Exploring Primary Justice in Afghanistan

Challenges, concerns, and elements that work

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Colophon

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1. Introduction

By Friederike Stahlmann

In the beginning of 2002, Afghanistan was not merely a country that had been riddled by decades of warfare and power abuse. It was, too, a country for which a new beginning had been declared. This new beginning was marked by immense hopes and expectations. The qualitative thresholds of success were accordingly set extremely high and timelines tight. Just as with the political roadmap that led from a military intervention to democratic elections, much has been achieved in the justice sector. Efforts like the facilitation of a constitution-making process and legal reform, the physical reconstruction and equipment of justice institutions, and the training and professional capacity development of justice personnel have led to tangible results (Wardak 2011 and 2016).

Nevertheless, 14 years and many 'rule of law' programmes and projects later, it is more than apparent that hopes of quickly succeeding in establishing the rule of law in Afghanistan and providing ordinary citizens with access to justice have been just as disappointed as hopes for security.[1] Defending one's rights against the more powerful is a hope many have lost or keep for a later regime.

While some of the reasons for the persistent injustice are sadly trivial, it is far from trivial to find answers to how to respond to the suffering that a lack of access to justice causes. The last 14 years have shown the complexity of interactions between the social order, the political order and the diverse institutions involved in dispute processes (Coburn 2015; Stahlmann 2015). Wars, after all, not only affect state infrastructure, but also society as such and the people that form it. They have also taught that the understanding of shortcomings just as the development of strategies for support have to start with the justice perceptions, experiences,[2] concerns and interests of those being vulnerable to abuse. In line with this lesson learned, the research project aims to improve the understanding of challenges disputants face in seeking justice in an environment that is as insecure and volatile as in Afghanistan.

The challenges people face in seeking justice are not the same in all of the country, but vary immensely from one setting to the next. Cordaid and the VVI thus decided to conduct this research in a comparative manner. Together with the Afghan partner organisation TLO (The Liaison Office), the districts Behsud in Nangarhar province and Istalif in Kabul province were identified as suitable research sites. These sites differ quite fundamentally in local power and governance arrangements, ethnic and religious composition, recent migration movements and the institutional landscape. To strengthen the comparative value of the concluding analysis, the findings of these two settings are compared with the results from Bamyan city that stem from a different research on the same topic.[3]

This introductory section provides some general background on the social, political, legal and institutional context as well as analytical and methodological considerations. It closes with an introduction to the eight case-study reports in section two. Section three summarises the findings of these case studies and embeds them in a more general analysis. This summary underlines that there are no quick answers and ready-made solutions to the challenges people face in seeking justice, and that any minor positive effect will take huge long-term efforts. This research still allows us to identify options for support and consider some of the more successful approaches.

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1 On the detrimental security situation see e.g. Human Rights Watch 2015, on women's security concerns e.g. UNAMA 2009.

2 On the importance of people's experiences for the functioning of the legal order see Stahlmann 2015 and 2016.

3 For further details of that research and Bamyan city see section 3.

1.1 Research settings – socio-economic profiles

As an earlier research conducted by TLO (2014) has explored, the districts of Behsud and Istalif allow for an interesting comparison in socio-economic regards. They not only differ in size and population, but also in ethnic composition and recent migration patterns.

Figure 1: Eastern Afghan section of 'Afghanistan Provinces and Districts 2012' (The University of Texas at Austin 2016)

The district of Istalif is located just 50 km north of Kabul and populated by approximately 60,000-70,000 inhabitants. The town Istalif serves as the district centre and has about 29,800 inhabitants. It is famous for pottery and leather production. The main livelihood remains agriculture and every family owns at least a garden, varying in size depending on economic resources available. The majority of the district's community is Tajik (about 90 percent), including a small minority of *shi'ite* Tajiks, but also other ethnic groups, such as Pashtuns and Hazaras, live in the area.[4]

Currently, very little inward migration is taking place in the district. Conversely, high seasonal variations of income triggers winter migration of most of the male population – especially youth – to Kabul, and there are reports of increasing permanent migration out of the district to the capital or abroad, in search of better livelihoods opportunities (TLO 2014: 23, 135).

Behsud district is located in the north of Nangarhar province, eastern Afghanistan, and populated by about 500,000 inhabitants. A majority of the population are Arabs divided into nine sub-tribes (approximately 60 percent), who settled in the area centuries ago, followed by a variety of Pashtun tribes (an estimated 31 percent), and a minority of Kuchis (nomads). The small but influential Pashai minority is located in the village of Daman. Since the fall of the Taliban, migrants and IDPs from neighbouring districts have settled in Behsud, due to its relative secure environment and the economic opportunities offered by the proximity of the provincial centre of Jalalabad (TLO 2014: 36-37). The main source of income remains agriculture although some commute for jobs to Jalalabad. Access to livelihoods, education, and infrastructure is still very limited and the influx of returning refugees and IDPs increases the scarcity of relevant resources, particularly of land (TLO 2014: 44).

4 For details see TLO 2014: 134 ff.

1.2 Political background

Post-war countries tend to share features of destruction. How exactly past wars continue to shape a country, its people, institutions of justice and last, but not least dispute processes depends very much on the kinds of war and the particular local history. The following short overview about Afghanistan's recent past can hardly do justice to either people's personal experiences or the immense local variety within Afghanistan. It is merely meant to provide the necessary framework to allocate references within the case-reports.

1978-1989 PDPA, Soviet occupation and resistance

The Saur revolution, which brought the PDPA (People's Democratic Party of Afghanistan) into power in 1978, was not the beginning of disarray, which shaped Afghanistan in the next decades.[5] But it irreversibly drew Afghanistan into the deadly dynamics of the cold war. In resistance to the Soviet occupation in 1979, Pakistan, Iran, the USA, European countries, Egypt, and Saudi-Arabia aided resistance parties. As these were nearly exclusively Islamic resistance parties, they are also called *jihadi* parties or Mujahedin.[6] This proxy war and the fight over political dominance within the region killed more than two million Afghans, made more than five million flee the country and left the deadly heritage of innumerable amounts of mines in the grounds.[7] How much hold governmental and Soviet forces or the Mujahedin could practically exercise varied considerably from region to region. For instance in Istalif, the PDPA's control over the area was restricted to the surroundings of the district centre and given up in 1982. Fighting not so much occurred between PDPA forces and Mujahedin, but among the different resistance parties.[8] Here, the Jamiat-e Islami was the strongest civil war party, followed by Hizb-e Islami of Gulbuddin Hekmatyar.[9]

In Behsud, the PDPA enjoyed most support close to the provincial capital Jalalabad, but the delimitation between PDPA supporters and Mujahedin was not clear-cut. The strongest Mujahedin party was the Hizb-e Islami of Gulbuddin Hekmatyar under its local commander Engineer Ghaffar, but another seven resistance parties were also present in the district.[10]

1989-2001 Civil war and Taliban

Upon the Soviet withdrawal from Afghanistan in 1989, international attention and involvement subsided to some degree and about two million refugees returned to their places of origin. But the efforts by president Najibullah, who continued to be supported by the Soviet Union, in ending the continuing war failed. And so did power-sharing agreements between the former resistance parties after Najibullah's government had fallen in 1992.[11]

The competition among these parties and their supporters in trying to gain control over the country instead led the country into long-term and brutal civil war, which was shaped by regularly shifting frontlines and ever-changing coalitions. While ideological lines of conflict had still played a major role in the late 1970s and early 1980s, the rivalry among these civil-war parties and their external supporters

5 On earlier tendencies of disintegration see Schetter 2004: 87ff and Edwards 2002.

6 For detailed studies on the early resistance see Shahrani & Canfield 1984.

7 On details of the refugee movements see Schetter 2004: 104.

8 This was not an unusual feature. About 40 percent of the Mujahedin, who were killed during the Soviet occupation, were not killed by Soviet or government forces, but by other Mujahedin – a phenomenon which earned the title 'Islam killing' (Pohly 1992: 384).

9 See TLO 2014: 133 for details.

10 See TLO 2014: 34f. for details.

11 Namely the Peshawar-Accord 1992. On the civil-war parties and the disintegration of the country see Maley 2002, Rashid 2001 and Rubin 1992.

increasingly turned into mere fights over regional and local control. In this course, the civil-war parties became increasingly ethnicised, which shaped lines of persecution. But it did not lead to ethnic unity, predictability of frontlines, or ethnically homogenous parties.[12] Many Afghans who remained in the country during the decades of war repeatedly changed party membership. Also competition among commanders and factions of the same party was a regular feature.

Behsud is an example of such competition, as it was taken by a wide range of commanders coming from neighbouring districts, who divided it into zones of influence. It was reportedly a violent period. Regular checkpoints were set up across the district, controlling membership documents of war parties, without which one could neither circulate freely nor hold a weapon (TLO 2014: 34).

In Istalif, Ahmad Shah Massud successfully pressured the local Mujahedin commanders to unite, which put an end to their local rivalry. They then joined a newly created military regiment (TLO 2014: 133).

To what extent these parties took on responsibilities of governance, such as the administration of justice, varied immensely in time and place. But often the line between ordinary criminals and ruling parties was hard to draw. The last war party that entered this scene, were the Taliban in 1993. While they were first welcomed by many for re-establishing some kind of order, they soon were despised by many for their harsh regime, lack of ability to govern, and disrespect for Afghan tradition and culture (Rashid 2001). Where they met resistance they acted no less cruelly than any other civil-war party – including retaliatory summary executions and persecution of civilians. Their military gain caused the remaining parties that managed to resist them to unite as the 'Northern Alliance', also known as 'United Front'.

Istalif was reached by the Taliban in September 1996, when they progressed swiftly across the northern part of Kabul province, resulting in the flight of most of Istalif's civil-war commanders to the Panjshir valley. Eventually, United Front forces ejected the Taliban from Istalif. The second Taliban attack on Istalif devolved into revenge on the local population for their assumed support of anti-Taliban forces. Villages were looted and burnt down, causing the flight of the majority of people (TLO 2014: 134).

In Behsud, the takeover by the Taliban occurred with some level of violence and bloodshed, especially around the airport, which had been under the control of Haji Hazrat Ali, who remains a major power-holder in Behsud to this day. Less influential commanders remained in the district and now constitute most of Behsud's *maliks*. Generally, Taliban rules and orders were followed by the population and the Taliban tried not to alienate their local allies by resorting to excessive violence or too much interference in local affairs (TLO 2014: 35).

The account of the war crimes and crimes against humanity by the 'Afghanistan Justice Project' illustrates with which cruelty these civil wars were fought (Afghanistan Justice Project 2005). The suffering they caused and the destruction they brought about are hard to enumerate. The more than six million Afghans, who sought refuge in neighbouring countries, are a telling sign. Numbers from the research sites confirm this. As the UNHCR district profile for Istalif stated in 2002: "From being a prosperous and alive village, Istalif has become a ghost village but still has incredible potential for recovery. All agricultural, health and education infrastructures are completely destroyed. Destruction of houses in Istalif: 100%" (UNHCR Sub-Office Central Region 2002: 1). For Behsud, the UNHCR noted: "About 90% of the houses were destroyed by the Russian army during the revolution. Some returnees are rebuilding their houses by themselves. The area was covered last year by the UNHCR shelter program, however there are many shelter problems remaining" (UNHCR Sub-Office Jalalabad 2002: 1).

12 See Schetter 2003 for detailed accounts.

2001-2016 Post-war order

The post-war order, as it was set out in December 2001 at the Bonn conference, was meant "to end the tragic conflict in Afghanistan and promote national reconciliation, lasting peace, stability and respect for human rights in the country" (United Nations Security Council 2001). Major steps of the political roadmap, which was set up to achieve these ends, have been surprisingly successful. The enactment of a new constitution in 2004 and presidential elections in 2004 were major steps in this regard. Who in 2001 had actually believed that they would witness presidential elections in 2009 and 2014, and parliamentary elections in 2005 and 2010?

People's seemingly never-ending will to rebuild their country over and over again together with international support has also made reconstruction efforts quite visible in many parts of the country. Aid efforts just as people's hopes in peace and stability have, however, been hampered by an array of factors. Rampant corruption and a lack of accountability have provided fertile grounds for abuse of power within and beyond the state administration.[13] Many fundamental state institutions, including those relevant for the administration of justice, remain in a dilapidated state and function poorly in areas where they exist.[14] The reliance on civil-war leaders to take over critical governmental positions has allowed them to continue clientelist rather than need-driven forms of governance (Human Rights Watch 2015; Singh 2014). While places like Kabul have been subject to immense modernisation agendas (Suhrke 2007), those areas which continued to be riddled by violence and war have seen little of the 'international community' but rather even more war as part of the counter-insurgency effort 'war against terror'. The re-armament of paramilitary troops as part of this war against terror (Human Rights Watch 2015), the blossoming drug trade and the immense strength, which the Taliban have regained, are yet additional factors which undermine hopes for security and stability. The number of Afghans who have fled violence has doubled to 1.2 million over the past three years (Amnesty International 31 May 2016).

With the fall of the Taliban in Istalif, former civil-war commanders regained their influence over the district. Istalif's main power-holder in civil-war times, returned to the area, whereupon he joined the intelligence service (National Directorate of Security, NDS), and continues to enjoy the backing of influential elements in the Jamiat-e Islami. Reportedly, disarmament programmes were widely circumvented (TLO 2014: 134). Currently, the overall security in Istalif district is relatively good. Respondents mentioned neither insurgency nor drug trafficking in the district. There were no known incidences of political assassination or rivalries between tribes – though some individuals gave accounts of persisting old rivalries between civil-war commanders, who pertain considerable power in the area (TLO 2014: 139).

In Behsud the situation is somehow similar. With the American takeover of Jalalabad in 2001, all Taliban "took their blankets and fled to Pakistan."[15] Since then, former civil-war commanders constitute Behsud's governing elite (TLO 2014: 13). In comparison to other parts of Nangarhar province the security situation is relatively good, but constantly deteriorating. State institutions increasingly lose control over the district. A major security concern is the continuing power of civil-war commanders and the strength of criminal networks, who are connected to and protected by the government, and engage in land grabbing as well as drug trade (TLO 2014: 44f.). The main insecurity experienced by the communities is thus widespread crime – murder, theft and kidnapping. There are also reports of insurgent attacks, IEDs, and suicide bombers (TLO 2014: 44). As latest reports confirm, insurgent groups are generally strengthening in the province (Mansfield 2016).

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13 See e.g. concerning the police forces Singh 2014.

14 For a summary discussion of the reconstruction efforts regarding the justice sector and its poor outcomes see Wardak 2016.

15 Quoted in TLO 2014: 13.

1.3 Legal and institutional overview

In contrast to the above section on the political history, the following summary of the legal and institutional framework is primarily an account of official mandates.[16] Details of legal provisions and practical performance of institutions will be critically discussed in the reports and the concluding analysis.

As in many other Islamic states, Art. 3 of the Afghan constitution stipulates that "no law shall be contrary to the beliefs and provisions of the sacred religion of Islam." Conflicts might emerge between the ways, in which these 'beliefs and provisions' are interpreted, the non-discrimination-clause in Art. 22[17] and the stipulation to honour obligations under international treaties and human rights law in Art. 7.[18] However, concerns about this competition rather seem to reflect the diverging interests between international and national stakeholders involved in constitution-making processes than everyday concerns of the rule of law within Afghanistan (Elliesie 2009).[19]

In Art. 130, the constitution stipulates a hierarchy of legal sources: "When there is no provision in the Constitution or other laws regarding ruling on an issue, the court's decisions shall be within the limits of this Constitution in accord with *hanafi* jurisprudence [...]." Traditionally *hanafi* jurisprudence was and is the main source of reference to the *sharia* in Afghan statutory laws. Noteworthy, in difference to earlier constitutions, the *shi'ite* minority community and its classical *ja'fari* jurisprudence is recognised legally in personal matters in Art. 131, which resulted in the adoption of a *shi'ite* personal status law in 2009. Further Art. 2 of the Civil Code establishes that in case of a legal vacuum with no provision existent in *hanafi* Jurisprudence, customs (*urf-e omumi*) may be referred to. This hierarchy, obviously, does not forestall that in realms, which are not administered by the state, this ranking is at times understood and done very differently.

The court and appeal system consists of three tiers: primary courts at the district level, appeal courts at the provincial level and the Supreme Court. "Almost as a matter of customary practice, most cases decided by the primary courts are appealed to the courts of appeal" (AREU 2015: 81). For criminal cases, the formal access point to the state judiciary is the police. For civil cases, this access point is an office termed *hoquq*. As part of the Ministry of Justice, the *hoquq* is not formally part of the judiciary, but responsible for the referral of cases to the court. It also engages actively in dispute settlement.[20] In case the parties agree, the *hoquq* as well as courts may refer civil cases to community-based justice institutions, which are not state-administered, but whose decisions may be registered by courts if they comply with applicable law.

Of crucial importance for cases of land disputes is the *Arazi* (Afghanistan Land Authority), which is an independent government institution responsible for the administration and management of state land, including clearing and leasing of state land. It was founded in 2010,[21] by merging the *Amlak* (Afghanistan Office of Land Affairs) with the Commission for the Restitution of Illegally Occupied Land.[22] However,

16 A summary of the political and institutional developments in the justice sector, has been provided by Wardak 2016 and Coburn 2015.

17 "The citizens of Afghanistan – whether man or woman – have equal rights and duties before the law."

18 That Afghanistan signed CEDAW without reservations, is an example of an international law which is in contradiction with current statutory laws.

19 For an analysis of the constitution-making process see Rubin 2004.

20 For historical and organisational details see Ministry of Justice, Islamic Republic of Afghanistan 2016.

21 Until its independence in 2013, it was part of the Ministry of Agriculture, Irrigation and Livestock.

22 For the respective cabinet decisions see UNAMA 2015: 5.

not only is the *Amlak* more widely known to many people, as it has kept and maintained ownership records since the 1960s,[23] the *Arazi* offices are often still called *Amlak* in the districts.[24]

Other governmental institutions engage in dispute management in a rather 'semi-formal' (Wardak 2016), or 'hybrid' (Coburn 2015) manner. For instance, in cases concerning women's rights, the Ministry of Women's Affairs (MOWA) often not merely assumes a supervisory and advocacy role, but actively engages in dispute management and the facilitation of private dispute settlements. The same pattern can be observed regarding the Afghanistan Independent Human Rights Commission (AIHRC), as well as governance institutions (Wardak 2016). For instance, disputants often choose state government institutions, such as the elected provincial councils, or centrally appointed district governors (*woleswali*) and provincial governors (*wali*) as their entry point to state-administered justice. Sometimes these actors engage in dispute settlement efforts themselves; sometimes they refer the parties to the police or the *hoquq*.

Also, elected development councils engage in dispute management. On a village level these are the CDCs (Community Development Councils), which were formed under the government's National Solidarity Programme (NSP). On the district level this is the District Development Assembly (DDA), established under the National Area Based Development Programme (NABDP), which is mainly responsible for monitoring the work of the CDCs.[25] Both should comprise men as well as women. Due to social expectations in gender segregation women convene, if it all, often separately.

When such governance institutions engage in dispute management, they often do so beyond their formal mandate, and thus practically become part of the non-state administration of justice. This feature resembles the traditional combination of executive and judicial mandates of non-state institutions and actors.[26] The actual non-state administration of justice varies immensely locally. Local councils, called *jirga* or *shura,* have varying degrees of formalisation from ad-hoc meetings for a particular case (then in the Pashtu context called *jirga*) to standing bodies with offices and opening hours (usually referred to as *shura*). Often there are several such bodies in one place, which reflect the variety of local stakeholders and authoritative figures – from traditionally legitimised authorities such as elders (*rish-e safed* in Dari, *spin-giri* in Pashtu), to Islamic scholars (*ulema*), people with particular professional expertise or relevant networks such as government employees, and those who are locally or regional powerful (*maliks* or commanders).

Istalif is an example of such institutional plurality. At the local level, village *shuras* appear to be the main decision-making and governance bodies, and reportedly cultivate close ties with government authorities – mainly the district governor and the chief of police. At the district level, there is an *ulema shura*, a community *shura*, a women's *shura*, and a *malik shura*. The local *shuras* are reportedly dependent on, or counterbalanced by, the influence of some *maliks* (often *shura* members themselves, though they assume individual responsibility in decision making) and former civil-war commanders who still enjoy a high degree of influence in the district. Extraordinary in terms of power are the commanders of the Jamiat-e Islami.

At the district level of Behsud, state institutions include the district governor's office, a district primary court, the police headquarters, and a *hoquq* office (TLO 2014). The only government-registered *shura* in

23 For a detailed account of the institutional past of land administration see Wily 2013.

24 The empirical reports thus feature both names for the same institution.

25 For details see: www.nspafghanistan.org

26 The distinction between state and non-state justice institutions in the following thus merely suggests, that the respective institution is primarily state-administered or not. This distinction is not meant to preclude cooperation, mutual acknowledgment, or any other kind of relationship between these kinds of institutions.

Behsud is the District Development Assembly (DDA). The DDA is composed of 30 members – mainly *maliks* and local elders, including ten women, representing different tribes present in the district. That being said, the electoral process appears to have been based more on an elite consensus, as most candidates reportedly faced no competition for election to the DDA (TLO 2014: 13). Apart from local CDCs there are several non-registered local *shuras* at the village level.

1.4 Conceptual framework

This research project's agenda draws on previous research and lessons learned so far.[27] One of these is that much more than a singular institution's performance, it is the relations among all institutions involved in dispute processes that decide if the environment for seeking justice is supportive or not.

Afghanistan is no exception in that most disputes are dealt with without recourse to state-administered justice institutions. Even if a dispute reaches a court, this is rarely the only institution that shapes the dispute process and decides over success and failure in regard to justice. The interrelatedness of all those justice providers and their dependency on each other has been long acknowledged in socio-legal theory (Von Benda-Beckmann 2003). However, it has challenged those specialised in assisting one part of the system or the other in the Afghan setting for several reasons. One reason was, that the complete disarray of state justice institutions made it more than usual dependent on societal support and public endorsement, while not even basic pre-conditions were fulfilled so it could earn this respect. The at times heated, political discussion of how and on which terms state and non-state institutions ought to work together, was not only shaped by the usual difficulties of establishing constructive communication and respect between members of different trades or institutional actors.[28] It was also shaped by mutual and profound mistrust (De Lauri 2010, Wardak 2011). This politicised discussion does little justice to the manifold ways in which state and non-state institutions cooperate and relate in practice. And it does little justice to how much disputants themselves move through the institutional environment in order to seek justice (Coburn 2015).

Models of cooperation are valuable inspirations and a reminder of the acute needs of victims of trespass.[29] Practically, interventions that aim to improve access to justice have to be built on a profound knowledge of the actual working of the institutional environment in any given field (Coburn & Dempsey 2010; Coburn 2011a). It is not an easy task to acquire this knowledge. The social, political and legal orders have been going through fundamental and often violent changes, and the variety of circumstances and actors that are relevant for access to justice is immense. But it is and remains necessary in order to do justice to the challenges people face in any given setting.

This study thus answers to this need in exemplary settings with the aim to raise awareness of the challenges justice seekers practically face in their dispute management. As the main concern of any rule of law regime is whether those who are relatively weaker stand a chance to defend their rights or not, this research aims to capture the challenges of those who are particularly vulnerable, which in Afghanistan are not only the poor but also women. To do this, it is crucial to also consider the interests, perspectives and evaluations of all those who take decisions which affect the dispute process apart from the victim of

27 See for instance the summary by Wardak 2016.

28 Cf. von Benda-Beckmann 2002.

29 Cf. Wardak in Wardak/Saba/Kazem 2007.

trespass.[30] These are not only the trespasser and the institutional actors, but also the bystanders who are asked to take sides or provide support and show solidarity.

1.5 The analytical potential of disputes over land[31]

As this analysis aims to discuss major challenges and problems that victims of trespass face when seeking justice, it seems appropriate to focus on the dominant substantive concerns informants accounted for. In terms of numbers, these are easily identified to be disputes over land rights.

In the light of two objections it is worth and necessary to justify this choice. One is that land rights have already received a considerable amount of attention.[32] Another is that the country is still riddled by systematic misuse of power and people are faced with a large variety of existential threats and large-scale crimes.[33] It thus could be questioned why this report, as many others about the legal order, focuses on seemingly daily affairs and in particular disputes over land rights. Why bothering about land disputes, when the public order is unable to protect children from getting kidnapped for ransom? Why bothering about inheritance rights of women, while the researchers that gathered the data for this analysis have to fear those, who kill as punishment for cooperation with foreigners.

One argument in favour of this focus is a methodological concern. Legal anthropologists have long warned that looking for 'troublesome cases' alone might merely provide a fractured picture of our understanding of an order (Von Benda-Beckmann 2003).[34] No doubt, the flourishing kidnapping industry needs to be of concern for any rule of law assessment. But if one is interested in what characterises the Afghan legal order and access to justice, negotiations about the ordinary, such as disputes over land rights, might be more revealing.

How common land disputes are and how much Afghans need to worry about respect for their land rights lies in empirical evidence, as it is difficult to find even one family without such a disputing record. Economic figures substantiate the statistical importance, as about 80 percent of the Afghan population directly depends on agriculture and husbandry (Afghanistan National Development Strategy 2008). The large-scale voluntary or involuntary return has also raised the market value of both housing and agricultural land, its potential as an object of prey and thus the need to fight for and defend it.

Social security and belonging

Land is not only a matter of physical, but also of social survival. It not only serves to grow food, feed animals, pay for health care, or invest into whatever might seem important. Marriages, fulfilling social obligations, and investing into social relationships also cost money, and it is revenue from land that most reliably covers any such costs and investments. And, at least in rural and semi-urban areas, ownership of land is also treated as a condition for fully belonging to a place and a community.[35] Ownership of land

30 In line with the general approach of this report, the usage of the term 'trespass' does not refer to any definition by a particular legal system or body of law, but follows the disputant's perspective. It thus refers to any act or omission of act that is interpreted as a violation of a right or entitlement by the respective claimant.

31 An extended version of this section has been published in Stahlmann 2015.

32 e.g. Deschamps & Roe 2009, Foley 2005, Scalise 2009, Wily 2013, UNAMA 2015, USAID 2007.

33 e.g. Human Rights Watch 2015, Maaß 2010.

34 Originally, this was a call not to look for rule-breaking alone, but also for rule-following. I suggest, though, that the principle also applies to a focus on land disputes in comparison to suicide bombers.

