

A light grey map of Afghanistan serves as the background for the title. It shows the country's borders and internal provincial boundaries. Labels for 'Fannu Darja', 'Harirud', and 'Kabul' are visible on the map.

Building Dispute Resolution Institutions in Eastern Afghanistan

**Lessons from The Liaison Office
Justice Shuras in Paktia and
Nangarhar**

July 2011

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Lessons from The Liaison Office Justice

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About The Liaison Office (TLO)

The Liaison Office (TLO) is an independent Afghan non-governmental organization seeking to improve local governance, stability and security through systematic and institutionalized engagement with customary structures, local communities, and civil society groups. TLO's mission is to *facilitate the formal integration of communities and their traditional governance structures within Afghanistan's newly emerging peace, governance and reconstruction framework.*

TLO main areas of activity are Research/Analysis using the do-no harm approach; Dialogue Facilitation and Participatory Peacebuilding, Access to Justice and Livelihoods.

In addition to the TLO headquarter in Kabul, the organization has a total of three (3) regional (Paktia-Southeast, Kandahar-South, Nangarhar-East) and five (5) provincial (Uruzgan, Khost, Paktika, Helmand, Nimroz) offices across Afghanistan, with over 200 staff.

TLO was established in 2003 by Swisspeace on the request of community leaders in the Southeast. TLO has been funded by various donors from the non-governmental and governmental sectors, as well as international organizations and foundations. Currently TLO's main donors include the Heinrich Boell Foundation, the United States Institute of Peace, and the governments of Australia (AusAID), The Netherlands, Norway, Canada, Germany, and Switzerland (SDC).

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Acronyms

ASOP	Afghanistan Social Outreach Program
CDC	Community Development Council of NSP
CoP	Chief of Police
DCC	District Community Council under ASOP/IDLG
DDA	District Development Assembly
IDLG	Independent Directorate of Local Governance; part of GIRoA
Jerib	Traditional unit of land measurement in the Middle East and southwestern Asia; equivalent to 1/5 hectare or 2,000 square meters
Jihad	Holy War in defence of one's faith; here the resistance against the Russian invasion from 1979 to 1989
Jirga	A traditional meeting in Pashtun communities among all, or a respected subset of, adult men, to resolve disputes, or debate and decide other important matters
Nahiya	City Precinct
NGO	Non-Governmental Organization
Shura	Originally gathering of Islamic dignitaries; today any gathering or council with official character
TLO	The Liaison Office
USIP	US Institute of Peace

Executive Summary

In 2010 The Liaison Office (TLO) established formal-informal dispute resolution bodies, called Justice Shuras, in three districts in Paktia: Ahmad Aba, Sayed Karam, and Mirzaka; and three districts in Nangarhar: Jalalabad Nahiya (City Precinct) 5, Bati Kot, and Mohmand Dara. Since their inception, the Justice Shuras have proved highly popular with litigants and **solved about 240 disputes**, improving both access to justice and the quality of dispute resolution services. Overall, TLO Justice Shuras heard significantly more cases than district-level bodies did in the year before the Justice Shura establishment.

Each Justice Shura has also **worked closely with its respective district government**, extending its involvement in the justice system as well. More specifically, Justice Shuras played the following roles in their communities:

Paktia Justice Shuras solved about ninety-seven disputes:

- **Forty-four Land disputes**, including some that had dated back for several decades and had resisted previous attempts at resolution.
- **Seventeen Criminal disputes**, including about ten cases where a death had taken place. In these cases, the Justice Shuras either brokered a ceasefire between parties in conflict, or both brokered a ceasefire and then arranged long-term settlement of these cases.
- **Ten Family disputes**, which Paktia forums otherwise almost never hear. In several of these cases, parties had threatened violence, which the Justice Shuras prevented. In others, the Justice Shura upheld women's claims in a way that exceeds Pashtunwali requirements.

In each Paktia district, **the Justice Shuras worked hand-in-hand with the Office of the District Governor**, which referred almost all Justice Shura cases, and then approved all Justice Shura decisions. However, the same government officials expressed some normative skepticism about the Shuras' broad mandate.

The Jalalabad Nahiya Five Justice Shura heard more than thirty disputes in the past year:

- **Fifteen major and minor Land disputes**. The Nahiya Five government could probably not efficiently solve these minor disputes. And, for many of the major disputes, the government either had previously attempted to solve the case or had an opportunity to intervene which it then declined.
- **Ten minor Criminal disputes**, such as simple assault, as well as assisting parties in **ten major Criminal cases**. In these latter cases, Justice Shura members provided various services, such as talking to the government on behalf of parties, and following up cases.
- **Five Family cases**. Especially as state officials disclaimed interest in these cases, the Nahiya Five Justice Shura played about the same role as in more rural areas, preventing violence and quietly settling highly sensitive matters.

The Justice Shura received the stamp of the Nahiya Five Chief of Police on each of their decisions, and was the **only shura meeting regularly with government officials** (as well as being the area's only shura generally).

The Justice Shuras in Bati Kot and Mohmand Dara solved about 110 cases:

- **Forty Land cases.** In many of these cases, the Justice Shuras have solved large cases in remote areas or that had proved beyond the government's capacity, or that began decades ago. However, there is some troubling evidence that the Justice Shuras could not effectively address disputes with very recalcitrant and powerful parties.
- **Twenty-Nine Family disputes.** Here the Justice Shuras heard an unusually large number of divorce cases. The Justice Shura also prevented at least one direct threat of death from being carried out, by intervening with a woman's brother on her behalf.
- **About forty Criminal disputes.** Such disputes included both minor matters, such as cases where Children had fought and injured one another, and extremely large cases that straddled the Afghanistan-Pakistan border and involved multiple deaths.

In both Mohmand Dara and Bati Kot, Justice Shura members **met with district authorities frequently and received their stamp on most cases**, even as a majority of Nangarhar litigants approached the Justice Shuras directly. The new governor of Mohmand Dara has also recently pledged to continue cooperation.

Policy Recommendations

According to litigants, elders and government officials, the **Justice Shuras engaged in the following best practices that made them more attractive dispute resolution forums:**

- **Carefully screening of membership to ensure:**
 - **Qualification and past experience of members** to ensure inclusion of experienced and trusted by the community (good reputation, clean record). This helped to excluded elders tainted by bribery, government capture, or lack of experience.
 - **Even geographic (and tribal) representation.** This allowed Justice Shuras to take cases from, and enforce their decisions, throughout their districts; supervise village-level shuras and jirgas; and coordinate their activities with government officials more effectively.
- **Providing access to justice for free:**
 - **No fees taken** for services rendered;
 - Close monitoring that **no member would take bribes**, an increasingly common practice in some areas;
 - Provision of **food and tea** to both dispute parties, increasing parties' trust in the institution.
- **Documentation of almost all of Justice Shura decisions**, including stamps of approval from government officials, thus improving later enforceability.
- **Maintaining a government connection** without government domination. Litigants overwhelmingly preferred that shuras work with the government, but did not want to go to government dispute resolution bodies directly.

Based upon the Justice Shuras' record of case resolution and the above best practices, the Justice Shuras should be built on in the following way:

- **Formation of an Association of Jirga Elders.** This Association will prove a vital complement to more integrated informal dispute resolution bodies, and will allow their institutionalized improvements to develop more fully, and efficiently spread throughout Afghanistan's informal justice system on a voluntary basis.
- Expansion into **vertically and horizontally integrated provincial dispute resolution bodies.**
 - Vertical integration (from the provincial to the village level) will allow a province's most experienced elders to advise and mentor elders sitting below them, and lend their weight to the area's most important decisions, increasing the reach and efficiency of the Justice Shura model overall.
 - Horizontal integration (across provinces) will facilitate the solution of the most destabilizing regional disputes, and allow important elders to network and share ideas more effectively.

Achieving these goals, and building on the good work of informal dispute resolution bodies such as the Justice Shuras requires **continued support to Afghanistan's informal justice system.** As this system continues to solve the overwhelming majority of local disputes, capacity building of informal justice providers will lead to quicker and greater access to justice for the average Afghan litigant, and

allow the informal justice system to work with the Afghan government on the basis of partnership and mutual respect.

Chapter

1

1 Introduction

The Afghan state, in many ways, faces a unique set of problems in providing dispute resolution services to its citizens. On the one hand, Afghan courts suffer from a frequent inability to reach the country's rural majority, and an occasional lack of legitimacy (Asia Foundation 2009). On the other hand, most Afghans benefit from access to non-state (or informal) dispute resolution services – exemplified, especially in Pashtun areas, by the related institutions of the jirga and shura.¹ In the Eastern provinces of Paktia and Nangarhar, such bodies hear over 90% of disputes in rural areas, and more than 60% in urban areas (TLO 2009, 2011). Sometimes these institutions cooperate closely with the state but, more often, formal and informal justice systems exist in parallel, limiting parties' access to state dispute resolution and lowering the quality and enforceability of dispute resolution services overall.

For a number of years, The Liaison Office (TLO) has been undertaking projects to improve capacity in the informal justice system, and strengthen its ties to the formal government. TLO began with the establishment of Commissions on Conflict Mediation (CCM) in Khost (2007) and Paktia (2008), province-wide dispute resolution institutions on the model of traditional shuras and jirgas whose decisions received the approval of the provincial governor. These bodies achieved considerable success, with the Khost CCM solving more than forty large and long-standing Land conflicts during its first two years of operation, along with much smaller numbers of Criminal and other disputes (TLO 2009). In order to maximize effectiveness and enforceability of decisions, the CCM's brought together elders representing all major tribes and geographic areas of each province. These elders then provided their services for free, allowing access to all litigants presenting serious and destabilizing cases. In both Khost and Paktia, the provincial governor both referred cases to the CCM's and approved the decisions they issued, increasing government capacity and improving the formal legal legitimacy of decisions issued.

In 2010, TLO took the lessons learned in these provincial CCM's and applied them to the district level, facilitating the establishment of Justice Shuras, on the CCM model, in six districts: Ahmad Aba, Sayed Karam, and Mirzaka in Paktia; and Jalalabad Nahiya (Precinct) Five, Bati Kot, and Mohmand

¹ This report will, unless otherwise noted, use these terms interchangeably.

Dara in Nangarhar. In each area, TLO identified and secured the cooperation of those elders who were already the most prominent and respected in their communities. In all areas but Nahiya Five these elders had previously organized themselves into a shura but, as will be seen, these bodies met less frequently, had fewer linkages to the government, and solved fewer cases than before TLO's intervention.

Since their founding, these Justice Shuras, funded by the United States Institute of Peace, have solved more than 240 conflicts, many of which had destabilized villages and larger communities and had resisted previous attempts at resolution. They have also heard a much wider variety of cases than the CCM's: about half of Justice Shuras' docket has been on Land conflicts, with the other half a mixture of Family, Criminal and other disputes serious enough to benefit from a district-level body addressing them.

