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Dear Colleague,

We are pleased to provide you with the attached copy of a report by the United States Institute of Peace (USIP) partner organization The Liaison Office (TLO) on research it conducted on traditional dispute resolution practices in six districts in Nangahar and Paktia provinces. The research was conducted on behalf of a larger USIP project on traditional dispute resolution that seeks innovative and practical ways to better link Afghanistan's formal and informal justice sectors to provide better access to justice for the Afghan people.

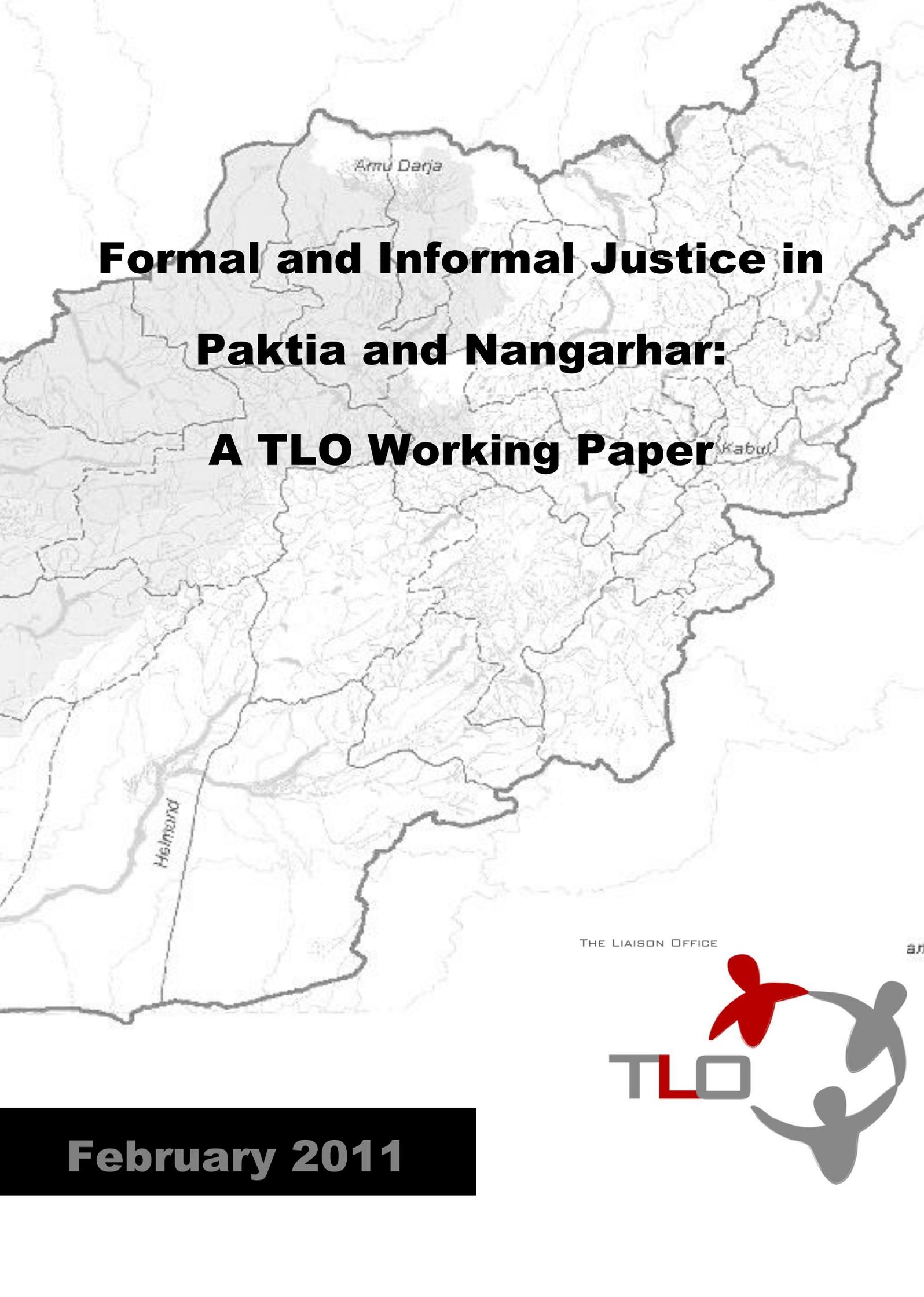
USIP began this research initiative in 2002, focusing on the important role Afghanistan's traditional leaders play in resolving disputes and maintaining stability amongst local and regional communities. Despite the constant shifting and realigning of Afghanistan's political and social landscapes, the Afghan public has continued to rely on and favor traditional mechanisms such as shuras and jirgas as the forums of first-instance for dispute resolution. To date, USIP and its Afghan partner organizations have worked in 15 Districts in 9 Provinces of Afghanistan. USIP's empirical research, conducted with national partners, aims to inform Afghan and International policy and programs so that they may be grounded in current contextual realities and can focus on providing access to justice for Afghans at every level of society.

In 2010, USIP expanded an earlier project with TLO to research and conduct pilot projects on regularizing linkages and coordination between state and non-state actors in 6 districts of Eastern Afghanistan. The following research synthesizes qualitative and quantitative research findings through the first six months of a one-year project. The views expressed represent TLO's understanding of the issues and concerns regarding the current state of informal dispute resolution bodies and practices in Nangahar and Paktia Provinces. It identifies the challenges those bodies face from competing loci of power, the impediments that exist in engaging and coordinating with formal justice mechanisms and Afghan government bodies, and the potential for increased understanding and interaction between formal and informal actors moving forward.

The report does not represent the views of the United States Institute of Peace or the Bureau of International Narcotics and Law Enforcement at the US Department of State, who has provided fiscal support for the project. We hope that you will find the research informative and helpful in guiding ongoing Rule of Law policy and programming concerns in Afghanistan.

Sincerely,

*Afghanistan Rule of Law Team  
United States Institute of Peace*



**Formal and Informal Justice in  
Paktia and Nangarhar:  
A TLO Working Paper**

THE LIAISON OFFICE



**February 2011**

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## Executive Summary

Jirgas and courts exist alongside one another in Afghanistan – hearing many similar types of cases and addressing many of the same problems – but the bodies do not have a precise or legally defined relationship. This is particularly problematic as, in many areas, jirgas and other informal bodies hear over 90% of cases. Moreover, although substantial political cooperation exists between local government and jirgas, legal cooperation is much rarer. In other words, no forum has a monopoly on any part of the justice system: customary law and state law exist in parallel, with Sharia bodies, such as government-sponsored Ulema Shuras, combining aspects of both. Each also enjoys areas of relative competence and popularity – for example, the Ulema Shura in Nangarhar hears an outsized number of Family cases – but here, likewise, absolute delineation remains elusive.

In order to examine the parallel responsibilities, areas of specialization and linkages between Afghanistan's formal and informal justice systems, the present study looks at three districts in Paktia province, and three districts in Nangarhar province. Within these districts, TLO surveyed nearly 300 villages and dispute resolution bodies, and also conducted extensive interviews, to gather both quantitative and qualitative data. Within this data, the present study further focuses, largely but not exclusively, on three types of cases: Criminal, Family and Land. Its major findings are:

- **Jirgas settle most Criminal disputes in rural districts, and a large number in urban areas. Only murder cases go to the government most of the time.** For these latter cases, interviewees also expressed some normative preference for state involvement. However, informal bodies almost always handle the most serious disputes that implicate district security, with minimal involvement by courts or police, who tend to act more in a counter-insurgent role than a law enforcement one.
- **Parties almost always tried to avoid any state involvement in Family disputes but were open to using the Ulema Shura.** More particularly, Family disputes tend to go either to jirgas made up of family members, or to the Ulema Shura, in districts where the latter body takes large numbers of cases (suggesting that this body can possess considerable legitimacy). This study also reveals a tendency to classify almost all disputes between family members as Family cases, even if they involve extreme violence or other nominally criminal acts.
- **Jirgas handle the large majority of Land cases. However, parties seem to mostly object to the current government's Land policies, not court settlement**

**as such.** Thus parties who find themselves on the right side of these policies use courts far more frequently than, for example, those without formal recognition of their holdings – who nevertheless constitute a large majority in both Paktia and Nangarhar. The occupation of land titled to the government also proved extremely common in rural areas of both provinces.

- **Within urban areas, informal justice, on balance, still predominates.** Urban parties do use governmental dispute resolution more than their rural counterparts, but even parties in Jalalabad continue to use government services strategically and take most disputes to the informal system – which itself is in some ways stronger in the city than in the countryside.
- **Linkages between informal justice providers and the district executive branch (district governors, chiefs of police, prosecutors, and the Huquq Department) are marked and increasing, but linkages between informal justice providers and courts are minimal.** The district executive seeks such cooperation as both a way to solve disputes, and as a means to improve governance and security – reflecting, perhaps, the very personal nature of district governors’ power. This pattern leaves district courts as the “odd man out”, as even other government officials express extreme skepticism about their honesty and present utility.

The present study thus concludes that, **while the international community and government of Afghanistan should encourage formal-informal justice linkages as a way to improve district-level security and governance, these will ultimately not substitute for a functioning state.** They will also not adequately address shortcomings in Afghan statutory Land law, the abuse of human rights in Family decisions, or the general suspicion that so often attends Afghan courts – which, like the jirgas, are not going away any time soon. Based on the extensive research conducted, TLO is then prepared to make the following recommendations, both for present policy and areas for further study.

TLO’s policy recommendations are:

- **The international community and Government of Afghanistan should work to support linkages between the formal and informal justice systems in a way that respects both systems equally.** Both the international community and Afghan Government should recognize that the informal system is the gravitational center of local governance in many rural areas: integration that mandates deep reform of jirgas, shuras, and tribal structures is simply not possible in places where formal authorities have substantially less power and authority than their informal counterparts. It should

nevertheless be possible to at least route more Criminal cases to the formal justice system in the medium term.

- In those districts where it is not already occurring, **district governments should endeavor to strengthen relations with tribal elders, especially regarding the joint provision of security.** Such linkages will allow the Afghan National Police to focus more on law enforcement, and less on counter-insurgency operations. Such reforms would also almost certainly increase the number of disputes brought to the government for resolution, also strengthening the court system.
- **The Government of Afghanistan should work to complete the process of setting up district Ulema Shuras** (which are hearing a large number of cases in Nangarhar, but not in Paktia). TLO's data and interviews strongly indicate that local people view these bodies as highly legitimate, and capable of handling even the most sensitive disputes, especially regarding Family problems. Although these bodies' records are far from perfect, and Westerners especially might find some Sharia practices objectionable, the consistent application of Islamic Law (as opposed to customary law such as Pashtunwali) to areas such as Family and Inheritance would prove a benefit to women's and children's rights.
- **Reformation of the current Land law is necessary to improve local governance and formal-informal linkages.** A combination of the government claiming vast land holdings, while not being able to defend them, causes large numbers of litigants to avoid government dispute resolution entirely, sets even government supporters in opposition, and will ultimately inhibit any deep integration of the state and jirga systems. Without at least some reform of statutory Land law – such as recognition of customary title, or a reduction in the amount of land claimed by the government – long-term improvements in local governance will prove unnecessarily difficult.

Finally this report also has identified several key areas that would greatly benefit from further study. These are:

- **The process and results of formalizing jirgas' interactions with district government need to be monitored and analyzed further.** As this study notes, many district governments are formalizing lists of jirgamaran. This process deserves to be monitored and analyzed as it is playing out in Afghanistan's provinces. The overlap of roles between district governors, police, and traditional elders in the

provinces – where they are cooperating, competing, or even undermining one another – would also bear further study.

- **The relationship of women to Afghanistan’s informal and formal justice needs further exploration.** Women seem to be using state justice resources in ways distinct from men and leveraging state power to improve their rights in areas such as marriage and inheritance. Although the relationship between Afghanistan’s formal and informal justice systems has received considered analysis, women’s unique role in this process has so far been under-examined.
- **The role of informal justice providers in urban areas requires further analysis.** No present study of which TLO is aware deeply analyzes the jirga system in urban areas, such as Kabul, Jalalabad, or Kandahar. This study finds substantial evidence that, contrary to a common assumption, informal justice providers still hear a substantial majority of urban cases. It also finds that, in some ways, the opportunities for centralizing authority and establishing connections in urban areas can actually lead to informal justice bodies even stronger than those in the countryside. However, this study could not analyze the whole of Jalalabad, let alone other, larger urban areas.

## 1 Introduction

Despite the highly centralized nature of the Afghan state emerging from the Constitution of 2004 (Evans et al., 2004), Afghanistan has a long history of legal pluralism (Tarzi, 2006; Wardak, 2004) and previous studies have recognized the very limited nature of governmental dispute resolution outside Kabul and a few other urban centers. Especially in rural areas, informal justice providers often hear around 90% of cases (Barfield et al., 2009), a percentage that probably has been increasing as the Afghan state has repeatedly disintegrated and re-formed since 1979. These informal dispute resolution bodies apply not Afghan statutory law or Sharia, but various forms of customary law<sup>1</sup> such as Pashtunwali, that focus more on affecting resolution between the parties than on adjudicating their rights and duties.<sup>2</sup> Although informal justice bodies vary considerably by region (International Legal Foundation, 2004), the Pashtun jirga or shura<sup>3</sup> has been the most prominent, and many

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<sup>1</sup> Barfield defines this term as “the means by which local communities resolve disputes in the absence of (or in opposition to) state or religious authority”, although most informal justice providers in Afghanistan regard customary law as consonant with Sharia (Barfield et al. 2009)

<sup>2</sup> As a result, the overwhelming imperative of the jirga system is to find a solution acceptable, as a compromise, to two disagreeing parties (See Barfield et al., 2006). In some situation, jirgas do clearly recognize one party or the other as being in the wrong: in an example discussed in Section 2, a jirga levied a fine against a defendant who had tried to break a contract. However, such a determination is the exception. In Section 3, this report examines a case in Jalalabad Nahiya 5: Here, a party had clearly forged loan documents, but the jirga awarded him a settlement in order to quiet the dispute. In many other cases, where the rights and claims of parties are difficult to establish, jirgas will most commonly “split” whatever resource is being disputed. Such solutions are rare in Western courts (which are theorized as being rights-based, as is Sharia), although much more common in Western-style arbitration, or pre-trial settlement. As in Western arbitration, compliance with jirga decisions is nominally voluntary, although parties who do not abide by jirga settlements may be shunned, or, less commonly, incur a fine.

<sup>3</sup> In theory, the term jirga refers to a traditional, ad hoc body of elders who meet to settle disputes, while shura is an Arabic word meaning “council” that can refer to any permanent discussion body, including those involved in dispute resolution. In practice, interviewees did not employ this distinction and the nature of dispute resolution

Afghans recognize it as something of a national symbol. It is also, along with government courts, the focus of this study.

TLO has previously examined formal and informal justice institutions in these areas, notably in the 2009 study *Linkages between State and Non-State Justice Systems in Eastern Afghanistan*. That study examined Ahmad Aba District in Paktia, and Jalalabad, Nangarhar's capital. It found that jirgas solve most Criminal conflicts in rural Ahmad Aba, while the government does in Jalalabad. It further found that the treatment of civil disputes was relatively similar in Ahmad Aba and Jalalabad, but that, while jirga-state linkages are already highly formalized in Jalalabad, the process was just beginning in Ahmad Aba. However, the study also noted that combining tribal and state institutions sometimes had the effect of reducing the former's accountability, as jirgas gained the power to distribute state resources.

