



INFORMAL JUSTICE AND THE INTERNATIONAL COMMUNITY IN AFGHANISTAN

Noah Coburn



UNITED STATES
INSTITUTE OF PEACE

ABOUT THE REPORT

This report analyzes the array of programs that dealt with the so-called informal justice sector in Afghanistan from 2008 to 2011. It focuses on a series of pilot projects sponsored by the United States Institute of Peace that engaged local Afghan organizations at the district and provincial levels to observe and record how informal justice systems resolve (or fail to resolve) people's disputes, and how informal and formal justice actors relate to each other in practice. It also examines the expanding role of international actors in local dispute resolution and the impact that such interventions have had on local practices and perceptions of justice. The report finds that the informal justice sector provides a pervasive and effective, if sometimes flawed, venue for the majority of the Afghan population to access justice and argues that the international community should commit more fully to supporting local informal justice mechanisms.

ABOUT THE AUTHOR

Noah Coburn is a political anthropologist at Bennington College. Since 2005, he has conducted over four years of research in Afghanistan for the United States Institute of Peace, the Afghan Research and Evaluation Unit, and other organizations. His study of local political structures, conflict resolution, and violence, *Bazaar Politics: Power and Pottery in an Afghan Market Town*, was recently published by Stanford University Press. He has a PhD in anthropology from Boston University and an MA from Columbia University.

Cover photo: iStock. Supporters of Afghan presidential candidate and former foreign minister Abdullah Abdullah line the streets in Gazni province for a campaign rally in Jaghori Afghanistan. (Photo by Paula Bronstein)

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

United States Institute of Peace

2301 Constitution Ave., NW
Washington, DC 20037

Phone: 202.457.1700

Fax: 202.429.6063

E-mail: usip_requests@usip.org

Web: www.usip.org

Peaceworks No. 84. First published 2013.

eISBN: 978-1-60127-172-3

© 2013 by the United States Institute of Peace



PEACEWORKS • APRIL 2013 • NO. 84

Introduction ...	5
What Is Informal Justice in Afghanistan? ...	9
The International Community and Informal Justice ...	33
Best Approaches for Working with Informal Justice Mechanisms ...	57
Systemic Problems in International Engagement with Informal Justice ...	65
The Culture Gap: Paradigmatic Issues Related to Working with Informal Justice Mechanisms ...	73
Conclusions ...	81

[While few Afghans have confidence in the state's ability to deliver justice through the formal court system, the informal justice sector in Afghanistan provides a pervasive and effective, if sometimes flawed, venue for the majority of the Afghan population to access justice.]

Summary

- Informal justice is an often debated yet poorly understood concept in Afghanistan. Generally, it refers to a series of mechanisms, such as local councils (*shuras* and *jirgas*), that are outside of the state's direct control—though not necessarily beyond its influence—and that are used to resolve disputes and conflicts in a manner perceived as legitimate by local communities.
- While few Afghans have confidence in the state's ability to deliver justice through the formal court system, the informal justice sector in Afghanistan provides a pervasive and effective, if sometimes flawed, venue for the majority of the Afghan population to access justice.
- However, large, internationally sponsored programs attempting to promote rule of law through the informal justice sector have faced serious paradigmatic and programmatic challenges that have made these programs generally ineffective and, at times, counterproductive.
- In particular, failure to understand fragile local power dynamics and efforts to apply a unitary model have changed structures of local legitimacy and accountability and may have emboldened or empowered local actors with limited community oversight.
- Smaller, Afghan-led initiatives have met with more success in increasing predictable dispute resolution, suggesting that certain types of small, flexible, and context-responsive programs focused on linking the formal and informal sectors can promote more predictable access to justice, particularly given the challenges facing formal sector reform.
- These small-scale projects, however, still face serious challenges, particularly when it comes to monitoring and evaluation and coordination with other programs, including the National Priority Programs of the government of Afghanistan.
- The government of Afghanistan needs to be more sensitive to local justice concerns and work in particular with local leaders in a more cooperative manner that is aimed at improving relationships and locally legitimate service delivery and not simply at extending the reach of the state.
- The international community needs to commit itself more fully to increasing access to justice and dispute resolution for all Afghans—on the Afghans' own terms. In doing so, it also needs to be respectful of local cultural patterns and cognizant of local political economies.
- Such a strategy means moving away from funding large projects that take a cookie-cutter approach to rule of law and that rely almost exclusively on outside experts and models and moving toward small, dynamic Afghan-led projects that have to date proven more competent on a small scale.

[INTRODUCTION]

Every serious recent attempt to analyze the ongoing instability in Afghanistan has included a commentary on the lack of justice as a motivator of grievance and conflict.¹ A number of these analyses have focused on the twin facts that Afghanistan's formal justice mechanisms are seen to be expensive, corrupt, and slow, while "informal" justice mechanisms are preferred by local communities because they are more familiar, more credible, and less corrupt.

In its increasingly fervent search for success in Afghanistan over the past few years, the international community began to pay much closer attention to these mechanisms and try to support existing ones or create new ones based on its understandings of functional, historical models. Approaches have varied from small-scale projects implemented by local partners to multimillion dollar interventions implemented by large international contractors that include the training of local dispute resolution facilitators and the paying of their salaries.

Given the millions of dollars that have been spent by the international community over the past ten years on improving the formal justice sector, the fact that the vast majority of Afghans still prefer informal justice mechanisms raises serious issues about the effectiveness of these programs. These include the practical question of whether the informal and formal systems can be combined, the programmatic question of whether the internationally driven rule-of-law programs were well designed in the first place, and the philosophical question of what "justice" means to Afghans in a continually evolving context.

This report begins with the latter question, situating Afghan notions of justice within a specific political and cultural context. While the international community has tended to see "justice sector reform" as a subcomponent of "security sector reform," for Afghans the question of justice plays a far more political role. Perceptions of political legitimacy are derived from judgments on how "justly" political actors behave, while community harmony depends on the satisfactory resolution of disputes. Both the political legitimizing function of dispute resolution and the impact of dispute resolution on community harmony have lodged within the Afghan informal justice system a preference for "restorative" solutions rather than the "punitive" measures of Western formal justice systems. Particularly in times of instability, the cost of not resolving a conflict within a community, or a conflict that involves several communities, affects a population much wider than that composed of only the disputants. This often leads to compromises that, while not perfect, are better geared to long-term stability, whereas the formal justice system tends to render "winner-takes-all" verdicts that leave a lingering sense of injustice on the part of the loser and that may contribute to future conflicts. The emphasis on reconciliation and the promotion of social harmony also reflects the influence of Islam on Afghan perceptions of justice. Some interpretations of Islamic law, like formal justice systems, have their punitive elements. But, as this report describes, the Islamic division between *huqoq-ul-ibad* (individual rights) and *huqoq-ul-Allah* (literally "God's rights" but often legally understood as state or community rights) provides a potential line of demarcation between cases best handled by the formal and informal systems respectively.

The report is divided into seven sections, including this introduction. The second section gives a broad overview of informal justice in Afghanistan. The third section describes some of the efforts made by the international community to engage the informal system. The fourth section analyzes a series of related programs funded by the United States Institute of Peace (USIP) over the past five years that have engaged with the informal sector in Afghanistan. The fifth and sixth sections analyze both paradigmatic and programmatic issues with the international community's engagement with the informal sector. The seventh and final section offers some conclusions about the future of informal justice mechanisms in Afghanistan.

Particularly in times of instability, the cost of not resolving a conflict within a community, or a conflict that involves several communities, affects a population much wider than that composed of only the disputants.

Sections two through six are written to stand alone, so that readers familiar with justice issues in Afghanistan may choose to skip the second section, while readers interested in government-sponsored programs may wish to read only section three. The recommendations and discussions in section five tend to be particular to Afghanistan, while the sixth section applies lessons from engagements with the informal sector to other countries as well.

The United States Institute of Peace and the Informal Sector

This study emerged from USIP's work since 2002 with the informal justice sector (what "informal justice" actually means, and the limitations of the phraseology, are discussed in the next section). Data in this report come primarily from a series of informal justice projects conducted from 2008 to 2011, including almost one thousand structured and semi-structured interviews conducted by USIP and its partners with Afghan officials, international donors, local leaders, those involved in local disputes, and others in a position to offer a credible assessment of the impact of projects. It also relies on an in-depth reading of the literature on the topic and an extensive review of available sources, including information from other informal justice programs that have been willing to share their data. Throughout the report, names and identifying details in the case studies presented have been changed to protect informants, except for nationally recognizable political figures.

USIP's work in the sector has tended to be small-scale and implemented by local partners with methodologies that have tended to be almost experimental. USIP's early work in the sector helped inform wider efforts that began in 2005 to develop a policy toward the informal sector. The catalyst for much of the recent work on informal justice was the publication of the Afghan Human Development Report, which was dedicated to the question of connecting the formal and informal sectors. Building on this work, in 2008 USIP launched pilot projects in eleven districts across Afghanistan. The implementing partners and the approaches have varied according to the different sociopolitical and cultural features of the area. One of the clearest conclusions from USIP's work is that understanding and accommodating these local features is essential to the success of any informal justice project.

While the analytical methodology used to generate the observations in this report is not based on an exhaustive analysis of every effort undertaken in the sector, it captures enough of its features to draw general conclusions, many of which have been insufficiently appreciated so far, and most of which have never been consolidated in a single study. Given the reliance on interviews to elicit qualitative assessments, many of the conclusions may seem anecdotal. However, every effort has been made to support data from interviews with observations and follow-up interviews that have been corroborated in many cases by other studies on the subject. In addition, it should be noted that creating precise definitions of what a dispute is, how it can be resolved, and even when it can be considered to be resolved is exceedingly difficult given differences between communities within Afghanistan, which in turn makes comparing data between districts and projects difficult. As a result, the statistics and case studies presented throughout the report in text boxes should be seen as general examples of dispute resolution in Afghanistan rather than as precise measurements of the state and nature of dispute resolution in Afghanistan.

III

[WHAT IS INFORMAL JUSTICE IN AFGHANISTAN?]

Informal justice is an often debated yet poorly understood concept in Afghanistan. Generally, it refers to a series of mechanisms that are outside of the state's direct control—though not necessarily beyond its influence—and that are used to resolve disputes and conflicts in a manner perceived as legitimate by local communities. These mechanisms include ad hoc or standing local councils (both *jirgas* in Pashtun areas and the more institutionalized *shuras* in Pashtun and non-Pashtun areas), as well as opportunities for appeal to respected elders, religious leaders, or informal mediators who may act with disputants' consent to facilitate a resolution. They may also be highly localized commercial shuras that deal with specific business disputes, *ulema* councils (councils of religious scholars), and a range of other potential groups and figures that resolve disputes in a locally legitimate manner.

There is often an assumption that in more urban areas courts are more likely to deal with serious crimes, but even within the Kabul court system, informal bodies are often used to address issues such as compensation in criminal cases.²

Informal justice mechanisms tend to apply restorative justice, as opposed to the retributive or punitive justice decisions obtained through most formal court proceedings. They also tend to focus on community reconciliation over individual rights (see box 1). *It is important to emphasize that these mechanisms are not static, centuries-old traditions but dynamic processes that continue to evolve based upon shifting social, political, and economic conditions.* Since they are embedded within communities, these mechanisms are highly reflective of local cultural norms. Similarly, they are often shaped by local political structures, where groups and figures who have the most local political influence, such as military commanders or ethnically based political parties, are most able to influence the selection, composition, and deliberations of informal mechanisms.

Research suggests that a large majority of Afghans use informal mechanisms as their primary means of resolving disputes.³ Anecdotal evidence and qualitative research methodologies reveal significant complaints that the formal justice system is corrupt, expensive, time consuming, and difficult to access. This report begins with some basic definitions and descriptions of these mechanisms in their ideal type but then looks at some of the ways that history has reshaped and altered them, creating the complex justice landscape seen in Afghanistan today.⁴

Justice in Afghanistan today is inherently linked to the ways in which political power is used and abused. A number of studies based on interviews with Afghans across the country began to establish a clear link between the lack of justice, or the corrupt provision of “rule-of-law” services, and support for the insurgency.⁵ These findings led to an attempt by the international community to begin to deal more seriously with the justice sector. But the attempt to address justice quickly became intertwined with a broader counterinsurgency and stabilization strategy in Afghanistan and inevitably led to a search for quick fixes. The existence and apparent effectiveness of traditional justice mechanisms became an obvious focus of attention and resources of both civilian and military actors.

While well-meaning and superficially based on an improved understanding of Afghan culture, the projects that emerged from this new focus sometimes generated perverse results because they were based on a number of flawed assumptions. Two flawed but abused assumptions (not confined to the justice sector) are that local successes are always generalizable across regions and that small-scale successes are always “scalable.”⁶ These flawed assumptions must be kept in mind even in the cases of the USIP projects discussed later in this report. There are many variations of informal justice mechanisms across Afghanistan, in part due to the many differences between localities. This report also shows that, apart from historical, political, and cultural differences between regions, differences in local stability also affect the effectiveness of informal justice mechanisms.

A number of studies based on interviews with Afghans across the country began to establish a clear link between the lack of justice and support for the insurgency.

Box 1. A Divorce in Nimroz

In a village in Nimroz, Malik Khan engaged his daughter to Abdul's son, Niazi, and Abdul's sister was engaged to Anwar, the son of Malik Khan, in a reciprocal marriage agreement. Later, after the wedding, it became clear that Abdul's sister was unhappy with her husband, Anwar. When Anwar realized this, he denied his wife a divorce, saying that he would only do so if his sister also divorced Niazi. This caused a great deal of enmity between the two families that only grew with time.

Finally, the families took the case to a local shura composed of five elders and complained about the situation. The elders on the shura asked the wives of Anwar and Niazi how they felt about their husbands. Anwar's wife said that she did not like her husband, but Niazi's wife said that she was happy. After some discussion, the shura convinced Anwar to divorce his wife and accept a payment of 120,000 afghanis to allow him to remarry someone else, as long as he allowed his sister and Niazi to remain living together happily. Both the families accepted the shura's final decision and were satisfied that all social and economic obligations had been met.

Source: The Liaison Office [TLO], unpublished field research.

What's in a Name?

As several international groups have started rule-of-law programs aimed at engaging informal actors, increasing research has been done, and a number of policy papers have been written, on how these mechanisms can work more cooperatively with the state. Despite these attempts, there remains a serious misunderstanding of how the informal system works. One of the key reasons why the international community's attempts to engage the informal justice system has been so ineffective is the difficulty of translating the phenomenon into concepts that are more recognizable to those primarily familiar with formal Western justice systems. Informal systems have been characterized as “nonstate mechanisms,” “traditional justice,” “community-based dispute resolution mechanisms,” or “alternative dispute resolution mechanisms.” Each of these names is in some way flawed and, more importantly, reflect different aspects of the deep political issues surrounding the phenomenon.

The term “nonstate,” for example, is misleading because government officials, particularly district governors, are often highly involved in these practices. “Traditional justice,” on the other hand, wrongly connotes a static, idealized (or sometimes backward) past that does not take into account the way that these mechanisms have adapted to changing political conditions, or how they have interacted with very modern groups like nongovernmental organizations (NGOs) and international military forces (see box 2). The term “community-based dispute resolution” ignores the fact that in many cases those resolving the disputes are not always from the community affected, particularly when religious or tribal leaders are brought in from other areas due to their reputations as conciliators. It also overstates the degree to which “communities” are coherent and isolatable bodies in Afghanistan.

What to call these mechanisms is not merely an academic or semantic debate. The choice affects policy decisions and perceptions about how to engage them—or even whether they should be engaged at all. Human rights groups, for example, oppose associating the word “justice” with these mechanisms, arguing that the only way individual rights can be protected is through the support of the formal system. This is because, as will be described, informal mechanisms tend to emphasize community rights over individual rights in rendering their decisions.⁷ On the other hand, international contractors that receive funds from donors to work with these mechanisms often refer to them as alternative dispute resolution (ADR) based on tenuous parallels with systems found in the United States and other Western countries where disputes can be resolved outside of the court system. The equation implies that international contractors who have ADR experience in the West are well positioned to send foreign experts to build the capacity of Afghan elders for dispute resolution. In reality, ADR in most Western

*Informal mechanisms
tend to emphasize
community rights over
individual rights in
rendering their decisions.*

Box 2. The Student Council in Chaprahar, Nangarhar

A fight between two neighbors turned violent, with one neighbor accidentally killing the other with a stick. The attacker and his male relatives fled the area before the police could arrive.

The attacker's family was eager to reconcile with their neighbors to end the feud and allow the men to return. The attacker's family took the case first to the village shura, then to the local police, and finally to the district *ulema* council. In each case, however, the victim's son, a student, refused reconciliation, stating that he wanted revenge instead. Finally, respected members of the local student council, of which the victim's son was a member, convinced him that taking revenge would jeopardize his future.

The victim's son finally agreed to a jirga involving members of the student council and several former students from Jalalabad. The jirga decided the attacker should give his house to the victim's family, one million Pakistani rupees, two sheep, and oil. In addition, the attacker and his male relatives could not return to the village for the next two years.

contexts consists of an organized system that augments the formal system. This is very different from the informal system found in Afghanistan, if only because in the West the formal system is preponderant, while ADR is a secondary but neatly fitting system. In Afghanistan, the informal system is preponderant, while the formal system seeks preponderance but remains secondary. Afghans themselves tend to refer to the entire process simply as "reconciliation," though in many cases they may just refer specifically to certain concepts rooted in *sharia* (Islamic law) (see box 3) or *Pashtunwali* (Pashtun tribal code) that are a part of the reconciliation process.

This report uses primarily the term "informal justice," because while being perhaps the least descriptive it is also the least politically charged. It is important to note that "informal" in this sense refers to the relationship of these mechanisms to those of the state and is not meant to suggest that these mechanisms are ad hoc or haphazard. While these processes are rarely as unpredictable as they may appear to external observers, they have their own internal coherence that is well understood by the parties involved. They may also take a variety of surprising forms, even including the use of young, educated men rather than groups of elders. This flexibility is part of what makes these bodies so effective in dealing with a range of disputes, but it also creates complications when it comes to trying to fit them into the Afghan legal code or a framework for adjudication that is readily familiar to foreign donors.

Shuras and Jirgas

The most commonly used mechanisms for dispute resolution across Afghanistan are shuras and jirgas. "Jirga" is a Pashto word, deriving from the Turkic word for circle,⁸ and typically denotes gatherings in which the parties to a dispute are represented by members of their patrilineal kin, who deliberate on the issue. These types of jirgas are related to, but not to be confused with, "Loya Jirgas," which are national-level "grand councils" that have periodically been convened to decide upon questions of major national importance (for example, the 2003–04 Constitutional Loya Jirga that ratified the current Afghan Constitution), imparting the impression of a nationally representative referendum on a given issue.⁹ Jirgas are most common in Pashtun areas in the south and east. In contrast, "shura," a Dari loanword from Arabic, is often translated as "council" and is generally a standing body assumed to be representative of the community.¹⁰ Such bodies can exist at various levels. It is common to find mosque or neighborhood shuras, for example, as well as, at higher political levels, district and provincial shuras. These councils deal with dispute resolution, as well as a wide range of other local governance issues, in the continuing absence of a number of formal deliberative bodies called for by the constitution but not yet created.¹¹ Shuras are found across the country with varying levels

Box 3. Reference to Reconciliation in the Quran

“And if you fear dissension between the two, send an arbitrator from his people and an arbitrator from her people. If they both desire reconciliation (*islah*), Allah will cause it between them. Indeed, Allah is ever knowing and acquainted [with all things].” —Ayah 35 of Surah Annesa

of influence and play a particularly important role in some ethnically divided areas where they help manage relationships between ethnic groups.

The terms *jalasa* and *majlas*, both generally translated as “meeting,” are also used in some areas to refer to gatherings that address disputes. The use of these terms, however, varies across the country. In some places, *shura* and *jirga* are used interchangeably, whereas in others a single term refers to both fixed councils and ad hoc bodies convened to resolve a specific dispute.¹² While there is a great deal of variety in the composition of these bodies, they tend to function in similar ways and promote similar values, in particular those of restorative justice, reconciliation, and equality among male members of the community.

These points of commonality are evidence of a long history in which *shuras* were an important consultative body for communities. This is not to say, however, that all *shuras*, because they are called *shuras*, are necessarily old or rooted in tradition. Chris Johnson and Jolyon Leslie suggest that many local-level *shuras*, often described as timeless entities by local community leaders, were actually set up in recent decades, many at the instigation of the international community.¹³ In other cases, given the Afghan peoples’ experience with foreign involvement, communities were acutely aware that international development funds were more likely to go to those areas with a “representative council” than those not as organized politically, giving them an external incentive to establish such bodies.¹⁴ In recent years, too, *shuras* and *jirgas* have become a key aspect in the ways that international actors, ranging from humanitarian groups and foreign embassies to the international military, attempt to interact with local communities, with these interactions further changing them. Despite questions about the true historical roots of these types of bodies, it is clear that the concept of *shuras* and *jirgas* as representative bodies, vested with decision-making authority over disputes and other political issues, has become firmly embedded in how most Afghans describe local politics and dispute resolution processes.

Cultural Values and the Informal System

There are several key concepts that define the way informal justice functions across Afghanistan. One of these is *islah*, or “reconciliation,” which is mentioned at several points in the Quran as an important religious virtue (see, for example, box 4).¹⁵ Beyond simple resolution of conflict, the concept implies the promotion of social harmony and justice. This religious value, as well as the fear of *fitna*, or social division or disorder, does much to shape the language and practice of informal dispute resolution. Elders often refer to these religious and social values during the deliberation process, and these values form a key element of the social pressure that motivates participants to accept certain decisions. This pressure is in ideal cases unspoken but nonetheless sufficiently present and accepted in order to ensure compliance. Any increase in coercive enforcement observed over the past forty years, often in the form of a threat of social isolation, is very much a reflection of the changing relationship between the individual and the group in Afghanistan, in which the implicit pressure from the community has become less coercive in making individuals conform to group norms. This has often been the result of the dislocation of communities through migration, as well as the rise of the influence of local military commanders.

Box 4. Another Reference to Reconciliation in the Quran

“If two parties among the believers fall into mutual fighting, make peace (*islah*) between them.”
—Ayah 9 of Al-Hujurat Surah

Another important cultural basis for nonstate dispute resolution in some parts of the country is Pashtunwali, a cultural code found in Pashtun areas. Pashtunwali often dictates specific procedures and punishments in dispute resolution. While sometimes referred to by both Afghans and outsiders as a “tribal code,” with the implication that it applies to all Pashtuns in the same way everywhere, in actuality it varies in interpretation and application from area to area and over time.¹⁶ This system is often combined with notions of what it means to be a “good Muslim,” despite the fact that the two diverge on some key issues. The core values of Pashtunwali, such as honor and hospitality, do much to shape how decisions are made in Pashtun areas and even have certain resonances in non-Pashtun areas.

These two value systems—sharia and Pashtunwali—can create tension when they are at odds with each other. For example, in most Pashtun traditions, a woman does not receive any inheritance from her father, despite the fact that the Quran clearly states that she should receive a half of the share that her brothers receive. In general, however, such distinctions are usually made by religious scholars and urban elites, while local communities generally manage to conflate the two systems.¹⁷ For example, a woman might receive a half share of the cash that the family has but none of the land that is divided among her brothers. In some instances these differences may actually create some space for negotiations within the dispute resolution process. Thus, a particularly poor woman may receive a share of the inheritance to ensure her economic survival, but if her family is well off, she might be denied this right. In the latter case people may be well aware that this violates sharia principles but will not bring the point up unless they disagree with it for some other reason. Ultimately these religious and cultural ideals are constantly negotiated depending on the case. They are not ossified principles that are consistent in each case.¹⁸

Two other concepts, rooted in Islamic jurisprudence, are also often discussed as shaping informal mechanisms. These are *haq alabd* and *haq allah*, described respectively in the Quran as the rights of individuals vis-à-vis each other and the rights of God or the rights of the community.¹⁹ According to most interpretations, *haq alabd* are individual rights, and offenses against them therefore are forgivable through negotiation or compensation to the victim. The rights of God, however, are those offenses against the entire community, such as murder, that cannot be compensated or forgiven and instead require punishment. A single incident, such as a homicide, can represent both aspects; resolving one element, such as imprisoning the killer in satisfaction of the *haq allah* obligation, may not resolve the need to pay compensation to the victim’s family in fulfillment of *haq alabd* requirements.

This distinction has proven useful in helping to delineate the jurisdiction of informal mechanisms. In many areas, local leaders and government officials agree that informal mechanisms should deal with *haq alabd* issues, while the state should deal with *haq allah* cases. In reality, however, there is often disagreement on how to divide these concepts (an issue discussed further in section six). Participants might agree conceptually that the state should be involved in *haq allah* issues, but disagree on what the precise definition of a *haq allah* issue is. In such instances, these differences have to be negotiated.

Informal bodies deal with a wide range of cases from small-scale civil disputes to serious criminal issues. While many observers will point out that informal mechanisms must adhere to certain religious and social values, and while certain types of cases may be more likely to

be resolved through traditional mechanisms, the fact that all of these issues are in the end negotiable allows these mechanisms to retain their flexibility. The negotiation process also serves an enforcement function, since the details of the conflict are often debated during these negotiations, and the likely resolution is inevitably foreshadowed by them. The rules strongly determine the results. After the resolution is reached, the community may then refer to religious values that describe the resolution as inevitable and thus uncontested, though in fact negotiations had been used to reach some type of compromise.

