

Perspectives on Involving Non-State and Customary Actors in Justice and Security Reform

Editors:

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Preface

Erica Harper¹

The chapters that appear in this electronic volume were presented at a conference organized by the Danish Institute for International Studies (DIIS). It was supported financially by the Ministry of Foreign Affairs of Denmark with additional funding from the International Development Law Organization (IDLO). The conference was entitled "Access to Justice and Security: Non-state actors and the local dynamics of ordering" and was held in Copenhagen 1-3 November 2010.

The program of work of the conference was extensive and covered a range of issues pertaining to seven themes, including: international support to informal justice systems and poverty reduction; notions of justice and security from the perspective of the citizen; human rights; conflict and fragile contexts, conceptualizing 'non-state' actors; the dynamics of local power relations, politics and authority; state formation and its 'Other'; and research methodologies. The aim was to combine insights from empirically-based studies by scholars, with discussions of policy options and international programs that engage non-state justice and security provision. This was facilitated by structuring the conference around keynote presentations and plenary sessions that introduced the themes more broadly, followed by parallel sessions that allowed more in-depth discussion and debate.

The work of DIIS on this subject includes a research theme on Justice and Security. It is recognized that the governance of territories, people and resources is a politically contested issue. In the Global South, it is concerned with questions of who controls the security forces and of how conflicts should be solved and justice and security be provided. At the same time, access of citizens to justice and security in their daily lives is held as a precondition for democratization and economic development by the UN, EU and OECD-DAC. The 'Justice and Security' theme explores the political dynamics of justice enforcement and internal security provisions in contexts where the regulative monopoly of state law and institutions is challenged by a range of non-state justice and security providers. After a decade of substantial investment in Security and Justice Sector Reforms with an almost exclusive focus on state building, international aid agencies and Southern governments are now increasingly drawn towards engaging non-state actors in various ways. The research theme examines the implementation of such reforms by analyzing the complex and often contested interactions between formal state institutions – the police, courts and administrations – and different types of non-state providers, including vigilante groups, traditional leaders, community courts, youth brigades, and community policing forums. Moreover the research

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focuses on the implications of these shifts for the sovereign authority of the state, access to justice and security, and the establishment of authority at the local level in the south.

IDLO's work program commenced in 2009 and examines the nature and effectiveness of customary justice programming. Over two years, IDLO has undertaken research on the various entry points for engaging with customary legal systems. It aimed to identify lessons learned from programming undertaken to date and develop responses to some of the more difficult questions left unanswered in the theoretical discourse. This knowledge has been collated in a series of publications intended to provide guidance to international and national actors on the potential role of customary justice systems in fostering the rule of law and access to justice in post-conflict, post-disaster and development contexts. A secondary aim has been to provoke thought among practitioners about the objectives of customary law interventions, to encourage critical assessments of the criteria on which programming decisions are made, and to provide tools to assist in gauging the extent to which interventions are having a positive impact.

This electronic volume forms part of a wider project by IDLO on legal empowerment and customary justice, and is situated within a portfolio of legal empowerment research focusing on gender, customary land titling, traditional knowledge and microfinance.

Introduction: Non-state and Customary Actors in Development Programs

Peter Albrecht and Helene Maria Kyed*

INTRODUCTION

Most people in the world do not take it for granted that state institutions such as the police and courts can or will provide justice and security for them. Written by practitioners and academics, the contributions to this volume suggest that international development programming should focus on 'what works' and what is seen as legitimate justice and security, rather than on 'what ought to be', based on Western normative frameworks. This means engaging with the variety of justice and security actors that already exist and are used by local citizens, rather than trying to create entirely new providers or solely supporting those that play a limited role at the local level. It also means accepting that while wholesale change is not possible, gradual improvement of the scope and quality of justice and security provision is. In the majority of contexts this further implies a move away from a state-centric approach that focuses predominantly on formal state institutions. The crux of the matter is that non-state actors, such as customary leaders, are the primary providers of justice and security in the Global South and deal with an estimated 80 to 90 percent of disputes.¹

During the past decade, international development agencies have indeed begun to include 'non-state providers' or 'informal justice systems' in their programs to

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¹ Such estimates appear in most policy-related literature on informal or non-state justice, see for example: Organisation for Economic Co-operation and Development (OECD), *Enhancing Security and Justice Service Delivery* (2007) 6; United Nations Development Programme (UNDP), *Community Security and Social Cohesion. Towards a UNDP Approach* (2009) 9. See also L Chirayath, C Sage and M Woolcock, *Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems* (July 2005), 2, available at http://siteresources.worldbank.org/INTWDR2006/Resources/477383-1118673432908/Customary_Law_and_Policy_Reform.pdf; USAID, *Field Study of Informal and Customary Justice in Afghanistan and Recommendations on Improving Access to Justice and Relations between Formal Courts and Informal Bodies* (2005), Washington DC: USAID.

improve access to justice for the poor and marginalized.² This relatively new focus covers programs in conflict-affected countries such as Afghanistan, in fragile and peacebuilding contexts such as Nepal, and in stable young democracies such as Ghana. All three countries are analyzed in this volume, illustrating the variation of contexts in which non-state justice and security provision is prevalent.

Today most international resources are, however, still invested in the establishment or reform of formal state institutions based on a Euro-American state-centric model of law and bureaucratic structures.³ This limits donors' ability to engage with a diversity of organizations and with alternative, yet locally legitimate, notions and practices of justice, including the processes of contestation that surround them. Therefore, even though donor agencies acknowledge that balanced support must be given to informal, customary and national systems of justice and security provision, they still face a number of dilemmas and challenges.⁴

Indeed, in a number of states donors question whether the government has the political will to take over the role and function of all providers of justice and security operating at the local level. At the same time, however, it is maintained that state agencies must deliver their services within national standards and guidelines, and in turn that they must reflect international norms and standards, particularly in relation to human rights, corruption and equal opportunities. This remains a fundamental oxymoron of many justice reform programs: on the one hand they acknowledge that it is unclear whether the government in question has the political will, and on the other hand they maintain that security and justice should be provided by state institutions according to national and international norms and standards. The question therefore remains: who will enforce national and international norms and standards if there is no or limited political will or capacity within a national government to enforce such standards?

A core argument of this volume is that there is a need to rethink the Euro-American state-centric model, if people's access to justice and security is to be improved. This is based on the view that in the foreseeable future it is not realistic that the state alone will be able to provide sufficient justice and security to the population.⁵ Moreover, empirical evidence suggests that even if state institutions could cope with the case load, it is not likely that the kind of justice they provide according to rule of law principles would fulfill the justice needs of

² See for example Department for International Development, *Non-state Justice and Security Systems*, DFID Briefing (2004); Organisation for Economic Co-operation and Development (OECD), *Handbook on Security System Reform – Supporting Security and Justice* (2007); DANIDA, *Informal Justice Systems*, How to Note (2010); OHCHR, *Rule-of-Law Tools for Post-conflict states: mapping the justice sector* (2006), New York & Geneva.

³ V Boege, A Brown, K Clements and A Nolan, 'On Hybrid Political Orders and Emerging States: State Formation in the Context of Fragility', *Berghof Handbook Dialogue No. 8* (2008), Berghof Research Center for Constructive Conflict Management, available at http://www.berghof-handbook.net/documents/publications/boege_et_al_handbook.pdf; S Sundstøl Eriksen, 'State failure' in theory and practice: the idea of the state and the contradictions of state formation', in *Review of International Studies* (2011), 37, 229–247.

⁴ M Weilenmann, 'Legal Pluralism – A New Challenge for Development Agencies', in Penal Reform International and Bluhm Legal Clinic, *Access to Justice in Africa and Beyond: Making the Rule of Law a Reality* (2007), South Bend: National Institute of Trial Advocacy.

⁵ See E Scheye and L Andersen, 'Conclusion: Toward a Multilayered Approach to Security', in Louise Andersen et al (eds), *Fragile States and Insecure People? Violence Security and Statehood in the Twenty-First Century* (2010), New York: Palgrave; B Baker, *Multi-Choice Policing in Africa* (2007), Nordic Africa Institute; B Baker, *Security in Post-Conflict Africa: The Role of Nonstate Policing* (2009), Boca Raton: CRC Press; P Albrecht and L Buur, 'An Uneasy Marriage Non-State Actors and Police Reform,' in *Policing and Society*, vol. 19, no. 3, pp. 390-405.

many poor and marginalized groups in the Global South.⁶ To improve access to justice there is a need to explore alternatives, beyond 'fixing' failed state institutions.

The first step in doing so is to pursue in-depth knowledge of the empirical reality across different contexts, focusing less on identifying where and how state institutions can be 'built', and more on what is actually prevalent on the ground. Thus, we argue that international programs need to become better at deepening their understanding of: 1. Who the local providers are, which may or may not include state institutions; 2. Which justice and security mechanisms are available; 3. How provision is experienced by different groups of local users; and 4. What these groups see as legitimate forms of justice and security. Moreover, instead of trying to identify what is state and what is not, a task that oftentimes is not possible, programming should take its point of departure in who provides justice and security, and how providers are linked to each other.

Context-sensitive and evidence-based programming is therefore crucial. In many situations, this means that support should be given to a broad spectrum of organizations, and that a pluralistic framework should be applied, building on 'what already works'. In turn, such an approach would support the evidence that state institutions at the local level tend to work more efficiently when they are shaped according to local justice needs and when they collaborate with local non-state providers. As demonstrated in this volume, there is a great empirical variety from locality to locality, and by extension there is no single response to these issues.⁷

Another key argument of this volume is the need to bring politics into the center of program design and implementation. Justice and security provision are not simply technical fields that require technical solutions. They represent political arenas where issues of power, resources and rights are at stake. Not only do providers often compete with each other over clients and authority, justice and security provision are also frequently subject to the political interests of others. Whatever framework of support is chosen, it will therefore involve political choices and have political implications. Thus, programs must to a greater extent be embedded in the wider context of specific political relations than has hitherto been the case.⁸ Along similar lines, we argue that in the promotion of human rights, donors must engage with broader processes of social change. Such an approach will carry more weight than a narrow focus on change of the formal or informal justice systems.

This volume deals with such complexities of international programming and implementation. All the chapters center on this theme and explore cross-cutting themes such as gender, cases of program implementation, and contexts in which a variety of actors are involved in providing justice and security. The contributions represent a collection of papers presented at the 2010 Copenhagen conference: *Access to Justice and Security – Non-State Actors and the Local Dynamics of Ordering*.⁹ In the remainder of this introduction we provide a short

⁶ See D Isser, S C Lubkemann and S N'Tow, *Looking for Justice: Liberian Experiences and Perceptions of Local Justice Options* USIP, George Washington University, and CSAE (2009).

⁷ Vera Institute of Justice, *Measuring Progress towards Safety and Justice: A Global Guide to the Design of Performance Indicators across the Justice Sector* (2003), available at: http://www.vera.org/download?file=9/207_404.pdf.

⁸ See for instance V Maru, 'Between Law and Society: Paralegals and the Provision of Justice Services in Sierra Leone and Worldwide,' in *Yale Journal of International Law* (2006), vol. 31, 427-476, 429.

⁹ The conference was held in Copenhagen on 1-3 November, 2010, and was supported by the Ministry of Foreign Affairs of Denmark with additional funding from International Development Law Organization (IDLO).

outline of the contributions and explore some of the key challenges and dilemmas of supporting plural legal orders, centering on the key arguments of the volume presented above. We point to the ambiguity of using the term 'non-state', given the fundamental empirical variety from locality to locality in terms of who in fact provides security and justice. With this in mind, we turn to an exploration of how plural legal orders, and the providers representing them, are incorporated into the policies of donor agencies. It is argued that while the concepts of customary justice and 'non-state actors' have crept into the donor discourse, 'state building' remains the preferred concept.

We conclude this introduction by noting that long-term, flexible and context-sensitive international programming poses a number of challenges for donors, including some of a normative nature. As Chopra and Isser note in this volume, alternative paradigms of justice offered by local communities are regarded by international actors as desirable only to the extent that they offer accessible remedies in ways that do not contravene international standards of rule of law and human rights. The recognized advantages tend to be outweighed in the minds of many development actors by the perceived failure of informal systems to comply with these norms.