The present study expands or modifies this previous one in several ways. To begin, it increases the former study's geographic scope, covering a combined six districts in Paktia and Nangarhar, as well as interviewing about twice the number of key informants (discussed below). This study also reaches slightly different conclusions. In particular, it finds that, while courts – meaning government judicial bodies – in rural areas probably handle most murder cases, they usually do not handle other major crimes, including those threatening to district security. Moreover, in Paktia's rural areas, the civil caseload is vanishingly small, while, in Nangarhar's urban and rural areas, it is larger, but characterized by highly selective use of the court system to settle disputes over alleged Land confiscation, and almost nothing else. The study also finds that the formalization of jirga-government linkages has, since 2009, advanced noticeably in Ahmad Aba, while also being well-established in not only Jalalabad but also Mohmand Dara District in Nangarhar. These linkages, in turn, have both greatly reduced the differentiation between formal and informal government, and seemingly made tremendous improvements in district security. However, such integration largely occurs because of the personal power of the district executive (district governors<sup>4</sup>, police, prosecutors, and the Huquq Department<sup>5</sup>), combined with a profound distrust of the courts. As such, although formal-informal linkages offer some promising signs of improved local governance, they do not necessarily offer a model on which to build the future.

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bodies in the areas studied was neither entirely ad hoc nor entirely set. Thus this paper uses the terms shura and jirga interchangeably.

<sup>4</sup> A district governor is also known as, in Pashto, a woliswal (pl. woliswali)

<sup>5</sup> This government department was begun as a means to help parties reach settlement out of court (Moshtaghi, 2006). However, most district governors seem to treat it as a body to assist in the handling of all civil disputes, routing them to courts or jirgas as appropriate.

Moreover, the present study also addresses areas that the previous study did not discuss at length. In particular, this study notes several factors that limit the volume of Criminal cases in government courts, such as a tendency to not treat as criminal violent disputes originating in Family or Land matters. The study further finds that Family cases almost never go to authorities outside the family itself, except in areas with a strong Ulema Shura, or in cases where women seek to use state resources to improve their situation. Finally, this report notes a tremendous gap between government Land policy, and provincial reality. Very few people have formal title to their land, putting it in legal jeopardy as the government claims most land to which the holders cannot establish legal title. And, outside of Jalalabad, litigation between private parties over nominally government land is frequent. These disputes take place outside the control of district government, with some government stakeholders even counseling litigants to avoid the courts. These problems with land policy will also inhibit any long-term government and tribal integration, as they pit formal and informal governance structures against each other.

In establishing these conclusions, TLO gathered data on nearly 300 villages and dispute resolution bodies in six districts: Ahmad Aba, Sayed Karam, and Mirzaka in Paktia; and Jalalabad Nahiya (Precinct) Five, Bati Kot, and Mohmand Dara in Nangarhar. These surveys focused on the number of cases the community had heard, which forum had heard the cases, and what type of cases they were. TLO staff in Kabul then assembled this information into a series of databases that form a large part of the quantitative data reported below. TLO also interviewed nearly 100 key informants, such as jirgaman (those who sit on a jirga; singular form is “jirgamar”<sup>6</sup>) district governors, vice-governors, judges, police chiefs, Huquq Departments and ulema.

These interviews took place in mid-October and late November in Paktia, and late October and early December in Nangarhar. TLO field staff then conducted further follow-up interviews as needed during December, 2010 and January, 2011. TLO sought information on how many disputes (whether jirga or court) the informants were aware of in the past year, the most serious cases among those, how they defined case seriousness, how they resolved these cases, their treatment of different types of cases, conflict patterns in their district, formal-informal justice linkages and related matters.

Last but not least, the reader should be aware of two issues pervasive both in discussions with Afghanistan’s justice providers and in this report, notably defining a “major” crime and a

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<sup>6</sup>As Deborah Smith has noted, there is a fairly stable group of, usually, older men who are called to sit on jirgas regularly. This position is usually inherited, but occasionally others can achieve it through a reputation for fairness, honesty, and understanding (Smith, 2006).

“minor” one, and a “verbal” versus a “written” case. When asked to define major or minor cases, justice providers did agree broadly on the importance of any death case, but on little else.<sup>7</sup> Regarding minor crimes, justice providers tended to agree that cases of hitting, “punishing” and insulting should not go to court<sup>8</sup>, along with cases without serious injury and where a compromise solution was possible.<sup>9</sup> It is important to realize that this results in many fewer cases being classified as major than in the West. An example given by a prominent jirgamar in Nangarhar will illustrate this point. The case began when a young boy minding the till in a shop was beaten after refusing to let a customer buy on credit, and a fight ensued.<sup>10</sup> In the West, such a case would probably result in a charge of assault or aggravated assault (it would certainly make the evening news). However, the jirgamar considered the case to be extremely minor, and solved it verbally, without issuing a written decision. He reasoned that no one had been seriously injured, the aggressor admitted his guilt immediately after the fact, and the victim’s family agreed to compensation.<sup>11</sup> Thus the case was classified, more or less, as an everyday fight in which the courts had no business.

Such verbal resolutions occur frequently: a prominent jirgamar might hear two such cases in an average day, and a normal district will typically have about thirty prominent jirgamaran – making 60 cases in a day, and roughly 22,000 in a year, for a single district. Interviewees typically referred to these as “verbal cases” or “verbal decisions”, because the parties did not receive a decision letter.<sup>12</sup> If counted along with written jirga decisions and court disputes, these verbal cases would reduce the comparative percentage of cases heard in the courts to much less than one percent. However, many of these cases – insulting is a good example – would never go to court, in any system. Thus, because this study addresses both jirgas and courts together, it does not address verbal cases unless noted. It instead addresses itself to cases that could conceivably go to either jirgas or courts – meaning the parties are exercising a choice on how to solve their problems, thus revealing, at some level, their preferences in dispute resolution forums.

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<sup>7</sup> Compare Interview with the Ahmad Aba Chief of Police, November 25, 2010 (listing murder, extortion, kidnapping, and highway robbery as “major” cases) with Interview with Mirzaka Jirgamaran, November 23, 2010 (listing death, theft, burglary, and conflict between villages as “major” cases).

<sup>8</sup> Interview with Ahmad Aba Jirgamaran, October 12, 2010; Interview with the Mohmandara Chief of Police, October 27, 2010; Interview with the Sayed Karam Officials, November 22, 2010

<sup>9</sup> See Interview with Nangarhar Union Shura Members, October 28, 2010; Interview with Nahia 5 Shura Members, December 8, 2010.

<sup>10</sup> Interview with Nangarhar Union Shura Members, October 28, 2010.

<sup>11</sup> Ibid.

<sup>12</sup> Ibid; Interview with Mirzaka Jirgamaran, October 14, 2010.

With these points in mind, this report will examine the formal and informal justice systems' handling of, primarily, Criminal, Family and Land<sup>13</sup> disputes within Paktia and Nangarhar (Commercial disputes are also discussed in the section on Jalalabad Nahiya Five). The present report will also analyze differences in urban and rural justice provision, and linkages between the state and tribal systems. The study then concludes by making, based on the foregoing, several policy recommendations, and suggestions of areas for further analysis.

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<sup>13</sup> These definitions are somewhat contested, a point discussed more in Section 2 of this report. However, unless otherwise noted, this report attempts to define them more or less as interviewees did. Most importantly, a Land case is any dispute over Land, even one involving significant violence short of murder. Similarly, a Family dispute is any dispute taking place between family members, unless it results in murder, or is taking place over land holdings. Given the previous definitions, defining a Criminal case becomes somewhat more difficult. But interviewees tended to define these as violent or aggressive acts (including robbery), taking place neither over land holdings, nor between family members.

## 2 Formal and Informal Justice in Paktia

Cases in Paktia largely conform to the observations laid out in the Executive Summary and Introduction. Provincial courts hear most murder cases and a small, but persistent, number of Land disputes. Thus the large majority of cases go to the jirgas – with the important exception of Family cases, handled almost exclusively within the family. These data in turn seem to reflect the very rural and conservative nature of the areas TLO studied. Interviewees from Nangarhar often commented on Paktia’s extreme conservatism, and Paktia interviewees themselves maintained that neither the King nor the Communists had the wherewithal to wrest control from the tribal system.<sup>14</sup> Moreover, Paktia, despite sharing a border with Pakistan, does not host a major border crossing. It also has no appreciable number of internally displaced persons (IDP’s<sup>15</sup>) (UNHCR, 2010), although it does have a large population of returnees, and some population of nomadic Kuchis (TLO, 2009). All of these factors will tend to reduce the use of state services: returnees and Kuchis usually travel with their own elders, or seek to access the traditional justice providers they used previously (Habibi et al., 2006), while IDP’s or economic migrants often do not.<sup>16</sup>

These same factors also, in the main, point to a weak state justice system. The state does successfully handle many murder cases but, despite obviously rising insecurity, processes virtually no security cases, as police are only acting in a reactive, counterterrorist role. Family

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<sup>14</sup> Interview with Sayed Karam Justice Providers, November 22, 2010.

<sup>15</sup> IDP’s are similar to refugees, but they have been displaced, and are seeking refuge, within their country of origin. Hence such people would be IDP’s in Afghanistan, but many also would have been refugees in Pakistan or Iran. See Guiding Principles on Internal Displacement at Art. 2.

<sup>16</sup> See Interview with the Nahiya Five Chief of Police, December 5, 2010.

cases, moreover, are an area that abounds in human rights problems, but from which the justice system is more or less entirely excluded. And Land cases, finally, could serve as the base rock of a functioning justice system, but, instead, government Land law and policy probably cause most people to avoid the formal justice system entirely.

## **A. Criminal Cases in Paktia**

As previously stated, formal courts are most established in major criminal cases (having heard no minor ones in the past year), with courts hearing about half of such disputes. And interviewees actually did express some normative preference for state involvement in these major Criminal matters<sup>17</sup> – although their commitment seems fairly limited in practice, as only murder cases made it to court with any regularity. Several factors, in turn, limit courts' criminal caseload in Paktia. First and most obviously, if courts are hearing about half of major Criminal disputes, then jirgas are hearing the other half. Second, as a result of deteriorating security, the police in these districts seem to focus at least as much on counter-insurgency as law enforcement, and most security incidents do not seem to result in arrests, let alone trials in court. And third and finally, many civil disputes in these districts actually involve a criminal element, but, unlike in the West, the civil aspect usually gets priority in handling, taking such cases to the jirgas. That being said, Criminal cases represent the high water mark of state authority in this area.

As to TLO's quantitative data, government officials in Sayed Karam and Ahmad Aba registered about 15 Major Criminal cases out of about 32 total for those districts, and referred most of these to the courts.<sup>18</sup> Mirzaka, by contrast, reported an unusually large number of major crimes – 36 in the past year -- but sent none of them to court in the neighboring districts. Mirzaka elders expressed a willingness to do so, but also reported that they have not actually referred a case in 6 years.<sup>19</sup> These decisions, in turn, seems to reflect some normative preference. Even some formal justice providers, such as the Police Chief and Prosecutor in Ahmad Aba, stated that they preferred to limit court involvement to cases of murder and theft<sup>20</sup>, while even some informal providers said they saw the utility of

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<sup>17</sup> Interview with Ahmad Aba Justice Providers, November 22, 2010; Interview with Mirzaka Jirgamaran, November 23, 2010.

<sup>18</sup> Interview with Ahmad Aba Officials, October 12, 2010; Interview with the Sayed Karam District Judge, October 13, 2010.

<sup>19</sup> Interview with Mirzaka Elders, November 23, 2010.

<sup>20</sup> Interview with Ahmad Aba Officials, November 25, 2010; Interview with Ahmad Aba Officials, October 12, 2010; See *also* Interview with the Sayed Karam Vice-Chief of Police, October 13, 2010 (stating that murder, theft, extortion and kidnapping needed to be punished in the courts).

government punishment in these cases.<sup>21</sup> In Sayed Karam, two of the three court convictions for the year<sup>22</sup> came in murder cases<sup>23</sup>, and Ahmad Aba justice providers reported that murder cases constituted a majority of their somewhat larger caseload.<sup>24</sup> Meanwhile, minor criminal disputes are extremely hard to count, since respondent jirgamaran indicated they made up a very large part of their massive verbal case docket.<sup>25</sup> Nevertheless, TLO's data, both quantitative and from interviews, found 9 minor criminal cases in the jirgas, and none in the courts.

That being said, the desire to use the state justice system for major crimes is commonly expressed, however limited in practice: an Ahmad Aba jirgamar, for example, even said that (state) due process before implementing harsh punishment was necessary to please God.<sup>26</sup> A case from Ahmad Aba reinforces this impression. Here, the district Chief of Police related that a mother-in-law had, along with her sons, murdered her daughter-in-law and tried to pass it off as suicide. In that case, neighbors to the family (who were also distant relations) heard about the incident and called the police themselves. The police, in turn, performed a thorough investigation and used forensic evidence to determine that the cause of death was not suicide. With this evidence in place, the district Prosecutor secured convictions against both the mother and sons for 19 years apiece.<sup>27</sup> In other words, even though this dispute technically took place within the family, even other family members felt comfortable – or at least compelled – to go to the government. Police interviewees reinforced this point themselves, saying that people called the police largely because they feared the police.<sup>28</sup>

Several factors seem to limit the presence of criminal cases in the courts, however. To begin, jirgas do often handle major crimes on their own, and seem to more frequently handle cases with significant security concerns.<sup>29</sup> For example, the Ahmad Aba shura reported one case wherein a young man had died under suspicious circumstances. The victim's family accused the defendant of not only taking the life of their son, but also of being a member of the insurgency. Thus, in theory, this case would qualify as a major criminal or security-related

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<sup>21</sup> Interview with Ahmad Aba Justice Providers, November 25, 2010;

<sup>22</sup> During the writing of this report, Sayed Karam received a new Prosecutor (previously the Prosecutor from Ahmad Aba had been covering both districts). He now seems to be pursuing more cases than his predecessor, but at this point is only investigating cases that had lain dormant in the Prosecutor's office previously. Interview with the Sayed Karam Prosecutor, November 22, 2010.

<sup>23</sup> Interview with the Sayed Karam District Judge, October 13, 2010.

<sup>24</sup> Interview with Ahmad Aba Officials, October 12, 2010.

<sup>25</sup> Interview with Mirzaka elders, October 14, 2010.

<sup>26</sup> Interview with Ahmad Aba Justice Providers, November 25, 2010.

<sup>27</sup> Interview with the Sayed Karam Chief of Police, November 25, 2010.

<sup>28</sup> Ibid; Interview with the Nahiya Five Chief of Police, November 5, 2010.