In solving these cases, the Justice Shuras, first encouraged by TLO, but then on their own initiative, also established closer linkages with district governments. From monthly meetings at the TLO office, the Justice Shuras have progressed to the weekly and sometimes even daily informal meetings that are the hallmark of truly close cooperation (*See TLO 2011*). As will be seen, district governments have also given their approval, in the form of an official stamp or registering the decision itself, to the large majority of Justice Shura case resolutions.

However, the details of this cooperation differ from district to district. Some district governments refer a large number of cases to the Justice Shuras, such as in Ahmad Aba and Sayed Karam. Elsewhere, such as in Nahiya Five and Mohmand Dara, case referral is relatively rare, and most litigants approach the Justice Shuras directly for resolution of cases that they do not want the government to address, but for which they want some state recognition. Despite their many similarities, these projects, then, appear to be fulfilling somewhat different district needs, suggesting that formal-informal justice bodies can help address a wide variety of governance problems, and particularly different versions of the general problem of lacking a reliable intermediary between the state and the people. Overall, however, Justice Shuras are improving access to justice by providing centralized and state-approved dispute resolution where either none existed previously, or it existed in a less popular and effective form.

This popularity and effectiveness derived in large part from practices which litigants, government officials and elders felt improved on previous dispute resolution. For example, Justice Shuras coordinated elders across each respective district; involved only the most trusted and respected elders; issued written decisions and gave copies to all affected persons; and liaised regularly with government officials, but without taking direction from them. These practices, and the preference for them, point toward more general lessons on the development of Afghan dispute resolution bodies, whether formal or informal.

That being said, spreading these practices will require continued engagement with Afghanistan's informal justice system, and in particular a greater degree of institutionalization (including knowledge transfer), and coordination among informal dispute resolution providers themselves – a point where NGO's and civil society can play a key role.

Coordinating and working with informal justice providers can help expand the state's role in dispute resolution. The actions of elders on the Justice Shuras and CCM's, and their direct statements to TLO

in this and other programs, have shown them to be willing to institutionalize their efforts, and open to discussions of informal justice sector reform and capacity-building. Their actions and words also show that they feel cut off from the state, even though they are the primary providers of dispute resolution services in Afghanistan, and that they strongly desire additional state engagement both in their activities and for their communities. Engagement with the informal justice sector, then, need not mean the exclusion of the state, or the reduction of its role. On the contrary, engagement with informal justice providers can not only help improve their performance but also help in their forming a durable and mutually beneficial relationship with the government.

For both these suggestions and the information and analysis elsewhere in this report, extensive interviews with Justice Shura members, government officials, and litigants have proved crucial. TLO staff conducted interviews with such people in the six aforementioned districts in March and April of 2011, with follow-up interviews in May and June. Overall, TLO spoke with about ninety key informants, either singly or in groups, gathering data on the Justice Shuras' operations, practices, strengths and weaknesses.

With these points in mind Sections Two and Three of this report will further elaborate on the Justice Shuras' operation and achievements in Paktia and Nangarhar, both in the cases they have solved, and in the governmental ties they have established. Section Four of this report, in turn, will attempt to delineate the specific advantages that the Justice Shuras possessed over other similar bodies in these districts, and Section Five will address the all-important question of how these good practices and good results can sustain themselves and spread throughout Afghanistan's justice systems.

Chapter

2

2 TLO Justice Shuras in Paktia

The operation of the Paktia Justice Shuras shows not only an impressive record of case resolution, but a great demand on the part of both litigants and the state for such district-wide dispute resolution bodies. During their year or so of operation, Paktia Justice Shuras solved ninety-seven conflicts in total. In the year before Justice Shura establishment, TLO found about fifty-five cases heard in the district shuras then existing, with state courts in these districts hearing about half that number (TLO 2011). In comparison, then, the Justice Shuras were highly popular with litigants, especially notable as all Justice Shura cases in Paktia proceeded with the knowledge of the district governor, and received his stamp or signature (the latter in the informal district of Mirzaka).² They thus represent both an informal body that litigants appear to have found more desirable than those previously existing, and a way to increase state involvement in the districts' justice systems, which had previously been minimal (TLO 2009, 2011).

Justice Shura cases also included an unusually large number of persistent disputes that other bodies had failed to resolve, as well as disputes of the utmost sensitivity – among the clearest signs of how the Justice Shuras increased access to justice for some litigants. Overall, the Shuras³ in Ahmad Aba, Sayed Karam and Mirzaka districts brought to resolution forty-four Land and Property disputes, seventeen Criminal disputes, thirteen Commercial disputes, ten Family disputes, and eight traffic disputes, along with a small number of cases where data is incomplete. They also solved a significant number of “verbal” disputes, meaning disputes small enough to be solved without a formal decision letter, but for that reason inherently hard to count.⁴ Each district body also showed a different mix of cases, suggesting that each was filling a somewhat specialized governance role, and meeting different, specific local needs. District governments in Paktia cooperated closely in these efforts, as

² Interview with Sayed Karam Justice Shura Members, June 8, 2011; Interview with Ahmad Aba Government Officials, June 7, 2011; Interview with Mirzaka Justice Shura Members, June 6, 2011

³ Throughout, this report will refer to the Justice Shuras as the Shuras or Shuras (with a capital S); other shura bodies will be referred to in the lower case.

⁴ Interview with Ahmad Aba Justice Shura Members, June 5, 2011

above, although government officials also expressed a clear normative preference for limiting shuras' jurisdiction in the future.

2.1 Cases and Controversies in the Paktia Justice Shuras

As expected, all the Paktia Justice Shuras saw a significant number of Land or other Property cases, but the Ahmad Aba Justice Shura heard twenty such disputes, or almost as many as the other two Justice Shuras combined (twenty-four). Long-standing cases, including some previously heard in the courts, seem to have been particularly likely to come to the Justice Shuras, another indication that the Shuras were filling an important governance need in the districts. In particular, the Justice Shuras appear to offer litigants not only a shura with a high capacity, but also one with a high degree of legitimacy, resulting in litigants voluntarily accepting the Justice Shuras' settlement even of very difficult disputes.

Two cases examples will help illustrate this point. In the first, the Ahmad Aba case of Saheb Din v. Haji Jalal Din, the two relatives had inherited land and a house. The boundary separating their properties had been drawn imprecisely, and Saheb Din alleged that Jalal Din was raising an animal on part of his (Saheb Din's) property. Before the Justice Shura's foundation, the parties brought their case to the Ahmad Aba district court, where it had languished for the past three years. When the Justice Shura began operation, the parties mutually decided to withdraw their court case, and bring their case to the Shura (via the District Governor) for resolution. The Shura, in turn, resolved the case by re-drawing the parties' property boundaries, and instructing Jalal Din to pay Saheb Din 65,000 Pakistani Rupees (PKR) (about USD 722) in restitution.⁵

Similarly, the Mirzaka case of Hasan Gul v. Kemya Gul began about twenty years ago, when the former sold a piece of property to the latter. After some time (during the Rabbani regime) Kemya Gul started to build a house on his property, but Hasan Gul objected, saying that he had sold the land only for agricultural use. According to the litigants themselves, the conflict simmered on since that time, until the foundation of the Justice Shura: seeing that the Shura had gathered together influential elders, the parties finally presented their case to this body.⁶ The Justice Shura, in turn, ruled that the parties should repeal the contract of sale, with Hasan Gul giving Kemya Gul 150,000 Afghanis (about USD 3,333) in compensation; this amount represented the market value of the land plus a penalty for raising the dispute.⁷ Along with the first case of Saheb Din, neither of these cases seems to have presented any very difficult issues of fact or law. However, each presented difficulty of a kind, as shown by the amount of time each had persisted without resolution. Concomitantly, according to the litigants themselves, each also benefitted from a centralized and influential body hearing the dispute.

That being said, no Justice Shura cases load speaks to their legitimacy more than their resolution of Family disputes. As a previous TLO report detailed (2011), very few Family cases come before Paktia shuras and jirgas in general: given the privacy concerns they implicate, almost all parties prefer not to even involve local elders in settling them. In the year before the Justice Shuras' foundation, TLO surveyors only found a total of seven Family disputes heard in these three districts in any forum. The

⁵ Interview with Conflict Parties, April 10, 2011

⁶ Interview with Conflict Parties, April 4, 2011

⁷ Interview with Ahmad Aba Litigants, June 5, 2011

Sayed Karam Justice Shura, by contrast, heard eight Family disputes, out of ten heard by the Justice Shuras altogether.

Information on these cases is somewhat limited, as Justice Shura Elders were plainly reluctant to discuss them. Elders from Sayed Karam initially stated that they could not remember any of the Family cases they had heard – a dubious assertion, given their excellent recall in all other matters. TLO’s data collector in Sayed Karam did eventually reveal one case, however. In this case a woman had approached the District Governor directly after her husband died and her brother in law denied her any inheritance. The District Governor in turn referred the case to the Justice Shura, which gave to her a portion of her husband’s estate.⁸

Several aspects of this case stand out. Most obviously, this appears to be the only case brought by a woman to any of the six Eastern Justice Shuras. Moreover, the Sayed Karam Justice Shura in this case went beyond the requirements of Pashtunwali, which generally gives women no inheritance rights, thus indicating that these elders were open to equitable arguments even if it required modifying their usual practices, a necessary quality if the elders are to ever undertake trainings or voluntary reforms. Finally, this dispute also starts to reveal state preferences and state capacity. In this Family case the government seems to have had the capacity to solve, but declined to do so. As discussed later, this probably reflects the preference of even state officials skeptical of informal justice bodies to let such bodies handle most Family disputes.

Whatever the precise line between formal and informal authority that eventually emerges, during the past year the Justice Shuras also worked with their district governments in the solution of about seventeen Criminal cases, including at least seven “Death” cases. The latter indicates cases where a death has occurred due to the alleged perpetrator’s negligent, reckless, intentional or premeditated action, thus triggering the right of revenge for the family of the dead person. As a result these cases pose a particularly great danger to the peace and stability of the community and can lead to long-term blood feuds. Concomitantly, state punishment does not itself satisfy this right of revenge (although it may be a kind of revenge itself, a point further discussed in the section on Nangarhar Justice Shuras). However, the victim’s family can extinguish the dispute by forgiving, in the presence of guarantors such as local elders, the family of the alleged perpetrator. Relatedly, elders or other prominent people also play a role in arranging temporary ceasefires in lieu of a permanent settlement or the resumption of the blood feud. The Mirzaka Justice Shura played a particularly notable role in this regard. Of the seven Death cases heard in the Justice Shuras, it heard five. Respondents directly connected the Mirzaka Shura’s playing this role to the lack of government in the area.⁹ Indeed, the small number of cases in the other Paktia Justice Shuras tends to show that the Ahmad Aba and Sayed Karam district governments, despite their limited reach, prefer to handle most serious Criminal matters themselves, a pattern also found in previous TLO studies of the area (2009, 2011).