Informal bodies also promote values of egalitarianism that are central to Afghan and particularly Pashtun social organization.²⁰ In an acephalous system, certain men may have more influence than others, but ultimately authority does not reside in specific positions as much as it may in Middle Eastern tribes, for example. In theory, given this egalitarian orientation, each male member of the community has the right to sit and speak at a shura or jirga if his family is involved in the dispute in any way. This concept does, however, have constraints, and sometimes younger men are represented by older male relatives instead of sitting on the council themselves. Women only sit on shuras in certain parts of the country, particularly in the north and central highlands; in most other areas, they are represented by a close male relative. In some cases, a respected older female or male in the community will interview and gather information from women involved in the dispute. The degree to which these aspects make women feel that they are being adequately represented varies greatly. Case studies from Bamyan show a significant involvement of women in informal resolution mechanisms.²¹ This contrasts with reports from Helmand, which indicate that women feel excluded from the system.²² Finally, while the ability of women to participate in such informal dispute resolution, and in local governance and public affairs more generally, is often dismissed as a static cultural value, in fact other factors, such as security or the availability of economic opportunities to women, do much to shape the extent of female participation.

Women only sit on shuras in certain parts of the country, particularly in the north and central highlands; in most other areas, they are represented by a close male relative.

Composition, Jurisdiction, and Authority of Informal Mechanisms

To a great degree, informal dispute resolution processes across Afghanistan emphasize the values discussed earlier, with both shuras and jirgas generally composed of influential members of the community who are expected to listen to the different sides of the case and are trusted to produce a decision that appears fair to the community and the disputants.

As noted, informal bodies in Afghanistan work on a range of issues, from marital disputes to murder and other serious crimes. Because they rely on social pressure and community involvement, informal bodies tend to address those disputes that communities find most pressing, such as land and water-use cases.²³ Informal bodies also address disputes arising from the disbursement of funds from the government or NGOs.²⁴ Disputes may also eventually revolve around multiple issues, and a land dispute that leads to murder may not be considered resolved until both elements are addressed.

Another factor in the selection of a venue for resolution is the type of case being addressed. If the issue is family-based or involves religious issues, it is more likely that individuals will seek out a religious figure to resolve the dispute. Personalities of the mediators are also important. For example, while government officials are only involved in informal dispute resolution on some occasions, an official with a reputation for being particularly just may find himself involved in a greater number of cases than other officials.

Finally, the level and type of informal mechanisms available also affects the types of disputes most commonly resolved by them. Since there is social pressure to resolve family matters

While government officials are only involved in informal dispute resolution on some occasions, an official with a reputation for being particularly just may find himself involved in a greater number of cases than other officials.

privately and quietly, these make up a higher percentage of cases at the village shura level, whereas provincial shuras are more likely to address large-scale land conflicts between tribal lineages. A sample of different types of disputes and the level at which disputes have been recorded from a variety of projects from different areas of the country is provided in table 1.

When a case is considered by informal bodies, there is generally a significant amount of discussion about the process: who will be involved in making the resolution, what the parameters of the resolution might be, and to what extent the decision is binding. In analyzing such processes there is the dangerous tendency to directly translate into English the techniques of resolution, such as “mediation” and “arbitration.” While informal dispute resolution contains elements of mediation and arbitration, it may differ in several important respects. The first important difference is that, in some parts of the country, both sides generally begin by presenting their cases, and there is a period of negotiation and discussion by participants before they grant authority, known as *waak*, to the jirga or shura to resolve the dispute.

Another difference is often that while the decision of a dispute resolution council is generally considered binding, in practice there may be room for a decision to be disputed and negotiated, unlike in binding arbitration where parties accept to be bound by the decision in advance. This is particularly true in Pashtun areas, where jirgas often require a sum of money called *machalga*, which is to be collected after both sides have formally granted *waak* to the jirga to resolve the dispute. The *machalga* is meant to ensure that both parties adhere to the decision of the group, because it is forfeited if either party does not accept the jirga’s decision or breaches it at a future date. In some instances, this may have unintended consequences, particularly in areas where jirga members can keep the money if a resolution is not achieved. Here individuals sometimes complain that the *machalga* can actually discourage jirga members from reaching a just resolution between the parties. As a means of personal enrichment, the *jirgamaran* (those members of the jirga) would intentionally reach a decision that they knew one or both of the parties would not abide by solely to gain legitimate claim to the *machalga*. This consequence may be mitigated, however, if the *machalga* is given to the community more generally and not to individual adjudicators. In practice, however, it is rare to find cases in which *machalga* has been given and the dispute has not been successfully resolved, since the submission of *machalga* publicly demonstrates a willingness on the part of both sides to negotiate.²⁵

Usually economic incentives such as the *machalga* are combined with social pressure to encourage disputants to resolve their cases and accept the decision that is given. In Pashtun areas, the concept of *kabargen*, or social isolation, is one means of social pressure. In other areas, less formal social pressure may be applied, particularly by family members. For example, a mutual relative of both disputants may be sought out to encourage both sides to resolve their dispute. Such pressure, however, has its limits; there are numerous instances of one side walking away from negotiations. In more extreme cases disputants may threaten violence if it appears the resolution is not in their favor.²⁶

Because of the risk that a solution might not be accepted, the composition of the jirga is an important factor in the dispute resolution process. In serious cases, more time may be spent discussing who should be on the jirga and the conditions for granting the group authority than on the deliberation process itself. Decisions are far more likely to be upheld when all participants agree on the composition and authority of the body. During one murder case observed by USIP researchers, almost an entire day was spent determining who from among a group of representatives from both sides, and from the community at large, would be included in the resolution of the case. Once this question was settled, the case was resolved within hours. Unsurprisingly, the discussion around who should be involved in the resolution process was

Table 1. Sample of Types and Number of Cases Found in Venues at Various Political Levels

Venue	Land/ water	Criminal	Family	Government/ NGO related	International military/ Taliban/ local commanders	Political	Commercial
Provincial Council in Nangarhar and Kunar	68	30	13	1	2	2	4
Analysis of district- level disputes recorded in Qara Bagh	4	3	1	0	0	0	1
Initial reports from CPAU's district-level peace councils (see section IV)	41	31	28	1	0	0	9

also a forum in which people discussed aspects of the case, who was qualified to speak about the case, and what were the underlying issues at stake. The issue of who is granted authority is thus considered important enough that in many cases it is formalized in writing (see box 5).

Bodies that are composed of knowledgeable community members who have had experience with traditional dispute resolution tend to be acknowledged as most effective. Just as important, however, may be the ability of these individuals to contribute to the enforcement of any decision. For example, the inclusion of powerful commanders may not help the process of seeking *islah*, or reconciliation, but the ability of these individuals to threaten violence may make it more likely that those involved in the dispute abide by the final decision.²⁷ The choice of selecting such a figure is thus a significant one, because the consequences of walking away from a decision could be severe. In more minor cases disputants might try to keep such powerful figures out of the process for fear they will try to extract resources.

In the case of the standing councils most often found in non-Pashtun areas, decisions are often less binding. In part this is because standing councils are less likely than *jirgas* to be composed of close relatives of the disputants. They are therefore less able to both understand the issue and to apply the requisite social pressure to compel acceptance of the resolution. Resolution may also be less likely when those involved in a conflict are more distant from each other socially. Generally, the social pressure created by those resolving the dispute is a significant determinant of whether the decision is to be accepted. Standing bodies, however, may be more effective in more ethnically mixed areas (for example, in the north, where there are scattered pockets of Pashtun groups as a result of a forced migration policy in the late nineteenth century), since they bring together groups that might not interact normally on other issues. In these areas, multiethnic district *shuras* create a forum that may address disputes that would be difficult to resolve otherwise.

In some areas, however, informal mechanisms have suffered from the declining importance of local leaders and tribal structures that has occurred over the past three decades as a result of social displacements from fighting, new forms of economic opportunities that have de-emphasized local land tenure systems, targeted assassinations by the Taliban of respected community leaders, and a general decline in the importance of local leaders who had historically resolved disputes. In areas such as Helmand, where tribal structures are less coherent than in other Pashtun areas, outside pressure from the Taliban has greatly eroded the ability of in-

Resolution may also be less likely when those involved in a conflict are more distant from each other socially. Generally, the social pressure created by those resolving the dispute is a significant determinant of whether the decision is to be accepted.

Box 5. Translation of a Sample Waak Letter from Kunar

I, Haji Arif, agree to submit complete waak (authorization) to the elders and ulema in order to solve the dispute. I will accept what they decide and if I do not accept and abide by the final decision, I will pay 3,000,000 afghanis as a fine to the jirga.

Sincerely,
Haji Arif

formal mechanisms to make and enforce decisions.²⁸ In these areas, the Taliban have targeted local leaders who are seen as supporting the international presence or even simply contributing to stability and economic growth. In other areas, the reason for the decline in the elders' importance may be more mundane. For example, as the land tenure system has become more flexible, with the buying and selling of land for cash becoming increasingly accepted, local elites whose influence once depended on large land holdings have lost part of the basis of their authority. This is usually connected with a wider decline in the influence of informal leaders over local economic concerns, marriage arrangements, and other issues of daily life.

Despite these changes, informal mechanisms remain highly popular. One of the reasons often given by disputants and adjudicators is that, as mentioned, these mechanisms emphasize reconciliation rather than punishment. Cases in the informal system are treated in a less adversarial manner than they are in the formal system. It is common, for example, for land disputes to ultimately be resolved by dividing the land between the disputants or by arranging monetary compensation for the side that loses the land in a decision (see, for example, box 6). These compromises are considered to be preferable, especially in the south of Afghanistan where decades of conflict have meant that land ownership may have changed hands multiple times, both legitimately and illegitimately. As the case in box 6 indicates, such approaches do not always protect individual rights, since the farmer lost half of his land to the more powerful commander. But these decisions are able to resolve the dispute while minimizing instability and enmity in the community. While the farmer in the Kabul case may not have received all the land that he lost, the negotiated settlement was ultimately in the best interest of the community and a far better result for the farmer than losing all of his land, which would have been the case had the dispute not been resolved. All parties were to a certain degree satisfied, and most agreed that the formal state justice system would not have been in a position to reach as satisfactory an outcome.

A final reason evinced by Afghans explaining the appeal of these mechanisms is that they emphasize a community's autonomy from the state. While at times community leaders clearly try to use their relationship with the state to gain authority or resources, they have also maintained a high degree of authority due to the relative lack of state penetration in rural areas. While the complex relationship between government officials and informal actors is discussed more completely in the next section, it is also clear that by using restorative ideals that maintain local stability, Afghan communities have been able to resist some of the forms of penetration typically found with the spread of state bureaucracy to rural areas through institutions like courts. This served Afghan communities well during the years of Soviet occupation and civil war, and more recently informal mechanisms have continued to allow for a degree of independence from a government that many perceive as parasitic.²⁹ It is a common assumption that Afghans resort to informal mechanisms because of the weak penetration of the state system. But this research suggests that in some cases Afghans used these informal mechanisms as a way of preventing the penetration of the formal state system.

This research suggests that in some cases Afghans used these informal mechanisms as a way of preventing the penetration of the formal state system.

Box 6. Stealing Land in Kabul Province

Several years ago Daud's land was seized by a local commander. At first he felt there was nothing he could do, but he eventually took the case first to the Department of Civil Affairs (Haqooq) and then to the prosecutor's office and the court. In each of these places the commander had allies and was able to block the man from advancing his case.

Finally, elders from his village agreed to arrange a shura and asked both sides to participate. Since Daud had better documentation, indicating that he did own the land, the elders believed that it was his land. The commander, however, did not accept this decision initially. Because the commander was feared in the local community and had been on the land for some time and had improved the land, the shura decided the land should be split into two equal parts. Eventually, the elders convinced the commander that what he had done was illegal. He agreed with their decision and it was ratified by the district shura as well. The original owner was disappointed he had not received all the land but relieved that some had been returned to him.

Source: USIP research notes

Legal Framework: Informal Mechanisms and the State

While informal dispute resolution mechanisms are generally considered legally distinct from the “formal” state mechanisms, there are several places where various forms of nonstate dispute resolution are mentioned within the body of Afghan law. Conciliators, for example, can be used to help resolve court cases in conjunction with the formal system.³⁰ There is a particular emphasis on encouraging the resolution of marital disputes outside of the court room, for example. The civil procedure code states that the court can assign conciliators from the family of both the husband and wife who must be “honest and trustworthy.”³¹ These individuals are then expected to “find the cause of the dispute between husband and wife, and resolve it.” Similarly, arbitration by conciliators is discussed extensively in chapters 7 and 11 of the commercial procedure code.

Beyond this integration of informal mechanisms into formal court proceedings, however, mention of other bodies for informal dispute resolution in the Afghan legal code is rare and often confusing. For example, the Law on Provincial Councils states that one of the duties of the provincial councils is to “participate in the settlement of ethnic and local disputes through the holding of peace councils (*shura-e islami*).”³² There is no elaboration on what these councils should look like, who is eligible to sit on them, what types of disputes they are allowed to resolve, or what their relation to the formal court system is.

Additionally, the High Council of the Supreme Court in 1975 issued a series of “Traditional Dispute Resolution Guidelines” that set out a series of procedural regulations for how informal disputes should be resolved, including eligibility requirements for those who make such resolutions and conditions under which cases should be brought to the court system. Despite the fact that laws from this era are still technically valid (unless they have been specifically overturned by subsequent legislation), few judicial officials are aware of these guidelines and they currently do not appear to be enforced anywhere in the country.

A further complication in the relationship of informal mechanisms to the formal state system is that new councils have been set up by government entities, such as the Independent Directorate of Local Governance (IDLG), to deal with issues such as disputes arising from the reintegration of former insurgent fighters.³³ These bodies are not provided for in any Afghan law, and it is not clear what legal authority they have. Similarly, international donors have set up local councils for various purposes, though again they have no basis in actual law.³⁴ When questioned, government officials often give contradictory accounts as to the specific responsibilities and authority of these groups, differing for example on such questions as whether local leaders can be prosecuted for participating in the resolution of a

dispute in a manner that violates national law—an issue that has been hotly debated within the Ministry of Justice.

There have been several efforts to ensure that the formal system recognizes the informal mechanisms in a more systematic way, given the fact that the informal mechanisms not only exist but are widely used. The first effort was the UN Development Programme's 2007 Human Development Report, which focused on the judicial sector and advocated a hybrid system, under which minor civil disputes and criminal incidents would be decided first by local mechanisms, while major incidents would be handled by the formal system. While the report conceded that there were real weaknesses in the informal system, in particular the unequal treatment of women, it was also highly critical of the formal system, which, it argued, did not enjoy much popular confidence. The report was, however, rejected by representatives of the formal system. The chief justice of the Supreme Court went so far as to attempt to ban the report. The combination of civil society and state institution opposition has since diminished the influence of the report.

The Ministry of Justice made another attempt, which sought a wider consensus, in 2009. The Ministry created a working group of Afghan and international representatives to draft a policy on the relationship between the state justice system and informal mechanisms.³⁵ The initiative grew out of the National Justice Sector Strategy of 2008—approved by the Supreme Court, the Attorney General's Office, and the Ministry of Justice—as well as the National Development Strategy of 2008, both of which were drafted with heavy international influence. A draft policy was completed and signed by the members of the working group in December 2009, and President Hamid Karzai reiterated his support for the process at the London Conference on Afghanistan on January 28, 2010.

These working group meetings revealed areas of general agreement between the disparate factions but also some of the potential problems in both internationally sponsored programs and the government of Afghanistan's attempts to deal directly with informal justice mechanisms.³⁶ For example, one contentious issue was whether informal mechanisms should be dealing with criminal cases. For the most part a consensus was reached that informal mechanisms could deal with petty crimes and, in particular, civil aspects of criminal cases. But a firm distinction between what constituted petty and major crimes was never reached.³⁷ To take another issue, some argued strenuously for more state oversight of the informal system, while others pointed out that the Afghan judicial system already lacked the capacity to deal with existing cases within the formal system and was unlikely to be able to oversee informal cases for the next several decades.

The group, however, did agree on many key points, such as the need for a more coherent national policy on informal dispute resolution, the need for international and government bodies to acknowledge the role played by these groups, and the need for better approaches in preserving the rights of individuals both in the formal and in the informal sectors (see box 7). Informal actors were called on to follow Afghan law, human rights standards, and religious law in all steps of the informal process. The policy especially addressed individual rights issues, such as providing all members of the community equal access to informal mechanisms. Specific sections addressed the rights of women, children, and other vulnerable groups (see box 8). The draft also attempted to codify other informal practices—something that would make the informal sector easier to regulate but might limit the flexibility of such practices and the ability of involved parties to negotiate, as discussed earlier.

The policy was seen by all involved as an important means of clarifying the state-informal sector relationship, though various groups had very different motives for this. For the Ministry

Box 7. Goals of the Draft National Policy on Relations between the Formal Judicial System and Dispute Resolution Councils

- 1) The government will ensure that all people have access to fair, cost-effective, and specialized justice mechanisms to resolve disputes.
- 2) GoIRA [the government of the Islamic Republic of Afghanistan] will strengthen the formal system of justice to meet critical justice needs in the country.
- 3) The jurisdiction and relationship between the justice system and dispute resolution councils shall be clarified by law.

(December 2010)

of Justice, it was perceived as a means of removing pressure from an already overburdened formal court system. For some other Afghan institutions, such as the Ministry of Women's Affairs, it was seen as a potential means of regulating and controlling informal bodies and preventing practices that discriminated against women, such as *baad* (the exchange of women to resolve a dispute, which is illegal under the criminal code). In some instances this approach genuinely was intended to curtail these practices, but in other cases the laudable motive disguised a political attempt to curb the influence of the rural elite, who are more empowered within the informal system. Finally, for a number of international groups, the policy was a means of supporting justice in Afghanistan without putting money into a formal court system that was seen as corrupt. Some saw this as a new form of statebuilding that avoided formal institution building by falling back on existing, though informal, practices. For others in the international community, the policy was meant to provide legal cover for detainee practices that did not necessarily fit within Afghan law, such as programs that released prisoners after a community shura's review, discussed more thoroughly later in this report.

After completion of the initial draft, it was sent to the Minister of Justice for review. However, in January 2010, a new Minister of Justice was appointed who halted the policy drafting process and began a process of drafting a law that was meant to be based upon the consensus draft policy. This drafting process brought in several more government bodies and the process slowed greatly.³⁸

The group had planned to organize a nationwide consultation on some of these issues, which would then help coordinate the efforts of various implementers. These plans were put on hold after several women's groups had an audience with President Karzai, in which they portrayed the drafting process as a manipulation of the government by the international community, despite the fact that there were far more Afghan officials involved in the process than international advisers. Following this meeting Karzai's earlier support for the policy declined greatly. By the time this occurred, the international community had become far less interested in the law-drafting process. The U.S. embassy had granted a large contract to an independent contractor to handle informal dispute resolution, and the contractor had chosen not to send a representative to the meeting. For its part, the United Kingdom's Department for International Development (DFID) appeared less concerned about securing cover for its Afghan Social Outreach Program (ASOP) program in Helmand, in part because U.S. troops had taken over much of the area and because the program had not generated any significant complaints from the government of Afghanistan over the legality of the involvement of informal leaders in the detainee process. With the International Security Assistance Force (ISAF) continuing to work locally but rarely engaging in policy debates about its work, there was little interest from the international community in applying any sort of political pressure that would have continued this process.

Box 8. Excerpts from the Draft National Policy on Relations between the Formal Judicial System and Dispute Resolution Councils

5.c. It is national policy to promote increased access, participation, and decision-making roles for women in informal councils.

5.d. It is national policy to increase the awareness of female and male decision makers in both the formal justice system and dispute resolution councils of the Constitution, and of women's legal rights within Islam, Afghan law, and international human rights standards.

5.e. It is national policy that informal justice decision makers cease using bad and other practices, which are inherently in violation of women's and girl children's fundamental rights, inconsistent with sharia, the Constitution, and domestic law, to resolve disputes.

Working with the Ministry of Justice, USIP presented the draft policy to provincial and district-level leaders in several provinces to seek their views on it. While these leaders were interested in engaging with the government on revising the policy, the national government was reluctant to continue a broader consultation. The initiative began to receive political pressure from several sources—primarily the Ministry of Women's Affairs and the Supreme Court—at the same time that support from the international community—particularly the U.S. and British embassies—ebbed. The United States and United Kingdom had initially been some of the greatest supporters of the drafting process, but their enthusiasm dimmed as they turned away from counterinsurgency approaches. Faced with these new sources of opposition, the drafting process eventually ran aground and has been stalled since the summer of 2011.

The continuing confusion over the actual legal status of the informal system and the lack of clarity on the current draft law has created a situation in which local officials are often unsure of the actual legality of resolutions made by many of these bodies, resulting in a system with a great deal of ambiguity. This ambiguity vis-à-vis the formal system both helps and hinders dispute resolution. In many cases it has created a nebulous space in which local officials and community leaders can broker local compromises and define their relationships in a flexible, if ad hoc, manner. But in other instances the lack of certainty over their authority has actually increased conflict between them, making it less likely that disputes will be resolved.

Pluralism, Not Dualism

While the actual legal framework for the resolution of disputes outside of the court system and the role of such mechanisms within the court system remain poorly defined, the state continues to play an important role in informal dispute resolution. Moreover, there is not a simple dichotomy in which disputants may choose either the formal justice system or informal mechanisms.³⁹ In addition to a wide array of local shuras, local notables, and religious leaders, disputants may take cases to the courts, to any one of numerous other government officials, or some combination of these options. This creates a range of hybrid pathways for dispute resolution. It is common, for example, for courts to refer both civil and criminal cases to informal bodies to resolve all of the case or aspects of it, after which the court certifies the decision. In 2007–08, for example, 150 of 377 civil disputes registered in the Jalalabad court system were ultimately resolved by informal jirgas.⁴⁰

Another way in which the systems intersect is that government officials may sit on shuras in their own communities or in the communities where they hold government postings, making them simultaneously members of the formal and informal systems. While research generally shows the predominance of informal mechanisms in creating longer lasting resolutions, these mechanisms exist with a constant awareness of government officials and state institutions. Various political variables and the personalities of those involved may ultimately

Table 2. Cases Resolved through Various Dispute Forums

	Village, district, or provincial shuras	District governor	Chief of police	Court
Gereshk, Helmand	1,525	584	380	65
Deh Rawud, Uruzgan	1,210	48	68	15

Source: Unpublished TLO research.

Note: TLO's methodology for this chart and others in this report is discussed in section five.

do much to shape these interactions. For example, see table 2 for numbers that hint at some of the local distrust of the district governor in Deh Rawud as opposed to Gereshk.⁴¹

Beyond the judges and prosecutors who form the heart of the formal judicial system, numerous other government officials take part in local dispute resolution. The Department of Civil Affairs (*Haqooq*) under the Ministry of Justice is used in some areas to resolve civil issues, particularly with regard to land disputes. In other areas, the Land Titles Department of the Ministry of Agriculture, Irrigation, and Livestock and the Ministry of Borders and Tribal Affairs are also occasionally involved in the resolution of disputes that may be brought to their office.⁴²

By far the most important government official in most areas, however, is the district governor, who is not a part of the judiciary but is often, as the most important local representative of the executive, an important figure in all forms of dispute resolution.⁴³ In many cases, the district governor acts as a type of facilitator, assigning certain shuras to deal with specific cases and often stamping decisions with his personal seal, which many Afghan officials have. This stamp and approval by the governor in the eyes of many provides a certain amount of quasi-state legitimacy (in some cases the district chief of police may fill a similar role). The district governor in Ahmad Abad, for example, claimed that he has signed every decision made by the informal district level shura.

The Continuing Relevance of the Formal Sector

Despite overwhelmingly negative opinions recorded about the formal system, there are few calls by Afghans for it to be eliminated.⁴⁴ On a purely practical level, elders pointed out to USIP researchers that they did not have the facilities to hold a prisoner who had been detained for a serious crime and often did not want to be held responsible for ultimately administering punishments. Despite complaints about the lack of government legitimacy in much of the country, however, many still felt that dispute resolutions that were approved or at least acknowledged by both government officials and local communities were most likely to endure. In almost all areas it is clear that Afghans want the option of bringing more serious cases to the formal sector, while at the same time resisting the penetration of a state that is still widely perceived as corrupt on more-local issues such as land and water disputes. This has created a relationship that has been described as simultaneously “symbiotic and hostile.”⁴⁵

The formal sector has a potentially important role in the protection of human rights. The representative of the Department of Women's Affairs in many provinces, for example, is perceived as important in fulfilling this role. Despite this, USIP's research shows that the current formal sector in Afghanistan appears no more capable of addressing human rights issues than the informal sector. In fact, cases of women being prosecuted for “running away” and other “moral crimes” that have no legal basis were surprisingly common.⁴⁶ UN Women officials re-

The current formal sector in Afghanistan appears no more capable of addressing human rights issues than the informal sector.

port that, while very little data collection has been done, they believe the rights of women and children are likely to be violated in both the formal and informal sectors.⁴⁷ The 2007 Human Development Report echoed this claim: “Women on both sides of the fence, meaning the traditional dispute resolution mechanisms and the formal justice sector, are on the losing end. In both systems there is limited access to justice for them.”⁴⁸

While both international pressure and funding is often aimed at national government bodies, usually local-level officials are the most effective at negotiating the space between national law and local practices. In some districts—though this is more the exception than the norm—the local Ministry of Women’s Affairs representative works with elders to protect the rights of women and children in the informal system. These officials tend to receive little support from either international groups or their national counterparts. In contrast, the national level officials and the programs they run, which are heavily supported by the international community, often simply deny the importance of the informal sector, creating a further disconnect between levels of government on the role of informal mechanisms.

Less discussed, but clearly a pressing issue for many Afghans, is the potential role of the state in resolving disputes between ethnic and tribal groups. Since many parts of Afghanistan are dominated by a specific tribal or subtribal group, it is common for local councils in those areas to be similarly dominated by that group. That puts minorities in the area in a possibly vulnerable position. Government officials have the potential to play an important role in ensuring that minorities are not discriminated against in either formal or informal venues. On a national level, there has been some discussion of using ad hoc councils to resolve large-scale land disputes, such as those between Pashtun nomads colloquially known as Kuchis and settled Hazaras that have created tensions in areas of the central highlands. Thus far, however, the potential for government officials to work with communities to resolve disputes in formal and informal settings has been limited, in part due to the current instability in the country and the political issues surrounding conflict resolution.