35 For instance, there is no written rule that someone has to own land in a place in order to be elected to a Community Development Council (CDC). In Bamyan, however, this was made a rule on social grounds: "Look, it's a village council. One can't be elected without owning land here. Only people from the village can be elected."

thus has existential long-term value. Possibly it is one of the very few long-term objects of value left in a society that has seen numerous fundamental and violent changes and faces an amount of insecurity, which makes it hard to predict even one's near future.

The recent experiences of civil war have added further value to land, as it has proven to be the most reliable resource for survival in times of turmoil. Land was the easiest resource to translate into social capital, into manpower, and into access to power-holders higher up in the military hierarchy. It provided for access to weapons, protection by warring parties, or could be used to buy sons out of conscription and likely death. It also serves to finance the costly enterprise of sending family members into exile, hoping to secure their security and the future economic protection of the remaining family through remittances.

Political value

Control over land is not only a matter of security and serves as a reliable indicator of relative power within a community.[36] It also serves to characterise groups and group-relations. Ethnic groups are thus often characterised by the ways through which they gained access to local lands, rather than the more official markers like language, descent, or sect affiliation. In a similar vein, accounts of oral history show that regimes are characterised by the effects they had on people's and groups' access to local land.[37] Oral history also accounts for all the many episodes of discrimination on ideological, ethnic, or religious grounds, which led to a systematic denial of the right to land. Having been driven away from one's father's land, often stands as a symbol for collective persecution and the experience that the right to live was in jeopardy.[38]

Given the multitude of identity markers disputing parties might differ in, and the many past frontlines these markers are associated with, interpersonal disputes or seemingly simple administrative decisions over the distribution of land might easily be understood as yet another episode in a long story of guilt and victimhood, even if the actual piece of land had previously not been part of that story. A case which a Tajik wins against a Hazara is thus easily interpreted as a continuation of Tajiks seizing Hazara land in the civil war, or the other way around. Evaluations of who would rightfully enjoy which kind of access to which land, are thus often not statements about law-abidance, but about the legitimacy of distributive land politics. The disputes over settlement of returning refugees, IDPs and access to land for nomads in 2.5 are examples of this. The immense social movements of the last decades have proven that the relative power of groups within a region may easily be lost and needs to be defended.

Gendered relationships

Practices and norms that regulate control over land have a great share in constituting gender relations. This not only concerns the practical control over land and the distribution of wealth and power, for instance through inheritance schemes. It also concerns the gendered rules that govern processes of disputing. The particular patriarchal order that determines these roles for the Afghan context not only excludes women from control over land. The same patriarchal order also sanctions women's access to justice and thus the very attempt to find acknowledgment of their ownership rights.

These gender roles have also repercussions for cases where men dispute with other men, as they effectively leave men little choice other than to defend their land rights by all means available. This accounts partly

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36 For a discussion of the direct correlation between being landless and poor, see for example Wily 2004.

37 To a question like 'What is the difference between Hazaras and Pashtuns' one could expect a list of markers such as sect-affiliation, language, or genealogical differences. However, respondents in Bamyan often answered this by lengthy accounts of who gained access to land how.

38 This does not suggest that it was the most painful experience of persecution. I assume that having lost loved ones, or fallen victim to a mass rape would be more traumatic, but for that reason also less easy to disclose and refer to.

for the phenomenon that men often invest much more in defending land rights than the market value of this land.[39] One consequence of this concept of masculinity is that the open refusal to acknowledge a landowner's rights not merely questions him as a bearer of that right, but also his ability to defend it. This is a dangerous signal in an environment which is marked by weak public control over law-abidance. By defending rights claims, victims thus not only defend the many kinds of security which land ownership provides, they also prove that they earn the respect of their specific social status and role. They further need to signal the wider public that trespass will be in vain, in order to deter others from following the trespasser's example. Efforts to defend entitlements are, therefore, not only a material and interpersonal matter, but also have a public dimension.

Legal pluralism

As far as men are concerned, there is widespread agreement on the most common land rights. Transmitted through either inheritance or contract,[40] entitlements of land are in principle agreed upon by all legal systems. Potentially problematic forms of legal pluralism,[41] such as a lack of practical agreement over the hierarchy of norms or normative diversity within social fields,[42] thus play a negligible role. Land disputes and the frustrations male parties face in defending their land rights are thus a near perfect scenario to evaluate challenges and grievances victims of trespass face in claiming their rights. Particular attention therefore has to be paid to those cases, where victims of trespass decide against pursuing their rights.

Regarding women, the situation is just the opposite. As much as there is a public social demand on men to defend their rights to land, it is 'shaking the (Afghan) sky'[43] to encounter a woman claiming her rights to land ownership, let alone personal control of land. The later discussion will show why and how the social order is that effective in inhibiting women to claim what would be granted to them under both state law and classical Islamic jurisprudence. This social exclusion, however, makes the few cases of such rights claims by women analytically immensely rich.

1.6 Methodology and practical limitations

This qualitative research was designed, executed and evaluated in a cooperation between academics, practitioners and local partners. In Afghanistan, Cordaid and the VVI worked together with Cordaid's partner organisation TLO (The Liaison Office). Prior to this research, TLO already had knowledge and experience carrying out research on justice-related matters in the districts of Istalif and Behsud (TLO 2014).

TLO and Cordaid's country office in Kabul were responsible for the initial selection of the local researchers. On behalf of the VVI, Dr Ali Wardak (University of South Wales, UK) provided further assistance to the project team based on his longstanding experience researching the Afghan justice sector. After the initial selection of eight researchers who were in the majority familiar with the research sites, a three-

39 The data from the three research sites suggest that there are no major differences in this gender perception along ethnic or religious lines. For an early, but detailed discussion in the context of the Pashtunwali see for example Steul 1981.

40 For a detailed discussion of various legal kinds of transfer of land and respective legal provisions see Foley 2005.

41 See von Benda-Beckmann 2002 for a general discussion of legal pluralism, which is neither unusual as an empirical observation, nor need it cause assessments of injustice.

42 That specific social fields establish and enforce norms of their own making is a worldwide and usual phenomenon, see for example Merry 1988. What makes negotiations about rights at times problematic in Afghanistan are the huge differences of legal socialisation and normative expectations among those sharing the same social field like villages or even families. One reason for this are the large differences in biographical trajectories that followed from the various survival strategies in civil-war times (see e.g. Glatzer 2002).

43 A phrase used to comment on women claiming divorce or land.

day workshop was convened during which the researchers got acquainted with the research project and with qualitative research skills. The team prepared for the field by discussing, adjusting and translating the initial interview guide and by preparing a document on how to conduct focus group discussions. The interview guide was adjusted for four different respondents: state and non-state justice providers, disputing parties, and community members. Data collection took place between January and April 2015. Data were noted down on the spot whenever possible, but sometimes had to be recorded afterwards. Notes were subsequently translated into English.

In May 2015, the researchers drafted initial reports that were commented upon by TLO senior staff and Dr Wardak. On the basis of these comments, researchers collected additional data in June. Because of an unexpected staff turnover at TLO it took some time before further revisions of the reports could take place. By then, the security situation was further deteriorating, which unfortunately impeded Dr Wardak from travelling to Afghanistan. Unwillingly, we had to put the start of the next round of data collection on hold. The VVI invited the author of this report, who has done research on access to justice in Afghanistan, to join the team as an external advisor to help finalise the reports and provide guidance to TLO. The final reports are thus reviewed versions of those provided by the original researchers and TLO.

The final research results were then discussed in consultation meetings with representatives of the government, civil society, (I)NGOs, religious authorities and ordinary citizens.

Collecting data in Behsud and Istalif has not been an easy task for the local researchers. Many of them faced mistrust from the side of the respondents, both the formal justice providers and the citizens. While researchers in South Sudan were able to consult court records, or to sit in court hearings, this was no possibility for the researchers in Afghanistan. And even though the team comprised half of men and women, access to women was often fairly restricted. People would often feel reluctant to talk about their justice concerns. This can be seen not only as a limitation of the research, but also as an indication of the levels of mistrust that characterise Afghan society.

Another major constraint this research faced was the limited amount of time available at the research sites. Both semi-structured interviews and focus group discussions could yield considerable results nevertheless. But it limited the chances of actually following parties through their dispute management by participant observation. To resolve the remaining contradictions in the story lines of some of the cases, which are highly typical for accounts of disputes in which different parties with different opinions are involved, would have required a much longer-term research design. The limited time also impeded on the chance to build trustful relations with disputing parties and relevant actors. The descriptions of the actual cases are thus not as complete, consistent and 'thick' as the authors would have wished. For example, in case report IV we do learn about a court decision, but nothing about what actually happened in the courthouse.

To make up for some of these limitations, the primary results as they feature in the case reports are thus comparatively discussed and validated with research results from a different, more long-term research project in Bamyan city, conducted by the author, on the same subject in the concluding analysis.

1.7 Introduction to the case reports

The eight case reports, that form the result of this conjoined effort, feature central concerns and challenges justice seekers face in the two research settings Behsud and Istalif. Generally, the reports combine data about actual cases with observations by a range of respondents as well as the researcher's analysis. The

researchers took different approaches in writing these reports, which reflect the different kinds of data they managed to obtain. Some reports present cases to exemplify more widely shared concerns. Others focus on the analysis of particular institutions and feature shorter cases for illustration. The reports are collated here in a comparative manner to illustrate shared features as well as differences between the settings.

Reports one to three focus on common practical and procedural problems disputants face and institutional responses to these.

Report one in 2.1 features an inheritance dispute in Istalif, which highlights typical post-war challenges of seeking justice. It shows how cases have often become protracted due to cycles of displacement and return in the wars, and subsequently lack acknowledged documentation of rights' claims. The case illustrates how these common features make fact-finding a challenging and difficult task, and how justice providers are often unwilling or unable to deal with such protracted cases. Daily and ordinary disputing scenarios may thus become highly frustrating experiences of seeking justice.

The difficulties that arise from long duration and problems with legal documentation also characterise the lead-case about a land transaction in the second report (2.2). The dispute further illustrates the immense value of land, which makes land a likely prey of trespass and justice providers highly susceptible to corruption or favouritism. The report shows how these central means of power abuse are related to each other and used to manipulate both the state and the non-state justice system. The exemplary case serves to illustrate how in such an environment a fairly simple transaction of land can easily turn into a decade-long row of attempts to seek but fail to gain justice.

Report three (2.3) features a real estate agency as an institution, which is meant to forestall many of the ordinary procedural and practical challenges that have been discussed in report one and two. However, the case which a real estate agent in Istalif is involved in illustrates how in an environment which is known for a lack of rule of law, institutions that could bring relief easily become part of the problem of power abuse rather than part of the solution.

The reports four and five discuss the effects of the general power relations in the respective settings on the performance of justice institutions. While both Istalif and Behsud are marked by the continuing power of those actors who also dominated the civil-war times, the actual power arrangements differ quite fundamentally.

Report four in 2.4 features a *shura* in Istalif under the leadership of the locally dominant civil-war commander. This commander adjusted his style to rule from a military regime to the post-war era and attempts to gain power and legitimacy by taking people's justice concerns in his own hand. In certain cases this *shura* manages to resolve disputes and to enforce decisions that the state is not able or willing to deal with. The overall effects of the commander's engagement are welcomed by many and thus underline the immense importance of reliable means of enforcement. The discussion also reveals considerable shortcomings. The *shura* actively sidelines state institutions, threatens other justice providers where it cannot co-opt them, actively and violently interferes in court proceedings, where its own interests or those of its comrades are concerned. Practically, the *shura* itself is beyond control and accountability. Former or current opponents of the are thus not only excluded from justice provisions, but threatened by its power.

Report five (2.5) about Behsud district shows that just as in Istalif the main power-holders are those who also dominated the commander civil war. The actual power arrangements are very different though.

The analysis reveals, how these former commanders and local strongmen use the insecurity and the weakness of state institutions to manipulate both state and non-state justice procedures and misuse their power to grab land with impunity. Behsud consequently has experienced a significant number of land disputes of various magnitudes since the fall of the Taliban regime. This report provides a discussion of the causes and the dynamics behind theses land conflicts with a focus on the role of local strongmen in these disputes.

The reports six to eight discuss challenges, which women face in addition to those which men are confronted with.

Report six (2.6) starts with a discussion of legal and socio-economic dimensions of women's rights. The Afghan constitution and the international treaties to which Afghanistan is a signatory stipulate equal rights for women and men. Afghan statutory laws significantly fall back behind this threshold. Yet poor law enforcement, a general lack of appreciation for women's rights and a highly patriarchal socio-economic and socio-political environment even prevent women from having adequate access to these statutory rights. By analysing a dispute between a woman and her nephew about the woman's inheritance claim in Istalif, this report investigates major socio-economic challenges of women claiming their rights and shows how the concept of shame is meant to bar women's access to justice. Yet, it also illustrates how much there is to gain for women, as well as justice providers, if state and non-state institutions join ranks in defending *sharia* and statutory norms.

Report seven (2.7), based on data from Behsud, illustrates how the social restrictions placed on women's access to justice institutions are primarily meant to defend realms of legal governance, i.e. the family, the local community and the state. The discussion shows that the further away women take the disputes from the setting where they emerged, the severer the restrictions and potential threatening consequences become and the less likely they find the social and institutional support necessary to pursue their rights claims. The report also underlines, that women not only have to withstand their families' resistance, but that both community and state actors are often complicit in upholding this patriarchal regime and the limits of these realms of legal governance.

Report eight introduces the women's *shura* in Istalif as an institution of support for women's rights. By taking up an advocacy and supportive role throughout the dispute process this *shura* allows women to overcome many of the barriers women face in claiming their rights. The report reveals that the particularly supportive role of this *shura* is only possible due to the personality of its leader Hassina. It illustrates though, which potent role seemingly powerless actors can assume with minimal institutional support, where they enjoy people's trust and dare to confront existing power structures.

2. Eight case studies on primary justice

By TLO and Friederike Stahlmann

2.1 Common challenges in claiming land rights – a case from Istalif

Summary
The following case study serves to highlight how frustrating the experience of seeking justice may become for disputants. It shows how even in assumingly unambiguous scenarios such as inheritance claims, cases may go on for decades due to cycles of displacement and return, and lack of acknowledged documentation. The case also underlines that the legal uncertainty this practically causes for disputants is further complicated by the unwillingness or inability to take and enforce decisions by justice institutions.

The dispute[44]
A man by the name of Sharif[45] and his maternal cousin Akbar are in a dispute about an inheritance claim regarding land from Sharif's maternal grandfather. The case started in the late 1970s, when Sharif's grandfather died due to natural causes. He left a son called Ahmad and a daughter by the name of Shirin, and 5 *jerib*[46] of land behind, but did not distribute the land between his son and daughter. As the *malik* from the village commented: "In our district very few fathers gave inheritance to their daughters."Therefore, "he did not think of dividing his land because he had only one son, and normally the father divides the land between sons when he is alive." The mentioned land did not have any official deed or documents.

Sharif's account of the case history from then on is thus: Shirin, like other women of Istalif initially did not consider claiming the inheritance right she had in her father's property. According to a local elder, who is familiar with this case, she changed her mind later and wanted to face the challenges and get her portion of inheritance from her brother Ahmad, because she needed the extra income. According to a tribal elder in Istalif, "it was quite rare in our area in the 1970s for a woman to ask for her portion of inheritance from her brother because it was considered shameful for herself and her family." Shirin, however, was very poor, so she asked for money from her brother instead of the land. She also agreed to take less money from her brother than the market value of her portion would have been.

Another elder from the village noted that it is very difficult to see these kinds of issues discussed outside of the close family realm such as among brothers, or cousins. "Therefore, we as villagers did not know the case in the beginning, but we as local villagers consider this a very personal issue of this family. Therefore, we do not want to interfere in it unless necessary." However, once Shirin had overcome the issue of shame it was decided that she would sell the land to her brother Ahmad and both agreed on it. But Ahmad did not have enough money at the time to pay his sister Shirin off. So an agreement was made that as soon as the brother had the money, he would pay his sister the agreed upon amount. In order to ensure that this arrangement would not become a problem between the two families later on, a contract was signed between the sister Shirin and her brother Ahmad, stating that 18,000 Afghani would be given to Shirin for her portion of the inheritance. This agreement was written in presence of local *shura* members and the current head of the DDA (District Development Assembly), who had been a significant elder in the

44 Based on interviews with Sharif, Akbar, a tribal elder and a judge.
45 Please note that apart from publically known actors, all names have been changed.
46 Five *jerib* amount to one ha.

district for a long time. The contract was given to a third party by the name of Hassan to keep until the remaining money had been paid.

However, the payment never took place, as the coup d'état of 1978, the war against the Soviet occupation, the subsequent civil war and the Taliban regime drove both Ahmad and his sister Shirin into exile. Their families migrated to different places and lost touch. After the collapse of the Taliban government, the communities came back to their villages and so did the extended families of Ahmad and his sister, who had both died in exile. Now Shirin's son, Sharif, wished to settle the outstanding debt on the land with his cousin Akbar, the son of Ahmad, and demanded either the land or the monetary value from him.

Given that the land had never been registered officially with the *Arazi* department (Land Authority Department) in the first place and that the contract, which had regulated the inheritance claim, had been lost together with Hassan, the man who should have taken care of it until the handover of the money, Sharif knew that it would be very difficult to claim his inherited rights. What complicated the case was that according to locals the original sum of 18,000 Afghani constituted only a fraction of the recent value of the land.

So Sharif first approached local elders to resolve his dispute with Akbar through the non-state justice system, by asking for a *jirga* to be held on this case. He also wanted to avoid going to court immediately as he believed that with regard to family matters this was not appropriate. Local elders tried to mediate between Sharif and Akbar. With Akbar and Sharif being cousins, mediating between them was not an easy task – cousin rivalry is an infamous tradition in Afghanistan, as they tend to compete for the same pool of internal family resources.[47] In this case Akbar simply refused to give either land or money to Sharif.

After various efforts within the community justice system, in 2009, Sharif finally decided to approach district officials in order to resolve this dispute. According to local respondents, he did not go to *hoquq*, but went straight to the district governor who referred his case to the primary court of Istalif.

According to government authorities who were interviewed for this case study, the problem was that Sharif did not have any legal documentation to support his claim. Therefore, the state authorities claimed that they could not do much about the case. From a legal perspective this is a bit curious, given that there are no papers in which Shirin states that she forgoes her right to inheritance nor any documentation, which shows that she received it. In this case the lack of papers should in fact favour Sharif.

Sharif blamed local district authorities for being on the side of Akbar, because state authorities had told him that the land did not belong to his mother anymore as his mother had already sold her share to her brother Ahmad. According to them, the fact that Sharif (son of Shirin) did not have any legal document, and the I-owe-you letter was no longer available as evidence, made it difficult to even initiate proceedings. How these officials established the sale without documentation remains unclear.

Sharif claims that no one has ever even taken a good look at the case and explains this by the connections Akbar allegedly has with relevant state officials. People generally agree that currently in Istalif district, one has to have money for bribery or personal links with relevant officials in order to win cases.[48]

47 As the family's resources are traditionally only divided among sons, this rivalry usually concerns paternal cousins.

48 Cf. cases in 2.3 and 2.4.

Some local respondents confirm Sharif's claim, as they suggest that Akbar is probably taking advantage of the currently weak rule of law regime in the district. As it is known that some people have even grabbed governmental land and the government cannot take it back from them, how should the government be able to provide Sharif with a just sentence when he does not even have any official document? Influence on the justice providers by power-holders in the district is a regular concern and thus at least a likely explanation.[49]

Repeatedly, Sharif attempted to solve the case in court, but he did not get any response. Common local explanations for such protracted cases are either that court officials do not take such cases seriously because they seem too complicated due to the lack of the right documents, or that court officials consciously protract proceedings to wear people down in the hope to extract a bribe for speeding up the process.

So Sharif returned to the local *shura* in the hope that they would help to solve the dispute in the non-state justice system. It has also become costly for him to repeatedly travel to the district centre to follow up on his case. He chose to approach Haji Akbar, as he is not only a prominent elder but had been present at the signing of the sale's contract decades ago. He also knows the area and the community well and should therefore be able to mediate a solution that would satisfy both parties. Furthermore, Haji Akbar is believed to be a powerful man with authority in the district. Sharif noted, "I prefer my dispute to get resolved through the non-state justice system. Mainly because some of the elders who are participating in the *shuras* and *jirgas* were present when the letter was signed between my mom and my uncle. And also Akbar will not have a lot of influence over *shura* and *jirga* members."

Given that the *jirga* did not manage to reach let alone enforce a settlement in the first place, it remains to be seen if a second attempt with the non-state justice system will make any difference. Given the alleged 'connections' of Akbar and his previous refusal of the mediation attempt by the elders, it remains questionable whether he would be willing to come to a settlement at all.

Conclusion

From the conversations with state justice actors and local elders, it became clear that Sharif's case is not unique. There are many cases that reach back decades. The combination of interrupted lines of ownership documentation, or competing documents for the same land from different governments, and justice providers that are either unable or unwilling to deal with such protracted cases is fairly common. Practically, such long duration of disputes creates an immense degree of legal uncertainty, which makes dispute proceedings highly vulnerable to practices of corruption and favouritism, and fair settlements and judgments as unlikely as their enforcement. Finding someone, who has the necessary power locally, can gain all relevant information and has an interest in ensuring that reconciliation between the disputants is based on a fair dispute resolution is, however, a difficult task and apparently a sign of good luck rather than a rule of law.

49 See report 2.4.

2.2 Land disputing processes facing corruption and favouritism – an example from Behsud

Introduction

It is part of the wisdom of survival in Afghanistan that one has to have two things in order to succeed: 'Firstly, you need to have money and, secondly, you need powerful relatives or acquaintances in the government or other positions of power.' Phrased differently, the country is riddled by favouritism and corruption (Guistozzi 2012; Jensen 2011; Singh 2014; Wardak, Saba, Kazem 2007). The following case-report from Behsud will serve as an example of the extent to which this also applies to the justice sector. Particularly, it explores how vulnerable the judiciary is to fall victim to and even become part of an overall abusive order of power when the abuse is committed from within the state realm. This case study whereby a high-ranking member of the police forces is largely responsible for inhibiting access to justice is symptomatic for the reputation of the police, as well as of high-ranking state officials and government representatives to be a main source of concern for the justice system at large. This case-report will show how the immense value of land makes it vulnerable to trespass and how favouritism and corruption as central means of such power-abuse are related to each other and used to manipulate the proceedings of a dispute in practice.

Such manipulations and the way in which they exclude weaker parties from seeking justice are reasons why many people turn to the non-state justice system to pursue their claims. However, this case study also shows that the three *jirgas* held during the course of this dispute were not effective either. Faced with this situation, victims of trespass will ultimately have to rely on the state justice sector, in particular in land dispute cases where formal documentation is needed in the end. This example of a dispute process thus serves to illustrate how a case, which is at the outset a fairly simple transaction of land, can easily turn into a decades-long row of attempts to seek but fail to gain justice.

The dispute[50]

This case goes back to the times of the Taliban regime, when Abid agreed to sell nine *jerib* of land to Matiullah for a price of 25,000 Afghanis per *jerib*. Matiullah paid 19,000 Afghanis as an advance-payment and they set up a sale contract that once Matiullah had paid the remaining 206,000 Afghanis he would own the land. Soon after signing the contract, Abid died in a car accident in Kabul before he had informed his family about the sale contract. In the last months of the Taliban regime Abid's nephew, Jahid, from whose perspective this dispute is accounted for, started to prepare part of his family's land for construction works. Learning this, Sharifullah, son of Matiullah, came to the land accompanied by armed men in order to stop Jahid's construction work. He told Jahid that his uncle Kabir had sold this land to his father Matiullah and showed him the sale contract. Jahid then stopped his work. But when it became apparent that Sharifullah claimed all eleven *jerib* of land, which his family had in the area, Jahid claimed two *jerib* back, as the sale contract only referred to nine *jerib*.

However, Sharifullah rejected the request and refused to give two *jerib* back to Jahid and a verbal dispute took place between both parties. Jahid wanted to take the case to court during the last days of the Taliban regime, but due to the invasion by ISAF and NATO forces he had to wait and could not press charges.

50 Based on Interview #1-#5.

Meanwhile, the cousins of Sharifullah had a conflict with him and approached Jahid to tell him that Matiullah had not paid the total amount to his uncle Abid, and that another zero had been added in the document to the advance payment so it now figured 190,000 instead of 19,000 Afghanis.

During the last phase of the transitional government under Hamid Karzai, both disputants agreed to a *jirga*. The members of the *jirga* were perceived as neutral arbiters. They received an authorisation for taking a binding decision from both sides in the form of a *wak*, but did not take *machalgha*, which is a deposit that is taken from both disputants before a *jirga* starts in order to help enforce the decision.

The *jirga* members went to the disputed land to verify the claims and found that Matiullah had taken eleven instead of the agreed upon nine *jerib* and thus decided that Matiullah had to give two *jerib* of land back to Jahid. Both parties accepted the decision of the *jirga* and signed and thumb-printed the decision-letter.

At the end of the provisional government under Hamid Karzai, Jahid decided to sell these two *jerib* of land to a property dealer in that area. As part of processing the sale documents this property dealer called Matiullah to his office and in presence of Jahid Matiullah's son, Sharifullah, confirmed and signed that his family had no claim or any right to this land. Nevertheless, three months later, Sharifullah started to construct a house on this land and claimed that the two *jerib* belonged to him.

In 2003, a high-ranking member of the district police entered this dispute by taking sides with Matiullah and Sharifullah. Allegedly, Sharifullah and the police officer had made a deal that the police officer would receive a share of the land in return for helping Sharifullah in gaining ownership. The police officer started constructing two flats on this land. According to other informants from the area, this fits a general pattern: "If someone has links with a power holder then it's easy for him to win a case. […] The power-holders don't grab land directly, but they use their influence and power in a conflict in favour of someone and then take their share when the related person gets land" (Interview #2). In this period, the price of land was rising daily because the security situation was improving and many people returned to Afghanistan from exile in neighbouring countries. People were buying homes and land, and willing to pay good prices.

The matter remained unchanged for many years because Jahid felt he could not confront Sharifullah. He neither had the money to outbid Sharifullah in the likely case that the judges were corrupt, nor the backing of a powerful actor who could make up for his lack of money and outrun the influence of the police officer. According to local respondents "the opposite party [Matiullah and his son Sharifullah] has money and more importantly power to succeed in this case" (Interview #1).