Of its five cases, the Mirzaka Justice Shura had only reached a settlement in one, while arranging a ceasefire in the others. More particularly, the Shura had, in a common Pashtunwali phrase, “put a stone” on the latter conflicts for a certain amount of time (for example six months, or one year), during which no party could perpetrate further violence on the other. The Shura, in turn, will use

⁸ Interview with Sayed Karam Justice Shura Members, June 7, 2011

⁹ Interview with Mirzaka Justice Shura Members, June 6, 2011

that time to broker a compromise between the parties and make the peace permanent.¹⁰ In one such case, a young man from Mirzaka had stabbed another to death in Gardez, Paktia's capital. The police took the victim to the hospital, but could not find the perpetrator or his family before they fled. The Justice Shura then assumed control of the case, found the perpetrator and his family, and convinced all sides to agree to a one-year ceasefire. It then wrote a letter to the government relating the Shura's actions in the case, and the state has apparently declined any further role in the matter (Justice Shura members described this as the usual practice in Paktia – the state would not interfere in a case if a shura or jirga was handling it).¹¹ The Mirzaka Justice Shura continues to work on this case at the time of writing.

Of course, Justice Shuras also did more than stop conflicts arising from Death cases, and has reached final settlement in several. In one Sayed Karam case (Meya Jan v. Daud Jan), a young man had caused a road accident, killing himself and two other people. As the death was accidental, the families quickly, but privately, decided to forgive each other. They then came to the Justice Shura to arrange a public ceremony, solemnizing their forgiveness and letting the community know that enmity had ceased.¹² In other words, these parties required no particular prompting to settle their dispute, but they did require a forum to recognize that settlement. The Justice Shura provided some advantage here, in that its elders are widely known and come from across the district. Solemnizing a case with them thus puts the entire district on constructive notice that a case has been settled, and more effectively prevents any further controversy (from either the conflict parties or others) from arising in the matter.

2.2 Formal-Informal Interactions in the Paktia Justice Shuras

In settling these cases, the Justice Shuras in Ahmad Aba and Sayed Karam have benefitted from very close relationships with district government officials, although some signs indicate these may not last if the state gains capacity. The relationship of the Mirzaka Justice Shura to district authorities appears even closer, but officials there expressed a similar desire to limit the authority of informal dispute resolution bodies in the future. With that said, at least at present, all of the district governors and Justice Shuras seem to be working together both legally and politically, in the solution of individual cases and for the improvement of district governance more generally.

As already stated, for both the Ahmad Aba and Sayed Karam Shuras, most of the caseload comes from the office of the district governor; in Ahmad Aba he referred perhaps 90% of the Shura's cases, including many litigants who had approached him directly in order to get access to the Justice Shura.¹³ The governor of each district has also lent his stamp to all Justice Shura decisions, a practice heretofore rare.¹⁴ And these governors and other local officials are meeting with the Justice Shuras more frequently than even TLO asked. In Ahmad Aba, official meetings have become weekly¹⁵, with both Ahmad Aba and Sayed Karam Shura members stating that relations are even closer and

¹⁰ Ibid

¹¹ Ibid

¹² Interview with Conflict Parties, March 26, 2011

¹³ Interview with the Ahmad Aba District Governor, June 7, 2011; Interview with Ahmad Aba Justice Shura members, June 5, 2011

¹⁴ Interview with Sayed Karam Justice Shura Members June 8, 2011; Interview with Ahmad Aba Justice Shura Members, June 5, 2011

¹⁵ Interview with the Ahmad Aba District Governor, June 7, 2011

meetings more frequent in the latter district. These meetings include both coordination on dispute resolution issues and discussion of local problems and security threats, including the exchange on information between Justice Shura members and the government.¹⁶ Shura members, as above, even referred to this arrangement in terms reminiscent of separation-of-powers: there are many situations, whether individual cases or more general problems, which either the formal or informal system could handle, but the tradition of Paktia is that, if the informal system, including the Justice Shuras, is seized of a case, the formal one should be informed but will not interfere.¹⁷ Such an arrangement would of course not work without somewhat free information flows between formal and informal justice providers.

Formal-informal linkages take a slightly different form in Mirzaka. As the district is not recognized by the central government, it technically has no formal officials, although the police do maintain a small battalion there, and one individual has been acting as an informal (and apparently quite popular) district governor for several years.¹⁸ Justice Shura members also state that they recognize his authority¹⁹, and even that he has obligations to the central government – such as upholding Afghan statutory law – that they do not, although this obligation does not appear to require much in practice.^{20 21} Thus, despite these nominal obligations, there unsurprisingly appears to be no enshrined formal-informal referral process, or division of labor between jirgas and (nonexistent) courts. Justice Shura members report that the Governor and Chief of Police meet with them at least weekly and, as tribal notables in their own right, frequently take part in Justice Shura deliberations. The Governor states that he and the Chief of Police do this in their private capacity²²: but, as Mirzaka’s dynamics make clear, this distinction does not necessarily have much meaning, and nowhere else in these six districts are governors and chiefs of police involved in Justice Shura operations to the same extent.

However, this reality of close cooperation leaves open the question of what kind of relationship between the government and Justice Shuras the government would actually prefer. In these districts the state in general has a reach far more limited than the elders (TLO 2009, 2011), thus the state presently derives a great deal of benefit from formal-informal linkages. But state officials in all three Paktia districts clearly want a bigger role in Shura operations than they have previously received. Authorities in Sayed Karam even provided a list of the cases which, in their estimation, lie beyond shuras’ or jirgas’ competence: murder, kidnapping, rape, bribery, other corruption cases, fraud against the government, intentional arson, large civil disputes (they did not, however, define “large”), and civil cases that have “become criminal”, i.e. for which parties have resorted to violence.²³ Moving beyond the precise composition of this list, which echoes the sentiments

¹⁶ Interview with the Ahmad Aba Chief of Police, June 7, 2011

¹⁷ Interview with Mirzaka Justice Shura Members, June 6, 2011

¹⁸ Interview with Mirzaka Government Officials, Received April 16, 2011

¹⁹ Interview with Mirzaka Justice Shura Members, Received April 16, 2011

²⁰ Mirzaka officials did speak of their obligation to uphold Afghan statutory law, although they did not delineate groups of cases that courts (but not shuras) should hear. As TLO’s previous report on the justice systems in these areas (2011) made clear, in practice, Mirzaka officials have neither referred a case to the court in nearby Sayed Karam district, nor rejected a shura decision for non-compliance with statutory law, in at least six years.

²¹ Ibid

²² Interview with Mirzaka Government Officials, Received April 16, 2011

²³ Interview with Sayed Karam Government Officials, Received April 4, 2011

expressed by government officials in Ahmad Aba and Mirzaka²⁴, one can summarize by saying that these officials want to limit shuras' jurisdiction to minor Criminal matters like simple assault or theft; "small" civil cases (again undefined); and Family cases. Of course, given the cases that the district governors of these areas referred to the Justice Shuras in the last year, such restrictions on shura jurisdiction certainly reflect more normative preference than present reality.

As a result, although the Justice Shuras and local government have, in these areas, worked together very closely, the government might take another line if and when its capacity increases. The terms of this cooperation do not lessen the Justice Shuras' achievements in solving nearly 100 cases and doing so in almost-daily cooperation with the state – a great improvement in governance, of which Justice Shura members can be proud. Yet, if the state gains in capacity, then the role of the Justice Shuras would certainly reduce, and they might risk government capture. As the Ahmad Aba District Governor stated, he felt the only way to improve the Justice Shuras would be to put them more firmly under his control, and let him choose their members.²⁵ This state agenda might recommend, in addition to building formal-informal linkages, more direct engagement with the informal justice system itself so that it can both improve the services it offers in the short term, and, in the medium and long term, find a mutually beneficial way to partner with the state. Assuming that litigants will continue to prefer informal dispute resolution for the foreseeable future, respectful partnership stands a better chance of improving state capacity and legitimacy than seeking to dominate – and perhaps delegitimize – the justice system that most Afghans prefer.

²⁴ Interview with Mirzaka Government Officials, Received April 16, 2011; Interview with Ahmad Aba Government Officials, Received April 9, 2011

²⁵ Interview with Ahmad Aba District Governor, June 7, 2011

Chapter

3

3 TLO Justice Shuras in Nangarhar

Litigants, elders, and governments also appear to have benefited from the Justice Shuras in Nangarhar, although the operational details of these bodies differed in notable ways from their Paktia counterparts. Taken together, the three Justice Shuras in Jalalabad Nahiya Five, Bati Kot, and Mohmand Dara heard about 150 cases, or roughly fifty percent more than the Paktia bodies. Justice Shura cases in Nangarhar also seem to have included an even larger number of disputes threatening to district stability, and beyond the capacity of local government to address efficiently.

The Nangarhar Justice Shuras also differed in how they interacted with the state, even while compiling an impressive record of linkage building. Procedurally, the Nangarhar Justice Shuras received the majority of their cases from litigants who approached them directly, not from area governments. Nevertheless, this proved a method of operation, and resultant division of labor between shura and state, that most government officials endorsed, so making for interactions with the state that appear less close, but perhaps more sustainable than relations in Paktia.

That each Justice Shura also saw more cases than did district tribal bodies in the previous year further testifies to their popularity with litigants of all kinds. In part, such popularity probably comes from all three Nangarhar Justice Shuras directly addressing at least one local problem not nearly as present in Paktia: in Nahiya Five, Bati Kot and Mohmand Dara, interviewees reported the widespread taking of bribes by tribal elders, while the Justice Shuras neither took bribes nor charged fees of any kind.²⁶ Yet this good practice does not itself account for the Shuras' success in resolving decades-old disputes, or conflicts involving the most private Family matters. Rather, the solution of such cases once again indicates both high capacity (in the Shuras) and improved access to justice (for litigants). Moreover, that the Nangarhar Justice Shuras saw these achievements while also increasing coordination with the state points to an improvement in governance more generally.

In breaking down and analyzing these achievements (as well as the Justice Shuras' occasional failings), this section will generally treat the Justice Shura in urban Jalalabad Nahiya Five separately from those in more rural Bati Kot and Mohmand Dara. All three, however, played a structurally

²⁶ Interviews with Bati Kot Litigants, May 25, 2011; Interviews with Mohmand Dara Litigants, May 15, 2011; Interview with the Nahiya Five Chief of Police, March 30, 2011

similar role in forging state connections, so this report will undertake a combined discussion of the formal-informal linkages they established.