1. The contributions

Following this introduction, Tanja Chopra and Deborah Isser argue in Chapter 1 that the growing interest in informal justice systems has been one of the most significant trends in recent justice reform efforts in fragile states and developing societies alike. However, this recognition has far outpaced change in strategies and programming of donor agencies. Looking at women's access to justice, the authors maintain that the two most dominant approaches currently used are flawed. Taking formal or informal systems as an entry point, donor agencies often assume that these systems can be 'fixed' into desired and known 'end-states' through legal and capacity building support. What this does not take into account, Chopra and Isser argue, is that neither system exists in isolation from the underlying socio-economic, cultural and political context that determines very real inequality and power asymmetries. In their chapter, the two authors present an alternative way of problematizing women's access to justice and corresponding ways of addressing inequality. Rather than focusing on selection, promotion or change of the formal or informal justice systems, interveners need to embrace processes of social change as the means of instituting legal change.

With a particular focus on the support to peace operations, Bryn Hughes argues in Chapter 2 that the international community must shift its focus on finding technical solutions to what are fundamentally political problems. In order for external assistance to obtain sustainable results, it must be guided first and foremost by the determinant fluid interests, power and legitimate forces on the ground. Hughes maintains that these forces exist within a complex social system whose interactions determine the outcomes. This reality does not lend itself to prediction by even the most sophisticated social science technologies. It is argued that a big part of the challenge for the international community is to accept that what results from an intervention may not approximate the Western liberal democratic model. In turn, international actors should not be forced to abandon or violate their own politics. Rather, Hughes argues, what emerges cannot be stifled by the model of a sovereign state or by liberal universalism. The pursuit of a political order that seeks to combine Weberian concepts of the state and traditional or customary institutions may provide a compelling alternative. However, this approach will only succeed when local notions of order are accommodated.

Focusing on the nexus between the international community, Afghan state actors and informal actors, Noah Coburn explores in Chapter 3 how the presence of the international community has begun to reshape the relationship between the formal and informal justice sectors in Afghanistan. Many of these programs have not been running long enough to create lasting results. However, some results can be seen in the initial phases of these programs. First, informal dispute mechanisms are highly politicized and adapt to changing political conditions. Second, international efforts to engage informal systems have been too reliant on Western, state-oriented paradigms of ordering society to be effective at increasing access to predictable justice in Afghanistan. Third, local actors have taken advantage of these shortcomings to increase their own political capital, often at the expense of local stability.

In Chapter 4, Catherine Fearon explores the order and interaction of a number of state and non-state actors at the district level in Helmand Province. A key argument is that although the numerous groupings of justice providers regularly engage in dispute resolution individually, it is more common to find a combination of the five groups of providers involved in resolving a given dispute. For the most part, the involvement of different providers is driven by 'whatever works' for the disputants and the providers. Fearon concludes that what she refers to as an 'a la carte approach to justice' implies three insights on dispute resolution in Helmand Province. First, for the Afghans in Helmand, an essential survival tool is that of being on the winning side. In a very pragmatic sense, whoever is the provider of security or justice is of less relevance than the fact that security or justice is provided, and that local Afghans enjoy protection and relative safety. Second, justice provision is inextricably linked with local power structures, and third, pragmatism is a key driver in dispensing justice.

On the basis of programming in Pakistan, Cassandra Balchin explores in Chapter 5 the impact of strengthening international programming on access to justice for the poor and for women. She welcomes that multilateral and bilateral development agencies are moving beyond a state-centric approach to justice and have begun to recognize the role that non-state legal orders play in people's lives as justice and security providers. However, Balchin suggests that the past decade of justice programming by donor agencies raises a number of concerns that appear common across regions with respect to their impact on access to justice for marginalized groups, women in particular. The chapter details these concerns, which are caused largely by the existence of plural legal orders. This is illustrated by the case of the Musalihat Anjumans (literally 'Reconciliation Forums') introduced since 2001 by the Pakistan government under a United Nations Development Programme (UNDP)-assisted decentralization program.

In Chapter 6, Matthew Zurstrassen uses research on dispute resolution processes in Maluku and Aceh provinces, Indonesia, to present an alternative framework for conceptualizing local-level dispute resolution actors. It is highlighted how local-level institutions, and in particular village government officials, play an important role not only in resolving disputes, but also in facilitating the interface with more formal state institutions. This interface is not always characteristic of competition between state and non-state actors, and indeed, as Zurstrassen suggests in his exploration of the legitimacy of local-level actors, insisting on pure categories of either 'state' or 'non-state' is not a fruitful approach. A more accurate description would be to view the range of actors as lying along a spectrum between the formal state and the purely informal. This conceptualization has at least three distinct advantages over defining providers as being either 'state' or 'non-state'. First, it helps to better acknowledge the complex interactions that occur between dispute resolution actors. Second, categorizing actors as one or the other fails to

adequately take into consideration the context in which such actors operate. And thirdly, it is vital to acknowledge that state recognition and the accountability of village level actors are two separate issues. Although village level dispute resolution actors may receive recognition from the state, they predominantly operate beyond the purview of the state.

In Chapter 7 Richard Crook and Kojo Asante explore the degree of public trust in and the legitimacy of public judicial institutions in Ghana, and by extension how these institutions underpin the legitimacy and trustworthiness of the state itself. They challenge a common understanding among some scholars and policy makers that the general population most often defaults towards the non-state if they have a choice. Based on a large survey and qualitative data, the chapter provides an empirical investigation into what kinds of state or state-supported justice institutions in African states might provide such legitimate, effective and accessible dispute resolution. They also ask what might explain any positive outcomes. The chapter challenges the dominant assumption in much of the academic literature that most Ghanaians prefer going to the institutions of the chieftaincy, simply because they pay respect to them. Crook and Asante make a strong case that the first instance state courts in Ghana, the magistrate courts, do present a form of justice which corresponds with popular understandings of justice and fairness. In addition, they offer the certainty and enforceability of remedies which people want, if attempts to find amicable settlement have failed. Indeed, they argue, state courts and agencies have been too readily dismissed in favor of so-called 'informal' solutions to the need for better and more legitimate forms of public dispute settlement.

Lars Christensen and René Taus Hansen analyze in Chapter 8 the current context in which justice and security in the Terai region in Nepal is provided due to the conflict from 1996 to 2006. They distinguish between the state on the one hand, and non-state 'spoilers' and 'providers' of security and justice on the other. In their discussions, they outline the major shifts and roles of non-state actors over time and establish a framework for understanding these dynamics. In the Terai, a post-conflict breakdown of law and order is slowly being brought under the control of the state, but the state is still unable to fully deliver basic security and justice to the population. In the interim, the security vacuum has been filled by criminal armed groups and politically motivated actors. Old and emerging elites are resilient and maintain the status quo. The inherent inequality in the system means that marginalized communities find it close to impossible to change the system of justice delivery. Hence, an informal alliance between police, politicians and criminals determine the order of justice and security. The opportunities for change, Christensen and Hansen argue, lie with stakeholders in the justice and security nexus that counter the patronage systems. These include the mediation and paralegal services, which have not yet been penetrated by political and criminal interest. They have the potential to influence communities, as the mediators have been known to influence state-sanctioned justice provision and traditional authorities in a positive way.

In Chapter 9 Mette Nielsen explores the case of international programming in Helmand in Afghanistan from a practitioner's point of view. She particularly looks at the conceptual challenges that international actors face when they work with community-based justice mechanisms. Above all, these include an inadequate understanding of the context in which programs are implemented, which in the past was due to the fact that headquarters did not pay sufficient attention to experts in the field. Another challenge has been that community-based actors fluctuate in the way they apply legal principles, and that the justice system comprises numerous actors who link up in a myriad of ways. Relationships between these actors are complex and vary from location to location and from

case to case. By definition, Nielsen argues, community-based justice mechanisms only work when they work for the community. Moreover, she challenges the conception among some international donors that community-based mechanisms are only necessary in the absence of a stronger statutory sector. However, in all societies there are issues to be discussed and disputes to be settled within the community.

Above all, the contributions to this volume suggest the complexities of dealing with plural legal orders in donor-supported programming. The chapters provide insight into the inherent politics of justice provision and programming, and point to the fact that what is partly at stake is the necessity of social change. Therefore, there is no need for technical solutions, because, ultimately, human rights violations and uneven access to justice are not technical problems. The contributions are all good examples of the importance of an in-depth understanding of how plural legal orders operate. By extension, it is on the basis of such an understanding that programming should be formulated and implemented.

2. Terminology – the difficulty of definitions

The concepts of 'non-state' and 'informal'¹⁰ are often used in policy guidelines and program documents of donor agencies to describe locally anchored institutions or systems providing access to justice for the poor and marginalized.¹¹ While such concepts can be useful in describing situations where formal state institutions and laws co-exist with numerous other providers and laws, making up what we refer to as 'plural legal orders',¹² they are also inherently problematic. This is due to the distinction that they reproduce between the state and the non-state, and between formal and informal justice actors.

De facto and *de jure*, the reality is that in many instances what is referred to as non-state justice and security providers constitute essential elements of or are integral to state institutions. Johnston for example uses the concept of 'hybrid' policing to conceptualize the many policing activities that cross the boundary between what is conventionally referred to as state and non-state, thereby challenging the dichotomy.¹³

As Zurstrassen argues (this volume), these actors should be seen as lying along a spectrum where legitimacy is derived from a number of sources, including legislation, local government and community legitimacy.¹⁴ Zurstrassen suggests that defining dispute resolution actors in this way better represents the complexities of dispute resolution processes, where multiple actors, and their source of legitimacy, overlap and interact.

In sum, it is therefore significant to recognize the conceptual and historically embedded debates about appropriate terminology not only with respect to

¹⁰ See for example Department for International Development, *Non-state Justice and Security Systems*, DFID Briefing (2004); Organisation for Economic Co-operation and Development, *Handbook on Security System Reform – Supporting Security and Justice* (2007); DANIDA, *Informal Justice Systems*, How to Note (2010).

¹¹ See International Council on Human Rights Policy (ICHRP), *When Legal Worlds Overlap: Human Rights, State and Non-State Law*, ICHR (2009), Geneva, available at <http://www.ichrp.org/en/zoom-in/when-legal-worlds-overlap>

¹² In agreement with a 2009 ICHR report, we find it useful to apply the concept of plural legal orders to describe the "contexts where a specific dispute or subject matter is governed by multiple norms, laws or forums that co-exist within a single jurisdiction." See ICHR, above n 11, iii.

¹³ L Johnston, *The Rebirth of Private Policing* (1992), London: Routledge.

¹⁴ On this topic see also C Lund, 'Twilight Institutions: Public Authority and Local Politics in Africa', in *Development and Change* (2006), 37 (4).

relations between 'state' and 'non-state', but clearly also to the way in which the concepts of 'informal', 'customary', and 'traditional' are used. What unifies them is that they refer to forms of dispute resolution not being an integrated part of the *formal* court systems.¹⁵ Furthermore, they have a certain degree of stability, institutionalization and legitimacy within a designated constituency.¹⁶ In this volume, we use the terms interchangeably to refer to a broad range of community-based dispute resolution practices that are distinct from, although interlinked with, a state-sponsored formal justice system.

As evidenced in the contributions to this volume there is a great contextual variety in terms of who provides security and justice. Non-state providers may include traditional or customary authorities, community-based policing groups, restorative justice and mediation organizations, work associations, and so forth. How they operate and the quality of the services they deliver depend on historical, socio-cultural, economic and political factors, and their relationships to the state differ widely. There may be full recognition and close collaboration, limited partnership, unofficial acceptance, competition, and even open hostility. This variety makes the very concept of 'non-state' ambiguous for international programming.

