutions see the Asia Foundation (TAF), *Afghanistan in 2012: A Survey of the Afghan People* (Kabul: TAF, 2012).
3. See Antonio Giustozzi, Claudio Franco, and Adam Baczko, *Shadow Justice How The Taliban Run Their Judiciary* (Kabul: Integrity Watch Afghanistan, 2012).
4. See Thomas Barfield, Neamat Nojumi, and J Alexander Thier, *The Clash of Two Goods: State and Non-State Dispute Resolution in Afghanistan*, Special Report (Washington, DC: USIP, 2006).
5. While some have argued that the two systems are in tension, other have pointed out that a more competitive marketplace for justice can reinforce and strengthen each of the forums by elevating the competency of both formal and informal actors, and improve the quality of justice for the end-user. See Deborah Isser, *Customary Justice and Rule of Law in War-torn Societies*, (Washington, DC: USIP, 2011).
6. See United Nations Assistance Mission in Afghanistan (UNAMA), *A Long Way to Go: Implementation of the Elimination of Violence against Women Law in Afghanistan* (Kabul: UNAMA, November 2011). This report documents the consistent failure of state bodies, including the justice forums, to uphold the basic legal protections of women against domestic violence and abuse. Human Rights Watch, *I Had to Run Away: The imprisonment of Women and Girls for Moral Crimes in Afghanistan* (Kabul: HRW, March 2012). This report similarly documented the systematic abuse of women in state courts, through the predatory application of Islamic law to punish women for practices such as running away from abusive homes or forced marriages.
7. For more on the debate over how to describe this sector, see Noah Coburn, *Informal Justice and the International Community in Afghanistan*, Peaceworks (Washington: USIP, forthcoming 2013), 12-13 (copy on file with the authors).
8. See Noah Coburn, *Informal Justice and the International Community in Afghanistan*, Peaceworks (Washington: USIP, forthcoming 2013), 47-51 (copy on file with the authors); The Liaison Office, *An Evaluation of the Khost Commission on Conflict Mediation (CCM)* (Kabul: TLO, June 2009); The Liaison Office Program Brief / 1, *Between the Jirga and the Judge: Alternative Dispute Resolution in Southeastern Afghanistan*, (Kabul: TLO, March 2009); The Liaison Office, *Building Dispute Resolution Institutions in Southern Afghanistan: Lessons from The Liaison Office Justice Shuras in Helmand, Uruzgan, and Nimruz* (Kabul: TLO, December 2011); Thomas Barfield, Neamat Nojumi, & J Alexander Thier, *The Clash of Two Goods: State and Non-State Dispute Resolution in Afghanistan*, Special Report (Washington, DC: USIP, 2006).

9. As Barfield, Nojumi, and Thier described in their analysis of potential for state and non-state dispute resolution mechanisms to complement each other, “For criminal disputes, it is the duty of the state to deliver justice and to punish the violation of basic rights. In the case of serious crimes, state authority is essential, but there may be a valuable role for community forums in reconciling parties and agreeing on compensation. For lesser crimes, community forums may be able to achieve outcomes that are acceptable to both parties rather than relying on imprisonment, which harms families and does little to satisfy victims.” See Thomas Barfield, Neamat Nojumi, and J Alexander Thier, *The Clash of Two Goods: State and Non-State Dispute Resolution in Afghanistan*, Special Report (Washington, DC: USIP, 2006). For a broader discussion on how a ‘hybrid’ model of formal and informal justice providers might deal with both restorative aspects of justice as well as state obligations to prosecute and punish criminals in criminal cases, see Ali Wardak, “State and Non-State Justice Systems in Afghanistan: The Need for Synergy,” *University of Pennsylvania Journal of International Law*, Vol. 32, No. 5, October 20, 2011: 1320-1322.
10. USIP-funded pilot projects through CPAU and TLO took place in 11 districts total in the provinces of Takhar, Kunduz, Paktia, Helmand, Nimruz, Uruzgan, and Nangarhar; however, only some of the pilot project sites were selected for full assessment and lessons learned analysis.
11. Although past research had cautioned against creating new shuras or other bodies, in the lessons learned workshop, the assembled partners argued that they had to create these bodies in their programming because some more structured mechanism was needed in order to facilitate the links with the formal sector and also to create an explicit group involved in the recording and registering of cases by informal actors. In addition, this allowed the implementing partners to try to create decision-making bodies that would include different community perspectives, and perhaps elders open to improving compliance with Afghan and/or sharia law. For more on concerns with creating or forming shuras absent careful consideration of the impact on local power dynamics, see Noah Coburn, *Informal Justice and the International Community in Afghanistan*, Peaceworks (Washington: USIP, forthcoming 2013), 3, 26 (copy on file with the authors); Noah Coburn and John Dempsey, *Informal Dispute Resolution in Afghanistan*, Special Report (Washington, DC: USIP, August 2010); The Liaison Office report, *An Evaluation of the Khost Commission on Conflict Mediation (CCM)* (Kabul: TLO, June 2009).
12. These numbers are based on CPAU’s reporting of cases. The case files were independently reviewed in the assessment, and the assessors found the same numbers. See Cooperation for Peace and Unity, *Opportunities and Challenges for Justice Linkages: Case Studies from Kunduz and Takhar* (Kabul: CPAU, 2012).
13. Although most government officials and elders argued that criminal cases should be handled by the government, in practice the Peace Councils got involved in criminal cases in insecure areas beyond the government’s reach or in some murder cases where the disputing parties did not want government involvement.
14. See Cooperation for Peace and Unity, *Opportunities and Challenges for Justice Linkages: Case Studies from Kunduz and Takhar* (Kabul: CPAU, 2012), 24.
15. CPAU found that of the 140 cases they recorded through the entire project (including the portion funded by USIP and the portion funded by other donors) only 17 were registered with the government, all of which originated with a government actor. See Cooperation for Peace and Unity, *Opportunities and Challenges for Justice Linkages: Case Studies from Kunduz and Takhar* (Kabul: CPAU, 2012), 17.
16. Beyond the scope of the USIP pilot, during all of 2010 and 2011 a total number of 497 cases were recorded with the Peace Councils and the Law Department. However, in most cases, only the total