3.1 Justice Shura Operation in Urban Nangarhar

In the Justice Shuras' area of operation, only in Jalalabad Nahiya Five does the state enjoy near-complete political control and something approaching a monopoly on violence. The area also has, in some ways, the weakest informal justice system, leading to some disputants being under-served. TLO studies of Nahiya Five had previously found a high number of cases heard in the courts, but that at least two-thirds of those were Criminal in nature (TLO 2009, 2011) – about the opposite of the proportion of cases overall. Neighborhood shuras and jirgas filled some of this gap for Land and Family cases, as did the police (*Ibid*). However, before the establishment of the Justice Shura, Nahiya Five lacked an area-wide dispute resolution shura of its own (despite occasional informal meetings of area elders (TLO 2011)). As this section will show, the Justice Shura thus played a valuable role in solving both minor and quite serious Land and Family matters. It also played a complementary role in Criminal cases, resolving minor disputes itself, and assisting parties in major Criminal matters before the government. The Justice Shura thus both improved access to justice overall (especially for non-Criminal disputants), while also showing how strong formal and informal justice systems can interact productively (in all sorts of cases, including Criminal ones). In the past year, the Nahiya Five Justice Shura has heard about 30 disputes, of which about 15 have been Land and related "Rights"²⁷ cases, five or so Family cases, and the remaining ten Criminal cases. It has also aided in the representation of about ten parties in major Criminal cases before the local and city governments.²⁸

In this category of Rights cases, property disputes over shared walls have been the most common.²⁹ These can range from the extremely minor to the highly destabilizing, and the Justice Shura heard a full complement of both. As an example of the minor type, in the case of Muder Zahir v. Pacha, the former was adding a second floor to his house, but the latter objected and forced a halt to construction. He feared for the honor of his home's female members, who might be visible from his neighbor's second story. The architect supervising the project subsequently complained to the Justice Shura, which ruled that, although Muder Zahir had a duty to warn Pacha that he was building a second story on his house, Pacha could not stop construction. The two disputants then accepted the decision and forgave each other. Obviously, in such a case, the state would probably never have

²⁷ In sharia legal terminology, "rights" in this context refers to the term "Rights of Man" which roughly corresponds to civil cases in the West and includes property disputes, breach of contract actions and other legal matters in which it is thought the state has no inherent interest. Family cases also sometimes fall under this umbrella, but interviewees tended to discuss them separately, and all shuras heretofore surveyed have treated them differently than other civil cases, largely because of the privacy and group-rights implications of such issues. By contrast, state authorities often claim a broad mandate in settling cases that implicate the "Rights of God", which roughly corresponds to the Western conception of crimes against society, such as serious Criminal matters (See Interview with Ahmad Aba District Authorities, June 7, 2011). The latter category of case, however, interacts unpredictably with the already discussed Right of Revenge. Exercising that right would seem to "double" the offense against Rights of God, but typically requires an informal justice resolution for its satisfaction. Some of this tension between these various rights certainly arises from the fact that Rights of God/Rights of Man is a sharia concept, while, in this context, the Right of Revenge is part of Pashtunwali.

²⁸ Interview with Nahiya Five Justice Shura Members, May 14, 2011

²⁹ *Ibid*

a large role, at least until the injury to one of the parties had become much greater. This kind of small case, then, easily recommends itself for shura resolution.

The Nahiya Five Justice Shura did, however, hear some larger conflicts when they had become destabilizing. These sometimes involved elements of Criminal violence, but the Justice Shura tended to treat them as major Land cases and received the stamp of the local Police Chief upon their settlement. These larger cases also tended to occur against a background of state bodies failing to resolve the matter, indicating that the Justice Shura hearing these cases can sometimes be less a matter of litigants' preference than of a lack of state effectiveness.

To give the most prominent example, the case of *Jamat Gul v. Haji Nazar* began when the Taliban government published a city plan for Jalalabad. That plan revealed that Haji Nazar's wall was intruding eight meters into Jamat Gul and family's property (the nominal plaintiff was nine years old when the case began³⁰). The conflict has waxed and waned since that time, with periodic outbreaks of violence and serious injuries on both sides. The parties had previously submitted their case to both the Taliban government and the current one, but had never received a viable solution. Similarly, the police had previously arrested members of both sides of the conflict, but had always released them shortly thereafter, and without any apparent deterrent effect. Most recently, the parties had engaged in a series of five clashes during last year's month of Ramadan. At the time of the Justice Shura's intervention, the two sides had gathered nearly thirty people and armed them with pistols and Kalashnikovs in preparation for a final confrontation. After being warned of the conflict's reemergence, Justice Shura members personally intervened and sat with both sides of the conflict separately, convincing them to lay down their arms. The Shura then met on the underlying issues, and engineered a solution whereby Haji Nazar agreed to straighten his wall, but Jamat Gul had to pay for the repair work. The Justice Shura then had the local police station stamp this decision.³¹

In a similar example, the case of *Janat Gul v. Dawlat Khan*, the latter had been occupying a government park for about thirty years, until the former bought an adjacent house and also claimed a portion of the park. Serious fighting ensued, and the dispute came to the Nahiya Five Justice Shura via a local Mullah. The Justice Shura decided that no one has the right to occupy an entire government park, and so divided the property between the parties. It did not seek to return the land to the government, but did rule that Janat Gul and Dawlat Khan should pay tax on it, since it is government property. Thus, although the Justice Shura did not return the property to its titled owner, it did forge a compromise that benefitted all parties: Dawlat Khan got additional security in his holdings; Janat Gul got access to land adjacent to his home; and the government should receive revenue that it had not received previously. The local police station also signed off on this decision. Given the history and disposition of this case and the one previously discussed, the government itself does not demonstrate deep commitment to asserting Criminal jurisdiction (although government officials do claim exclusive jurisdiction in this area; see below). It also does not show much interest in sorting out even its own holdings. Such circumstances create a fairly large opportunity for institutions like the Justice Shura to settle major disputes even in areas of government control.

³⁰ Interviews with Nahiya Five Justice Shura Litigants, May 15, 2011

³¹ Interview with Nahiya Five Litigants, May 15, 2011

The Justice Shura is also playing a notable role in solving Family cases, despite the presence of the Jalalabad Family Court. These were also the cases in which the Vice Chief of Police of Nahiya Five disclaimed any state interest³², another example of the state using less than its full potential capacity for dispute resolution. The Nahiya Five Justice Shura heard approximately five major Family cases within the past year. In one such case, a husband and wife had been fighting late at night, and the husband expelled his wife from the house, intending to then request a divorce. She went to the home of her brother, a policeman, who approached the Justice Shura. Shura members remained vague on the precise cause of the marital discord, but they prevented the divorce, stipulating that the wife should be more “accepting” of the husband, and that the husband will be fined 100,000 Afghanis (about 2,000USD) if he fights with his wife again.³³

The Nahiya Five Justice Shura, much as in rural Paktia, is also preventing parties from being forced to carry out the duties of revenge that can arise under Pashtunwali. In one such case, a girl, unhappy with the fiancé her parents had selected, eloped with another boy to Kunar. According to Shura members, their conception of Pashtunwali would normally require the boy’s family to kill him, and the girl’s family to kill her.³⁴ However, the girl’s father contacted the Shura, who then negotiated with all parties to find a non-violent solution: the boy in question would pay financial penalties to both the girl’s former fiancé and her father, equivalent to the penalty usually assessed if the woman had been murdered (to the former fiancé), and twice that (to the father). The boy and his family paid these fines, and the couple is now married.

In contrast to the state encouraging Justice Shura jurisdiction (in Family cases), or at least acquiescing to it (in Land cases), Criminal cases in Nahiya Five sometimes saw a higher level of state involvement, and a division of labor between the state and Justice Shura. According to Justice Shura members, they had settled about ten small Criminal disputes themselves, and represented parties before the state in another ten more serious cases.³⁵ Regarding the aforementioned minor Criminal cases, the Justice Shura’s docket appears to resemble the case of *Malim Rafiq v. Bilal*, where both sides had fought after Bilal had hit a cricket ball into Malim Rafiq’s house. The Justice Shura engineered the parties forgiving one another, and stipulated that people should not play cricket so near to Malim Rafiq’s house in the future.

In line with the Justice Shura hearing such cases (and no Death cases or other major Criminal matters, besides those it treated as Land disputes), there is little doubt that the state settles most significant Criminal cases in Jalalabad (TLO 2009, 2011). In these cases, Justice Shura members are playing dual roles. On the one hand, they are helping represent parties in their dealings with the state by, for instance, speaking with police on litigants’ and arrestees’ behalf. And, on the other hand, the Justice Shura is also addressing the “civil” side of the underlying dispute, i.e. brokering compensation and forgiveness between parties in order to prevent revenge.³⁶ Justice Shura

³² Interview with the Nahiya Five Vice Chief of Police, May 15, 2011.

³³ Interview with Nahiya Five Justice Shura Members, May 14, 2011

³⁴ Ibid.

³⁵ Interview with Nahiya Five Justice Shura Members, May 14, 2011.

³⁶ Ibid

members reported playing these roles in around ten murder cases since the Shura's inception, and the government set free at least one murder suspect after the Shura's intervention.³⁷

Justice Shura members were less clear on how often they have helped represent parties before state institutions, but say they do so regularly, given that many ordinary people are fearful of approaching the government directly. They further stated that they usually, though not always, obtained a positive result such as the release of detained persons.³⁸ In the most recent case, a man and woman traveling at night mistook a band of Kuchis for robbers, and reported them to the police, who then arrested a number of the Kuchis. As of this writing, Justice Shura members are attempting to intervene on the Kuchis' behalf, although so far the police have refused to release them.³⁹ Especially in an area of significant state capacity, such a service would appear to be highly beneficial (it would usually be a role played by a detained person's or the family's legal counsel in a Western country). Indeed, no Justice Shura members outside Nahiya Five reported playing an equivalent role: a strong state may reduce the need for strong shuras in some ways, but it also increases the need for them in others.

3.2 Justice Shuras in Rural Nangarhar

Among all six Justice Shuras, those in the Bati Kot and Mohmand Dara districts of Nangarhar proved the most active. Justice Shuras in these districts have heard approximately 110 significant disputes within the past year (about 60 in Mohmand Dara⁴⁰, and 50 in Bati Kot⁴¹, with the majority of litigants approaching the Justice Shuras directly), and appear to be playing a very significant role in supplementing the state justice system, and extending orderly dispute resolution into areas that the district government has difficulty handling. Indeed, the 110 cases heard in the Justice Shuras in these districts represent more than double the number that district-wide tribal bodies had heard in the year before the Justice Shuras' establishment (TLO 2011), indicating again an improvement in litigants' access to justice. For some sorts of cases, such as those dealing with Land or Criminal matters, a stronger state would potentially reduce the need for Shura services. However, for other cases, and especially for those dealing with Family issues, increased state involvement would require not only an increase in state capacity, but also a profound shift in social norms, as was implied by the Shura's role in Nahiya Five.