<sup>29</sup> This report uses such terms as "security cases" or "cases with significant security concerns" to refer to any dispute, typically violent, that threatens district security. Such cases include not only insurgent activity, but also, for example, disputes between tribes where violence is threatened or already occurring.

matter. However, the jirga solved the case itself by having several members of the accused's family take an oath that they were neither responsible for the victim's death, nor an insurgent. The jirga also stipulated that, for every member of the accused's family who took the oath, the accused would also have to pay the plaintiff 65,000 Pakistani Rupees (PKR), or 650.00USD – for a total fine of 450,500PKR (4,500USD) against the defendant, but without any admission of guilt (the parties also pledged not to take the case to the government – a pledge recorded in every Paktia case study TLO received). And, as above, this was far from the only case study involving serious violence that TLO received: if anything, such cases seem more difficult, and potentially destabilizing, than those handled in the courts.

Indeed, the courts reported handling no security cases at all – which does not, of course, mean security is good. Indeed, during the writing of this report, there was an assassination attempt on Sayed Karam's governor, and Ahmad Aba in particular reported a greatly increased pace of insurgent attacks<sup>30</sup> and international military action.<sup>31</sup> Rather, in line with previous studies (RAND 2010), the police in these districts seem to spend as much time on counter-insurgency as law enforcement, perhaps improving security but rarely bringing security matters to the courts. Indeed, the Sayed Karam Chief of Police (a prominent man whose jurisdiction ran more or less throughout the three districts studied<sup>32</sup>) reported seeing 8 serious security *incidents* in a single month<sup>33</sup>, while also proudly stating that he had almost no security cases because his men went out early every morning to remove mines and IED's planted overnight from the District's roads and bridges.<sup>34</sup> He focused, in other words, on addressing security as a matter of intelligence gathering and the prevention of attacks – not as a matter for traditional law enforcement. On the one hand, there would be more security cases if the police were not only removing explosives from the roads, but also apprehending those who placed them there. But, on the other, government officials professed profound skepticism of the security cases they received: the Manager of the Paktia Court of Appeals stated that, although security cases were increasing, he heard mostly cases of madrasa students being wrongly arrested and the like. He in turn attributed this to ex-Communist elements in the security forces.<sup>35</sup> If he is correct in his assessment, then security cases in the Paktia courts would seem to be mainly a function of political prejudice or imperative –

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<sup>30</sup> Ahmad Aba elders themselves seem somewhat intimidated by an increasing insurgent presence. When asked who were the main insurgent factions in their district, they replied that they couldn't remember their names – an utterly improbable response. Interview with Ahmad Aba Justice Providers, November 25, 2010.

<sup>31</sup> Communication from Paktia Elders to TLO, January 23, 2010.

<sup>32</sup> Indeed, the same security commander often attended meetings of government officials or shura members from Ahmad Aba, Sayed Karam, and Mirzaka. When he was removed from office in January of 2011, elders from these districts protested vigorously – a rare vote of confidence in the Afghan context.

<sup>33</sup> Interview with the Sayed Karam Chief of Police, October 13, 2010.

<sup>34</sup> Interview with Ahmad Aba Government Officials, October 12, 2010.

<sup>35</sup> Interview with the Paktia Court of Appeals Head, November 24, 2010.

meaning that police chiefs close to the local population would be less likely to bring security cases than those more tied to the government in Kabul.

Finally, it is worth noting briefly that just because a case involves violence does not make it a criminal case. As the next two sections will discuss, parties and jirgas will often treat as civil matters that involve both the infliction of violence, and an underlying Family or Land dispute. All of these factors together dramatically limit the number of Criminal cases that government authorities in Paktia actually hear, and so to limit the presence of the state in solving what are often the community's most pressing problems.

## **B. Family Cases in Paktia**

Even with those factors limiting the number of Criminal cases, Paktia's Family cases exhibit the biggest trend away from state – or any outside – involvement of any case type and area studied. Jirgas only heard about seven Family cases in the past 12 months, and courts<sup>36</sup> and the Ulema heard none – although, interestingly, about four Family cases originated with the Department of Women's Affairs (DWA) in Gardez.<sup>37</sup> As multiple interviewees stated, Paktia's people strongly prefer to settle all Family disputes<sup>38</sup> – with the exception of murder in the family (above)<sup>39</sup> – only with the aid of other family members. People only call the shura for very large and complex cases<sup>40</sup>, and obviously prefer to call governmental authorities not at all. This includes even the Ulema Shura<sup>41</sup>, a quasi-governmental institution which in Nangarhar nevertheless solves most Family disputes. The Head of Paktia's Department of Women's Affairs (DWA), for example, stated that she could not remember when the province's last public divorce case occurred. She also indicated that she thought this was appropriate, and that she discouraged women disputants from making their cases to the courts or other public forum.<sup>42</sup> Of course, the four cases in the Department of Women's Affairs somewhat belie this trend. However, three of its four cases involved women "running away" from the homes of their fathers or husbands, and then usually seeking out the DWA themselves.<sup>43</sup> As such, they involve women in very desperate straits, and with the threat of

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<sup>36</sup> Interview with Ahmad Aba Government Officials, October 12, 2010; Interview with the Sayed Karam District Judge, October 13, 2010.

<sup>37</sup> Interview with Head of the Women's Affairs Department, Gardez, November 24, 2010.

<sup>38</sup> This report generally treats Family disputes to mean all disputes involving family members. The key point is that, for almost all disputes involving family members, litigants eschew any outside involvement of any sort.

<sup>39</sup> Interview with Sayed Karam Elders, November 22, 2010.

<sup>40</sup> Interview with Sayed Karam Elders, November 22, 2010; Interview with Head of Paktia's Women's Affairs Department, November 24, 2010

<sup>41</sup> Interview by TLO Provincial Research Officer with Ulema Shura Members, December 29, 2010.

<sup>42</sup> Interview with Head of Paktia's Women's Affairs Department, November 24, 2010.

<sup>43</sup> Ibid.

violence hanging over them<sup>44</sup>, who are then willing to break the sanctity of the family's privacy. The DWA does not seem to object to some punishment for "runaway" women, although it does seek to prevent serious violence from being inflicted.<sup>45</sup> Informal justice respondents, in turn, stated that even cases of serious domestic violence should be solved in the family, and that outside involvement would only make the situation worse.<sup>46</sup> Thus, except for the very small number of cases in the DWA, research revealed virtually no Family disputes, although they obviously are occurring. Even the role of elders here would seem quite minimal.

By contrast, cases of extramarital sex – whether adulteries, rapes, or simple cases of voluntary, non-adulterous liaisons – present some of the most interesting, and troubling, questions over the role and use of formal and informal justice. When these cases do come before jirgas in Paktia, those bodies are often acting at the height of their power, with the ability to impose severe punishment in some situations. This power represents one of the few times that jirgas consistently act outside of their traditional role of finding reconciliation between the parties. Jirgamamran from Ahmad Aba stated that, in cases of rape, their jirgas would prescribe either the Pashtunwali penalty of death for the aggressor, or the Sharia penalty of 100 lashes, depending upon the marital status of the aggressor.<sup>47</sup> <sup>48</sup> These jirgamaran, as well as ones from Mirzaka, in turn added that, in cases of adulterous sex where both parties consented, they would prescribe the death sentence for both parties<sup>49</sup>, suggesting that the perceived violation is perhaps more to the marital union than to any individual. In some cases, the jirgamaran reported imposing death by any means available<sup>50</sup>, while in others they reported using the Sharia punishment of stoning.<sup>51</sup> Both groups also stated that, while they had not had to impose these punishments in the past year, they had imposed them in the relatively recent past.<sup>52</sup> As such, this imposition of punishment represents jirgas acting with uncommon executive authority, and perhaps as a quasi-governmental embodiment of their communities. In these cases, the authority of jirgas crowds out the authority of the state almost entirely.

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<sup>44</sup> Ibid.

<sup>45</sup> Ibid.

<sup>46</sup> Interview with Sayed Karam Justice Providers, November 22, 2010.

<sup>47</sup> Interview with Ahmad Aba Jirgamaran, October 12, 2010.

<sup>48</sup> Mirzaka jirgamaran, however, held out the possibility that, if both parties consented to sex before marriage, marrying the parties could be the solution to the problem. However, the girl's family murdering the boy was also an acceptable outcome, although not the preferred one. Interview with Mirzaka Jirgamaran, October 14, 2010.

<sup>49</sup> Interview with Ahmad Aba Jirgamaran, October 12, 2010; Interview with Mirzaka Jirgamaran, October 14, 2010.

<sup>50</sup> Interview with Mirzaka Jirgamaran, October 14, 2010.

<sup>51</sup> Interview with Ahmad Aba Jirgamaran, October 12, 2010.

<sup>52</sup> Ibid.

### C. Land Cases in Paktia

Like Criminal cases, Land cases represent an area of competing state and traditional authority, with jirgas being the preferred forum except, generally, when one or both parties possesses formal documentation of their claims, or a forgery in which they feel confidence. Paktia's Land cases also exhibit both criminal and civil traits, as violent conflict often accompanies land dispute – although such conflict apparently makes it no more likely that the case will go to the government. TLO's surveys revealed 6 Land cases solved in the formal system, and about 200 outside it (both ownership and boundary and access disputes) – although even here the Sayed Karam district judge reported solving no civil cases of any sort during his 8 months on the job.<sup>53</sup> This probably reflects two interrelated phenomena: that most people in Paktia – interviewees said 80% -- do not have formal title to their land<sup>54</sup>; and that Paktia hosts a large number of returnees from Pakistan<sup>55</sup>, but not a large number of economic or other migrants whose lineages come from outside of Paktia (with the exception of the aforementioned nomadic Kuchi population). These factors would cause litigants to prefer traditional dispute resolution for at least two reasons. First, local elders are more adept at fact-finding than government courts: they often know the litigants, their families, and the history of land use and (undocumented) ownership in the area.<sup>56</sup> Such knowledge would be crucial to settle a dispute among parties without formal land demarcations, especially if those parties had not been in the area continuously and instead had at some point left their land and become IDP's. And as most people trace their lineage to the area, they enjoy relatively good access to the traditional justice system.

And, second, going to a jirga allows parties to avoid at least two aspects of the government system: it allows them to avoid treating disputes, even those involving violence, as Criminal; and, perhaps more importantly, it allows parties to work around government Land policy, and government intervention in Land disputes. To begin, there is a substantial class of Land cases that result in violent clashes and severe injuries, and almost none of them go to the government. Of the jirga case studies TLO has received from Paktia, these comprise about 25%, yet no government body reported handling similar cases. For example, in the case of Aferdi v. Mamor Ali Jan, the latter had bought a plot of land from the former. But, after a year or so, Aferdi sought to get out of the deal. The two argued, and badly injured one another: as the Sayed Karam District Shura (which heard the case) put it, the case "became criminal."

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<sup>53</sup> Interview with Sayed Karam District Judge, October 13, 2010

<sup>54</sup> Interview with Sayed Karam Justice Providers, November 22, 2010.

<sup>55</sup> Interview with Ahmad Aba Jirgamaran, October 12, 2010; Interview with Sayed Karam Jirgamaran, October 13, 2010; Interview with Mirzaka Jirgamaran, October 14, 2010.

<sup>56</sup> Interview with Sayed Karam Jirgamaran, November 22, 2010

However, despite this statement, the shura continued to treat the dispute as one over land, and did not explicitly address the case's criminal aspect. In the end, the shura fined Aferdi 300,000 Pakistani Rupees for attempting to break the contract, and ruled that the land rightfully belonged to Mamor Ali Jan. Although such a fine from a shura is unusual, it seems to have arisen as contract damages, and not compensation for injury. Other disputes involving similar violence, but without an underlying contract, did not result in such a fine.

Going to a jirga also allows parties to avoid government intervention in their land disputes. According to the Afghan Land Management Law of 2008, the government generally claims all land to which parties cannot establish title<sup>57</sup>, while also generally disallowing the use of traditional documents to establish title.<sup>58</sup> Some formal justice providers also stated that they would not approve jirga decisions that violated Afghan statutory law, as many jirga decisions on land would.<sup>59</sup> Nominally, then, about 80% of people in Paktia are living on government land, and would not get a sympathetic hearing in the courts. Even disregarding this legal interpretation, jirga members and government officials reported multiple cases of land that the government had previously used (as opposed to merely claimed) that was now in private hands.<sup>60</sup> Thus parties bringing a case in formal court would risk the government confiscating their land, or at least tying it up in litigation. When asked if they feared the government taking its land back otherwise, jirgamaran responded with laughter and stated that the government had no way to defend its land holdings.<sup>61</sup> Concomitantly, interviewees stated three reasons that people would want to use the courts: if they in fact had formal documentation for their holdings, and so objected to splitting the land with the opposing party; if they wanted to use the threat of protracted litigation to grab a piece of land for themselves; or if they believed they could successfully bribe the judge.<sup>62</sup>

These Land cases would thus seem an area where the government is limiting its own effectiveness. Unlike in Family cases, interviewees expressed no strong, principled objection to state involvement in this area. And, as in Criminal cases, parties do clearly seek out state intervention some of the time. However, such parties – especially those with formal documentation of their holdings – are extremely rare, and most Land litigants seem intent on avoiding the state system. Without hearing most Land disputes, the state justice system will

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<sup>57</sup> Arts. 3.8 (States that the government lands include those to which the holder cannot prove legal title).

<sup>58</sup> Art. 5 (Making it very difficult to use customary deeds to establish title).

<sup>59</sup> Interview with Paktia Court of Appeals Members, November 24, 2010; Interview with the Head of the Ahmad Aba Huquq Department, November 25, 2010.

<sup>60</sup> Interview with Mirzaka Elders, November 23, 2010; Interview with the Paktia Provincial Governor, November 23, 2010.

<sup>61</sup> Interview with Sayed Karam Jirgamaran, November 22, 2010.

<sup>62</sup> Interview with Sayed Karam Elders, November 22, 2010; Interview with Ahmad Aba Elders, October 12, 2010.

probably never obtain true legitimacy. Yet trying to force cases into court under the current legal framework would almost certainly prove either completely ineffective or disastrous. Until the incredible gap between government Land law and policy, and the actual situation on the ground, closes, courts in Paktia will encounter great difficulty in further establishing themselves, or making themselves the forum of choice for any large number of litigants.

### **3 Formal and Informal Justice in Nangarhar**

As observed before, Nangarhar is a more urban province than Paktia, is more tied to both the Kabul government and the cross-border trade with Pakistan, and has a much larger migrant population. It thus presents somewhat more complex conflict dynamics than does Paktia. In all areas, courts and formal government in Nangarhar hear more cases than their Paktia counterparts, although respondents in both places applied the same broad definition of a Land or Family case, and narrow definition of criminality (discussed in Section 2 of this report). That being said, the areas studied evince a notable urban-rural split. In Jalalabad's Nahiya Five, courts hear about one third of almost all types of disputes, with Criminal cases going to courts somewhat more frequently, and Family cases somewhat less frequently. By contrast, Mohmand Dara and Bati Kot courts, like those in Paktia, hear mostly major Criminal cases, and a few Land disputes, but almost certainly less than ten percent of disputes in total. Taken together, the data from these districts suggests that there is an upper limit on how much parties will use state services in their present form: while urban parties do utilize state criminal justice more than rural ones, more or less across the board, city-dwellers' actions do not show the same enthusiasm for state settlement of Land and Family disputes. Without thoroughgoing change, state justice would thus probably find it difficult to expand aggressively into these areas.