3. Incorporating non-state actors into policies and programs

For at least a decade, policies around justice and security programming have grappled with how to engage non-state actors.¹⁷ Although still not necessarily reflected in programs, as Chopra and Isser highlight (this volume), this focus signals a move away from the state-centric model of justice and security sector reform that dominated past policies. Chopra and Isser point out that the policy focus on non-state actors or informal systems can partly be seen as a response to the poor track record of interventions aimed at transforming formal justice institutions into well-functioning systems that meet Western rule of law ideals. It is also an effort to accommodate what is now recognized as an empirical fact that cannot be ignored, namely that non-state actors or informal systems are the primary locus of dispute resolution. Thus, the shift in focus can also be seen as reflecting a genuine wish to be sensitive to the context that international development agencies are ultimately trying to change.

The perceived need to engage informal systems in justice reform policies and programs due to their greater accessibility, proximity to local norms and conceptions of justice was, as Chopra and Isser note (this volume), promoted in the first major United Nations report on post-conflict rule of law efforts in 2004.¹⁸ More recently, the high-level Commission for Legal Empowerment of the Poor has included a focus on non-state or informal justice actors.¹⁹ Equally, the United

¹⁵ Here we emphasize *formal* because in practice the judges of formal courts may also apply forms of dispute resolution that merge with or directly draw on those used by so-called informal or customary providers. See for instance H M Kyed, *Traditional Authority and Localization of State Law: the intricacies of boundary making in policing rural Mozambique*, in Jensen S. and Jefferson, A. (eds.) *State Violence and Human Rights* (2009), Cavendish: Routledge.

¹⁶ DANIDA, above n 10, 2.

¹⁷ See L Chirayath, et. al. *Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems* (2005), Washington D.C.: World Bank. UNDP, *Doing Justice: How Informal Justice Systems Can Contribute* (2006), Oslo: Oslo Governance Centre; E Scheye, *Pragmatic Realism in Justice and Security Development: Supporting Improvement in the Performance of Non-State/Local Justice and Security Networks* (2009) Hague: Clingendael Institute.

¹⁸ United Nations Security Council, 'The rule of law and transitional justice in conflict and post-conflict societies: Report of the Secretary-General,' 23 August 2004, S/2004/616.

¹⁹ Commission on Legal Empowerment of the Poor, *Making the Law Work for Everyone. Volume 1* Report of the Commission on Legal Empowerment of the Poor (2008) 63-64.

States Government issued a policy document on Security Sector Reform in 2009, referring specifically to 'non-state providers of justice and security', arguing for the positive role that can be played by "informal and/or traditional justice systems or community watch groups".²⁰

One of the more comprehensive documents written on 'non-state justice and security systems' was produced in 2004 by the United Kingdom's Department of International Development (DFID). It was their first coherent briefing on the issue, and has not, at the time of writing, been updated. It states that security and justice institutions presided over by non-state actors are "critically important in the context of DFID's pro-poor approach to security and justice."²¹ These actors, the note continues, "deal with the vast majority of disputes" and are "widely used in rural and poor urban areas, where there is often minimal access to formal state justice".²² The briefing recognizes that this approach raises broader governance issues. It is therefore neither neutral nor technical, but political. There is often no separation between providing security and justice, on the one hand, and local governance institutions on the other: "[A] person who exercises judicial (or quasi-judicial) authority through a non-state justice system may also have executive authority over the same property or territory".²³

In 2006, the Organization for Economic Co-Operation (OECD) published a report that built on DFID's 2004 definition of non-state actors. It called for what was referred to as a 'multi-layered' approach to reforming actors and institutions that *de facto* provide security and justice.²⁴ The report concludes that statutory as well as non-statutory providers of security and justice should be engaged in reform efforts. This approach, it is stated, "targets the multiple points where service occurs and strengthens the linkages between state institutions and local justice and non-state providers".²⁵

In the OECD *Handbook on Security System Reform*, published in 2007, this line of thinking was consolidated. The report states that a multi-layered approach: "helps respond to the short-term needs of enhanced security and justice, while also building the medium-term needs of state capacity and critical governance structures".²⁶

The multi-layered approach is both one of the most innovative and paradoxical elements of the security sector reform debate as it has evolved since the late 1990s. The 2006 report, which presents the multi-layered approach in its most radical outline, warns that whatever support is provided "to non-state systems [...] ought to be balanced by the establishment of mechanisms to link them to state systems".²⁷ Similarly, the *Handbook on Security System Reform* is preoccupied with the capacity of state institutions. In this sense, the multi-layered approach has become an attempt to extend the scope of state control into areas where its influence is limited or non-existent by means of negotiating relations of sovereignty with existing non-state providers of security. This move

²⁰ US Agency for International Development (USAID), US Department of Defense, US Department of State, *Security Sector Reform* (February 2009).

²¹ DFID, above n 2, 1.

²² *Ibid* 2.

²³ *Ibid* 3.

²⁴ E Scheye and A McLean, *Enhancing the Delivery of Justice and Security in Fragile States* (2006), Paris: OECD.

²⁵ Global Facilitation Network for Security Sector Reform, *Supporting State and Non-state Provision of Security and Justice* (2007), available at http://www.ssrnetwork.net/documents/Events/security_justice_141207/Supporting%20state%20and%20non-state%20security%20and%20justice.pdf, 1.

²⁶ OECD, above n 2, 17.

²⁷ Scheye and McLean, above n 24, 32.

may be viewed as an attempt to reclaim state sovereignty through the incorporation of non-state intermediaries and allies, and not as a means to strengthen non-state elements in their own right. How the state operates and should be operated may be under discussion, but who the hierarchically superior authority should be is not. The latter remains a centrally governed state, preferably with the prefix of 'nation'. As a result, the incorporation of non-state actors becomes an instrument in the state building repertoire.

As a 2009 International Council for Human Rights Policy (ICHRP) report suggests, the international interest in non-state actors has also been driven by a kind of "market-driven approach to rule of law and justice sector reform" where emphasis has been on cost-effectiveness, rather than the quality of justice: "interest in non-state legal orders or ADR [alternative dispute resolution] stems in large measure from the failings of over-burdened state justice systems and the desire to promote a more efficient justice system. The aim has been to free up the ability of formal courts to take on more 'serious' cases, by resolving 'minor' ones in other forums".²⁸ The real danger of this approach is that it tends to focus too much on quantity (that is to say how many cases are dealt with, and how many people can access justice systems) rather than on the quality of the justice provided, including compliance with human rights in procedures and outcomes.

This approach can be contrasted with, and has more recently been substituted by, a stronger focus on reform and compliance with human rights, exemplified by the policies of a number of donors, such as the Danish International Development Agency (DANIDA) and the UNDP. It is also evident in a number of recent comprehensive studies that focus on the relationship between human rights and non-state law or informal justice systems, carried out for instance by the ICHR and the Danish Institute for Human Rights (DIHR), respectively. Moreover, it should not be underestimated that a number of International non-governmental organizations (NGO) have been engaged with legal empowerment projects and programs for quite some time, which have a strong focus on human rights, and which to different degrees engage non-state providers. Such projects tend to focus less on state building, and much more on users' access to justice. At the same time there has been a tendency for such projects to build 'new' hybrid institutions that can more easily fit in with international standards, like community-mediation schemes and paralegals, rather than support already existing providers on the ground.

Timap for Justice in Sierra Leone, for instance, established with support from Open Society, relies on paralegals that are mentored and supported by a small group of lawyers. Their approach is one of negotiating between different legal orders and of empowering individuals and communities to draw upon formal and informal legal systems. Timap activities also include reaching resolution through education and collective action. Bangladesh Legal Aid Service Trust (BLAST) operates in a similar way, prioritizing support to poor and discriminated women, men and children. In addition, it provides legal aid, advice and representation in civil, criminal, family, labor and land law, and so forth.

4. Rethinking the state model – beyond the rule of law

Despite inclusion of non-state actors in programming, 'state building' is still the preferred concept, guiding international donors for both domestic and international political reasons. It is necessary to scrutinize this concept, and in

²⁸ ICHR, above n 11, 116. See also Penal Reform International, *Access to justice in sub-Saharan Africa: the role of traditional and informal justice systems* (2000), 15, available at <http://www.qsdr.org/docs/open/SSAJ4.pdf>.

particular to rethink the Euro-American state model and the stringent rule of law focus, which has dominated the application of it in the Global South. There are at least four core reasons for this.

First, it is not realistic to assume that the dominant Euro-American state model is achievable for this generation or the next in most of the world. As Andersen suggests, state building "will not lead to the establishment of the 'bordered power-container' we know as the Weberian state: The central government in the state-being-built will remain unable to uphold a monopoly on legitimate violence and extend its authority evenly throughout the entire territory of the state."²⁹ A model of state building that centralizes authority in a singular state apparatus and system of law, is not only unrealistic due to resource constraints, but also due to the empirical reality of multiple centers of authority, exemplified by a plurality of institutions, norms and practices that engage in order-making activities (policing, dispute resolution, punishments, distribution of resources etcetera).

Without exception, the contributions to this volume suggest that if this empirical plurality is excluded from programming, a large part of society simply will not be included in efforts to improve access to justice and security. This is not a question of abandoning the state altogether. Albeit unevenly distributed across the national territory, and even absent in some areas outside of a country's capital, the state remains important to most people. Rather, the challenge is to substitute state building in the narrow sense of building the capacity of state institutions and of centralizing authority in one singular unit with a more flexible concept that can encompass the pluralism of local norms and institutions.

Second, it cannot be assumed that the national leadership and the central state institutions are willing to dominate all other organizations within their internationally recognized territory. This is the case even if state officials insist that funding is channeled through the institutions that they represent. More recent literature on security governance argues for a more minimalist state, where a network of providers collaborates and coordinates their activities to improve access to justice and security. This is done while reducing the case load of the state apparatus, but not in theory its responsibility to protect its citizens. The challenge here is the accountability of local, non-state providers to the citizenry, and the need for locally grounded mechanisms to ensure this in light of the limited state capacity.³⁰

Third, the rule of law principles and practices that state institutions apply often do not meet the needs and demands of the users, and it is unlikely that they would even if correctly applied.³¹ This element has to do with differences in conceptions of what is appropriate justice, associated with cultural norms and beliefs, but also with the socio-political conditions that people find themselves in. For instance, poor citizens with no private insurance are more likely to prefer restorative justice, which compensates them for their loss, as opposed to the punitive forms of justice enforced in state courts, which do not consider the victim's needs.³² A

²⁹ L Andersen, *Post-Conflict Statebuilding in Africa: From State Failure to Tacit Trusteeship*, Department for Political Science (October 2010), 29. A similar point was made by Bruce Baker at the November 1-3 Conference in Copenhagen in his paper *Justice and Security Architecture in Africa: The Plans, The Bricks, The Purse and The Builder*.

³⁰ See J Wood and C Shearing (eds.), *Imagining Security* (2007), Devon: William Publishing. M Marks and J Azzopardi made a similar point at the 1-3 November Conference in Copenhagen, with their paper *Rethinking and Reconfiguring the State and Non-State Actors in Making Communities Safer in Africa: A Return to Left Realism?*

³¹ See for instance D Isser, S C Lubkemann and S N'Tow, above n 6.

³² L Buur, 'Sovereignty and democratic exclusion in the New South Africa', in *Review of African Political Economy* (2005), 104 (5), 253-268.

rule of law based system is also characterized by stringent application of law and formalized procedures, as opposed to the flexible and negotiated character of other kinds of justice providers such as customary ones.

Importantly, rule of law approaches to justice and security programming are often too concerned with establishing a single state-legal system. They discredit other available options that are deemed incompatible with a modern state, irrespective of whether these correspond to the values and practical concerns of citizens. In Liberia, for instance, this has led to a 'justice vacuum'. The majority of the population prefers customary courts, but recent policies and laws restrict their jurisdiction and methods. In turn, state institutions lack capacity and popular legitimacy.³³ When rule of law frameworks actually do include locally anchored options there has still been a tendency to tie them into a state-building-oriented process in the sense that a regulating and overseeing state is considered to be pivotal.

Moreover, as Chopra and Isser (this volume) discuss, this framework also underpins a focus on 'codifying and standardizing' the domain of law and justice, even though it is often the flexible, context specific and negotiated elements of justice provision that are attractive to local users. For instance codification of customary law has gathered momentum, an example being the customary law strategy developed by the UNDP and the Ministry of Legal Affairs and Constitutional Development in Southern Sudan.³⁴ The question is whether donors are ready to accept and support justice and security provision that is not considered to be rule-driven, homogenous and universal. A way out of this impasse is to support less top-down and more inclusionary dialogues between users and providers, for the development of shared principles for justice and security provision.