number of cases recorded was available. Other documentation, such as a description of the final decision, or pictures of the disputants or the evidence, was not available, making it difficult to verify the total number or establish other patterns or trends in dispute resolution over that period of time.

17. CPAU noted that “In most of the cases that were transferred to the informal sector, there was not sufficient evidence or documentation for the police, courts or district government to resolve the dispute.” See Cooperation for Peace and Unity, *Opportunities and Challenges for Justice Linkages: Case Studies from Kunduz and Takhar*, (Kabul: CPAU, 2012), 17.
18. Peace Committees made three copies of the decision and provided each disputant with one copy while a third copy was kept for the Peace Committee’s records.
19. In the past, the Afghanistan Social Outreach Program (ASOP) program supported District Community Councils, 30-50 community members elected at the district level to involve traditional tribal shuras and religious leaders in government decision-making. The program was funded by USAID and administered by IDLG. See USAID Afghanistan website, “Afghanistan Social Outreach Program (ASOP),” July 2009-January 2012, available at [http://afghanistan.usaid.gov/en/USAID/Activity/167/Afghanistan\\_Social\\_Outreach\\_Program\\_ASOP](http://afghanistan.usaid.gov/en/USAID/Activity/167/Afghanistan_Social_Outreach_Program_ASOP) (last accessed February 23, 2013). For a more critical review of the ASOP program, see Noah Coburn, *Informal Justice and the International Community in Afghanistan*, Peaceworks (Washington: USIP, forthcoming 2013), 39-42 (copy on file with the authors).
20. Because of the security situation, the independent assessors could not visit Deh Rawud district in person and had to conduct interviews there by phone. There was less institutional knowledge of the Justice Shura project because TLO staff who had worked on that project no longer worked for the organization, or were accessible during the independent assessment period.
21. See The Liaison Office (TLO), *Building Dispute Resolution Institutions in Eastern Afghanistan: Lessons from The Liaison Office Justice Shuras in Paktia and Nangarhar* (Kabul: TLO, July 2011), 2.
22. The tribal structures and traditional dispute resolution patterns also tend to be significantly weakened during periods of instability, by displacement, or conflict. Thus, in communities facing this situation, disputants turned to whoever might enforce decisions, with the most powerful actor often being the district governor. See The Liaison Office (TLO), *Building Dispute Resolution Institutions in Eastern Afghanistan: Lessons from The Liaison Office Justice Shuras in Paktia and Nangarhar* (Kabul: TLO, July 2011), iv.
23. Ibid: iv, 2.
24. For example, the Head of the Law Department estimated that the Correction Council dealt with 750 cases in 2011, including both criminal and civil cases. He said that most of these cases were registered and recognized by the Law Departments, which was longstanding practice.
25. USIP Workshop with Traditional Dispute Resolution Practitioners, June 14, 2013, USIP office, Kabul, Afghanistan (TLO comments).
26. The Head of the Law Directorate and several prominent lawyers interviewed were not aware of the Justice Shura but said they were working with the DCC, which is also chaired by the head of the Justice Shura. This dual membership was a point of confusion in analyzing the linkages and impact of the Justice Shuras. Some interviewees suggested that cases attributed to the Justice Shura had actually been referred to the DCC members in their personal capacity.
27. Several TLO reports have provided statistics tracking the overall numbers and trends in dispute