Regarding Land cases, the Bati Kot Justice Shura has heard about 25 (ten referred from the district government⁴²), and the Mohmand Dara Justice Shura has heard about 15 (four referred from the government⁴³). The Justice Shuras proved particularly adept at solving cases either beyond the government's capacity, or cases that were otherwise especially troubling, including some cases that had dated back several decades (with the oldest dating back more than thirty years⁴⁴). Thus the Justice Shuras provided a valuable service in extending the reach of orderly dispute resolution, even if, as will be seen, they proved unable to substantially curb the behavior of the most powerful and

³⁷ Interview with Nahiya Five Justice Shura Members, May 14, 2011

³⁸ Ibid

³⁹ Ibid

⁴⁰ Interview with Mohmand Dara Justice Shura Memers, May 15, 2011

⁴¹ Interview with Bati Kot Justice Shura Members, May 25, 2011

⁴² Interview with Bati Kot Justice Shura Members, May 25, 2011

⁴³ Interview with Mohmand Dara Justice Shura Members, May 15, 2011

⁴⁴ Interview with Bati Kot Justice Shura Members, May 25, 2011

determined parties. This failing of the Justice Shuras, in turn, might suggest the creation of a larger, provincial-level body, a possibility explored in this report's next section.

In a significant number of the government-referred Land cases, Justice Shura members stated that they received the case because the government lacked capacity to handle the case itself. Indeed, Mohmand Dara Shura members stated that each of the four cases they had received shared this characteristic. In one such case, neighbors in an area far outside the district center were fighting over 500 square meters of land, on which one of them subsequently built a house. The other party objected, and brought his case to the district government. However, after the plaintiff spending a large amount of money, the state still did not enforce his ownership, and the government referred his case to the Justice Shura. The Justice Shura decided that his claim was valid, and awarded him not only the original 500 square meters of the dispute, but an additional 500 square meters in compensation.⁴⁵ In this case, then, the Shura's geographically balanced membership worked in its favor, and it could enforce even punitive decisions in an outlying area where the government could not.

Similarly, a large Bati Kot case began when the river separating Bati Kot and Gushta districts changed course, "giving" land to Bati Kot, which Bati Kot residents then claimed. Gushta residents across the river objected, and large-scale fighting broke out. Police came from both districts, as did both district governors, and they stabilized the situation. After negotiations, the conflict parties decided to refer the case to the Bati Kot Justice Shura, which is now mediating the dispute. According to Bati Kot Shura members, their geographic reach again played the deciding role, as they have credibility in a large geographic area, including where the river had changed course.⁴⁶ Here, moreover, the Justice Shura and government were acting in a complementary way, with the government providing enough force to convince parties to cease fighting in the short-term, while using the Justice Shura to craft what will hopefully be a long-term settlement.

Government involvement in this case seems important, as the Justice Shuras succeed by brokering compromise, and do not have an ability enforce socially optimal solutions – which can lead to problems with recalcitrant and powerful litigants. For example, a prominent local commander, Dr. Rislán, had seized around 30 *jeribs* of land during the Mujahedeen government. He had kept the land continuously until this past year, when a large *jirga*, made up of representatives of the Musa Khail, Mama Khail, and Sultan Khail sub-tribes ruled that the land should be divided three ways. Dr. Rislán, a Mama Khail, would receive some land in this allocation, as well as land elsewhere in the district as compensation. He, however, objected to some of the allocation, and wanted to keep other parts of the land he had been occupying. To accomplish this goal, he engineered the arrest and imprisonment of nine Musa Khail tribal leaders, including a Justice Shura member, for thirteen days. Upon their release, the Justice Shura itself received the case. Afraid that Dr. Rislán would raise an even more violent conflict, the Justice Shura convinced the tribal leaders who had been imprisoned not to retaliate, and to accept Dr. Rislán's continued possession of the land he wanted to keep, including land that the *jirga* had allocated to the aforementioned Justice Shura member.⁴⁷ In this case, then, the Justice Shura arguably acted for the greater good by preventing violence, but at the

⁴⁵ Ibid

⁴⁶ Interview with Bati Kot Justice Shura Members, May 25, 2011

⁴⁷ Interviews with Mohmand Dara Justice Shura Litigants, May 15, 2011

cost of ratifying Dr. Rislán's destructive behavior, and imposing an unsatisfactory solution on some relatively innocent parties.

That being said, the problem, such as it is, seems to stem from the Justice Shuras' lack of power, not a lack of legitimacy. Because the state eschews solving Family cases and has not played an important role in their resolution previously (TLO 2011), one cannot say that the Justice Shuras in these cases actually expand the state's reach. Rather, as in other districts, the Mohmand Dara and Bati Kot Justice Shuras provide a forum legitimate enough to issue decisions on even highly sensitive and complex Family matters. The Mohmand Dara Justice Shura has heard approximately 11 Family disputes, including a remarkable eight divorce cases;⁴⁸ while the Bati Kot Justice Shura has heard approximately 18 Family disputes, but issued decision letters in only the most serious three cases.⁴⁹ These numbers represent a significant increase over Family cases heard in district tribal shuras in the previous year, although still significantly fewer Family cases than the Ulema Shura in each district typically hears (TLO 2011).

In one such Bati Kot case, a girl from the tribal areas of Pakistan was engaged to a boy from Bati Kot. During her engagement, she had also maintained relations with a Pakistani boy. Soon after her marriage, she quickly became unhappy with her husband in Afghanistan, ran away to Pakistan, and her family found her four days later. She then ran away again, and this time her family did not find her until forty-five days later, whereupon her brother announced his intent to kill her. The District Chief of Police learned of the brother's threat, and alerted the Justice Shura. The Shura, in turn, working with the District Governor, first got all parties to sign a letter guaranteeing the girl's safety, and then sat to solve the underlying case itself. The Shura granted her a divorce, but also ruled that she could not marry within her own tribe.⁵⁰

The Justice Shuras also appear to be taking some small steps to uphold women's rights, at least as traditionally conceived. In one case from Mohmand Dara, a family had given away two daughters in marriage, one a teenager to be married immediately, and the second younger, and to be married after three years. After the latter marriage occurred, the families of the wives and husbands began a conflict with one another, for apparently unrelated reasons. Both girls returned to their father's home. The younger one brought her jewelry – i.e. her main store of personal property – with her, while the older one alleged that her mother in law had prevented her from doing the same. After assessing the facts of the case, the Justice Shura ruled that the older girl should receive monetary compensation equal in value to the jewelry she had lost, which was 180,000PKR (or about 1,800USD). Her father also received the same amount in compensation, and the Justice Shura granted her a divorce letter.

In these cases, then, the Justice Shuras have taken at least small and tentative steps to both prevent violence against women, and improve these women's property rights and access to divorce. One should not overstate the case, but such cases do seem to be something of an improvement over the results recorded in other customary justice institutions, as was also the case in Paktia. Given parties' great desire for privacy in Family cases, outside intervention to secure further gains on gender issues would likely prove prohibitively difficult, if not impossible given low state capacity (for example, the

⁴⁸ Interview with Mohmand Dara Shura Members, May 15, 2011

⁴⁹ Interview with Bati Kot Justice Shura Members, May 25, 2011

⁵⁰ Ibid

Mohmand Dara Justice Shura did not issue decision letters in Family cases in order to protect litigants' privacy⁵¹). As a result, voluntary trainings and discussions on improvement of shura and *jirga* standards recommend themselves as ways to gain ground on women's rights more generally, a possibility discussed in Section 5 of this report.

By contrast, it is with Criminal cases that the practical authorities of the Justice Shuras and the state complement one another to the greatest extent, with the Justice Shuras building the peace on which future governmental and economic development will depend. First of all, the Bati Kot and Mohmand DARA Justice Shuras, in various ways, lessen the state's caseload by handling minor cases efficiently and without cost – cases that, in many instances, the state would prefer not to handle. And, second, both Justice Shuras are addressing some major crimes that the district governments could not generally handle efficiently, and with the state's actual or constructive knowledge. This role for the Justice Shuras might (and perhaps should) reduce over time, but it has proven highly valuable thus far. It also accords with the moral preferences of some litigants to avoid punishing opposing parties, which is sometimes thought of as a form of revenge.

As to the more minor cases, the Bati Kot Shura has heard about 10 small Criminal matters⁵², such as simple assault, most solved verbally. Similarly, the Mohmand Dara Shura has settled around twenty "Children's" cases⁵³, which typically involve children fighting, setting small fires, or other minor Criminal activity. In one of the Bati Kot cases that received a decision letter, *Meyazer v. Daftar*, the latter's son was walking by the former's house late at night. Meyazer's family thought Daftar's son's activity suspicious, detained him, beat him, and took his gun. He complained to the district authorities in the morning; when Meyazer's family went to the district center to respond, one of them also brought a gun. The government seized that firearm, and later got hold of the one taken from Daftar's son. The parties then requested that the government refer their dispute to a shura, to which the government agreed. The Justice Shura settled the dispute by ruling that each side should pay the other for half the cost of the guns seized and, in turn, Daftar's son would bear the responsibility to make sure that the government returned the guns themselves. The former payment thus comes across not as purely compensatory, but as also the price paid to otherwise quiet the case.

The Mohmand Dara case of *Adam Khan v. Mahmoud Hanif*, a Children's matter, shows broadly similar dynamics. In that case, Mahmoud Hanif, Adam Khan's neighbor and cousin, had procured a dirt pile, on which Adam Khan's children were playing. Mahmoud Hanif's children in turn tried to order them off, and fighting broke out. Hearing a commotion, women from both families also came out and began fighting – resulting in one Adam Khan's daughter's skull being cracked open. Seeing this rising tide of chaos, one of Adam Khan's sons went to the district and filed a complaint, and the district in turn arrested five people. Mahmoud Hanif almost immediately asked the case to be removed to the Justice Shura. Adam Khan initially resisted, because he felt that he had caught his cousin in a misstep⁵⁴ and wanted to "tire out his rival"; female members of his household who had

⁵¹ Interview with Mohmand Dara Justice Shura Members, May 15, 2011

⁵² Interview with Bati Kot Justice Shura Members, May 25, 2011

⁵³ Interview with Mohmand Dara Jirgamaran, May 15, 2011

⁵⁴ Rivalry between male cousins, or *tarburwali* in Pashto, is thought to be one of the most characteristic aspects of Pashtun culture. Edwards (2009) describes it as "the endemic gamesmanship, rivalry, and sometimes open hostility that is thought to exist inevitably between the sons of brothers."

been imprisoned also engaged in self-harm, which they then claimed that Mahmoud Hanif's family had inflicted before their arrest.⁵⁵ However, eventually Shura members convinced Adam Khan to give his consent, and the government agreed to remove the case. In compensation for the injuries inflicted, the Justice Shura awarded Adam Khan 7000PKR (about 70USD), and had Mahmoud Hanif's family perform an apology and slaughter a sheep.⁵⁶

Yet the Justice Shura is not only playing a role in smaller Criminal matters such as these. Rather, it is also supplementing state authority in more serious disputes (including Death cases) or, similar to Land and Family cases, filling in gaps where state or other community authority does not reach. The Bati Kot Justice Shura has heard three such cases, and the Mohmand Dara Justice Shura has heard two. They are thus not a large part of either Shura's caseload, but do give important insight into the gaps the Shuras are filling.