#### **A. Urban Justice: Jalalabad Nahiya Five**

Justice in Nahiya Five differs in surprisingly few significant ways from justice in rural areas, yet this study does reveal many small differences, and subtle ways in which parties seek to use the state court system. Most importantly, courts and jirgas in Nahiya Five split responsibility for cases of all types. For Criminal cases, this split manifests itself as a greater variety of crimes, including minor disputes, heard in the courts (although the area lacks significant security cases, or, by and large, incidents<sup>63</sup>). For Family cases, this means a somewhat greater use of government dispute resolution in cases of domestic violence, or among recent migrants. And Land cases evince a pattern of one sort of litigant – those claiming property confiscation – taking a large number of disputes to court, but all others overwhelmingly preferring the jirgas. These urban litigants thus still prefer traditional dispute resolution as a matter of course, while, especially in civil cases, using the government system strategically, in order to get a certain result. Moreover, one should not read a stronger state system as requiring a weaker informal system: Jalalabad's Union Shura is perhaps the strongest justice body, of any type, surveyed here.

#### **a. Criminal Cases in Nahiya Five**

To begin with the just-discussed case data, the split of Criminal cases between the Jalalabad City Court and Nahiya Shura seem broadly similar to elsewhere for major crimes. But, unlike in other places, the City Court, the police, and the shuras split minor criminal cases somewhat evenly, suggesting that the City Court is hearing a significant number of cases heard by jirgas in rural areas. In the past year, the City Court has heard something like 40 cases from Nahiya Five.<sup>64</sup> The most common crimes were robbery (roughly 17 cases from the Nahiya), beating or fighting (roughly nine cases from the Nahiya) and drinking alcohol (roughly seven cases from the Nahiya).<sup>65</sup> In line with the previous data, the Nahiya should also have recorded three murders, but, according to the Nahiya Chief of Police, the area had

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<sup>63</sup> Interview with the Nahia 5 Chief of Police, October 25, 2010; Interview with the Nahia 5 Chief of Police, December 5, 2010.

<sup>64</sup> A note on the below quantitative data is in order. Nahiya Five does not itself have an independent court system. If litigants want to go to court, they may make use of the City Court, which covers all of Jalalabad, or the Family or Commercial Courts (among other specialized forums beyond the scope of this paper), which in theory cover all of Nangarhar, but in fact take almost all of their cases from Jalalabad as well. Researchers thus could not obtain precise information regarding which decisions in these bodies came from Nahiya Five, and which came from elsewhere: translating the requisite number of case files would have proven impractical and, in any event, judges sometimes stated that they did not themselves know. As a result this report employs the following method: Recent research has found that Jalalabad has a population of about 210,000 people in total (TLO, unpublished, 2010) and that, in turn, Nahiya Five has a population of about 70,000 (Interview with the Nahiya Five Chief of Police, October 25, 2010). Unless otherwise noted, then, when dealing with citywide case totals, this report will divide them by 3, in order to arrive at a rough figure for Nahiya Five.

<sup>65</sup> Interview by a TLO Research Officer with a City Court Judge, Received January 3, 2011.

none.<sup>66</sup> That being said, TLO's quantitative data revealed that shuras in the area heard about 40 criminal cases, six major, and 34 minor, and an additional 17 cases that mixed criminal and civil elements. The District Shura also reported hearing a number of criminal cases<sup>67</sup>, as did the Union (or Commercial) Shura discussed below.<sup>68</sup> Given these data, courts in the Nahiya almost certainly hear a minority of Criminal disputes, although they do hear a much greater variety of disputes than courts elsewhere. Indeed, no other court hears a similarly large volume of robbery, alcohol, or fighting cases, and the rural courts surveyed heard virtually none. Overall, residents of Nahiya Five proved more willing than almost all others to use state dispute resolution services, even though, as will be shown, this willingness itself has definite limits.

This use of the court does not, moreover, leave the jirgas idle. These are still probably hearing a greater number of more minor Criminal cases than the courts, and a nearly equal number of major ones. As to the former, an example would be the case of a young man harassing female high school students; jirgamaran spoke to the young man's parents, and the school's Principal, and extracted pledges to cease the offensive behavior, in return for school officials not going to the police. With these kinds of cases, the role of jirgas here appears very similar to that in more rural areas, i.e. affecting reconciliation and keeping community peace. Moreover, Nahiya Five jirgas also play a prominent role in settling even violent disputes, despite the easy availability of government forums. Members of the Nahiya Shura, for example, stated that they had settled one case of a knife fight between two youths that had left one of the parties so badly injured that he required treatment in Peshawar.<sup>69</sup>

Thus court access does not radically change party preferences. It does, however, lead parties to use state resources strategically. The Nahiya Five Shura stated that parties very often went to the police when a conflict had just occurred, and they were angry. Later, however, the parties would approach the police themselves, or ask the shura to do so, in order to settle the case informally. Sometimes police acquiesced to the parties' request; other times, they did not.<sup>70</sup> One such case is that of Amirzada v. Shapatang shows most of these dynamics. After an argument, Amirzada attacked Shapatang's nephew, cracking open his skull with a rock. Shapatang then both went to the police (according to the case study, as an alternative to taking revenge), seeing to Amirzada's arrest, and asked for a jirga to be convened. The jirga subsequently ruled that Amirzada should compensate Shapatang's

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<sup>66</sup> Interview with the Nahiya Five Chief of Police, December 5, 2010.

<sup>67</sup> Interview with Nahiya Five Shura Members, December 8, 2010.

<sup>68</sup> Interview with Nangarhar Union Shura Members, October 28, 2010.

<sup>69</sup> Interview with Nahiya Five Shura Members, December 8, 2010.

<sup>70</sup> Interview with Nahiya Five Shura Members, December 8, 2010.

family with two bags of rice and a sheep, and that either party would incur a fine of 200,000 Afghani if he transgressed the jirga's decision. Amirzada's family paid this compensation and, in return, Shapatang's family, including his nephew, announced their forgiveness, to both Amirzada's family and to government authorities. This did not, however, stop the criminal case against Amirzada from going forward. At the time of writing, he remained in jail, and the Prosecutor had not relinquished the case. Such cases seem to indicate that, while parties will use some state justice services willingly, they do not necessarily want to follow the complete state judicial process.

The next question thus becomes why, given this pattern, courts in Nahiya Five still resolve such a wider variety of cases than do courts in rural areas. The presence of migrants (economic or otherwise) goes some way toward explaining the increased volume of court cases, as both police and jirgamaran stated parties without connections to local elders were more likely to use government dispute resolution.<sup>71</sup> However, it would seem that closer relations to government authority, even among very established people, also play a role. To take one example, in the case of Adam Khan v. Salam Khan, the parties shared space in a market, and Adam Khan accused Salam Khan's sons of burglarizing his office there. After some procedural maneuvering, the latter failed to appear to answer the charges and were sentenced to 3 years in jail and ordered to return the stolen property.<sup>72</sup> Thus here we see relatively prosperous people, owners of commercial property, who approach the police directly to solve a nonviolent criminal dispute. This case would seem to be a relatively clear example of preferring government dispute resolution for its own sake.

Moreover, the cooperation of the population with the police strengthens this impression: the police seem to be acting not as a counter-insurgency force (see Section 2), but rather as one focused on law enforcement. The Nahiya Five Police Chief thus reported having a network of informants (or "special people") who would report many cases to him, and inform on absconding parties.<sup>73</sup> In one such case, these "special people" reported on the robbery of a shop, including the identities of the perpetrators. However, the police ceased pursuing the case, on the request of the victims, when it turned out that the suspects were agents from the National Directorate of Security.<sup>74</sup> Putting aside the fascinating detail of NDS agents engaged in criminal activity, such reporting would seem to testify to a relatively well-regarded police

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<sup>71</sup> Interview with the Nahiya Five Chief of Police, October 25, 2010; Interview with Nahiya Five Shura Members, October 28, 2010.

<sup>72</sup> Interview by a TLO Research Officer with the Jalalabad City Court, Received January 21, 2010.

<sup>73</sup> Indeed, capturing parties as they tried to flee via Jalalabad's bus station constituted a running theme with the Nahiya Five Police Chief. Interview of December 5, 2010.

<sup>74</sup> Interview with the Nahiya Five Chief of Police, December 5, 2010.

presence in the Nahiya. The role of the Nahiya police in deciding even sensitive Family cases, discussed in the next section, only underlines this phenomenon.

### **b. Family Cases in Nahiya Five**

Nahiya Five stands as the only area surveyed with a significant number of Family disputes handled by state authorities. Yet this break with rural patterns, although dramatic, is very partial: disadvantaged parties, such as women or migrants, make use of state resources in Family cases to an unusual degree, but the average run of Family litigant avoids government intervention, much as in the other areas studied. To wit, Nangarhar's Family Court reported hearing 40 cases during the past year. The court hears cases from all parts of Nangarhar, but most come from Jalalabad, not rural districts<sup>75</sup> (Bati Kot and Mohmand Dara districts reported a total of one case going to the Family Court<sup>76</sup>), leading to a rough estimate of ten Family Court cases from Nahiya Five.

By contrast, the Nahiya Five District Shura reported hearing around 100 cases in total last year, and stated that most of them were Family disputes.<sup>77</sup> Additionally, TLO's quantitative data revealed a further 25 Family cases from Guza (small neighborhood, or block) shuras, or tribal shuras sitting in the Nahiya. Moreover, jirgamaran from these bodies stated that most people preferred to settle serious Family disputes outside of the shuras<sup>78</sup>, a class of cases that proved impossible to count. Thus these informal bodies probably heard at least 75 Family cases in the past year, not counting verbal disputes. Taken together, these data indicate that even in urban Jalalabad government forums hear at best around 10% of Family cases (Jirgamaran, for their part, speculated that government bodies only heard about 20% of domestic violence cases, the class of Family dispute more likely than any other to go to the government, as discussed below<sup>79</sup>).

Thus, despite the presence of increased state resources, jirgas do still tend to predominate in the settlement of Family disputes in this urban area. These jirga cases do encompass some significant disputes, but do not, however, include cases of divorce or marital infidelity. For example, shura members reported one dispute between father and son. The son, a musician, had grown his hair long, and refused to cut it. His father objected vigorously, and their disagreement escalated to the point that they brought the case to the shura. The shura then

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<sup>75</sup> Interview by a TLO Research Officer with a Family Court Judge, Received December 14, 2010.

<sup>76</sup> Interview with the Mohmand Dara District Judge, December 7, 2010.

<sup>77</sup> Interview with Nahiya Five Shura Members, December 8, 2010.

<sup>78</sup> Ibid.

<sup>79</sup> Interview with Nahiya Five Shura Members, December 8, 2010.

gave the son a choice: he could either cut his hair, or leave the area, a serious penalty in a tribal culture. The son agreed to cut his hair, and so the case ended.<sup>80</sup>

As to the most serious Family disputes, these proved something of a puzzle. As mentioned above, respondent jirgamaran reported hearing no cases of divorce, or allegations of extramarital sex, in the past year.<sup>81</sup> Instead, when questioned, shura members opined that the most serious Family cases, such as divorce or sexual assault (a Family case in this, and other shuras' definitions<sup>82</sup>), should go to the Ulema, as Sharia governed their disposition<sup>83</sup>, while also adding that many people preferred to settle such cases among their immediate family members.<sup>84</sup> Assuming that any forum is granting divorces or hearing cases of infidelity, it would seem to be the latter. That is, while Ulema did report a few more serious cases, such as two of "divorce prevention", it did not report any cases of granting divorce, or addressing infidelity.<sup>85</sup> In turn, this pattern of cases (or their lack), strongly hints at a turn toward customary law. However, the details of such matters proved impossible to substantiate, as even jirgamaran proved extraordinarily uncomfortable providing any more information on these cases.<sup>86</sup>

That being said, one should not overlook unique uses of government resources in Family cases, especially for disadvantaged groups. In particular, at least some parties – primarily women – are bringing serious domestic disputes to government courts, and a large number of people – primarily migrants – are bringing small Family disputes to the police. In both cases, these groups' lack of power and resources would seem to change their relationship to government.

Regarding the Family Court, about thirty of its forty cases center on allegations of domestic violence, and the rest involve what is considered very serious misconduct, usually, it seems, on the part of the husband. In one reported example, a woman sought a divorce because her husband had not had sex with her after a year of marriage: the court granted the divorce. In

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<sup>80</sup> Ibid. Depending on how construed, the shura's ultimatum could be taken as serious indeed. Tribal societies sometimes consider exile a more serious form of punishment than death, because the former is a kind of "living death" or "social death", in that moving away from family and tribe robs a person of support and even individual identity. In an urban area like Jalalabad, with lots of migrants, one should probably take the threat as less serious. Nevertheless, the shura clearly was not playing around, and obviously intended its ultimatum to carry some considerable weight.

<sup>81</sup> Interview with Nahiya Five Shura Members, December 8, 2010.

<sup>82</sup> Interview with Nahiya Five Shura Members, December 8, 2010; Interview with Ahmad Aba Shura Members, October 12, 2010.

<sup>83</sup> Interview with Nahiya Five Shura Members, December 8, 2010. Also note that this is one of the few times when shura members clearly separated the law they are applying from Sharia. Many other shuras insist they are applying Sharia, even if their knowledge of formal Sharia is minimal.

<sup>84</sup> Interview with Nahiya Five Shura Members, December 8, 2010.

<sup>85</sup> Interview by a TLO Research Officer with the Nahiya Five Ulema Shura, Received January 21, 2011.

<sup>86</sup> Interview with Nahiya Five Shura Members, December 8, 2010.

another, a woman sought to stop her husband from watching pornography (a criminal offense): the Family Court handed that case over to the City Court for prosecution.<sup>87</sup> These cases would seem to represent women leveraging the power of the state to improve dire and worsening family situations – very similar, but even more pronounced, to how women seemed to use the Department of Women’s Affairs in Paktia. To give the most striking example, no justice provider in Nahiya Five other than the Family Court reported granting a divorce on the wife’s initiative.

But this is not the only unique role the Nahiya government is playing. It appears that Nahiya Five’s police hear an actually quite large verbal caseload of Family disputes. Of course, these cases raise a question of what counts as a “government” case and what counts as an “informal” one: if people bring a problem to the police, who then mediate a solution, one can say that they are no longer acting as police per se, but as powerful people mediating a problem – they are acting as jirgamaran. Yet it seems that, in most cases, litigants would not be approaching the police if they did not hold formal power and government positions. Thus although such settlements might be less lasting than court cases (for example, if a new Chief reverses the decisions of the previous one), they probably represent people trying to access the power and prestige of the state, and so are treated as state cases for purposes of this study.

With that point in mind, the Chief of the Nahiya reported hearing a total of 20 civil complaints in one month, most of them Family complaints (of those he referred three to shuras, all of them were over Property disputes, discussed below). Most of these Family cases, in turn, seem to have been relatively minor disputes, solved verbally, and mostly involving people not originally from Jalalabad.<sup>88</sup> For instance (in a case the Chief described as typical), a son had punched his mother, who then called the police. The police arrested the boy, and his father came to the station. There, the father explained the family’s dire poverty and lack of resources. Hearing this sad story, the police simply admonished the boy, and sent him home with his father. In this instance, the police seem to have acted in a way very much like tribal elders, with an eye toward neither counter-insurgency, nor traditional law enforcement, but community reconciliation – a fairly remarkable change of roles, but one that would seem limited, however, to people without many other options.