Fourth, the state building framework is strongly informed by attempts to clearly distinguish between what is seen as the 'right' or 'true' state and what is not, that is to say the 'non-state'. This underpins a kind of dichotomous thinking that rarely, if ever, reflects empirical realities on the ground. Normative and practical linkages and overlaps exist between institutions that represent and draw authority from the central state and institutions that generate authority at the local level. Collaboration between providers and competition between them over the authority to provide services are continuous.

Thinking in 'pure', dichotomous categories can therefore underpin false assumptions about different providers and, even worse, lead to a romanticization or idealization of them. Nielsen (this volume), a practitioner herself, talks about these issues in the case of programming in Helmand, Afghanistan. Debates about linkages between the state and community-based justice mechanisms are often centered on the dangers of co-opting perfectly well-functioning community-based mechanisms into state structures that might be seen as corrupt, not well-trusted and even predatory. Within this framework of thinking lies an understanding that such linkages would 'contaminate' something that is 'pure'. However, as Nielsen suggests, this has little bearing on reality because of the extensive linkages that *de facto* exist already.

Thinking beyond the state/non-state dichotomy has real implications for how programs are designed and implemented. It means that donors can begin to look at the networks of providers that link together numerous nationally and locally

³³ D Isser, S C Lubkemann and S N'Tow, above n 6.

³⁴ This case from Southern Sudan was presented by C Leonardi and D Isser at the 1-3 November Conference in Copenhagen in their paper, *The Politics of Customary Law Ascertainment in Southern Sudan*.

embedded legal orders, rather than focus on state and non-state actors as belonging to discrete or even opposed categories. This gives the donors a means to better comprehend and politically navigate between the different levels of the multi-layered or plural state. Also it will allow them to view plural legal orders as an opportunity, rather than a limitation, to improve overall access to justice and security and even to increase the legitimacy of the state, despite the limitations of state institutions. At the same time, transparency and equal application of the rule of law are potentially contentious issues.

In the next section we further address some of the elements that an alternative approach to justice and security support could entail in contrast to the state-centric model.

5. Evidence-based programming and user perspectives

As a 2009 ICHRP report suggests, the “[...] debate about non-state law tends to be conceptual rather than empirical and is therefore dominated more by ideology than a real understanding of the ways in which remote and marginalised communities deal with governance and resolve their disputes”.³⁵

Although the current donor discourse on ‘context sensitivity’ supports the need for evidence-based programming, many programs continue to build on apparent commonsense assumptions and stereotypes about non-state, informal or customary legal orders.³⁶ DFID’s briefing note on *Non-State Justice and Security Systems* confirms the importance of commitment to a ‘pro-poor approach’. It emphasizes the need for evidence-based research into the outcomes of reforms of non-legal orders and presents a useful “checklist for appraisals” of non-state legal orders.³⁷ The checklist notes the importance of asking questions regarding efficiency and fairness of the system supported, accountability to users, inclusiveness and existing linkages between different actors.³⁸

Empirical analysis of the actual practices and experiences of justice and security provision will shift the focus from ‘who ought’ to be the providing institutions to ‘what works’ for the users of these systems. The contributions to this volume suggest that such analysis needs to be much more oriented towards the perspectives and justice experiences of the users than has hitherto been the case. Programs must also be embedded in a wider understanding of specific social political relations. This is part of a broader shift away from the institutional or ‘systems’ approach that has dominated the state building agenda. This agenda has focused on reforming the providers, or more precisely, ‘the systems’ that they represent in accordance with international frameworks, rather than being based on empirical understanding of the needs and demands of the primary target groups of donors: the poor, the vulnerable and the marginalized. This is reflected in the studies commissioned by donors, which overall have tended to focus on describing distinct ‘systems’ of justice and outlining their strengths and weaknesses in relation to international standards.³⁹ Evidence in the chapter by Fearon (this volume) by contrast suggests that in Afghanistan users involve different providers based on ‘whatever works’ in a given situation, rather than on the kind of system they represent as such. Chopra and Isser (this volume) show that when justice support begins with an empirical understanding of how women

³⁵ ICHRP, above n 11, 118; see also Balchin’s contribution to this volume.

³⁶ ICHRP, above n 11, 119-121; Benda-Beckmann *et al.* (2002-2003), in ICHRP, above n 11, 301.

³⁷ DFID, above n 2.

³⁸ *Ibid.*

³⁹ See for instance: UNDP, *Doing Justice: How Informal Justice Systems can Contribute* (2006), Oslo: Oslo Governance Centre.

use and experience the justice options available to them, far more complex and nuanced means of navigating legal pluralism in search of justice are revealed. They are not irreducible to the notion of distinct 'systems'.

Methodologically, evidence-based programming that is user oriented implies that designs are based on in-depth assessments of what justice means to different users and what their preferred choice of providers are. This can be captured through quantitative user-surveys, qualitative interviews, and participant observation. Evidence-based programming also includes thorough mapping of available providers and of the various forms of linkages that may exist between them, for example in terms of *de facto* referral mechanisms, the norms they apply, and the sources of authority they draw on. The key here is also to map out how providers are linked to wider power relations and interests.

Very good examples of such mapping exercises are found in Zurstrassen's and Fearon's contributions to this volume, focusing on Indonesia and Afghanistan, respectively. In these studies representativeness and broad-based participation of users is also very important, thus taking into consideration different group interests and positions. Too often, as a 2009 ICHRP report suggests, have programs been based on shallow studies that only include the voices of the powerful few, whose perceptions of justice and security arrangements may very well serve to reproduce often uneven power relations rather than promote broader access to justice.⁴⁰

In their survey on popular opinion of justice and dispute settlement in Ghana, Crook and Asante (this volume) interviewed no less than 800 respondents randomly selected from two case study districts. They used a multistage, stratified area sample with random selection of households and individuals within households. The questionnaires focused primarily on people's experiences of and opinions about dispute settlement, whether in court or elsewhere, paying particular attention to how people think about fairness, what they value in any dispute settlement process and who and what they find trustworthy.⁴¹

Importantly, genuine evidence-based programming excludes a preconceived understanding of which providers to support. For instance, Crook and Asante's study suggests that in Ghana citizens prefer magistrate courts in many places for certain disputes. Interestingly, this preference is partly due to these courts operating on the basis of informality and negotiation. Thus they are popular because they reflect a long history of adaptation to Ghanaian society and because they are not, as in Afghanistan and Liberia, viewed as externally imposed institutions.⁴²

What these observations also point to is that programs need to take historical and wider contextual factors into account, including legislative legacies, such as colonial legal arrangements, and histories of war or armed conflict as well as contemporary levels of fragility and stability. Justice systems and policing groups, whether state or non-state, are not isolated from, but intimately embedded in wider socio-political relations and are the product of historical reconfigurations.

Crook and Asante (this volume) for instance assert how even a brief acquaintance with the history and culture of the Akan and other kingdoms in Ghana would suffice to counteract the conventional descriptions of customary justice,

⁴⁰ ICHRP, above n 11, 126.

⁴¹ The United States Institute for Peace (USIP) carried out a similarly comprehensive study in post-war Liberia, however with more emphasis on qualitative data collection. On the methodology used here, see D Isser, S C Lubkemann and S N'Tow, above n 6, 14-17.

⁴² On Liberia see, D Isser, S C Lubkemann and S N'Tow, above n 6, 47.

particularly with respect to their emphasis on restorative justice. The powerful hierarchies of these polities were not only consolidated, but further strengthened under the colonial indirect rule system and the native courts played a particularly important role in the development of judicially-recognized customary law. Nonetheless, the kinds of procedures and values which were taken up in the native courts have been forgotten. In short, stereotypes of traditional chiefly justice as being predominantly about reconciliation have had a tendency to romanticize the role of customary authorities vis-à-vis state institutions, essentially due to lack of a wider contextual and historical understanding of the subject matter.

It is evident that in-depth evidence-based programming is time-consuming and costly as it covers large territories – not simply ‘pilot areas’. It takes into account variations across and within localities regarding different groups of people and their respective experiences and views. However, it is a worthwhile investment to ensure program success. Support given to local research capacity and joint donor analysis can be important ways of reducing costs, and can feed into monitoring and evaluation as well as help to ensure sustainability. However, research should not only be used to inform donor programming, but as a powerful tool of empowerment and contestation with respect to changing the inequalities in society that are also reproduced by justice systems (see Chopra and Isser in this volume).

6. Process rather than ‘end-state’ – ensuring sustainability and local ownership

Donors often design and implement programs with a particular end-state in mind and emphasize the creation of specific standards and certain types of institutions. This tendency can be seen as one of the reasons why non-state providers have been excluded or ignored in many programs in the past, namely, because they do not fit the specific standards of donors. However, even when non-state providers are included today, the emphasis on end-states often still prevails. The result is that the entry point for reform becomes the ‘systems’ or institutions in themselves, which are seen as constituting both the problem and the solution. Intervention consequently becomes a question of either excluding ‘flawed’ systems, and substituting them with new ones, or ‘fixing’ them so they fit desired and known end-states through legal and capacity building support (on this point see further Chopra and Isser in this volume).

As Hughes notes (this volume), such ‘fixing’ by applying largely technical tools and discourses ignores the socio-political and cultural context in which ‘systems’ are deeply embedded. As a result, ‘fixing’ is assumed to be something that can be done over a relatively short period that is to say within the lifetime of an international program. According to several of the contributions to this volume, this institutional or systemic approach risks being highly unsustainable, because it does not engage with processes of social and political change. More problematically, technical support to ‘systems’ and the actors inhabiting them can also have a negative impact on those disadvantaged groups that donors seek to support in the first place. Programs do not challenge, but may actually support underlying relations of power, as Chopra and Isser (this volume) show with regards to women’s access to justice.

A focus on the correct standards and institutions has commonly led donors to support the establishment of new hybrid solutions, rather than work with existing ones, such as customary courts, traditional leaders or elders. This is because the latter category of actors is seen as too problematic from the perspective of

international standards. New hybrid solutions, alternative dispute resolution (ADR) institutions, can by contrast be trained in human rights from the outset, while also drawing on those local norms and customs that do not violate human rights. They represent a 'fresh' beginning, so to speak, that is sensitive to local notions of justice and adhere to international standards. Examples of this is the NGO-operated community mediation schemes and paralegals like the *Musalihat Anjumans*, 'Reconciliation Forums', in Pakistan (Balchin in this volume), and the district level justice sub-committees in Afghanistan (Nielsen in this volume).

'New' hybrid solutions such as the justice sub-committees represent alternative justice options, which could potentially give vulnerable groups a means to opt out of the systems that discriminate against them, whether state or customary, or that do not deliver sufficient justice. In the long run such new solutions also hold the promise of being alternative sources of power (see Chopra and Isser, this volume), which may even contribute to wider socio-political changes. However, they also raise important questions about sustainability, especially in situations where 'older' providers are ignored, if not outright criminalized or excluded. For instance, while 'new' hybrid providers might fit international standards, they also have the potential to exclude already available local providers, such as the community elders or chiefs. This is not necessarily a negative outcome, but inevitably it touches on issues around local politics. Moreover it must be realized that in some cases, competition between 'new' providers and state institutions can develop with one refusing to acknowledge the judgments of the other, or only reluctantly doing so, thus compromising disputants' access to justice.