In one Bati Kot Death case, two brothers and their wives were sharing a house. The two wives began to fight constantly, to the extent that the brothers decided to partition off the house. One day, one of the brothers was gone, and his wife was causing a disturbance. The other brother told her to stop, whereupon she went and retrieved a Kalashnikov and shot his head off. She returned to her father's house, and her former husband married another woman. The case persisted for almost two years, she eventually requested a divorce, and the case came to the Justice Shura. The Justice Shura, in turn, refused her divorce, but did rule that her father should pay three lakh Pakistani Rupees (about 3,000USD) in compensation to the family of the man she murdered. This situation accords with the observation of several interviewees that even very serious matters within the family can persist indefinitely with parties resisting outside involvement.⁵⁷ As such, the Justice Shura proved capable of extending, if not state authority, then at least community authority to punish a woman who had taken the life of another, in a matter outside the state's reach due largely to subject matter.

These district governments also suffer from problems in Criminal cases that arise because their authority does not extend much beyond their district centers – particularly problematic given these districts' proximity of the Pakistan. For example, one Mohmand Dara case began with fighting between two children, until one of their older brothers intervened and stabbed the other child to death. A traditionally-organized *jirga* (not the Justice Shura) heard the case first, and decided to exile the murderer and his family to Pakistan for one year, and stipulated that, if any of them returned, they would be killed. However, before the year had passed, the murderer's father returned surreptitiously to Afghanistan and, after his presence became known, the original victim's family tracked him down and killed him in Pakistan. The family of the second victim then brought their case to the Justice Shura. The Shura ruled that, as each side had suffered from one death, neither owed compensation to the other. However, the Shura would fine them 5 lakh rupees (about 5,000USD) if the families fought again by hand; 10 lakh rupees (about 10,000USD) if they fought again with weapons; and 2.5 million rupees (about 25,000 USD) if the killings began again. Once the Justice Shura settled this case, it held a large celebration in the Mohmand Dara district center, with hundreds of people in attendance.⁵⁸

⁵⁵ Interviews with Mohmand Dara Litigants, May 25, 2011

⁵⁶ Ibid

⁵⁷ See, e.g., Interviews with Bati Kot Litigants, March 21, 2011

⁵⁸ Ibid

In this way the Justice Shura successfully solved what had become a destructive blood feud, obviously of great concern to the community, but whose cross-border nature made state resolution effectively impossible.⁵⁹ Moreover, the Justice Shura was clearly not trying to hide its actions from the state, as it organized a conspicuous public event to mark what it had done. Rather, it was filling a gap in state authority, one that seems to have existed on both sides of the Durand Line.

3.3 Formal-Informal Interactions in the Nangarhar Justice Shuras

With that said, the dynamic between Justice Shuras and local government appears substantially different in the various Nangarhar districts. Although state officials in all three areas have cooperated with the Justice Shuras extensively and meet with them frequently, only the Bati Kot Justice Shura has seen state-Shura collaboration in solving a large number of disputes, and even there state referrals constitute only about half of the Shura's caseload. The Nangarhar Justice Shuras have thus operated more independently than their Paktia counterparts. Nangarhar officials, however, generally endorse their present arrangement with the Justice Shuras, meaning this looser model of cooperation may actually prove more sustainable going forward.

This report has already noted that, in Nahiya Five, government officials have referred only a small number of cases to the Justice Shuras, although cooperation outside the context of case referral remains substantial.⁶⁰ Such a pattern of behavior seems to proceed fairly directly from the attitudes of district officials, who spoke in favor of a limited, but important, role for shuras and jirgas in the Nahiya Five justice system. To begin, the Chief of Police stated that, if the parties so requested, he would refer minor Criminal matters to Shura, but would send all major ones to the court.⁶¹ Unlike the similar statements of Ahmad Aba and Sayed Karam officials, the Chief's statements correspond fairly closely to the overall reality of the Nahiya's justice system (TLO 2009, 2010, 2011), and certainly reflect the high capacity of the government in the area. The Chief of Police did, however, state that government could not generally regulate the composition of shuras, or their operation so long as they stayed within the law.⁶² This attitude, in turn, reinforces the Chief of Police's statement that he values the Justice Shura because there is no comparable body in the area to offer litigants a low-cost and high-quality dispute resolution service.⁶³ In other words, the Chief appears to say he would restrict the Justice Shura's decision-making authority to minor disputes, but would not interfere with it inside those boundaries.

In turn, the Nahiya Five Justice Shura settled fewer major cases than in Mohmand Dara or Bati Kot counterparts. However, Nahiya Five authorities are still lending their stamp to the major Land and Family cases that the Justice Shura occasionally handles such as that of *Jamat Gul v. Haji Nazar*.⁶⁴ Thus, although the statements of the Chief of Police regarding Criminal cases are more or less correct, they do not capture the entire reality of shura-state interaction, reinforcing the point that,

⁵⁹ Ibid

⁶⁰ Interview with the Nahiya Five Chief of Police, May 15, 2011; Interview with Nahiya Five Justice Shura Members, May 14, 2011

⁶¹ Interview with the Nahiya Five Chief of Police, Received May 17, 2011

⁶² Interview with the Nahiya Five Chief of Police, Received May 17, 2011

⁶³ Ibid

⁶⁴ Interview with Nahiya Five Justice Shura Members, May 14, 2011

even in urban areas with high government capacity, Shura members and government officials interact based not on a hard-and-fast set of rules, but much more on a case-by-case basis.

Mohmand Dara officials probably favor the same relatively limited shura jurisdiction, although that district's governmental capacity and political context are very different from the Nahiya. In Mohmand Dara, the Prosecutor stated that he would only refer minor and Family issues to the Justice Shura⁶⁵; while the District Governor implied that he would refer a broader spectrum of cases, but in fact has only referred minor and Family ones.⁶⁶ Like officials in Nahiya Five, they also added that, while the government could regulate the cases heard by shuras, or their role in the justice system, the government should not regulate shuras' membership or try to police their day to day operations.⁶⁷

These statements, however, only partially reflect reality. On the one hand, the government has, as above, referred about twenty cases to the Justice Shura, and most have involved Family matters or minor disputes. On the other hand, at least four government referrals were major Land cases that took place in outlying areas where government authority does not run. Moreover, this report has already established that the Mohmand Dara Justice Shura has settled a wide variety of (other) major Land and Criminal cases that were, in perception or in fact, beyond the capacity of the district government. The Justice Shura also settled some of these cases in a highly public way – commemorating their resolution with a large celebration in the district center – and so the government certainly had actual or constructive knowledge of their activities.

Mohmand Dara Justice Shura members did not, however, formally register the resolution of that case with the government⁶⁸, and in general they utilized government stamping and registration rarely. Justice Shura members further stated that although, under TLO's encouragement, they had been registering more cases with government authorities recently, they saw no inherent advantage to the process, and believed it mainly as another chance for the government to extract bribes.⁶⁹ Thus they said they would prefer to reserve registration to the most serious cases, to prevent parties taking their dispute to government authorities later.⁷⁰

Bati Kot, then, represents the district with government officials the most open to broad shura jurisdiction, and the Nangarhar Justice Shura with the closest government connections both in the referral and stamping of cases. Although there is no particular evidence that Bati Kot officials met with the Justice Shura more often, or to discuss a wider variety of matters, than in Mohmand Dara, the attitude of Bati Kot officials indicates a greater willingness to embrace broad shura powers. More specifically, Bati Kot officials sent about thirty cases to the Justice Shura in the past year, of all types.⁷¹ Indeed, both the Bati Kot District Governor and Chief of Police reported that they would

⁶⁵ Interview with the Mohmand Dara Prosecutor, Received May 29, 2011

⁶⁶ Interview with the Mohmand Dara Administrative Head, Received May 29, 2011

⁶⁷ Interview with the Mohmand Dara Prosecutor, Received May 29, 2011; Interview with the Mohmand Dara Administrative Head, Received May 29, 2011

⁶⁸ Interview with Mohmand Dara Justice Shura Members, May 15, 2011

⁶⁹ Interview with Mohmand Dara Justice Shura Members, May 15, 2011

⁷⁰ Ibid

⁷¹ Interview with the Bati Kot District Governor, Received May 3, 2011

send any case to the Justice Shura when the parties requested it⁷², with the Chief of Police in particular noting that he would send even Criminal cases.⁷³ These officials also claimed for the government a relatively narrow ability to regulate shura activity. Both the District Governor and Chief of Police stated that the government could only regulate the operation of shuras which the government had also played a part in creating, such as development and peace shuras.⁷⁴ Neither claimed that the government could regulate shuras in general, nor, like other Nangarhar officials, did they think it wise for the government to have a say in who sits on shuras. As compared with Mohmand Dara, such preferences bear a significantly closer relation to the present realities of district governance, with broad informal justice authority, but government power sharply limited (See TLO 2009, 2010, 2011).

As above, government referrals to the Bati Kot Justice Shura make up something more than half its total caseload, the highest percentage of any of the Nangarhar Justice Shuras. In turn, the Shura is receiving a government stamp on all its decisions, but through an idiosyncratic process. The Head of Bati Kot's IDLG Shura is also a Justice Shura member, and thus has the power to use the IDLG stamp at will. He further states that he has arranged for all Justice Shura decisions to receive this stamp, and that it carries the same weight as a stamp from the District Governor.⁷⁵ The Bati Kot district government and Justice Shura thus cooperate closely, and in a process that seems more highly institutionalized, and in better accord with stakeholders' preferences, than the similarly close cooperation witnessed in most of Paktia. Although Bati Kot's arrangements would clearly not work everywhere, they do at least provide an example of how genuinely close shura-government cooperation can proceed.

⁷² Interview with the Bati Kot District Governor, Received May 3, 2011; Interview with the Bati Kot Chief of Police, Received May 3, 2011

⁷³ Interview with the Bati Kot Chief of Police, Received May 3, 2011

⁷⁴ Interview with the Bati Kot District Governor, Received May 3, 2011; Interview with the Bati Kot Chief of Police, Received May 3, 2011

⁷⁵ Interview with Bati Kot Justice Shura Members, May 25, 2011.

Chapter

4

4 Advantages of Justice Shuras: Evidence from Litigants, Elders, and State Officials

Litigants had freedom of choice in both submitting their disputes to the Justice Shuras and in accepting the Shuras' solutions to their cases. As voluntary organizations, the Justice Shuras' caseload thus depended largely on their attractiveness to litigants; the amount of cooperation they could receive from government officials; and, concomitantly, elders' willingness to take the lead and maintain a high standard of operation and decision making. Interviews in turn showed that litigants, elders and officials displayed a consistent preference for several aspects of the Justice Shuras' organization, and several aspects of their operations. These organizational and operational aspects in turn led to a preference for the Justice Shuras over other dispute resolution forums for some kinds of cases. These preferences also hold lessons for constructing dispute resolution forums in the future, especially as the Afghan state attempts to build up its presently small dispute resolution capacity in a sustainable and democratic way.