### **c. Land Cases in Nahiya Five**

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<sup>87</sup> Interview by TLO Research Officer with the Family Court Judge, December 14, 2010.

<sup>88</sup> Interview with the Nahiya Five Chief of Police, December 5, 2010.

Unlike in rural areas, courts and shuras in Nahiya Five seem to have split land cases between them. The City Court heard something like 25 Land cases from the Nahiya during the year (out of a total of about 75 Land cases for the entire of Jalalabad)<sup>89</sup>; the Nahiya Shura heard at least that number (members reported that Land cases constituted a large part of their total caseload of about 100); and smaller shuras reported hearing about 15, although this could very well be an undercount, due to the prominence of neighborhood shuras in settling boundary and access disputes. The Nahiya Five police also heard several Land conflicts, although they did not provide a precise number.<sup>90</sup> There was, however, a significant difference in the sort of land cases each body heard, and, perhaps as importantly, all forums but the police (who settle only minor disputes) reported much more extensive use of documentation than their rural equivalents.

Confiscation<sup>91</sup> cases, in particular, proved an area of state court prominence, although all forums heard cases of this type. In particular, these constituted something like 24 of the City Court's 25 Land cases from Nahiya Five<sup>92</sup>; a large part of the Nahiya Shura's caseload<sup>93</sup>; and a part of the caseload of the Police and smaller shuras. For all of these forums, formal documentation seems to have played an unusually prominent role. Additionally, parties preferred state resolution to an unusual degree, almost certainly because many of these confiscation cases involve plaintiffs who are essentially trying to evict defendants, including defendants who acquired the land under the Communist or Mujahidin governments.<sup>94</sup> As such, according to the Court of Civil Appeals, these plaintiffs have no interest in compromising or splitting their land, almost certainly the solution the shura would arrive at.<sup>95</sup> Moreover, government forums seem to place greater weight on official documentation than do jirgas. Specifically, judges at the Court of Civil Appeals stated that they take documentation to be the strongest form of evidence that a party can offer, meaning, essentially, documentation from the current government or the time of the King.<sup>96</sup> Taken together, then, courts would seem to be a highly desirable forum for parties with non-Communist documentation, seeking to regain property they had previously left.

Jirgas also use documentation in these cases to an unusual degree, although they do not accord it the same weight as do courts. Indeed, the Nahiya Five shura reported that parties

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<sup>89</sup> Interview by a TLO Research Officer with a City Court Judge, Received January 3, 2011.

<sup>90</sup> Interview with the Nahiya Five Chief of Police, December 5, 2010.

<sup>91</sup> TLO's translator chose this term to indicate cases of alleged illegal occupation of land, frequently occurring during Communist or Mujahidin times.

<sup>92</sup> Interview by a TLO Research Officer with a City Court Judge, Received January 3, 2011.

<sup>93</sup> Interview with Nahiya Five Shura Members, December 8, 2010.

<sup>94</sup> Interview by a TLO Research Officer with Court of Civil Appeals Judges, Received January 23, 2010.

<sup>95</sup> Ibid.

<sup>96</sup> Ibid.

had forged most of the documents presented to them, and, even when valid documentation was presented, shuras did not treat it as dispositive (although the Nahiya Five shura seems to evaluate documentation more commonly<sup>97</sup> than do shuras elsewhere<sup>98</sup> -- another fairly unique way in which an urban setting seems to change shura practice). Intentionally or not, the shura's use of documentation probably encourages forgeries, or at least creates substantial incentives for parties with fake documentation to use this forum. For example, in one dispute between two brothers over a house (Mistari Akhtargul v. Mawlawee Sahib Omargul), one brother had produced valid documentation of ownership, while the other had not. Nevertheless, the jirga ruled that while the brother validly possessing the house could keep it, he still had to pay the other 500,000PKR (5,000USD) to settle the dispute. In this case, then, the jirga clearly used documentation as evidence, but did not treat documented ownership as dispositive. It also provided a major incentive to file frivolous claims, and probably an incentive to forge documents: the evaluation of documents prolongs a conflict, and shuras will almost certainly issue a payout if a conflict has become sufficiently long and bitter, regardless of the underlying merits.

Other types of Land cases, involving boundaries, access, and related issues do not necessarily present the same dangers, nor do parties seem to use documentation to the same extent. They also come to court far less often, and are usually heard in shuras, or by the police themselves. Indeed, the City Court reported hearing no such cases in the past year<sup>99</sup>, and judges on the Court of Civil Appeals went so far as to opine that jirgas could hear these cases more efficiently than courts, as boundary cases benefit from the local knowledge jirgamaran can provide.<sup>100</sup> Thus both jirgamaran and police interviewees said they heard a large number of boundary disputes, but without providing specifics.<sup>101</sup> The Nahiya Five Chief of Police also indicated that he sent many of these cases to the shura, and gave an example. The case involved two neighbors, one of whom wanted to expand a wall between their houses. The other neighbor objected that doing so would intrude onto his property. After a period of heated argument, the parties brought the case to the police, who then eventually referred them to the shura.<sup>102</sup> We do, however, once again see overlapping authority between police and elders, with courts playing a notably smaller role.

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<sup>97</sup> Interview with Nahiya Five Shura Members, December 8, 2010.

<sup>98</sup> See, e.g., Interview with a Mohmand Dara Shura Member, October 27, 2010 (stating that, in hearing nearly 1000 Land conflicts, he could not remember reviewing documentation).

<sup>99</sup> Interview by a TLO Research Officer with a City Court Judge, Received January 3, 2011.

<sup>100</sup> Interview by a TLO Research Officer with a Civil Appeals Court Judge, Received January 23, 2010.

<sup>101</sup> Interview with the Nahiya Five Chief of Police, December 5, 2010; Interview with Nahiya Five Shura Members, December 8, 2010.

<sup>102</sup> Interview with the Nahiya Five Chief of Police, December 5, 2010.

#### **d. Commercial Cases in Nahiya Five**

Regarding commercial cases, then: these exhibit virtually the same pattern as other cases in the Nahiya, despite sometimes being claimed as an area of state expertise. That is, most commercial cases went to informal authorities, absent certain conditions making them suitable for court. But both the relevant court and shura are specialized, with a province-wide Commercial Court and Union Shura<sup>103</sup> capturing more or less all commercial disputes, but with the former capturing far more than the latter: The Commercial Court has heard 24 cases on the year, and the Union Shura about 180 as of late October, 2010. In turn, the largest cases in the Commercial Court centered around government contracts, not large private transactions. Such cases included one dispute involving nearly 200 million Afghanis: the local government had leased some property to a company for four years, but the national Finance Ministry objected, and unilaterally reduced the contract to one year. The Commercial Court upheld the government's actions, and indeed noted that it sees its mission in such cases as the protection of government interests.<sup>104</sup> Such a mission will obviously deter private litigants from using the forum.

By contrast, the Union Shura reported that its largest cases tended to involve cross-border transactions, whether between Afghanistan and Pakistan, or across Afghan provinces (the Commercial Court did not report any such cases, although a comprehensive survey of all its decisions was not possible<sup>105</sup>). In one case, traders had contracted to send varieties of vegetables between Jalalabad and Peshawar. However, poor logistics resulted in significant loss of inventory, and the Afghans involved also accused their Pakistani partners of diverting supply. The Union Shura, in turn, assessed 300,000PKR (3,000USD) for compensatory damages relating to logistics troubles, and additional punitive damages of 200,000PKR (2,000USD) against the Pakistanis for supply diversion.<sup>106</sup> Such fines – the Union Shura reported imposing several<sup>107</sup> -- mark this body as one of the few informal institutions with the power to enact substantial punishment. Indeed, the Union Shura's handling of complex transactions, its ability to impose punitive sanctions, and its large volume of cases mark it out as perhaps the most powerful justice institution in this study. Moreover, this power tantalizingly suggests that urban areas such as Nahiya Five do not prove inhospitable to informal justice institutions. On the contrary urban people are nearly as likely to use informal

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<sup>103</sup> Formed as a collection of unions during Soviet times, this unusual institution persists today, and boasts about 190 members, who represent all of the trades present in Jalalabad. Interviewees further stated that the shura, or groups of its elders, hear up to 50 conflicts daily, although most of these are verbal. Interview with Nangarhar Union Shura Members, October 28, 2010.

<sup>104</sup> Interview by TLO Research Officer with a Commercial Court Judge, Received January 21, 2010.

<sup>105</sup> Interview with Nangarhar Union Shura Members, October 28, 2010.

<sup>106</sup> Ibid.

<sup>107</sup> Ibid.

institutions as their rural counterparts, and the money and opportunities for coordination available in urban areas can actually result in informal justice institutions even stronger than those in rural areas.

## **B. Justice in Mohmand Dara and Bati Kot**

With that said, the state justice system plays a much smaller role in rural Nangarhar than it does in Jalalabad. Indeed, both tribal elders and the Ulema Shura often exercise authority at least equal to that of the state, and solve at least eight times the number of disputes: shuras and jirgas solved about 550 in these districts, and government courts about 70. On the Criminal docket, the division of responsibilities between formal and informal authorities manifests itself as a high proportion of murder cases in court, but little else consistently. Even security cases vary between these neighboring districts, with the woliswal (if not the courts) heavily involved in their resolution in Mohmand Dara, but not in Bati Kot, which is facing widespread insurgency. Family cases, however, show consistency: the state plays only a very small role, while the Ulema Shura dominates their resolution in both districts, and addresses even sensitive, trans-tribal domestic issues not seen elsewhere in this study. Finally, Land cases make up a plurality of jirga decisions, and an absolute majority of civil decisions in the courts. However, the former hears vastly more such cases than the latter, with courts only playing a notable role in disputes over alleged confiscation – especially those that allege the seizing of land during Communist times. Outside those cases, however, the occupation of government land seems widespread and even parties with government connections often seek to avoid state dispute resolution. Given that tribal bodies remain essential to providing security, their resistance to government Land law probably puts a limit on how much the state can expand into the countryside, even in the absence of insurgency.

### **a. Criminal Cases in Mohmand Dara and Bati Kot**

These districts evinced a split between court and government settlement of both minor and major crimes. As of December, 2010, jirgamaran in Bati Kot and Mohmand Dara had reported solving 55 minor criminal disputes, while courts solved about 18, made up largely of traffic cases in Mohmand Dara, or fighting cases in Bati Kot. Similarly, courts reported resolving around 13 major crimes in the past year, almost all murders, while tribal jirgas and the Ulema Shura resolved about 12 major criminal cases, which seem to have been a

mixture of murder cases and violent land and tribal conflicts.<sup>108</sup> The latter security cases, however, presented a somewhat different dynamic, with Mohmand Dara executive authorities notably more involved than authorities in Bati Kot. This variation plausibly relates to the differing security situation in the districts, and the relative closeness of formal and authorities in these areas. In neither district, however, does the government – and especially the courts – seem capable of addressing serious security problems on its own.

As in Paktia, courts in both districts reported “simple” murders as virtually the only major crimes that they had heard, even as courts seem to split these cases with the jirgas (Bati Kot jirgamaran, for example, stated that they believed that jirgas handled most murders<sup>109</sup>). The Bati Kot Vice-Governor reported handling four murders in November, 2010, such as one in which a mentally ill doctor had killed his wife, and another in which nephews had killed their uncle to avenge his previous affair with their mother.<sup>110</sup> And the Mohmand Dara District Judge at one point described the two murder cases he had handled for same time period: one involved a nephew murdering his uncle to avoid paying a debt; the other involved a girl’s brother murdering her supposed lover.<sup>111</sup> By contrast, the courts in Bati Kot reported handling only two robberies for the year – a crime that should be far more common than murder – and the courts in Mohmand Dara none at all.<sup>112</sup>

Moreover, as above, shuras in both places also reported hearing cases where death or, especially, serious injury had occurred. In one case from Mohmand Dara (similar to several others), that of Takmeer Khan v. Zarwali Shah, the former was operating a threshing machine close to the latter’s house, causing a nuisance. The two fought and were both badly injured. The case went straight to the shura without government involvement, and the shura affected reconciliation between the parties. Similarly, both an Ulema Shura member in Mohmand Dara<sup>113</sup> and jirgamaran from Bati Kot stated that they had handled death cases in the past year.<sup>114</sup> However, it seems indisputable that a relatively high percentage of murder cases are actually settled in the Bati Kot and Mohmand Dara courts. Indeed, state forums have not established themselves as thoroughly for any other type of case.

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<sup>108</sup> Interview with the Bati Kot District Judge, October 26, 2010; Interview with the Bati Kot Prosecutor, October 26, 2010; Interview with Bati Kot Jirgamaran, October 26, 2010; Interview with a Mohmand Dara Jirgamar, October 27, 2010; Interviews with the Mohmand Dara District Judge, October 27 and December 7, 2010; Interview with a Bati Kot Ulema Shura Member, December 6, 2010; Interview with a Mohmand Dara Ulema Shura Member, December 7, 2010.

<sup>109</sup> Interview with Bati Kot Jirgamaran, October 26, 2010.

<sup>110</sup> Interview with the Bati Kot Vice-Governor, December 6, 2010.

<sup>111</sup> Interview with the Mohmand Dara District Judge, October 27, 2010.

<sup>112</sup> Interview with the Bati Kot District Judge, October 26, 2010; Interview with the Mohmand Dara District Judge, October 27, 2010; Interview with the Mohmand Dara Prosecutor, October 27, 2010.

<sup>113</sup> Interview with Mohmand Dara Ulema Shura Member, December 7, 2010.

<sup>114</sup> Interview with Bati Kot Jirgamaran, October 26, 2010.

That includes cases that might threaten district security. More specifically, respondent jirgamaran, Ulema Shura members and government officials in Bati Kot stated that the district's largest conflicts, involving multiple deaths, tribal conflict, or serious security implications, always go to the jirgas<sup>115</sup> (police are, at best, acting in a more counter-insurgency role, addressing security incidents, but not bringing security cases to the courts<sup>116</sup>). This pattern, in turn, accords with the statement of the district Chief of Police that "95%" of people in the district support Gulbuddin Hekmatyar and refuse to cooperate with the government, limiting formal authorities' ability to handle significant cases.<sup>117</sup> Bati Kot jirgamaran related one such case. There, the Alisherkhail and Sepayee tribes had been arguing for several years over almost 1,000 jeribs of land claimed by the government. After several Sepayee were killed, the government stepped into the conflict. It could not, however, exert enough control to end the fighting or bring a resolution, so a jirga, not involving government officials, had once again taken control of the dispute. At the time of writing, the jirga was still working on the case, but the jirgamaran remained optimistic that they could solve it soon.<sup>118</sup> It would seem, however, that resolution was taking place in spite of, not because of, government intervention. The government's involvement in these cases adds weight to the keen observation of the Bati Kot Chief of Police, who stated that, by his lights, jirgas best handled two types of conflicts: the smallest and the largest.<sup>119</sup>

Mohmand Dara evinced a somewhat different pattern, although the difference is only a matter of degree. There, both government officials<sup>120</sup> and a well-known jirgamar<sup>121</sup> stated that the government heard most cases of serious violence, but they seem to have meant district executive authorities, and not courts. Such responses match well with the district's reportedly good security (also confirmed by people from outside the district<sup>122</sup>), and close cooperation between tribal and government authorities.<sup>123</sup> For example, the aforementioned prominent Mohmand Dara jirgamar stated that his shura, along with the office of the District Governor and quasi-governmental bodies such as the District Development Shura, were jointly handling several major cases of violence stemming from land disputes. In one such case, the Awodad and Mulukhan Khan families had been fighting since the time of Prime Minister

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<sup>115</sup> Interview with the Bati Kot Vice-Governor, October 26, 2010; Interview with Bati Kot Shura Members, October 26, 2010; Interview with a Bati Kot Ulema Shura Member, December 6, 2010.