Nevertheless, in 2014, Jahid went to Behsud district centre and filed a suit against Sharifullah in the *hoquq* department of the court. As Jahid knew that Sharifullah still had the backing of the high-ranking police officer, he somehow changed the nature of the case. He claimed that his uncle could not have sold this part of the land, as it was his part of the inheritance. According to the inheritance laws of Afghanistan, Abid could not have sold the entire family's property to anyone because there was an inheritance portion of his nephew Jahid in it. He wrote in his petition that while his uncle Abid had the right to sell his personal property amounting to nine *jerib*, he had no right to sell the two *jerib*, which Jahid declared to be his inherited portion.

Upon arrival of the case in court, Sharifullah had thus already agreed to give back the additional two *jerib* to Jahid in the *jirga* and had repeated in front of the property dealer, that he had no claim to this land. Now, there was an additional inheritance claim on the two *jerib* to undermine the claim by Sharifullah.

This inheritance claim made Sharifullah and his partners worry because according to the laws, no one can sell other person's right, and inheritance rights enjoy high social respect. If any of that would have been acknowledged by the judge, the case could have been decided with little further effort.

At the same time, Abid's son Baqir returned from the Netherlands and also filed a lawsuit against Matiullah, claiming that Sharifullah had merely paid 19,000 Afghanis to his father Abid, and that the remaining 206,000 still remained open. In response, Sharifullah claimed that his father had paid 190,000 and not just 19,000 Afghanis.

Both cases kept pending in court, while the conflict between the families worsened day-by-day. In 2015, Jahid and his cousin Baqir bribed the judge so he would send the allegedly tampered contract, which figured 190,000 Afghanis, to the forensic department for investigation to prove that a zero had been added in the contract to the original amount of 19,000 Afghanis.

However, the forensic department was delaying the case as well, so Jahid and his cousin Baqir again bribed them to send the results back to the court. Once they got their money, the forensic department sent the documents to the court. As Jahid commented: "Not only courts are involved in corruption, but in fact almost all the state officials are involved in corruption. Some of them won't ask for money directly, they will delay your work and that is a signal to pay a bribe otherwise your work won't proceed."

Presently, the case is awaiting the final verdict of the court and both parties have paid bribe money to the judges in order to turn the decision of the court in their favour. According to a local respondent: "There is a lot of corruption in the formal justice system. You have to have enough money in order for the result of the court to be in your favour" (Interview #3).

According to Jahid and his cousin Baqir, so far they have paid around 60,000 to 70,000 USD to bribe judges, lawyers, prosecutors and district officials. Jahid added that in order to raise this amount he had to mortgage his home in Kabul. He also bought cars on instalments and resold them, so he had the bribe-money on time. He is thus under an immense burden of loans.

Often though, it is not clear if money alone is sufficient to bring about the wanted outcome, or if the officials in charge are under pressure from or even threatened by power-holders. The fact that the judge recommended to Jahid to hold a *jirga* with Sharifullah is such an example. According to Jahid, that might mean that the judge either wants more bribe-money from him or that he is under pressure from the police officer. One way or another, according to a neighbour who is familiar with the case, he is still pressuring the judge not to take the final verdict.

By now, Jahid has complained many times about the police officer, "because he has financially destroyed me." His attempts to limit the police officer's power over the proceedings have also been in vain. He filed a complaint against the police officer for backing Matiullah and his son Sharifullah in order to obtain some portion of the grabbed land for himself. Once an attorney called the police officer for an investigation, but nothing happened against him. Jahid also filed a complaint against the police officer with the Ministry of Interior, but as the brother of the police officer is a public prosecutor he was protected from prosecution.

Summary analysis

The case is an example of how corruption and favouritism have become systemic features not only of the judiciary, but of all related institutions, sadly confirming the assessment by Transparency International, which ranked Afghanistan as the country with the fourth highest level of corruption in 2014 (Transparency International 2014). By disputants these are considered the main problems in seeking justice and this

exemplary case shows the difficulties of defending one's rights. According to local elder, "people don't go to courts because corruption is involved and people would have to give a lot of money as a bribe to court officials." (Interview #3) Where bribes need to be raised by loans, the loans in turn force the disputants to try and secure the asset by all means and usually even more bribes, in order to pay back the loans. In total, expenses then often exceed the value of the land at stake.

The case underlines how the combination of favouritism and corruption potentiates the risks for relatively weaker disputants. While the money necessary to bribe those in charge of the proceedings might be raised somehow, it is nearly impossible to actually have much impact on the influence that such powerful figures have on proceedings and outcomes. The partisan and nepotistic networks which helped many officials to gain their positions also help to maintain them, no matter how grave their misuse of power might be (Cf. Maaß 2010; Singh 2014).

The case illustrates how the combination of favouritism and corruption serves to weaken or even co-opt the judiciary into networks of power abuse. After taking sides with the trespassing party, the police officer either bribed or pressured the respective officials in charge in order to weaken the plaintiff financially to a point where he has to give up pursuing his claim. In contrast to Jahid, who started the proceeding because he was in need and by now is under immense pressure to pay back the loans he entered into, an official like the police officer does not face such pressures and is thus under no time pressure to secure a result. The level of corruption in this case has reached the point whereby the police officer is taking nine *jerib* of land from a poor person who is left with a seven *biswa*[51] share in it.

But even if there had been a verdict in favour of Jahid, the chances that the court could enforce it against the police officer are quite unlikely. The public knowledge about this fundamental weakness not only undermines the judiciary's authority. Without a chance to see verdicts enforced and respected, members of the judiciary have also little incentive to enter the personal risk of confronting powerful actors by issuing fair and timely verdicts.

The case further shows that a corrupt state judiciary undermines people's respect for non-state justice institutions and to what extent respect for one is linked with respect for the other: a confirmation of the *jirga* decision through the court could have strengthened people's respect for the non-state system by indicating that there is no point in going to court, if served with a fair resolution. That in this case the disrespect for the non-state system paid off for the trespasser instead sent the signal that there is no need to honour such an agreement. It also underlines how little power is left within the social realm to ensure the enforcement of non-state resolutions. The interpretation of Jahid that the suggestion by the judge to convene a *jirga* was a result of bribery, is not unusual and indicates the lack of trust both the state and the non-state system enjoy by the public, as long as they use each other to evade responsibility or try to undermine each other's authority (Stahlmann 2015).[52]

As a local elder claimed, "if these problems are solved by the government, none of us will use the non-state justice system or none of us will prefer the non-state justice system. We are preferring it only because the formal justice system is weak in our area" (Interview #3).

51 One *biswa* equals 100m^2.

52 For a suggestion on rules of hierarchy and mutual respect between state and non-state justice providers in Afghanistan see e.g. Wardak 2011.

2.3 Intermediaries as part of the problem? A land dispute with a real estate agent, Istalif

Introduction

As Report 2.1 and 2.2 have illustrated, disputes about ownership of land are notorious for being marred with complications in Afghanistan. As existential as land is as a resource, any disruption in either politics of land distribution or the social order itself necessarily complicates such disputes further. The statement by an elder from Istalif illustrates that this is not merely a recent phenomenon:

> I do remember that many land related disputes arose in our area during the time of the communists. The government of that time decided to redistribute land and those who held more land had to give land to landless people. Once the communist regime went down, people started to claim their land back and that created a lot of disputes in our area, but fortunately these disputes are solved and we don't have these disputes in our area anymore.

In the post-Taliban era, people, politics and last but not least institutions of justice have to deal with the consequences of the immense political and social disruptions of the civil wars, the many regime changes, and the forced migration movements. The loss of ownership records and lack of registration, competing expectations of what constitutes legality within the different legal systems in place and the conflictive character of land distribution by the state are only some of the features that make it a challenging enterprise to find and provide justice. Others are that most ownership documents are *urfi* (customary) rather than *shara'i* (official) and that all these documents can be forged.[53]

What complicates the process of coming to terms with these long-lasting effects of civil war is that the misuse of power is far from over. Disputants are thus faced with an environment of continuing and persistent power abuse that goes along with a notorious weakness of both state and non-state justice providers.[54] While some of these power-holders indeed seem to be beyond control, the rule of law would already be increasingly served if ordinary small-scale ownership transactions were dealt with through agreed-upon procedures and the necessary assistance to have one's rights formally approved.[55]

One of such institutions could be real estate agencies, which according to their legally prescribed mandate, could help to address many of the pressing and conflictive issues potentially arising in the context of land transactions. According to their mandate, real estate agencies take care of all the paperwork of land transactions including that with the government offices. The buyer and the seller thus do not have to worry about complying with the legality of the proceedings, but only need to come to court for one day to confirm their will to buy and sell the land on the agreed-upon terms. Real estate agents are also asked to verify the ownership status and thus could help to stem the flow of illegally obtained land changing hands. Given that many people are not aware of the laws and regulations regarding land registration, this institution could serve as an intermediary between practical interests and legal expectations.

They can also assist to avoid the pitfalls of unregistered property arrangements. According to an elder from Istalif, almost 70 percent of the land is not registered officially. Instead, people hold private contracts as proof of ownership. As soon as the buyer and seller agree on the amount of money, they meet with a

53 For a discussion of the changes of politics throughout the regimes and the practical difficulties to trace and prove land rights see e.g. Foley 2005 and Wily 2013.

54 For general accounts of the continuity of impunity and rule of might rather than law see e.g. Human Rights Watch 2015, Mason 2011, Schetter et al. 2007, Maaß 2010.

55 On the recognition of the need for legal assistance see e.g. the demands by the Ministry of Justice 2005.

few elders and write a so-called 'letter of land' (*khat zamin*), which both the seller and the buyer and at least three witnesses sign and thumb-print. While many prefer this swift procedure to the lengthy and complicated process of registering land, the associated problems with future recognition are immense. Real estate agents could be a solution to both problems by taking over the effort of the proceedings and preventing future problems. In order to forestall that real estate agents misuse their knowledge about these proceedings, the law on real estate agencies limits their fees to one percent of the sale's value. In practice this limit seems not to be respected, as local informants report that they often charge two percent. The more crucial question is whether such an institution practically serves to fulfil overall rule-of-law interests and increases the access to justice or not. The following case from Istalif will illustrate how vulnerable such institutions are to fall victim to and become part of the power abuse that marks the general socio-political and legal environment of Afghanistan.

The dispute

A man by the name of Yussuf was interested in purchasing one *jerib* of agriculture land in Masjid area of Istalif district. He had found this land through a real estate agency which provided him with all the required information and documents. After having studied these documents, he consulted the neighbours of the land and some relatives, who were living in that area, and decided to purchase the land. Thus, he went to the real estate agency and had a very detailed discussion with the agent who then called the owner of the land, Azatullah, to the real estate agency. Together they discussed the documents and more importantly the price of the land. After many negotiations, Yussuf and Azatullah agreed on 525,000 Afghanis as the price for the land and both parties signed an initial document in presence of the real estate agent. As this contract stipulated, the next day all the parties involved in the process met at the real estate office and Yussuf paid 30 percent of the sale's price to Azatullah in front of the real estate owner, who documented the payment. The second instalment of another 50 percent was scheduled for the next week and happened as planned, which freed up the way for the full handover of the land.

The next week Yussuf, the real estate agent and Azatullah met to formally conduct this handover. According to Yussuf, what happened then was that Azatullah took them to a piece of land other than that which the real estate agent had shown to Yussuf initially. Even though this plot was not far from the land, which Yussuf wanted to buy, he refused to accept this other plot, as it was of far less value. The plot, which he had planned to buy, was nearer to the road and bazaar, benefitted better from the sun, had better access to water and could be reached by car in winter. The plot was also bigger in size and had many fruit trees.

In the dispute that emerged Yussuf thus insisted to get the original piece of land or have his money back. Azatullah on the other hand claimed that he never had registered any other land with the real estate agent than the plot he had shown to Yussuf and that he could not give back the money since he had spent it already. As the real estate agent had shown another slot to Yussuf it should be him to answer Yussuf's claims. According to the real estate agent, he had merely shown Yussuf the plot that Azatullah had shown to him originally. According to him the dispute thus was between the seller and the buyer and that they had to come up with a solution. According to the real estate owner, he had duly fulfilled his responsibilities.

As the dispute could not get resolved among these parties, Yussuf addressed the local *shura* to seek its help and find support for his claim. However, neither the real estate agent nor Azatullah agreed to such a procedure. Therefore, Yussuf contacted the regional Koh Daman Shura,[56] which is known to have considerable influence and power, but never got a positive response. He insisted to get the matter resolved

56 See 1.2 and 2.4 for details on this *shura*.

with the council as it is cheaper than pursuing claims in the state justice system and would improve the chances of seeing the resolution enforced, but found that the *shura* was not interested in dealing with the matter. When he found out that Azatullah himself was a member of the *shura*, he knew that he would not find justice there. So he decided to take the case to court. All in all, by then seven months had passed since the initial contract. It took him many days to only register the case in the primary court of Istalif and then, again, a long time and much effort to make sure that the court would consider the case.

After a hearing had been held, Yussuf found that the court did not want to deliver a verdict. So he tried to move the case to Kabul, as he suspected that the delay was due to Azatullah's connection with power-holders in the region and their influence on the court. His chance to find justice there was thus minimal. This attempt failed though and in the end the primary court of Istalif ruled in favour of Azatullah. Yussuf was told to pay the remaining 20 percent of the sale's price to Azatullah to get the plot, which he did not want to buy. According to this verdict, the real estate agent had no responsibility for the dispute.

As an elder from Istalif commented:

> The decision of the court is not something unexpected to me, because I knew from the beginning that one of the parties involved in the case is very powerful and has influence over the courts here, so the verdict of the primary court is not something unexpected to me. […] The primary court in Istalif does not have the power to decide on the cases independently, their decisions are more influenced by the powerful people in the area and even MPs [Members of Parliament] get involved in influencing decisions.

This general pattern is confirmed by another resident of Istalif:

> There are so many commanders and some of those commanders are in the Afghanistan parliament as well, they are so powerful, they don't care about the court or anything else.

Once the primary court of Istalif delivered its verdict on the case, Yussuf lodged an appeal and the case was transferred to the appellate court (*Mahkama-e Istenaf*) in Kabul, where it is still pending.

Summary analysis

In retrospect and without access to the relevant documents it is usually impossible to trace truth beyond doubt in cases like this. It could have been that Yussuf had the plan to pay for the worse plot of land but get the better one and thus only pretended that he had been shown the wrong plot. However, the course of events which proves his lack of power to influence the proceedings in his interest makes this version of the dispute unlikely. More likely is that he became a victim of some fraudulent scheme which tricked him into paying for the wrong land. The responsibility for causing this would lie with the real estate agent, as according to his mandate it is his legal responsibility to make sure that land transaction is clear and transparent. The course of events, however, suggests that the power which ensured that the scheme would be successful, was in the hands of Azatullah. Whether he persuaded the real estate agent by gain or threat to play along is impossible to assess. It might be that the real estate agent simply knew that the defendant was a powerful and influential person in Istalif district to play along without further gain or open threat. That he is known to have influence over almost all relevant institutions in Istalif could have been enough reason to avoid confronting him but aim to get in his good books instead.

The case, thus, shows once more that relatively weaker parties are facing similar challenges in the state as well as the non-state system. In both, the stronger party will make sure that justice providers decide on cases along the power-holder's interests rather than along laws. It also shows that in an environment

where power-holders are known to stand above the law, institutions such as real estate agencies which should prevent challenges that disputants tend to face in defending ownership rights to land, are likely to become part of the problem of power abuse rather than part of the solution.

What is left to a claimant such as Yussuf is to keep fighting and hope:

> I am a schoolteacher in a governmental school. I have been saving this money for the last 30 years. I am not a businessman who earns *lakhs* and millions within a month or two. I earn a monthly salary of eight thousand Afghanis and you can count yourself how long it will take to earn five hundred thousand Afghanis from my salary. I planned to purchase this land to do agriculture works after my school hours, because I have eight children and my school salary alone is not enough to provide for my family. In regards to my case in the court, I have to mention that for the past months I have struggled a lot in the *shura* and then in the court and now I know that I will struggle more with travelling to Kabul and coming back. My request to the appellate court of Kabul is to bring justice to my case. I have promised myself that I will fight for my case till the end and I am sure that justice will come my way.

2.4 Commanders managing disputes – a case from Istalif

Introduction

Former civil-war commanders are known to yield considerable influence on disputing processes in all of Afghanistan. Their continuous power allows them to manipulate proceedings or secure war-party members jobs within the administration of justice. The following example from Istalif is a slightly different attempt to gain power over disputing processes and outcomes, as it concerns a commander who created a *shura* to publically engage in dispute resolution. According to local respondents this non-state dispute resolution body has become an influential institution in the realm of dispute resolution since its establishment in 2007. This raises questions and concerns with regard to impartiality and options of redress for parties who consider this involvement inappropriate or disagree with outcomes.

This case study investigates how this *shura* emerged, how the commander assumed his role, which consequences it has for the institutional environment in the administration of primary justice and primary parties' justice concerns.

Foundation and political context of the commander's *shura*

Respondents in Istalif widely agreed that the situation after the fall of the Taliban regime turned out to be highly problematic in several regards. On the one hand, many disputes emerged in the district over land, inheritance, water and other related issues because thousands of people had just returned from up to 30 years of exile in Pakistan or Iran to their own villages. The status of landownership had often become ambiguous during the wars as people did not exactly remember where the land demarcations were and water systems had been damaged during the wars. Matters of inheritance had often not been resolved in an acknowledged and timely manner while people were in exile (Cf. Foley 2005; Wily 2013). On the other hand, most people in Istalif were armed and the state institutions were weak. Accordingly, such disputes had a great potential to escalate and spiral out of control.

There was, however, no lack of local strongmen in the area, who had gained immense power as commanders in the civil war, and faced the task to redefine and adjust their socio-political position to the new, post-

war reality. That one of the leading commanders in the district of Istalif responded to this situation by founding a *shura* is not an unusual move. According to another prominent civil-war commander one of the main aims of the *shura* was to find solutions in response to the detrimental security situation and the vacuum of law-enforcement that shaped life in Istalif after the fall of the Taliban. As a declaredly civil institution the *shura* does not oppose or challenge the current political order openly, while the term bears connotations of both Islamic and war-party notions of governance. However, even though it is called *shura* by name, it practically defies the idea of a council, as in fact the commander is the only permanent member. There are not even deputies or secretaries, or any other registered members.

Instead, the *shura* represents the structures of command and networks within the commander's war party.[57] The *shura* he established thus is, according to local respondents, a sub-branch of a bigger *shura* which spans the seven districts north of Kabul in the Shomali plains and is led by one of the most powerful commanders in the northern districts of Kabul province. Delegates of this main *shura* have registered sub-*shuras* in each district, one of which is the *shura* in Istalif.

The assessments of the interests behind this organisation differ fundamentally. Some residents report that the commander was aware of the immense problems in Istalif and therefore decided to take action to resolve these problems. As a local elder said "This is primarily a matter of politics. The main aim of this *shura* is to allow these former civil-war commanders to keep control of the district, to keep their influence over the population." (Interview #4)

The following analysis of the commander's engagement regarding disputes will illustrate that these two perspectives are not necessarily contradictory: by referring to the continuous power of his war-party and the large network of party-members, he manages to regain control of the district and influence over the population by assuming the combined role of judge and police in settling upcoming disputes.

In many systemic regards, this is as much a continuation of military logic to rule, as the structure of the *shura* is a continuation of party hierarchies and depicts the typical shortcomings in terms of rule of law standards that uncontrolled power-holders tend to cause. What makes this commander's strategy interesting is that he not merely tries to enforce obedience and submission by force. Rather he attempts and in many regards succeeds to gain authority and legitimacy by taking unsatisfied justice concerns and related security needs seriously, which serves as a cornerstone for enforcing his claim to rule while legitimising it at the same time. The following procedural analysis of an exemplary case shows how this is done by making rhetorical and formal allusions to the participatory character of traditional dispute management on the one hand, and employing his power to replace customary means of social control and sideline state authorities on the other hand.

The workings of commander's *shura*

The following case illustrates the working of the *shura* in relation to other justice institutions by the example of an inheritance dispute.

Getting involved

In early 2015, an inheritance dispute broke out between four sisters and two brothers in Qarya Shanki area of Istalif district. The dispute started when the two brothers showed a letter to their sisters that their father had written about the distribution of the land. It declares as a last will that the daughters should receive seven *jerib* of farm land, whereas the sons were to receive the six *jerib* of orchard land. The sisters claimed that the letter had been forged, and that their father had never written such a will. The sisters

57 See 1.2.

suspected that their brothers wanted to get the orchards, because they are considered to be of higher value than farm land. In order to address the situation, the sisters went to the district governor with a petition to look into the case. As is usual in civil matters, the district governor referred the case to the *hoquq* department.

According to a local respondent, "the *hoquq* reviewed the letter and noted that a decision should be made in favour of the sisters". However, the brothers did not accept the *hoquq*'s resolution voluntarily. As the recommendation of the *hoquq* is not binding, this was their full right.

Having the choice between referring the case to the court and suggesting a non-state settlement, the *hoquq* decided for the latter. While this shows little interest in assuming state competence in settling disputes, it is in line with the external suggestions that ask for an acknowledgment of local competence in the administration of justice (Cf. Wardak 2011). It is noteworthy though, that the parties were not just advised to seek non-state settlement, but that the case was referred to the commander, as it entails an active support and indirect state-authorisation of this known war-party commander. The comment that the leading concern had been to find someone who could enforce a settlement and this commander was well known in the area suggests that this was done in appreciation of his power rather than mere wisdom. That the *hoquq* apparently located this power outside the state realm, rather than with, for instance, the local police forces tallies with a widely held local perception that sees the police to be dependent on figures such as this commander. "The chief of police of Istalif fears that if he goes against them, he might get fired because the commander is connected to Dr Abdullah [Chief Executive of the Islamic State of Afghanistan], who can fire the chief of police within hours."[58]

It might thus be a pragmatic move to address the actual power-holder directly. It might however also have been proactive resignation or even fear. There are sources which report that the commander's *shura* also appears as a violent force, which alters decisions made by the state authorities and challenges their legitimacy. According to the district authorities, the *shura* at times acts as a second government and uses armed forces to threaten judges and manipulate the procedures of the court. A state justice provider highlights these issues by giving an example:

> Some people referred to me for a dispute where the counterpart had connections with the commander. Before even starting the investigation process, the commander comes to my office asking to view the dispute's papers and shouted that no one should stand in his way, claiming that he was able to resolve the issue by himself. I explained to him that he was inside a state institution where none should and can commit illegal actions.

This indicates that the cooperation between the state-authorised *hoquq* and *shura* works smoothly, as long as the *shura* gains and keeps control over a disputing process, but may shift to violence where it is denied this right by the state, or by a concerned disputing party that prefers state procedures.

Composition

The account of the case continues with the formation of a decision-making body. "The first thing the commander did was to find the right people in the district who could work on resolving this dispute." A local elder noted that the commander "not only knows the entire district of Istalif but is also familiar with entire Koh Daman area of Kabul province." (Interview #4) According to a local respondent this knowledge of the district and the wider area helps him with dispute resolution: "Whenever a dispute

58 Personnel communication by a researcher involved in writing this report. See also Singh 2014. For an account about local police in Istalif see Coburn 2011b.

comes to the commander, he knows exactly through whom he can resolve it" (Interview #4). For example "if it is inheritance case, the commander invites local *mawlawis* to resolve the dispute," added the same respondent (Interview #2). The reason why *mawlawis* (religious scholars) are involved in inheritance cases is the local acknowledgment that inheritance is a *sharia*-regulated matter and thus should be solved according to Islamic principles. Since the commander did not study inheritance law, he called upon several *mawlawis,* who came to the *shura's* office to discuss the dispute between the brothers and sisters.[59]

The inclusion of religious authorities is very much in line with a traditional composition of a *jirga*. However, given the relatively low social status and often limited religious education which locally employed religious functionaries have, this neither in the past nor in the present guarantees that settlements respect Islamic norms.[60] Often their impact is limited to ceremonial functions. Many of those, however, gained military power during the war and the existence of a separate *shura* is an indication of their increased power on the one hand, and of the attempt to distance themselves from the often incriminating war-related past on the other. Agreeing to come and act upon the request of the commander, while they equally could insist that the commander.

The commander also invited two government officials from the district centre as a government delegation to witness the resolution of the dispute – one from the Afghanistan Office of Land Affairs *Amlak*, the other a village representative at the district level. The involvement of the government officials could suggest respect for the state system, even cooperation. However, symbolically this arrangement creates a clear hierarchical order in favour of the *shura* at the detriment of the state representatives. The meeting takes place in *shura*'s office, at the invitation of the commander, and is chaired by him. The state representatives merely had the role of witnesses, which confirms their subordinate position.

This practical cooperation is not limited to state and religious authorities. Apart from the commander's *shura*, there is also a *malik shura* (council of village chiefs) in the district centre of Istalif, which meets every Sunday. There are 14 *maliks* across Istalif district in total. At certain instances some members of the *malik shura* have been called by the commander to play the role of arbiters. It shows that the commander manages to draw upon the *malik shura* as well.

When the commander's *shura* resolves a dispute, there is no fixed number of people involved. As another civil-war commander from the area explained: "Sometimes five people resolve a dispute, whereas other times 20 to 30 people or more are involved in resolving more complicated disputes. Each dispute has its own seriousness. For example, a case about killing is a serious case, therefore, a lot of people are involved to solve it, whereas for a simple case of fighting, fewer are getting involved to solve it." (Interview #2) What this also shows is a rare witness statement that the difference between civil and criminal matters is of no concern for the self-proclaimed mandate of commander's *shura*. To claim a mandate for criminal matters challenges the state's claim to an exclusive competence regarding criminal affairs. In order not to question the current state order openly, non-state institutions therefore usually cover up their involvement in criminal matters and claim that they stick to the civil realm. People involved in commander's *shura* are

59 *Mawlawis* may also play major roles as non-state justice providers on their own account. Sometimes, disputants approach them directly hoping for a fast mediation and reconciliation process. The *shura* of *ulema* in particular, plays an important role since their members can draw upon the expectation that they are qualified in *sharia* law. Many disputants explain that they prefer resolution implemented according to Islamic principles rather than customary, especially in inheritance and other family-related matters.