resolution in each of the target districts; however, these statistics did not distinguish or identify cases resolved exclusively under the USIP-funded pilot versus those resolved by participating elders as part of their existing duties within the community. For example, from 2010-2011 tribal jirgas settled 1,195 disputes: 814 land disputes; 333 criminal disputes; 203 minor crimes, and 76 major crimes. The Liaison Office, *Formal and Informal Justice in Helmand and Uruzgan: A TLO Working Paper* (Kabul: TLO, June 2011), 5. In Nahy-e-Five, from 2010 through 2011 tribal shuras heard 40 criminal cases and 17 cases that combined criminal and civil matters. The Liaison Office (TLO), *Formal and Informal Justice in Paktia and Nangarhar: A TLO Working Paper* (Kabul: TLO, February 2011), 17. In 2010 and 2011 tribal shuras and jirgas solved an estimated 550 cases in Mohmand Dara and Bati Kot, eight times more than the government courts. These included 67 criminal disputes, 151 family disputes, and 266 land disputes. Ibid: 25-31.

28. CDCs are councils with control over local development funds, created under the National Solidarity Program in 2002. See website of “National Solidarity Programme,” available at <http://www.nspafghanistan.org/> (last visited February 23, 2013).
29. A small number of government officials said they were hesitant to formally stamp or register any cases resolved in the informal system because they believed that any official government acknowledgement with these cases being resolved outside the formal system would be considered illegal.
30. For example, in Nangarhar, the assessment found that local officials not only frequently referred such small land or civil cases to the informal system, but the informal system then also frequently reported back these decisions to be stamped (registered) by local officials. Civil cases formed the bulk of the Peace Councils’ cases in Kunduz, and many small cases were reported back to the district governor, or other semi-governmental bodies like the CDC. Referral of civil cases also happened in Uruzgan, although at lower levels.
31. Afghan land law stipulates that any land that is not privately owned through formal documentation by the state will be considered an asset of the state. This has been contentious among local communities, given that nearly 80% of the land in Afghanistan is used under community titling or ownership arrangements.
32. Those interviewed in Nangarhar said parties to a land or property conflict are not willing to have their agreement registered by the government because they feared corruption; there was a lack of legal documentation showing legal ownership; or they wished to avoid paying tax on their property to the government.
33. For example, four of the interviewed disputants who had cases related to water resources and land inheritance in Kunduz said they had their documents stamped (registered) with the department of law in the district. They said they were more confident that the dispute was settled by having official document. They had advised other disputants in the community to get their property dispute documents legalized as well.
34. *Baad* is the practice through which women are used as compensation for criminal acts or as restitution for personal injury suffered by another party or family.
35. Despite officials’ sensitivity about the legality of informal engagement with criminal cases, both formal and informal sector cooperation in resolving or addressing criminal cases is permitted under Afghan law. The Afghan Civil Procedural Code allows for conciliation, and it is a common practice in urban centers such as Kabul, with clear guidelines on the process of referral and registration of civil, commercial and family law cases. See Zuhail Nesari and Karima Tawfik Peacebrief, ‘the Kabul Courts and Conciliators: Mediating Cases in Urban Afghanistan,’ Washington, DC: United States Institute of



Peace, July 29, 2011. There are also examples in which judges have reduced criminal sentencing if there has been a successful parallel informal dispute resolution or mediation process. This is supported loosely through the generally accepted concepts of Haq-ul-abd ('Rights of Man') and Haq-ul-allah ('Rights of God') in Afghan interpretation of Islamic Jurisprudence. In effect, parties may use informal dispute resolution to address the Haq-ul-abd elements of the case (often through compensation or rituals of apologies) while the state retains the right to inflict punitive actions based upon Haq-ul-allah.