<sup>116</sup> Interview with the Bati Kot Chief of Police, October 26, 2010. This Chief of Police also echoed his compatriot in Sayed Karam, Patia, in describing removing explosives from roadways as a significant part of his mission. See also Section 2 of this report for a fuller discussion of this issue.

<sup>117</sup> Interview with the Bati Kot Chief of Police, October 26, 2010.

<sup>118</sup> Interview with Bati Kot Jirgamaran, October 26, 2010.

<sup>119</sup> Interview with the Bati Kot Chief of Police, October 26, 2010.

<sup>120</sup> Interview with the Mohmand Dara Chief of Police, October 27, 2010.

<sup>121</sup> Interview with a Mohmand Dara Jirgamar, October 27, 2010.

<sup>122</sup> Interview with Nangarhar Union Shura Members, October 28, 2010.

<sup>123</sup> See Interview with the Mohmand Dara Chief of Police, October 27, 2010.

Daoud over land and forest holdings. A combined body of shura members and local government officials from Mohmand Dara, and national government officials including President Karzai, eventually settled the conflict.<sup>124</sup> Bati Kot authorities reported no similar instances of collaboration.

It would thus seem that security and collaboration between formal and informal authorities, despite seeming to have an effect on the handling of the most serious cases, does not in these districts affect the run of more ordinary cases of violence in the courts and shuras. As detailed in Section 4 of this report, such a pattern appears typical: district governors and chiefs of police cooperate with tribal authorities far more extensively to settle cases than do judges and courts, resulting in courts being, essentially, specialized institutions, hearing only a small variety and number of cases.

#### **b. Family Cases in Mohmand Dara and Bati Kot**

Family cases in these districts, as elsewhere, almost always stay out of the courts. They do, however, constitute a large portion of jirga cases, and the dominant portion of Ulema Shura cases. The dominant position of the Ulema Shura in Family cases, in turn, also seems relatively unique to these districts: the Shura plays this role neither in Paktia nor in Nahiya Five. By contrast, Mohmand Dara police authorities address only a few of these conflicts, all of them minor,<sup>125</sup> and Bati Kot authorities report hearing only one Family dispute in the past year.<sup>126</sup> Family cases thus might serve as a rough indicator of the legitimacy and trust placed in these various bodies, as people empowered to handle even the most sensitive and complex disputes. Put another way, people would only risk honor by resolving Family disputes in an outside body if they felt a great of trust in the outside body so utilized; that the Ulema Shura and tribal jirgas receive so many sensitive cases probably speaks to belief in these institutions.

Regarding the quantitative data, village shuras reported hearing more than 71 Family disputes in the past year, while Ulema Shura members reported hearing about 80<sup>127</sup>, and formal authorities about seven (five of which were addressed by the Mohmand Dara police without court involvement<sup>128</sup>). Such data point toward a rather different dynamic than in Paktia. On the one hand, litigants in both places obviously prefer to avoid formal authorities

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<sup>124</sup> Interview with Mohmand Dara Shura Member, October 27, 2010.

<sup>125</sup> Interview with the Mohmand Dara Chief of Police, December 7, 2010.

<sup>126</sup> Interview with the Bati Kot Vice-Governor, December 6, 2010.

<sup>127</sup> Interview with a Bati Kot Ulema Shura Member, December 6, 2010; Interview with a Mohmand Dara Ulema Shura Member, December 7, 2010.

<sup>128</sup> Interview with the Mohmand Dara Chief of Police, December 7, 2010.

for solving Family disputes. On the other hand, litigants in Nangarhar engage informal authorities outside the immediate family far more often than people in Paktia. Respondents in Nangarhar also did not state a normative belief that only immediate family members should settle Family disputes. Rather, they tended to state that Family disputes should stay out of the courts, but could go to either the tribal or Ulema shuras, depending on the parties' preference.<sup>129</sup>

When Family disputes did go to the formal authorities, they tended to be very minor or involve very weak parties. In Mohmand Dara, the new Chief of Police stated that he had solved five family conflicts in his one month on the job, but did not provide any case details, stating angrily "I am not a computer!"<sup>130</sup> But that these conflicts were being solved quickly and without the involvement of courts, elders, or Ulema indicates their minor nature (this is also the pattern in Nahiya Five). In Bati Kot, the one case involved extremely old and poor parents, upset that their son did not do more to support them. According to the Vice-Governor of that district, these people brought their case to the government because they were too powerless to go anywhere else.<sup>131</sup> And, finally, formal authorities also reported one case that went to the Family Court in Jalalabad, an engagement dispute where the wronged fiancé refused to compromise with another man who claimed engagement to the woman.<sup>132</sup>

Ulema Shura Family cases were both the most numerous and the most exceptional, as they included both suits for divorce, and disputes where parties crossed tribal and cultural lines to make use of shura members' services.<sup>133</sup> For instance, a prominent Ulema Shura member in Mohmand Dara related a case taking place amongst members of the Shinwari tribe (a group that seems to generally avoid outside settlement of its disputes) and a Kuchi (another group that tends to avoid outside intervention<sup>134</sup>). In that case, one Shinwari bought a mother and her daughter from one of his fellow tribesmen<sup>135</sup>, and he then re-sold the daughter, and married the mother. The mother missed her daughter and demanded to see her. But, on the pretext of taking the mother to see her daughter, the tribesman instead sold the mother to a Kuchi. The Kuchi, in turn, worried by his distraught wife and wanting some recognition of the

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<sup>129</sup> Interview with a Bati Kot Ulema Shura Member, December 6, 2010; Interview with Nahiya 5 Shura Members, December 8, 2010.

<sup>130</sup> Interview with the Mohmand Dara Chief of Police, December 7, 2010.

<sup>131</sup> Interview with the Bati Kot Vice-Governor, December 6, 2010.

<sup>132</sup> Interview with the Mohmand Dara District Judge, December 7, 2010.

<sup>133</sup> Interview with a Bati Kot Ulema Shura Member, December 6, 2010; Interview with a Mohmand Dara Ulema Shura Member, December 7, 2010.

<sup>134</sup> See Interview with the Mohmand Dara District Judge, December 7, 2010 (stating that IDP's and people with roots outside the district tend not to favor outside dispute resolution). TLO's Research Officer in Nangarhar also added that such people like to keep disputes with their own elders.

<sup>135</sup> In this case, "bought" is meant quite literally. According to multiple interviewees, Shinwaris practice a custom of "buying and selling women like animals." Interview with Mohmand Dara District Shura Members, December 7, 2010; Interview with a Mohmand Dara Ulema Shura member, December 7, 2010.

marriage, approached the Ulema Shura. The shura insisted that the Shinwari tribesman produce a divorce letter, which he did. The shura member then instructed the Kuchi that he must wait three months before marrying the woman (who never got to see her daughter).<sup>136</sup>

Several aspects of this case stand out, even putting aside its obvious human rights implications. Most obviously, the trans-tribal and trans-cultural aspects of the case seem exceptional, and point toward fairly unique legitimacy being invested in the Ulema Shura. Both Shinwari tribal members and Kuchis apparently feel comfortable approaching the Ulema Shura, despite its ties to the district government<sup>137</sup> and Mohmand tribe. Moreover, they feel comfortable approaching it for disputes that carry great potential to bring shame on the parties involved. No other body – with the fascinating, if small, exception of the Family Court in Jalalabad – reported hearing cases with this combination of characteristics. Finally, one should note that parties both seem to approach the Ulema Shura even when the parties don't know the relevant Sharia rules, and accept that shura's decisions even when Pashtunwali would probably yield a more favorable result. In one such case, an Ulema Shura member in Bati Kot related a suit for divorce, in which he twice presented the husband a choice between having the case heard under more restrictive Sharia rules, or more favorable (to the husband) Pashtunwali ones. Both times, the husband chose Sharia.<sup>138</sup> Once again, Ulema Shura cases represent perhaps the only area where litigants are willing to bear such burdens, just to have access to a particular forum.

Taken together, these cases suggest that people in rural Nangarhar are far more willing to make use of outside dispute resolution for Family disputes than are people in Paktia. In addition the Ulema Shura seems to be playing a role in the district seen neither in other rural areas, nor even in Nahiya Five. Somewhat strangely, rural Nangarhar was the only area studied that possessed a widely used and publicly available forum for divorce cases, underlining, at least, the very local and particular nature of dispute resolution throughout the study area. It also, of course, highlights the potential of religious bodies to consensually regulate private life, an ability that the government certainly seems not to possess.

### **c. Land Cases in Mohmand Dara and Bati Kot**

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<sup>136</sup> Interview with a Mohmand Dara Ulema Shura Member, December 7, 2010.

<sup>137</sup> In fact, one member of the Ulema Shura in Bati Kot stated that he believed the shura's primary job was to encourage support for the government and recruit young men for the Afghan National Police and Afghan National Army. Interview with a Bati Kot Ulema Shura Member, December 6, 2010.

<sup>138</sup> Interview with a Bati Kot Ulema Shura Member, December 6, 2010.

As everywhere else, Land cases constitute the single largest number of cases overall, distributed across every forum in the province. They constitute more or less 100% of courts' (small) civil docket<sup>139</sup>; a plurality of cases in tribal jirgas; and a significant minority of cases in the Ulema Shura<sup>140</sup>, with the latter bodies hearing about nine times as many cases as the courts. As in urban areas, courts hear almost entirely cases of alleged confiscation. This statistic does not, however, capture the entire dynamic. First, the district executive branch receives many more Land cases than they send (or that parties demand they send) to court. Moreover, Bati Kot feels the effects of large populations of IDP's and transient Kuchis, while Mohmand Dara suffers the lingering effects of Communist land redistribution programs. Without these factors, court use would likely be even lower. Finally, even respondents in these districts with government connections tended to avoid government dispute resolution of Land disputes whenever possible. Taken together, these districts thus present a remarkably unsettled picture of land tenure, with conflict dynamics seeming to sometimes overwhelm the dispute resolution systems designed to deal with them. Put numerically, TLO's data reveal that courts in the districts have heard about 34 Land conflicts<sup>141</sup>, traditional jirgas about 266 (including ownership, boundary and access disputes)<sup>142</sup>, and the Ulema Shura about 20.<sup>143</sup>

Jirga resolution of Land conflicts encompasses by far the largest number and greatest variety of cases. As already noted, traditional bodies heard at least 122 cases over ownership, a further 54 on boundary or access disputes (especially in Mohmand Dara<sup>144</sup>), and 90 cases that combined civil and criminal components. Unlike the courts (as will be seen), many of these disputes are quite ordinary disagreements over the ownership of shared property. For example in the case of Adam Khan, he and his grandchildren disagreed over the division of family land. The first jirga convened to settle the dispute could not do so, resulting in a second being called. The second reached the same decision as the first, but apparently the conflict had gone on long enough for tempers to cool; Adam Khan's grandsons received 4 meters of land, according to the case study.

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<sup>139</sup> See, e.g., Interview with Mohmand Dara District Judge, December 7, 2010, stating that 100% of civil case docket was land cases.

<sup>140</sup> Interview with a Bati Kot Ulema Shura Member, December 6, 2010; Interview with a Mohmand Dara Ulema Shura Member, December 7, 2010.

<sup>141</sup> Interview with the Bati Kot District Judge, October 26, 2010; Interview with the Mohmand Dara District Judge, October 27, 2010; Interview with the Mohmand Dara District Judge, December 7, 2010.

<sup>142</sup> In addition to TLO's quantitative data, see Interview with Bati Kot Jirgamaran, October 26, 2010; Interview with a Mohmand Dara Jirgamar, October 27, 2010.

<sup>143</sup> Interview with a Bati Kot Ulema Shura Member, December 6, 2010; Interview with a Mohmand Dara Ulema Shura Member, December 7, 2010.

<sup>144</sup> It is reasonable to suppose that Mohmand Dara has so many such disputes because the district is extensively irrigated, thus making access to irrigation canals vitally important. Interviewees even used these canals as geographical markers, e.g. a security incident that took place "by the 28<sup>th</sup> streamlet." Interview with the Mohmand Dara Police Chief, December 27, 2010.

That being said, jirgas are of course hearing larger Land disputes. This report has already examined one such case in its section on Criminal cases in these districts, between the Sepayee and Alisherkhel tribes. In another such case from Bati Kot, the Sepayee tribe was again involved in a conflict over a large amount of land the government claimed. According to the jirga it is the “weakness of the government” which prevents it from taking control of the situation, and the government has so far played no role in the dispute. Nevertheless, the jirga continues to work on the conflict, but had not reported solving it at the time of writing.<sup>145</sup>

Regarding court cases, it seems that most have been confiscation disputes. Of Mohmand Dara’s 20 cases, for example, 18 have been of this type (the other two are also interesting in their own right, as they represent women trying to leverage state power to enforce their inheritance rights).<sup>146</sup> In almost all of these, the parties approach the government directly; government representatives, in turn, state that they give parties a choice between state and informal forums, while attempting to send as many Land cases on to the shuras as possible: as a result, court cases are only a sub-set of what could be classified as government land cases in total.<sup>147</sup> Thus, the Mohmand Dara Prosecutor stated that about 25 Land conflicts had come across his desk in the past year, and he had sent all of them for jirga resolution<sup>148</sup>, meaning the number of Land cases sent to jirgas is slightly greater than the number heard in the district court. Documentation, in turn, seems an important factor in determining if a case goes to the courts. Interviewees stated that parties with documentation for their land do approach the government in disproportionate numbers, but these still do not seem to constitute a majority of court cases.<sup>149</sup>

Finally, underlying conflict dynamics do of course affect how the government handles Land cases, but with substantial variation by district. Strikingly, in Bati Kot, the government is well aware of large-scale confiscations of government land, particularly by settling Kuchis<sup>150</sup> (the Bati Kot Vice-Governor estimates 20,000 Kuchis in the district<sup>151</sup>, and Nangarhar in general has the country’s largest winter population of Kuchis (PDP, 2010)). When such land seizures take place far from the district center, the government is not able to intervene.<sup>152</sup> However, in one recent case, taking place close to the district center, two villages were arguing over how

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<sup>145</sup> Interview with Bati Kot Jirgamaran, October 26, 2010.

<sup>146</sup> Interview with the Mohmand Dara District Judge, October 27, 2010; Interview with the Mohmand Dara District Judge, December 7, 2010.

<sup>147</sup> Interview with the Bati Kot Vice-Governor, October 26, 2010; Interview with the Mohmand Dara District Governor, October 27, 2010.

<sup>148</sup> Interview with the Mohmand Dara Prosecutor, October 27, 2010.

<sup>149</sup> Interview with the Bati Kot District Judge, October 26, 2010; Interview with the Mohmand Dara District Judge, October 27, 2010.