60 The actual competence of local *ulema* tends to vary greatly, depending on the actual training they have enjoyed. Traditionally, training to become a full-fledged Islamic scholar (*alem*, pl. *ulema*) takes many years, in some teaching traditions even decades. Just as with other educational careers, the wars have greatly damaged these teaching traditions.

apparently in such a strong position that they do not need to worry about such distinctions and whether the state agrees on them taking a role in criminal matters or not.

It is interesting that the number and the expertise of those recruited to preside over a case depend on the type of case, for it shows that the commander's *shura* rather functions like a *jirga* in coming together in a new composition every time and that this composition is adjusted to the circumstances of the dispute. However, the commander 'finding the right people' underlines a crucial difference to a traditional *jirga*, where the disputing parties have the authority to determine its composition. It also makes it quite likely, that the commander is not going to choose people who would go against his or his clients' interests.

The fact that the commander chooses alone, while relying on a source of power which is neither locally controlled nor impartial, has consequences for the trustworthiness when members of formerly competing war fractions are involved in disputes. In these cases the power of the commander can actually deter disputants from approaching the *shura* and pursuing their rights claims.[61]

Decision-taking
After a consideration of the facts and a debate on their merits, the decision of the *hoquq* was practically confirmed by the commander, as it was decided that the letter from the father presented by the brothers had been forged. The commander concluded that all farm land and orchards should be fairly distributed among the four sisters and two brothers, according to the principles of *sharia* inheritance law.

Allegedly, when the *shura* takes a decision it hands over the papers with all the information to the government.[62] While the inclusion of state representatives seems easily achieved, there is little effort to formalise the results and thus comply with state demands. One of the main problems mentioned during interviews with locals is that the *shura* does not have a robust record keeping system of the disputes resolved by it. However, a former civil-war-commander who works with the commander to resolve disputes claimed: "We resolve disputes. Then we write down the decision on a piece of paper and ask both parties to thumb print it [instead of a signature] for acknowledgement. We then keep a photocopy of this with us." (Interview #2) This has, however, in the past caused problems, as there is not always a copy available for the government office or for both disputants. The lack of uniform decision letters also does not always give the *hoquq* the opportunity to review the decision for law-compliance – especially if not all information is contained in the piece of paper that was shared.

Enforcement capacities
After the verdict the two state representatives were tasked to go to the area and divide the orchards and farm land among the siblings as decided by the *shura*. This is an interesting arrangement, for it turns the state representatives into executioners or henchmen of the commander in relation to a decision that was not state-authorised.

When the state representatives arrived at the land and started demarcating the property for each of the parties, the two brothers got upset and forced them to leave the land. This is to say that the brothers did not allow the government representatives, who had been invited to the session, to divide the land between the sisters and brothers despite the decision from the *shura*.

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61 See 2.3.

62 Which complies with the demands on non-state institutions from a rule of law perspective (see Wardak 2011 for a discussion).

According to another civil-war commander from Istalif, two days later he received a call from the *shura's* leader asking him to go and help divide the land. The commander said that he had agreed to participate in the land distribution. This is highly interesting, as it suggests that *shura's* authority is so limited that it requires an acute proof of power. The commander, who divided the lands, said that he and the community understood each other. The commander also stated that "I supported the *shura* and its commander because I know he was right. I knew the sisters needed to get their rights. Therefore, without any hesitation, I carried out the order by dividing fairly the land among the sisters and brothers."

"The commander who leads the *shura* has very good relations with key mujahedin in Kabul province" (interview #3). This is quoted as one of the reasons why this *shura* has been effective – because it has the support of all key commanders of Koh Daman area. Locals suggested that the *shuras'* main task was to control, to keep the people calm, because "a lot of people of Istalif used to be civil war fighters or commanders for the Northern Alliance" (Interview #4). Therefore, many are still armed, according to one respondent. For the government, especially in the beginning of the Karzai government, it was difficult to bring these people under control. According to a local respondent, the commander's *shura* "resolves those issues which are beyond the control of family, village and area" (Interview #2). As the example shows, the enforcement powers of an Afghanistan-wide renowned war party are even needed in conflicts which have not left the realm of the family.

The lack of respect for government representatives, even when they act in the powerful commander's name, by the brothers who refused to cooperate with the state representatives is indeed telling: the locals expect someone to implement the decision. In line with this thinking, within two days, the *shura's* leading commander sent a fellow commander to implement the *shura's* decision over the land. This potentially served both as an act of deterrence and as a promise to the people that if a case comes to this *shura*, it will not only be resolved but also enforced. In a similar vein, the commander's *shura* has the power to resolve disputes once they have turned into an inter-group conflict. The capacity to assess and address such dynamics goes well beyond the means of regular judges, while the extensive networks, which actors like this commander can draw upon, still stand a chance to quell inter-group escalation.

Another *malik* said that "deeply rooted or sensitive disputes need someone influential, to work with the disputant sides to make them agree on a settlement, and the *shura* provides such an environment." (Interview #4) The commander's *shura* has thus gained the respect of the local population with regards to dispute resolution through its enforcement capability. People are listening to and respecting the decisions proposed by the commander and his fellow adjudicators. As mentioned by another respondent "people trust the *shura*." He added that "it is good to have someone in the community who is able and willing to intervene before conflicts escalate. We know that the government cannot resolve many problems" (Interview #2), which is why communities appreciate power-holders such as the former Mujahedin who are part of the Koh Daman Shura. "In order to keep the communities in the districts united and under control, these Mujahedin have come up with the establishment of a *shura* system." (Interview #4) That locals used the terms 'united' and 'under control' underlines the military logic, which is also represented in its structure. While 'control' is a relevant matter regarding security, unity and control are hardly conclusive criteria for a supportive dispute environment. Opening a dispute, is after all, in itself a form of dissent. The threats, which the women's *shura* of Istalif face from the commander's *shura*,[63] show how narrow the limits of tolerated forms of dissent are.

63 See 2.8.

Accessibility
The commander's *shura* has a permanent office in the Istalif bazaar, in a former carpenter shop, which has been renovated and is now furnished as an office and a meeting room. The location of the office is very convenient for the population.

One civil-war commander suggested that the local population appreciates the commmander being available and accessible to the population '24 hours a day, seven days a week' to all residents of Istalif without formally taking any money or charges. (Interview #1) Locals, however, also complained, that while the *shura* is accessible when the commander is residing in the district, there is a lack of access when he is in his home in Kabul or outside the country for treatment or otherwise unavailable. This situation has sparked calls for a larger permanent membership of the *shura.*

Generally though, swift responses have the immense advantage of forestalling unnecessary escalation. The commander apparently goes one step further as he intervenes in disputes without waiting for the problems to be brought to him. From a rule-of-law perspective this potentially unwanted interference by a non-state-actor can also raise considerable concerns in regard to impartiality or freedom of choice for disputing parties.

Yet another civil-war commander suggested that locals liked the *shura* because "it resolves your problems one way or another, but unlike others [referring to the state] it is not asking for money or delaying your case" (Interview #1). While bribery had not been a concern in the inheritance case discussed above, there is a general perception that approaching state institutions is either a waste of time or requires considerable investment in terms of bribery. A respected *malik* from Istalif said: "There are many people resolving disputes among the people, but conflicts and disputes between people require expenses for food, tea and one has to run between different sides. Thanks to the *shura* this is not necessary in Istalif."[64] (Interview #4) As expenses like those to host mediators, are traditionally meant to encourage parties to agree without causing unnecessary protractions, the commander's *shura* can apparently afford to bypass such tricks due to their external enforcement powers.

Summary analysis

Power-holders and former civil-war commanders play an immensely important role in local disputes. At a first glance, this commander's attempt to adjust his style to rule through non-violent means and to gain legitimacy by addressing pressing concerns people have in their daily lives, seems encouraging. In certain cases the commander's *shura* manages to resolve disputes and enforce decisions that the state is not able or willing to deal with.

The particular case shows how this *shura* becomes effective in both settling the dispute in favour of the sisters, and enforcing its decision. It does so in line with the recommendation of the state *hoquq* office, with the support of the religious scholars, who are competent in inheritance cases and apply *sharia*-based rules, with the support of state representatives and a local militia leader for the enforcement. The latter is indeed needed, as the defendants do not comply with the state representative. The overall effects of this engagement are welcomed by many and thus underline the immense importance of reliable means of enforcement and illustrate how crucial these are for creating a sense of basic security.

However, the discussion also detects worrisome aspects of the practices by this *shura* and the power it exercises over dispute processes. The active and violent interference in court proceedings, where its own interests are concerned, shows to what extent it regards itself as a force superior to the state. The fact that

64 The case in 2.3 suggests that this swift response only applies to cases in which he or his comrades have an interest.

local state officials such as the chief of police regard themselves as dependent on the *shura* underlines that this represents the actual power relations. As 2.3 showed, those who might dissent with the *shura*'s work or its associates, often find the way to justice and protection from abuse closed. And report 2.8 will illustrate that the level of interest in gaining control over the socio-political and legal order is so high, that even the low-scale engagement of the women's *shura* poses a challenge to this claim.

2.5 Uncontrolled abuse of power – the example of Behsud

Abstract

Behsud district in the province of Nangarhar has been experiencing a significant number of land disputes of various magnitudes since the fall of the Taliban regime. This report provides a discussion of the causes and the dynamics behind these land conflicts with a focus on the role that local strongmen play in these disputes. The analysis reveals the way in which insecurity and weak state institutions leave room for such strongmen to manipulate both state and non-state justice procedures and misuse their power to grab land with impunity.

Introduction – Contentious land claims in Behsud

Since the collapse of the Taliban government, Behsud district has witnessed a variety of small and large-scale land-related disputes and conflicts, including government-tribe, inter-tribe and inter-sub tribe conflicts. The limited amount of land which can be used for agriculture and dwelling has always made it a scarce resource. However, the increased number of disputes is also related to the rapid repatriation of refugees and internally displaced persons after the fall of the Taliban in 2001.

In ethnic and tribal regards, Behsud is fairly heterogeneous, with a majority of Afghan Arab communities divided into nine sub-tribes (approximately 60 percent of the population), who settled in the area centuries ago, and a variety of Pashtun tribes (an estimated 31 percent). A minority of Kuchi nomads and a small but influential Pashai minority are also present (TLO 2014).

In addition to these long-term residents, many of whom have returned since 2001 from exile after several decades, about 300 to 500 families (2000-3500 individuals) primarily from neighbouring districts and provinces have reportedly also settled in the district since 2001, as the situation back in their Afghan place of origin was unfit to return. For instance, refugees from Kunar who had previously migrated to Pakistan, decided to remain in the area of Wasam Abad of Behsud. Also returning refugees originating from the districts of Shinwari, Bati Kot and Haskameena stayed in Behsud. While the relationship between long-term residents and these newcomers are reportedly generally good, their presence has caused and intensified some conflicts related to land in the area.[65] A local respondent explains: "While we were refugees in Pakistan, we left our land, fields and houses in the hands of Allah. We come back and the population of the village has increased to twice the level of before. Now it is difficult for the returnees to reclaim the land that belongs to them as others have meanwhile settled on these lands."

An aggravating factor in these dispute scenarios is the widespread lack of ownership documentation on disputed land. According to a previous analysis done on land in the district, only about 20 percent of the land in Behsud is registered with a *zahir shah*, as a state-issued ownership document from pre-war times is called locally and which enjoys high respect locally (TLO 2014: 54). Many respondents argued that this lack of documentation was due to illiteracy or attempts to avoid taxation, as the owners of registered land have to pay taxes for the estate (TLO 2014: 54). However, it also emerged from the interviews for this case

65 For details on migration movements in the district see TLO 2014: 36ff.

study that during the war many ownership documents were burnt or replaced (interview non-state actor 1, cf. USAID 2007). As also state registries were often destroyed, such replacements may have been used to document legitimate and legally valid transactions, such as inheritance arrangements or sales. But as it was hardly possible to reconfirm the validity of ownership claims, or register transactions with the state and obtain new documentation, registration and documentation of land transactions are prone to fraud and can be a way to 'legalise' unlawfully obtained land. Such documents may, therefore, equally register theft or sale under duress. The lack of documentation also aggravates the already conflictive politics regarding state-owned land. Any allocation or sale of such land is prone to frustrate former users and spiral conflicts between the concerned communities (cf. Wily 2013; UNAMA 2015).

What proves even more detrimental to justice perceptions in the district and constitutes the main challenge in finding justice is the continued power of local strongmen who have repeatedly taken advantage of this situation, usurping land by force and reselling it by use of forged documents. Land grabbing has also been a typical phenomenon of the civil-war times. But according to local people interviewed for this case study, the practice of land grabbing became even more prominent during the Karzai era, when land rose in value in more populated areas such as Behsud. Currently, practices of land grabbing range from the illegal occupation by migrants to deliberate acts of usurpation by local power-holders, who are often strongly connected to the state administration. Former civil-war commanders, and with their support also local communities and newcomers occupy private as well as state-owned land and expand the boundaries of existing villages and settlements. Respondents interviewed in Behsud agree that these forms of land grabbing are one of the main reasons contributing to insecurity and have led to many violent disputes in the area (interview with an elder, 4-6 April 2015).

Local strongmen

Local strongmen who are involved in land-grabbing activities are not just locals, but come from across Nangarhar and Kunar province. The exemplary biographical profiles below document a typical continuity of power by these strongmen throughout the regimes: many of these have strong tribal connections, which secured them high positions in the anti-Soviet resistance and the civil-war parties until 2001. After the fall of the Taliban these former commanders continued to remain strong in the region and some still employ illegal militias. Even more importantly though, war-party allegiances tightly link them with state and government officials. It is these connections and networks, which allowed them to transform military into economic strength. In many cases, these militias have thus turned into criminal networks, keeping political connections for the purpose of securing political protection from prosecution.[66]

66 For general accounts of local strongmen and their effects on rule of law see Guistozzi 2012; HRW 2015; Maaß 2010; Mason 2011; Schetter et al. 2007.

Exemplary profiles of local strongmen	
Engineer Ghafar	54 years old, holding an engineering degree from Nangarhar University. He was commander of the Hezb-e-Islami at the time of the civil war and is widely suspected to have grabbed land from both private owners and the state during those years. Twice he successfully ran for the provincial council and he is closely affiliated with Afghanistan's Chief Executive Abdullah Abdullah.
Haji Ahmad Jan	Trader of car batteries and cigarettes, and belongs to the Hazarbuz tribe of the Kuchi. He is not involved in politics but he is said to have grabbed land by bribing government officials during the Karzai government. A case against him was opened at the primary court and ended at the Appellate Court of Nangarhar. However, even though he does not have any legal documentation, he still has control over this land.
Doctor Zalmy	Resident of Behsud. He was a commander of the Hezb-e-Islami in the anti-Soviet resistance and district governor of Kama from 1992 to 1994. Allegedly, he grabbed private land in a local village from people who had migrated to Pakistan, and produced fake documentation in order to claim property rights over these lands. As he is part of the government, the local population does not dare speaking up against him.

In particular local strongmen based in the provincial capital Jalalabad allegedly enjoy immense political and economic power in the district. As an elder highlighted: "Apparently [these men] are not connected with anybody, but the truth is that they are backed by government authorities and some MPs, who misuse their position" (TLO 2014: 55). Over the last decade, during which the price of the land has risen, many warlords have taken advantage of the situation by grabbing land from either private owners or the state, and then selling it. Apart from their powerful networks, personal resources, such as money and arms, help them to have properties assigned to them irrespectively of the actual property situation. Land has thus turned into a resource through which they can consolidate and even increase their power by non-military, but no less harmful means.

According to local residents, in many areas such criminal networks have become the dominant force in controlling access to land:

> There is a group of strongmen, originally not from this province [Nangarhar]. This group has grabbed state and private lands without facing any resistance from the local population, which seems to support them for whatever reason. They are very powerful, some are from Kunar, Nuristan and Laghman province […] they have certainly connections with the government and are directly supported by some MPs, even though they are causing insecurity in the region (TLO 2014: 55).

As emerged from the interviews, the majority of locals blame local governmental authorities for having connections with these actors and backing warlords according to their political history of fighting together during the civil war time. To what extent state officials are unwilling or unable to address these problems is often hard to discern. The local chief of police in Behsud stated that he tried to reduce such practices by conducting regular meetings with residents, following up on the resolution process of every case he addressed within the state justice system, and assisting in the registration of resolved cases with the local land administration office *Amlak*. However, residents have become extremely sensitive to land occupation and communities are keen to 'secure' the areas surrounding their villages in order to ensure

that nobody settles on them unauthorised (TLO 2014: 55). Such efforts of self-organised defence show the limits of singular state actors' efforts, but also underline the mistrust in state protection of rights.

This mistrust is further confirmed when local residents claim that there is little to no capacity on behalf of the local government to control powerful actors. This general feeling of power abuse is confirmed by the communities' observations that land already registered or held as belonging to the state is often taken with force by local strongmen and then sold privately to local citizens (interview with elder, 5 April 2015; interview with elder, 6 April 2015; cf. Wily 2003). Personalities, such as those profiled above, are often alleged to have been involved in such activities. A local police officer stated: "The local government of Behsud district does not have the power over these lands and strongmen are faking documents in order to take ownership and sell them privately to locals on a daily basis." The above profiles of such strongmen indicate three reasons for this relative weakness of the local government: either these strongmen hold government-positions themselves that outrank local state actors, or they are protected by political elites in Kabul, or their wealth is such that they can afford to bribe all those who might oppose the grabbing of state-owned land.

This procedure of grabbing land to sell it on was also confirmed by a real estate owner interviewed during the fieldwork. He added that it is particularly common to have to engage in land disputes, since many strongmen have occupied and taken control over land illegally. The influence of the strongmen significantly shapes the dynamics around land ownership and transfer of property in Behsud district. Further, the provincial and national government have little to no resource or interest to address corruption by local government officials. Partly, this is due to a lack of detection and investigation capacity, and partly to a lack of enforcement capacity to effectively remove government officials and others who are abusing their power. To the local communities this signals that any means is accepted in order to take hold of land.

The presence of the insurgency further facilitates an environment in which strongmen can usurp land with impunity as the national law enforcement agencies are not even able to effectively access many areas. Meanwhile, the security situation in Behsud district continuous to deteriorate, with insurgency elements having taken over parts of the district, which also means that state justice actors are not able to move around within the district anymore in order to evaluate land claims.[67] Hence this insecure environment disproportionally advantages strongmen who continue to usurp land that was abandoned by those who had to flee from the area due to the insecurity.

State and non-state justice institutions

Many of the returnees who struggle to gain their land back have filed claims with both non-state and state justice institutions. Doing so, they effectively encountered a rule of law vacuum created by years of violent conflict. The main issue raised was that political connections and networks of power would affect the sentence of a dispute – in particular for cases related to disputes over land. According to local community members, the presence of several strongmen competing for influence over Behsud district has a significant impact on both the local state and non-state justice systems and their procedures. These actors provide protection to their local supporters. Even local MPs allegedly became involved in manipulating justice providers. It is telling that even a high-ranking judge at the primary court of Behsud commented on the situation as follows: "Most of the cases over the land are between one person supported by a power-holder and another person that is powerless. Usually the latter does not even file a case against the power-holder, because he knows already the results" (TLO 2014: 54).

67 On the current security situation in Nangarhar see Mansfield 2016.

The known or suspected connections between local strongmen and governmental actors not merely undermine perceptions of fairness and transparency of governmental policies, but also reverberate on the perception of the judiciary. As lasting and strong as these uncontrollable networks of power are, the chances are indeed quite good that members of the judiciary are either part of them or powerless towards them. Locally, this lack of transparency and independence tends to be phrased as corruption. Who takes whose bribes, who can be threatened into compliance and who has been part of a plan of abuse is hard to trace and prove. However, the persistent accusations of corruption regarding the judiciary serve as a strong indication that it is at least seen to be impotent towards these criminal networks. The additional lack of trust in the law enforcement institutions is so fundamental, that victims of trespass often not only refrain from defending their rights by disputing because they expect a manipulated outcome; many are even concerned that they might be arrested once they accuse a strongman for a crime. These dynamics of course severely impact local communities' access to primary justice as many disputants without influence opt to forego seeking justice rather than risking a confrontation with a power-holder.

Yet another, but no less severe accusation, is that state officials are not merely susceptible to power abuse, but that they have no other interest in their jobs than personal gain. Corruption, it is argued, is so pervasive that state officials would not bother to take action in cases of land grabbing without the involvement of bribes:

> State officials do not pay any attention to those cases of land where they cannot receive a share or a bribe. For example, when the Qasam Abad area was occupied by IDPs and local residents opened a case against them, the judge did not pay any attention to the issue because he knew that no bribes would be involved.

As a local *malik* stated:

> If the government officials were professional, just and honest, then this is the best way for a dispute resolution, but it should not be the officials like those of the Karzai government. When the government cannot provide security to its people, how will it be able to resolve the disputes of the people? There is corruption in the government departments. If the government is strong enough and provides fair and honest judges, then all people will refer their cases to the formal justice system and nobody refers their cases to the *jirgas. Jirgas* also have some negative aspects. Giving a daughter or a sister in *baad*, taking *walwar* and *machalgh* are bad customs of the *jirgas*. However, in present condition, the informal justice system has more positive aspects than the formal justice system (Focus group discussion 2).

What makes *jirgas* powerful is explained by a local farmer: "The *jirga* is led by the powerful. Tribal elders, local commanders and rich people are the ones invited to the *jirga* in order to decide and sentence on a dispute." How much power *jirga* members might assume in legal terms can be seen from this statement by a local elder: "We haven't allowed criminal cases to be referred to the government administration. In case they are referred, we have retaken them from the respective department" (Focus group discussion 1).

While usually religious leaders are also invited to *jirgas,* they predominantly attract influential local elders, who by default often include strongmen of various kinds. The presence of one or more influential power-holder(s) often strengthens a *jirga* in the sense that a decision by this body is more likely to be respected by the disputants and the wider community, as these strongmen would not tolerate that their decisions were challenged or ignored.

Theoretically, disputants should be granted the right to select the individuals on their *jirga* themselves. But as it has emerged from the interviews, strongmen actively take advantage of this flexible system of appointment in order to gain personal influence over the customary administration of justice. The following statement by a community member illustrates this: "To me, all the tribal elders are worthy to be respected. However, it is also a fact that there are some elders who don't want to resolve disputes immediately and instead of resolving a dispute they often accelerate the dispute for the sake of their personal interests" (interview community member 1).

Further, is not uncommon that strongmen invite themselves to a *jirga* and due to their powerful status disputant parties but also other community members are often not in the position to disinvite them. Their power allows them to hijack the dispute process. There are even reports that strongmen manipulated the decision in a way that neither of the parties to the dispute were awarded the land but instead the strongman walked away with it in a forcibly procured 'agreement' of the parties. In this situation, it will be nearly impossible to find recourse for the disputants in a corrupt state system to effectively reclaim their land. As a local housewife explained:

> Most government officials, members of the provincial council, *maliks* and other community elders prefer their personal links in decision-making processes. They are under the influence of strongmen and they are bribed by one of the disputant parties to make decisions in their favour (…) The *jirga* instead should make decisions according to Islamic laws, keeping the facts in mind rather than doing favours.[68]

The systematic practice by judges to refer cases to non-state institutions and leave the responsibility to resolve these disputes to them, even against the parties' wishes, and the tacit consensus and informal cooperation between the two systems, is thus drawn into even more question. In the words of a state justice representative:

> These days the *jirga* has also lost its standing due to wrong decisions, which are totally against the law and human rights. For instance, *jirgamaran* [*jirga*-members] are not as honest as they were before. They fix *machalgha*[69] and use it themselves. Moreover, girls are still given in *baad*[70] and the opinion of women is not considered at all.[71]

It comes to little surprise that these words came from a woman working in the field of human rights. However, the note on the power abuse suggests a bigger justice concern than an assumed competition between legal systems. It particularly questions the practice that decisions taken in the non-state realm are automatically endorsed and considered to be binding by judges.

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68 See 2.7 / Interview community 2.

69 Amount of money or goods, which are taken from both opponents as a deposit in order to ensure implementation of agreed upon settlements.

70 A practice to settle severe crimes, by handing over a girl to the harmed family as a means of compensation and with the aim to forestall further enmity between the families.

71 See 2.7 / Interview formal justice provider 2.

Exemplary case summaries	
Example One (TLO 2014: 56) *Locals vs Kuchi (Nomads)*	In 2010, a conflict over 500 *jerib* of pasture land broke out between locals of the Banda village and Paindakhel Kuchis. The locals began to distribute land, which the Kuchis had used as pasture land, to the landless people in the area, claiming that Kuchis did not belong to the area and had no right over that land. The dispute quickly escalated and resulted in the death of one of the Kuchis. After the intervention of the police, a *jirga* was formed, which included several local commanders, including Qadar Kuchi, a former MP, and Engineer Ghaffar, along with District Community Council members in order to decide on the matter. The *jirga* made a proposal that would allow the local population and the Kuchi to share the use of the land. However, the local community objected to the decision, as they felt that some power-holders had favoured the Kuchi population by not taking their claim into account that all the land belonged to the local community. Until now, no agreement has been reached and the parties involved are still refusing to even attend the same mosque.
Example Two (TLO 2014: 56) *Locals vs Kuchis (Nomads)*	A land conflict started during the Taliban regime, when 40 Kuchi families from Paktia, Logar and Khost decided to settle in the area. The district authorities declared that the Kuchis would be allowed to remain only during the winter-time and that they were not permitted to start any cultivation or build houses. However, with the help of the Taliban governor at the time, Malawi Kabir, they managed to remain permanently. After the fall of the Taliban the case was reopened. The local Samarkheil took the case to Haji Qadir, the new governor of Nangarhar, who ordered the arrest and imprisonment of the Kuchis. Haji Qadir managed to gain the attention of President Karzai and Ali Ahmad Jalali, the former Interior Minister. The commission who examined the documents sentenced the expulsion from the land of both parties involved, arguing that the land was governmental land. However, the Kuchis rejected the decision and regularly, deadly confrontations between members of the two groups break out.
Example Three (interview community member 2) *Power holders vs Locals*	A former provincial council member has a dispute with some local families of Buland Ghar village over a piece of land. He wanted to build a market in front of the houses of the local families, who live at the Kunar-Jalalabad road. The families asked him to stop the construction, because the new market would close the access to their homes, and argued that the side of the road is public not private property. The villagers brought the case to state and non-state justice institutions at the same time. They hoped that state authorities could halt the construction until the elders and the Provincial Council could facilitate a settlement. So far, the case has not been decided. Locals believe that there is little hope for the village families as their opponent comes from a strong family and still has a strong connection with the provincial council members.