Legal orders are the result of ongoing socio-political contestations over norms and institutions that go beyond the orders themselves. It is unproductive, and indeed unsustainable, to ignore these processes by imposing standards from the 'top' or from the 'outside', and by focusing only on creating new or fixing old institutions. Donors should have an honest debate internally about how to strike a balance between what they often consider non-negotiable standards, such as human rights, and the space for local notions of justice and needs. Local ownership is in turn dependent on broad-based and participatory dialogue about what standards for justice and security provision might look like and how they can be monitored. Donors are in fact in a good position to facilitate such dialogue, not simply 'within' systems, but across the multiplicity of actors engaged in providing justice and security, and among the users themselves. In Somaliland, for instance, the Danish Refugee Council supported the organization of inclusive dialogue meetings. They involved clan elders, community and ministerial representatives as well as international and local NGOs. A number of solutions were discussed on how to promote human rights, build linkages between providers and create a plural system. Solutions included referral mechanisms between customary authorities to protect vulnerable groups.⁴³

In sum, rather than focusing only on legal reforms of isolated systems or institutions with a particular end-state in mind, donors should support constructive processes of social change.

7. The centrality of politics

Even when donors appreciate the centrality of politics in the programs they design and implement, it remains a challenge to think beyond the logic of a state bureaucratic framework. Many donors are also reluctant to explicitly engage in

⁴³ This Somaliland case was presented by Louise Wiuff Moe at the November 1-3 Conference in Copenhagen in her paper *Exploring Issues of Legitimacy and Interaction across Difference. The Case of Somaliland – and beyond*.

political issues. At worst, this can lead to programs that leave out or ignore the very politics that they engage with by formulating issues in technical terms.⁴⁴ Moreover, there has been a tendency to separate justice and security provision from politics *per se*. The Euro-American state model informs this separation, which emphasizes an ideal separation of the police and courts from political interests. Such a separation rarely exists empirically.

Any justice system is ultimately the product of specific, historically and culturally embedded power relations, which fundamentally makes the system part of the political, as Hughes (this volume) points out. Empirical evidence also suggests that justice and security providers may become political actors in their own right – that is to say run for parliament or become a local big man. Moreover, providers are often enlisted by other actors into their political projects.⁴⁵ This is not confined to developing societies and fragile states, but tends to be more widespread where the police frequently protect specific political interests, and where customary leaders are often compelled into mobilizing votes for national or local politicians in exchange for other favors. In addition, as Christensen and Hansen (this volume) suggest for Terai in Nepal, a complex relationship exists between the state and non-state ‘spoilers’ on the one hand and non-state ‘providers’ of justice and security on the other hand, including a large number of civil society organizations, but also armed groups, motivated by criminal activity and affiliated with political interests.

Justice – how it is provided and to whom – is a product of broader power relations, and is equally part of (re)producing power relations, manifested, for instance, in unequal access to resources such as land, and to rights such as issues of inheritance.⁴⁶ Thus, justice and security providers can also be significant authorities and power-holders in their own right. At the heart of the issue lies the fact that justice and security provision, and by extension social ordering, are fields where power is contested, authority is reconfigured and constituted, and where different actor interests are at stake over power, resources and ‘clients’.⁴⁷

Such politics also manifests itself in competition between different providers, whether state or non-state, over the power and resources that accrue from policing and dispute resolution functions. Such competition is one of the key characteristics of contexts with a high plurality of legal orders. Therefore, as Hughes suggests (this volume), donors need a deeper understanding of ‘the political’, of how politics operates in a given society. Moreover, as Chopra and Isser highlight (this volume), in such contexts local norms, socio-political realities and power structures mediate how people navigate between the different norms and institutions of justice that are available to them. At times users can take advantage of the competition between providers in search of better justice outcomes, but research also suggests that it is often the most powerful groups and individuals that benefit from such strategies.⁴⁸

⁴⁴ See S Byrne et al., *Decentralisation and Access to Justice* (2007). Fribourg: International Research and Consulting Centre Series; T Barfield, N Nojumi and J Alexander Thier, *The Clash of Two Goods: State and Non-State Dispute Resolution in Afghanistan* (2006), Washington DC: Unites State Institute for Peace.

⁴⁵ See H M Kyed, ‘The Politics of Legal Pluralism: State Policies on Legal Pluralism and their Local Dynamics in Mozambique’, in *Journal of Legal Pluralism and Unofficial Law* (2009), no. 59, 87-120.

⁴⁶ This point was for instance made by Anne Griffiths at the 1-3 November 2010 Conference in Copenhagen. Her paper had the title: Legal Pluralism and the Changing Gendered Dynamics of Land Tenure in Botswana.

⁴⁷ B Z Tamanaha, ‘Understanding Legal Pluralism: Past to Present, Local to Global’, *Sydney Law Review*, (2008), 30(3): 375-411; H M Kyed ‘The Politics of Legal Pluralism: State Policies on Legal Pluralism and their Local Dynamics in Mozambique’, in *Journal of Legal Pluralism and Unofficial Law* (2009), no. 59, 87-120.

⁴⁸ See Chopra and Isser, this volume; H M Kyed *State Recognition of Traditional Authority. Authority, Citizenship and State Formation in Rural Post-War Mozambique*, (2007), PhD dissertation, Roskilde

The political dynamics of justice and security provision should directly impact on how programs are designed. As Hughes (this volume) suggests, such dynamics should be the target of programs, if any kind of sustainable change is to be achieved. This implies, Hughes argues, that international agencies gain a 'political consciousness' of the contexts in which they operate, which means understanding and working with existing sources of power and legitimacy, and the social orders they enable. Central to program design is a thorough analysis not only of the relations of power that operate at and across the local and national levels, but also of the socio-cultural values that inform them.

Importantly, donors must consider the political role that they themselves inevitably play when engaging in justice and security sector support. The choice of supporting certain providers and agendas over others is in itself deeply political. A key challenge is the opposition that donors meet from state leaders and officials who may fear losing access to political and economic resources, if funding to state institutions is reduced to the benefit of other providers or simply shared with them. Furthermore, donors should be aware of the risk that national leaders often try to benefit politically from the inclusion of customary leaders into justice sector support, for instance, by capitalizing on their local political power. What donors are well placed to do is to facilitate a process of change through political negotiation where a plurality of actors is considered and included in the dialogue. In doing so donors can also help push the agenda towards improving how ordinary people access justice and security, rather than reform being captured by the political interests of the powerful few. It is both the weakness and strength of donors that they are political actors, and their level of influence with national actors inevitably varies.

The shift from a singular focus on 'state' towards a pluralistic or multilayered approach that includes the 'non-state' has political implications for the programs that are being designed. Everyday life and politics – and by extension justice and security provision – may be shaped predominantly by informal institutions and non-state actors at the local level. At this level they are also often shaped by horizontal networks of power comprising both competing and collaborating actors, such as customary authorities, elected local governments, community paralegals and state officials.

8. Human rights and inequality – engaging with social change and contestation

Grounding programs in 'what works' emphasizes the dilemma that justice and security provision in the Global South is associated with a number of human rights violations, including gendered or other kinds of discrimination and corporal punishment.⁴⁹ Indeed, as Chopra and Isser note (this volume), the practitioner literature on informal systems has largely served to document the various ways in which informal justice systems contradict fundamental human rights standards, such as in the area of gender equality. Simultaneously, as Balchin notes (this volume), while reform towards a national system based on greater recognition of plurality may often be necessary or justified from the perspective of enhancing the effectiveness and scope of justice provision, there is no guarantee that such provision will be human rights compliant.

University; B Z Tamanaha, 'Understanding Legal Pluralism: Past to Present, Local to Global', *Sydney Law Review*, (2008), 30(3): 375-411.

⁴⁹ R Mungoven, Beyond the Courts: Developing Amnesty International's position on non-judicial mechanisms for accountability and redress (2001), AI Index POL 30/003/2001.

It can safely be assumed, however, that human rights violations are often as much the case for the state police and courts as it is for customary providers.⁵⁰ This reflects how human rights violations, and inequalities, are rooted in deeper socio-political structures, which affect both types of 'systems'. Often however, it has been assumed that the root cause of such violations lies within the institutions themselves. Indeed, as Nielsen notes (this volume), the fact that 'community-based justice practices' or customary providers do not always respect human rights is sometimes cited as a reason why engaging with them is too risky. Conversely, it could be argued that such lack of compliance is exactly one of the reasons why international programs should engage with them, that is to say, to promote reform. This is because such providers often offer a platform or entry point from which to engage with local constituencies so as to facilitate a change of discriminatory practices.

More generally, what leads to human rights challenges lies more in attitudes and power relations than within the type of institution itself. Cultural notions of gender roles, social status, and belief systems drive some of the human rights violations occurring in justice and security provision. However, they cannot be divorced from the socio-economic and power relations that sustain inequality in the first place.

The promotion of human rights and gender equality begins by understanding the continuous processes of political contestation and social change through which power relations and rights are mediated. A simple focus on institutions and on prohibiting those practices that violate human rights within them is unlikely to be successful. Rather, the relations of power that underpin inequalities, including those between providers and users, should be the aim of programming. Thus, as Chopra and Isser (this volume) suggest with respect to promoting gender equality in justice provision, interveners need to engage with processes of social change as the means of instituting legal change, instead of focusing only on the selection, promotion or change of the formal or informal justice systems.

The challenge here is to identify key agents of change and to work with human rights objectives that can be realistically obtained by linking up with already ongoing processes of contestation and social change. Empowerment strategies are in this respect valuable, first, because they can help facilitate spaces for constructive dialogue about justice issues where disadvantaged groups, such as women, are heard and enabled to begin to question those local practices and cultural norms that inform their disadvantaged position. Second, empowerment initiatives can contribute to formal rights awareness among vulnerable groups and establish alternative sources of power, such as community paralegals.

Another valuable strategy is to support existing social movements and NGOs that advocate the socio-economic opportunities of women and vulnerable groups. Finally, change can be fostered by working with 'insider' agents of change (see Chopra and Isser in this volume). This implies identifying local citizens who are familiar with the socio-cultural and political contests in a specific locality, who can challenge justice provision in the right spot. To select the right agents of change, however, the context needs to be understood so as not to reproduce discriminatory power relations and cultural norms. These strategies all point to a long-term process as is generally the case for processes of social change in the field of justice and security provision.⁵¹

⁵⁰ On this point see for instance ICHRP 2009, above n 11, 145.

⁵¹ We are indebted to Fergus Kerrigan from Danish Institute for Human Rights (DIHR) for illuminating some of these points on human rights.

9. Donor constraints

Overall, this volume argues for long-term, flexible and context-sensitive international programming, which would pose a number of challenges to how international agencies have operated for a long time. By extension, donors are under various pressures. The international system in which they operate is governed by state-to-state interaction. In itself, this limits how much they can push for alternatives to centrally governed police and court systems. They are also driven by the domestic political agendas and bureaucratic practices in their home countries, and therefore often try to build states along similar lines (operating with frameworks, organigrams, etcetera). Since their funding is derived from taxpayers, donors are relatively risk-averse and have to consider the implications of failure through program experimentation for their constituencies at home. Money is also a challenge to spend due to bureaucratic checks and balances and complex grant-making procedures. At the same time, donors are under pressure to spend their budgets, which means that activity and expenditure are conflated.

Training, conferences and the building of infrastructure are expensive activities, but spending money on the 'non-state' seems not to be.⁵² This is another reason why 'state building' in the narrow sense of focusing on state institutions is often preferred. Impact needs to be articulated, and if success cannot be clearly defined, donors are not able to provide financial support. It is worth being explicit about these limitations so that demands on what can be achieved through external support are set within a more realistic framework. Improved communication of alternative development options in the home countries of donors is worth considering, both within the donor organizations and to the public.

However, the biggest challenge to donor agencies' engagement with a variety of actors in the field of justice and security remains a normative one. As Chopra and Isser (this volume) note: if the dispute resolution practices of local actors are not in line with international standards of human rights and rule of law, they remain hesitant, if not against, engaging them in programming. The crux of the matter is that even when it is accepted that balanced support must be given to both local and national actors within one framework, donors still insist that justice is delivered within national standards and guidelines. In the end, as Chopra and Isser suggest, the recognized advantages of engaging a plurality of justice and security providers is outweighed by the perceived failure of 'informal systems' to comply with these norms. There is therefore a danger that they default back to 'what ought to be' rather than building up programs around 'what works' from the perspective of the users.

⁵² This point about costs was highlighted by several of the practitioners and policy makers, who participated at the 1-3 November 2010 Conference in Copenhagen.