<sup>150</sup> Interview with the Bati Kot Vice-Governor, October 26, 2010.

<sup>151</sup> Ibid.

<sup>152</sup> Ibid.

to divide a government-owned farm. In that case, the government did intervene successfully, and arrested two people involved in the division.<sup>153</sup>

Mohmand Dara authorities, in turn, are grappling with their district's history of Communist-era land redistribution. The Mohmand Dara District Judge reported that virtually all of his cases arise because, during Taraki's time, the government re-settled Peshai and Sepayee people in the district. As a result, people whose land was re-distributed are now filing suit in the courts to recover their holdings<sup>154</sup> – a use of the courts, as above, well in line with government policy, which does not recognize the validity of Communist land title.

Of course, not all people find themselves in such a happy relationship with government land policy. Even some government stakeholders encourage disputants to avoid the courts for this reason. A prominent Ulema Shura member from Mohmand Dara, who reported personally close relations with the district government (his interview with TLO took place in the same building as the District Governor's office), told of one case, a fairly ordinary land dispute, but again over land the government claimed. The parties could not agree, but then presented the case to the Ulema Shura. Even in the latter forum, they could not agree, and threatened to take the case to the government. However, the Ulema Shura member warned them that they should not, as the government would both claim tax on the land, and re-take the land for itself. Hearing this, the parties agreed to settle the dispute with the Ulema Shura.<sup>155</sup> One should note that such Land cases constitute the only reported occasions when the Ulema Shura feels compelled to act in contravention of government policy.

Thus, while the government in Bati Kot and Mohmand Dara remains more deeply involved in the resolution of Land conflicts than does district government in Paktia, Land disputes, in many ways, reveal a certain underlying weakness. Even in a district like Mohmand Dara, with close relations between tribal elders and formal authorities, the government cannot defend the land it claims to hold, let alone capture the majority of disputes. Notably, the government seems more involved in cases of significant violence and major crimes, and there seems a genuine demand for the government to act. Land cases, by contrast, perhaps represent the government undermining itself, due to a combination of aggressive land policy, and low capacity for enforcement in the face of public hostility.

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<sup>153</sup> Ibid.

<sup>154</sup> Interview with the Mohmand Dara District Judge, October 27, 2010.

<sup>155</sup> Interview with a Mohmand Dara Ulema Shura Member, December 7, 2010.

## **4 Formal-Informal Justice and Government Linkages**

In both Paktia and Nangarhar, civil cases regularly move from formal government to the jirgas, guided by the preferences of the parties and government officials involved. Cases move from the jirgas to the government far less often, and the disputes are usually criminal, not civil. However, significant political cooperation between jirgas and government exists in most districts, including joint attempts to solve disputes so large that they endanger district stability, and some district officials have taken significant steps to formalize both jirgas and government interaction with them. The amount of cooperation seems to generally depend upon the strength of the government in the district. Districts with stronger state government also tend to have stronger – or at least more longstanding – links between formal and informal systems. However, these linkages, as much as anything, reflect the personal ties of the district executive, and a deep skepticism of formal courts. Given these realities, such linkages do not seem to be greatly benefitting either courts or informal dispute resolution (courts of appeals might be an exception), but they may well be improving security and governance in these districts more broadly.

### **A. Cases – and Cooperation – from the Formal System to the Informal**

As a result of formal-informal linkages, in most districts of Paktia and Nangarhar, there is increasingly little difference between the informal and formal governments, particularly the woliswal. He and the other organs of his office regularly send cases to the shuras, and some

woliswali have engaged the shuras in serious political cooperation and formalization of their role. The woliswal's office is also by far the most likely entity to register shura decisions, improving their legal enforceability. By contrast, with the exception of Courts of Appeals, formal courts in the covered districts do not send a substantial number of cases to the informal system, and register shura decisions less frequently than the woliswal. These outcomes probably reflect the highly personalized nature of the district executive's power, on the one hand, and the lack of a difference in role between appeals courts and other courts, on the other. They also derive from a profound lack of trust in the formal court system, which even woliswali and police often view as extremely corrupt and inefficient.

### **a. Cooperation in Solving Disputes between Jirgas and Executive Officials**

In most districts surveyed, when parties present a civil case to the formal government, the government gives them a choice of forum at least twice: when the case is initiated, and if the case is appealed. As to cases being initiated, executive officials in Ahmad Aba and Sayed Karam districts in Paktia, and in Nahiya Five and Bati Kot and Mohmand Dara districts in Nangarhar all stated that, when parties present a civil case to the government, they will encourage parties to go to the jirgas, as well as allowing them to use the courts.<sup>156</sup> By contrast, judges were more ambivalent: Sayed Karam, Paktia's judge spoke against the procedure<sup>157</sup>, and Mohmand Dara, Nangarhar's judge stated that he accepted jirga procedures, but thought that more cases should be going to the courts.<sup>158</sup>

Reported case referrals from Nangarhar and Paktia confirm this pattern. In Bati Kot District, Nangarhar, the Prosecutor stated that he referred 18 of his 30 cases to the shuras, and both the Vice-Governor and Chief of Police reiterated that they often referred cases as well.<sup>159</sup> Similarly, the Chief of Police in Mohmand Dara reported sending 15 cases to the shuras, and 15 to the courts<sup>160</sup>, and a highly placed Mohmand Dara shura member stated that the District governor traditionally referred almost all civil cases to the shuras.<sup>161</sup> While in Jalalabad Nahiya Five, the Chief of Police reported sending 30 of his 40 conflicts to the shuras, as well as sitting with shuras himself once or twice a month.<sup>162</sup>

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<sup>156</sup> Interview with the Ahmad Aba District Governor, October 12, 2010; Interview with the Sayed Karam District Governor, October 13, 2010. Interview with the Bati Kot District Vice-Governor, October 26, 2010; Interview with the Mohmand Dara Governor, October 27, 2010.

<sup>157</sup> Interview with the Sayed Karam District Judge, October 13, 2010.

<sup>158</sup> Interview with the Mohmand Dara District Judge, October 27, 2010.

<sup>159</sup> Interviews with Bati Kot Officials, October 26, 2010.

<sup>160</sup> Interview with the Mohmand Dara Chief of Police, October 27, 2010.

<sup>161</sup> Interview with Mohmand Dara Shura Member, October 27, 2010.

<sup>162</sup> Interview with the Nahiya Five Chief of Police, October 25, 2010.

In Paktia, the pattern is similar, although the number of cases is lower. More specifically, the Ahmad Aba Huquq Department (which is part of the woliswal's office) has received 20 cases in the past year, and sent six cases to the courts and three to the shuras, all of the latter land<sup>163</sup>; while its Sayed Karam counterpart has received eleven cases, and sent two to the shuras and one to the courts (the remainder are still being investigated).<sup>164</sup> Similarly, the Chief of Police in Ahmad Aba stated that he preferred to send small conflicts to the shura<sup>165</sup>, but declined to provide a number, while his counterpart in Sayed Karam reported that he had sent 5 cases to the shuras in the past year.<sup>166</sup> Finally, Mirzaka District, while not having an official Governor, does have a Chief of Police, and he reported sending all of his disputes to the shuras – at least in part, it must be said, because the District has no courts of its own<sup>167</sup>, although Sayed Karam's are fairly easily accessible.

These linkages between the District executive branch are taking place in an environment of deepening, and in some cases already substantial, political cooperation. In the covered districts in both Paktia and Nangarhar, officials are creating formal lists of shura members, and working with the shuras to both improve district security generally, and to handle large cases that threaten the stability of the district. Officials in Nangarhar have generally advanced these processes more than their Paktia counterparts. Nahiya Five seems to have begun the practice, working through the Election Commission to create a Nahiya Shura, and registering this list with the government, about two years ago.<sup>168</sup> Moreover, as above, the area's Chief of Police does often refer cases to the shuras, and sits with them on a regular basis, including providing his personal imprimatur to their decisions. The Chief did not describe any political cooperation with the shuras as such, perhaps because Nahiya Five does not have much insurgent presence to begin with.<sup>169</sup> Nevertheless, he was the only police official that reported such deep involvement in shuras' settling disputes, further underlining, as above, how his role can itself resemble that of a tribal elder in a rural area.

Mohmand Dara District also has seen very deep cooperation, although a recent change in the Chief of Police has probably scaled back formal-informal interaction, at least for the moment. The former Chief of Police stated that he met daily with the shuras, especially on security issues, and that he had initiated these regular meetings himself in an apparently

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<sup>163</sup> Interview with Ahmad Aba Huquq Department Head, October 12, 2010.

<sup>164</sup> Interview with Sayed Karam Huquq Department Head, October 13, 2010.

<sup>165</sup> Interview with the Ahmad Aba Chief of Police, October 12, 2010.

<sup>166</sup> Interview with the Sayed Karam Chief of Police, October 13, 2010.

<sup>167</sup> Interview with the Mirzaka Chief of Police, October 14, 2010.

<sup>168</sup> Interview with Nahiya Five Shura Members, December 8, 2010.

<sup>169</sup> Interview with the Nahiya Five Chief of Police, October 25, 2010.

successful bid to reduce violence.<sup>170</sup> For his part, the Woliswal, who is serving his second stint in Mohmand Dara after a series of transfers elsewhere, also reported meeting frequently with traditional elders. These meetings in the past included regular meetings with jihadi commanders and their shura, most of whom seem to have been Hezb-e Islami. Since the split between the Hezb-e Islami Khalis, and the Hezb-e Islami Gulbuddin (HIG) – the latter being Hekmatyar’s party – the Woliswal reported that these jihadis have now either joined the government, or gone into business.<sup>171</sup> Thus while the district has many Hezb-e Islami supporters in general, officials both there and in other districts agreed that Mohmand Dara no longer has a substantial insurgent presence.<sup>172</sup> Moreover, the Chief of Police reported that attacks on certain police posts had decreased from weekly, to once in the past year, as a result of these efforts.<sup>173</sup>

Bati Kot, for its part, continues to have a very substantial insurgent presence, as discussed in the previous section. Yet the very dynamic Vice-Woliswal of the district has recently begun a number of initiatives similar to those in Mohmand Dara. He has scheduled meetings every second week between himself and shura members, and often meets with them daily as the need arises<sup>174</sup> (shura members were meeting in his office when researchers from TLO arrived). He has also initiated monthly meetings between the district government, tribal shuras, the Ulema Shura, and representatives of the insurgents, including HIG.<sup>175</sup> The Vice-Woliswal, in turn, seems to be approaching these interactions primarily as a government reform effort, as well as a way to unite the community politically. However, he also expressed considerable skepticism of the courts’ honesty, and seemed to prefer the shuras to settle most kinds of disputes.<sup>176</sup>

Such political cooperation is also ongoing in Paktia. In particular, woliswali in Ahmad Aba and Sayed Karam districts have begun to make official lists of shura members, and the former has recently completed the process.<sup>177</sup> Sayed Karam has not completed its registration process yet, but even so there are weekly meetings between shura and government members.<sup>178</sup> Government officials and shura members from these districts did not always characterize such linkages as a security initiative, per se, but rather as a more general undertaking to improve governance. That is, if the district government possesses reliable lists

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<sup>170</sup> Interview with the Mohmand Dara Chief of Police, October 27, 2010.

<sup>171</sup> Interview with the Mohmand Dara District Governor, October 27, 2010.

<sup>172</sup> Interview with the Mohmand Dara District Governor, October 27, 2010; Interview with Nangarhar Union Shura Members, October 28, 2010.

<sup>173</sup> Interview with the Mohmand Dara Chief of Police, October 27, 2010.

<sup>174</sup> Interview with the Bati Kot Vice-Governor, October 26, 2010.

<sup>175</sup> Ibid.

<sup>176</sup> Ibid.

<sup>177</sup> Interview with Ahmad Aba Shura Members, November 25, 2010.

<sup>178</sup> Interview with Sayed Karam Shura Members, November 26, 2010.

of shura members, then it, on the one hand, can contact shura members efficiently in order to distribute them resources, provide training, and the like; and, on the other hand, such lists prevent false shura members hoodwinking the government, while allowing true shura members to work more closely with the government as representatives of the people.<sup>179</sup> Of course, if the government had previously been taken in by false shura members, that would give a strong indication that the relationship between the government and the actual shuras had previously not been very close. Thus, although government officials and shura members in Paktia are now expressing warm regard for one another<sup>180</sup>, it remains to be seen if these good feelings last and translate into systematic improvements in governance and security.

These improvements, if they occur, will build on the final relevant facet of interaction between district government and the shuras: cooperation to resolve major disputes and crises. Shuras most often take the lead in resolving these crises, but governments can also be involved as both security stakeholders and as providers of troops and police. The above discussion of Nangarhar has already provided several examples of how this involvement can work. But it is also surely worth noting that, in Mohmand Dara during the last elections, police and tribal militias cooperated to provide security to district polling places, thus demonstrating a high degree of cooperation even outside the solving of specific disputes.<sup>181</sup>

#### **b. Political Bases of Cooperation between Jirgas and the District Executive**

However, one should note that the political basis for these structures is mostly non-institutional. Rather, it is driven, usually, by the personal inclinations of the district governor or, to a lesser extent, other officials in the district executive. As such, one should usually understand these jirga-government relationships as being somewhat unstable and changeable, and occasionally even in opposition to the formal courts. Thus, in Mohmand Dara district, cooperation between the Chief of Police and jirgas, while still very substantial, actually seems to have reduced in the last few months, as the Chief who established this cooperation has been re-assigned, and a new one has taken over. While the previous Chief, as above, reported elders providing security during the elections, the new Chief disclaimed any ability to get elders to provide armed security at all (although the agreement to exclude insurgents, and regular meetings, still persist).<sup>182</sup> This is a small example, but, given the extraordinary frequency with which the Karzai government re-shuffles district government

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<sup>179</sup> Interview with Sayed Karam Shura Members, November 26, 2010.

<sup>180</sup> As recently as 2009, TLO researchers found some considerable antagonism between the two groups, and a reluctance to cooperate.

<sup>181</sup> Interview with the Mohmand Dara Chief of Police, October 27, 2010.

<sup>182</sup> Interview with the Mohmand Dara Chief of Police, December 7, 2010.

positions<sup>183</sup>, such examples pose a real danger to the long-term endurance of these jirga-government connections.

Moreover, these connections can even appear somewhat troubling, when even government officials' extremely negative attitude – sometimes outright hostility – toward formal courts is taken into account. Multiple executive branch officials, in both Paktia and Nangarhar, described the courts as the most corrupt, and least trustworthy, branch of government.<sup>184</sup> The Nahiya Five Chief of Police even went so far as to describe formal courts as “like butchers, cutting the meat of the people.”<sup>185</sup> Given this level of distrust, one must suspect, in part, that woliswali want to empower the jirgas not to complement the courts, but as an alternative to them. Much like the personal power of the woliswal, this situation will obviously endanger long-term stability, as the Afghan state fights against itself. And this combination of personal power and institutional hostility, in turn, potentially provides little foundation on which to build the future.