At the same time, there are sources of resistance at the national level to ceding too much recognition to informal mechanisms, especially when the latter are perceived as challenges to the authority of the former. This creates an interesting paradox: While local officials often engage informal mechanisms, many on the national level deny the existence of such mechanisms. This was especially clear in the debate on the stalled national law on informal justice mechanisms. Some members of the Supreme Court are clearly hesitant to discuss the informal sector, presumably because any acknowledgment of the informal sector is an admission that the formal sector is not functioning as effectively as it should. There is also the clear fear that international interest in the informal sector will lead donors to spend money there instead of on the Supreme Court, the Attorney General’s Office, and other government bodies.

Other groups, such as the Ministry of Women’s Affairs and the Afghan Independent Human Rights Commission (AIHRC), whose mandates are grounded in formal rights enunciated by international treaties, see any acknowledgment of informal leaders as both a potential threat to their own political power and a threat to the rights-based framework. Furthermore, for some human rights groups, anecdotes about the abuse of human rights have served as an effective tool for generating international attention and funding for many of their projects, even though such examples of “tribal justice” are an incomplete representation of the justice landscape as a whole. All of these elements combine to create strong political opposition in some quarters to collaborate with the informal sector, despite a general acknowledgment of the ability of these actors to meet local justice needs.

Some members of the Supreme Court are clearly hesitant to discuss the informal sector, presumably because any acknowledgment of the informal sector is an admission that the formal sector is not functioning as effectively as it should.

Local Politics and Disputes

One of the challenges that reformers within the government and the international community have faced in analyzing the informal sector is the desire to separate dispute resolution from local governance, both conceptually and programmatically. The reality of local-level politics in Afghanistan, however, displays no such separation: Those in charge of local governance tend to be the same as those who resolve disputes.⁴⁹ This partly stems from the fact that the ability to bring two disputing sides together and get them to accept a final decision demands a certain amount of local political capital. In turn, issuing a decision that is respected by the community will create even more political capital for those leaders involved, making it more likely that individuals will bring disputes to them in the future. This positive cycle is one reason why informal dispute resolution is effective and why elders are interested in remaining involved in cases without financial inducements and in ensuring that resolutions remain respected by all members of the community. But this also makes dispute resolution an inherently political issue, as the acknowledged authority to resolve disputes is transmuted into local political authority more generally. The ability to resolve disputes is often connected to the ability to make other decisions about governance within the community, related to a broad range of issues such as the control of irrigation systems, the control of religious shrines, and even the arrangement of marriage alliances.

As a result, at a local level, both community leaders and government officials often compete to determine who will resolve disputes. This also means that changes in local politics can reshape how informal dispute resolution happens. For example, the influx of development funds and other financial resources, as well as changes in local political capital due to support for certain local leaders by international troops or the government of Afghanistan, has altered the dynamics of dispute resolution in various settings (see box 9). Similarly, the relationship between community leaders and government officials often shapes the dispute resolution process. USIP's research suggests that it is generally where the district governor is strongest that he is willing to involve community elders in dispute resolution, often stamping their decisions once they are finalized. In areas where the governor is not as strong he may hesitate to cede any power lest he appear even weaker.

Local politics can also become intertwined with national politics and affect informal dispute resolution. In Deh Rawud, for example, the Popalzai, who are currently politically dominant due to the support of President Karzai and, until 2011, his late brother and head of the Provincial Council, Ahmed Wali Karzai, have been able to exploit their national connections to seize an increasing amount of land and local political influence.⁵⁰ This influence was subsequently increased by the appointment of a Popalzai provincial police chief who was also strongly backed by the United States. This dominance has shaped the way even very low-level disputes are resolved. For example, in one case a husband from the Popalzai tribe was accused of being cruel to his wife from the Babozai tribe. After she ran away from her husband, her father attempted to convene a jirga to resolve the case. He was unsuccessful in part due to the weakness of his tribe vis-à-vis the Popalzai who dominate the area. The case ultimately went before Matiullah Khan, the tribal leader of the Popalzai in the area, who had a reputation for favoring the Popalzai in local disputes. The dispute was resolved, but with conditions that were far less favorable than if the Popalzais involved had not had connections to a political network that stretched to the highest levels of government.

Even within the formal sector, however, the local political power of certain individuals can have a strong influence on the outcome of cases. For example, a district prosecutor in Helmand complained to DFID officials that the local district chief of police, who had both a one

Box 9. A Dispute Involving an International NGO

In Kabul, an NGO rented an office in order to set up a training center for women. The center had only a narrow path to it, which the NGO widened to turn into a proper road. A neighbor, Latif, who owned the land the road passed through, complained that the NGO had passage rights for the path, but not for an entire road. He originally went to the Haqooq Department to complain about this, but the Haqooq Department refused to intervene.

Latif then brought the case to the area shura, which selected five elders to study the case. The elders determined that the land was Latif's and that the NGO could either purchase the land for the road or stop using it. Concerned about community backlash, the NGO stopped using Latif's land.

hundred-man militia and an additional one hundred police on his staff, was dominating the area politically and making all the real decisions about detainees in the district. Even when the prosecutor wanted to bring a case against a detainee, he would find the detainee transferred to either the National Directorate of Security (NDS) or an ISAF facility on suspicion of being a “terrorist,” at which point the prosecutor lost all authority.⁵¹

On a national level, some of these similar political patterns help explain some of the reluctance of the national government to encourage consultation at a provincial or district level among leaders they perceive as a threat to their authority, leading to the aforementioned paradox that while local officials often engage informal mechanisms, many on the national level go as far as to deny the existence of such mechanisms. This resistance has also led to a general rejection by these institutions of cooperative programs, in which government officials and local leaders work together to monitor for human rights violations.

Corruption

One of the central concerns of many Afghans was the perceived growing divide between the values espoused by informal bodies and the ways they actually function. Despite the generally positive local opinions of informal mechanisms and the cultural values embedded in them and because local politics are so intertwined with these mechanisms, in areas where politics are dominated by certain corrupt figures, dispute resolution mechanisms are likely to be similarly dominated. As box 10 suggests, certain figures, particularly those who acquired weapons or a reputation for violence over the last few decades, may be able to use these illegitimate resources to control the informal dispute resolution process.

This illegitimate control is particularly visible in cases of land grabbing by strongmen. If a local strongman begins seizing land but does not exert some degree of control or influence over both the formal and informal sectors, it will be much more difficult to maintain the land that he has seized. As a result, these figures tend to be involved in complex webs of patronage and intimidation that allow them to maintain both their land and their political influence. It is important to note, however, that this use of illegitimate means to control dispute resolution is something that is done by both nonstate and state actors. Other forms of political force, beyond community consent, allow local leaders to resolve decisions in ways that do not take into account the desires of the community and lead to many of the same issues of frustration and distrust that greet the state judicial system. This appears to be particularly true in less stable areas where opinions of the informal sector are not as favorable as in other areas.⁵²

In some cases, such as that of Uruzgan discussed in the previous section, there is evidence of favoritism toward the tribe or ethnic group that dominates local political structures. This has long been the complaint of Hazara groups in their land disputes with nomadic Pashtun groups in Ghazni, where they claim both formal and informal venues tend to be Pashtun dominated.

Box 10. A Village Shura in the Shomali Plain

A village shura in a fairly wealthy agricultural area north of Kabul had four men running for the position of head of the council. Three of them were former jihadi commanders, and the other was Dagarwal Reza. Most members of the village council support Reza, but he did not put himself forward as a candidate since if he “had run for the position, the supporters of the jihadi candidates would have made some problems in the village.” So, finally, they accepted one of the former commanders instead. Since this former commander is uneducated and inexperienced, however, he now relies on Reza to hold many of the meetings and make decisions.

More worrisome are the cases where both international development funds and support from the international military has flowed toward local strongmen who do not necessarily have the support of the community, allowing them to expand their influence over both local governance and dispute resolution but with decreasing local legitimacy.⁵³

Most USIP interviewees described the formal system as more susceptible to corruption and more likely to make decisions based upon which party could pay the most. The International Development Legal Organization (IDLO) research from several provinces reported that 56 percent of survey respondents felt that decision makers in both the formal and informal sectors were influenced by the status of the parties to at least some extent, 47 percent thought that decision makers were unwillingly influenced, and 32 percent reported that decision makers solicit payment.⁵⁴ Similarly, the Asia Foundation found that 70 percent of Afghans have either a great deal or a fair amount of confidence in community shura and jirga decisions, compared with 55 percent who feel similarly about the government judicial system.⁵⁵

There are still some clear differences between corruption in the formal and the informal sectors. IDLO shows that while respondents felt that court officials and jirga members were equally likely to be influenced by the status of the parties in the disputes, court officials were more likely to ask for illicit payments than informal leaders. Corruption among informal leaders is still limited and depends upon the degree to which local leaders rely on the support of followers to maintain their positions. In some cases, such as in Paktya, certain leaders may be perceived as corrupt by local communities, but those interviewed still tend to support these leaders because they provide services and protect the area’s interests vis-à-vis other outside groups. One local commander in an area where USIP conducted research was said to have stolen land from several members in the community and was referred to by people in highly negative terms. Despite this, many also hoped that he would stay in power because the area was seen as at least relatively stable compared to more turbulent neighboring areas. In these cases there are instances of individuals and communities sacrificing certain economic and political rights in order to ensure their own protection and security. However, in truly unstable areas, high levels of insecurity can make such leaders even less accountable, rendering all forms of dispute resolution in the area ineffective. In other words, both formal and informal systems seem to require a baseline of security in order to be effective at justly and permanently resolving disputes.

“Forum Shopping”

A clear consequence of having nonstandard, pluralistic, and informal dispute resolution mechanisms is the temptation for disputants to seek the forum that they feel will be most conducive to a result in their favor—the issue of forum shopping. In some cases this can be beneficial. If a local farmer does not want, or is unable, to travel to the provincial center to resolve a small-scale land dispute with a neighbor through the formal system, he can take it to the local shura instead. In other instances, a series of at-times competing forums may make it less likely for a dispute to be resolved. Sarah Ladbury, for instance, reports a high level of opposition among

The Asia Foundation found that 70 percent of Afghans have either a great deal or a fair amount of confidence in community shura and jirga decisions, compared with 55 percent who feel similarly about the government judicial system.

interviewees in Helmand to forum shopping and a decrease in the effectiveness of informal, tribal mechanisms in part because disputants no longer necessarily believe that in the face of challenges from Taliban and other strongmen that these mechanisms will be able to enforce their decisions.⁵⁶

Disputing parties may feel that they have an advantage in taking cases to venues where personal connections dominate. If one disputant has personal ties to one venue and the other has ties to another, they may attempt to bring it to two different venues. In some instances this exacerbates the conflict by creating tension not simply between the disputing parties but between those associated with each of the dispute resolution venues, as has been seen with the adversarial relationship between the police and community leaders in some parts of Nangarhar. More often in USIP's research, however, the use of multiple venues leads to something of a deadlock, when neither forum wants to directly challenge the authority of the other. In cases where the deadlock is between an informal and a formal mechanism, informal leaders may not want to draw attention to themselves by challenging the court system, while the decision by the court system itself may go unenforced by informal leaders, leaving the case essentially unresolved. In such instances, poor communication between the two groups, particularly when state officials are not from the region and elders try to avoid state control, leads to a situation where there is little to no cooperation. In settings where there is a large international presence and the Afghan state is considered neither a provider of local security nor a source of significant resources, there are even fewer incentives for informal actors to improve cooperative efforts with the formal system.

Urban areas in particular present a large number of informal venues to choose from, including mosque shuras, neighborhood shuras, tribal gatherings, trade unions or guilds, and even civil society organizations. Further complicating matters, in the past ten years, a series of initiatives, many of them sponsored by the international community, have set up new local councils at both the district and village level. Many of these are primarily aimed at development activities, but some have deliberate justice functions—such as ASOP, which was originally funded by the DFID and was later sponsored by the U.S. Agency for International Development (USAID).⁵⁷ The growing number of venues, and the increasing power of those whose influence is gained from means other than community support, has eroded the ability of leaders with true local legitimacy to negotiate durable settlements.

Informal Justice and the Insurgency

A good deal of the current interest in the informal sector by the international community comes from the belief that support for insurgent groups stems in large part from increasing disillusionment with the national government by the Afghan people, and in particular with the government's perceived failure to provide effective governance or dispute resolution at the local level.

However, little convincing research has been done to actually test the link between the failure to create good governance and the growth of the insurgency. Anecdotally, it is likely to be a factor, but one of many. Other factors include ill-distributed economic gains, the continued presence of international troops, and more ideologically based issues. Research on the relative weights of these factors is difficult to carry out and difficult to find funding for but would be invaluable to understanding the reason for the insurgency's expansion and would enrich the discussion beyond the primarily anecdotal evidence being relied upon so far.

As suggested earlier, general instability has a detrimental effect on all forms of informal governance and rule-of-law structures because it prevents local leaders from adjudicating

Table 3. Land versus Criminal Disputes in Three Provinces

	Number of land disputes per 100,000 residents	Number of criminal disputes per 100,000 residents
Mohmand Dara, Nangarhar	439	247
Deh Rawud, Uruzgan	1,033	597
Gereshk, Helmand	1,007	900

Source: Unpublished TLO research.

disputes and enforcing decisions. In Helmand's Gereshk district, for example, local elders have been physically prevented from hearing cases. And when disputants have connections with the Taliban, such elders may be unable to enforce their decisions without fear of retribution. In many cases, the Taliban's strategy of targeted assassinations of local leaders has meant that local leaders are now hesitant to involve themselves in any sort of local political issue regardless of their relationship to the international military or the government of Afghanistan. In some cases, elders agreed to mediate disputes only if all those involved agreed to keep their involvement secret. Such instances, along with other evidence of the Taliban's deep interest in how disputes are being resolved locally, demonstrate how important the Taliban feel it is to ensure that neither the Afghan government nor the international community appear capable of setting up or supporting any sort of stable justice or governance structures.⁵⁸

Instability also shapes the types of disputes that are most prominent. A comparison of the types of disputes in Gereshk (Helmand), a district with a very active insurgency, Deh Rawud (Uruzgan), a district that has primarily suffered secondary effects of the insurgency (such as general political instability, as opposed to widespread military engagement), and Mohmand Dara (Nangarhar), a more stable district, is instructive (see table 3). In the more stable areas, there are fewer land and criminal disputes. Both of these types of disputes increase in the less stable districts. These increases are slight, however, in comparison with the more dramatic increase in the number of criminal disputes in the district most impacted by the insurgency.⁵⁹

It is also interesting, given the common complaint among Afghans that international aid goes primarily to the most insecure districts—essentially rewarding instability—to consider how the insurgency and the varying levels of instability it creates shapes dispute resolution. USIP's research, for example, suggests that individuals have the most concerns about dispute resolution not in the most insecure districts but in districts where insecurity is a growing problem. In the most violent districts, communities' primary concern is often security and securing basic resources. In those areas where the insurgency has only created some instability, respondents are more likely to be upset by what they consider the unjust settlement of disputes by both government officials and informal leaders. In areas that have been more stable, state actors have simply not met justice demands or demands for a predictable formal dispute resolution system.

Another dimension is the increasing number of actors (often working in particularly non-transparent ways) who complicate the political landscape in unstable areas. The NDS, for example, is notorious among interviewees for taking young men away on unexplained charges in less stable areas, where presumably it is easier to ignore concerns for due process. In the same areas, however, international military forces often have similar reputations for making detentions for unclear reasons. Unstable areas are also more likely to have influential local strongmen, such as narcotics smugglers, whose power exists outside of historical political structures. While these factors may not directly influence informal dispute resolution, they are all present

in unstable areas and they decrease the population's faith in the state, the international presence, and any informal actors who may be associated with these groups.

Taliban Justice

Further complicating the justice landscape in many parts of the country is the fact that in addition to the formal mechanisms overseen by the state and other informal mechanisms, the Taliban have established their own justice mechanisms that compete with both. While research on the Taliban justice system has been extremely limited, most reports suggest that Taliban justice generally comes in two forms: mullahs educated in Pakistan and backed by Taliban commanders who often travel from town to town, or local elders in Taliban-controlled areas who continue making decisions much as they would otherwise, but with the backing of local Taliban commanders.⁶⁰

The first of these two forms is popularly considered to be a Wahhabi form of Islamic jurisprudence, which is much harsher than the Hanafi school that has historically predominated in Afghanistan.⁶¹ These Taliban courts use an extreme version of sharia to resolve disputes, then rely on local Taliban strongmen to enforce their decisions. These decisions are often made by mobile judges who briefly visit an area, relying on a system of "shadow" Taliban provincial governors, district governors, and commanders to support them, creating a quasi-state structure similar to Taliban rule in the late 1990s. In some areas this parallel system of shadow officials is stronger than Afghan state institutions. In areas where the Taliban's influence is less assured, local elders have established formal treaties with local Taliban groups; they agree not to support the Karzai government in exchange for community autonomy on local issues. In Paktya, for instance, several tribes have signed formal agreements with the Taliban establishing such arrangements. In these cases local elders may be expected to use stricter interpretations of sharia, particularly when addressing family cases, but are left for the most part to resolve disputes as they see fit.

As with the informal sector, Taliban justice cannot be considered to be completely isolated from other forms of dispute resolution. One of the factors that make Taliban mechanisms effective is that they tend to be based on a greater familiarity with local political structures than formal state mechanisms or internationally supported systems. Some respondents to USIP research questions reported cases of the Taliban referring disputes to, and cooperating with, the Land Title Department in Helmand to resolve land disputes.⁶² Even while claiming to fight the government, the Taliban have demonstrated in some cases that it is to their advantage to work with government officials. These efforts complement a wider parallel governance structure set up across the country by the Taliban, and contribute to their stated tactical interest in challenging the government by delivering more effective governance, including dispute resolution.

Much of the current counterinsurgency campaign has been aimed at the criticism that in the mid-2000s the Taliban were more effective at establishing local governance structures, particularly in the south, than the national government. Despite appealing to local communities on certain levels, Ladbury argues that the people are not choosing to use the Taliban system as much as the system is being forced upon them in areas where the Taliban have the most strength.⁶³ It is more often described as coercive rather than voluntary. On the other hand, the ability of the Taliban to enforce the decisions reached by their resolution mechanisms may explain those cases where people voluntarily choose Taliban courts. The fact that the Taliban have been able to set up dispute resolution mechanisms that are effective on certain levels has led the international community to increasingly look at the failings of the formal sector.

Even while claiming to fight the government, the Taliban have demonstrated in some cases that it is to their advantage to work with government officials.

Despite some of the cultural challenges raised in this section, international rule-of-law programming has increasingly begun to look at the informal sector. The following section looks at some of these attempts by various international bodies to engage the informal sector.

[THE INTERNATIONAL COMMUNITY AND
INFORMAL JUSTICE]

International groups, particularly relief organizations, have long dealt with shuras and other local bodies involved in dispute resolution in Afghanistan. Following the American invasion in 2001, there was a dramatic increase in the international community's focus on rule of law and access to justice. This focus intensified following the shift in U.S. policy on Afghanistan under the Obama administration. Approaches to informal justice after 2001 initially focused on basic state institution building with a generally light footprint. This was followed by an increased emphasis on counterinsurgency and stabilization and, more recently, concerns over transition to Afghan-led security and governance. As a result of this shifting political interest, there has been a significant increase in funds and interest directed toward governance and rule-of-law issues, which has included an increase in funds for programs that deal with informal justice. For example, the USAID budget for all rule-of-law programs more than doubled between 2009 and 2010 to \$75 million.⁶⁴ This increase has led to the development of a range of programs, from those that strictly conduct research to ones that attempt to reshape informal structures to serve counterinsurgency goals.⁶⁵ There are positive aspects to many of these projects, but their effectiveness has also been limited due to a series of issues, ranging from difficulties in understanding cultural aspects of the informal sector to the contradictory goals within some of these projects. In some instances, international programs have actually made local dispute resolution more difficult, while smaller Afghan-led initiatives have been somewhat more effective.

This section addresses primarily a series of programs that deal directly with the informal justice sector, beginning with some of the newest and largest in financial terms. Due to the politicized nature of how disputes are resolved in Afghanistan, any project that involves local political actors has the potential to create repercussions in how local disputes are resolved in the immediate term as well as in the future. Approaches such as “key leader engagement” by the military, which tend to increase the political capital of certain local figures at the expense of others, will shape how disputes are resolved within that community. In such instances, the simple act of holding a meeting with a leader can increase his reputation in some areas as someone who has access to international resources or, more dangerously, make them a target in less secure areas because of their affiliation with international forces. This association can also alter the balance of power in long-standing local feuds, perhaps generating new disputes as one lineage takes advantage of its enhanced status to attempt to resolve a disagreement on its own terms.

At the national level, international support for national figures who are widely believed to be corrupt shapes the way that Afghans interpret the political options open to them.⁶⁶ The fact that the international community has continued to favor such leaders has led many Afghans to believe that warlords and other corrupt officials are likely to remain in power, forcing them to make political choices in what they feel is an inherently unfair system. This obviously shapes the way in which disputes are resolved locally. In areas of southern Afghanistan, where Karzai's tribe, the Popalzai, have greatly consolidated power, both formal and informal bodies will be more likely to support Popalzai disputants than they might otherwise. This demonstrates how almost all international policy decisions, or even operational decisions, can impact dispute resolution all the way down to the local level.

The “international community” is, of course, not a uniform entity. It comprises a vast assortment of military forces, foreign governments, NGOs, and other civil society groups.⁶⁷ In terms of informal justice, this multiplicity of groups has generated a wide array of approaches, ranging from the international military's attempts to use informal mechanisms as a counterinsurgency tool to human rights groups' efforts to monitor and condemn practices that violate international rights. While USIP, ISAF, and several other bodies hosted a series of meetings

In some instances, international programs have actually made local dispute resolution more difficult, while smaller Afghan-led initiatives have been somewhat more effective.

to attempt to standardize approaches to the informal justice sector, for the most part there was a general lack of collaboration between groups, often because they perceive each other as competing for the same funds. This has become a more serious problem with the increase in funding for these projects and the consequent increase in the number of private contractors competing for program money.

The result has been a series of projects that occasionally overlap and, despite much research being conducted (a lot of it duplicative), a lacunae in our understanding of informal justice. This section highlights some of the different approaches to informal justice by different international groups and attempts to analyze some of the strengths and weaknesses of each approach with the ultimate goal of understanding how they have shaped access to justice for Afghans.⁶⁸

Initial Work on the Justice System

The initial focus of international attention to the judicial sector after 2001 was on strengthening formal state justice institutions. The Supreme Court received the majority of funds, followed by bodies such as the Attorney General's Office and the Ministry of Justice.⁶⁹ As one assessment of the period has pointed out, rule of law was seen as a "capability problem rather than a political one" and there was "a focus on infrastructure (court building), standards (higher degree qualifications), increasing staff numbers to meet needs (judges, prosecutors, defense bar), sorting out applicable laws (monarchist, republican, socialist, mujahedeen, Taliban) and instituting common procedures."⁷⁰ Technically the Italian government was given the lead on coordinating justice issues, but in reality, different donors with different priorities tended to fund the projects they wanted to with limited consultation with the Afghan government or other donors.⁷¹

In particular, funds went to programs that were viewed as supporting the international community's concerns in the country and were aimed at high-profile issues, such as setting up a narcotics tribunal and a major crimes task force.⁷² Efforts to promote legal awareness and access to justice for basic dispute resolution were not prioritized, nor were debates over the actual nature and structure of the judicial system. As funds began to come to entities like the Supreme Court and Ministry of Justice, Afghan officials tended to push for more infrastructure projects and training for judicial officials both inside the country and abroad. As noted, these funds increased drastically following the surge of both troops and programming by the Obama administration in 2009. For example, funding for the State Department's Bureau of International Narcotics and Law Enforcement, which spends significant funds on training and infrastructure, went from \$26.5 million in 2006 to \$328 million in 2010.⁷³

Afghan officials are often accused of corruption when asking for infrastructure and training projects, since there is the common perception that it is easiest to siphon money off such projects, but there is some logic to these requests. Such projects were seen by many government officials as more likely to yield immediate returns, whereas they had no control over whether international donors would continue funding longer-term capacity building or reform-oriented projects. Short-term infusions left officials with more control of how the money was spent. At the same time, of course, corrupt officials were able to skim funds off of these cash-heavy projects more easily, which they could then use to solidify their own patronage networks. Construction projects, in particular, are cited by Afghans and internationals alike as particularly easy to take money from.⁷⁴

By 2008, however, it became increasingly clear that both the government of Afghanistan and the international military controlled less and less of the country, and that the Afghan

government structures, particularly the judiciary, were ineffective and unpopular. The priorities and approaches taken by different organizations therefore began to shift, especially as some observers began to associate the increase of the insurgency to the ineffectiveness of the government's service provision. This shift included a rather uncomfortable attempt to reshape some of these statebuilding programs to fit a new counterinsurgency approach that began to focus on winning hearts and minds of local communities through improving local governance. For justice programs, this meant a shift from working to create ideal state institutions to looking at how local communities were currently resolving disputes and asking what programs could be applied that would encourage stabilization through improved dispute resolution. In addition, President Barack Obama's announced timeline for withdrawal meant that projects were expected to work under stricter deadlines. Many projects were tasked with producing tangible results within eighteen months or less, causing both government agencies and NGOs receiving U.S. funding to scramble to find new ways of demonstrating their utility.

For the rule-of-law sector, this deadline meant a new interest in the informal justice sector, which had previously been widely ignored by the international community. As General Stanley McChrystal's 2009 initial assessment report declared, ISAF must work with the government of Afghanistan "to develop a clear mandate and boundaries for local informal justice systems."⁷⁵ This assessment prompted a series of new strategies to strengthen both formal and informal justice mechanisms, including suggestions such as roaming courts and quick response "justice teams." As the Obama administration reworked its focus on Afghanistan—surging the number of troops in late 2009, appointing high-profile diplomats such as Richard Holbrooke to the area, and dramatically increasing the amount of aid flowing into the country—a wide variety of justice support projects were quickly conceived and implemented. Unfortunately, the haste with which these programs were conceived and the incomplete understanding of the informal justice sector meant that this confusing array of projects has generally not had its intended impact. In some instances, international programs have actually made local dispute resolution more difficult.