Conclusion

The data presented above illustrate that even in cases where injured parties dare to engage in dispute processes in order to defend their rights, whether this is via state or non-state institutions, they have essentially few prospects to secure their land rights due to the involvement of strongmen. These strongmen often are not only involved in land disputes, but might also play a role in the justice institutions, or have strong connections with powerful people within these institutions. This is aggravated by the circumstances that the local government officials appear to be at least partially involved in criminal networks. This further seems to undermine any chance to negotiate the many necessary, but politically sensitive policy decisions regarding e.g. housing for IDPs, settlement opportunities of Kuchis who lost their herds or find their traditional migratory routes closed, or the negotiation of group vs individual rights. Many of the local power-holders – from common to high-ranking government officials, former civil-war commanders, prominent tribal elders and other powerful actors – are involved to some extent in land disputes in Behsud district by taking advantage of the heated political discussions over rightful access to land, and the volatile legal conditions to prove land claims.

Connections with or close involvement of government representatives thus present one of the major obstacles to access justice, in particular when it is the strongmen themselves who grab land from private owners or the state and make fraudulent claims by the use of fake documents. But the influence of strongmen, often determined by arms or money, can also have a manipulative role in both state and non-state institutions in protecting their followers and constituencies. Local strongmen can take advantage of the persistent and increasing insecurity and lack of enforcement powers by the state in order to gain access to land or to prevail in disputes with less powerful parties. While respondents generally emphasised their mistrust towards the state judicial institutions, many also criticised the non-state system for being biased and corrupt.

In general, the presence of strongmen and their manipulation of the justice systems undermine the trust of the local communities in the opportunity to address their disputes with local actors in a fair manner. Some respondents also highlighted that under these circumstances it is only local strongmen who might provide the necessary enforcement powers, which makes it in some cases useful to involve them in dispute settlements. Their uncontrolled power, however, also enables them to hijack and misuse the non-state system for their own gain. The overall assessment is thus that their powerful presence contributes to a long-standing culture of impunity and perpetuates patterns of abuse regarding land rights.

2.6 Socio-economic barriers to women's access to justice – an inheritance case from Istalif

Introduction

The Afghan constitution and the international treaties to which Afghanistan is a signatory stipulate equal rights for women and men. Afghan statutory laws fall back significantly behind this threshold. Yet poor law enforcement, a general lack of appreciation for women's rights and a highly patriarchal socio-economic and socio-political environment even prevent women from having adequate access to these statutory rights. By analysing a dispute between a woman and her nephew about the woman's inheritance claim, this report aims to investigate major socio-economic challenges for women claiming their rights and shows how the concept of shame is used to bar women's access to justice.

Legal and social context

Since the implementation of the new Afghan constitution in 2004, Afghanistan has officially recognised the equality of men and women before the law.[72] Having ratified CEDAW without reservations in 2003, Afghanistan is obliged to align existing laws accordingly. However, laws of inheritance are a typical example of how in case of doubt statutory laws tend to favour Art. 3 of the constitution, which stipulates that "no law shall be contrary to the beliefs and provisions of the sacred religion of Islam." In regulating matters of inheritance, the Civil Code thus continues to follow the lines of *hanafi* jurisprudence, which was constitutionally privileged when the code was drafted in 1977.[73]

A study of popular attitudes toward women's inheritance rights in ten provinces by the Women and Children's Legal Research Foundation found that, among those surveyed, 89 percent of men versus 37 percent of women had received an inheritance owed to them.[74] In discussing inheritance rights, local dignitaries tend to argue that women forgo such rights out of loyalty or respect for their family of origin. From a rule of law perspective, it is not a concern if a woman decides not to claim or actively forgoes her right to inheritance, as long as she wishes to do so voluntarily and in full awareness of her rights. Forgoing rights becomes highly problematic though, if women are actively and systematically barred from claiming their rights on socio-political and socio-economic grounds. The case of inheritance rights can serve as an example of such systematic denial. The research by Women and Children's Legal Research Foundation (2011) found that 39 percent of women said that cultural norms and values prevented them from claiming any inheritance rights. A significant share of women, 19 percent, stated that although they sought help from the government in order to get their inheritance, they still could not obtain it. And finally, 21 percent of respondents gave various reasons for not claiming inheritance such as a lack of economic means to claim their inheritance (Women and Children's Legal Research Foundation 2011: 14).

The economic dependency, which results from this traditional denial of inheritance, obviously leaves women in a socially dependent and inferior position and undermines the opportunity to defend their rights. Article 14 of CEDAW serves to raise awareness of the fact that particularly rural women might need special attention in having their rights guaranteed. However, little progress has been made so far, and gender discrimination in inheritance cases remains high, especially in rural areas such as Istalif,[75] where agriculture constitutes a key source of income (ANDS 2008) and inheritance of land is a deciding factor in regulating power relations in the social realm. The following discussion will, therefore, focus on inheritance claims to land.

Inheritance rights of land also serve to show to what extent women claiming inheritance fundamentally question the traditional socio-economic order at large. Not only does it question the traditional authority of the man as being the sole person responsible for the family, which is based on his ability to provide for his family and the right to control its assets. It also questions the patrilineal and patrilocal order which is expressed in the traditional inheritance scheme that aims at preserving the father's property as a unit in the locality of the patrilineal family. As daughters 'change' family upon marriage, they move to their husband's families, whereby the husband takes over the responsibility to provide for the woman's needs

72 "The citizens of Afghanistan – whether man or woman – have equal rights and duties before the law." (The constitution of Afghanistan, Ch. 2, Art 1).

73 The Constitution from 2004 recognises *jafari* jurisprudence in interpersonal matters among Afghanistan's *shi'ite* citizens. The majority of the population in Istalif is *sunni.*

74 Women and Children's Legal Research Foundation 2011. As the respondents in this study have been asked "Have you received your inheritance?" it is not clear to which legal framework women refer to in their answers.

75 Even though Istalif is part of Kabul province, and the district centre forms a small town, in socio-economic regards life is rather rural than urban.

and security from the father and brothers. Excluding them from inheritance is traditionally the only way to keep the forefather's land and thus power within the patrilineal family. This goes at the expense of not gaining the daughter-in-law's heritage, which ensures long-term equilibrium between families within local communities. This equilibrium would however be deeply disturbed if one daughter claims inheritance while the other does not. So in practice if land is being split, the fear is that the family would lose influence within the community, without a chance to reciprocal gain.

Apart from these particular interests in protecting the socio-economic order, women's access to justice is more generally barred by sanctions applying to the disclosure of family internal affairs to the public or personally addressing the public on their own.[76] Any such attempt is not only sanctioned by their immediate social environment, but often also by institutional actors – state and non-state alike. The primary means to signal such sanctions are practices of shaming. The sanctions that follow upon such labelling practices may easily cost a woman the access to existential means of social security. The fear of being labelled shameful thus often relegates women to silence and potentially leaves them a victim of missed economic opportunities as well as legal protection. The following case will illustrate how exceptional circumstances have to be in order to allow for a successful claim of inheritance rights by a woman.

Women claiming inheritance – an exemplary case

The actors
After the death of a local man, his sister Sabera and his son Zahir had a dispute over the sister's share of the inherited land, as the nephew refused to grant his aunt her share voluntarily.

Sabera is a 50-year old, illiterate woman. She has four daughters and two sons. Economically, she and her husband are not doing very well. Her oldest son has problems with his back and works just during the summer since the pain becomes worse in the winter. According to her, this is the main reason that pushed her to claim her inheritance rights from her nephew: "I need to help my son and my family," she explains.[77]

Zahir is a 52-year old man with basic education and father of two sons and three daughters. Apart from his wife and children, he lives with his mother and sister. His oldest daughter has a face malformation. He commented: "If I had money I would do something for my daughter, but I am very poor and I have not enough money to help her."[78] Meanwhile, his two boys are still very young and cannot help him with the work on the land.

This is an interesting dispute relationship, as it presents greater social distance than a dispute with a brother. Asking 'who poses problems on your access to inheritance' the 2011 study by the Women and Children's Legal Research Foundation revealed that brothers of women form the major obstacle to women's rights to inheritance (51.6 percent), followed by the legal system, either courts (21.7 percent) or the police (4.7 percent), brothers-in-law (17.7 percent) and husbands (4.2 percent) (Women and Children's Legal Research Foundation 2011: 15).

The relationship between Sabera and her nephew is also exceptional in regard to the risks she enters by angering her nephew. The social profiles of the two disputants show that risking her nephew's anger by asking her share in the inheritance poses little risk in terms of long-term security, as practically he

76 See 2.7.
77 For this and all other statements by Sabera see Interview 2.
78 For this and all other statements by Zahir see Interview 1.

seemed neither willing nor able to offer her this kind of security anyway. This lack of solidarity can make it a better strategy for the woman to claim her share of her brother's inheritance. In this way she can invest in her marital family's wellbeing and contribute to her husband's and son's ability to provide for her long-term social security. However, a mere economic advantage alone often hardly suffices to take this step, as it goes at her and her husband's expense in terms of public reputation.

Bearing suffering silently and patiently, including that inflicted by one's family is often cited as a requisite or natural part of a woman's life in Afghanistan and "the aspiration to meet these social standards, often deters women from making a complaint" (Luccaro & Gaston 2014: 25). This is also why Sabera did not consider to claim her inheritance rights when initially her father died. The land was left to her brother and when he died, it was inherited by his son. With time, however, after getting married and having a son, her economic situation deteriorated. So she went to her nephew Zahir to ask for her inheritance. According to her account of the dispute, he replied: "Why did you not ask for your share of the land when my father was still alive?" Her explanation for this delayed request was the following:

> I did not ask my inheritance during his [brother] life, because my husband was still younger and my son was healthy […]. Then he got sick and I needed money […]. Many people believe that when a woman asks for her inheritance share it is because she is in needs and it is a shame for her family. He [Zahir] told me that I better went begging instead.

Asking for the right to inheritance in itself is considered shameful by many. As long as it remains an internal issue, it is, however only incriminating for the husband, who obviously fails to provide for his family. This, however, changes fundamentally with taking the dispute into a public arena.

Going public

Even though it is widely known that under *sharia* law women have a right to inheritance, women in this village rarely asked for it publicly. But as her nephew had refused to grant her right voluntarily, she decided to send her husband to the *malik* and discuss her problem with him. The nephew was angry when he heard that the case had been brought to the local elders and outside the family realm. But Sabera sees it differently:

> Local people know little about *sharia* law and speak ill of women who are asking for those rights. But I have not done anything bad or inappropriate, I just asked for my rights and it should not be considered a shameful action by me as Islam allows me to do so […].

The angry response of the nephew is not unusual, as many people believe that family issues must not be discussed beyond the family realm. In rare instances, disrespect for this norm may even lead to honour killings. According to the head of the district *shura*, "It is not that the shame factor is irrelevant but it has become less of a determinant for acts of revenge." More likely, women are shunned from their families and thus deprived of existential protection, if they decide to disclose internal disputes to outsiders.

By those critical of this exclusion based on shame, the high illiteracy rate among women is often used as a symbol for women's lack of agency. A local *malik* who works as a teacher commented:

> Women are weak here because they are illiterate. Their role is considered to be at home and they are supposed to be concerned only with housework. If they talk about anything else, they will be punished by men because men do not accept the empowerment of women. It is in our culture but it is not correct. This is the approach of the Taliban, not of real Muslims (interview #4).

The account by her nephew is highly interesting in this regard, as it shows that his first outright rejection of her claim had happened, despite him being aware of her right to a share in the inheritance:

> I never said that my aunt should not ask for her inheritance, it is her right but she should take the right amount of land, according to what is defined by *sharia* law, but instead local elders are giving her more land […].

As he claimed publicly, the issue for him was not about his aunt's right to have a share of his father's land but about the amount she requested as her right. As he argued, the vine stocks left by his father amounted to 1200, while his aunt insisted that there had been 1800 of which she claimed 600 as her inheritance. However, the nephew said, he had bought 600 out of the 1800 vine stocks with his own money after his father's death and he insisted that his aunt had no right over them.

Sabera's account of how he had refused to even meet the *malik* who wanted to mediate the case makes it more likely though, that he refused the meeting in an objection to the procedure rather than on substantive grounds:

> With the help of the *malik* I tried to have a meeting with my nephew many times, but my nephew did not accept to see me […] and refused also to meet the *malik* directly. […] Therefore, I had to solve the issue through the formal system.

The choice of asking for the support from the state justice system is quite unusual in the context of Istalif. However, it was her only option left to ensure justice, even if she was reluctant to take the case to court, as she feared the additional shame she was bringing over her family in the eyes of the village. Nevertheless, she went ahead with her case. What she could do to mitigate this shame was not to approach these institutions and public actors herself, but to send her husband as her representative.

> I did not go anywhere myself. My husband was my attorney […]. My husband and my son helped me because I could not go by myself to the district so they followed up on the case.

Sabera did not provide an explicit reason of why she could not seek help from the *malik* and the court herself, but exposure of women to outsiders is commonly a cause of great shame. If anything, a female justice provider would have been preferred, but as there are few female justice workers in most areas, it is easy to assume that the case was undertaken by the husband in order to protect the honour of his wife and family. The judge, who presided over the case, seemed to be aware of the restrictions this poses on women's access to seeking justice. He covered up the real reason by explaining that she was sick, even though admitting that it is rare for a woman to actively participate in and follow a case herself.

The involvement of her husband made sure that at least this minimal social expectation was fulfilled. This, however, also made the husband a target of accusation by the nephew. This is another reason why men are often hesitant to support women in their rights claims, even if they would profit from them in economic terms, and no matter how arbitrary such accusations would be on factual grounds. As Zahir explained:

> I have gone to the *mullah* and *malik* of the village but they could not solve my problem because my aunt's husband wanted more than their legal right. I even heard that the *malik* received a bribe from my aunt's husband.

While all other voices on this case disagree with this version of events, and it is very unlikely that the woman's family would have the means to bribe, it underlines the difference which it made in social regards that her husband represented her in the dispute proceedings. The nephew now held her husband responsible for what he considered fundamentally wrong. This reduced his aunt's responsibility for the shame entailed in going public. As a woman's misconduct also reflects badly on her family of origin, in this case her nephew, this strategic move also served to protect his own reputation. That her nephew disagreed heartily with approaching a court for the dispute resolution is expressed in the following statement:

> I wanted to solve the problem amicably with the elders but they went to the DG and it was not good both for them and me. We lost our honour, now everyone knows what our dispute was about and this is a shame for all of us.

The statement contradicts the woman's and the *maliks*' accounts, according to which he had refused to take part in a non-state settlement. Nevertheless, it shows his discomfort in having been forced to discuss private matters in public.

The outcome

In line with the *maliks*' opinion, the court's verdict was in favour of Sabera, and confirmed that she had inherited 600 vine stocks. The practical effort of approaching the state system had thus been repaid. The social costs were less easy to account for:

> The state helped me to get my right, but I am sad because the relationship with my nephew is now finished and destroyed. He is very angry with me and does not want to talk to me anymore. He believes I did a bad thing, and it was shameful to ask for my inheritance.

Having lost the court case, the nephew resorted to a final argument in order to express his disagreement with the proceedings:

> When the government official came, they counted also my extra vine stocks, which are my personal property. […] I heard that *malik* gave a bribe of 100,000 Afghanis to the judge. It explains why he forced me to sign the papers and accept their decision under the threat of sending me to jail. If I had the money I would have won the case, however, I do not have any and I lost.

The judge insisted that a proper investigation had been conducted before the sentence, and that the amount of land estimated corresponded to that left by his father and was not the private purchase of the son:

> Zahir did not want to grant his aunt her right; that is why he has made these accusations. Everyone including the *mullahs* knows that we judged justly. I even talked with the local *mullah* familiar with this case, and he confirmed that the judgment of the government was correct and right according to Islamic law (interview #4).

The following statement shows that the nephew was fully aware of the mechanisms he had employed in trying to deny his aunt her right. He questions her right, but also knows what the outside observer likes to hear.

> I think women should not be ashamed. This is their right that God gave them, but it should be done justly. Here in Istalif, women are afraid that their brothers end the relationship after asking

> inheritance and I think it should be changed. I am not angry because my aunt asked her right but I am angry that she got more than her actual right. This is my problem, otherwise it was her right and I wanted to give her the inheritance. Anyway I like to help women in my family to be educated, because I am not educated, and do not know many issues related to law, *sharia* and human rights, so I like my daughters to be educated persons who know everything about law and Islam to help other women. Three decades of war caused all men and women to remain illiterate and this illiteracy causes disputes and misunderstandings.

It is difficult to assess whether the woman will actually keep personal control over this piece of land, and the case itself suggests that this was not necessarily her aim. As it was to a large degree her effort to gain it for the benefit of her in-law family, it is nevertheless likely to contribute to the respect she enjoys in her in-law-family. The case would be very different though, if her husband had forced her to sign such a claim and pursued it against her will. This would have alienated the woman from her family of origin and thus left her unprotected from potential abuse by her in-laws, without gaining economic power or at least respect.

Conclusion

This case shows that the common barriers created by practices of shaming can be overcome. However, it also underlines that it requires exceptional circumstances for such an attempt not to cause lasting harm and existential threats. If she had needed to initiate this dispute with her brother instead of her nephew, the risk of losing existential support in the future would have been much higher. Her advanced age, her husband's support and her nephew's lack of will and ability to support her were crucial conditions for not suffering long-term negative effects.

Probably the decisive and most exceptional feature that made this inheritance claim a success was the supportive, and congruent role that non-state and state institutions played. While often it is the lack of acknowledgment by non-state institutions that forces women to seek redress at a state institution, only then to find that state actors are complicit in denying them their rights (Women and Children's Legal Research Foundation 2011: 15), here both institutions mutually cooperated in supporting the woman's claim. The local *malik* himself suggested to both parties to refer to the court in order to receive a binding judgment on the matter, and by that mitigated the additional shame on the woman, which addressing the court would usually bring about. The court on the other hand confirmed the *malik's* opinion and thereby his legal capacity. Mutually supportive cooperation between both systems can change women's access to justice dramatically.[79] The emphasis on the decency of the claim according to *sharia* stipulations even forced the nephew to adapt his rhetorical strategies and thus diminished the power which shaming practices can gain. The woman's discomfort with these proceedings nevertheless highlights how deeply engrained and potentially powerful means of shaming are even under such exceptional circumstances:

> It is a bad custom that in Istalif women have to feel ashamed for asking their right. Indeed, I am glad for the sentence's results. However, I would have preferred to inherit the land without having an argument with my nephew. Now I am not happy about our relationship. He excluded me from his life and treats me as an enemy, not an aunt. Also the rest of my family and the people from the village are blaming me for what I have done […] since they consider it shameful. In their eyes I am not a good woman. However, I do not think it was shameful to ask for my right, God gave it to me and he mentioned it in his book too. People do not know about Islam and they just talk without knowledge.

79 On the need for such synergy see: Wardak 2011; Barfield, Nojumi, Thier 2006; Coburn, Dempsey 2010.

2.7 Socio-political barriers to women's access to justice – the example of Behsud

Introduction

Afghan legal history, but also its present, is typically accounted for as being highly pluralistic. While the term 'legal pluralism' is often employed to describe normative plurality and the competition over the hierarchy of norms in the public discourse and legal practice, the underlying concept yields much more analytical potential, if the politics that guard legal practice are taken into account as well. In analysing these, Sally F. Moore's concept of semi-autonomous fields may serve as a starting point:

> The semi-autonomous field has rule-making capacities, and the means to induce or coerce compliance; but it is simultaneously set in a larger social matrix which can, and does affect and invade it, sometimes at the invitation of persons inside it, sometimes at its own instance (Moore quoted in Merry 1988: 878).

Innumerable such semi-autonomous fields can be found in any society. The following account will thus hardly allow to include all those in the Afghan context and not even those in the limited setting of Behsud district. But the concept may serve to discuss a long-lasting political negotiation about who enjoys the right to govern the social realms of the family and the local community.[80]

How these realms are defined concretely and particularly how 'community' is conceptualised varies immensely – both due to conceptual differences and due to the actual composition of the social set-up. Old schemes of social distinctions, which were used to define relative social nearness and were fundamental to claims of legal competence, have partly broken down during the civil wars. The many migratory movements have added to a weakening of formerly bounded communities. However, the prominence of the distinction between community-based justice institutions and state justice institutions quoted and referred to in legal reports underlines that this basic distinction is still of relevance (Cf. Wardak 2011; Barfield, Nojumi, Thier 2006). The limits of these realms of governance are not merely defended in the public discourse by competing concepts of justice, and they not only provide for partially competing substantive norms (Cf. Wardak 2011; Barfield, Nojumi, Thier 2006). They are also enacted by regulating access to justice institutions based on the general principle that disputes should not leave the social realm in which they emerged. Core family issues thus should stay in the core family, disputes within the extended family should be dealt with in the extended family, and so on. That this principle concerns primarily control over women's access to justice is due to the patriarchal character of socio-legal power and the limited personal agency that is granted to women under customary regimes. In practice, it means that the actual number of different justice providers available to a disputing party can be rather limited, even though the legal landscape in Afghanistan might at first sight seem to be characterised by a plurality.

The report discusses what happens when women in search for justice question this order and create wider publicity than a dispute originally had, by 'inviting' external actors into the social vicinity of the disputing relationship – to use Moore's expression – and thus by trying to change the rules of the game. It will show how the continuing assertion of families and social communities to legal governance affects women's access to justice, which from a rule of law perspective would at least have to entail the option to seek justice from state institutions if their rights are not protected otherwise. This is of particular importance in relatively conservative environments such as Behsud, where the women's statutory rights are often systematically ignored by both family and community regimes of justice.

80 On details and the trajectory of this negotiation see Suhrke 2007; Barfield 1984; Glatzer 1998.

Non-state institutions

A typical comment about the Afghan order of disputing goes like this: "Typically, women try to resolve their disputes inside the family and only if that fails they turn to community mechanisms."[81] That disputes are, at first, negotiated among the parties, is not unusual. If disputes can be solved by talking about the matter at stake with one's opponent for a while, they hardly deserve the label 'dispute' though. The question is what happens if this does not work and the immediate family cannot facilitate an amicable solution to the affair. The particular question here is what happens if women decide to disclose such an internal affair to some kind of wider public?

The first problematic aspect of this is that, in order to protect a woman's honour as well as the responsible man's reputation, no man may see a woman alone apart from their husbands, sons, brothers, brother-in-laws and few other very close relatives. In its more conservative version no man except these close relatives may see a woman at all.[82] The fear of provoking the community's bad judgement which would endanger the woman's honour and cause their fathers' or husbands' anger thus impedes women quite generally from addressing outsiders directly or even participating in a social life outside the close family structure. In the extreme case, this can be summarised by a popular Pashtu proverb: 'Women are made for home or grave.'[83]

Even worse than a woman exposing herself to a male in public is the very act of disclosing internal information to any wider public. If such information further entails problematic or personal information it is an even greater affront to her superior male, challenging his authority and questioning his ability to keep family internal affairs as well as the women of his household under control.

The situation of data collection for this report might serve as an example of this. On the one hand, female researchers found it difficult to access the public forum due to social restrictions on women's movement in public spaces. On the other hand, all the interviews with female disputants happened in the presence of women representatives of the local *shura* or the *malik* himself, thus making sure that the limit between private and public would be observed in the interview. While such a setting severely impedes objective research, seeking justice from within such a setting is not only even more challenging, but also more risky.

The sometimes quoted advantage of community authorities to be known and accessible (Cf. Wardak 2016), therefore does not really apply to women seeking justice, as on two accounts it is shameful for them to approach members of the community: the undue appearance in public and the disclosure of internal affairs. The first might be mitigated, if the woman in question finds a male relative to represent her in the proceedings.[84] That the disclosure of personal affairs is considered to be incriminating makes women's chances to find support and company for such a move quite small. Even if she does find such support, it diminishes her agency in the proceedings immensely (USAID 2005).

If the woman succeeds to have her claim heard by a community institution another problem arises. The chances that community members would restrict a fellow community member's authority over a dependent woman are quite low. At least as long as these male community members claim such authority over their dependent women. More generally, controversial customary practices, such as *baad*,[85] and

81 Comment from a female respondent. For a detailed discussion see Luccaro & Gaston 2014.

82 For a detailed discussion on the Pashtunwali see Steul 1981.

83 This is not quoted to suggest any kind of statistical evidence. And it is known and quoted beyond the Pashtu-speaking realm. On this and further barriers to community and state institutions see Luccaro & Gaston 2014.

84 See for a detailed discussion 2.6.

85 A customary version of dispute settlement, in which girls are given over to another family as compensation for murder or acts of violence or even to settle debts.

the widely acknowledged primacy of family or community interests over personal rights undermine individual women's claims to justice. As Muslims, local dignitaries would never claim to act against *sharia*, and usually *shura*-members happily recount examples where they enacted Islamic law. For institutions as the Department of Women Affairs (DOWA) and other women rights' advocates, this opens the door to using *sharia* stipulations in defending women's rights claims:

> A widow, from Qasim Abad Behsud, came to us claiming her rights from her brothers in law to inherit her husband's property. We established a *jirga*, formed by local *maliks* and elders and we decided to assign her five *jerib* of her husband's land as provided by the Islamic law. She was very poor and used to work as a housekeeper. Now she has sold one *jerib* and bought a car for her son, who has become a taxi driver (interview state justice provider #1).

However, the allegedly Islamic norms currently implemented in local villages, often significantly fall short of *sharia* in its classical interpretation.[86] As the wife of a tribal elder highlights: "*Maliks* and other *shura* representatives, in fact, are selected not for their legal competence but according to the reputation and connections within the community." The regular complaints about verdicts being issued in favour of local power-holders and along personal alliances suggests that connections would top reputation of impartiality. A lack of impartiality is not restricted to *maliks*. The following statement underlines that often people see no difference between state and non-state actors in this regard: "Most of government officials, members of the provincial council, *malik's* and other community elders prefer their personal links in decision-making processes. They are also under the influence of power-holders" (interview community member #2). This generally compromises the role of non-state justice institutions, but particularly disadvantages women for their limited access to relevant resources. A state actor comments on the matter as follows:

> There should be females judges, lawyers, police officers but, unfortunately, there are not. I am a professional engineer but I could be a director for the municipality but without the right connection it is impossible to gain such positions. To monitor their power, *maliks* should be registered by the government and submit their decision in legal form to the official authorities (interview state justice provider #2).