Structurally, respondents particularly liked having a district-wide, centralized body made up of only carefully selected elders. To begin, litigants in both Paktia and Nangarhar frequently stated that they benefitted from having a district-wide body like the Justice Shura. Some Mirzaka litigants, for example, pointed out that, due to the Shura having representatives from different areas, they knew that it would not favor litigants from one particular area over others.⁷⁶ Bati Kot and Ahmad Aba litigants echoed the same sentiment,⁷⁷ as did some Shura members themselves.⁷⁸ That is, even though not purely democratic, litigants seem to have thought the Justice Shuras balanced enough by geography to be trustworthy and reliable for parties and cases from across each district.

Shura members and government officials also endorsed the Justice Shuras' centralizing effect: before, individual elders were making decisions for their individual areas, but now they could share

⁷⁶ Interview with Mirzaka Litigants, June 6, 2011

⁷⁷ Interview with Ahmad Aba Litigants, June 5, 2011; Interview with Bati Kot Litigants, May 25, 2011

⁷⁸ Interview with Mirzaka Justice Shura Members, June 6, 2011; Interview with Mohmand Dara Justice Shura Members, May 15, 2011

information and work together on cases.⁷⁹ In Nahiya Five, government and jirga leaders further stated they appreciated having the Justice Shura as a new option to solve certain sorts of disputes, such as those involving Family matters,⁸⁰ and added that the presence of the Justice Shura increased the people's trust in government, by giving the government access to this outlet.⁸¹ Officials in both Paktia and Nangarhar similarly praised the Justice Shuras' neutrality⁸², as well as its ability to solve a large volume of cases quickly.⁸³

In many respondents' telling, the personal qualities of TLO Justice Shura members made the Shuras themselves trustworthy, a point also observed in other TLO discussions with elders on constructing high-quality shuras (TLO 2011B). Several interviewees, for example, expressed admiration that only experienced elders had been selected for the Justice Shuras, while expressing disapproval of some groups of elders not chosen for the Justice Shuras. Elders accused of taking bribes clearly fall into the latter disapproved category, as do, in the words of one Ahmad Aba litigant, the well-connected but "unprofessional" people on some government-operated shuras.⁸⁴ Such statements clearly imply the need to exclude some elders from the operation of shuras, and, as such, a standard for who should join. Along with the above data, they also suggest that institutions like the Justice Shuras can both raise the standards of local informal justice, while also helping solve coordination problems between litigants, the state, and even the elders themselves.

Yet, even more so than the structure of the Shuras, respondents of all sorts praised their methods of operation, suggesting an idea among these individuals of shura "best practices." These included not charging a fee to litigants, the writing of decisions, and maintaining a relationship with the government, without becoming a government body. In Nahiya Five, Bati Kot and Mohmand Dara, interviewees spoke highly of the Justice Shura not taking any money for its services. As above, they reported that even village jirgas are usually taking small fees (typically equivalent to food and travel costs) for their services, while a smaller group of elders is taking bribes in return for settlements.⁸⁵ Indeed, one Mohmand Dara litigant expressed amazement that not only did the Justice Shura in that area not ask litigants for food costs, but it even gave them food. In the litigant's words, it was "a giving shura."⁸⁶

In operational terms, respondents appreciated that the Justice Shuras write their decisions, keeping one copy for themselves and distributing others to litigants and the government. Many litigants preferred having a written decision so that, if the case reemerged, they would have evidence of its prior settlement.⁸⁷ A few, however, also saw written decisions as a way to police the Shura itself. According to interviews with litigants from Sayed Karam, shuras should issue written decisions so

⁷⁹ See, e.g., Interview with Mirzaka Justice Shura Members, June 6, 2011; Interview with Bati Kot Justice Shura Members, May 25, 2011.

⁸⁰ Interview with the Nahiya Five Vice Chief of Police, May 15, 2011

⁸¹ Interview with the Nahiya Five Chief of Police, March 30, 2011

⁸² Interview with Ahmad Aba District Governor, June 5, 2011; Interview with the Nahiya Five Chief of Police, March 30, 2011

⁸³ Interview with the Mohmand Dara District Governor, April 4, 2011

⁸⁴ Interview with Ahmad Aba Litigants, June 5, 2011

⁸⁵ Interviews with Bati Kot Litigants, May 25, 2011; Interviews with Mohmand Dara Litigants, May 15, 2011; Interview with the Nahiya Five Chief of Police, March 30, 2011

⁸⁶ Interviews with Mohmand Dara Litigants, May 15, 2011

⁸⁷ Interview with Nahiya Five Litigants, May 28, 2011

that, if the shura does something unjust or against Islam, those suffering from the decision can report it to a proper authority.⁸⁸ Shura members concurred in this sentiment; with some also stating that they had not previously written their decisions.⁸⁹ Indeed, some elders identified requiring written decisions as one the specific strengths of the Justice Shuras: on each Shura one person acted as a Secretary, so that, even if many Shura members could not read and write, the Shura itself could still put its decisions on paper.⁹⁰

Once the Shura has issued a decision, most litigants then preferred that it receive the approval of government authorities, and be registered with the relevant government department, with some Justice Shura members saying they did not engage in this practice until TLO prompted them.⁹¹ More specifically, litigants appreciated the ability of government registration to foreclose the possibility of re-litigation in a government forum.⁹² Justice Shura members in Mohmand Dara perceptively added that, given state authority does not extend beyond the district center, government approval will not actually convey additional authority on a decision for litigants in outlying areas – rather, it's prophylactic.⁹³

Court-style settlement itself also does not necessarily conform to litigants' moral preferences, given that some view state punishment as the equivalent of private revenge. For example, Sayed Karam litigants expressed frank distaste at the prospect of the police enforcing court (or other dispute resolution) decisions, especially in rural parts of the country.⁹⁴ They saw police intervention as something that would cause the dispute to reemerge later, as the parties to the case would have not agreed to settle the underlying grievance. Indeed, one Mohmand Dara litigant, also quoted above, put the point even more strongly, saying that he initially brought his case to the court specifically to punish and "tire out" his opposing party⁹⁵, implying that bringing a case to the government is primarily a form of revenge, not justice-seeking.

With these statements in mind, one can say that, while litigants wanted some government involvement with the Justice Shuras, they did not want government taking part in the actual settling of many disputes. In line with this preference, almost all respondents, even those favorably disposed toward the government, wanted shuras to be in a relationship with the state, but not to be dominated by, or be a part of, the state. Litigants in Bati Kot, for example, stated that they preferred the Justice Shura solve their disputes because other shuras were primarily instruments of government policy⁹⁶, a sentiment echoed by litigants in Mohmand Dara (the only two areas with District Community Councils formed under the Afghanistan Social Outreach Program (ASOP) by the Independent Directorate of Local Governance (IDLG)).⁹⁷ These litigants did not necessarily intend this as a criticism, but rather as an observation that these shuras' primary duty is not the resolution of

⁸⁸ Interview with Sayed Karam Litigants, June 8, 2011

⁸⁹ Interview with Mirzaka Justice Shura Members, June 6, 2011

⁹⁰ Interview with Sayed Karam Justice Shura Members, June 8, 2011

⁹¹ Interview with Ahmad Aba Justice Shura Members, June 5, 2011

⁹² Interview with Ahmad Aba Litigants, June 5, 2011; Interview with Nahia Five Litigants, May 15, 2011;

Interview with Mohmand Dara Litigants, May 15, 2011

⁹³ Interview with Mohmand Dara Justice Shura Members, May 15, 2011

⁹⁴ Interview with Sayed Karam Litigants, June 8, 2011

⁹⁵ Interview with Mohmand Dara Litigants, May 15, 2011

⁹⁶ Interview with Bati Kot Litigants, May 25, 2011

⁹⁷ Interview with Mohmand Dara Litigants, May 15, 2011

private disputes.⁹⁸ As shuras set up by the IDLG do have a dispute resolution mission, such a statement poses problems, but it also seems to stop short of outright hostility to government as such. Nevertheless, the ability of the Justice Shuras to serve as a bridge between the government and the people may have been their single most attractive feature, and one uniquely hard for a state institution to emulate. This ability further implies that the Afghan state can extend its involvement in dispute resolution via engagement with traditional structures themselves.

⁹⁸ Interview with Bati Kot Litigants, May 25, 2011

Chapter

5

5 Conclusion: Justice Shura Lessons for Improving and Supporting Afghanistan's Justice Systems

As demonstrated in Sections 2 and 3 of this report, the TLO Justice Shuras showed capacity to handle a large volume of all kinds of disputes. In all Justice Shura areas, district-wide dispute resolution bodies either had not existed previously, or seem to not have been as popular and effective, as exemplified by the Justice Shuras handling a significant number of long-term disputes where resolution had previously failed. And as Section Four laid out, state officials, Justice Shura members and their litigants expressed some clear preferences for how informal justice bodies should operate. In particular, shuras should not take money, they should involve only certain elders, they should write their decisions, and the government should also register (or at least stamp) those decisions in order to forestall later trouble. Litigants also preferred that dispute resolution shuras not be part of the state, while still maintaining state relations.

The experience of the Justice Shuras contains several lessons for those (whether in the Afghan government, international community, or others) seeking to develop dispute resolution forums. Moreover, these experiences, along with those drawn from other TLO programming, suggest both how to build on the Justice Shuras, and how to take their best aspects and expand them to achieve far more broad-based improvements in Afghan dispute resolution. In particular, the experiences of the Justice Shuras indicate the potential for justice sector reform led by, or at least with the active engagement of, Afghanistan's traditional elders. A combined program of helping Afghanistan's elders to organize themselves, along with linking informal dispute resolution bodies (both to one another and to the state) suggests a path to increase justice sector capacity, the quality of decision making, and government involvement in dispute resolution. Engagement with traditional elders would also promote the democratic consensus that successful reform requires. Continued support to, and engagement with, Afghanistan's traditional justice sector will thus prove necessary to the country's justice reform, and will need to continue if these reforms are to bear fruit.

5.1 Helping Elders Organize Themselves: an Association of Jirga Elders

This report has already recorded the various ways in which Justice Shura structure and operations improved upon earlier practices. These preferences and improvements closely align with what TLO found when previously working with a much larger and more diverse group of elders, strongly suggesting a capacity for, and the outlines of, systemic improvements to the informal justice system. In March of 2011, TLO conducted a workshop that brought together nearly 100 tribal elders from across Afghanistan, to explore setting up a voluntary Association of Jirga Elders to assist *jirga* and shura leaders to coordinate their activities, develop best practices, set guidelines for *jirga* and shura funding and fee structures, and, potentially, be a focal point in dealing with the state. In line with elders' responses for this report, these earlier discussions further revealed Afghanistan's elders as a group willing to reform their practices, and eager to engage with the state. In addition to interviews conducted for this paper, the present section will draw extensively on the forthcoming TLO report on the aforementioned workshop, "Empowerment of Informal Justice: Creating a Best Practice Association" (2011B).