Military Engagement: Prisoner Review Shuras and the "Shura Strategy"

Frustration on the military side of the international intervention at the slow rate of planning and implementation of civilian-led projects led to an increasing military involvement in a series of rule-of-law projects, which is historically not an area that the military has been heavily involved in. The increasing emphasis on counterinsurgency led to a focus on local engagement and on building relationships with community leaders. Such "soft" approaches are at the heart of what some have described as the military's "shura strategy."⁷⁶ The sense of urgency and the pace of counterinsurgency efforts meant troops were often much quicker to embrace the concept of informal justice than their civilian counterparts. The capacity of the military to provide security meant that the military was in fact better suited to deal with project implementation in unstable areas. At the same time, however, the military's focus on short-term stabilization over long-term development and its lack of experience working in some of these areas led to a series of projects that saw short-term gains but ultimately complicated local dispute resolution.⁷⁷

There has been little central direction on how military units deal with informal justice mechanisms. There is no coherent policy for those units on the ground as to how they should think about or approach informal justice mechanisms. The international military has also issued few statements or directives to troops on how they should interact with informal

The military's focus on short-term stabilization over long-term development and its lack of experience working in some of these areas led to a series of projects that saw short-term gains but ultimately complicated local dispute resolution.

dispute resolution bodies. One of the few exceptions to this is a document pulled together by the Interagency Planning and Implementation Team that outlines some basic issues with informal justice mechanisms but gives little concrete direction.⁷⁸ This ambiguity leads the young troops on the ground to deal with local leaders as they see fit, something that they have been effective at in many cases.

Two examples of the general types of programs the international military has set up are prisoner review shuras and prisoner release shuras. The international military has embraced both these mechanisms in the hopes of creating a more effective detainee system that both processes prisoners expeditiously and is supported by local communities.

Prisoner review shuras bring together a mix of ISAF officials, representatives from the Afghan security forces—such as the Afghan National Army, the Afghan National Police, and NDS—the district governor, and community representatives to review evidence against prisoners, many of whom were detained by ISAF. Typically these shuras are set up on an ad hoc basis but may be done more systematically in some areas. These councils aim at eliminating arbitrary detention and ensuring that prisoners are not detained without being charged beyond the seventy-two hours mandated by Afghan law.

The prisoner review programs are often combined with efforts to establish formal mechanisms in insecure areas. In some cases, they are set up as an interim transition board before districts have prosecutors in place. Evidence suggests, however, that in some cases these councils have had a lasting negative impact on the establishment of a functional justice system because they allow the district chief of police to consolidate power and sideline the new prosecutors once they arrive.⁷⁹ For example, in one district in Helmand with no prosecutor, a police chief partnered with coalition forces and was able to take almost complete control of the process of detaining and trying those captured by international military forces. When a prosecutor was finally brought to the area, the police chief, reluctant to forfeit any power, effectively sidelined him.

Prisoner release shuras tend to be largely ceremonial and are composed of members of the international military, detainees who are being released, community members who are vouching for the released detainees, and a handful of Afghan officials. Ideally these are meant to be venues in which community leaders take responsibility for detainees for whom the military does not have sufficient evidence to implicate in a serious crime. If the individual detainee is arrested again, there is the threat of negative repercussions for the community. However, in actuality, discussions with military and civilian officials reveal the challenges of organizing such events and managing information around them. This means the military is not always sure who the elders are who are accepting the prisoners and thus struggle with tracking the detainees after their release. The threats of negative repercussions if the men return to fighting also remained vague, while the repercussions themselves would have been of questionable legality under Afghan law. In cases observed by USIP researchers, no community leaders were ever actually held accountable if released detainees did return to fighting. The release shuras that USIP attended revealed higher levels of interaction between community leaders and the international military than were observed in other attempts to meet with community leaders, but they were also fairly disorganized, with elders coming and going and not always from the same areas as the detainees.

Interestingly, while of more dubious legal status since there is no real process under Afghan law that would allow for such a transfer of responsibility to local elders, local communities are reported to support prisoner review shuras because they decrease arbitrary detention and increase transparency at the local level.⁸⁰ USIP interviews with Marines operating these shuras suggested that given the difficulty of transporting prisoners, securing evidence, and setting up

Local communities are reported to support prisoner review shuras because they decrease arbitrary detention and increase transparency at the local level.

courts, prisoner review shuras present a utilitarian alternative. They are generally spoken of positively by respondents in the few studies that have been done (though, with the exception of Sarah Ladbury's 2010 study, attempts to analyze these mechanisms have admittedly been limited). Prisoner review shuras do seem to have improved both cooperation between international troops and Afghan security forces and increased the perception of transparency of the detention process for many Afghans.⁸¹

What is more worrying about these mechanisms is the long-term precedents that they are establishing. In the cases that USIP studied directly, the international military has a very limited amount of information on those involved in either prisoner review or release shuras. Particularly in the case of prisoner review shuras, it is easy to see how a certain corrupt district governor or powerful local elder could dominate these forums and essentially use them as a means for making the international military detainee system an extension of their own local patronage networks. This has the potential to also undermine the role of legitimate government institutions. Furthermore, while the military often focuses on this type of work because they feel that they have no alternatives, their short-term priorities often conflict with the long-term investments needed to promote justice.

Concern about stabilization and winning hearts and minds often leads to quick fixes that rely on local leaders who may or may not have the community's best interests in mind. Many Afghans complain that the international military has limited knowledge of local politics and may not be selecting those leaders that best represent the community. Military decisions on who to engage with—made in haste, without proper analysis of the local context—can upset certain balances and actually empower those who have impeded the provision of justice in a given community. In conversations with military officers, particularly before campaigns to reclaim areas in the south, there is a clear awareness of these issues, but also little sense of how to address them. This reliance on quick fixes may actually be counterproductive to counterinsurgency objectives over an extended period of time since it can breed resentment of both the international military and the government of Afghanistan.

Many Afghans complain that the international military has limited knowledge of local politics and may not be selecting those leaders that best represent the community.

Large-Scale, Internationally Sponsored Governance Projects

By far the most money on informal justice has been spent by the American and British governments on a series of projects to work with local communities to improve rule of law and, more generally, local governance. Information about these projects is often not released publicly, making thorough assessments difficult. But even the publicly accessible information provides some insight into the challenges they have faced.

As USAID and other funders dedicated resources to the informal justice sector, project design was initially driven by a demand from ISAF for civilian actors to create quick-impact programs as part of the “hold” stage of the stabilization strategy’s “clear, hold, build” mandate with little concern about the long-term impact of these projects.

A prime example was ASOP. The project was primarily a local governance initiative to establish district-level councils. These councils were often described as a predecessor or a stand-in for the constitutionally mandated district and village councils that are supposed to be elected.⁸² The ASOP “elections” were not from a district-wide constituency but from a list of local elders created by the district governor and DFID employees in consultation with local community members. These were elections in the sense that those on this list of local elders were able to vote, but the elections were not inclusive in that others were not permitted to vote or run. Once elected, each council had three subcommittees that focused on justice, security,

and social and economic development. The justice subcommittee was expected to meet in order to resolve disputes that were then supposed to be recorded in a log book.⁸³ Some training was ideally done, but it seems to have focused primarily on building the capacity of the elders' administrative skills.

Ladbury reports that ASOP shura members in Helmand received a salary of \$120 a month, which, at the time, was nearly double the salary of local prosecutors, along with funds for council-supported projects of approximately £250,000 (roughly \$400,000) a year as of 2010, a large percentage of which is spent on development projects.⁸⁴ DFID's staff worked closely with elders and the district government, providing training and support for the councils. The lack of security in some of the districts, however, hampered this work. In some of the districts that USIP visited the influence of the councils did not seem to have spread far beyond the district center.⁸⁵

Based upon the initial councils set up in Helmand and sponsored by DFID, USAID issued a request for proposals for a large contract to roll out similar programs in eighty "key" districts across the country.⁸⁶ While technically a national-level initiative of the government of Afghanistan, both the British and American versions of the ASOP program were funded and heavily steered by international donors. In Helmand, DFID employees and stabilization advisers from the Provincial Reconstruction Team (PRT) on forward operating bases organize much of the election process, meet with government officials, and oversee the project. At a national level, the American version of ASOP did seem to coordinate more closely with IDLG. Despite the overlapping design of these ASOP councils, the versions sponsored by the British and the Americans were set up with a limited amount of consultation with each other.⁸⁷

USIP visited over a dozen of these districts where ASOP was operating. Discussions with residents in these districts suggested that the influence of ASOP councils was primarily restricted to the district center. This contention is supported by a selection of justice subcommittee records analyzed by Sarah Ladbury, primarily from shopkeepers and homeowners in the district bazaar, which suggest that the group's influence does not reach far beyond the bazaar. In 2010, Ladbury reported that councils were hearing on average two to four cases a month in Helmand, and "the number does not appear to be increasing."⁸⁸ Similarly, in districts in Helmand where USIP research projects overlapped with ASOP councils, there were no reports of the justice subcommittees playing an important role in resolving local disputes.⁸⁹ Opinions were also split in a survey overseen by Ladbury as to whether these councils were linking the government with the people, increasing awareness of human rights or access to justice for excluded groups. It is possible that this changed as the committees gained more traction.

At the national level, political tensions within the government of Afghanistan were exacerbated by this new international funding. The Ministry of Rural Rehabilitation and Development (MRRD), whose National Solidarity Program (NSP) was considered by many to be the premier local governance program in the country, argued that the local councils already set up by the NSP program should be the focus of local governance efforts. In the meantime, the IDLG has used funding from the British and the Americans to strengthen its position vis-à-vis other Afghan government institutions. As a new government entity that has the reputation for being heavily influenced by young, Westernized Afghans with connections to international embassies, the IDLG has created resentment among many within Kabul's established bureaucracies. Afghan justice officials complained that ASOP's justice subcommittees were infringing on the jurisdiction of the Ministry of Justice. Complicating this situation even more is the fact that USAID engaged another contractor to work on the informal system, creating tensions between these programs and between Afghan officials.

USAID and Informal Justice

While USAID's ASOP councils were only partially involved in informal justice, another USAID contract was awarded to a different U.S.-based contractor in 2010 to work specifically with the justice sector in four districts in Kandahar and Nangarhar (in some cases these districts overlapped with USAID's ASOP districts). The \$25 million contract was initially awarded for work on both formal and informal justice-sector projects to a single contractor. Following a critical story on the contract and the issue of the "fast-track" process in the U.S. media and a lawsuit by another private contractor, USAID split the contract into two components. One addressed the formal sector and the other the informal sector.⁹⁰ The setup and ultimate success of the project was therefore affected by the fact that, from the earliest phase of the project, contracting arrangements generated tensions between groups that ideally should have been coordinating justice efforts.

In early 2010, the contractor that had been awarded the informal component began its work by setting up three offices in Kabul, Jalalabad, and Kandahar and recruiting an expert on informal dispute resolution and a team of Afghans with experience in the area. One of the challenges that the contractor faced during this period was that both the U.S. military and USAID had significant input in determining the districts where the contractor would be working. The military in particular pushed the contractor to work in some of the least secure districts in the east and the south, where it felt the need for rule-of-law work was the greatest, but where the logistics were also the most challenging.

The initial design of the contractor's project was intended as a counterinsurgency and stabilization project in which consultants went into areas that had been recently "cleared" by the military and immediately assisted in the resolving of disputes. Within the U.S. embassy and USAID, it was debated whether such an approach was feasible and how it could fit with the way that USAID traditionally conceived of its mandate as an institution focused on development, not counterinsurgency. The military's approach to informal justice in counterinsurgency appears based on the assumption that the problem in unstable areas is that the informal sector has ceased to exist, and an informal stopgap is needed before formal government structures may be brought in. This is, however, rarely the case. Informal authorities may be in hiding or delegitimized, but this does not mean that importing new mechanisms or simply convening "traditional" forums can effectively replace traditional processes for dispute resolution. More often than not, the real goal of the military in such situations is simply to have civilians deal with justice and other issues that they see as beyond their responsibility. These conflicting positions between the military, the embassy, and USAID made program design especially challenging.

The project was initially designed as follows: Once set up in a district, the contractor would hold workshops, implement publicity campaigns about justice issues, and carry out some legal advocacy work (see, for example, box 11). In conversations with those attending workshops, there was a tendency for participants to speak of these programs positively, while in interviews with those not directly included, there was general confusion over what the actual focus of the project was. Reports by the contractor at the time provided no evidence that these training sessions improved the ability of participants to resolve disputes or weaken the insurgency.

By the time the contractor's initial contract was set to expire a year later, the focus of the project had shifted yet again. Both contractor employees and U.S. embassy officials were discussing the goals of supporting informal justice as a means of statebuilding, where the contractor's project was meant to assist informal actors in accessing the formal sector as a counterinsurgency tactic (this shift was facilitated by the fact that an entirely new group of embassy officials

Informal authorities may be in hiding or delegitimized, but this does not mean that importing new mechanisms or simply convening "traditional" forums can effectively replace traditional processes for dispute resolution.

Box 11. Action Plan from Kandahar City Assessment, June 2011:

1. Foster links between state and ADR processes
2. Raise ADR actor awareness of Afghan and Islamic law
3. Support elder network
4. Lessen bias/corruption in ADR and state justice
5. Support women's role in and access to ADR mechanisms

Source: Checchi and Company Consulting, "Assessment and Action Plan Sub-District 9, Kandahar City," June 2011, 17–18.

began to oversee the contract and most of the key figures at the contractor had also changed). By this point, certain military officers maintained interest in the work that the contractor was doing, but few of them described it as an effective counterinsurgency tool, and there appears to have been little to no actual programmatic cooperation with the military. While there was sound reasoning behind some of these shifts, it is also clear that any major thematic shifts in a short, one-year project are likely to undermine the effectiveness of the project as a whole.

Interviews with both contractor employees and U.S. government officials reveal some of the challenges of working on projects contracted by USAID. The need for embassy officials to demonstrate gains within a 12–18 month deployment period often puts pressure on contractors to focus on projects that can generate short-term outputs instead of long-term impact. In some sectors, such as road construction, progress can be easily quantifiable in terms of miles of roads paved. But rule-of-law initiatives do not lend themselves to this sort of quantification. One quantitative indicator for rule-of-law projects, for example, has been the number of participants at sponsored workshops. This number, however, does not demonstrate what participants learned or what the impact of these workshops was beyond the fact that they were simply well attended. For issues such as access to justice that may take years to change, the need to demonstrate success rapidly and in quantifiable terms can lead to shifts in strategies that ultimately make programs less likely to succeed.

Overlapping Governance and Development Projects

In addition to the internationally sponsored projects, such as those described above that target primarily rule-of-law issues, as well as the ASOP program that focused on dispute resolution as a subset of local governance, there have been a series of other projects focusing on governance and development that have impacted the local dispute resolution landscape—intentionally and unintentionally. The most interesting of these, and the ones with the greatest potential for altering dispute resolution for better or for worse, are those that focus on creating local councils. Since much of what these projects intend to do is beyond the scope of this report, the focus will be on the ways in which such programs potentially impact informal dispute resolution rather than on full descriptions of the programs themselves.

The NSP, funded by the World Bank and implemented across the country by a series of Afghan and international NGOs, is based on the establishment of Community Development Councils (CDCs) to oversee small-scale development grants. The CDCs were chosen through local election processes run by various international NGOs. These councils were meant to ensure community input into how development funds were spent and to encourage transparency in both development and local governance. In some areas the funding for these projects has essentially ended, but in other places, CDCs are seen by NGOs as effective mechanisms for reaching local communities. As a result they have continued to receive funds from other sources or have established relationships with figures such as district governors.

In areas where USIP has conducted research, CDCs have been reported as having both positive and negative effects on dispute resolution. The effects appear to be based primarily on the skill of the implementing NGO and the extent to which CDCs build upon local governance structures that were in place before the program arrived. In general, CDCs are not designed to resolve disputes, except when those disputes are related to specific development projects, but in some areas they have taken on this role. This was particularly true, among areas where USIP has conducted research, in Nangarhar province. Instances of CDCs becoming involved in dispute resolution have also been reported in Kandahar and other areas.⁹¹

This trend has been heightened by the fact that in some areas both NGOs and other international organizations have begun to use CDCs to distribute funds from other sources for projects not necessarily related to NSP directly. This has generally been done in an unsystematic manner, making the role of CDCs highly variable from area to area and often leaving communities with a poor understanding of the goals of the program. In some cases, this access to funds has increased the CDCs' political capital, making them more important actors in the local justice landscape and encouraging disputants to bring more cases to them. This can be a positive thing if a CDC has actually been chosen in a transparent manner and is fairly representative of the community. But since district- and village-level elections have not been held, the CDC election process has not been standardized, and different NGOs interact with CDCs in very different manners. In some cases this means that effective local dispute resolution mechanisms have been marginalized when skilled elders and reconcilers have not been selected for the CDCs. These issues arise not just in the case of NSP-sponsored councils but also for multiple other councils that have been set up by NGOs or simply empowered by the influx of funds that they bring with them. While such funds might be strictly development oriented, international funders often do not consider how control of new projects might damage current dispute resolution structures.

More worrying for long-term local governance in Afghanistan is the way in which these councils, new and externally sponsored, overlap and threaten to undermine the authority of bodies that had previously been providing local justice and governance. As new, competing sources of local authority, they tend to gain legitimacy by distributing external funds rather than by responding to the community and its needs.⁹² There are multiple reasons why international donors and the military have incentives to set up new bodies, ranging from a simple lack of knowledge of the area to the desire to claim credit for anything that the council eventually achieves. Partially as a result, the lack of coordination between the government of Afghanistan (including bodies within the government such as the MRRD and IDLG) and international donors has led to a growth of local bodies claiming various sources of legitimacy. Ultimately this not only makes the delivery of resources less effective but also makes these bodies less responsive to local communities and weakens their ability to resolve disputes and enforce these resolutions through political and social pressure.

Other Organizations and Approaches

Local Afghan Organizations

In addition to the projects primarily implemented by international organizations, there is a group of local organizations currently engaged in informal dispute resolution projects. These organizations are Afghan-run but generally rely on small-scale international grants and funding. They tend to have better local connections and local knowledge than international organizations and are more culturally aware and more interested in the long-term goals of

The lack of coordination between the government of Afghanistan and international donors has led to a growth of local bodies claiming various sources of legitimacy.

promoting locally legitimate forms of justice in Afghanistan. But they are also limited by both weak capacity and uncertain access to funds.

One example of these is the network of *maliks* or community leaders set up by the Welfare Association for the Development of Afghanistan (WADAN), which provides local elders with training on governance and on other issues. They also provide networking opportunities, so that elders may work with each other to discuss issues around governance and local conflict resolution. One of the strengths of this type of approach is that, because it is Afghanistan-based and committed to the long-term welfare of communities, organizations work to establish long-lasting relationships and are flexible enough to reshape their projects to fit local contexts and constraints. Those involved in WADAN's networks have now been working together for several years and have an impressive reach across the country, currently operating in thirty-four provinces.

Such local programming also has the ability to be more flexible than projects run by large international contractors. For example, Cooperation for Peace and Unity (CPAU), funded by USIP, began by setting up district-level "peace shuras" in the Shomali Plain north of Kabul. For the most part these shuras were new creations that were both labor intensive and overlapped with other local bodies. But some of them proved successful in creating venues that facilitated the discussion and resolution of certain types of community disputes.⁹³ Realizing that it was potentially more effective to deal with bodies that were already in place, the CPAU more recently began to work with peace shuras that were pulled directly from the cluster CDCs run by the NSP. This allows CPAU to do the same work but in a way that is more effective and less disruptive to local communities without duplication. This approach also enhances and consolidates structures already in place in a way that will add to the legitimacy and effectiveness of local governance. Setting up parallel structures may help dispute resolution in some areas, particularly where the informal system has been under attack, but risks being an inefficient and potentially disruptive use of economic and political capital.

At the same time, there are drawbacks to this commitment to communities. One example is that Afghan NGOs are far more hesitant than international NGOs to work on women's issues, since they realize how sensitive these issues are to communities and are concerned about the potential impact of pushing these issues on their future relationships with these groups. For a similar reason, they are less likely to try bold approaches like challenging local strongmen and government officials. The biggest challenges these organizations face, however, is the way in which funding constraints shape their programming.

In many instances, organizations are quite open about the ways in which they alter the description of their ongoing projects in an attempt to gain funding from a variety of sources. In other instances, however, NGOs have had to make serious programmatic changes in order to receive continued funding. Typically, the international community favors programs that involve training, because they are public and easy to monitor. Organizations then feel pressed to include training aspects to projects even when they do not necessarily feel that these aspects of their program will have much impact. Often, organizations with extensive networks of local contacts will work to maintain these networks during gaps in funding, creating a series of programs that start and stop based upon whether they currently have funds or not. The recent injections of cash into these types of organizations have actually in some cases disrupted their work, since they have scrambled to expand and reframe themselves in order to secure the larger grants that have become available. As this funding is reduced, it is likely that these organizations will again have major problems sustaining themselves. In

many cases, they might end up worse off than they were originally or, as has happened in some cases already, shut down.⁹⁴

Research-Based Programs

In contrast with organizations that work directly to facilitate dispute resolution, with varying degrees of success, several other organizations have run medium-sized, research-focused projects that have not attempted to engage informal mechanisms as much as study them in order to better inform Afghan and international policy on the informal sector. Most significantly, the Afghan Research and Evaluation Unit (AREU) had a team of researchers that focused on specific field sites in Bamyan, Nangarhar, Balkh, and Kabul provinces.⁹⁵ This research was primarily ethnographic and as a result is more fine grained and location specific than any other work that has yet been done on informal justice in Afghanistan.

The research focused particularly on women's access to justice. Given many of the conservative cultural norms surrounding women in Afghanistan, researchers worked within specific communities where their goals were known, and they were able to conduct long interviews on a wide range of sensitive issues that could not be asked in a more formal survey. In particular, this work reveals some of the challenges women face due to social constraints concerning both the formal and informal sectors. One of the key arguments of the resulting reports is that it is not the informal justice mechanisms themselves that are barring women's access to justice (as is currently argued by many Afghan and international human rights groups) but that the social and cultural norms in which these mechanisms are currently working makes accessing justice challenging regardless of the forum. Similarly, in response to some of the large-scale donor projects on justice in Afghanistan, these reports confirm that the Afghan conception of justice itself is different from many of the Western assumptions that drive the design of internationally sponsored justice programs, as discussed in the second section of this present study.

The upside to AREU's methodology is that the data tells a rich story that highlights the variety of manners of resolving disputes, including multiple perspectives on how individual villages resolve disputes and how women in particular access different venues. The downside to such an approach, though, is that such a labor-intensive study means that the number of case studies from different sites is limited and that these types of study do not produce the type of quantitative data that large-scale donors often demand to justify continued funding of the sector.

In contrast with this, IDLO, in conjunction with a local Afghan research group, has done the most serious quantitative study of popular opinions on both the formal and informal sectors across several provinces. The large amount of data that IDLO has gathered is impressive and analyzes a series of issues with a far greater sample size than any other previous survey. The type of data that it has gathered includes public preferences for justice mechanism based on the type of case to be adjudicated (see table 4).⁹⁶

The data in table 4 confirm some trends from other research. For example, it suggests that the majority of the respondents felt that murder was best dealt with by the courts. On the other hand, domestic violence, an issue deeply tied to the honor of the family, was the type of issue that respondents clearly favored addressing at the lowest level by using the village jirga.

Of course, there are some issues that necessarily arise when conducting a survey of this size, such as the basic limitations of survey categories. For instance, surveys tend to supply only a few bounded options such as "village jirga" or "district jirga," which do not take into account the movement of cases between venues and the numerous cases that pass through a series of venues during their resolution process. Additionally, the number of case studies and

Table 4. Breakdown of Where Specific Types of Disputes Are More Likely to Be Handled (by Percentage of Cases)

	Court	Village jirga	District jirga
Murder	56	23	21
Assault	29	33	38
Theft/Robbery	28	36	36
Domestic Violence	13	66	21

the background data gathered was limited so that it was often difficult to determine the effect of local variables on the data. For example, the degree to which the surveys were conducted in unstable areas with high levels of banditry would likely shape how respondents feel about the importance of theft and robbery.⁹⁷

While AREU and IDLO's research fill many of the holes in international observers' understanding of informal justice in Afghanistan, it has not been possible to combine qualitative and quantitative approaches so as to provide a more complete picture of dispute resolution across the country. These projects have also benefited from the fact that their sources of funding were secured before the projects began, and they were not as shaped by political or economic pressures as Afghan NGOs or international contractors.

Unfortunately, as international funding for informal issues increased and became increasingly reliant on contractors, both organizations have lost funding for such projects, and many staff members that previously worked on research projects have left for private contractors. Despite this, however, they have managed to remain far more impartial in their conclusions than other groups and have not acted to reshape the local justice landscape, other than perhaps encouraging local discussions about these issues.

Human Rights and Other Targeted Work

While usually not directly working with the informal justice sector, there are a series of programs run by human rights organizations that address problems with the formal and informal sectors. In most cases these groups are focused on the rights of women and children and vociferously oppose the exchange of women and female children to resolve conflicts, a practice that still occurs in certain areas of the country. These programs, however, are for the most part reactive; they provide shelter or support for women who have been victims of these crimes and encourage greater state prosecution of domestic abuse. Thus far there have been very few human rights programs designed to address women's justice issues proactively by piloting methods for preventing these practices before they occur. Several human rights NGOs or umbrella organizations, including Global Rights and the Afghan Women's Network, have also worked closely on the drafting of the national policy on informal dispute resolution, which is currently on hold, and have successfully advocated the protection of important rights during the drafting process. However, the lack of work done by these groups or others on quantitative research makes it difficult to determine the extent to which these abuses occur.