### **c. Cooperation between Jirgas and Courts**

As might be assumed from the above, these practices and attitudes make district courts, especially, something of the “odd man out” of local governance, with courts, despite the similarity of their role to that of jirgas, only rarely figuring in to the linkages between woliswali and jirgas. However, if a case makes it to court, it will likely remain there, although it might go to the jirgas on appeal. District judges reported sending almost no cases to the jirgas. Some stated that they would send civil cases if both parties agreed, but, of course, the government has already given parties this choice once, and parties have chosen the formal system.<sup>186</sup> Paktia trial judges thus reported sending no cases to the shuras within the past year, and the judge in Sayed Karam strongly objected to the idea.<sup>187</sup> Similarly, judges in Bati Kot and Mohmand Dara stated that they had respectively sent only one and three cases to the shuras in the past 12 months.<sup>188</sup> The judge in Bati Kot also stated that, per his understanding, courts could generally not send cases to the shuras, although the woliswal could.<sup>189</sup> Finally,

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<sup>183</sup> See, e.g., Interview with the Mohmand Dara District Governor, October 27, 2010; Interview with the Mohmand Dara Chief of Police, October 27, 2010 (each describing often being moved to new government positions up to several times a year, for a number of years running).

<sup>184</sup> Interview with the Ahmad Aba Police Chief, October 12, 2010; Interview with the Bati Kot Vice-Governor, October 26, 2010.

<sup>185</sup> Interview with the Nahia 5 Chief of Police, October 25, 2010.

<sup>186</sup> Interview with Mohmand Dara District Judge, October 27, 2010.

<sup>187</sup> Interview with the Sayed Karam District Judge, October 13, 2010.

<sup>188</sup> Interview with the Bati Kot District Judge, October 26, 2010; Interview with the Mohmand Dara District Judge, October 27, 2010.

<sup>189</sup> Interview with the Bati Kot District Judge, October 26, 2010.

Jalalabad's City Court reported sending 15 cases to the jirgas – a similar rate of referral to other courts, given the City Court's caseload of around 300 cases in the past year – but stated that, while it would review jirga decisions in these referral cases for legal sufficiency, it would not approve or stamp any of them.<sup>190</sup>

Appeals courts, however, present a different dynamic. Appeals court judges in both provinces, like executive officials, stated that they encouraged parties to take their disputes to the jirgas.<sup>191</sup> Although the Appeals Court in Paktia declined to provide quantitative data, Civil Appeals Court judges in Nangarhar stated that they send about 60% of their disputes to the informal system.<sup>192</sup> If one conceives of the role of appellate courts as to perfect the reasoning and judgment of lower courts, as in the American system, then such a pattern would appear deeply anomalous. However, both parties and judges seemed to see an appeal as an opportunity to re-litigate the entire case (albeit under slightly different procedures), so the appellate courts trying to move cases to the informal system is really no more strange than prosecutors and district governors trying to do the same thing.<sup>193</sup> Both are abiding by the principle that parties can choose the forum to resolve their civil disputes. This also reinforces the occasional observation that parties will go to the formal authorities when they are angry, but come back to the formal authorities once tempers have subsided (and money has been spent)<sup>194</sup>: after a district decision seems a convenient time to exit the formal system.

## **B. Movement of Cases from the Informal to Formal Systems**

As already stated, movement of cases from jirgas to courts occurs far less frequently than the reverse, but it does happen in some circumstances. Notably, jirgamaran send some criminal cases to the courts, and parties dissatisfied with the jirga's disposition also

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<sup>190</sup> Interview by TLO Research Officer with the Jalalabad City Court Judge, Received January 3, 2010.

<sup>191</sup> Interview with the Nangarhar Court of Civil Appeals, October 28, 2010; Interview with the Paktia Appeals Court Head, November 24, 2010.

<sup>192</sup> Interview with the Nangarhar Court of Civil Appeals, October 28, 2010.

<sup>193</sup> Interview with the Nangarhar Court of Civil Appeals, October 28, 2010; Interview with the Paktia Appeals Court Head, November 24, 2010. Appeals court judges stated that they primarily reviewed the facts of the cases they received, based upon new submissions by the parties, to attempt to discern who was telling the truth in the lower court. They do not seem to perform any additional investigation, examine witnesses, or take other evidence beyond party submissions. Even moreso than in lower courts, appellate judges stated a very strong preference for speedy disposition of cases – which would obviously limit their ability to review evidence. An appellate judge in Jalalabad expressed his ideal by saying that he had once observed an appellate judge in Egypt dispose of thirty cases in one hour, and lamented that Afghan courts were not as “efficient.” In addition to factual review, appellate judges in the provinces also perform technical review of lower court decisions, e.g. if the lower court had submitted its judgment in an improper format. None mentioned performing any review of lower court legal interpretations.

<sup>194</sup> Interview with Nahiya Five Shura Members, December 8, 2010.

sometimes re-litigate their cases in the courts.<sup>195</sup> Far more commonly, parties will bring jirga decisions to be approved and stamped by the woliswal, district court, or appeals court, although several factors probably limit the willingness of litigants to follow even this procedure.

Regarding jirgas sending cases to the courts, many jirgamaran stated a willingness to do so in major criminal cases such as murder and serious intentional injury.<sup>196</sup> They also stated that they would send a case to the courts if they failed to solve it themselves.<sup>197</sup> However, in practice, this only happened rarely, and even jirgas in Jalalabad city -- where the formal authorities are most accessible and best established -- reported handling major criminal cases themselves.<sup>198</sup> In Nangarhar, only the Mohmand Dara District Court reported receiving cases from the shuras: they reported receiving about four criminal cases, in all of which the parties had not accepted the outcome that the jirga had reached. Interestingly, in these cases the court accepted the jirgas' findings of fact and detained the parties deemed the aggressors without any further process.<sup>199</sup>

Far more commonly, parties will bring completed jirga decisions to the courts or woliswali for registration. All woliswali are apparently registering shura decisions (including for small criminal cases)<sup>200</sup>, as are the courts in Bati Kot and Mohmand Dara in Nangarhar.<sup>201</sup> None, however, could provide a number of decisions registered. They also varied in how much oversight they provided regarding jirgas' compliance with Afghan law. At one extreme, the Nangarhar Court of Civil Appeals reported rejecting a significant number of shura decisions because they violated the law, and in particular because they involved the use of baad.<sup>202</sup> Some woliswali also reported sending decisions to their Huquq Departments for legal

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<sup>195</sup> Some reports state that this re-litigation is a tremendous problem in Western provinces such as Helmand (DFID, 2010), and many researchers, including TLO, regard this as a major systemic problem. Nevertheless, such forum shopping does not appear to happen very frequently in Paktia and Nangarhar. It is not known why this difference would be so pronounced, but a partial answer might stem from traditional networks being severely degraded in the South (Gopal et al., 2010), but still quite strong in the Southeast (Smth, 2009). Thus Southeastern jirgamaran possess enough prestige to usually bind parties to settlements. Case reports have also revealed that jirgamaran in Paktia and Nangarhar usually make parties take an oath not to take each other to court, as a condition to hear the case.

<sup>196</sup> Interview with a Mohmand Dara Shura Representative, October 27, 2010; Interview with Mirzaka Shura Members, November 23, 2010; Interview with Ahmad Aba Shura Members, November 25, 2010.

<sup>197</sup> Interview with Ahmad Aba Shura Members, October 12, 2010.

<sup>198</sup> Interview with Nangarhar Union Shura Members, October 28, 2010.

<sup>199</sup> Interview with the Mohmand Dara District Judge, October 27, 2010.

<sup>200</sup> Interview with Ahmad Aba Government Officials, October 12, 2010; Interview with the Bati Kot Vice-Governor, October 26, 2010; Interview with a Mohmand Dara Shura Representative, October 27, 2010.

<sup>201</sup> Interview with the Bati Kot District Judge, October 26, 2010; Interview with the Mohmand Dara District Judge, October 27, 2010.

<sup>202</sup> Interview with the Nangarhar Civil Appeals Court, October 28, 2010.

review.<sup>203</sup> Yet no woliswal reported rejecting any shura decisions, and none mentioned engaging in legal review without prompting from the interviewer.

Several reasons caution against parties bringing cases for registration. As discussed at length elsewhere, if parties are arguing over government land, then registering their cases serves to alert the government to the land's occupation. Moreover, district and appeals courts (but not woliswali) also reported charging fees to register cases. Specifically, District Courts will often charge a fee equivalent to ten percent of the case's settlement value<sup>204</sup>, while Courts of Appeals will charge three percent.<sup>205</sup> Especially if parties do not have much cash, such fees could be extremely burdensome, and might, for example, require selling part of land just acquired. Such fees – along with legal review of land decisions – certainly provide yet one more incentive to avoid the formal court system. More broadly, it also seems likely that many parties do not register decisions with the courts because jirgas are, locally, stronger and more important: If the government is exerting little control outside the district center, then its approval will not actually add much to a verdict or settlement in one's favor. At present, then, linkages do not seem to be doing much to strengthen the formal court system, although they are arguably helping improve security and governance in a number of these districts.

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<sup>203</sup> Interview with Ahmad Aba Government Officials, November 25, 2010.

<sup>204</sup> Interview with the Mohmand Dara District Judge, October 27, 2010.

<sup>205</sup> Interview with the Nangarhar Court of Civil Appeals, October 28, 2010.

## **5 Conclusion and Recommendations**

Overall, parties in the covered districts of Paktia and Nangarhar seem to take jirgas and shuras as a baseline, and a case must cross certain thresholds to cause them to pursue justice in state courts. In particular, in both Paktia and Nangarhar, parties have some notable desire to resolve death cases in government forums. This preference, however, also has some definite limits: even in urban areas, jirgas and other informal bodies resolve up to half of major Criminal cases, including an even larger percentage of the most serious disputes that threaten district security (with police mainly in a reactive, counter-insurgency role). Moreover, Afghan justice providers often draw distinctions between civil and criminal matters differently than do Westerners, and have a marked tendency to treat violent conflict over Land or Family problems as a civil matter first, and a criminal matter second, if at all. Nevertheless, Criminal cases remain the only area where representatives of the informal justice system expressed a desire for state involvement, and thus the area in which the state could probably expand its reach with the least resistance.

Family cases, however, impose severe limits on state power, as virtually all parties avoid government resolution, and the government appears more or less content with this arrangement. Indeed, except for a small number of women who seemed to seek to leverage state resources to better desperate situations, respondents avoided the state system almost entirely, although with substantial local variation. Most importantly, rural Nangarhar can boast the most developed and active Ulema Shura of any area under study – a body whose power

and legitimacy is highly suggestive of the potential for Sharia-based justice, which could even, in some situations, ameliorate customary law human rights violations.

Land cases, in turn, represent by far the most common kind of conflict overall, and one that puts state and private parties in distinct opposition. On the one hand, Land cases obviously reflect, more than any others, Afghanistan's extraordinarily turbulent history over the last three decades. But, on the other hand, no other area shows such a gap between current reality and the aspirations of government policy. One can doubt that the courts will gain significant strength unless and until these realities and aspirations come closer together. For these reasons, it is perhaps unsurprising that in Paktia and Nangarhar linkages between formal and informal justice bodies appear mostly limited to tribal elders and district governors, with courts left out, as just discussed in the previous section.

With these points in mind, TLO can then offer several policy suggestions, and ideas for areas of further study. First, as a general matter, the international community and Government of Afghanistan should support linkages between the formal and informal justice systems. Such linkages have already proven a benefit in Mohmand Dara, and have resulted in the mostly successful exclusion of insurgents from the district. These security arrangements also have the potential to allow the Afghan National Police in these districts to re-focus on law enforcement, and away from counter-insurgency. Such a realignment could ultimately improve relations between district government and local people, thus extending the reach of state power and resulting in more cases brought to the state for resolution, as is occurring in Jalalabad Nahiya Five.

However, the Afghan Government, especially, will need to approach such linkages very carefully, and keep in mind that, in many rural areas, the informal system possesses much more power and reach than does the formal. As a result, any reform that conditions formal-informal integration on deep modification of the jirga system will almost certainly fail. Successful integration will require putting aside, for the near term, both concerns over the occupation of government land, and the human rights – especially women's rights – problems that permeate the informal justice system.

Yet there is a relatively short-term goal that the Afghan Government and its international supporters can take to improve both local justice and women's rights: Setting up and strengthening Ulema Shuras. Obviously, the justice dispensed in these bodies does not always, or even usually, meet Western conceptions. But the rights-based justice Sharia provides would do much to alleviate the situation of women, children, and other vulnerable groups. Although Ulema Shuras are active in Nangarhar, the ones in Paktia seem much

weaker, and do not take a substantial number of cases. Such a situation puts disadvantaged groups in Paktia in a worse situation than necessary, and need not go on.

All of these efforts at reform, however, could be held back by counterproductive government laws and policies, particularly those on Land. If government dispute resolution is ever to function, and if jirgas are ever to become acceptable to the state, then inadequacies in statutory Land law and policy must be addressed. As things stand now, the state claims a vast amount of land occupied by private people, but lacks the will or the ability to enforce those claims. This combination causes large numbers of litigants to avoid government dispute resolution entirely, sets even government supporters in opposition and will ultimately inhibit any deep integration of the state and jirga systems. Without at least some reform of statutory Land law – such as increasing recognition of customary title, or a reduction in the amount of land claimed by the government – long-term improvements in local governance will prove unnecessarily difficult.

Exploiting these opportunities at reform will require further analysis, well beyond what can be offered in a single report. In conclusion, then, TLO would urge the further examination of several interrelated areas. First, especially in districts where such links are ongoing, the operational realities of government and tribal cooperation should be examined. This report has presented some considerable evidence that such linkages can increase security, as in Mohmand Dara. Yet it is not known with any specificity in what areas governments and tribes so linked are cooperating, in which they are competing, and in which they are opposed and working at cross-purposes. One can also not say with any assurance what effect these links have been having on district government outside the governor's office, or how such links have evolved after their initial establishment.

The same goes for women's evolving use of the state justice system. Both Paktia and Nangarhar provided tantalizing clues that, in some situations, women use the state justice system more commonly than men, as a way to improve enforcement of their rights. Both the international community and the Afghan government would benefit from an improved analysis of the relationship between women and state justice, both as it plays out in rural and conservative areas, and as it manifests in more liberal and urban settings such as Kabul or Jalalabad.

And these urban settings themselves have not always received the attention they deserve: there have as of yet been very few studies of, especially, informal justice in urban areas. This study has provided considerable evidence that, at least in Jalalabad, urban informal justice providers hear more, and sometimes more complex and significant, cases than do formal

ones. A study expanding coverage of Jalalabad, and also including other major cities such as Kabul or Kandahar could prove beneficial, and improve the understanding of how state and tribal justice interact when the state is at its strongest.

TLO has made the above recommendations for policy makers, and suggestions for further analysis, in full recognition that Afghanistan's state and non-state justice systems are in a state of flux, and will remain that way for the foreseeable future. Historically, the Afghan state has often acted in opposition to the jirga system (Tarzi, 2006), and today this customary system has no clear legal basis – even as it hears a majority of the country's disputes, both large and small. Thus formal-informal linkages might provide a promising model for local governance in Afghanistan, building on the strength of state and non-state systems. However, this happy interpretation leaves district courts almost entirely out of the picture, and is at odds with the unitary structure of Afghanistan's government (Evans et al., 2004), where even many district officials are appointed from Kabul. Until such contradictions are resolved, Afghanistan will face formidable hurdles building the effective, tripartite system of government to which it aspires.

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