To begin, these elders often expressed trepidation in dealing with the state, and felt that, despite being Afghanistan's primary justice providers, they were being left out of Afghanistan's law reform process. As these elders represent a group that solves the large majority of Afghanistan's legal and equitable disputes, their lack of knowledge and consultation about governmental law reform, including of the Informal Justice sector, represents, at the least, a failure of organization and democratic dialog. Formation of an Association of Jirga Elders thus constitutes a way to have this dialog with some efficiency – not with every elder in the country, but with an institution that would represent their views faithfully.

Moreover, most of the elders present then, and interviewed for this report, recognized significant flaws in customary justice as it currently exists in Afghanistan. Most were, on the one hand, conscious of the destructive practices of bribe-taking elders and other bad actors, while, on the other hand, also suspicious of the capacity and ability to act as a fair regulator of *jirga* and shura activity. Taking both of these desires into account thus resulted in an expressed enthusiasm for self-policing. Although the elders have not laid out a comprehensive code of conduct (or some similar document), they seem to agree that proper *jirga* and shura mediation requires a high standard of honesty and personal integrity, and that not all elders meet this standard. They also appear to agree that an Association would be beneficial in both coordinating standard-setting discussions, and in taking some steps to enforce these standards (the Justice Shuras have also begun to play this role, overseeing village-level bodies in some areas⁹⁹), up to and including mass-publishing customary decisions to help ensure transparency.

And, finally, the elders have not identified an occasional lack of personal virtue as their only flaw. Rather, many state vigorously that they would personally benefit from legal training, and that they would try to apply the laws of Afghanistan if they had training to do so – another avenue to integrate Afghanistan's justice systems, perhaps bringing them more into line with human rights standards. Yet training a large number of elders, enough to have some noticeable systemic impact, requires centralization and coordination. Given the limitations on state power in rural areas, made clear in this report's narrative of Justice Shura activities, voluntary organization of elders almost certainly

⁹⁹ Interview with Ahmad Aba Justice Shura Members, June 5, 2011

represents the only practical way to achieve the coordination necessary for large-scale trainings. As such, it also represents the easiest path to increased law compliance in Afghanistan.

Thus an Association of Jirga Elders, or some similar body, would build on the work of the Justice Shuras by increasing coordination both between elders and the state, and between elders not currently in contact with one another. Such an Association would also allow reformed dispute resolution institutions, such as the Justice Shuras, to expand in various ways up to the provincial level, and down to the villages. It would thus help vertical integration of the informal justice system, which, in the long term, would also prove beneficial to any further law reform efforts, whatever direction those might eventually take.

5.2 Continuing Support of the Informal Justice System: Dimensions of Development

Achieving these good results will also require long-term support to the Afghan informal justice system. As many studies have established (TLO 2009, 2011, 2011A; Smith 2009; Barfield 2006, 2009), informal justice institutions hear a majority of disputes in Afghanistan, and, for the country's rural majority, are often the only viable option for dispute resolution. This report, as well as TLO's previous work has also demonstrated that, if engaged respectfully and empowered to employ and develop the skills they already possess, *jirga* elders can and will constructively modify their practices, reach out to the state, and, last but not least, provide superior dispute resolution services to dozens, or even hundreds, of litigants (TLO 2009A, 2011A). Thus, when seeking to improve Afghanistan's justice system, litigants' access to justice, and community stability in the short term, support for the informal justice system provides an extremely viable option, which has proved its effectiveness repeatedly, including in the Justice Shuras.

Continuing the process of informal justice engagement will benefit from not only an Association like the kind discussed above, but also informal (or linked formal-informal) justice bodies themselves, working with both the Association and each other. An integrated set of provincial and district-level dispute resolution bodies on the model of the Justice Shuras (and TLO's previous Commissions on Conflict Management (TLO 2009)), across a geographically contiguous area, recommends itself to fulfill these criteria, without of course being the only possible solution. With that said, the experience of the Justice Shuras suggests three dimensions along which formal-informal justice bodies themselves should be developed:

- **Vertical integration.** A number of elders and litigants noted that the example of the Justice Shuras had positive systemic effects throughout their areas of operation. Ahmad Aba elders described their Justice Shura as supervising the village elders in the district; village elders using the Justice Shura to pass along information about developing conflicts both to the Justice Shura itself and to the state; and village elders referring "big" cases to the Justice Shura, and the Justice Shura referring "small" cases to the village.¹⁰⁰ Mohmand Dara elders, in turn, stated their belief that the Justice Shura would play this role if funding continued.¹⁰¹ And, more dramatically, some litigants even reported that village elders had ceased taking fees for their services since the Justice Shura's establishment.¹⁰² The Justice Shuras do not appear to be having these effects

¹⁰⁰ Interview with Ahmad Aba Justice Shura Members, June 5, 2011

¹⁰¹ Interview with Mohmand Dara Justice Shura Members, May 15, 2011

¹⁰² Interview with Sayed Karam Litigants, June 8, 2011

everywhere, but their spontaneously, if occasionally, assuming these duties points toward the uses of vertical integration amongst village, district, and provincial informal justice providers in policing one another and finding the best forum, and practices, for cases of all types.

- **Horizontal integration.** The Justice Shuras overall amassed an impressive record of resolving major cases, including at least a few that partially took place in districts outside the Justice Shuras' nominal jurisdiction. That being said, these cases were few, and the Justice Shuras also had occasional trouble in fairly settling cases involving powerful parties, as the case of Dr. Rislan demonstrated. Taken together, these limitations suggest the need for a provincial-level body, utilizing the services of the province's most prominent and powerful elders. Such a body would obviously be better-positioned to handle disputes that stretch across districts, and, assuming it would involve the province's most respected elders, also disputes involving powerful parties (as did TLO's previous CCM projects). Moreover, if several such bodies existed in geographically contiguous provinces, they could, especially if working with the government, efficiently handle even large regional disputes and act as an engine for broad-based discussion, engagement, and reform. Finally, establishing provincial-level bodies would also help in vertical integration of the informal justice system. Realistically, district-level bodies can only supervise their village counterparts. However, provincial bodies can exercise some supervisory functions over both district and village shuras and jirgas, helping high quality dispute resolution services to spread even further.
- **Information Sharing.** As above, elders in Justice Shuras described village elders giving them information; Justice Shura members from different areas sharing information with each other; and the great utility of elders from around the country meeting to share ideas, experiences, and challenges. Justice Shuras, CCM's and related bodies thus display great potential as a springboard for the greater sharing of information among Afghanistan's traditional elders, and between such elders and the government. Such a function directly relates to the Association of Jirga Elders discussed above, and the concepts are mutually supporting. Elders in a horizontally-integrated group of provincial dispute resolution bodies can efficiently share information, experiences, and best practices with one another as part of a larger regional forum. And if these dispute resolution bodies are vertically integrated, these ideas and information can then spread to the district, and even village, level, achieving true systemic improvements.

Given limited state capacity and the uncertainty of continuing international involvement in informal justice institutions, these functions will need to proceed on elders' own initiative, with the international community, Afghan civil society, and the Afghan government in a supporting role. These good effects will also take time to develop. Elders, litigants and others have already expressed enthusiasm for all the above ideas. However, in most areas, such positive developments had only started to occur after a year of Justice Shura operation, and the more ambitious program outlined here would almost certainly take longer. Moreover, pushing for too much change and too much institutionalization, risks eliminating many of the informal justice system's most beneficial traits: its village-level legitimacy, local accountability, and ability to make peace and settle disputes by forging consensus among competing parties.

That being said, if the state and the international community engage the informal justice system deeply and respectfully – and elders follow through on their pledges to work with the state – then both litigants and the Afghan government should see substantial benefits. Through some degree of vertical integration, horizontal integration and information sharing in the informal justice system, litigants will gain from increased access to justice, provided to a higher standard of quality, and, potentially, in increasing compliance with Afghan and international legal norms. Moreover, governance in Afghanistan will also benefit from elders well-positioned and willing to work with the state while contributing to Afghanistan’s legal and political development. In TLO’s Justice Shura projects, elders showed the ability to both improve dispute resolution and, in conjunction with the state, build governance at the local level. If all sides remain actively engaged, then these improvements can spread even further to the benefit of the state; the elders; and ordinary Afghans.

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Appendix I: Other Shuras in Target Districts

Type of Shura	Paktia		Nangharhar	
	Ahmad Aba	Sayed Karam	Mohmand Dara	Bati Kot
<p><u>District Development Shura (a/k/a District Development Assembly):</u> Central body of approximately 25 members linked to local village shuras of four people (Manager, Vice-Manager, Clerk, and Storekeeper). Advise the government on income-generation activities, assisting those (e.g. NGO's or contractors) carrying out those activities in each locality.</p>	X	X	Governors sometimes refer cases to these shuras, especially if those cases relate to development projects, or individual elders are known to the litigants.	
<p><u>District Community Council:</u> Part of Afghanistan Social Outreach Program (ASOP) of the Independent Directorate of Local Governance (IDLG) According to an IDLG representative in Gardez, this shura will have a mission to build peace and stability; “achieve development and equitable economic growth”; and improve government service delivery via democratic processes.</p>	<p>Each DCC has a Development, Stabilization and Justice/Rights Committee. Meet every fifteen days, and local Provincial Reconstruction Teams have met with them twice in the past year. Take a small number of cases referred from the district governors (usually either involving the state as a party or implicating issues that directly affect state interests), but litigants are not approaching them directly.</p> <p>Respondents expressed some reluctance to bring cases to the DCC because of their governmental nature. They did not think the DCC promoting government interests as inappropriate, but they did expect it to balance government policies against the interests of litigants, making it a less desirable dispute resolution forum.</p>			
<p><u>Provincial Shura (Gardez)</u> Chosen by PG via the Election Commission. It has reportedly demonstrated hostility toward informal shuras. Litigants and elders complain that the government manipulated the election process to choose unqualified people (but with good connections).</p>				
<p><u>Jihadi Shura</u> Hears small volume of cases brought directly by litigants. According to its Head (also a Justice Shura member), members do not see dispute resolution as a primary mission of the shura; rather promoting the values of <i>Jihad</i>, such as fidelity to Islam and loyalty to fellow fighters.</p>				X
<p><u>Ulema Shura</u> Hear about 50 cases per year, mostly Family disputes, including many divorce and other serious cases, as well as small numbers of Land and Criminal cases.</p>			X	X