Women's Access to Justice, Legal Pluralism and Fragile States

Tanja Chopra and Deborah Isser

INTRODUCTION

Perhaps the most significant recent trend in justice reform efforts in fragile states and developing societies has been a growing interest in informal justice systems.¹ This trend is partially in response to the poor track record of interventions aimed at transforming formal justice institutions into well-functioning systems that meet the ideals of Western rule of law. It also reflects an effort to accommodate what is now recognized as an empirical fact — in many societies, informal justice systems are the primary locus of dispute resolution for the vast majority of the population, and therefore cannot be ignored. The idea that informal systems should be a key part of justice reform strategies due to their greater accessibility and their reflection of local norms and conceptions of justice was promoted in the first major United Nations report on post-conflict rule of law efforts in 2004.² It is also reflected in guidance papers produced by several donors and international agencies³ as well as the high-level Commission for Legal Empowerment of the Poor.⁴

However, the rhetorical recognition of the importance of informal systems has far outpaced change in strategies or even programming. There are several reasons for this, including a lack of guidance and best practices on how to engage informal justice systems, and the difficulty of shifting from the well-trodden programs aimed at supporting state institutions to more diffuse and complex types of programming (and the lack of the corresponding skill set that requires). But the biggest challenge is a normative one. International actors regard the alternative paradigms of justice offered by local communities as desirable only to the extent that they offer accessible and restorative remedies in ways that do not contravene international standards of rule of law and human rights. Here, the recognized advantages tend to be outweighed in the minds of many development actors by the perceived failure of informal systems to comply with these norms, especially when it comes to women's rights. It is widely assumed that customary systems are based on patriarchal social norms that reaffirm a subordinate role for

¹ The authors recognize the debate on the appropriate terminology as between 'informal', 'customary', 'traditional' and 'non-state'. For the purposes of this chapter, the terms are used interchangeably to refer to a broad range of community-based social regulation and dispute resolution practices that are distinct from, even if influenced by and intertwined with, the state-sponsored formal justice system. See D H Isser, 'Introduction' in D H Isser (ed), *Customary Justice and the Rule of Law in War Torn Societies*, United States Institute of Peace (USIP) (2010).

² United Nations Security Council, *The rule of law and transitional justice in conflict and post-conflict societies: Report of the Secretary-General*, S/2004/616, 23 August 2004.

³ UK Department for International Development (DFID), *Non-State Justice and Security Systems* (May 2004); Organisation for Economic Co-operation and Development (OECD), *Enhancing Security and Justice Service Delivery* (2007).

⁴ Commission on Legal Empowerment of the Poor (CLEP), *Making the Law Work for Everyone. Vol. 1*, Report of the Commission on Legal Empowerment of the Poor (2008) 63-64.

women.⁵ Indeed, the practitioner literature on informal systems has largely served to document the various ways that informal justice systems contradict fundamental human rights standards.⁶

The dilemma this poses has resulted in two primary approaches. The first assumes that informal systems are inherently and irremediably inconsistent with women's rights and therefore the formal system must be the primary, if not the sole forum for adjudicating disputes involving women. This approach calls for strengthening the capacity of the formal system, removing the authority of informal justice providers on these matters, and promoting women's use of and access to formal courts. The second approach seeks to engage with informal systems with the aim of transforming them to comply with international standards, while retaining the positive features of accessibility, familiarity and effectiveness. They tend to focus on training and awareness, introducing formalized approaches, and instituting regulation and oversight.

The first and second sections of this chapter discuss and analyze the limitation of these two approaches. Ultimately, it is argued here, they are flawed in that they both take systems – formal or informal – as their entry point. They assume that these systems can be 'fixed' into desired and known end states through legal and capacity- building support. What this fails to take into account is that neither system exists in isolation from the underlying socio-economic, cultural and political context that determines the very real gender inequality and power asymmetries. Justice institutions and processes are a reflection of the fundamental inequalities in society. While in some cases, focusing on formal legal mechanisms can help correct social inequalities, in others – particularly where the reforms are superficial impositions, and where the legal institutions themselves are not seen as legitimate – it can have the opposite effect. Similarly, efforts to make informal systems embrace gender equality tend to be fruitless unless they engage with deeper processes of social change.

The third section presents an alternative way of problematizing women's access to justice and corresponding ways of addressing the inequality. Rather than focus on selecting, promoting or changing the formal or informal justice systems, interveners need to embrace processes of social change as the means for instituting legal change. The argument is based on the view that access to justice in legally plural environments needs to be understood from the perspective of the user. Rather than examine distinct systems, formal and informal, as entry points for the analysis, this section begins with an empirical understanding of how women use and experience the justice options available to them. This often reveals far more complex and nuanced means of navigating legal pluralism in search of justice.

⁵ See, for example, S Quast, "Justice Reform and Gender" in *Gender & Security Sector Reform: Toolkit*, Geneva Center for Democratic Control of Armed Forces (DCAF), Organization for Security and Co-operation in Europe (OSCE), Office for Democratic Institutions and Human Rights (ODIHR), and UN-INSTRAW (2008), tool 4, 13.

⁶ W Scharf, C Banda, R Rontsch, D Kauna, and R Shapiro, *Access to Justice for the Poor of Malawi? An Appraisal of Access to Justice Provided to the Poor of Malawi by the Lower Subordinate Courts and the Customary Justice Forums*, report prepared for the Department of International Development (2002); S Golub, *Non-State Justice Systems in Bangladesh and the Philippines* Department for International Development (2003); C Nyamu-Musembi, *Review of Experience in Engaging with 'Non-State' Justice Systems in East Africa* Institute of Development Studies, Sussex University, Brighton, Commissioned by Governance Division, DFID (2003); E Wojkowska, *Doing Justice: How Informal Justice Systems can Contribute*, United Nations Development Programme (UNDP) (2006) 21; S Douglas, *Gender Equality and Justice Programming: Equitable Access to Justice for Women*, UNDP, Primers in Gender and Democratic Government 2 (2007) 14–15; S Everett, *Perceptions of Law and Justice: Timor-Leste 2008* Asia Foundation (2008) 8; Amnesty International, *No Place for Us Here: Violence against Refugee Women in Eastern Chad* (2009).

The analysis is further guided by the notion that for positive change to be sustained in favor of women's equality and rights, it needs to be socially embedded. Here, legal orders are understood as the reflection of social norms and dynamics, which implies that they are not static, but the product of continuous processes of social and political contestation.⁷ Thus, supporting women and women's rights through these processes of contestation is the most constructive avenue to promoting legal orders that reflect positive social change and that constitute a legitimate and durable framework for social order.

Finally, the focus is on fragile states, understood here as states recovering from or vulnerable to a relapse of violent conflict. While the analysis would hold true for more stable developing contexts, the issues are amplified in these countries given the heightened degree of state – including formal justice – dysfunctionality and social fragility, combined with the intensity of international engagement, the multitude of such actors and their more overtly political objectives.

1. The limitations of formal justice reform

The main formula of international organizations and donors to strengthen women's access to justice in fragile states has consisted in interventions aimed at the formal justice system.⁸ This approach builds on the organizational mandates and conceptual assumptions that underlie the state-building efforts of many international actors. For example, it is assumed that the aim is to strengthen the capacity of the state to exercise a monopoly on force and fulfill core state functions including justice service delivery in a way that complies with international human rights standards. Further, it is assumed that women's rights can only be enforced through formal justice institutions, and therefore the role of informal systems should be minimized. The standard reform package includes efforts to mainstream gender in legal frameworks, ensure non-discrimination clauses in constitutions,⁹ limit the jurisdiction of informal systems, raise women's awareness of their rights,¹⁰ promote legal assistance to women through civil society organizations or governments, provide gender sensitivity training to law enforcement agencies, cut court costs, and/or make courts physically more accessible.¹¹

Four reasons for which this approach often fails to serve women will be explored (sections 1.1-1.4). What they all have in common is the tendency to assume that technical inputs can make formal systems comply with international standards. In fact, the practice of formal institutions is often as reflective of the complex socio-

⁷ See C Sage, N Menzies, and M Woolcock, *Taking the Rules of the Game Seriously: Mainstreaming Justice in Development*, World Bank Justice and Development Working Paper Series 7/2009, World Bank <http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2009/11/25/000333038_20091125_023547/Rendered/PDF/518450NWP0J1D010Box342050B01PUBLIC1.pdf> at 30 June 2011.

⁸ This analysis is based on the experience of conflict-affected states such as Timor-Leste, Liberia, Afghanistan, the Palestinian Territories and Southern Sudan. While the formal justice systems in these countries are particularly problematic, much of this analysis also holds for developing countries with lesser extents of dysfunctionality. However, differences in such cases are worthy of more focused study and research.

⁹ AusAid, *Gender Guidelines: Peace-building* Australian Agency for International Development (2006), AusAID <http://www.ausaid.gov.au/publications/pdf/gender_peacebuilding.pdf> at 30 June 2011.

¹⁰ In reality, since it is sometimes the male members of the community who hold back women from addressing the formal system or who make use of the formal system themselves, the first important step would be to realize that legal awareness is fundamental for the whole community and not just for women. It is problematic, however, that women will understand these new instructions through the lens of their own normative system.

¹¹ See, for example, Douglas, above n 6; Amnesty International above n 6; M Bastick and K Valasek (eds), 'Justice Reform and Gender (Practice Note 4)' in *Gender & Security Sector Reform: Toolkit*, DCAF, OSCE, ODIHR and UN-INSTRAW (2008).

political context in which they operate as are informal systems, requiring deeper social change to achieve meaningful reform.

1.1 Subjecting women's issues to failed systems

Pushing women's issues out of the informal and into the formal system in fragile or conflict-affected states often means subjecting them to a dysfunctional or failed system. Nearly every rule of law assessment by United Nations agencies or other international actors highlights how malfunctioning existing formal systems are in conflict-affected countries in terms of weak technical financial, institutional, and human capacity. The general success rate of building or reforming post-conflict justice systems has been considerably low. While every mission is guided by timeframes and budgets measured in years (and sometimes just months), (re)establishing a well-functioning formal justice system that complies with basic international norms and standards is a matter of decades.¹²

The problem is well illustrated by recent efforts in Liberia to crack down on the horrific proliferation of rape. The Association of Female Lawyers in Liberia successfully lobbied for a law requiring that all rape cases be heard exclusively by the Circuit Courts, which were empowered to enforce harsh penalties. While there was obvious good intention, the impact was far less constructive for the simple reason that the formal justice system was incapable of effectively implementing the law. As a result, detention centers swelled with the accused, jail breaks were rampant, and the general perception in society was that rape could be committed with impunity.¹³ Six years after the conflict, the formal justice system remains exceedingly weak, corrupt and under-capacitated.

1.2 Reproducing local norms and biases

Even when formal justice systems are relatively functional, practitioners make the mistake of equating them with the ideals they aspire them to be. In reality, while they may exhibit some of the trappings of rule of law mechanisms and standards, they may simultaneously operate in ways that reflect dominant social norms and biases of the societies they serve. Simply put, the formal system in practice may provide no better access to justice for women than other institutions, because they reproduce the social inequalities of the societies in which they function.

With respect to Somalia, Gundel states that irrespective of the system, the clan will maintain responsibility, and "rights of women and children will continuously be seen in the context of the interests of maintaining the strength of the male-based clans."¹⁴ Cases from Timor-Leste demonstrate how neither system is able to protect women, since the justice actors in both systems reflect the social norms of the society.¹⁵ In a report on Afghanistan, it was found that the failure to protect women's rights in customary decisions was not a flaw of the customary

¹² See, for example, the latest Security Council Report on Timor Leste, February 2010 <http://www.securitycouncilreport.org/site/c.gIKWLeMTIsG/b.5764299/k.1C78/February_2010brTimorLeste.htm> at 15 March 2011; see also L Pritchett and F de Weijer, *Fragile States: Stuck in a Capability Trap?*, Background Paper to the World Development Report 2011, World Bank <http://wdr2011.worldbank.org/sites/default/files/pdfs/WDR%20Background%20Paper_Pritchett_0.pdf?keepThis=true&TB_iframe=true&height=600&width=800> at 25 May 2011.