Women cannot even theoretically monitor the proceedings, because they are barred from them.

> Most women's rights are violated because women are not represented in the *jirga* and even when the case is analysed, often the members find no solution for it. Even as disputant women are not allowed to participate in the *jirga* session and their claims are presented by a male representative, which is extremely unfair […]. Their rights are constantly violated: the right to education, the right to work, the right to justice (interview state justice provider #2).

The existence of a women's *shura* can allow women to speak more freely about their problems. Female *shura* members are not allowed to participate in the men's *jirga* sessions, where such a dispute is discussed once it has left the realm of the family. They could, however, assume an advisory role as it tends to be the *maliks*' wives who are elected into women's *shuras* in Behsud. Thus, at least informally, they could exert some influence on their husbands. However, it is not guaranteed that this is necessarily in support of a woman's rights claim, as women play a large role in curtailing other women's rights.

86 In Afghanistan this relates primarily to *hanafi* and *ja'fari* jurisprudence (*fiqh*).

Especially older women have affirmed in interviews that they do not consider controversial practices implemented by the non-state system as particular harmful for the community. On the contrary, they expressed appreciation for compensation such as *baad*, even though it is nowadays rarely implemented:

> We want to prevent an issue to become big and avoid too much government interventions or an increase of hostility between two families. If this can be done by giving our daughter, it is not a big deal (interview community member #5).

This statement is not surprising from the perspective of the community since many of the women-related disputes in Behsud concern couples formed by different tribes or extended families. Any escalation in such a setting could lead to an extensive conflict between larger parts of the community and cause long-term animosities and even fights between different groups. Customary law thus aims at preventing such dangers by de-prioritising the wellbeing of the individual for the sake of the community. However, a changing attitude regarding this pattern can been seen among younger women, who were interviewed, for instance a local student:

> Why should I be punished for a crime perpetrated by my brother or other family relatives? If this happens to me I will certainly contact human rights organisations. I don't care what the society will think about me.

The easiest way to prevent conflicts though is by keeping women under such control that a dispute cannot become public in the first place. Usually, it is thus women who cannot afford to consider 'what society thinks' but who are forced by existential economic or personal needs to claim their rights, who defy social expectations and ask for external help. The question is what happens then, given that an explicit aim is to avoid 'governmental intervention' and how this is enacted. As a young woman from Behsud noted:

> I was a student of 8th class when my brother forced me to leave school because of the bad words by other people. If women are not allowed to attend school then how can we even aim to access to court, district offices or formal forums? (interview community member #7).

State institutions

It is a curious feature of researching matters of dispute in Afghanistan to witness how rhetoric about women seeking justice changes as soon as a discussion turns to state institutions. Those who merely minutes ago had dearly reprimanded women for dishonouring their families by having disclosed family internal affairs to the community's public, suddenly turn into fervent defenders of dealing with women's issues in the 'socially secure environment of the village community'.

As the following will show, most of the substantial arguments in favour of keeping women's affairs within the communities have little factual ground: approaching a court makes no difference in terms of publicity, if the whole village knows about the dispute anyway. Courts are just as male-dominated as community institutions. If Islamic law were implemented in non-state institutions there would not even be a normative difference.

There is one crucial difference though, and this lies in the source of governance and the fact that outside authorities 'invade' the semi-autonomous field of the local community and thus challenge its authority. How control over women is a cornerstone of this claim to local governance is illustrated by a comment of a representative of the non-state realm from Behsud quite openly:

> We prefer that all matters are resolved through the customary *jirga* system. If women were included in the state justice process during the dispute resolution, we would lose the trust of people, who would see no difference between the government and us (interview non-state justice provider #1).

The following shows that local stakeholders make considerable efforts in order to defend their claim to jurisdiction against the state and to perpetuate the exclusive control over women.

The norms of *satar*,[87] which bar women's access to public space, obviously also include their appearance in courts or police stations. It is noteworthy though that the social sanctions, and women's fear of them, escalate if women not only question their family's authorities but also that of their community.

> *Satar* still is an important value in our society and if we approach the government our relatives might cut their relationship with us (interview community member #5).

As a female disputant explained:

> We feel more secure in the informal system. Many people believe that going to a court is a sign of disrespect to the *satar* (interview community member #5).

The social penalty for referring to state representatives in a dispute thus could lead to the complete isolation of a woman from the local community. This is particular feared by the majority of those women, whose future and economic survival is absolutely dependent on their family's support.

All the women interviewed expressed their preference for the non-state justice system, which they consider less socially harmful for their personal reputation and family's honour. The underlying choice is, however, limited if opting for the state procedure entails a fundamental risk of social exclusion. Presenting this as an indication that justice is served in the non-state system is therefore a misleading conclusion.

That state institutions are male-dominated environments would in itself constitute no difference to the men-only local *jirgas*. However, the chance to find support of male relatives who can present a woman's case on her behalf or at least accompany her to the court, is much smaller given the shame this act causes to her family. The deterioration of security makes it nearly impossible for women to access the court system and related institutions on their own, as these are usually located in towns and require male protection during the journey.

Yet another, quite widespread scheme by non-state justice providers for discrediting state institutions and alienating their constituencies from the state justice realm is to declare the state and its laws as 'western', 'alien', and 'non-Islamic'. It is curious to accuse the state laws of lacking Islamic credentials, given that it is the customary regimes which tend to fall short of them. Also the existence of the state or the court system as such is nothing new, and not a creation of the international community or foreign troops. However, it has to be taken into account that in many Afghan areas state institutions hardly ever claimed a governing role in a legal sense, but often relied on community elders and representatives to take care of local affairs. Calls for a supervisory role of state institutions over local governance structures are thus in some regions practically quite new. It also has to be taken into account that the post-Taliban government is by many regarded to be enacting foreign policies, as it is backed internationally. Where

87 The Arabic term *satar* originally involves covering women physically from men's sight, but is also used to describe exposure more generally.

foreign troops fight alongside the Afghan army killing local civilians it seems quite understandable to regard this regime to be alien.[88] Statements as this are thus indeed quite revolutionary and threatening to local governance regimes:

> Our society prevents women from asking for their rights, that is why many of us consider the *jirga* a more secure environment. Nevertheless its decisions are often influenced by our tribal culture and compromise our girls' rights to avoid conflict between families. I think the role of *jirgas* should instead be formalised and they should submit their decisions to the district authority (interview community member #8).

A major structural hindrance to gain support by state justice institutions is people's lack of familiarity with state procedures. While this problem in principle concerns everybody, it systematically disadvantages women, who are more likely to be illiterate and less likely to find the necessary social support in claiming their rights. Professional support such as from lawyers is hard to find in any case. Female lawyers, who could help to facilitate women's access to formal institutions, are near to non-existent, which increases the social barriers further:

> The fact that there is not a single female lawyer or judge in the court is the main reason why families do not allow their women to access the state courts. It is an environment dominated by male judges and prosecutors and you could hardly find a woman going to the court in our area (interview state justice provider #3).

Yet another problem of state institutions, which particularly disadvantages women, is the widespread corruption. While local justice providers are also accused of partiality and corruption, the state system is not void of such malpractices. Lacking not only the economic means, women who act in disrespect of those who have control over the necessary means are more disadvantaged by corruption than men are (Women and Children's Legal research Foundation 2008).

The fear of corruption is then a welcome argument in the attempts by non-state actors to prevent women from even trying to access the state system.

> The *malik* of our village, who is also a general attorney, suggested to us to claim our right at a *jirga* instead of the court, since we are extremely poor and we cannot afford the financial costs of the state procedures (interview disputant #3).

Given that the *malik* worked as a general attorney and there was a high chance he would oversee the proceedings, making sure that corruption would not affect the outcome, indicates that this intervention was down to the *malik's* interest in keeping the case within the non-state system rather than a justice concern. As he confirmed: "I prefer all kinds of cases to be dealt with by the *jirga*" (interview state justice provider #3). There are also reports of *maliks* physically trying to stop disputants from entering a court by arguing that this would be in the disputants' own interest (Stahlmann 2015).

However, not only *maliks* who work as general attorneys might practically uphold the non-state claims to exclusive legal governance. Also judges have shown prone to be either very hesitant to deal with women's affairs or reject them outright. Even though judges are presumably aware of the fact that women only dare to address the state system if they see no other option to claim their rights, cases that involve claims by women are regularly sent back to the communities. Allegedly, this only happens in civil cases. The

88 See Suhrke 2007 for a discussion of alienation by non-military means.

willingness to subsume criminal offenses under the category of civil cases is, however, high. Just as cases of assault are subsumed under 'dispute over land', cases of domestic violence are often termed 'marital disagreements'. That this happens in appreciation of local claims to legal governance becomes apparent in the regular comments, particularly of older judges, who accuse disputants of 'bothering' the court with 'nitty-witty' personal issues and holding it against them when they want redress for allegedly unfair *jirga* resolutions. "They are trouble-makers. If they were not, why don't they listen to their elders? The court should not give them the chance to create even more trouble" (interview judge Bamyan #37). It is clear that such an attitude disadvantages particularly women.

Regarding the state justice system, another major fear remains the lack of legal protection or implementation of verdicts. Local state institutions often neither have the power nor the authority to affect intimate relationships. The following case may serve to underline the unwillingness and inability of both state and non-state institutions to enforce judgments.

Exemplary case I
The dispute, which started during the Taliban regime, happened between a man and his stepsister. The man, who was building a huge market on one of his properties, agreed to rent one of the shops to his nephew, his stepsister's son. However, the man refused to live up to this promise and the woman opened a case in the Taliban court. The man had inherited from his father 100 *jerib* of land, 5 of which he had given to his other sister. When the case was brought to court, he offered his stepsister 5 *jerib* of land, but the woman refused. She claimed that it was her right to inherit 30 *jerib* of land and a third of the shops owned by the man in the market. However, in court the man denied her the rights of a sister, claiming that she was the daughter of his stepmother's former husband. The woman provided witnesses to prove her rights as stepsister and the Taliban court sentenced in her favour.
The case was re-opened by the man during the Karzai government and brought to the Supreme Court. With the decision pending there, the district governor decided to arrange a *jirga* and called both parties for a meeting. The man, however, insisted to stick with his original offer of giving 5 *jerib* to his stepsister and the case remained unresolved. Despite the lack of a binding decision, his son started to build a house on the contested land. His cousin, son of the woman, reacted violently to this action and heavily injured the woman's nephew, who needed to be taken to Pakistan for treatment. The woman's son was arrested along with his mother and put in jail. After a few months, however, they were both released, which was interpreted as a result of corruption by the brother. The injured man, seeking revenge, later shot at the woman's grandson. To date, the dispute is still ongoing (interview non-state justice provider #2).

Conclusion

This account from Behsud shows how the social restrictions placed on women's access to justice institutions are primarily meant to defend zones of legal governance. The discussion shows that the further away women take the disputes from the setting they are emerged in, the severer the restrictions and potential consequences become and the less likely they find the social and institutional support necessary to pursue their rights claims. It also underlines that women not only have to withstand their families' resistance, but that both community and state actors are often complicit in upholding this patriarchal regime and the limits of these realms of legal governance.

In addition to the lack of protection from social sanctions, there is a minimal chance that court verdicts will be respected by local communities. These factors combined leave little incentive to take the risk and

approach community elders or a court. The challenges and risks women face, when they challenge this traditional order, are immense. Nevertheless, many female participants of this research were willing to demand a more active role in both justice systems, especially the younger and the more educated.

2.8 Women's participation in dispute management – The case of the women's *shura* in Istalif

Introduction

As in other parts of Afghanistan, women and girls in Istalif district are rarely allowed to leave their houses without a publically approved reason and play a marginalised role in public life. While access to basic rights to education or medical assistance is limited, the public defense of rights is traditionally barred on principle.[89] As a result, most women are cut off from the few legal remedies afforded to them under statutory and Islamic law by their inability to access the justice institutions that could provide those remedies.[90]

It is not uncommon, however, for women to become involved in traditional dispute settlements, such as ritualised pleas for forgiveness or informal negotiations among the parties (Kakar, no date). But the role and function which the women's *shura* of Istalif and her leader Hassina assume in regard to dispute management goes far beyond these traditionally acknowledged roles. She raises awareness among women (and to some extent also among men) about their rights and provides active support to women seeking justice.

This report examines the role of the women's *shura* in Istalif as part of the institutional justice environment and how Hassina's personality has emerged as a driving factor behind this *shura*. It traces the challenges she faces, and investigates how the emergence of the women's *shura* brought a change to how women of Istalif can engage in disputing and defending their rights.

Hassina, the leading actor

Enabling access to justice for women necessarily challenges the underlying patriarchal patterns that bar women's access to justice. Any such effort thus tends to be met with disapproval and opposition by men who benefit from this system and have the means to enforce it.[91] The defence of women's rights thus depends on actors who can, dare and want to cross the set limits. Therefore, it is often actors who are external to the social setting, as those are less dependent on public approval. The case of this women's *shura* is an exception in this regard, as its leader Hassina, who turned this *shura* into a lobbying institution for women's rights, comes from the district.

Enabling factors for Hassina's commitment are her family's support, her professional experience and her personality. Hassina's father, who is a local farmer, strongly supported his daughter's education until grade nine, despite the fact that illiteracy is very common among women in the district. He also supported Hassina during her training as a midwife in Kabul. After she graduated, she worked in a local clinic until 2002, when she began to give literacy and tailoring classes for local women. During this period she also served as a community mobiliser for Cordaid and collaborated with other NGOs such as Women for Peace, IRC, and Care International. When the women's *shura* was founded in 2004 and she was selected

89 See 2.6. and 2.7 for details.

90 On this and further typical challenges women face in disputing see UNAMA 2009, Women and Children's Legal Research Foundation 2008.

91 See UNAMA 2009 for the existential threats this may entail.

as its head, she was already well known by the majority of people in Istalif, especially by women who had participated in her courses. Being 40 years old by now, and having spent most of her adult life in professional occupation, she has not only established a network of trust and external support, but has also acquired an unusual level of confidence in taking up public functions.

The workings of the *shura*

Composition

How much this *shura* depends on the personality and commitment of Hassina is already depicted in the composition of the *shura*. While it is already progress that a women's *shura* could form in the first place, its conservative setting prevented that it could attract a large number of female members. Officially, the only registered members are the head of the *shura*, Hassina, and her deputy Sadiqa:

> Just Sadiqa and I are registered officially with the district office as the representatives of the women's *shura*. However, there are also representatives for each *manteqa* [area] who help me with the activities. I have written their names on a piece of paper, but it is nothing official since they are not registered with the district authorities.

According to Hassina, the reasons behind the lack of official participation by other women can be attributed to local customs. Many men refuse to let their women participate in activities outside the home, especially when such activities are related to women's rights:

> Even when I ask the help of women representatives in a village, they always ask me to talk directly with their husbands or another male family member. Since I am the head of the *shura*, the men normally allow them to work with me. However, if the women were to ask their husbands directly, they would refuse to give their women permission because male villagers would consider it shameful.

It is not uncommon for women to be considered dishonourable and to be shunned by the community if they become active in the public sphere. However, Hassina explained, when conferences and trainings are organised by international and national organisations, the members of the men's *shura* are not afraid to let their wives or daughters participate:

> Indeed, it is merely for economic reasons. Normally women get paid for these trainings and this is the only reason why they allow them to participate instead of selecting local women who are more active on this matter. I told them that this is absurd. They talk about women's honour when they want to prevent women from participating in public events, and then they allow their female family members to participate in other activities just to receive the cash paid to compensate for their participation.

Furthermore, it has been difficult for the women's *shura* to attract more permanent members because male elders in Istalif also fear that the women's *shura* might become too powerful and, therefore, gain too much influence as an institution in the district: "The district *shura* of local elders wants the women's *shura* in Istalif to be merely symbolic," said Hassina. Even against her appointment in 2004, while supported by the majority of the local elders, she faced significant opposition by local strongmen and former civil-war commanders of the district.

Rights awareness

In daily life, women face a series of serious shortcomings in respect of their rights. This not only concerns the often quoted but exceptional practices of *baad*, but also the toleration of grievous bodily harm, forced marriages and customary denial of inheritance rights. Due to the combination of customary malpractice and a low level of literacy, rights awareness among women is sometimes very limited. A larger constraint though is the customary denial to inhibit the claiming of rights. As a local housewife explains:

> I don't know any method of dispute resolution – I just know that the issue should not go outside of the family and must be solved between the families or family members. If the issue goes outside of the family, this is not good. People will become aware of it and they will gossip about it – stating that the family is not united (interview community member #2).

This quote serves well to exemplify that it is not merely knowledge of rights which is at stake, but the awareness of the very right to claim them. This customary denial comes together with a fear of any contact with the government authorities. State institutions are often seen as the opposite of being supportive of women's rights. As Hassina explained: "Many women are afraid to be put in jail and accused of committing a crime." Cases in which women have ended up in jail for 'running away' exemplify that, indeed, the state apparatus may become an active accomplice in ensuring patriarchal control.[92] Judges are, just as elders, after all, not just judges and elders but also men. As reported by other local respondents, government officials usually refer any dispute involving women or family-related issues to the male district *shura* or they simply avoid proceeding at all. Local women reportedly fear that, even if they gather all their courage and approach state justice actors, their efforts to contact the district authority directly would be wasted. Widespread illiteracy further contributes to most women's insecurity and ambivalence when asking for rights, which they are denied systematically.

A fundamental element to Hassina's work is thus to serve as a legal advisor, both in substantial and procedural regards. In this difficult context, Hassina can count mainly on her extensive network of relationships with the state authorities, both in Istalif district and in Kabul province, as well as international human rights organisations.

> If I am in doubt regarding the best legal advice to offer, I normally avoid consulting with the local *mullahs* because I am afraid they will not give me the right information. I prefer to contact a government official, who works with the legal department – then I know that he offers me the correct advice.

The arguments used by locally influential men to discredit her in these attempts are telling though, as they do not openly question her support for rights' claims. This is interesting as it suggests that the legitimisation of women's rights by the *sharia* is known. Instead they question her piety as a Muslim by referring to her work for international organisations and a trip to the USA, which she made as a representative of Afghan women for an international non-governmental organisation. Hassina comments on such accusations:

> These claims, however, are false. I always refer to the *sharia* law and I am aware of women rights and legal procedures according to Islamic law. I have also received further training on this matter through an NGO program (Women for Women), which was active in Istalif.

The assaults on her piety as a Muslim, however, underline how extraneous her efforts are to the local order and the enormous threat which an awareness of *sharia*-based women's rights potentially bears in

92 See Luccaro and Gaston (2014) for a detailed discussion of such cases.

an environment in which it is hard to openly question *sharia* stipulations. As the case of Fariba illustrates, even the threat of family isolation does not always deter women from disputing, when they become aware of their rights.

Exemplary case I

Fariba asked her brothers for her share of land inherited from their father. She has six brothers, one of whom disappeared in Iran fifteen years ago, and four sisters. Her father died twelve years ago but she did not try to claim her inherence rights until last year, which was six years after also her mother had died. For these six years, Fariba had remained silent fearing that she would upset her mother with such claim. Then Fariba waited for other six years in order to respect the mourning for her dead mother. But when her health condition deteriorated, she decided to pursue her claim to the land. She was not aware of how much would be her share but she estimated that in total the land left by her father would amount to 800 fruit trees. The brothers were willing to give her some part of the land, which was less valuable. However, she claimed that also the more valuable land was part of her father's estate. Since she started to claim the land, the relationship with her brothers deteriorated significantly. The other sisters refused to support her claim and argued that she had no right to ask for her inheritance. She recently got in touch with Hassina and the women's *shura*. For this reason, she claims, she is now aware of her rights. She is sorry that the relationship with her brothers has deteriorated. However, as she claims: "I am now aware of my rights and I will not stop. My brothers need to give me the right share of the land inherited from my father."

So far, she has avoided contacting the local governor or other relevant authorities, as she still hopes to be able to find a resolution within the family.

Nevertheless, as the head of the district *shura* pointed out, this 'awakening' of local women and their ability to claim their rights might risk an increase in local conflicts and family disagreements – an issue also mentioned by the district governor:

> It is good that women are increasingly aware of their rights and they are motivated to take action in order to defend them. It is important though that this process is formally followed and supported by all institutions; otherwise it would just lead to an increase in local conflicts.

As the following will illustrate, this process is obviously not supported by all institutions. The comment should thus be read as a polite version of the common argument against unwanted rights claims, namely that disputing practices 'disturb the social peace'. From a rule-of-law perspective this disturbance is a most wanted feature as it indicates the practical defence of rights through disputing. It should be taken seriously for the challenge it poses to an established patriarchal order, as well as to norms that rank family and community interests over individual ones.

Dispute settlement

Starting a dispute against brothers or husbands bears the existential risk for women to lose their protection, or being shunned from the community at large. Afghan women can thus hardly avoid being concerned about the family's reputation. But to married women their family of origin is also an immensely important social realm – as Hassina explained: "Afghan women love their brothers, and they would not do anything to harm them." This attitude can be assumed as one of the causes why legal cases are often opened only when women run out of alternative options. Fariba's case is an example that this is sometimes years after the original claim could have been made. As risks to these relationships increase with the publicity disputes gain, women typically try to resolve issues inside the family environment first

in order to avoid the public shame that any publicity and particularly a state proceedings could bring to the whole family. A local respondent commented:

> I believe that a dispute needs to be solved between the family members first, trying to reach an agreement internally. For instance, in case of an inheritance, I would talk with my sisters, brother and father. If they agree with me, there will be no problem – otherwise I will go to the district authorities.

If the dispute cannot be resolved among the family, the woman has to tread carefully if and when proceeding, in order not to cause too much damage by claiming her right.

The way Hassina responds to this need is that she tries to resolve any issue that a woman may have within the family context first. While her presence is already perceived as an undue publicity, it still means avoiding the even greater shame any other type of proceeding would entail for the family. She knows that her support to the women in opening a case is perceived negatively. But even if the family does not agree with the claim and does not consider it legally valid, the fear of further publicity can serve as a powerful incentive to agree nevertheless – as a local housewife explained:

> My brothers do not like me anymore and neither do they like Hassina, the head of the women's *shura* who was helping me with this case. My family refused to listen to my claims, but then they listened to Hassina's arguments and gave me the part of land I should have rightfully inherited. I also know that local people are judging me negatively for demanding my rights. They do not tell you in person, but I know they talk about it.

On this level, Hassina practically serves as an institution of social control of norms, as the following example by Hassina illustrates:

> A woman I was teaching during a literacy course was known by her neighbour to hit her daughter-in-law. Some women called me to notify me of the situation. I then went to visit her. In the beginning, she was very happy to see me because I was her former teacher. When she understood the real reason of my visit, however, she was very surprised and she kept asking me how I came to know about this. I told her, I have eyes everywhere and I asked her to stop abusing the girl, which she then did.

That women are hesitant to address state institutions is, however, not only due to the fear of social repercussions. Particularly in cases that would qualify as criminal offenses, even women who are aware of their rights, are cautious to start proceedings as they could lead to the imprisonment of e.g. their husbands. While an imprisonment would obviously put an end to the abuse, it makes the negotiation of future living arrangements, such as a woman's return to her family of origin, immensely more difficult and increases the fear of revenge by the husband's family.

Non-state institutions, which in theory could provide the acknowledgment of the trespass and facilitate the negotiation of future-oriented alternatives, are however of little help in regard to women's rights. The main reason is that they are often complicit in the disrespect for statutory norms. In particular, the local *shuras* in Istalif who are influenced by local power-holders and commanders, often deny women their rights with reference to customary norms. Therefore, in the case of women affairs, the general mistrust towards state institutions is overtaken by the hope that in state institutions *sharia* law will be implemented.

Access to state institutions and the chance to have *sharia*-based rights confirmed by them requires the institutionalised support of actors like Hassina. This has several reasons. One lies in the practical challenges in complying with formal requirements by the state order, which would be difficult to master even if most women were literate. Another need for support lies in the fact that just as with non-state institutions, state institutions tend to be led by men and that often, as in the case of Istalif, not a single woman is working in the district court. This serves as an immense social barrier for women, who are not used or not allowed to move within male-dominated environments (interview state actor #2).

> Here women don't have that much encouragement and also don't have support from their families. The main reasons are customs and insecurity. Government has to be stronger and support women by sending someone to Istalif district office who is able to work with women and solve their problems or disputes. It is the government's fault that we don't have woman employees with us in the office.

Assistance is also needed to prevent the risk of verbal abuse by state employees, who often show openly how they personally disapprove of such dishonourable behaviour. Even if Hassina has no official power in this regard, her excellent relationship with the district governor, the Ministry of Women Affairs and her contacts with human rights organisations provide the necessary authority to informally supervise proceedings. Her personality thus serves as a bridge between local woman and state justice institutions, while supervising the various institutions at the same time. Several women informants have confirmed that their claims have been possible only due to Hassina's support and her determination to bring their cases to the state justice authorities.

The protection from likely abuse and the credible chance to find rights confirmed is mirrored in significant changes in the perception of women regarding their legal rights. Many of the women and girls interviewed who were directly supported by Hassina, seemed to be firm in their claims and less afraid of likely social sanctions. As Shahnaz, whose case is featured below, said:

> I don't care about what people say. I have lived under very bad conditions and I just hope to find a good solution soon. I try to make up with my husband, but I am not afraid of divorce if this remains the only solution.

Shahnaz's case also serves to show how in order to minimise the potentially immense social repercussions, a constant mediation between the social and the legal realm is necessary.