International human rights groups often focus on women's, and occasionally children's, difficulty in accessing justice. On the other hand, there has been little discussion of the rights of minorities in areas that are dominated by specific ethnic groups or tribes. While it is difficult to quantify these abuses, in several areas where USIP works (supported by observations by other groups), the difficulty that minorities have in accessing justice in these settings may be just as great, if not greater, than the challenges that women face. This is particularly true

in areas where USIP has worked that are ethnically diverse, such as Kunduz, with minority groups having little say in district-level politics. When disputes arise between members of different ethnicities, the member of the minority group complains that he or she is almost always at a disadvantage.

Related to the effort of some human rights groups are a handful of legal awareness programs currently being run that sometimes affect informal actors. The United Nations Development Programme, for example, ran several legal and constitutional-rights awareness training sessions for informal actors in order to increase access to justice at the district level in several provinces. While these programs may have increased the knowledge of the national legal system among local actors, their impact will be extremely limited if they do not address the core issue of why local leaders choose to resolve disputes in certain ways and not others. A simple increase in information does little if elders do not see an incentive to change the ways in which they are resolving disputes. In some instances, organizations have worked to increase knowledge while providing actual assistance to accessing the formal system. The Norwegian Refugee Council (NRC), which works primarily on rights for returning refugees, many of whom lost land while outside of the country, supports paralegals who often divert cases from the formal system to the informal when they feel that these venues are more likely to provide their clients with a just resolution. The reach of these groups, however, is limited, particularly when compared with the vast amounts being spent by international donors like USAID and DFID on the one hand and with the on-the-ground capacity and local knowledge of Afghan organizations on the other hand.

When disputes arise between members of different ethnicities, the member of the minority group complains that he or she is almost always at a disadvantage.

USIP's Work with Informal Justice Mechanisms

USIP has been working on informal justice in Afghanistan since 2002. This work has taken several forms, from the awarding of grants to Afghan NGOs to USIP staff working directly with local elders. In contrast to some of the internationally sponsored programs described earlier, most of USIP's work has been on a smaller, more local scale. These programs were set up primarily as pilots, aimed at testing approaches and generating ideas for interacting with the informal justice sector. The goals of each program were to facilitate dispute resolution, increase access to justice, and improve constructive cooperation between communities and the Afghan state, all while learning as much as possible about how the informal justice sector functions. This section outlines several of these basic approaches, describes USIP's work, and evaluates both lessons learned and some of the challenges that these approaches have encountered.

Approaches Taken by USIP

USIP's work generally focused on the following types of projects: (1) projects that were purely research driven; (2) projects that focused on building the capacity of informal actors to approach the formal sector, often times through training about the formal sector; (3) projects that facilitated cooperation and linkages between the formal and informal sectors; (4) projects that established networks of informal leaders to facilitate dispute resolution; and (5) projects that established councils to resolve disputes (for a breakdown of projects in these categories, see table 5). USIP-sponsored projects, in part because of their nature as pilot projects, often used a series of these approaches simultaneously (see, for example, box 12). There was also cooperation between projects, with projects learning from each other and refining their approaches over time, primarily through informal conversations with USIP and with each other but also through a series of more formal roundtable presentations to other groups

Box 12. Objectives of TLO's Linkages Project

1. Gain a better understanding of the current justice situation.
2. Work to build confidence and trust between the traditional and state justice systems through systematic interaction, dialogue, and exchange.
3. Test a potential model as a pilot for dispute resolution that constructively links the traditional and state justice systems.
4. Develop means to improve how justice is provided in Afghanistan through linkages developed between the two systems.

working with the informal sector. All projects also had at least some research component to them.

More specifically, USIP's work included the following:

- In 2010–11, USIP staff conducted research on the formal and informal systems in both urban and rural areas in Kabul and Parwan provinces. This research was aimed at generating baseline data and an understanding of the justice landscape in one of the more urban parts of the country. This included an in-depth study of informal aspects of cases in the district civil, commercial, and criminal courts of Kabul, as well as work in several ethnically heterogeneous districts in the Shomali Plain, north of Kabul.
- In 2009, the NRC implemented a USIP project aimed primarily at providing training in legal awareness for 503 community leaders from sixty-four villages. The project also studied the relationship between formal and informal sectors that included several roundtable discussions between formal and informal community leaders.
- Beginning in early 2009, The Liaison Office (TLO) began work on linkages between formal and informal justice sectors in two districts in Nangarhar and Paktya. In 2010, this work was expanded to include two additional districts in both Paktya and Nangarhar and districts in Helmand, Nimroz, and Uruzgan. These pilots aimed at initially conducting research and then piloting context-specific approaches for creating links between formal and informal actors, including ideas such as hosting roundtables among both government officials and community leaders and formalizing the documentation process of informal decision makers. In later iterations, TLO organized “justice shuras” to resolve disputes, establish linkages with formal actors, and facilitate other program components.
- In 2010, CPAU began working on a similar linkage project in Takhar and Kunduz, aimed at building bridges between the formal and informal sectors using a series of peace councils (similar to shuras), some of which had been established previously by CPAU and some of which CPAU established under the program auspices. CPAU also provided the peace council members with justice support workers, who were often law students,⁹⁸ and offered a range of services, including providing legal advice, helping to direct cases to both formal and informal mechanisms, seeking advice from judges, providing transportation for those working to resolve disputes, and ensuring that informal decisions did not violate Afghan law.
- In 2010, USIP helped set up two Provincial Dispute Resolution Councils (DRCs) that brought together respected elders, tribal leaders, and religious leaders from Kunar and Nangarhar to work with the Ministry of Border and Tribal Affairs and the respective provincial governors. The objective of the project was both to resolve high-level, prolonged disputes and to foster cooperation between formal and informal actors on political conflicts in the two target provinces. Serving more as a network of respected mediators than as a formal commission, the DRCs recorded and were involved in the resolution of over 150 disputes in the project's twelve months. USIP served primarily as a coordinating

Table 5. USIP Informal Justice Project Approaches

Primary Approach	Implementer	Provinces
Research	USIP staff	Kabul and Parwan
Linking formal and informal sectors	TLO	Paktya, Nangarhar, Helmand, Nimroz, and Uruzgan
	CPAU	Kunduz and Takhar
	NRC	Herat
Establishing networks	USIP staff	Kunar and Nangarhar
Establishing councils	TLO	Khost and Paktya

body, improving communication between local leaders and government officials. Employees also recorded the resolution of disputes and brought both councils together for basic training and facilitation workshops. This project was expanded in 2012, continuing the DRC in Nangarhar province and bringing together new DRCs in Logar, Wardak, and Parwan provinces.

- TLO also worked on developing a Commission on Conflict Mediation (CCM) in Paktya and Khost provinces, which involved bringing together a group of local elders with the provincial governors to work primarily on land cases, as well as some criminal cases where land was a major underlying reason for the crime. The CCMs functioned more as councils than the network-type structures of the DRCs and worked only on government-approved cases. This limited the number of cases handled but also ensured greater buy-in by key government officials.

What Has Worked for USIP?

Beyond these specific lessons learned and challenges, USIP's pilots point to the fact that well-defined, small-scale programs engaging the informal justice sector can be successful at promoting dispute resolution, increasing access to locally legitimate justice, and strengthening state-community cooperation.

In general, USIP found that programs that focused on training and capacity building in the informal sector were appreciated by those who participated in them, but they faced serious challenges when looked at in terms of cost effectiveness and sustainability. There are simply too many elders involved in dispute resolution to all be trained. It is also paradoxical that much of the current interest in the informal system, which has led to the idea of training elders, is precisely because those in the *formal* system have not received enough training.

Research-oriented approaches can help other organizations better understand local justice issues, but they have not demonstrated a significant ability to affect change beyond the dialogues and discussions that they initiate. These discussions often have value in and of themselves, but it is difficult to scale up their impact strictly through hosting workshops or conferences that help actors analyze key issues in dispute resolution. Research needs to be a key component of any project, but it must be combined with other methods if it is to improve the impact of assistance to informal dispute resolution or at least ensure that these interventions do not have negative impacts—for example, by further empowering individuals or mechanisms that infringe on the rights of others, introducing unsustainable practices, or generating conflict between informal and formal systems.

Research that has compared programs that establish new dispute resolution councils to those that emphasize better networking between councils and leaders who are already in place tends

Research needs to be a key component of any project, but it must be combined with other methods if it is to improve the impact of assistance to informal dispute resolution or at least ensure that these interventions do not have negative impacts.

to demonstrate that the networking approach is more effective and less likely to cause political backlash. New councils may be useful in certain instances where there is a genuine political vacuum (rare in Afghanistan) or where political tensions mean that a new council that distances itself from other political actors in the area is useful (as in the case of the CCM and the new governor of Khost). In general, however, most parts of the country have councils already resolving disputes (most without international assistance). New councils established by outsiders (such as USAID's ASOP program) may have different memberships and end up competing with each other⁹⁹ or have the same or similar membership as previously existing councils and therefore be redundant. In most cases studied by USIP, there is actually a mixture of both. In one district, the district council was essentially paralyzed due to the constant turmoil over who was on what council and who was not. Almost every time that the district council met, small spats broke out over who should be participating, with many claiming that since they were on other councils, they should also be granted a seat in the main district council. Many participants claimed that the council had not achieved anything in the past year due to these conflicts.

USIP has found that projects that focused on creating and supporting networks and linkages between elders or councils already in existence and government officials tend to be more effective in encouraging dispute resolution, increasing access to justice, and strengthening the ties between the government and the community. These attempts at facilitation and cooperation were the most productive when building on local innovations to resolve conflict. Using the strengths that implementing partners had (in terms of encouraging cooperation, setting up meetings, analyzing local issues with dispute resolution, and so forth), these projects allowed the political negotiations that are most important in improving the dispute resolution landscape to occur more organically. As noted earlier, the central problem is that the greatest barriers to dispute resolution tend to be determined by local political issues, such as the relationship between a district governor and local elders, but internationally sponsored projects generally lack the knowledge, capacity, and desire to intervene in such political issues—issues that, of course, are deeply embedded in the social, economic, and religious landscape of each area. Thus, the best approaches are projects that help create an environment for local political change and that strengthen linkages between existing formal and informal actors. These approaches essentially give both sides something that they want: Government officials get improved visibility on local issues and increased local legitimacy, while local leaders see their decisions gain some official sanction, which they hope will decrease the likelihood of later state interference in issues that they see as primarily community based. Internationally supported projects that are able to help create this sort of win-win outcome are likely to be more effective and more sustainable.

In addition to such win-win approaches, some programmatic approaches were taken to make informal decisions more transparent, more enforceable, and therefore more likely to be accepted by the state. Chief among these was the recording of local decisions, which was done extensively in both USIP-supported linkage projects and in the DRC. The way decisions were recorded varied but most records included the names of the disputants, the names of those resolving the case, and basic details of the dispute. The purpose was to ensure that basic details were preserved without making forms so onerous that they were unlikely to be used. The practice of recording decisions may have a long-term effect on the quality of justice, as parties may be less likely to reignite an old feud when there is documentation of its resolution. Though this long-term benefit is speculative for now, there was evidence for it from conversations in which respondents discussed the potential value of such documentation. It would be worthwhile to test this hypothesis several years from now.

The best approaches are projects that help create an environment for local political change and that strengthen linkages between existing formal and informal actors.

The potential value of recording informal decisions is particularly apparent in the case of land disputes that deal with land titles from numerous previous regimes. Land titles, in theory, determine ownership, but due to changing governments over the past three decades, this function is not consistently effective as the same land may be covered by multiple, overlapping title documents. Therefore, land disputes continue even when there is formal documentation. As a result, more extensive documentation appears to have a mixed impact. In most areas where USIP conducted research, land titles were helpful, but ultimately community consensus seems to have been more important in determining ownership. As a result, communities were often already aware of the importance of documenting certain cases. TLO estimated in Ahmad Abad, Paktya, that 50 percent of cases were already being documented before they began their work, with similar trends being reported in other areas.

Attempts to register informal cases with government officials have had mixed results. Disputants claimed that bringing a decision to the court or the Department of Civil Affairs opened the door to more rent-seeking opportunities, with either judges or lower level administrators asking for fees for registration or simply for providing government forms. Government officials, particularly when approached by projects sponsored with international funds, often expect some sort of payment in exchange for their cooperation, even when it is clearly in their interest to cooperate. Another disincentive to registering decisions on land disputes, expressed by some interviewees, was the possibility that the government would tax the owner of the land. At the same time, the formal system struggles with its own systems of documentation and record storage. In one case, a court official expressed strong support for informal decisions being registered in his office, even while having no documentation of the cases that he was working on in the formal court system.¹⁰⁰

Experience suggests that there are some things that can be done to increase efficient cooperation and complementarity between the formal and informal justice sectors, but most of these involve creating political space for local community leaders and government officials to negotiate and improve cooperation, rather than relying on quick fixes such as training sessions that tend to be proposed by international donors. While there may be some benefit to programs that encourage structural issues, the key for their success is cooperation between local leaders and government officials.

Challenges and Concerns in USIP's Work

While achieving some successes, USIP's initiatives also highlight clear challenges that all justice projects face in Afghanistan.

Monitoring and Evaluation

One of the greatest challenges, particularly for small-scale projects with limited staff and funds, is conducting effective monitoring and evaluation. Monitoring and evaluation is too often dismissed as an auxiliary aspect of projects and sometimes as a waste of resources. Instead, monitoring and evaluation should be used to constantly test project assumptions, providing ongoing feedback that can be used to adjust a project to shifting conditions. If programs are to be context-responsive, they need to be iterative and capable of adjusting to meet the changing demands of the local community.

Ideally, research on dispute resolution would include surveys and interviews of all those involved in the dispute resolution process, outside observers, and baseline data collection. The scope of most of the programs funded by USIP, however, combined with challenges such as security and limited access to certain areas, meant that evaluations in each project had to be

If programs are to be context-responsive, they need to be iterative and capable of adjusting to meet the changing demands of the local community.

targeted and small in scope. Most projects used different approaches: NRC relied heavily on a series of “knowledge, attitudes, and practices” questionnaires that measured understandings of the formal sector but did not necessarily reveal much about satisfaction (or dissatisfaction) with informal systems. CPAU evaluated its work more qualitatively, through a series of interviews that were more in-depth but less able to assess change since they were less effective at establishing a measurable baseline. CPAU augmented its questionnaires with some quantitative studies, while TLO remained primarily qualitative.

These approaches, in turn, created certain biases, which in some cases revealed beneficial insights to specific aspects of the informal system but in other instances made the comparison of results difficult. For example, TLO has developed strong networks of elders that it depends upon for the majority of its information. This provides a level of depth about the local political landscape that most other research in Afghanistan lacks. At the same time, their analysis tends to focus exclusively on those resolving the disputes, as opposed to those involved in the disputes. Similarly, NRC relied heavily on cases brought to them, which they then assigned to legal councilors, who sometimes steered cases toward the formal system and other times the informal. This created an inherent bias in its data since cases only came from those who were willing to use the formal sector to resolve their disputes. Similar problems arise in other projects that focus on human rights issues, where data tend to be drawn solely from those who have been victims of certain violations, as opposed to those who are more satisfied with how the system functions.

There is also a tension between attempting to maintain high-quality monitoring and evaluation and attempts to respond to local contexts that may differ significantly. One of the strengths of USIP’s smaller projects was the fact that they could respond to very different security or political conditions at the local level. The more adaptive and responsive a program is to what can be reasonably accomplished in each district, however, the more difficult it is to maintain a rigorous and uniform monitoring system that evaluates the actual outcomes of the program.¹⁰¹ As a result, there is a clear need for organizations to carefully balance the costs and concerns of doing good monitoring and evaluation with the benefits of thorough analysis.

Finally, organizations that rely on donor funding for their activities will tend to resist reporting on problems that arise in their projects or on flawed approaches that might be revealed by monitoring and evaluation for fear of losing their funding. In a context as complicated and varied as Afghanistan’s, where many initiatives are being tried for the first time, there is a huge value to “negative learning,” or learning from failed attempts. This reluctance to report on negative experiences means that lessons are lost while flawed approaches are perpetuated and sometimes replicated.

Problems in Making the Specific General

While the intense local focus of USIP’s work is a benefit in most senses, it also creates challenges when it comes to attempts to scale up that work. In multiple cases, USIP has found that what works in one district or province may not work in other provinces. For example, it should not be assumed that simply because USIP’s DRCs were fairly successful in Kunar and Nangarhar a similar model could work in neighboring provinces. Such projects rely on personal relationships and adaptability to local political contexts. This makes program expansion very difficult. For each new province or district, careful assessments and program planning need to be done, all of which are time and resource intensive. Such a context-specific approach tends to be less compatible with large-scale aid projects that rely on economies of scale and acceler-

ated timelines, and it also makes it difficult to fit these approaches into the more standardized national strategies or the plans of line ministries.

Certain implementing partners were better at working in certain geographic areas using certain approaches than they were in others. For example, NRC, which historically focuses on land and other issues, refused to discuss criminal cases with local leaders, bringing in another Afghan organization to do this and creating a certain lack of coherence across the project. Similarly, TLO, which began working in the southeast of the country and later began linkage work in the south, clearly had better social and political networks in the southeast, and it took longer for the projects to hire staff and actually begin work in new districts in the south of the country. Clearly, projects may face serious challenges scaling up their work beyond the district level even when they have had local success.

Violence and Instability

The political and security context of Afghanistan also affected these projects. Both 2009 and 2010 were marked by a significant deterioration in security in most parts of Afghanistan. There were concerns about the safety of staff and fears of attacks, which limited the movement of TLO's team in the south. Similarly, Taliban-enforced cellular network blackouts inhibited communications between research teams and offices in Kabul.

Security also shaped many of the issues surrounding the project on an even deeper level. In times of instability, there is simply less incentive to resolve disputes, since disputants are more likely to have other, more pressing concerns regarding physical security, and because a resolution reached during an unstable political period is less likely to endure. Instability may increase local tensions, while decreasing the capacity of both the formal and informal sectors to deal with resulting disputes. Where there is instability and local political tensions, the informal sector becomes less of a deterrent against disputes becoming increasingly violent and severe. In many instances this led to a rise in reports of disputes across Afghanistan during the period that these pilots were conducted, while in other cases instability and security fears meant that disputes arose, but that fewer cases were actually reported. This presents something of a chicken-and-egg dilemma in which it was not clear whether large-scale disputes were making instability in certain areas worse, or whether the instability in those areas was making large-scale disputes more likely. This increases the difficulty of measuring the impact of projects, since it is not clear whether a rise in disputes is due to increased insurgent activity in the area or whether it has to do with the failure of formal or informal mechanisms.

Insecurity not only made dispute resolution more difficult, but it also made both local elders and government officials less likely to participate in programs that addressed such issues. Particularly in areas where the insurgency was increasing, local elders were hesitant to associate themselves with projects that linked them to an increasingly unpopular and contested government. The risks were made especially clear after the assassinations of several elders who were a part of the ASOP program in 2010. Local elders in Ahmad Abad were much more willing to engage with TLO staff and government officials in 2009 than they were at the end of 2010, when insecurity had increased significantly. Unlike some of the larger, more visible projects sponsored by international donors, USIP-funded projects run by Afghan NGOs were not considered to be linked to the foreign presence in the country. Even so, many local leaders still preferred to take a wait-and-see approach toward dispute resolution and relationships with the government, regardless of who was running a project. In the least secure areas, where it was unclear whether the Karzai government or a Taliban group would be in control in the

Particularly in areas where the insurgency was increasing, local elders were hesitant to associate themselves with projects that linked them to an increasingly unpopular and contested government.

medium-term future, most elders seemed to simply not do anything until it became clear what the political future might look like.

In such conditions, instability is not simply a concern about personal safety—it is a collective understanding that there is uncertainty about a community’s political future. This shared uncertainty makes dispute resolution programming difficult to design and implement. In TLO’s linkage project, for example, moving past the research stage and piloting genuinely new approaches took a good deal of effort and initially met with limited success. Some of the key impediments were concerns by both members of the formal and informal sectors that any shift in the status quo could threaten their own authority. While elders saw the value of a formalized documentation system, the risk that registering cases in the formal sector would lead to a reduction in their status made them hesitant to embrace the concept. At the same time, while court officials worked with the informal system because of its de facto influence and often referred a majority of their cases to the informal sector, TLO’s project had trouble expanding these patterns, because any formal recognition could potentially be perceived as an acknowledgment of the officials’ own limited authority. All this suggests that it is far more beneficial to provide secure spaces in which local and autochthonous dispute resolution processes can arise on their own. Trying to force bodies into such practices as a part of stabilization is fraught with challenges and risks to the local population.

Capacity and Funding Issues

Projects run by small Afghan NGOs in particular are susceptible to both capacity and funding issues. Staff turnover at Afghan NGOs following the “civilian surge” has been incredibly high as new USAID funding has led to program expansion, putting an increasingly high premium on Afghans with experience working for international organizations and those who speak English. High attrition and turnover is particularly damaging to programs that rely on establishing relationships with community leaders and government officials. One of the reasons TLO and CPAU were comparatively successful was because the mid-level staff who typically met with these individuals remained fairly constant and was able to establish relationships. Other staff members, however, were lured away by higher salaries that only large international organizations could support, which further exacerbated a series of issues that stem largely from NGOs running donor-driven (as opposed to community-driven) initiatives.

The way that international funds are disbursed meant that all implementing partners struggled to balance the work that they were doing for USIP with attempts to find funds for future projects. As noted, this incentivizes organizations to overreport their own success (a problem with all internationally sponsored projects), making it difficult to analyze “failures” whose lessons nonetheless have value. This bias is particularly problematic for projects that attempt to create an objective description of ultimately subjective qualifiers, such as whether an individual has had “access to justice” or whether a case was “resolved.” In several instances, USIP had to make significant efforts to ensure that all aspects of dispute resolution were being recorded and presented by partner organizations. In one instance, USIP was told that researchers at CPAU had not recorded all the results from their research because they were concerned that international donors would not find them “interesting.”

Similarly, in both USIP projects and in other internationally sponsored programs, there is a tendency to take credit for the creation of certain councils (e.g. reports sometimes talk of “our councils” as opposed to “the community council that we are working with”). This is done because it makes the NGO’s role in dispute resolution sound more substantial (i.e., the council

High attrition and turnover is particularly damaging to programs that rely on establishing relationships with community leaders and government officials.

would not have formed if the organization were not there) and more appealing to international donors. This practice, however, further complicates the on-the-ground process of dispute resolution by possibly creating more competing shuras and making the data collected less illustrative and exact concerning the actual resolution process and the flow of cases.

IV
[**BEST APPROACHES FOR WORKING**
WITH INFORMAL JUSTICE MECHANISMS]

Taken as a whole, USIP's research on informal justice, on programming efforts by other actors, and on its own pilot projects has led to numerous lessons learned and identified several potential challenges in working with the informal justice sector. This section makes broader recommendations about engaging the informal sector in Afghanistan based on USIP's experiences with the informal sector. These recommendations are not meant to serve as a step-by-step guide, but they are meant to raise key concerns and offer guidance that need to be considered by anyone choosing to engage the informal justice sector in Afghanistan or elsewhere.

Success is difficult to measure precisely, but in evaluating these programs, "success" refers to projects that met USIP's broadly defined goals of improving dispute resolution and access to justice at a reasonable cost and in a manner that encouraged compliance with Afghan law and international human rights standards. This means not simply expanding understandings of the law and human rights but also generating actual improvements in how justice is being accessed.

Success Depends on Dealing with Local Context

Perhaps the greatest factor of success is the ability to deal with the local context and adapt to challenges as they present themselves. As discussed in section two, informal justice mechanisms can vary greatly based upon the political, social, and economic landscape of an area. The traditions of an area and the personalities of local leaders, along with an array of political and economic variables, all shape how disputes are being resolved in any given community. The more that programs can first research and then adapt their plans to these contexts, the more successful they tend to be.

For example, both the DRC and the CCM worked well because they focused on areas where tribal structures are largely intact. These structures create a certain amount of social cohesion and political authority among informal leaders, making resolutions by informal mechanisms more likely to be adhered to by both sides of the dispute. In areas where tribal structures are not as intact, dispute resolution may be more difficult or may require a great number of shuras and other informal bodies, making direct attempts to implement an identical council less likely to succeed. On the other hand, in more heterogeneous districts in the north, CPAU's approach of a greater number of councils in each district made more sense based upon the extent to which districts were often divided along ethnic lines. At the same time, CPAU's rather divided approach and TLO's linkage program did not involve enough key provincial-level actors to resolve larger disputes the way that TLO's CCMs and USIP's DRCs were able to because of their scale and the involvement of provincial level leaders.

On a programmatic level, the ability to deal with local context demands a certain level of flexibility in implementation while attempting to adhere to more uniform goals. Thus, in establishing DRCs in Nangarhar and Kunar, it quickly became apparent that, due to the tribal and political structures in the provinces, it was far more effective to select members from Kunar based on their district of origin (due in part to the fact that specific tribes are less dominant politically and that districts are a key unit of political organization) and to select members in Nangarhar based upon their tribal affiliation (since this continued to be the key determinant in political alignment regardless of one's district of origin).

On the most basic level, dealing with local context means having local staff members who are knowledgeable about the areas in which they are working and where they have good social and political connections. This, of course, creates an opportunity for corruption and co-option by certain local leaders, but it is a risk worth taking. For example, the hiring practices of TLO

and NRC created an interesting contrast. TLO hired locally connected individuals, many with limited education. NRC, on the other hand, had a more professional and qualified staff, but one that sometimes had less local experience. There is a clear need in these types of programs for both types of employees, but those with local knowledge tend to have a greater impact on a program's ability to reach community members.¹⁰²

The Importance of Community Buy-in

One of the key issues for ensuring success is the need for community buy-in. Put simply, if a community and the elders from that community do not see the benefits of a justice program, they are unlikely to participate. In some sense, this is true of all internationally sponsored programs in Afghanistan. Informal justice programs and rule-of-law programs more generally, though, lack many of the clear material incentives that come from other development projects.¹⁰³ Without such local interest, it is clear that programs will have little to no impact. Successful projects offer clear benefits to the community members who participate in them. Thus, for USIP, a clear indicator of the legitimacy and success of the DRCs in Kunar and Nangarhar was when community members began referring cases directly to commission members.