¹³ See S Lubkemann, D Isser and P A Z Banks III, 'Justice in a Vacuum: The Unintended Consequences of the Constraint of Customary Justice in Post-Conflict Liberia' in D H Isser (ed), *Customary Justice and the Rule of Law in War Torn Societies*, United States Institute of Peace (USIP) (2010).

¹⁴ J Gundel, *The Predicament of the Oday: The Role of traditional structures in security, rights, law and development in Somalia*, Danish Refugee Council (2006) iii.

¹⁵ See, for example, S Butt, N David and N Laws, *Local Dispute Resolution Mechanisms in Timor Leste*, Australian Legal Resources International (2004) 31; USAID, *Rule of Law in Timor-Leste* (2007) 32.

system itself, but rather a consequence of prevailing gender roles and relations in Afghanistan's societies.¹⁶

Where international standards are imposed without general societal consent, justice sector personnel, including the police, judges and prosecutors are likely to continue to act in accordance with the dominant social code. Thus, in many places, judicial personnel send women back to community authorities, where they believe their cases should be handled. In Timor-Leste, for example, victims of sexual and gender-based violence are frequently referred back to communities by formal authorities, who consider such cases to be 'private matters'.¹⁷ Similarly, in Aceh, Indonesia, law enforcement officials dismiss cases brought to them by women.¹⁸ And in Afghanistan, women are turned back by formal justice actors at every step of the chain.¹⁹

Where the formal system does adjudicate matters affecting women, local attitudes tend to overshadow legal rights. According to a United Nations Office of Drugs and Crime (UNODC) report, half of the women they interviewed at Pul-e-Charki Prison had been charged with 'moral crimes' such as running away from forced marriages.²⁰ In Liberia, women victims of sexual crimes, as well as female litigants in civil and petty criminal cases, have been subjected to abuse by formal system personnel.²¹

Beyond succumbing to social norms, formal systems are also vulnerable to politics and power interests, which may lead to compromising women's rights. At various points in Afghan history, governments that have pushed for rapid changes in discriminatory practices "found that this undermined their political legitimacy because they were accused of abandoning true Afghan values."²² Due to pressure by powerful interest groups, a variety of countries have embraced the role of religious or customary laws concerning personal status and family issues, which can result in serious inequities for women in the matters most important to their social and economic survival – marriage and divorce, inheritance, child custody.²³

These examples may involve an insufficient legal framework, yet changes in formal law alone are not likely to end discrimination, because deep-seated social norms are a stronger determinant of behavior than is the law. Due to insisting that women's issues be handled by formal systems in the absence of concomitant social change and credible enforcement, formal institutions that have been established with international support are used against women rather than to uphold their rights.

¹⁶ Afghanistan Research and Evaluation Unit (AREU), *A Holistic Justice System for Afghanistan* (2009).

¹⁷ See, for example, in Timor-Leste: *Report on Human Rights Development in Timor Leste* (September 2007 – June 2008) 11; Butt, David and Laws, above n 15, 31; USAID, *Rule of Law in Timor Leste* (2007) 5.

¹⁸ See, for example, UNDP, *Access to Justice in Aceh report: Making the Transition to Sustainable Peace and Development in Aceh* (2007) 79.

¹⁹ Human Rights Watch, *"We Have the Promise of the World" Women's Rights in Afghanistan* (2009) 7.

²⁰ T Barfield, N Nojumi and J A Thier, *Clash of Two Goods: State and Non-State Dispute Resolution in Afghanistan*, United States Institute of Peace (USIP) (2006) 15.

²¹ D Isser, S C Lubkemann and S N'Tow, *Looking for Justice: Liberian Experiences and Perceptions of Local Justice Options*, USIP, George Washington University and CSAE (2009) 47.

²² Barfield, Nojumi and Thier, above n 20, 22.

²³ International Council on Human Rights Policy (ICHRP), *When Legal Worlds Overlap: Human Rights, State and Non-State Law* (2009).

1.3 Promoting an inaccessible system

Promoting formal mechanisms exclusively will have little impact on the many women who are unable to access the system due to social pressures. In Somalia, for example, local norms prohibit a woman from directly accessing courts, requiring that she be represented by her husband or a male family member, who may have interests at odds with hers. In Afghanistan, women and girls who act against the wishes of their families often face threats and intimidation.²⁴ In addition, in Aceh, local leaders actively discourage women from turning to the formal system, as it may upset the community order.²⁵

Where women do bring cases to the formal system, their access may be undermined by those with stronger social power. In Afghanistan, perpetrators have successfully lobbied for rape cases to be rejected by the highest judicial authorities.²⁶ A United States Institute for Peace (USIP) report on Southern Sudan notes that: "men frequently have the upper hand in court cases through their potentially closer relationships with chiefs and judges."²⁷ Among the pastoralist communities in northern Kenya, Magistrates report that community elders frequently come to their offices seeking to withdraw cases reported by women, promising that they will solve them through communal mechanisms. Where magistrates do not allow the withdrawal of the case, communities will stop cooperating with the police and may hide complainants, witnesses and the accused.²⁸

In other cases, women have been able to get legal recognition of their rights in formal courts, only to find enforcement undermined by social realities. Among the agriculturalist communities in Kenya, women have been encouraged by non-governmental organizations (NGOs) to contest property inheritance cases in court. Their legal victories, however, have proved pyrrhic as more powerful community members have rejected the judgments, sometimes even excommunicating the claimant.²⁹

1.4 Producing negative results

Formal systems that are effective in upholding international standards may produce adverse and unwanted, if unintended, consequences for women. Here, again, the problem is the gap between these standards and social realities. Women who are 'victorious' from a rights perspective may end up as losers in their daily lives. As this happens, evidence shows that women and/or their families may avoid the formal justice system and seek alternative remedies more in line with socio-economic realities.

In Timor-Leste, for example, cases of sexual and gender-based violence are predominant, and there is consent among the government and donors that all cases should go before a formal court. Yet, punitive sanctions of the perpetrator can seriously threaten a woman's socio-economic survival if the community cuts off the woman for rejecting family or communal resolution. In domestic violence cases, imprisonment of the husband may leave a woman destitute. It has been

²⁴ Human Rights Watch, above n 19, 7.

²⁵ UNDP, above n 20, 73.

²⁶ Human Rights Watch, above n 19, 7.

²⁷ C Leonardi, L Moro, M Santchi and D Isser, *Local Justice in Southern Sudan*, USIP and Rift Valley Institute (RVI) (2010) 41.

²⁸ T Chopra, 'Dispensing Elusive Justice. The Kenyan Judiciary Amongst Pastoralist Societies' (2010) 2 *Hague Journal on the Rule of Law*, 95-110.

²⁹ A Harrington and T Chopra, *Arguing Traditions: Denying Kenya's Women Access to Land Rights*, Research Report No. 2, World Bank, Justice for the Poor (2010).

documented that women have stopped reporting domestic violence for fear of these consequences.³⁰

Empirical studies in both Southern Sudan and Liberia document how formal resolution of crimes against women, including rape, adultery, defilement or impregnation, may not be in the best interests of the women victims. In Southern Sudan, these cases “provide a clear example of how attempts to impose statutory law can lead to the avoidance of government judges’ courts because of dissatisfaction with strict application of the penal code”, which will lead to the ‘needless’ imprisonment of the perpetrator and increased shame for the victim and her family.³¹ In Liberia, the prospect of compensation, including medical expenses and school fees, may be far more desirable than the crippling court fees, delays and difficulties involved in taking cases to court.³²

Land, property and inheritance represent another area where formal mechanisms and standards may undermine rather than protect women’s interests. For example, in Kenya, the introduction of individual land ownership and formalization of title had the unintended consequence of cutting many women off from their usage rights under the pre-colonial system. Similar experiences are described in Mozambique.³³ As noted by Tamanaha, “The flaw in these efforts is the unthinking application of a single (Western) state law model for property, failing to consider alternative arrangements that better conform to local understandings of property while also satisfying economic needs.”³⁴

The examples above are not meant to suggest that formal justice systems cannot be an important means of promoting women’s rights in conflict-affected societies, nor that donors should not seek to improve their quality and effectiveness. However, expectations for change need to be based on a deeper understanding of the socio-political dynamics in which formal systems are situated. Butt et al argue that “[e]ncouraging women to pursue rights that are not adequately recognized by the available mechanisms might place them at greater risk. It could also create disenchantment and disengagement with a system that does not provide them with the resolutions they have been encouraged to expect.”³⁵

2. The problem of ‘fixing’ informal legal systems

The second main donor approach to promoting women’s rights in post-conflict societies recognizes some of the limitations explored above and seeks to engage with informal justice systems. The task is usually defined as modifying the gender biases and discrimination within these legal orders to make them more compliant with and accountable to international standards. The idea is to ‘fix’ customary systems by eliminating ‘negative’ features, while building on their positive aspects, such as their accessibility, low costs and general local legitimacy.

Exactly how to achieve this remains a key question for many international agencies, generating conferences, workshops and commissioned studies, which

³⁰ T Chopra, S Pologruto and T de Deus, *Fostering Justice in Timor-Leste: Rule of Law Program Evaluation* USAID (2009); Butt, David and Laws, above n 15, 31.

³¹ Leonardi et al, above n 27, 66.

³² D Isser, S Lubkemann and S N’Tow, *Looking for Justice: Liberian Experiences with and Perceptions of Local Justice Options*, USIP Peaceworks No. 63 (2009).

³³ C Tanner and S Baleira, *Mozambique’s Legal Framework for Access to Natural Resources: The Impact of New Legal Rights and Community Consultations on Local Livelihoods*, United Nations Food and Agriculture Organization (FAO), Livelihood Support Program Working Paper 28 (2006) 2.

³⁴ B Z Tamanaha, ‘The Rule of Law and Legal Pluralism in Development’ (2011) 3(1) *Hague Journal on the Rule of Law*, 1-17.

³⁵ Butt, David and Laws, above n 15, 32.

are all in search of programmatic guidance and best practices.³⁶ Current thinking and programming generally fall into three approaches.

The first is based on the assumption that lack of knowledge underlies discriminatory systems. Thus, it involves programs that aim to reduce gender-bias in decision-making³⁷ by educating local justice authorities about human rights³⁸ and by training them and raising their awareness on how to address sexual and gender-based violence.³⁹

The second approach may be more ambitious in its attempt to re-engineer informal systems by introducing new mechanisms and procedures that aim to remedy deficiencies. The language used in such prescriptions is telling: it is proposed to 'adapt' informal systems and 'amend' them to overcome their lack of responsiveness to women,⁴⁰ so as to promote the 'evolution' of informal systems (assuming a linear development of justice).⁴¹ This approach includes attempts to regulate decision-making structures, for example, by: requiring the participation of women;⁴² prohibiting discriminatory practices; introducing elements of due process into procedure; and standardizing and modifying customary law.⁴³ One approach that was particularly fashionable during the colonial period was the codification of customary laws, in order to make them conform to the legal standards of the colonial state.⁴⁴ Recently, codification or 'ascertainment' processes have become popular again, most notably in the customary law strategy developed by the United Nations Development Programme (UNDP) and the Ministry of Legal Affairs and Constitutional Development of Southern Sudan.⁴⁵

The third approach focuses on the interaction between informal and formal systems, with the aim of clarifying and delimiting clear roles for each by creating "formalized interactions between systems"⁴⁶ or by establishing 'interfaces' between them.⁴⁷ A report from Afghanistan points out the opportunity for "developing a more formalized interaction between informal and formal justice providers in order to strengthen the credibility of the formal court system on the one hand, and increase the legitimacy of the customary system within the Afghan justice system".⁴⁸ In Liberia, Somalia, Timor Leste, and Southern Sudan, among others, government and donor policies call for a definition of possible areas of

³⁶ See, for example, the Danish Institute for Human Rights, *Study on Informal Justice Systems: Access to Justice and Human Rights*, commissioned by UNDP, United Nations Children's Fund (UNICEF) and UN Women (forthcoming 2011).

³⁷ Wojkowska, above n 6, 41.