Exemplary Case 2

Shahnaz and her cousin were engaged four years ago, when she had just turned 16 years old. Originally, she was supposed to marry this cousin's older brother, but he refused to follow the wish of his father, the uncle of Shahnaz. At first the younger brother also did not agree to marry her but then he submitted to his father's request. However, according to Shahnaz, he behaved badly since the beginning of the marriage. Also his mother, who was living with the young couple, treated her like a servant inside the house. Shahnaz said that in her understanding this was a forced marriage. Her uncle, who acted as her legal guardian since her father had died, refused to let Shahnaz marry a stranger, and forced her to marry his son. Nevertheless, she had hoped that the situation would improve with time. Instead, the situation grew worse and she became the victim of physical and verbal abuse by all the members of her husband's family, including her sisters-in-law. When her mother-in-law burnt her feet, she could not stand it anymore and run away to her mother's house. She asked her husband to come and live with her at her mother's house but he refused. Three years have passed since and her husband has barely given her any financial support, nor has he come to visit her or provided food. He insisted that she should ask for a divorce, but he has refused to take the first steps. Therefore, with the support of her mother, Shahnaz went to the governor of Istalif district to explain her situation. He suggested that she returned to her husband's house in order to avoid a divorce. Feeling left alone by the district authority, Shahnaz contacted Hassina for help. Hassina agreed to support her case and assumed the role of mediator between the young girl and her family in law. She also urged the district authorities to assume a more active role in this case. Shahnaz returned to her husband's house, but the district governor also sent an official to their house in order to stress that there could be no further abuse. The situation remained calm for about six months before Shahnaz was again forced to run away from her family-in-law, as they started to abuse her once again. She returned to her mother's house, not knowing what else to do. She complained about the situation also to other members of her family, but they refused to get involved in the dispute. As her father is deceased and her two brothers were too young to have an active role in this case, there was no male family member to help her. She was also afraid to again contact state authorities by herself, and therefore has entrusted Hassina to follow up on the case on her behalf.

Challenges and Chances

Beyond her role as legal adviser, Hassina plays a key part in the increasing rights' awareness of women in Istalif. Women collaborate and show support for Hassina's work due to the positive reputation she has earned during the last decade of public activism. Many local women contact her directly when they have become a victim of abuse or report to her cases of injustice they have witnessed. Women interviewed for this case study identified her as the only person able to support women in Istalif in their struggle. Her personality and efforts have been mentioned as particularly important, also due to the sensitivity of the legal issues in which many women are involved. As Hassina explained: "When they come to me, they tell me the truth. I have explained to them how important it is for reaching a solution that they are honest and tell me everything with no lies." Many local cases, in fact, are related to rape and similarly sensitive issues in this culturally conservative environment. The presence of a personality like Hassina has indeed helped to facilitate women's access to justice through her willingness to speak out about their problems. Her main asset is thus the trust she enjoys. However, her role is limited to one of a mediator between women, their families, local and state institutions and will remain limited, unless it is backed by further social and institutional support. A wider acknowledgment of women's rights in the social realm would be best, but hardest to gain.

> With me, women feel supported. It is important, however, that family also support them in this process. My father and husband gave me the power of being this fearless because I know they would never leave me alone. All families should do the same for their wives and daughters.

How much her commitment challenges the existing power relations, is highlighted by the fact that Hassina has been constantly under threat by some members of the local men's *shura*, former civil-war commanders and other strongmen, who continue to have significant influence in Istalif.[93] For instance, Hassina's daughter has recently received an official paper, issued by a local *shura* of elders that broke her engagement with her cousin due to her 'bad reputation'. Hassina said "I am the head of the *shura* and they did that to my daughter. Imagine what they can do to other people!" Threats and the risk of a bad reputation, however, do not stop Hassina's work with the women's *shura*. She firmly noted: "If necessary, I would take women rights from the mouth of a lion."

It is promising that the number of people who strongly supporte the participation of local, elderly women in *jirga*/*shura* proceedings and decision-taking is increasing (Wardak & Braithwaite 2013). It is likely that a change of attitude in the general public perception will have to be accompanied by substantial reforms within the state institutions, such as more institutionalised and a better equipped support structure for those seeking justice, and a more women-friendly environment within institutions like the court or police forces. As Coburn points out in his analysis of the politics of dispute resolution in Afghanistan, it is important that the international community supports the state judiciary in setting up legitimate, transparent processes, "in particular where there is demand for such mechanism" (Coburn 2011a).

While the reforms necessary to achieve substantial change in the state realm will likely take a considerable amount of time, even if they are pursued effectively, they could be accompanied by empowering trusted institutions like this women's *shura* directly. As Hassina explained, she has no income from the *shura* and since the international NGOs, for which she had previously worked, have concluded their activities in Istalif, she has remained without a job: "Everyone, from the governor to the local people asked me to remain in Istalif and I do not want to leave either but if I don't find a job it will be very difficult for me to do so." In attempting to overcome this problem, she has created a small manufacturing company, which sells bags and other accessories to finance her and the women's *shura* activities. This business also aims to teach other women to work in this sector and allows them to raise an income in order to have more economic independence. However, so far, this income remains limited and not sufficient to cover her work. As she repeated various times in the interview, this issue was crucial not just for her role as women's *shura* leader but also for facilitating women to participate more formally in dispute resolution:

> If women were paid for their participation in the *shura*, their family members would certainly support them since the majority of people in Istalif suffer from insufficient income. Their support would certainly put pressure on the local *shura* of elders, who would not dare to oppose the will of the local population. For this reason, I really believe that an additional income would allow not just me, but also other women to continue their activist work in Istalif.

According to Hassina, giving women economic independence could also mean a significant change in the attitude of husbands towards their participation in the public sphere and facilitate the official election of more female representatives. And it would decrease women's dependence on men's approval to seek access to justice. After all, limitations of women's access to justice is widely acknowledged to be directly associated with poverty (Women and Children's Legal Research Foundation 2008).

Conclusion

Although women's access to justice is protected by both statutory and *sharia* law, the research data demonstrate that women's access to primary justice is still denied to them in a systematic manner on social and customary grounds. Lack of acknowledgment of women's rights by both the local population

93 See 2.4 for a detailed discussion.

and the justice systems' representatives has emerged as a main cause for no actual implementation of gender equality in access to justice providers. An institution such as a local women's *shura* can be considered a fundamental cornerstone for improving women's access to justice, by taking up an advocacy and supportive role throughout the dispute process. The particular role this Istalif *shura* plays is only possible due to the personality of Hassina. It underlines, though, which key role seemingly powerless actors can assume with minimal institutional support, where they enjoy people's trust.

3 Concluding Analysis

By Friederike Stahlmann

The eight reports highlight a wide range of concerns and challenges with seeking justice in Afghanistan. Overall, disputing often seems to be a protracted, highly frustrating, and even risky affair, in which relatively weaker parties stand little chance of finding justice. The persistent complaints about corruption and favouritism are both a symptom and a symbol of this state of affairs.

Corruption, indeed, has the power to jeopardise any official mandate and any kind of legitimacy. Justice tends to be its first victim, because the question is not how much officials charge for services that ought to be free, but who has more to offer or is better connected. Accusations of corruption may have other reasons than actual events of corruption.[94] How persistent these accusations are (Isaqzadeh 2014; Transparency International 2014), is nevertheless a strong indicator that there is little respect for and much frustration with justice institutions. In light of the discussion about the Afghan legal order so far (Wardak 2016), it is noteworthy that this frustration concerns both state and non-state institutions. This suggests more general, underlying concerns in addition to the particular failures of specific institutions.

This concluding analysis traces these concerns. It embeds the findings of the case reports in a more general discussion of concerns and challenges, analytically summarises the particular problems that women face, and spells out elements that work to improve access to justice as well as the limits of such efforts. In addition to the findings from the reports on Behsud and Istalif, this concluding analysis draws upon feedback from the consultation meetings in Nangarhar and Kabul in which the research results were critically discussed, and results from a different research[95] on the same topic in the city of Bamyan.[96] Bamyan city is of special comparative value in this regard, as many of the formal conditions for the rule of law were fulfilled and the security situation was unusually good in 2009.[97] This allowed for an easier tracking of more subtle post-war features and causes of frustration. A more long-term research design further made it easier to build relationships of trust and trace dispute processes by participant observation.

94 As far as singular cases are concerned, one has to be aware that they are little more than accusations. They may express a lack of satisfaction with the outcome due to competing normative expectations. They may be used to cover the public humiliation of having lost a case. They may be used to explain what is unknown and unexpected in procedural regards. The following discussion shows that even procedurally and substantially correct proceedings and outcomes may cause immense frustration.

95 This research, conducted by Friederike Stahlmann, was academically and financially supported by the Max Planck Institute for Social Anthropology in Halle (Saale), Germany and the International Max Planck Research School on Retaliation, Mediation and Punishment. It was conducted in a period of 13 months from 2008-2009 in the city of Bamyan, as part of a PhD project titled: *Disputing amidst Uncertainty. Failures of procedural justice in post-war times – a disputing parties' account, Bamyan/Afghanistan 2009.*

96 Bamyan city, the capital of Bamyan province, is located in the central highlands. Along ethnic distinctions the majority population of Bamyan city are shi'ite Hazara, along with a considerable Tajik minority and several smaller ethnic groups. The district of Bamyan centre, including the city and the surrounding villages, has a population of about 80,000 people. Apart from employment in state institutions and (I)NGOs, the main source of income is agriculture. The bazaar of Bamyan also serves as the centre of trade for the province. Even though it is the provincial capital, most living areas rather resemble rural settlements, where the groups of houses are next to the agricultural land of the village.

97 See Stahlmann 2015 for a more detailed discussion.

3.1 Matters of legitimacy and general challenges with seeking justice

This first section on general challenges with seeking justice will focus on two major themes which are predominantly mentioned by the respondents in this and other research efforts:[98] on the one hand, the limitations of institutional capacity to provide justice; on the other hand, the control of illegitimate power-holders over institutions of dispute management and the detrimental effects of such control on the enforcement capacities as well as the accountability of justice providers. Both severely undermine the legitimacy of justice institutions as well as the chance for victims of trespass of finding institutional support in seeking justice.

Institutional capacity

Availability
The physical availability of state justice institutions is likely to be the aspect of reconstruction that has yielded most success. Court buildings, police stations and prisons have been built or repaired, refurbished and supplied with printed laws and related legal materials. Much has also been invested in the training of new generations of justice providers and on-the-job training of existing personnel (Wardak 2011 and 2016).

That does not mean that there are enough judges to deal with the total number of cases nor that those who are operating in the justice sector are all sufficiently qualified. Many of these efforts have also centred on urban areas (Jensen 2011). Access to courts and police stations in the provincial capital Bamyan is thus much better than in the rural area of Behsud. In places such as Behsud insecurity often makes travel too risky, thus limiting justice seekers' access to these institutions. As discussed in 2.5, security concerns also impede access to justice of personnel to the site of a dispute for investigation or enforcement. In Nangarhar province, even the district courts are currently out of use due to security concerns of the courts' personnel (Consultation meeting).

The frustration expressed in the reports about state institution's capacities is not only caused by these shortcomings though. As the case in 2.2 illustrates, the regular effort it takes to pursue cases in courts disadvantages the weaker parties with less capacities to afford the expenses and time to travel to court and follow up on cases. The longer a case takes, the more the weaker party is affected. Land dispute cases are a good example of this. A party whose family's survival depends on the next harvest can hardly afford to pursue lengthy procedures, appeals, and any other delay in procuring access to a disputed plot of land. Acute need thus can make it impossible to seek justice with state institutions, even though they are physically available and would provide the confirmation of a rights claim. The dependency on a swift solution also puts weaker parties at a disadvantage in direct negotiations through non-state procedures. As parties in Bamyan regularly reported, they had no option other than to enter into an unfair compromise in order to gain at least access to part of their land.

One of the most recurrent accusations of corruption, such as in 2.2, is that the procedures are protracted with the purpose of harming the weaker party. It is often difficult to prove such accusations, as there are many procedurally correct reasons why decisions may take a long time. In addition, judges complain that people are little prepared for how long court trials usually take.[99] The experience of the often swift and speedy Taliban and war-party trials has set a different standard in this regard, which can hardly be met while complying with procedural laws of the state. It also underlines that the importance of the

98 See Wardak 2016 for an overview.
99 See e.g. data from Istalif.

duration of procedures may outweigh other concerns in the administration of disputes. An example of that may be the respondent who commented that he liked the commander's *shura* because "it resolve your problems one way or another, but unlike others [referring to the state] they do not ask for money or delay your case."[100] Non-state justice procedures may be the better option in this regard. Of relevance for the relationship between state and non-state justice providers is that in all three research settings the practice of referring cases back and forth between the different institutions has been portrayed as an indicator of corruption rather than a remedy.

Qualitative capacity

Given that state, customary and *sharia* law have nearly identical provisions on land rights of men, the main challenge of justice providers lies in providing reliable and convincing procedural means to establish evidence, proof of rights claims, and trespass upon them. As crucial as matters of land have always been, they enjoy immense procedural attention and regulation not only in state laws, but also in customary proceedings. More important for matters of procedural justice might be that these procedural means for establishing evidence and proof of rights and trespass enjoy widespread endorsement.

Discussions on the shortcomings of these procedures often centre on problems with the documentation of claims, and the cases in 2.1 and 2.2 are examples of that. Not only was paperwork lost in the turmoil of fighting and fleeing, registries were also partly destroyed or incomplete, because owners sold their land while being abroad or could not afford the arbitrary and extravagant fees for registering contracts with regimes that were often considered as hostile.[101]

While it is often difficult enough and sometimes impossible to prove the validity of a single transaction that happened under the extraordinary circumstances of a civil war, disputes tend to develop their own history of harm, claims, counter-harm, and counterclaims. Over the years, disputes thus often create blurred lines of responsibility. Doing justice to such blurred, but no less real webs of guilt and victimhood, is hardly possible through any kind of formal fact-finding procedure, which relies on formal correctness of ownership documents. But it still might shape the dynamics of a dispute and the assessment of justice.

In the cases where responsibility cannot easily be established, elders as well as judges tend to claim that customary means of fact-finding are more reliable than the more formalistic and rigid rules of state procedures. A main argument in support of customary procedures is that the social proximity in which people live provides for sufficient publicity of relevant knowledge in order to establish such facts. The case presented in 2.1 serves as an example of this. However, the wars have considerably questioned this reliance on public knowledge to establish the veracity of accusations of trespassing or individuals' claims to rights and entitlements.

The following example illustrates a customary method for evaluating entitlements to a piece of land in addition to formal paperwork, which also features in 2.3. This method of fact-finding is to consult the owners of the adjacent plots as witnesses for a transaction. These neighbours are not only expected to know the borders of their land, but should also be informed about transactions concerning slots adjacent to theirs. This method of forestalling undue rights claims or the temptation to forge contracts faces several war-related problems though.

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100 See 2.4 / Interview #1.

101 For a discussion of the changes of politics throughout the regimes and the practical difficulties to trace and prove land rights see e.g. Foley 2005 and Wily 2013.

Neighbours, for example, may not necessarily serve as neutral witnesses when sharing the alleged trespasser's past in the wars.[102] But even with witnesses whose reputations are not called into question and whose testimonies are beyond reproach, there are practical problems that stem from the past: the many regime changes and civil-war periods have forced virtually everyone to flee at some time or another. This means that with regard to local affairs, there are gaps in every person's memory, no matter how trustworthy and detailed they might otherwise be. Disputes are, however, often precisely about these times of forced departures, when large-scale illicit appropriation took place, and people sold their land more readily than during times of stability. Migration caused the additional problem that land transactions just as inheritance arrangements were often made far away from the land in question and without the knowledge of those who had remained behind.

These problems with reliable fact-finding due to the extraordinary circumstances of the civil wars, and the fact that the legal order at large is not equipped to even name injustice in an appropriate manner has cast doubts on the legal systems' reliability, even for cases arising in the present. At least such cases are often quoted by informants in order to question the chance of seeking and finding justice.

Customary proceedings should, in theory, be much better equipped to produce reliable evidence. Their advantages over state proceedings include a better assessment of witnesses' reliability, the ability to account for degrees of uncertainty of more complex histories of disputes, and disputing relationships that sometimes defy absolute, one-sided declarations of guilt. Furthermore, customary proceedings are able to acknowledge the emotional and social value of the harm caused by a trespass and the refusal to acknowledge a rights claim. There were some complaints about the practice to reach compromises or forgiveness when justice perceptions rather demanded a one-sided declaration of guilt. On the suggestion to hold another *jirga* to resolve the dispute featured in 2.2, Jahid argued: "Why would I have to share my land? The case has already been with the elders three to four times and every time the elders suggested dividing it between us. But why do I have divide my land for no reason?" As a woman in Behsud argued: "For murder cases I like courts as it is written in the Afghanistan constitution that murderers should be hanged till death. But *jirgas* normally reach compensations and forgive the murderers which I don't like" (2.7; Focus group discussion 1).

In general, however, people widely agreed that elders usually had no problems in finding the truth and that local authorities often already knew who had done what and if it was right or wrong. In cases where both parties were of equal power and had an interest in reaching a settlement, dispute resolutions seemed to be quite effective, which accounts for much of the success of non-state-institutions.[103]

However, tracing disputes through the institutional environment shows that there are many disputes that move to courts after attempts to find justice in community forums or even start their institutional path in courts. The most widespread argument for that is that even though elders may know the facts best, they would or could not act upon and according to this knowledge, in cases where there is a power gap between the parties. The cases featured in the reports confirm this pattern. In scenarios with considerable power differentials, the individual assessments even suggest that the more trust was granted to a third party, the less it was part of and related to the social field of the disputing parties. Problems with enforcement and impartiality are not merely a feature of non-state justice. But the findings from all

102 An example from Bamyan may illustrate this: The destruction of the old, Tajik-dominated bazaar of Bamyan during the war and the building of a new Hazara-dominated bazaar are an example of that kind of constellation. A Tajik who has a dispute with his Hazara neighbour over the border between their shops will be hard pressed to accept neighbouring Hazara shop-owners as trustworthy witnesses, because most Tajiks consider the new bazaar and the distribution of slots to be a symbol of power-abuse by the Hazaras at large.

103 For respective statistics see Wardak, Saba, Kazem 2007.

three research sites suggest that these are also a problem of non-state institutions. The frequent recourse to state institutions suggests that these may even override advantages in procedural regards as well as interests in more encompassing justice assessments.

Enforcement and Accountability

The challenges that justice providers face in delivering verdicts that meet people's expectations have proven to be considerable. These challenges explain a considerable part of people's frustration with justice delivery. The persistent claims of corruption are, however, also due to external factors, which have the power to undermine the authority and legitimacy of justice providers and their ability to fulfil their mandate satisfactorily. The reports confirm that two aspects stand out in this regard: one is the question whether the administration of justice is able to provide checks and balances over power-holders, may they be official or private; the other is whether the independence and impartiality of the administration of justice is effectively institutionally controlled or not.

Both questions are of immense importance for the authority and the legitimacy of the administration of justice, and for the chances of victims of trespass of finding institutional support in seeking justice. In order to gain relevance and respect in practice, verdicts or settlements need to be backed by the power and support that is necessary to outweigh differences in power among the disputing parties.[104] The accounts from all three research sites suggest though that currently settlements and verdicts are largely ignored by the relatively stronger parties. This not only questions the lack of enforcement powers, but also the independence and impartiality of the administration of justice in issuing verdicts. Where institutional control of the administration of justice is missing, it is prone to fall victim to abuse. Seeking institutional support is then an advantage for the stronger party rather than the weaker one, turning the institutions that should serve justice into accomplices of trespass. The most worrying and strongest sign of this state of affairs are the many accounts of disputes that are not conducted due to a power differential between the parties.

Relative power of justice providers

The respect that verdicts and settlements of justice providers enjoy partly relies on subjective assessments of procedural and substantive fairness. However, even if this kind of legitimacy were granted to justice providers, the capacity to enforce is also required to create rule compliance or respect for dispute settlements. Without these, legal authorities would be reduced to mere advisory institutions. The type of enforcement powers obviously depends on the institution at stake, but they have to outweigh the powers which spoilers of justice may mobilise. In a dispute between two poor farmers who argue about the demarcation between their fields, this is easily achieved. However, justice perceptions are not merely a matter of a concrete case, but concern the assessment of the assertiveness and robustness of the rule of law at large.

The developments of the years after 2001 have right from the start cast severe doubts on the robustness of the rule of law and the accountability of power-holders, for they depict a continuity of power abuse both beyond the official political realm and within. The very process of rebuilding the Afghan state relied from the very beginning at the Bonn Conference on many of the power-holders who had led the country to its destruction. This did not go unnoticed to those who had fallen victim to these warlords, and it was soon

104 Respect for verdicts cannot be judged by the realisation of the verdict alone. It is not a particular Afghan feature that court or mediation settlements are not realised one-to-one, and it need not be a worrying sign in regard to justice as long as it is a voluntary choice by a relatively weaker party. Dispute settlements often merely touch upon one out of many conflictive aspects of a relationship. The party, which has been favoured by a settlement, may thus choose to trade the benefit of a settlement or verdict for other interests.

apparent how immediate and disastrous the effects of the policy of relying on former power-holders were (Cf. Human Rights Watch 2002).

Exchanging justice for short-term stability[105] which the international community opted for by relying on criminals of war to govern the country, and by re-arming paramilitary groups in their fight against terrorism, did not have need the formal confirmation of a general amnesty law for crimes committed before 2001 (published in 2008) – including crimes of war and against humanity.[106] Many of the informants in Bamyan were highly surprised about the international outcry that followed upon the publication of this law. As an elderly man from Bamyan commented: "They put these people back in power. They re-arm them. They invite them and their followers to trips to Europe and treat them as partners. And now they are shocked that these people decide that they don't want to go to prison?"

While in Istalif the continuing power of a civil-war party constitutes a kind of shadow government that outranks e.g. the police chief in terms of power, the report from Behsud illustrates how intrinsically intertwined criminal networks are with high-ranking government officials. In both settings these networks outweigh both state and non-state institutions in regards of power. Assessments from Behsud and Istalif underline that sincere justice providers hardly stand a chance to override these networks of power, no matter which kind of institution they belong to. A local police officer stated: "The local government of Behsud district does not have the power over these lands and strongmen are faking documents in order to take the ownership and sell them privately to locals[…]."[107] As a resident in Istalif remarked: "There are so many commanders and some of those commanders are in the Afghanistan parliament as well, they are so powerful, they don't care about the court or anything else" (2.4). For matters of legitimacy this is a disastrous state of affairs. Why should the petty thief acknowledge that he has to go to prison, when strongmen who have responsibility for people's immense suffering during the wars are granted impunity and weaponry and use them to grab land?

The comment by a judge from Behsud illustrates yet another effect of the knowledge of uncontrolled power: "Most of the cases over land are between one person supported by a power-holder and another person that is powerless. Usually the latter does not even file a case against the power-holder, because he knows already the results" (TLO 2014: 54). Where rights claims are not even pursued, justice provides are in turn robbed of the chance to strengthen the rule of law and perpetrators learn that they can trespass with impunity.

The lack of accountability is not limited to Afghan actors though. It also concerns foreign troops and the lack of respect shown to rule of law standards by international powers like the USA.[108] This disregard for justice concerns also undermines the credibility and authority of the many genuine attempts to establish respect for the rule of law.

The exchange of justice for security not only crushed hopes of a robust rule-of-law regime, it also laid the foundation for power abuse to become systemic and undermined the hope of accountability, as will be discussed in the next section. And it did not work out in terms of security either. Many areas continue to be at war, the Taliban are continuously gaining in strength, ISIS has entered the scene, and the war

105 See Jensen 2011 for a summarised discussion of how the inclusion of civil war leaders in the state apparatus was in turn used to crash demands for transitional justice.

106 On the re-armament of militias see e.g. Human Rights Watch 2015, on the amnesty law Leopold 2010.

107 See 2.5 for a detailed discussion.

108 The images from Abu Ghraib and Guantanamo have been part of the daily news and serve as a common reference to the lack of sincerity for justice regards by international actors. The former extra-judicial prison facilities of Bagram serve as a prominent example for Afghanistan.

economy of the civil war times transformed into one that is fundamentally shaped by criminal networks and particularly drug trade (Maaß 2010; Singh 2014). A *malik* from Behsud stresses the consequences this has for the perception of the state administration of justice: "If the government officials were professional, just and honest, then this is the best way for a dispute resolution, but it should not be the officials like those of the Karzai government. When the government cannot provide security to its people, how will it be able to resolve the disputes of the people?" (2.7; Focus group discussion 2).

Just as the quote by this judge, the data from Bamyan indicate that many justice providers themselves believe that the rule-of-law regime they ought to serve is of very little relevance in practice. As will be discussed below, the inability to confront power-holders and a culture of impunity also undermines their impartiality and accountability.

People's suffering from insecurity, the lack of access to justice and the subsequent disenchantment with the state building project also provides an incentive to hope for alternatives to this order, for taking disputes to Taliban courts where they exist (Giustozzi & Baczko 2012), or join ranks with those fighting the current order.

The question remains though why communities cannot take over the enforcement of settlements. Even though it is little surprising that small communities find themselves unable to resist well-connected warlords or criminal networks, elders rightfully claim that most scenarios of trespass could effectively be dealt with locally, just as in any social community, Afghan or not. Given the traditional distance of the Afghan state, particularly in rural areas, the means and methods of doing so are well established and well known. Considering the effective control of women in public space, communities appear to still be fairly successful in controlling local norms and public interests. What the cases suggest is that this capability to enact social control of norms and to sanction rule-breaking effectively, seems to work only where the concerned culprit is in a relatively weaker position. As Coburn points out, "the fact that disputes were resolved more regularly in Afghanistan before the war years, when the formal justice system had even fewer resources, indicates that other causes are involved" (Coburn 2011a: 1).

The findings suggest that this is due to a combination of factors. One is that customary means of dispute resolution and law enforcement have in some regards been weakened during the wars. Particularly the long-term reliability of social relations within communities, which is a fundamental condition for making customary means and methods of social control powerful, has been challenged by the many large-scale, long-term migration and refugee movements. Also, the fact that power is usually not accumulated locally anymore, but relies on access to external resources tends to increase power differentials between disputing parties and undermines many of the traditional means to gain control over rule-breaking.

As Barfield notes, the non-state system has particular shortcomings

> […] in the ability of a weak party to demand settlement from a much stronger one. […] Where customary law fails entirely is where it was never meant to go: solving disputes among people who do not see themselves as a common community. […] In the absence of strong common bonds, disputants have less incentive to accept an unfavourable outcome or to consider a ruling as binding. Under such conditions disputes become more political in nature and are resolved to the advantage of the stronger party (Barfield 2006: 17).[109]

109 Traditionally, the private right to take revenge was meant to mitigate this imbalance. For a discussion of how retaliation has lost its capacity as a means of empowerment for the weaker and a tool to forestall a dispute's escalation see Stahlmann 2016.

The frequent recourse by injured parties to the state order, the regular ignorance of locally achieved settlements, and the many complaints of power misuse within communities in the cases of the reports, show how much the mighty ones are indeed beyond social control.