Similarly, in projects that attempt to link the formal and informal sectors, it is essential that community leaders see the benefit of establishing and maintaining such relationships. For example, in TLO's work in Paktya, many community leaders have long had informal relationships with government officials. The project added a layer of authority to the informal dispute resolution process by having participating government officials stamp or certify informal decisions. In these cases, formalizing such practices may be in the best interest of all those involved. Doing so gives government officials some say in the process and grants additional legitimacy to the informal decisions because they have been approved by government officials. In instances in which it was believed beneficial, disputants felt that a decision was less likely to be overturned if both formal and informal actors approved a resolution. On the other hand, TLO had more problems making progress in urban Jalalabad, where local community leaders and government officials have had a more confrontational relationship. In these cases, initial roundtables were tense because they initially lacked community buy-in. In such areas, projects helped facilitate informal dispute resolution in other ways, but community members did not see government participation as adding legitimacy to decisions. TLO's practice of providing stipends to officials has somewhat clouded their real impact, since it is difficult to determine how much officials have actually bought into the process and how much they have participated only because they were remunerated.

The importance of community buy-in, however, raises several other programmatic issues, including the need to balance other concerns, such as publicity and security. One of the major complaints about the CCM was that it lacked "greater recognition" within the province, and members wanted to work to promote the commission's reputation in communities so that more cases would be brought to them.¹⁰⁴ Publicity campaigns were suggested that would increase the likelihood that communities would seek the CCM out in order to resolve disputes. On the other hand, in several instances DRC members asked that their participation be kept anonymous in order to protect them from the Taliban and other anti-government elements. This was a common complaint in the least secure areas. Thus, there are some clear benefits to increasing the visibility of dispute resolution mechanisms but also some dangers, which must be addressed with local partners in each area.

In several instances DRC members asked that their participation be kept anonymous in order to protect them from the Taliban and other anti-government elements.

Need to Balance Types of Representatives

Related to both understanding local context and the need to establish community buy-in is the need to balance types of representation. This again places a premium on understanding the local political landscape and making sure all key actors are informed and involved in the project's activities. Thus, the DRC and CCM went through a careful selection process in consultation with both community leaders and government officials not only to make sure that key local actors were involved but also to ensure that projects had selected representatives of the right *types* of local actors. In much of Afghanistan, power is deeply divided and there are a large number of very different actors involved in local political issues, ranging from religious and tribal leaders to commanders and former bureaucrats. In part due to continued instability these different types of actors continue to have influence and shape local dispute resolution in different ways.¹⁰⁵ In many instances, this means including not only representatives of certain tribes but also potentially a member of the religious establishment or someone, like a local teacher, respected for his knowledge and education. In a few less stable areas, some also felt it important to include commanders or others with coercive authority, in part because this provided a better guarantee for implementing decisions, and in part because if such figures were involved in the process, they would be less likely to disrupt the settlement in the future.

This, however, may mean that projects will not look the same in all areas. Thus, it was considered a key aspect of the DRCs that religious leaders should be involved—something that quickly became apparent during early research and initial discussions with community leaders. On the other hand, research done in Qara Bagh made clear that the involvement of most mullahs and other religious leaders was primarily superficial, essentially ratifying decisions that had already been made.

More challenging are attempts to involve women, minority groups, or others who may historically have been underrepresented in informal dispute resolution. In general, USIP's projects intended to integrate women and minorities so as to increase their involvement in dispute resolution and their access to justice. For most projects, however, USIP worked to promote inclusion in ways that did not undermine the chances for the long-term success of the project. In conservative Pashtun areas, such as TLO's linkages work in Paktya, concern about community reaction meant that the issue of women's participation was either not highly visible or was simply not possible.

In USIP's work on the court system in Kabul, a venue that women had much more access to, researchers focused more specifically on women's issues and were able to directly question and challenge some of the current discriminatory practices. Ultimately, however, all projects must create a balance between increasing the participation of less represented groups and accepting that such challenges to the local social and political order may be negatively perceived by the community. Discussions with women in both venues suggest that better education, access to economic opportunities, and improved security and livelihoods would improve political opportunities for women more gradually but also more meaningfully than externally imposed social change.¹⁰⁶

The Importance of Government Buy-in

In addition to community buy-in, government buy-in is also essential. The most successful programs that USIP has worked on are those where government officials, as well as local elders, have supported the process. In particular both the CCM and the DRC projects, where provincial governors were key actors in ensuring the success of the programs, proved the importance of government buy-in (see, for example, box 13). While communities often work to maintain their autonomy from the state, there is also an understanding that projects and other political

Ultimately, all projects must create a balance between increasing the participation of less represented groups and accepting that such challenges to the local social and political order may be negatively perceived by the community.

Box 13. A Case from a CPAU Peace Council

A local community member in Ali Abad district accused police of loitering in front of houses in his village and illegally disturbing people in their houses. The case was brought to the local peace council. After seeking the legal opinion of CPAU's justice support workers, the peace council determined that the police were in violation of Article 38 of the Afghan Constitution, which forbids the state from trespassing in a private residence without the resident's permission or a prior court order. The police accepted the decision and ceased their previous behavior without the case ever being referred to the formal justice system.

Source: Peavey, Opportunities and Challenges.

processes that have the government's consent are more likely to have cases brought to them. Where state control is tenuous, local government officials may attempt to undermine projects they see as empowering community leaders and thus threatening their power. Such projects are less worth investing time and political capital in and could even exacerbate problems.

For example, the CCM was initially based on a joint initiative between the governor of Khost and TLO.¹⁰⁷ The elders on the CCM worked closely with government officials, often doing much of the dispute resolution and discussion of the case on their own and then presenting the resolution to government officials. At the same time, CCM members resisted when the governor wanted the body to be under the Directorate of Tribal Affairs, since they were concerned about becoming a part of a bureaucratic structure and losing their direct connection to the governor. The body ultimately remained independent. In the various linkage projects, work was often done to formalize, strengthen, and increase interactions that were already common between formal and informal actors. For example, in the Mohmand Dara district, there were almost daily meetings between district officials and community leaders. The two cooperated on security issues and the district governor referred a large number of cases to the informal system, a practice that TLO's linkages project encouraged.¹⁰⁸

Since judicial officials are rarely at the center of informal dispute resolution processes, cultivating relationships with other officials is often more important. TLO tended to concentrate on cultivating relationships with district governors and other executive officials who already recognized the practical role that informal bodies played in the community. NRC similarly focused on the district governor, while holding roundtables with Ministry of Justice officials at the provincial level. On the other hand, CPAU met with serious resistance when approaching court officials in Kunduz, who refused to discuss any issues with it until they received official letters from both the Supreme Court and the Ministry of Justice. Of all these approaches, those that first targeted district and provincial governors appeared to have been the most successful at cultivating and nurturing positive relationships with government officials more generally.

Programmatically there are clear challenges to ensuring government buy-in of informal mechanisms. The role of government officials varies a great deal from district to district and is constantly shifting based upon national-level political priorities. In Afghanistan's current political landscape, however, it is likely that for the medium term, authority will continue to be primarily personality based. This means for programs to be successful, they must deal with the shifting and variable influence of a variety of local government officials.

For programs to be successful, they must deal with the shifting and variable influence of a variety of local government officials.

The Importance of Political Will

Another important lesson from these experiences is the importance of political will. Government officials and community leaders need to not just be involved in the program but also be

willing to make political compromises that alter the status quo. This means not just simple acceptance of projects as submitted by outsiders but also an active desire to invest political capital in them locally. This desire is not always present. On a local level, for example, TLO has faced resistance to its projects from district governors and prosecutors who see TLO's linkage work as a threat to their own, already limited, power. In Nangarhar, several of these officials spoke very positively to USIP about TLO's efforts but refused to sign any document of endorsement or make their support more public. As noted, and perhaps unsurprisingly, it is those government officials who are most secure in their positions and have the most political capital who are willing to compromise, whereas those who are weaker and feel threatened by community leaders are far less willing to engage with them. The lack of guidance from national-level institutions, such as the Supreme Court and the Ministry of Justice (something that the draft national policy aimed to correct), also made many local officials more hesitant to discuss their interactions with the informal sector.

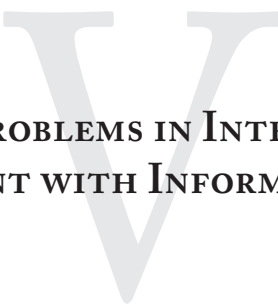
Programming That Ignores Politics

One of the most serious programming issues faced by Afghan organizations and international donors is the faulty assumption that local dispute resolution is a tabula rasa on which new programs may be easily drawn. As Astri Suhrke writes of the years following the initial American-led invasion: "Afghanistan was perceived as a legal terra nullius—an empty territory where legal institutions had either disintegrated or were useless for the new order."¹⁰⁹ Many international groups do not acknowledge that communities have an established political hierarchy and an often complex series of carefully balanced political relationships between formal and informal actors that shape the ways in which disputes are resolved (or in some cases, explain why they are not being resolved).¹¹⁰ Setting up new mechanisms or making even more subtle changes, such as altering specific, targeted aspects of dispute resolution practices, can be perceived as a political act. This has been made even more complicated in recent years by dozens of programs set up by both Afghan organizations and international donors that have further reshaped the justice landscape.

The illusions that actions in the justice sector can be apolitical shape programs in subtle but meaningful ways. For example, most programs that target the informal sector are based upon training elders in what international human rights standards are on the assumption that these elders lack knowledge of such standards and have a desire to learn more about them. This approach seems to have little impact, primarily because the reason that elders are not employing human rights standards has little to do with a lack of knowledge. Instead, the reason for the persistence of existing standards is that elders believe they are best suited for resolving disputes in their area. For example, many elders interviewed claimed to oppose the exchange of women to resolve disputes but lamented that there were currently no other effective means of reconciling two families. Similarly, considering Afghans' deep commitment to Islam and the constantly changing national legal systems over the past three decades, it is also not surprising that so many are quick to turn to what appears to be the more stable and constant legal system. To change social practices, programs need to first consider the political, economic, religious, and social reasons that both community elders and government officials are choosing to resolve disputes in specific manners outside of the state system.

Dispute resolution work needs to acknowledge that local actors, both elders and government officials, are often deeply invested in the ways in which disputes are currently being resolved. Disputes may actually remain unresolved for important political or economic reasons

that are not easily apparent to outsiders. For example, large amounts of land might remain technically under dispute by different tribes, while the land is in fact being used by each one. Neither side wants to address the issue, since losing may hurt its political capital, and both are relatively content with the current economic situation—or with waiting until some other shift in its political power vis-à-vis the other group to challenge the current equilibrium.¹¹¹ In other instances, the larger disputes become, the more likely higher-ranking executive branch officials, like governors, are to become involved.¹¹² Statements by project implementers to the effect that programs are “just setting up roundtables” or have similarly modest goals should be treated with caution. In many instances either these workshops do not have much impact, in which case they may be a poor use of resources, or, at the other end of the spectrum, they are generating political repercussions that the implementers are not even aware of, in which case they may be a counterproductive use of resources.



[**SYSTEMIC PROBLEMS IN INTERNATIONAL
ENGAGEMENT WITH INFORMAL JUSTICE**]

In addition to these broad programming concerns and guidelines, USIP's evaluations of its own and others' work in this field consistently point to a number of systematic issues in the way that the international community approaches justice programming, particularly vis-à-vis the informal justice system. Questions of project funding, monitoring and evaluation, and staffing and capacity issues, as well as a lack of clarity or transparency in goal setting, have often encumbered otherwise well-intentioned and well-resourced efforts. Some of these issues go beyond efforts to work with the justice system and bedevil related international efforts to improve governance and development sectors as well. Nonetheless, a discussion of what has impeded success in working with the informal justice system would be incomplete without a discussion of these factors.

The Need for Both Preliminary and Ongoing Research

Perhaps one of the most serious limitations for internationally sponsored projects in Afghanistan is that projects are designed and planned with a significant lack of quality research. If the international community is to be responsive to the nuances in the political, social, and economic organization of each community, they need to ground any programmatic intervention in sound empirical research that focuses on the ways in which disputes are being resolved in a community both before and after the implementation of the program. This means taking approaches that go beyond the basic assessment tools that are being employed at the end of projects to justify the use of funds to international donors. For example, most research would demonstrate that it is insufficient to judge the success of a project on the number of people who attended a workshop. Contrary to the flawed assumptions on which many projects are based, just because a workshop is well attended does not mean it is effective and has led to any observable change in perceptions or behaviors of attendees.

It should be recognized that it is exceedingly difficult to assess the impact of projects that work on local dispute resolution, because there are so many variables that shape the way in which disputes are resolved and it is not always obvious when a specific project is actually responsible for improving dispute resolution. Beyond this, it is clear that the questions being asked are often the wrong ones because they focus on participants in the project as opposed to the general experience of the community in accessing justice. They also focus more on the short-term—the life of the project—rather than on longer-term impacts.

Pressure on contractors and government officials to produce metrics that indicate success has further skewed data coming out of many government-sponsored projects. The current, less rigorous approach to project monitoring and reporting suggests that donors often do not want to hear when the projects they have funded are not working well. Work is being done in some areas to improve these methods, but given the emphasis on meeting rapid deadlines and spending money before short-term contracts expire, not enough is being done to generate critical long-term data. Projects are expected to generate tangible results within the life of the project, and so questions are asked so as to generate positive answers. For example, one assessment asked for opinions about a project but only asked those who were working and receiving stipends from the project. Unsurprisingly, respondents were overwhelmingly positive about the project. These types of questions and assumptions make the current reporting process vague and not useful for other organizations or government of Afghanistan bodies attempting to work with informal actors or learn from them.

To a great extent, the questions currently being asked during monitoring and evaluation phases are not only inadequate, they are, in some cases, also misleading for those attempting to analyze the impact of work done with the informal sector. In one discussion on informal

The focus of all efforts should be on the dispensation of justice to the end user, and the end user's perceptions and opinions of how their justice landscape has improved or deteriorated based upon different interventions.

justice at the U.S. embassy in Kabul, an official suggested that, in future attempts at measuring the success of a program, elders should be tested on their knowledge of Afghan law. Such a metric might be successful for a legal awareness project, but it would reveal very little about whether an informal justice project has addressed the justice demands of the local population. It furthermore contains the flawed hypothesis that knowledge of formal Afghan law leads to its actual application by informal actors. The focus of all efforts should be on the dispensation of justice to the end user and the end user's perceptions and opinions of how their justice landscape has improved or deteriorated based upon different interventions.

Even when questions are more suited to measure the actual goals of a project, the high turnover of researchers means that many projects fall repeatedly into a number of common methodological pitfalls. For example, there is a tendency for those attempting to assess the types of disputes in a given community to go to either the courthouse or the local council to gather cases. Both approaches are clearly slanted toward the type of cases that tend to be brought to each venue in the first place. Much more useful is a multivenue approach that actually researches the major conflicts in the area and then traces their history to see what venues actually address them. As described earlier, some conflicts pass through several resolution mechanisms. The goal of the initial research—prior to designing a project—should be to determine the users' perspective on the available justice forums in their community and the actual processes they currently use in resolving their disputes. Multiple projects, however, have made the mistake of focusing on just one venue, only to realize later that their baseline data was incomplete and that better initial research would have revealed the need for a broader approach.

Different groups use a wide array of research methodologies, which makes it difficult to compare data between projects and, in turn, inhibits collaboration between projects. Surveys used by IDLO and the interview techniques of AREU and TLO are fairly standard and may lend themselves to comparative analysis. But other methodologies are more unusual, such as the “thematic phrase coding” used by one USAID contractor, which essentially counts the number of times certain phrases are mentioned during a discussion.¹¹³ This may be useful in identifying certain themes, but the results are heavily determined by both those who run the focus group discussion and those who eventually code the interviews. This essentially makes it impossible for other groups to compare their data to the data gathered by the USAID contractor, and thus the contractor's data is not very helpful in gaining a better understanding of local justice concerns.

Unfortunately, the current economic incentives that drive most international contractors do not encourage good dispute resolution as much as they encourage good public relations. The reports asked for by donors reveal little. Many of these updates and reports are repetitive, only providing surface-level information and revealing little about the justice landscape in an area and people's actual dispute resolution practices.¹¹⁴ If donors are committed to more effective approaches to the informal justice sector within their own projects and how their projects fit in with the dozens of other rule of law programs currently running in Afghanistan, a far more transparent and vigorous monitoring and evaluation system needs to be implemented.

Lack of a Coherent Strategy on Rule-of-Law Issues

One of the major reasons that monitoring and evaluation of informal justice programs has been so problematic is that on a higher level there has not been much agreement on a coherent strategy for dealing with rule of law in Afghanistan. While a series of national strategies have been written in an attempt to organize work in various sectors and reaffirmed in the

communiqués of international conferences, they seldom guide actual funding decisions. At the same time, some of these strategies are worded so broadly that they could justify almost any type of project and therefore are insufficient guides to project approaches. As described in section three, the priorities of the international community in terms of rule of law have shifted greatly since 2001, from light-footprint statebuilding to counterinsurgency and the civilian surge. While there are other serious problems that stem from this lack of a clear vision, at the most basic programmatic level it has left real questions about the goals and methods of different projects. Programs designed by the United Nations, NGOs, and various government bodies emphasize the relationship between the government and communities in different ways. Sometimes these programs seem to work with communities in order to avoid the state, and at other times work with the communities is meant to strengthen the state itself.

In the case of U.S.-sponsored programs, there is some conflict even within certain programs, with the military pushing USAID contractors to work in more unstable districts in order to promote their counterinsurgency goals, and the State Department emphasizing more stable districts in order to improve dispute resolution and protect human rights. It may be possible for programs to have multiple goals, but the constantly shifting and unclear aims of certain programs undermine broader rule-of-law efforts. For example, the enthusiasm for a national policy on informal justice reached its height in 2009 when the counterinsurgency push was at its height. By 2010, however, this had been de-prioritized. This left those in the Ministry of Justice and other Afghan bodies confused as to the international stance on informal justice and wasted hundreds of hours of work and a good deal of political capital on the now discarded approach.

Problems with Targeting

There has been a tendency for programs to focus on specific geographic areas, which has impeded a broader nationwide discussion about how various projects could tie into a national strategy. This regional focus has been not only due to limited funds but also due to how the international military forces have shaped how funds are spent. The short-term, locally targeted spending has meant that insufficient attention has been paid to building the capacity of the national- or provincial-level government bodies to integrate informal justice mechanisms.

There are similar issues in the ways that programs focus on certain rule-of-law aspects while not engaging other projects in often closely related areas. For example, projects focused on land title reform and detainee policy are both closely related to informal justice projects, but they are rarely coordinated on a programmatic level. There has been some discussion of trying to improve coordination between these types of projects, and ISAF has organized a series of conferences on rule-of-law issues, but these efforts have not really led to real coordination between projects. As a result, their disparate impacts remain limited, and, perhaps more significantly, the programs continue to ignore the ways in which most justice issues are related. This reflects the tendency of the international community—and not just in the rule-of-law sector—to isolate certain policy issues within silos and then create further divisions within each issue.

Finally, the counterinsurgency focus has created a reactive approach to justice issues. The military's tendency to emphasize activity in areas where there has been recent fighting makes sense for certain types of programs but not for dispute resolution projects. In a country with a highly suspect judicial system, far more can be done in stable areas where there is some hope of promoting cooperation between formal and informal leaders. In the most unstable areas, where groups such as USAID and USIP are being pressured to work, significant damage has often

The enthusiasm for a national policy on informal justice reached its height in 2009. . . . By 2010, however, this had been de-prioritized. This left those in the Ministry of Justice and other Afghan bodies confused as to the international stance on informal justice.

already been done to local institutions, and the political setting is simply not ready to focus on resolving small-scale disputes.

The Funding and the Favoring of Those Not Best Equipped to Address Justice Needs

A particularly acute problem with the international community's work in many areas is that current funding mechanisms favor organizations that are in the poorest position to actually perform the work being funded. Smaller Afghan organizations, which often have the networks that are best positioned to do this type of work, are rarely given funds by the international military or by large donors. The military, due to its district-by-district approach to informal justice that lacks continuity and its poor relationships with Afghan NGOs, has not been able to bring in such local organizations to help the stabilization effort and, at a local level, is often actually unaware of the Afghan NGOs active in the area. In any case, this is a difficult hurdle to overcome, because associating with the international military in the least secure areas can be dangerous for Afghans. However, under certain circumstances in which Afghan NGOs do not have to work directly out of military bases, they may be interested in running projects that they feel are useful for the community and, potentially, remunerative.

At the same time, while the U.S. embassy has more contacts with Afghan NGOs than does the military, the way in which it distributes funds makes it very unlikely that any of these capable groups will receive them directly from the U.S. government. USAID's funding process is considered onerous and confusing by many of these smaller organizations, and an entire development specialty has arisen out of understanding USAID contracting procedures. USAID lacks the necessary staff to oversee multiple small contracts and ultimately favors dispersing funds to a single contractor. This system is unlikely to change in the current environment, as the foreign aid budget and staffing levels are likely to be reduced.¹¹⁵ Funds therefore end up going to large U.S. contractors who have full-time grant writers, despite the fact that they have little experience dealing with relevant issues in Afghanistan or elsewhere and little capacity to understand complicated local contexts. These groups then bring in a large international staff (the contracting system provides an incentive for these contractors to increase their overhead, since their profit is calculated as a percentage of all money spent—meaning they also have a financial incentive to be ineffective). In a few cases, some work might be subcontracted to Afghan organizations, but this practice has been limited and is still much more costly than if the embassy had decided to fund these smaller groups directly. While embassy officials privately agree with such criticism, any move to address it would require a significant overhaul of U.S. government bureaucracy.

Staffing, Capacity, and Other Related Issues

There are also capacity issues that impact all internationally sponsored programs in Afghanistan but are especially damaging to informal justice projects. One of these is the high rate of turnover at the U.S. embassy (where postings are rarely more than twelve months) and NGOs (where staff may stay somewhat longer). Informal justice is an area in which most State Department officials have had little experience. There is therefore a much longer learning process than in other sectors. Often, those with rule-of-law backgrounds, especially those focusing on police and judicial training, are slow to embrace mechanisms outside of the state's control and with which they are less familiar. In addition, because so much of justice delivery in Afghani-

stan relies on predictable, personal relationships, the fact that Afghan officials and local leaders are forced to meet an entirely new set of internationals every twelve months (who also often have extended leave periods) is seriously disruptive. This is particularly true when attempting to establish relationships with Afghan officials and coordinate with other similar initiatives. Tightened security regulations also mean that Western diplomats and even researchers for international contractors leave their compounds infrequently, further undermining the development of relationships with key local actors.

Transparency and Goal Setting with International Interventions in Informal Justice

Too often international donors do not seem to have a clear set of goals in discussing justice in countries where they are actively intervening. One of the reasons for the relative success of USIP's projects in Afghanistan was that there were thorough discussions about USIP's primary goals of improving dispute resolution, increasing access to justice, and strengthening linkages between communities and the state. Too often, however, the goals of international donors are not made this explicit, breeding mistrust that makes project implementation more difficult. This mistrust is not necessarily misplaced. International concern with justice is rarely as altruistic as it appears on the surface. There are often motives, such as the ability to monitor and control populations, that become intermixed with the other goals of the programs. Justice initiatives in all settings need to have a clearer, more transparent set of goals that are agreed upon both by donors and by the governments and people that those programs are funding.

International interventions often work with informal justice mechanisms as a means to a different end, or for multiple ends, which are not always reconcilable. In the case of informal justice in Afghanistan, for example, real funds only became available for studying the informal sector when international officials decided that it was potentially an effective counterinsurgency tool. In this case, programs promoted the linking of informal dispute resolution to the national government in order to improve popular perceptions of the national government and limit the spread of the insurgency. At the same time, however, the military sometimes saw dispute resolution as a tool for stabilization. This did not always align with the counterinsurgency approach, because when the military has intervened in certain parts of Afghanistan, it has quickly co-opted local warlords to help stabilization efforts, negatively affecting the medium- and long-term perceptions of such interventions. Relationships with some of these figures, who are strongly disliked by local communities, is unlikely to either win hearts and minds or build support for the international community or the government of Afghanistan in the long run. These conflicting reasons for engaging the informal system are ultimately undermining each other.

In addition, the many different actors attempting to work with informal justice mechanisms often have goals that conflict with each other, undermining one another's work. For some rights organizations, for example, interacting with the informal justice sector is about protecting the rights of women and children. For State Department-funded programs, informal justice is seen as a way to augment the formal system and essentially help statebuilding efforts. For the military, interacting with informal actors has been done primarily to help stabilization or counterinsurgency efforts. For others, Afghan NGOs in particular, it is about increasing the quality of access to justice for Afghan citizens. While these programs may have multiple positive effects, they simply cannot be everything to all people.

International interventions often work with informal justice mechanisms as a means to a different end, or for multiple ends, which are not always reconcilable.

VI

**[THE CULTURE GAP: PARADIGMATIC
ISSUES RELATED TO WORKING WITH
INFORMAL JUSTICE MECHANISMS]**

In addition to some of the obvious problems with trying to develop programs to engage the informal justice sector in Afghanistan, there are more nuanced paradigmatic issues related to attempts by diplomats, development workers, and academics in the sector that raise some questions about justice and international interventions more broadly. A number of conferences have attempted to discuss issues such as cultural understandings of justice and international interactions with local justice systems across cases. In general, justice initiatives tend to be studied on a country-by-country basis, meaning that both academics and practitioners do not stop often enough to consider the broader issues that this work raises.¹¹⁶ Based on USIP's work (which can only address some of these broader issues), there are several themes, particularly revolving around cultural understandings of justice and the ways in which different political issues shape international rule-of-law work, that are worth future consideration in discussions about international engagement with informal justice systems more widely.