36. For example, disputants interviewed in Uruzgan were of the view that registering decisions with the government provides legality to a decision, but it does not guarantee its sustainability. Disputing parties said that resolving the disputes and making decision in front of the community elders is more sustainable and trustworthy, because it has been practiced for generations. This is not an entirely unreasonable calculation, in a context in which central governments have changed multiple times over the course of the last 30 years, whereas, the community forums have tended to collectively be more consistent over that period.
37. Disputants may also have assumed that Afghan law would not protect decisions made through informal bodies, notwithstanding statutory protections for informal decisions that are not in contradiction to existing Afghan or Sharia law.
38. Some prior research by USIP and TLO suggested even if documentation was established it may not bring the accountability or sustainability benefits envisioned if the local community preferences did not inherently value such documentation. See The Liaison Office (TLO), *Building Dispute Resolution Institutions in Southern Afghanistan: Lessons from The Liaison Office Justice Shuras in Helmand, Uruzgan, and Nimruz* (Kabul: TLO, December 2011), vi-vii.
39. See Noah Coburn, *Informal Justice and the International Community in Afghanistan*, Peaceworks (Washington: USIP, forthcoming 2013), 21-23 (copy on file with the authors).
40. See Shahmahmood Miakhel & Noah Coburn, *Many Shuras Do Not a Government Make: International Community Engagement with Local Councils in Afghanistan*, Special Report, (Washington: USIP, September 7, 2010).
41. See *infra* note 28.
42. Established in 2002, the Ulema Council is the largest religious body in Afghanistan, with representative councils in all 34 provinces. Although the more than 3000 members are themselves independent religious leaders in their local communities, they receive salaries or stipends from the Afghan government and so are often associated with the Afghan government. The program is administered by the Afghan Ministry of Haj and Awqaf.
43. Mandated to deal with reconciliation and reintegration processes, and created through the 2009 Peace Jirga.
44. See *infra* note 19.
45. See USAID Afghanistan website, "Afghanistan Form First District Community Council: USAID supports the creation of a community council in Kushi district, Logar province," January 3, 2010, available at [http://afghanistan.usaid.gov/en/USAID/Article/964/Afghans\\_Form\\_First\\_District\\_Community\\_Council](http://afghanistan.usaid.gov/en/USAID/Article/964/Afghans_Form_First_District_Community_Council) (last accessed February 23, 2013).
46. See The Liaison Office (TLO), *Building Dispute Resolution Institutions in Southern Afghanistan: Lessons from The Liaison Office Justice Shuras in Helmand, Uruzgan, and Nimruz* (Kabul: TLO, December 2011).

47. Although particularly noted in Khanabad, similar sentiments were expressed in other communities in Kunduz.
48. In Kunduz, the most powerful dispute bodies tended to be the CDCs and DCCs, while in Uruzgan, it was the Eslahi shura established by the Chief of Police.
49. See, for example, Noah Coburn, *Informal Justice and the International Community in Afghanistan*, Peaceworks (Washington: USIP, forthcoming 2013), 19 (copy on file with the authors) (describing a dispute in which a powerful local commander seized land that belonged to another man; although the shura was not able to enforce the owner's full legal rights due to the power the commander held in the community, it was at least able to persuade the commander to return half of the man's property to him, resulting in a better outcome for him than had the shura not intervened).
50. In Uruzgan the Deh Rawud site was originally selected because there were not strong, competing dispute forum in that district. During the course of the project, other strong dispute resolution individuals and mechanisms from Tirin Kot extended their reach to Deh Rawud, undercutting much of the value and traction of the Justice Shura there.

## About the Authors

---

Erica Gaston is a human rights lawyer at USIP, specializing in human rights and justice issues in conflict and post-conflict environments. Akbar Sarwari, Afghan Independent Researcher, peace-building & conflict resolution expert. Arne Strand is a political scientist with a specialisation on Afghanistan with the Chr. Michelsen Institute (CMI).

USIP is the independent, nonpartisan conflict management center created by Congress to prevent and mitigate international conflict without resorting to violence. USIP works to save lives, increase the government's ability to deal with conflicts before they escalate, reduce government costs, and enhance our national security.

## About USIP

---

### USIP's Strategic Goals:

- To help prevent, manage, and resolve violent international conflict both within and between states
- To promote post-conflict stability and development
- To increase peacebuilding capacity, tools, and intellectual capital worldwide
- To build and shape the field of international conflict prevention and management and to professionalize its practice
- To build knowledge and create innovative tools for peacebuilding
- To bridge research and practice in preventing, managing and resolving violent conflicts
- To teach, train, inform policymakers, practitioners, students and the public about the challenges of conflict prevention, management and resolution and how to respond to those challenges