Impartiality and institutional oversight

The weakness of the state administration of justice does not only lie in the inability to confront those in power. State officials, whether they are judges, general attorneys or members of the police, may also find themselves in direct dependency of illegitimate power-holders – through direct threats or for fear of future repercussions. Where the judiciary cannot defend laws against the powerful, it can neither protect its own members from the powerful. Personal confirmations of such fears are difficult to obtain, for admitting to be fearful and helpless fundamentally undermines the remaining authority of a justice provider. Even in the relatively safe setting of Bamyan, concerns were voiced in private settings only. What might matter even more is that irregular dependencies and allegiances are widely assumed by the public.

Pervasive corruption, and a failure of oversight institutions,[110] sets the stage for state institutions turning into accomplices of crime and practically part of criminal networks in general and the drug trade in particular (Maaß 2010; Singh 2014). The persistent accusations of partiality are not only caused by corruption though. They are, too, a result of biased and partisan recruitment policies within the respective branches of the government and state institutions. Partly, these build on former war-party networks, partly on ethnic and tribal favouritism. In case of the police forces it seems to be a combination of both (International Crisis Group 2007; Singh 2014). Not only are these networks thus strengthened by the resources that are channelled through them. They, also, tend to lack loyalty to the state (Singh 2014). The distribution of power within the state system among the pre-existing power-holders continues their competition over public resources. An example of this is the competition between the institutions responsible for justice provisions, which fundamentally undermines constructive cooperation and the chance of finding support with justice concerns.[111]

This expectation of partiality, however, not only applies to state officials, but to everybody who enjoys influence or power. For instance, a housewife in Behsud stated:

> Most of the government officials, members of the provincial council, *maliks* and other community elders prefer their personal links in decision-making processes. They are under the influence of strongmen and they are bribed by one of the disputant parties to make decisions in their favour (…) The *jirga* instead, should make decisions according to Islamic laws, keeping the facts in mind rather than doing favouritisms (2.7; interview community member #2).

Methodologically, it is not always easy to gain access to such critical voices about non-state actors. Local authorities have the advantage that their claim to speak for the community is sometimes hard to circumvent practically and, thus, impedes critical investigation of their assertion to enjoy legitimacy. The constraints of contact with female informants discussed in 2.7 illustrates this. No doubt, there are elders and local authorities who go out of their way to serve justice. Given that they assume positions of power, it is still necessary and worth asking the same critical questions regarding the source of their powers, their impartiality and institutionalised control over them, as one does with state officials. And claims and stories of success and legitimacy should be double-checked. In the setting of Bamyan, several of such stories of success have upon investigation turned out to have led to yet another case of murder.

110 See SIGAR 2011, Wardak 2011 for a focus on the judiciary, and Isaqzadeh 2014 on the police forces.

111 See Wardak 2016 for a detailed discussion.

The parties just did not find it useful to return to the *shura*, which had already failed to settle the dispute. Inquiries among those who decided against pursuing their rights claims in all three research settings reveal that local authorities are either considered powerless or partisan when there is a power difference between the disputing parties.

While a lack of power is easily explained when commanders and high-ranking government officials are involved in the dispute, they alone cannot account for this persistent feature. Partly, this is due to the disruptions within local communities and the weakening of social bonds, which made communities more susceptible to influence by 'gunlords' than in earlier times (Barfield 2006: 17). One way in which the power of such warlords continues is exemplified by the case of the commander of Istalif featured in 2.4. He consolidates his power by engaging in dispute management which allows him to gain control over dispute processes, parties and outcomes. His rule resembles in many regards the uncontrolled power of the war-party regimes in civil-war times. As a resident from Istalif stated: "The main aim of this *shura* is to allow these former civil-war commanders to keep control of the district, and to keep their influence over the population."[112]

Nevertheless, many local residents grant him legitimacy and support for using his power to ensure some kind of control over and within the community. This underlines the immense value of enforcement capacities.[113] The shortcomings in terms of rule of law are nevertheless immense, and are to a large degree due to the lack of accountability. The lack of control can be seen in the extent to which the commander outruns state officials in terms of power. "The chief of police of Istalif fears that if he goes against them, he might get fired because the commander is connected to Dr Abdullah [Chief Executive of the Islamic State of Afghanistan], who can fire the chief of police within hours."[114] A state justice provider gave an example: "Some people referred to me for a dispute where the counterpart had connections with the commander. Before even starting the investigation process, the commander comes to my office asking to view the dispute's papers and shouted that no one should stand in his way, claiming that he was able to resolve the issue by himself. I explained to him that he was inside a state institution where none should and can commit illegal actions." (2.4) The case featured in 2.3 serves as an illustration.

The courts' practice to refer cases back to non-state authorities against their will is thus at times a dubious support of such local power-holders, as it sanctions and strengthens uncontrolled power. Particularly in the cases, whereby judges hold it against parties that they do not agree with a locally made decision, but choose to return to court for a review, the door of redress through the state is practically closed and non-state actors gain uncontrolled and unchecked power over the proceedings.

The assessments people make of local authority figures, however, suggest that accusations of impartiality are also due to a more general change in the production of local authority, which, in reference to Elwert, can be described as a shift from the *khan*-model of power to a warlord-model. Elwert summarised the differences between these, with African settings in mind, as the difference between warlords and 'big men'. Warlords, he wrote, "create power with money for weapons and mercenaries, and win prestige from power, which gives them credit for the acquisition of new wealth. Big men […] transform prestige into power. Power may create wealth, but wealth and labour power has to be 'devoted' to the people in order to create prestige" (Elwert 2002: 42).

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112 See 2.2, interview #2.

113 The support, which the Taliban enjoyed when they first assumed power and ended the complete lawlessness, which the reign of criminal gangs had created, is an example for this kind of legitimacy.

114 Personnel communication by a researcher involved in writing this report. See also Singh 2014, and for an account about local police in Istalif see Coburn 2011b.

When that shift happened exactly, is difficult to trace; we can hardly judge if the *khan*-model was ever fully valid in practice. The historical accounts suggest though that with the beginning of the civil war, the foreign military interference and the ever-increasing dependency on foreign money and weapons not only changed the conditions of leadership in terms of necessary skills, but also sealed off the dominance of the warlord-model of power.[115] The descriptions people give of what legitimate authority should be like (honest, impartial, of good character, concerned about people and their problems, not his own), still refer to the *khan*-model,[116] in which power would have to be legitimised by general rule-abidance. Instead access to external resources is the decisive criterion for local authority, which has in principal not changed since the Taliban fell, even if it is currently in some areas rather access to development funds than weapons (TLO 2014). Practically, power thus depends on access to those with even more power, rather than local legitimisation. As a result, one must not offend those with more power, because one might be cut off from access to existential resources. People's dependencies on these outside resources and thus on those who can procure them, undermine the ability by local communities to exercise effective control over them – in dispute management and beyond. A woman from Behsud commented: "These days the *jirga* has also lost its standing due to wrong decisions, which are totally against the law and human rights. For instance, *jirgamaran* [*jirga*-members] are not as honest as they were before. They fix *machalgha* and use it themselves" (2.7).

This lack of local control explains, why the accounts of non-state actors in the case studies often deviate fundamentally from the idealised accounts of customary justice. Taking these idealised descriptions at face value is thus as misleading as assuming that state justice institutions are able and willing to fulfil their official mandates. In both realms, success in dispute settlements rather depends on two things: one's own resources and one's relationship with those with more resources. The case in 2.2 exemplifies how these relate to each other. Respect for power is thus often an acknowledgment of current or future dependency, based on a hierarchy of resources. This logic applies to everybody, as there is always someone higher up in the ranks. Locally, this not only deters witnesses from supporting the truth of the weaker, but also sets aside traditional norms of solidarity and institutions of social protection of norms.[117] The report on Behsud in 2.5 shows how the combined failure of impartial law-enforcement by state as well as non-state institutions creates an environment that is nearly completely void of any kind of control over power and turns the institutions of justice into accomplices of crime and trespass.

3.2 Particular challenges for women in seeking justice

> In Behsud district women face a number of constraints when accessing justice. These constraints usually emerge from our norms and values and the way of life in our villages. Women cannot file cases against their brothers and husbands to seek their rights. If they do so, usually their families cut off their relations with them until the end of their lives. Women are asked to keep silent and don't open their mouths in front of their brothers and husbands. There is a famous proverb in Pashtu: women are either for homes or graves.
>
> – Teacher in Behsud (2.7; interview non-state actor #1)

115 See for example Anderson 1978 for pre-war developments that already supported this change, and Glatzer 1996, and Edwards 2002 for war related reasons for that shift.

116 The data from all three settings agree on this.

117 For a more detailed discussion of the consequences this has on social ordering and even basic provisions of social security see Stahlmann 2015 and 2016.

Practices of disputing have their own specific rules and institutions. But the particular disputing relationship between claimant and defendant is just as much part of the social realm as other social relationships. In a society in which gender plays as prominent a role in organising the private and public realm as in Afghanistan, it comes as no surprise that seeking justice for women is a very different experience than for men. The reports 2.6, 2.7 and 2.8 illustrate this difference vividly. They also illustrate that the same discriminatory structures which undermine women's enjoyment of rights in the first place also serve to limit their access to justice.

It is noteworthy though that as opposed to men's rights the normative plurality regarding women's rights is immense. The long-term migratory experiences and diverse biographical backgrounds caused by the wars have further increased the already extreme normative plurality that could be found in pre-war Afghanistan. Social distinctions along long-lasting markers of identity, such as ethnic or sect-affiliation, hardly allow any pre-assumption in regards to the norms people believe in and privately live.[118] The father in 2.8 who makes sure that his daughter finishes school and supports her in becoming a women's rights activist is as much part of the Afghan reality as the sisters in 2.8 who scorn their sister for asking for her inheritance share even though she is in existential need. Nevertheless, in the public realm the wars and the mass migratory movements rather led to an assimilation of what used to be immense differences between the rural and urban realm in pre-war times.[119]

The reports confirm that this assimilation leans towards a systematic social discrimination of women in seeking justice, which undermines the enjoyment of rights that are granted to them under statutory and *sharia* laws. Two features are of outstanding importance in this regard. The first is the patriarchal order and the way it tends to regulate family-internal relationships; the second is a longstanding negotiation over the question who has the right to govern which social realm. Due to space constraints, the following hardly does due justice to the practical plurality, but will summarise these two features in a schematic manner.

Patriarchal order and its means

That hierarchical and patriarchal patterns dominate both the public and the private realm is not new, but was and is used to answer the immense degree of insecurity of life in Afghanistan. Lacking any kind of public protection from outside threats, whether from nature or people, the family unit has to provide basic social security. The social responsibility for the family's safety and wellbeing lies with the head of the household who is in turn given the right to override individual interests of family members for the sake of this goal.[120]

It is not only hierarchy *between* men and women but also *among* men and women, prescribing clear-cut duties to each family member in serving this unit. The expectation to serve this unit comes along with the expectation to honour this hierarchy. The sometimes disturbing quotes by women on 'how a good woman is one which suffers silently' and does not consider her own interests, expresses how crucial the family's unity is considered to be for the survival of all (Luccaro & Gaston 2014; report 2.6). In the most extreme version this practically denies women full legal capacity. Where rights are not voluntarily granted and women wish to claim them, they face the problem that challenging their superiors' rule necessarily disrespects this hierarchy. Even where women's rights are theoretically endorsed, practically the offense

118 There are female Pashtu human rights activists and Hazara women who justify a husband killing his wife by her 'inappropriate appearance in public', quoting what was above cited as a Pashtu proverb: 'A woman is made for the house or the grave.' Both are extreme cases, but the reports and the men and women featured there reflect this variety.

119 Not only has there been a trend of urbanisation. People also returned after decades of city life in exile to their rural places of origin. Another reason are the long-term security concerns.

120 For a recent study on perceptions of masculinity see Echavez, Mosawi, Pilongo 2016.

of disrespecting the hierarchy easily overrides the legitimacy that may be granted to a woman's claim in general terms.

If a woman decides to not only challenge a superior's rule internally, but does so publically she demonstrates to the public that her male head of the household is either unwilling or unable to exercise control over his household. This is shameful along persistent expectations in masculinity, and it is likely to be interpreted as a sign of weakness of the responsible head of household. This is risky in an environment that always was and still is potentially dangerous and marked by impunity and where signs of weakness might provoke trespass and attack. The weakening of social control of norms within communities together with the immense and large-scale security risks further increases the need to proof oneself powerful to the public and thus the stress on control over women.

An indication that a woman has crossed the lines of expected behaviour and thus that the father or husband has not lived up to public expectations, is the practice of shaming, as discussed in 2.6 and 2.7. The practical sanctions for this may be physical abuse or expulsion from the family and thus the loss of all socio-economic protection.

This does not mean, or is not meant to mean that women are completely left without protection against abuse from, for instance, husbands or mothers-in-law. What women need is the support from another male who is considered family, usually her father or brother, to confront the abusive husband and provide protection. Obviously, this relies upon the brother's readiness to support his sister and risk the confrontation with her husband. The weakening of social control of those more powerful discussed above disadvantages women in this regard, for generally speaking the wife's family is often less powerful than the husband's. Also, the many migration movements have often put immense distances between a woman and her family of origin, making it practically impossible to access them. Still, the theoretical option for a woman to seek refuge with her family of origin can exercise quite some control on abusive husbands or mothers-in-law.

For women's dispute management this is of immense concern, as the case of inheritance rights illustrates. Claiming these rights from her brother easily risks the loss of his protection against her husband. If a husband knows that his wife has lost her brother's protection, the risk to fall victim to abuse by him increases. More distant relationships, like that of a woman with her nephew in 2.6, are often less of a concern. Disputing scenarios thus need to be tested for the potential relational repercussions and the potential future risks a dispute would pose to the easily endangered provision of social security, which women's lives depend on practically. And each case scenario has to be evaluated for how grave the challenge is that it poses to the patriarchal order on substantial grounds. Section 2.6 discusses in detail how for instance women' claims to inheritance are an immense socio-economic challenge to this patriarchal order.

Women and the order of legal governance

The roles, which the patriarchal order assigns to men and women clearly follow different objectives than those of state or human rights laws. As a result, these lead to different understandings of personal relationships, personhood and concepts of legal governance. It is not merely a matter of competing norms of what a husband may or may not do to his wife. And it is not merely a question of whether a daughter may inherit nothing, half of her brother's share or just the same as him. The competing concepts of a woman's role in a dispute also relate to different concepts of legal governance, different concepts of who may and may not govern which social realm. The negotiation about the different roles goes back to the beginnings of the Afghan state, and the first attempts by King Abdur Rahman to curtail regional and local power-holders. Since then many rulers and governments have tried to advance the

state's power to govern communal and personal affairs. As Suhrke reminds us, they tended to do so based on claims to modernity (Suhrke 2007). What they all did though, including the Taliban regime, was to claim control over communal and personal affairs.

In many regards the state's presence has become a regular and accepted feature, and people's frustration with the governments during the last 14 years is a strong indicator of a fairly high level of expectation towards the state to take on responsibility. However, the barriers that are put up when women attempt to seek justice beyond the realm of their families, are a reminder that the state's claim to govern intimate relationships is not undisputed. Roughly, the competing customary model claims that no one may curtail a man's right to control his personal affairs (Barfield 2006; Glatzer 1998). The community is responsible for providing the support so that disputes among men are dealt with constructively. The community may demand that disputing parties do no harm to the community by taking the risk that a dispute could escalate and it can defend itself against a trouble maker. Just as the community, the state may demand its own interests to be respected, such as taxes or conscription. Otherwise the state is responsible for protecting the nation from outside harm and defending its autonomy, just as the community has the right and duty to protect itself from outside harm and interference, and a head of household has the right to do the same for his personal affairs. The fact that the state usually attempted to interfere in these claimed autonomous realms of legal governance with the argument to ensure respect for Islamic laws, makes it difficult to challenge this intrusion on substantive grounds.[121] But according to this perspective, it is not a matter of substance but a matter of principle, as any claim by the state to govern community affairs and even more so the private realm, constitutes an illegitimate intrusion (Glatzer 1998). The principle that disputes should be dealt with in the social realm where they emerged, is a summary of this model.

What connects this concept of legal governance with the issue of gender is that men, as free and autonomous subjects, may choose to use *shura* or state support as a means to conduct their defense of rights, while women are not. As a tribal elder in Behsud stated: "We live in an Islamic and Afghan society, where people don't allow their women to deal with cases outside their families. Therefore, women usually don't bring their disputes to us" (2.7; Interview non-state actor #1).[122] A *malik* from Istalif explained: "Here in Istalif society it is shameful for women to have disputes. So they do not have permission to go out of the home and talk with *mullah* or *malik* or go to the government for their dispute" (2.6; interview #5).

A woman working in a women's shelter in Bamyan commented about those women who had sought refuge in the shelter: "I would never do what these women did. I would rather let my husband kill me than go public and put shame on me and my family." Just as it is shameful for a husband or father not to be able to control the woman of the household, so it is collectively shameful for the community not to be able to control its women (Glatzer 1998). Women thus have to overcome considerable barriers in order to access both the community and the state justice institutions.[123] Where a woman chooses to address not just community members but also state institutions, she thus sides with the state against her superior male in their competition over who has the right to govern internal family affairs, including the household's women.

This is the extreme version of this particular model of governance and it is not the only one. The state has been a governing force for a long time in Afghanistan and the concept that men's rule over their women

121 A pattern that started with Abdur Rahman (1880-1901). For detailed discussion see Olesen 1995.

122 Women's exclusion from the public or from access to justice on principle can hardly be justified by classical Islamic jurisprudence. It happens though that *sharia* justification is used for customary norms.

123 See Luccaro & Gaston 2014 for a detailed discussion of these barriers with reference to domestic and sexual violence.

has to have limits is widely shared. There is also a growing number of women who have become used to be in public environments and speak up for their concerns. Hassina, the head of the women's *shura* in Istalif, who is featured in 2.8 serves an example of this, just as her father who encouraged her to go to school and study is an example of a man actively trying to end this tradition of women's unconditional subordination.

There are several indications that the traditional model of governance still has a powerful impact on women's access to justice. One is that the strategies by institutional actors in response to women going public as discussed in 2.7 serve to repel rather than support them. These are classical scenarios of shopping forums (Von Benda-Beckmann 2003). After all, it is not only disputants, who seek to find the best institutional support by forum-shopping, but also justice institutions tend to 'shop' for cases that serve their interests best and try to get rid of others. Such interests might be practical, such as the procurement of bribes, or reducing a work-load. Institutional actors might also be concerned about their authority in defending parties who enjoy no communal support. The practices by community forums regarding female claimants described in 2.7 illustrate this pattern. As long as there is a chance that the responsible man keeps the respective woman under control, community forums assist in this attempt by refusing assistance. As soon as she overcomes this barrier and makes the claim public, the community has a vital interest in dealing with the matter in order to regain control over the woman and preclude interference by the state. As community-based institutions tend to share the normative convictions of their male peers and often disregard *sharia* or statutory rights, this is often of limited substantive support. However, a woman who threatens to go to court increases a community's interest to actually deal with her claim, just as the threat to go public provides incentives for her family to take her seriously.[124]

The threats of physical abuse or expulsion by families make it a risky dispute strategy for women coax their families and communities into action by announcing to seek support from the state.[125] The threat to be shunned is the female equivalent of the traditional punishment for men to be excluded from the community for doing harm to it (Luccaro & Gaston 2014; Glatzer 1998). The difference is that men have a chance to survive on their own, while most women depend on their families more existentially.

Women who actually address state institutions, whether it is courts or the police, face yet another new set of risks. Even though their chances to gain access to rights that are denied to them under customary law, such as that to inheritance, should be better protected by state institutions, the question remains if they actually stand a chance to procure them. Just as in non-state institutions there is hardly any female personnel in state institutions. Those who are there, tend to be the subject of internal abuse (Luccaro & Gaston 2014). And both justice and police personnel often seem to respond rather as concerned men rather than as concerned justice providers. The many accounts of verbal, but also physical abuse by members of the police and justice personnel show that this environment is easily hostile to women and their interests. The cases show that the regular attempts by judges to refer the parties back to non-state actors serve to undermine the option of redress by the state and thus robs women of a main asset to negotiate settlements within the social realm.

124 On the details of these strategies see Luccaro & Gaston 2014.

125 See 2.6, 2.7 and 2.8, as well as Luccaro & Gaston 2014.

3.3 Conditions, options and limits to elements that work

As the above discussion has shown and the case-reports exemplify, both state and non-state institutions continue to suffer from the after-effects of the civil war and the challenges of the current political environment.

The general problems that people face in state and non-state institutions have shown to be very similar. Both the state and the non-state system is shaped by either ineffectiveness or have become complicit in favouring relatively stronger parties. The latter may be due to pre-existing bonds between disputing parties and justice providers, which lead to favouritism. Or it may be the mere result of bribery and other forms of corruption and dependencies. Where enforcement powers exist, both types of institution are thus marked by a lack of accountability (e.g. the commander's *shura* in Istalif). All this supports the relatively stronger party in a dispute and thus fundamentally curtails access to justice and the rule of law.

Many of the root causes of these phenomena can hardly be addressed at the level of development aid. Some because they lie in the past. The harm that has been done to traditional kinds of authority and social control of authorities' conduct is one example of such lasting effects. Addressing justice institutions cannot always provide an answer either, for some issues lie beyond the realm of institutions. These may be the large-scale security concerns and the regional politics that shape them, the general culture of impunity and continued power of war parties, or the corruption that shapes Afghan politics in general. All these, and many more, fundamentally undermine the respect for any law and the authority of institutions, which could provide justice. They, too, take away incentives to fulfil institutional mandates professionally. All this sets narrow limits on what can be done to support disputants in seeking justice.

There are indicators that there is a lack of awareness of legal provisions and procedures among some actors.[126] Some of the frustration of disputing parties with the length of procedures might thus be mitigated by raising awareness e.g. about the procedural requirements in the state realm. Similarly, not everyone seems to be aware of the legitimisation of women's rights through Islamic laws and provisions.

However, more often than not, rights and rules seem to be ignored or discarded consciously. This suggests that many of the practices that are used to manipulate the outcome or disadvantage the weaker party can only be mitigated by an increased institutional oversight. As long as such an oversight is a mere personal assistance for victims of trespass and not backed by substantial reforms in the general political order, e.g. through effective anti-corruption policies, this will be of limited reach. Personal assistance will not end the misuse of power, and it will not end the control of the illegitimate power networks who protect perpetrators. Hassina will not be able to help the wife of a commander in her wish for a divorce. Nor will a lawyer be able to lastingly protect a victim of land grabbing, which a high-ranking government official profits from. The cases indicate that increased transparency and external supervision of institutional conduct can nevertheless curtail some of the manipulative power of stronger parties over disputing procedures and institutions.

What the research confirms is that many of the immediate frustrations – and thus the highest potential for relief from injustice – rests on the relationships between the different justice providers. Cases from all research settings have underlined that it is not so much the lack of cooperation but the kind of cooperation which is the concern in terms of justice.

126 Interview with an elder who complained about this lack of knowledge among the people (2.6; interview #5).

The case featured in section 2.6 shows how much there is to gain for these institutions and the victims of trespass, if institutions mutually support each other. However, the cases also show that this does not work where there is a considerable power difference between the parties. As different as the relationships between state and non-state institutions are in the different settings, they all tend to increase the existing imbalance of power between the parties rather than decrease it.

The responsibility for this mismanagement lies to a considerable degree with the state system. The referral back to a *jirga* against the party's wish is such an example, as it undermines the option to use the state for redress in case rights claims are not honoured by non-state institutions. Another is that the ultimate responsibility for enforcement and control of perpetrators should rest with state institutions. A lack of enforcement capacities or the interest to actually control perpetrators undermines the respect for the justice sector at large, verdicts and settlements in particular and the authority of law as such.

Rather than providing assistance for each kind of institution separately, support of weaker parties could be most successfully done by providing assistance throughout the whole dispute process. The legal assistance programme run by the Norwegian Refugee Council has been brought up by informants both in Behsud and in Bamyan as a positive example of such assistance. Run by lawyers and former judges, they are publically recognised for their legal competence and thus can take up supervisory functions during court proceedings as well as help to mobilise enforcement powers. Making sure that state institutions are an actual option for redress can in turn help to open the doors to a voluntary agreement by non-state procedures and institutions. By supervising the settlement process for its compatibility with current laws and formal standards, they also help to forestall future problems in defending rights.

Hassina, the head of the woman's *shura* in Istalif, featured in 2.8 is yet another positive example of taking this approach. As she is known not to shy away from making abuse or rights denials public and assist women with going to court where need be, she creates an immense incentive for the women's family and particularly the responsible man to acknowledge rights claims. Practically, this turns the practice of shaming, which usually bars women from claiming their rights, into a threat against men and appeals to their interest in keeping internal family affairs within the family realm. Claiming rights remains a highly risky affair for women, but Hassina can serve as an example of how access to justice can be improved by low-scale interventions. Another widely shared request was a much larger number of women employees in the state justice administration.

There is another reason why the case of Hassina cannot be regarded as a one-fits-all solution. By confronting local power-holders in an environment which she shares and on which she depends, Hassina runs a real personal risk. This social vicinity to women in need is, however, a precondition to create the level of trust necessary for women to seek outside help in the first place. Women in Behsud stated that "It would be good, if there were three, four elderly women in the village, whom we could approach and who could help to defend our rights."

For male supporters, the criterion of intimate familiarity is a slightly smaller concern, as their access to outsiders is hardly barred on social grounds. Where men assist men, it is rather an advantage if those who support the dispute process do not actually live in this place permanently, as it makes their and their families' security less dependent on local power-holders. It also gives them the chance not to be directly associated with the local war-related injustice of the past. And it is easier to earn trust, if one is not suspected of partiality and favouritism merely because of being part of the social fabric. Anyway, earning trust is nothing to come by easily. The malpractice by the real estate agent in 2.3 illustrates why people have a good reason to be suspicious. In terms of rule of law interests, it is worthwhile identifying and supporting those who not merely earn respect due to their enforcement powers, but actually identifying

those who have proven to be trustworthy and supportive no matter who is in need of justice. In that way, paying attention to the way in which local actors gained power serves as a criterion to test their impartiality and trustworthiness. Asking members of a competing war party how they are treated by the commander who assumes legal powers is such an example. This would also constitute a change in politics, away from the persistent warlord back to the traditional *khan*-model of local authority, and thus also a start to strengthen local capacity to regain control over those who are in power locally.

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