One of the least discussed but most pressing issues with the way that international programming has targeted rule-of-law issues in non-Western countries is the sharp contrast in how terms like justice are understood in different settings. Western understandings of justice have a clear impact on programming priorities but, more importantly, shape the assumptions of international diplomats and development workers when they discuss rule-of-law issues. Attempts to import Western terms, values, and definitions into settings with very different political and juridical histories can be counterproductive and, at times, damaging. Many of these recurring issues are highlighted by the Afghan case but have broader relevance to international rule-of-law and justice reform interventions.

Reconciliation versus Retribution

In the Afghan case, it is clear that when justice is discussed in most communities there is much more emphasis on reconciliation and community harmony than on retribution.¹¹⁷ In most informal justice systems, the goal of restoring community harmony is prioritized more than the desire to punish offenders, as it may be in Western legal systems (see, for example, box 14). Early attempts by the international community to support justice in Afghanistan favored those aspects of the judicial system that had the most resonance in the Western world—for example, the prosecution of criminals for major offenses such as involvement in the narcotics industry. At the same time, in these early years, very little was done to target land or water disputes or the usurpation of power by local commanders, yet these issues were much more pertinent to the daily lives of the majority of Afghans. The result was that early justice sector work did not help meet the demands of many Afghan communities for more reconciliatory justice. More recent work on informal justice has shifted the focus somewhat toward reconciliation, but this shift has been incomplete and there is still a strong focus on criminal prosecutions in rule-of-law discussions and programming. For rule-of-law efforts to be more effective collectively, there needs to be an increased focus on how the failure to achieve reconciliation has created dissatisfaction among Afghans with the state of the wider judicial system. While Afghans clearly emphasize the need to punish punitively in certain circumstances, a retributive system based on foreign models is clearly not attuned to most Afghans' values.

In most informal justice systems, the goal of restoring community harmony is prioritized more than the desire to punish offenders, as it may be in Western legal systems.

Group versus Individual Rights

Related to some of this difference is the fact that in many non-Western countries there is much more emphasis on protecting group rights rather than protecting individual rights. In

Box 14: Excerpt from an Interview with an Expert on International Access to Justice

“Notions of justice [in Afghanistan] are much more about a balancing of rights with the exigencies of peacekeeping. Rules are still known and reasonably predictable, the protection of rights prioritized (especially in cases that reference sharia rights), and remedies calculated to make whole in a similar way, but the key difference is the demand for a higher degree of subjectivity. In this sense, the attainment of ‘justice’ is tailored (within anticipated boundaries) to the needs and capacities of the parties and the ‘community’ in which they’re situated, and the circumstances surrounding the case, as opposed to based on rules objectively applied by external actors.”

Initial programs that focused exclusively on individual rights in a very Western sense were not received well by Afghan communities or government officials.

Afghanistan this is seen particularly in the cases of many women’s rights issues. A woman, for example, may be denied recourse in a situation of domestic abuse in order to protect the honor of the family and to preserve stability in the community. This does not imply that internationally sponsored programs cannot work to simultaneously protect individual and group rights. Rather, initial programs that focused exclusively on individual rights in a very Western sense were not received well by Afghan communities or government officials. Internationally sponsored programs run in societies that emphasize communal rights may be able to encourage the protection of individual rights, but they must recognize that the protection of these rights is likely to continue to be secondary to the protection of group rights. For example, programs that emphasize the way in which sharia law protects women from domestic abuse or preserves their inheritance would be far better accepted than those programs with similar goals but phrased in the language of individual rights based upon international human rights principles.

Rule of Law and Local Governance

In Western approaches to justice there are several other conceptual divides that do not necessarily resonate at a local level. There is a tendency among international donors to divide their programs between those that target the “rule of law” and those that address broader “governance” issues. On a local level in much of Afghanistan, this distinction is simply not relevant; individuals involved in local dispute resolution are the same ones as those involved in local governance. Governance and dispute resolution decisions are often made in the same venue at the same time. The legitimacy of local government institutions—formal or informal—is often closely tied to the perceived quality of the justice of their decisions. As a result, when two separate programs are introduced into an area to address what is essentially regarded locally as a single concept, the result is generally more confusion than improvement in service delivery.

In Western societies, rule of law is seen primarily as an impartial set of laws applied equally across all contexts. Due to the relationship between governance and rule of law in Afghanistan, dispute resolution and other rule-of-law issues in this context are shaped by local political issues and structures. A weakening or strengthening of judicial mechanisms is also going to reshape local balances of power in ways that Western observers may be slow to understand. Despite this, as has been noticed by numerous critics, there is a continued desire by internationals to see these programs as apolitical.¹¹⁸ This is problematic when there are not frequent discussions between diplomats and practitioners and when programs are not responsive to political and military changes.

Any conversation about informal justice necessarily invokes issues concerning the relationship between the citizen and the state. Due in part to the last thirty years of instability in Afghanistan, but also due to the failure of the Karzai regime to establish transparent, functional government structures, any work with the informal justice system constitutes an inherent political statement about the Afghan state’s relationship with its citizens. This is one of

the reasons that Afghan government officials are often so wary of making statements in support of the informal system. This, along with concerns about funding, gives officials the sense that engagement with the informal system is a zero sum game—any credibility or resources given to the informal sector detract from the credibility or resources they would otherwise receive. Further complicating the situation has been the international community's troubled relationship with President Karzai over the past few years, with foreign donors supporting him financially but making public complaints about the corruption of top officials and the government's inability to prosecute such actors. In such a situation, and indeed in any situation in which the international community chooses to interact directly with informal justice practitioners, ignoring the link between dispute resolution and the politics of governance is ill-advised and potentially dangerous.

Rule of Law, Corruption, and Other Culturally Embedded Concepts

In understanding justice locally, there are numerous other sub-issues that can take on culturally explicit meanings not always taken into account by practitioners. Some of the anticorruption initiatives in Afghanistan, which have been another major rule-of-law priority, have struggled with how corruption is perceived by Afghans locally.¹¹⁹ In a society where patronage networks and kinship are essential to both the daily political and economic lives of those in a community, practices such as hiring a close relative are rarely seen as corrupt. At the same time, it is still considered immoral for a judge to accept payment during the course of a trial. Furthermore, the awarding of contracts to international firms instead of Afghan ones through complicated processes leads many Afghan officials to complain that this is simply another form of corruption that the West is perpetuating. The ultimate problem is that international programs are often unaware of local perceptions of corruption; they tend to operate under the assumption that Afghan and American definitions of the term are synonymous. Popular perceptions of international programs are that they are interpreting corruption through Western understandings of morality instead of attempting to first understand how it is perceived locally.

A problem that has confronted Westerners specifically attempting to work with informal justice in Afghanistan has been misguided attempts to understand informal justice by applying the concepts of mediation and arbitration. At times, it has been argued by international officials and contractors that are setting up programs that mediation is best applied to shuras and more binding arbitration should be applied to jirgas. In reality, there is not such a clear divide in most local contexts. This is because the binding nature of informal mechanisms has far more to do with who is making the decision and the local political context. Pashtun jirgas often are binding, but this has far more to do with the social pressures being applied by fairly homogenous communities than the nature of the jirga itself. All of these misunderstandings have made discussions about informal justice far more complex, as international experts have tried to hammer Western concepts onto an Afghan context, but they also threaten to undermine how informal institutions function. More often than not, international efforts are exercises in rendering something foreign familiar to the external observer, rather than in trying to understand the internal logic and rationale of the informal systems. This is a feature of the international community's approach, which relies on straightforward models and does not deal well with flexibility, despite the fact that flexibility and the lack of a single model is part of what has made the informal system both effective and enduring. If an official law were passed making jirga decisions fully binding, it would de-emphasize the local, social negotiations that

Popular perceptions of international programs are that they are interpreting corruption through Western understandings of morality instead of attempting to first understand how it is perceived locally.

take place during the decision-making process. Since it is these negotiations that make the decision acceptable in the eyes of the community, removing this step would be a grave error, even though, in Western terms, working to make decisions more binding might seem a logically sound decision.

Understanding Justice Locally

Cultural sensitivity in discussing rule-of-law issues, however, cannot be limited to learning certain foreign terms. Even within specific communities there are debates over justice that need to be understood and taken into consideration. In Afghanistan there is a great deal of debate over what justice means and the role of both the courts and communities in resolving disputes—with particular conceptual divides between urban and rural areas, those of different ages, education levels, and ethnicity, and types of dispute. For example, the difference between the concepts of *haq alabd* and *haq allah* is widely interpreted by religious scholars in Afghanistan, with many suggesting that informal bodies, such as *jirgas*, have the authority to resolve civil aspects of certain cases, but that only the state has the legal authority to address criminal aspects. The classic example of this is in murder cases. Informal bodies can arrange payments to the victim's family to address the civil aspect of the case, while the state is solely responsible for the punishment of the guilty party. Despite this general consensus among religious scholars, in many areas of the country, particularly the Pashtun south and east, if a *jirga* resolves the civil aspect of a murder case, the criminal aspect may not be brought to the formal system and will be essentially forgotten. Despite the fact that this appears to be a clear violation of most interpretations of sharia law, Afghan criminal law, and the way that many state officials and even local leaders describe how the system is *supposed* to work, the practice continues in much of the country.

The Limits of Culture?

At the same time, it is clear that project programming and discussions of justice cannot descend into pure cultural relativism. Culture has often been used by advocates of the informal system as an excuse for ignoring certain pressing justice concerns. For example, many women's groups in Afghanistan have complained that programs have used cultural sensitivity about women's issues as an excuse in many parts of the country for not supporting women's rights initiatives more actively. This is especially the case in less secure parts of the country where the military has made the argument that community support for the military presence is more important than addressing more complex and potentially contentious issues such as human rights.

There are ways to support justice initiatives in culturally sensitive ways, but this needs to be done through dialogue and discussions about a community's justice needs, and it needs to be done in ways that emphasize overlapping points in systems that may at first glance be disparate. This approach would move away from the projects that focus only on those negative and repugnant practices. One of the key reasons that USIP has found small, local implementers to be more effective than large-scale international contractors is because they are culturally attuned to these differences and are more capable of bridging the cultural gap between international donors and communities. They are much more likely to identify local innovations and progressive voices who can generate locally derived and relevant justice reform. These approaches must remain flexible and disposed to engaging in local discussions and being modified on the basis of those discussions. Extreme inefficiencies will remain and real damage can

Many women's groups in Afghanistan have complained that programs have used cultural sensitivity about women's issues as an excuse in many parts of the country for not supporting women's rights initiatives more actively.

occur if international donors do not supply money in such a manner that local communities can take part in determining what their justice systems will look like.

VIII

[CONCLUSIONS]

While much of the international community's efforts to work with informal justice in Afghanistan may have been well intentioned, the foregoing critiques suggest that they have not always been well informed. Often they have done as much harm as good and, at a minimum, may have wasted significant amounts of much needed donor funds. This does not mean that efforts to work with the informal justice system are inherently flawed, but it does mean that the international community must be more cognizant in the future about issues such as those highlighted in this report. This includes following programmatic guiding principles that have proven effective in the past, such as being sensitive to local politics and ensuring local buy-in. It also includes ensuring greater collective efforts to avoid the systematic and paradigmatic issues that have routinely led to mismatched, misguided, or conflicting goal setting, or to flawed and often harmful interventions in local communities.

Given the political complexities of the informal justice sector, as a general principle programs must first ensure that they are doing no harm. This means, in particular, avoiding interventions that disrupt subtle political balances and undermine informal processes that were already working effectively. One of the most worrying issues attached to international programs that work with informal leaders and dispute resolution is the Taliban's campaign of targeted assassinations of local leaders, particularly those who are known to have worked with the international community. In one case, shortly after the establishment of an ASOP shura in Helmand, multiple key members of the shura were killed—each symbolically shot in the mouth. While it is difficult to determine whether these leaders were assassinated because of their affiliation with the ASOP project or because of their general influence in the community, which posed a perceived or real threat to insurgents, these killings demonstrate the difficulties and moral dilemmas of working with local leaders, particularly in unstable areas. The symbolism in how they were killed sent a clear warning to others who might consider talking with the international community.

Another major problem with the international community's approach to local governance, which affects informal dispute resolution, is the tendency to set up new community councils when external actors are unhappy with existing local bodies. This tendency has created a large amount of tension within the Afghan national government, between the MRRD, which runs the NSP, and the IDLG, which ran ASOP and handles various district-level governance issues. In this case, international donors are responsible for increasing the inefficiency of local governance and creating tensions within the government of Afghanistan. On a local level, these bodies may overlap with numerous development, religious, and other councils. Frequently they conflict, ultimately undermining the authority of one another. In many instances, this leads to a good deal of waste and redundancy.

Moreover, the international community's involvement in certain rule-of-law issues has undermined the way in which all of these bodies work. For example, there is a tendency now for elders to demand payment, or at least a travel payment, before attending any council meeting or workshop sponsored by the international community, even those run by Afghan NGOs. In contrast, shuras that are not associated with international programs generally consider the request for payment as immoral (though certain fees may be concealed in fees for fuel, phone cards, or meals).¹²⁰ Elders will attend shura meetings for free if they believe that the group is addressing important issues. The current practice of payment, which is now hard to avoid because it has become so prevalent, creates questions about both the motives of elders and their impartiality and suggests that they might not have considered a given meeting worth their time had they not been paid.

Doing no harm . . . means, in particular, avoiding interventions that disrupt subtle political balances and undermine informal processes that were already working effectively.

As long as local communities commonly believe that the easiest way to resolve a dispute favorably is through bribery or the use of force, attempts to reform the justice sector will make little to no progress.

Abiding by a “do-no-harm” principle, justice programs need to be designed with an awareness that they do not exist in a political vacuum. Ill-informed past efforts have contributed to a culture of impunity in Afghanistan, which has large ramifications for overall justice efforts. Initiatives that seek to improve justice on a local level will fail if political leaders on a national and international level are not also held accountable. The current culture of impunity in Afghanistan has created deep problems that are far beyond the scope of this report and includes an industry of corruption, warlords who continue to control vast economic and political resources, and resentment by local communities toward the central government, all of which have fueled the insurgency. There are some ways in which current approaches are specifically undermining local dispute resolution, such as the continued reliance by the international military on figures who are perceived locally to be warlords and who are usurping resources meant for local communities, as well as the co-option of community-based forums for dispute resolution by current military actors. As long as local communities commonly believe that the easiest way to resolve a dispute favorably is through bribery or the use of force, attempts to reform the justice sector will make little to no progress.

This is brought into remarkable relief in Afghanistan, where the Karzai government has increasingly been perceived as abusing its power and fueling corruption. From the perspective of many Afghans, the international community’s continuing support of Karzai means that the international community is at least complicit, if not actively to blame, for the overarching lack of justice in the country. Attempts to discuss justice on a local level with formal or informal actors will make no real headway as long as this perceived hypocrisy at the national and international level is not acknowledged and addressed.

Looking Ahead in Afghanistan

As the international community, and the United States in particular, begins a phase of transitioning out of Afghanistan, it is even more important to think critically about the role of internationally sponsored programs and justice at the local level. Focusing on informal justice mechanisms may be even more important given the ongoing processes of “transition.” Three factors in particular drive this relevance. First, investments in the formal justice sector have yielded disappointing results. Second, reduced financial assistance budgeted for Afghanistan will result in a sort of triage of programs, which in the best case will favor what works effectively and efficiently rather than continue to pursue expensive but failed ambitions. In the worst case the triage will be far less strategic, creating what has been called a “chaotic cutoff” of aid. Third, in general, local-level governance initiatives have proven extremely difficult to implement, and there will be a strong temptation to minimize formal governance efforts at the level of what Thomas Barfield has called the “weakest link in the chain”—that between the provincial-level and district-level administration.

This renewed interest is also likely to revive the debate over whether there should be any assistance at all to the informal sector. Segments of civil society, the AIHRC, and the grand institutions of the formal justice system—the Supreme Court, the Attorney General’s Office, and the Ministry of Justice, in particular—have opposed working with informal mechanisms. They argue that these mechanisms operate outside the sphere of human rights, perpetuate discriminatory practices, and undermine the valid attempt to extend the formal sector. This is a serious debate that this report does not attempt to resolve but does attempt to inform. The premise of the argument for working with the informal sector (particularly following transition) is that it exists, it functions, and it is in fact the main vehicle for dispute resolution across

the country. Not recognizing its existence will not make it go away, and the opportunity to improve the formal system in an impactful way seems to be slipping away. In part, the opportunity has been squandered both by poorly conceived international plans and by the usual and well-known Afghan impediments to real institution building. On the other hand, research clearly indicates that there is a clear limit to how much these systems can be improved. In other words, the object of working with the informal system cannot be to eventually morph them into the formal system. They are too localized, too resistant to homogenization, and too linked to specific, local cultural patterns and political structures. The most that can be hoped for is that assistance, correctly applied, can soften the harder edges of the informal system and buy time at the local level for the formal system to eventually implant itself—though this is likely the work of generations.

With less resources available in the future, it is essential that programs look to efficiently promote access to justice and dispute resolution without disrupting those areas where the formal or informal systems are already functioning. However, improving the informal system requires much more than money and training and salaries—it requires a detailed local knowledge of how the system works in each of Afghanistan’s many microsocieties. Small-scale projects at the local level are best positioned to continue to make headway in resolving some disputes and promoting local access to justice. Furthermore, the international community’s reliance on ineffective funding mechanisms and the lack of a coherent strategy means that much of the money currently being spent on justice projects in Afghanistan is being wasted. The international community and the government of Afghanistan need to work together to clarify their goals and recommit to justice in local communities. USIP’s pilot projects demonstrate that there are fairly easy, inexpensive ways for supporting justice in Afghanistan, but without a certain amount of flexibility, vision, and political commitment most programs working on informal justice in Afghanistan are likely to flounder.

Finally, the systemic issues and the key lessons learned that have appeared in the course of this work in Afghanistan point to wider issues related to the relative lack of coordination between those funding justice initiatives, academics studying these issues, governments working to improve justice delivery, and communities struggling with their own justice issues. At this point, most of the work on informal justice has been done on a country-by-country basis, with only a few attempts at wider synthesis or testing the basic assumptions that are the foundation for this report and countless other projects. In general, more research needs to be conducted, but perhaps even more importantly, efforts in various countries should be better linked, creating wider discussions on justice and the international community.¹²¹

Notes

1. See for example, Stephen Carter and Kate Clark, *"Snakes and Scorpions": Justice and Stability in Afghanistan* (Kabul: Office of the High Commissioner for Human Rights, May 2010).
2. For the use of informal conciliators in the Kabul court system, see Zuhul Nesari and Karima Tawfik, *The Kabul Courts and Conciliators: Mediating Cases in Urban Afghanistan*, Peace Brief 101 (Washington, DC: USIP, July 2011).
3. The Center for Policy and Human Development (CPHD) at Kabul University estimated in 2007 that 80 percent of all disputes were being resolved in the informal sector. Based upon USIP's work in nine provinces and interviews with those working in other areas, this estimate seems accurate, perhaps even underestimating the reach of the informal system; TLO, for example, reports 95 percent of cases are resolved in the informal sector in Deh Rawud district of Uruzgan and the Grishk district of Helmand in 2010, and NRC reported only 16 percent of cases brought to them in 2008 were brought to the formal system. See CPHD, *Afghanistan Human Development Report 2007: Bridging Modernity and Tradition—the Rule of Law and the Search for Justice* (Kabul: CPHD, Kabul University, 2007), 9. For Afghan perceptions of the formal system, see the Asia Foundation (TAF), *Afghanistan in 2011: A Survey of the Afghan People* (Kabul: TAF, 2011).
4. This tendency of various international organizations to continue to favor a highly statist approach to justice in countries where most continue to resolve the majority of their disputes outside the court system is hardly unique to Afghanistan. While this piece focuses on the particularities of the Afghan case, in part because there is such current focus on the country, a more comparative approach is also illuminating of several key patterns in how various groups define and approach justice issues. For a series of excellent case studies, see Deborah Isser, ed., *Customary Justice and the Rule of Law in War-Torn Societies* (Washington, DC: USIP, 2011).
5. See Andrew Wilder and Stuart Gordon. "Money Can't Buy America Love," *Foreign Policy Magazine*, December 1, 2009.
6. Frances Z. Brown, *The U.S. Surge and Afghan Local Governance: Lessons for Transition*, Special Report 316 (Washington, DC: USIP, September 2012), 2–3.
7. The United Nations Universal Declaration of Human Rights, the foundational document of human rights efforts, clearly emphasizes individual rights over group rights. This document, the covenants, other documents that have flowed from it, and the assumptions that they represent do much to shape the approach by international rights groups. See United Nations, "The Universal Declaration of Human Rights," December 10, 1948, www.un.org/en/documents/udhr/index.shtml.
8. The image of the circle emphasizes the ideally egalitarian nature of the bodies. For more on the origin of the word "jirga," see Ali Wardak, "Jirga: Power and Traditional Conflict Resolution in Afghanistan," in *Law After Ground Zero*, ed. John Strawson (New York: Routledge-Cavendish, 2002).
9. Loya Jirgas have been a part of Afghanistan's historical identity since Ahmad Shah Baba was selected emir of Afghanistan from among the various Pashtu tribal leaders during a Loya Jirga in 1747. Until the twentieth century, the Loya Jirga had no defined composition or powers. The constitutions of both 1964 and 2004, however, both attempted to codify Loya Jirgas. Interestingly, President Hamid Karzai has recently convened what were termed "traditional Loya Jirgas"—that is, nationwide temporary bodies in which were vested the authority to deliberate and decide on certain defined issues that were of transcendent national interest but whose legitimacy lay entirely outside of the constitution. (The National Consultative Peace Jirga convened by President Karzai in 2010 to discuss beginning negotiations with the Taliban is one such example.) On the other hand, a Loya Jirga as defined in the constitution has never been convened. As Thomas Barfield points out, however, the actual strength of these Loya Jirgas has sometimes been inflated by history, and that much of the real politics of decision making takes place behind the scenes where they are largely controlled by the political elite. This pattern continues to hold true today, where many of the true issues a jirga deals with are actually dealt with in informal conversations and in the politics of establishing the group in the first place. For more on this, see Thomas Barfield, *Afghanistan: A Cultural and Political History* (Princeton, NJ: Princeton University Press, 2010), chap. 5.
10. In the 1964 Constitution, "shura" was the word used to denote the unicameral parliament, in contrast to the 2004 Constitution, where the legislature is divided into two houses, both of which use the word "jirga" (the "Meshrano Jirga" and the "Wolesi Jirga" for the upper and lower houses, respectively). For more on shura, see Government of Afghanistan, "Title Four: The Shura (Parliament)," Constitution of Afghanistan, October 1, 1964, 23, paper 3 in the digitized Afghanistan materials in English from the Paul Arthur Afghanistan Collection, University of Nebraska, <http://digitalcommons.unl.edu/afghanenglish/3>
11. The Afghan Constitution calls for provincial-, district-, and village-level elections to select local councils. Thus far, only Provincial Councils have been elected and their powers are ill-defined, meaning that many are fairly weak. Despite this, many districts and villages have councils, which have been established through means other than government-sponsored election, and in many cases, these councils are considered both legitimate and powerful. For more on local councils, see "Chapter 5: The National Assembly," Constitution of Afghanistan, January 2004.
12. The terms vary by location of the speaker and have become somewhat conflated in popular parlance. It is likely that the government of Afghanistan and international community's attempts to set up "shuras" across

- the country have further confused and conflated local terminology. For more on this, see Noah Coburn and Shahmahmood Miakhel, *Many Shuras Do Not a Government Make: International Community Engagement with Local Councils in Afghanistan*, Peace Brief 50 (Washington, DC: USIP, September 2010).
13. See Chris Johnson and Jolyon Leslie, *Afghanistan: The Mirage of Peace* (London: Zed Books, 2008). It is also important to note that these informal bodies have had a long and complex relationship with the state and did not simply arise as a result of the Soviet invasion to fill a governance vacuum, as was assumed by some international programs after the U.S.-led invasion. For more on this, see “Rule of Law in Afghanistan: Conference Report, September 23–24, 2010,” American Institute for Afghanistan Studies (AIAS), Boston University, June 2011, 7.
 14. See Johnson and Leslie, *Afghanistan*, 41–42.
 15. The Holy Quran, Surah 49, Al-Hujurat, Ayah 9.
 16. For some interesting examples of Pashtunwali that assume a static interpretation, see International Legal Foundation (ILF), “The Customary Laws of Afghanistan,” 2004, <http://theilf.org>. While values may be similar, the way in which Pashtunwali is enacted can vary drastically from tribe to tribe. As one member of the judiciary in Paktya described an example: if a member of the Mangal tribe commits murder, is imprisoned, and dies there, the dispute between the two families is considered finished if compensation has been paid. If a similar case occurs among the Ghaljai tribe, revenge must be sought among the murderer’s kin irrelevant of compensation and the fact that the murderer is dead. For more on this, see Lutz Rzehak, “Doing Pashto: Pashtunwali as the Ideal of Honorable Behavior and Tribal Life among the Pashtuns,” *Afghanistan Analysts Network*, 2011, 2.
 17. See Thomas Barfield, Neamat Nojumi, and J Alexander Thier, “The Clash of Two Goods: State and Non-State Dispute Resolution in Afghanistan,” ch. 4 in Isser, ed., *Customary Justice* (Washington, DC: USIP Press, 2010), 170.
 18. In certain instances, disputants may specifically request that sharia be used to mediate their dispute rather than Pashtunwali, but in most Pashtun areas, Pashtunwali is referred to first. See The Liaison Office (TLO), *Linkages between State and Non-State Justice Systems in Eastern Afghanistan: Evidence from Jalalabad, Nangarhar and Ahmad Aba, Paktia* (Kabul: TLO, May 2009), 15.
 19. Haq allah is sometimes equated with the rights of the state, in the sense that they are the rights that the state is obligated to protect in its management of society. However, particularly in rural areas, where state penetration is minimal, haq allah is more often interpreted as offenses done to the community itself, not to the state.
 20. Pashtun tribes are generally egalitarian, whereas Turkic ones are hierarchal. This has shaped much of the political order of the country for the last several hundred years. See Barfield, *Afghanistan*. For more on Pashtun individualism, see David B. Edwards, *Heroes of the Age: Moral Fault Lines on the Afghan Frontier* (Berkeley, CA: University of California Press, 1996).
 21. For more on the role of women in informal justice mechanisms, see Deborah Smith and Shelly Manalan, *Community-Based Dispute Resolution Processes in Bamiyan Province* (Kabul: Afghanistan Research and Evaluation Unit [AREU], December 2009): 12–13.
 22. See Sarah Ladbury, “Helmand Justice Mapping Study,” final report for the Department of International Development Afghanistan, Coffey International Development Ltd, July 2010, 9–10.
 23. The prevalence of land disputes has been noted in many studies. See, for example, TLO, “Formal and Informal Justice in Paktia and Nangarhar” (working paper, TLO, Kabul, 2011); TLO, *Linkages between State and Non-State Justice Systems in Eastern Afghanistan*; TLO, *An Evaluation of the Khost Commission on Conflict Mediation (CCM)* (Kabul: TLO, June 2009); and Ladbury, “Helmand Justice Mapping Study,” appendix A-1.
 24. For more on the types of disputes that informal bodies address, see Noah Coburn, *The Politics of Dispute Resolution and Continued Instability in Afghanistan*, Special Report 285 (Washington, DC: USIP, August 2011).
 25. There are exceptions to this, particularly in the case of very large intertribal land disputes where both groups are unwilling to compromise. In such cases the machalga forfeited by the group may be very large, but the amount forfeited by each individual is probably much less. For more on machalga practice, see TLO, *Linkages between State and Non-State Justice Systems in Eastern Afghanistan*, 16–17.
 26. This is particularly true in Herat where NRC research indicates that jirga decisions are considered nonbinding.
 27. The effect of commanders on these processes is another example of how they are not purely “traditional” but have mutated according to changing circumstances. The authority of local commanders is a relatively new phenomenon in Afghanistan, yet it has been grafted onto the shura/jirga mechanism. For more on the influence of commanders in dispute resolution, see International Crisis Group (ICG), *Peacebuilding in Afghanistan*, Asia Report (Kabul/Brussels: ICG, 2003), 13.
 28. See Ladbury, “Helmand Justice Mapping Study,” IV.
 29. For more historical examples, see Barfield, *Afghanistan* and Louis Dupree, *Afghanistan* (Princeton, NJ: Princeton University Press, 1980). For more recent cases, see Barfield, Nojumi, and Thier, *The Clash of Two Goods*.

30. For more on this, see Nesari and Tawfik, *The Kabul Courts and Conciliators*.
31. Republic of Afghanistan, "Civil Procedure Code," Ministry of Justice, Official Gazette, Articles 185–190, August 22, 1990, 30–31.
32. Afghanistan, "The Law on the Provincial Councils," Article 4, paragraph 3, 2004.
33. The Independent Commission for Dispute Resolution was formed in June 2012 to call on insurgents and other armed opposition to join the peace and reconciliation processes. For more on this, see Afghanistan Watch, Truth newsletter no. 35, May 2012, 29.
34. There is confusion in the case of councils set up by the international military as well, discussed in more detail later in this report. For more on this, see Douglas Saltmarshe and Abhilash Medhi, *Local Governance in Afghanistan: A View from the Ground*, Synthesis Paper (Kabul: AREU, 2011), 5.
35. The working group included Afghan bodies, such as the Ministry of Justice, the Ministry of Women's Affairs, and the Afghan Independent Human Rights Commission (AIHRC), and international donors including the American and British Embassies, the United Nations Assistance Mission in Afghanistan (UNAMA), the United Nations Office on Drugs and Crime (UNODC), and various other NGOs. For more on this, see United Nations Office on Drugs and Crime, *Afghanistan: UNODC Helps Improve Justice System*, (Kabul: UNODC, December 17, 2009), and for the role of the MOJ working group, see Afghanistan Rule of Law Project (AROLP), "Traditional Justice Pilot Survey: Parwan and Nangarhar Provinces" (presentation to Informal Justice National Policy Working Group, Ministry of Justice, Kabul, April 2009).
36. The draft policy on the relationship between the state justice system and the informal mechanism has been discussed in these working group meetings, but the full document has yet to be placed on the Ministry of Justice's Web site.
37. One of the issues in this debate was the fact that the three categories of crimes in Afghan law are determined not by the crime itself but by the punishment, making it impossible to categorize crimes before the court deals with them. For more on some of these issues, see Noah Coburn and John Dempsey, *Informal Dispute Resolution in Afghanistan*, Special Report 247 (Washington, DC: USIP, August 2010).
38. This second stage involved both the Ministry of Rural Rehabilitation and Development (MRRD) and the IDLG, which were feuding over funds for setting up local councils (discussed further in the third section of this report). Both groups, by attempting to undermine each other, greatly slowed the process. For more on this, see El Snarkistani, "This Is Not the IDLG You're Looking For" It's Always Sunny in Kabul blog, August 14, 2011, <http://www.republicofsnarkistan.net/2011/08/14/this-is-not-the-idlg-youre-looking-for/>. A study done by the RAND Corporation also mentions the political differences between MRRD and IDLG. See Michael Shurkin, *Subnational Government in Afghanistan*, Occasional Paper (Santa Monica, CA: National Defense Research Institute, Rand Corporation, 2011), 16–17.
39. For similar observations on the Liberian case, see Deborah H. Isser, Stephen C. Lubkemann and Saah N'Tow, *Looking for Justice: Liberian Experiences with and Perceptions of Local Justice Options*, Peaceworks (Washington, DC: USIP, 2009).
40. See TLO, *Linkages between State and Non-State Justice Systems in Eastern Afghanistan*, 9.
41. For more on this, see TLO, *Linkages between State and Non-State Justice Systems in Eastern Afghanistan*, and Ladbury, "Helmand Justice Mapping Study."
42. The capacity and political influence of these departments varies drastically by province. For example, the Ministry of Tribal Affairs is much more influential in provinces that border Pakistan and is more likely to be involved in intertribal disputes in these areas. Ultimately, however, politics and influence in Afghanistan continues to be personality-based, and if a certain government official is known in a community for being impartial or particularly influential, this will make it more likely for disputants to bring cases to him regardless of actual government position.
43. It is important to note that this is not true in all districts and that there are some highly unpopular district governors who have little influence on local disputes. In general, however, the judiciary's subordination to the executive branch at all levels of government has a long history in Afghanistan. For more on this, see AIAS, "Rule of Law in Afghanistan," 3–4.
44. For more on public opinion regarding the formal sector, see TAF, *Afghanistan in 2010: A Survey of the Afghan People* (Kabul: TAF, 2010).
45. See AIAS, "Rule of Law in Afghanistan," 8.
46. Human Rights Watch, "'I Had to Run Away': The Imprisonment of Women and Girls for 'Moral Crimes' in Afghanistan," March 2012.
47. For more on this, see UN Women in Afghanistan, "Overview," www.unwomensouthasia.org/un-women-in-south-asia-2/un-women-in-afghanistan/overview-afghan/, and Children Rights International Network, "Afghanistan: Persistent Violations of Children's Rights," October 25, 2011, www.crin.org/resources/info-detail.asp?ID=26424.
48. See CPHD, *Afghanistan Human Development Report 2007*, 97.
49. In the informal sector, checks and balances are not so much between different branches of local governance structures as they are within the structures themselves. Leaders who are not effective at resolving disputes

- will eventually lose honor, and this will in turn limit their political effectiveness. For more on the separation of power, see Douglas Saltmarsh and Abhilash Medhi, *Local Governance in Afghanistan*, 1.
50. See, for example, Jonathan Steele, “US Convinced Karzai Half-Brother is Corrupt, WikiLeaks Cables Say,” *Guardian*, December 2, 2010, and Dexter Filkins, Mark Mazzetti, and James Risen, “Brother of Afghan Leader Said to be Paid by CIA,” *New York Times*, October 27, 2009.
 51. DFID official, personal communication with author, Helmand, February 2010.
 52. Initial research by DFID supports these claims.
 53. For more on the impact of the flow of international funds to local commanders, see Noah Coburn and Shahmahmood Miakhel, *Myths and Misconceptions in the Afghan Transition*, Peace Brief 123 (Washington, DC: USIP, April 9, 2012).
 54. See International Development Legal Organization, “Presentation to the United States Embassy” (presentation, IDLO, Kabul, July 2, 2011).
 55. See TAF, *Afghanistan in 2011*, 5, 69.
 56. See Ladbury, “Helmand Justice Mapping Study,” 13.
 57. The USAID-led ASOP program closed in January 2012. The key ASOP structures, the District Community Councils (DCCs), have been transferred and are transitioning under a new program, the National Priority Program, the IDLG. For more on the closure of ASOP, see Hussain Yasa, “Police Recruitment Process and Green-on-Blue-Attacks,” *Daily Outlook Afghanistan*, September 1, 2012. For more on the transition of DCCs from USAID-ASOP to IDLG, see Michael Shurkin, *Subnational Government in Afghanistan*, 11–12. The impact of such internationally sponsored programs is discussed more thoroughly later in the report.
 58. For more on Taliban preventing elders from hearing cases, see TLO, “Formal and Informal Justice in Helmand and Uruzgan” (working paper, TLO, Kabul, June 2011), 19.
 59. These statistics come from unpublished TLO research. All statistics in this report, particularly when coming from unstable areas, should be used for detecting general trends—not for creating a precise picture. See TLO, “Formal and Informal Justice in Helmand and Uruzgan.”
 60. Research is limited, but see, for example, Ladbury, “Helmand Justice Mapping Study,” and AIAS, “Rule of Law in Afghanistan.”
 61. See Ladbury, “Helmand Justice Mapping Study,” 9. In fact, the “Wahhabi” label seems to stem more from the Taliban’s association with groups such as al-Qaeda than from the Taliban’s actual statements, which more often refer to Hanafi texts, though with more extreme interpretations than used by most other Hanafi groups worldwide. Abdul Samad Kamawi, personal communication with author Kabul, June 2011. For more on this, see Ahmed Rashid, *Taliban: Militant Islam, Oil and Fundamentalism in Central Asia*, 2nd ed. (New Haven, CT: Yale University Press, April 13, 2010).
 62. Ladbury, “Helmand Justice Mapping Study,” 9.
 63. *Ibid.*, 28.
 64. See Astri Suhrke, *When More Is Less: The International Project in Afghanistan* (New York: Columbia University Press, 2012), 216.
 65. For example, the *Washington Post* points to a \$14.5 million program funded by the U.S. government in 2010. See Ernesto Londoño, “Afghan’s Death a Parable for Country’s Justice Quandary: Courts or Elders?” *Washington Post*, April 20, 2011.
 66. On an elite level, there is some continued resentment, particularly among Pashtuns, of the composition of participants in the 2001 Bonn process, which was seen as biased toward northerners and Tajiks in particular. On a local level, however, concerns have more to do with how resources are being distributed between tribes and other local groups. For more on resources allocation, see Caroline Bertram, “Corruption in Afghanistan among the Most Important Problems for Development,” Heinrich Böll Stiftung, Green Political Foundation, July 13, 2011), and for more on public perception on corruption, see TAF, *Afghanistan in 2011*, 97.
 67. For many Afghans, however, the vast number of NGOs and military groups working in an area are difficult to distinguish from one another, and there is often a sense that programs run by one group represent all groups, creating serious problems when one program gains a bad reputation in an area. Further complicating the issue, the increased U.S. government focus on “civ-mil” fusion makes it difficult for local actors to sometimes understand the difference between civilian and military operations. For more on the overlapping mandate between NGOs and the military, see George Bragg, “Civil-Military Relations in Afghanistan,” *e-International Relations*, September 11, 2011.
 68. Methodologically this section draws primarily from interviews with those working on specific projects, the reports and documents made available by organizations—when they have been made available—and, when possible, interviews with Afghans living in areas targeted by these programs.
 69. For a good general outline, see AIAS, “Rule of Law in Afghanistan.”
 70. *Ibid.*, 4.

71. While this has improved in some ways in recent years and there is much talk in diplomatic circles about “coordination,” in reality cooperation in the allocation remains token and is something that Afghan government officials often complain about. For more on the lack of coordination, see Matt Waldman, “Falling Short: Aid Effectiveness in Afghanistan,” Agency Coordinating Body for Afghan Relief (ACBAR), Kabul, March 2008.
72. For a detailed discussion of early attempts at judicial sector reform, see Suhrke, *When More Is Less*, 183–198.
73. See Liana Sun Wyler and Kenneth Katzman, *Afghanistan: U.S. Rule of Law and Justice Sector Assistance*, (Washington, DC: Congressional Research Service, November 09, 2010).
74. See Ernesto Londoño, “In Afghanistan, Anti-corruption Fight Goes Local,” *Washington Post*, October 18, 2010.
75. See General Stanley A. McChrystal, “Commander’s Initial Assessment to Secretary Gates,” ISAF, August 30, 2009.
76. See, for example, Ann Marlowe, “Shura to Fail?” *New Republic*, May 13, 2010. This reached its height in the period immediately following the troop surge when various extreme forms of localized engagement were encouraged. This strategy was perhaps best embodied by Jim Gant’s *One Tribe at a Time Approach*, a controversial self-published treatise calling for local engagement that was praised by some military leaders and highly criticized by others for Gant’s neocolonial willingness to insert himself into local conflicts of which he had little knowledge. For more on the treatise, see Jim Gant, *A Strategy for Success in Afghanistan: One Tribe at a Time* (Los Angeles, CA: Nine Sister Import Inc., 2009).
77. For more on related issues, particularly the incorrect assumption that development necessarily leads to stability, see Paul Fishstein and Andrew Wilder, *Winning Hearts and Minds? Examining the Relationship between Aid and Security in Afghanistan* (Medford, MA: The Feinstein International Center, January 2012).
78. See Interagency Planning and Implementation Team (IPIT), TDR: Field Guidance (Kabul: 2010).
79. Ladbury, “Helmand Justice Mapping Study,” 25.
80. *Ibid.*, vii.
81. *Ibid.*, 23–25.
82. While these district and village council elections are technically called for by the constitution, there is little political impetus for them either within the government of Afghanistan or in the international community, which made it rather unlikely that the so-called ASOP-based councils would eventually morph into councils elected in national elections.
83. When the author attended a justice subcommittee meeting, there was a log book, but it was not being used.
84. Ladbury, “Helmand Justice Mapping Study,” 18.
85. The author and USIP researchers spent the most time at the Garmsir ASOP but also conducted research in other districts in the south and east where ASOP was active.
86. ISAF designated approximately 100 of Afghanistan’s 400 districts as “key terrain districts,” where it would focus its resources. These are districts where ISAF had decided it could reach a large segment of the Afghan population through its counterinsurgency (COIN) strategy. See David Axe, “ISAF Rethinks Afghan Districts,” *The Diplomat* blog, March 25, 2011.
87. One of the key DFID figures involved in the British version of ASOP was not asked at all to contribute to the setup of the American version of the project and claimed that the British embassy had not been contacted by the USAID contractor and had almost no knowledge of the program. This lack of transparency, however, was not limited to the British embassy. Several months into the American rollout of the program, U.S. officials directly overseeing the contract had not been supplied with a complete list of districts where the program was operating.
88. See Ladbury, “Helmand Justice Mapping Study,” 18–19.
89. USIP did find one example in Uruzgan, when TLO shura members all migrated to the IDLG shura after being promised a monthly stipend for their work. They claimed that once they became part of IDLG they resolved cases as part of that shura.
90. See James Rosen, “Obama Administration Steers Lucrative No-Bid Contract for Afghan Work to Dem Donor,” *Fox News*, January 25, 2010.
91. See, for example, Checchi and Company Consulting, “Assessment and Action Plan Sub-District 9, Kandahar City,” June 2011, 8.
92. For more on this, see Coburn and Miakhel, *Many Shuras Do Not a Government Make*.
93. For more, see Chris Snow, Christian Dennys, and Idrees Zaman, *Conflict Analysis: Farza and Kalakan Districts, Kabul Province* (Kabul: CPAU, March 2009).
94. Certain types of programs are particularly susceptible to this disruptive pattern of funding jumps, and, for example, programs that deal with cyclical processes like elections are often disrupted. For more on the case of the Free and Fair Election Foundation of Afghanistan, see Anna Larson and Noah Coburn, *Derailing Democracy* (New York: Columbia University Press, 2013)..

95. See Deborah Smith, *Community-Based Dispute Resolution Processes in Nangarhar Province* (Kabul: AREU, 2009); Deborah Smith and Shelly Manalan, *Community-Based Dispute Resolution Processes in Bamiyan Province* (Kabul: AREU, December 2009); Rebecca Gang, *Community-Based Dispute Resolution Processes in Balkh Province* (Kabul: AREU, 2010); and Rebecca Gang, *Community-Based Dispute Resolution Processes in Kabul City* (Kabul: AREU, 2011).
96. IDLO never made its findings public; however, the data presented here was transmitted to the author for use in this report and is on file with the author.
97. Any survey in Afghanistan, and particularly those sponsored by international organizations, faces additional challenges of understanding local cultural issues. For example, was the ethnicity of the surveyors the same as the ethnicity of those interviewed? In areas where women rarely leave family compounds, how were women approached? Were surveys conducted door to door (making hospitality and the host-guest relationship an issue), in the mosque (making religion an issue), or, worst of all, in the district center under the watchful eyes of the police? This is not to say that methodologies cannot be created to deal with these issues, but, since 2001, vast sums have been spent on poorly designed surveys whose numbers have been used to justify certain policy decisions. Therefore, almost all statistics concerning popular opinion in Afghanistan should be dealt with cautiously.
98. CPAU unsurprisingly had difficulty finding enough law students in Kunduz to fill these positions, so some of them were not law students, but all had had some type of legal training. For more on this, see Seth Peavey, *Opportunities and Challenges for Linking Formal and Informal Justice Institutions in Kunduz and Takhar: An Evaluation of the USIP Justice Linkages Project in Kunduz and Takhar Provinces* (Kabul: CPAU, 2012), 11.
99. This situation is likely to only be further complicated if and when district and village level council elections are held.
100. TLO, *Linkages between State and Non-State Justice Systems in Eastern Afghanistan*, 10.
101. This problem, which applies to other organizations as well, is discussed further in the next section.
102. In an even more basic example, USIP hired a researcher from Qara Bagh to conduct research in the districts of Qara Bagh and Istalif. While the researcher eventually collected data from both districts, the process was slower in Istalif where his political connections were less established and where the community was wearier of the questions he was asking as an outsider.
103. The tendency for programs to pay elders to participate is discussed later in this report. In some areas this practice has simply become so prevalent that it is unavoidable. USIP worked to keep this practice to a minimum, if for no other reason than that if elders are being paid to attend a workshop or meeting, there is no real way to determine whether they actually see any value in the project in and of itself. One worrying exception to this was when TLO provided stipends to local government officials to participate in its programmatic work, which may have compromised some of the data from their projects.
104. See TLO, *An Evaluation of the Khost Commission on Conflict Mediation*.
105. For more on this, see Coburn, *The Politics of Dispute Resolution and Continued Instability in Afghanistan*.
106. There are clear parallels here with rejection of programs aimed at creating massive social change both under the Soviets and early in Afghan history as well. For more, see Barfield, *Afghanistan*, chap. 5.
107. For more on this, see TLO, *An Evaluation of the Khost Commission on Conflict Mediation*.
108. TLO, "Formal and Informal Justice in Paktia and Nangarhar," 36–37.
109. Suhrke, *When More Is Less*, 183.
110. In particular, see Coburn.
111. There are several examples of the international military unintentionally igniting long dormant local feuds. For more on this, see Coburn and Miakhel, *Many Shuras Do Not a Government Make*.
112. For examples see TLO, *Linkages between State and Non-State Justice Systems in Eastern Afghanistan*, 10.
113. See Checchi and Company Consulting, "RLS-I Program Perception Study Rodat/Kama Nangarhar," May 2011, 2.
114. See, for example, Checchi and Company Consulting, "Assessment and Action Plan Sub-District 9."
115. USAID estimates that, in 2012, its budget for Afghanistan will diminish by 50 percent and drop to 25 percent of 2011 spending levels by 2013.
116. Some of the few exceptions to this lack of work on the informal justice sector in a comparative context include a USIP-, World Bank- and George Washington-sponsored conference in Washington in 2009 and a conference hosted by the Danish Institute for International Studies (DIIS) in 2010. DIIS is currently preparing several publications from its proceedings. See also Isser, ed., *Customary Justice and Rule of Law in War-Torn Societies*.
117. See, for example, Ali Wardak, "Structures of Authority and Local Dispute Settlement in Afghanistan," in *Conflicts and Conflict Resolution in Middle Eastern Societies: Between Tradition and Modernity* (Berlin: Duncker and Humblot, 2005) or any of Wardak's work on informal justice in Afghanistan. Of course, there is also variation in how much individual Afghans emphasize issues like reconciliation, but there are some clear trends that are striking when compared with more Western ideas about justice.

118. Most notably, see James Ferguson, *The Anti-Politics Machine: "Development," Depoliticalization, and Bureaucratic Power in Lesotho* (Minneapolis: University of Minnesota Press, 1994). Although Ferguson primarily discusses development programs, his observations seem as relevant, if not more so, to rule-of-law programs.
119. See, for example, Integrity Watch Afghanistan, "Afghan Perceptions and Experiences of Corruption: A National Survey 2010," 2010.
120. For more, see TLO, *Linkages between State and Non-State Justice Systems in Eastern Afghanistan*, 16–17.
121. For a good example of a more broad-based approach to informal justice, see Isser, ed., *Customary Justice and Rule of Law in War-Torn Societies*.



ABOUT THE INSTITUTE

The United States Institute of Peace is an independent, nonpartisan institution established and funded by Congress. Its goals are to help prevent and resolve violent conflicts, promote postconflict peacebuilding, and increase conflict management tools, capacity, and intellectual capital worldwide. The Institute does this by empowering others with knowledge, skills, and resources, as well as by its direct involvement in conflict zones around the globe.

BOARD OF DIRECTORS

J. Robinson West (Chair), Chairman, PFC Energy, Washington, D.C. • **George E. Moose** (Vice Chair), Adjunct Professor of Practice, The George Washington University, Washington, D.C. • **Judy Ansley**, Former Assistant to the President and Deputy National Security Advisor under George W. Bush, Washington, D.C. • **Eric Edelman**, Hertog Distinguished Practitioner in Residence, Johns Hopkins University School of Advanced International Studies, Washington, D.C. • **Joseph Eldridge**, University Chaplain and Senior Adjunct Professorial Lecturer, School of International Service, American University • **Kerry Kennedy**, President, Robert F. Kennedy Center for Justice and Human Rights, Washington, D.C. • **Ikram U. Khan**, President, Quality Care Consultants, LLC, Las Vegas, Nev. • **Stephen D. Krasner**, Graham H. Stuart Professor of International Relations, Stanford University, Palo Alto, Calif. • **John A. Lancaster**, Former Executive Director, International Council on Independent Living, Potsdam, N.Y. • **Jeremy A. Rabkin**, Professor of Law, George Mason University, Fairfax, Va. • **Judy Van Rest**, Executive Vice President, International Republican Institute, Washington, D.C. • **Nancy Zirkin**, Executive Vice President, Leadership Conference on Civil and Human Rights, Washington, D.C.

MEMBERS EX OFFICIO

Michael H. Posner, Assistant Secretary of State for Democracy, Human Rights, and Labor • **Kathleen Hicks**, Principal Deputy Under Secretary of Defense for Policy • **Gregg F. Martin**, Major General, U.S. Army; President, National Defense University • **Jim Marshall**, President, United States Institute of Peace (nonvoting)

Every serious attempt to analyze the ongoing instability in Afghanistan recognizes the lack of justice in the country as a motivator of grievance and conflict. Despite millions of donor dollars spent on building the state judicial sector in Afghanistan since 2001, access to fair, equitable forums for justice in the country remains extremely poor, and few Afghans have confidence in the state's ability to deliver justice. As the international community begins transitioning out of Afghanistan, international groups have begun to consider more deeply the informal mechanisms through which a majority of conflicts in Afghanistan are resolved. This report argues that many of these internationally sponsored programs have done as much harm as good or have simply wasted funds that have gone primarily to Afghan government officials and international contractors. In the worst cases, these programs have undermined the provision of justice. Given that Afghanistan's formal justice mechanisms are seen to be expensive, corrupt, and slow, and that informal justice mechanisms are preferred by local communities, the international community must think more critically about the role of internationally sponsored programs and justice at the local level.

Related Links

- *Customary Justice and the Rule of Law in War-Torn Societies*, Deborah Isser, ed. (USIP Press, 2011)
- *Myths and Misconceptions in the Afghan Transition* by Shahmahmood Miakhel and Noah Coburn (Peace Brief, April 2012)
- *The Politics of Dispute Resolution and Continued Instability in Afghanistan* by Noah Coburn (Special Report, August 2011)
- *Promoting Stability and Resolving Provincial Disputes in Afghanistan: USIP's Dispute Councils Program* by Shahmahmood Miakhel and Noah Coburn (Peace Brief, June 2011)
- *Many Shuras Do Not a Government Make: International Community Engagement with Local Councils in Afghanistan* by Shahmahmood Miakhel and Noah Coburn (Peace Brief, September 2010)
- *Informal Dispute Resolution in Afghanistan* by Noah Coburn and John Dempsey (Special Report, August 2010)
- *Traditional Dispute Resolution and Stability in Afghanistan* by John Dempsey and Noah Coburn (Peace Brief, February 2010)