³⁸ K Kalla and J Cohen, *Ensuring Justice for vulnerable communities in Kenya: A Review of HIV and AIDS-related Services*, Open Society Institute (2007) 9.

³⁹ T Dexter and P Ntahombaye, *The Role of Informal Justice Systems in Fostering the Rule of Law in Post-Conflict Situations: The Case of Burundi* Centre for Humanitarian Dialogue (2005) 34.

⁴⁰ K Samuels, *Rule of Law Reform in Post-Conflict Countries: Operational Initiatives and Lessons Learnt* The World Bank, Social Development Papers No. 37 (2006) 19; Dexter and Ntahombaye, above n 39, 8; IDLO, *Enhancing Legal Empowerment Through Engagement with Customary Justice Systems: Concept Note* (2010); Quast, above n 5, 13.

⁴¹ CLEP, above n 4, 63-64.

⁴² Dexter and Ntahombaye, above n 39, 40.

⁴³ T von Gienanth and W Hansen, *Post-Conflict Peacebuilding and National Ownership: Lessons from the Sierra Leone Peace Process. Executive Summary* Zentrum für Internationale Friedenseinsätze, Report 2 (2006) 6.

⁴⁴ See S Falk Moore, 'Treating Law as Knowledge: Telling Colonial Officers What to Say to Africans About Running 'Their Own' Native Courts' (1992) 26(1) *Law and Society Review* 11-46.

⁴⁵ Leonardi et al, above n 27.

⁴⁶ See, for example, Dexter and Ntahombaye, above n 39, 41; United Nations Population Fund (UNFPA), *Gender Based Violence in Timor-Leste: A Case Study* (2005) 2.

⁴⁷ For example, UNDP Global Programme on Accelerating Access to Justice for Sustainable Human Development.

⁴⁸ The Liaison Office, *Linkages between State and /non-State Justice Systems in Eastern Afghanistan*, (2009) 26; Barfield et al, above n 20, 2.

cooperation between formal and informal justice,⁴⁹ for their “review and harmonization into a complementary whole”,⁵⁰ for defining clear jurisdictional limits,⁵¹ and establishing regulatory oversight over the informal by the formal system.⁵²

These approaches are too new and/or have been subject to insufficient study to enable proper empirical evaluation of their impact. Project evaluations tend to count the number of women or justice personnel 'trained' or simply state that people’s understanding of law has increased. They may point to the introduction of new mechanisms and forms of regulation that look good on paper, but there is rarely an inquiry into how this translates into actual justice delivery.

There are, however, reasons to be concerned that such approaches may, at best, be too superficial to have any serious impact on underlying social norms and power dynamics, or, at worst, be counterproductive. The few assessments that do exist indicate alarming results. In Timor-Leste, for example, after nearly a decade of intense international support for justice sector development, a survey by the Asia Foundation showed that the understanding that sexual and gender-based violence is a crime had decreased.⁵³ Once again, the problem is that most approaches that take systems as their entry point risk increasing the gap between laws and institutions, on the one hand, and social dynamics and realities, on the other. Some specific examples, provided below, can illustrate how efforts to socially engineer local systems can backfire.

2.1 Codification and its variants

Southern Sudan provides an interesting case study on the pitfalls of ascertainment and codification as a means of promoting women’s rights in customary systems. The policy of codification has been promoted by several policy makers in the Government of Southern Sudan for a variety of reasons, including: (a) to incorporate the norms and values of Southern Sudan’s customary heritage into its body of legislation; (b) to modernize the legal framework by harmonizing the many systems of customary law and modifying them to meet modern needs, including the elimination of discriminatory provisions; and (c) to ensure predictable and equal application of customary law. Good intentions notwithstanding, a 2010 report by USIP has identified several ways in which this policy may backfire, based on empirical research of the dynamics of local dispute resolution.

The report argues that a process of codification is likely to formalize social relations in favor of those in power. Even a process of ‘self-statement’ as advocated in the Customary Law Strategy of the UNDP and Ministry of Legal Affairs and Constitutional Development,⁵⁴ is likely, under the current realities, to crowd out women’s voices. Forcing certain elements of the written customary law — by prohibiting discrimination or rewriting norms — may produce a law that

⁴⁹ Ibid.

⁵⁰ A Le Sage, *Stateless Justice in Somalia: Formal and Informal Rule of Law Initiatives* Centre for Humanitarian Dialogue (2005) 7.

⁵¹ In the authors’ experience, this has been a common refrain in Afghanistan, Liberia, Timor-Leste and southern Sudan.

⁵² OECD, *Enhancing the Delivery of Justice and Security: Governance, Peace and Security* (2007).

⁵³ Asia Foundation, *Law and Justice in Timor-Leste: A Survey of Citizen Awareness and Attitudes Regarding Law and Justice 2008* (2008).

⁵⁴ A 2010 Customary Law Strategy developed by UNDP and the Ministry of Legal Affairs and Constitutional Development calls for “self-statement” rather than codification. Modeled on a process in Namibia, self-statement is intended to avoid the pitfalls of codification by establishing an inclusive process for communities to define, review and update their own laws. Key government policy makers, however, have expressed codification as their intention.

looks good on paper, but is unlikely to be enforced or to have any impact on social norms. Several chiefs interviewed for the report were in favor of codification because it would increase their stature, but they also admitted they were unlikely to change their process of dispute resolution as a result.

More fundamentally, the problem with reducing customary law to a written code is that it fails to appreciate the fluid and dynamic nature of customary dispute resolution. In practice, the flexible and negotiated nature of customary law provides considerable space for contestation and adaptation, including for women, who have been adept at using these spaces to advance their rights. In the name of predictability and equal application, codification is likely to reduce these constructive spaces of contestation and with it, the practical options available to women to define and redefine norms as their rights consciousness grows.⁵⁵

Codification may be a satisfying legal 'fix', but – especially where the formal legal system is rudimentary, broken, and/or not protective of women's rights – ineffective in changing underlying social norms and possibly destructive to existing mechanisms of rights promotion.

2.2 Jurisdictional clarity

The policy response to complex and overlapping rule systems in legally plural contexts is often to establish clear lines of jurisdiction. One problem with this policy is that it assumes a clear dichotomy between formal and informal justice systems. In reality, the lines are usually blurred, with police enforcing informal decisions, formal courts applying customary law, and a whole range of ad hoc linkages between the two.⁵⁶

Nevertheless, the effort to define jurisdictional boundaries persists, with a variety of consequences for women's rights. The impact of pushing matters affecting women out of the customary systems and into the formal has been discussed above. But the converse – authorizing specific subject matters for customary systems – can also be adverse to women. The International Council on Human Rights Policy (ICHRP) has documented how matters of personal status and family law are most frequently delegated to customary or religious courts, with potentially devastating social and economic consequences for women with regard to marriage and divorce, child maintenance and inheritance.⁵⁷ As in the previous section, establishing a clear jurisdiction between different legal orders may cut off mechanisms that work for women by decreasing the opportunity to 'forum shop', i.e. to select the justice institution with the outcome most beneficial to them.

Legal determination of jurisdictional boundaries is usually reflective of a political or ideological decision – perhaps a strict interpretation of international standards, in the latter, or the interests of customary or religious elites. Legal pluralism in general opens up the law for political manipulation,⁵⁸ and encourages what might be called 'legal patrimonialism'. It is critical to be aware of how these power interests play out, and to promote ways for legal approaches to follow empirical evidence and the interests of practical positive outcomes for women.

⁵⁵ Leonardi et al, above n 27.

⁵⁶ Everett, above n 6, 8; see also Leonardi et al, above n 27.

⁵⁷ International Council on Human Rights Policy, *When Legal Worlds Overlap: Human Rights, State and Non-State Law* (2009) 69.

⁵⁸ See, for example, Y Sezgin, 'A Political Account for Legal Confrontation Between State and Society: The Case of Israeli Legal Pluralism' (2004) 32 *Studies in Law, Politics and Society* 199-235.

2.3 Training/awareness

Training and awareness-raising activities constitute a large portion of donor support to promoting women's rights in customary systems. Rights awareness is critical to empowering women and mobilizing a bottom-up demand, and training may be essential to ensuring that justice providers understand laws and international standards. The problem is that these activities are often carried out as a one-way, top-down, 'sensitization' or 'awareness' of legal standards, rather than a contextualized dialogue that engages socio-political realities.

It is specifically questionable whether top-down teaching of foreign concepts can have an effect on local realities, especially where there is little opportunity for rights vindication. Awareness alone may set up expectations that cannot be met, especially where the state is not able to deliver. Rather than 'teaching', it is important to allow for 'rights consciousness' to be developed through positive experiences with the law.⁵⁹ This may require a broader set of empowerment activities, as well as appreciation of the non-linear trajectories from rights awareness to realization.

3. Supporting processes of change

It is necessary to develop more innovative approaches to improve women's access to justice in legally plural environments where the formal justice sector is weak. A key problem with the two approaches discussed above is their fixation on justice systems, formal and informal, as both the problem and the solution. In fact, both systems are just players in the much larger theater of social and political processes. Three additional points argue in favor of moving away from systems as entry points.

First, it is important to recognize that legal pluralism is not a passing phenomenon. Experience shows that, especially in fragile states, there is a long road to a well-functioning formal justice sector, which is both acknowledged by the population and has the capacity to be the exclusive deliverer of justice. Tamanaha points out that legal pluralism is not only not disappearing, but is even getting more complex in a globalized and capitalist world: "One must avoid falling into either of two opposite errors: the first error is to think that state law matters above all else (as legal scholars sometimes assume); the second error is to think that other legal or normative systems are parallel to state law (as sociologists and anthropologists sometimes assume)."⁶⁰ The implementation of women's rights therefore requires engaging with legal pluralism, rather than seeking to hasten its end.

Second, customary systems are neither essentially bad nor good for women. It depends on how they are interpreted and applied by various groups in society, and on the power dynamics and general inequities that inform justice processes. Most discriminatory elements are not engrained in a specific justice system, but in asymmetric power relations in society, including those between men and women. A report by ICHRP suggests that "virtually every criticism leveled at non-state orders for failing to match the characteristics of an 'ideal' justice system has also been leveled against formal state legal systems, often in the same national context".⁶¹ In fact, individuals who are powerless – particularly women – will not

⁵⁹ S Engle Merry, 'Rights Talk and the Experience of Law: Implementing Women's Human Rights to Protection from Violence' (2003) 25(2) *Human Rights Quarterly* 343-381, 343.

⁶⁰ B Z Tamanaha, 'Understanding Legal Pluralism: Past to Present, Local to Global' (2008) 30 *Sydney Law Review* 374.

⁶¹ ICHRP, above n 23 2009, 145.

obtain their rights under any system. Neither system in practice supports the claims of those with a lack of power.

Third, ordering formal and customary law in binary divisions does not reflect reality. In most situations, there is not only a formal and a customary justice system operating, but also, there can be various other legal orders and actors at play, such as religious legal orders, new orders created by rebel or resistance movements and orders developed around economic markets. These orders often do not operate in a clear-cut way. Justice processes are often conglomerations of different legal orders in various hybrid forms.⁶² In the following sub-sections, some alternative entry points and perspectives to the systems approach are presented.

3.1 A user perspective and focus on power interests

An alternative entry point to justice systems is justice experiences. Studying how litigants perceive and navigate their complex legally plural landscapes reveals more nuanced ways of understanding both obstacles and opportunities to achieve justice that take the broader social context into account. A user perspective demonstrates that, in most fragile contexts, the formal justice system is often simply one possible avenue in the reality of multiple legal orders. This perspective clearly shows that in many fragile contexts, the notion that the state is, or even should be, the primary definer and implementer of justice is a fallacy. In the justice landscape as a whole, different actors assert their claims based on a range of calculations. The way in which people either try to claim their rights or address their grievances may reveal a range of authorities or institutions that stand for specific sets of values or that have developed out of certain socio-political scenarios or power hierarchies. Local norms, socio-political realities and power structures mediate how people navigate between the different values and fora of justice available to them. There is often a whole array of possibilities, such as institutions informed or influenced by 'customary', socio-cultural, religious, and/or formal legal norms.

Power often plays out strongly against women in legally plural settings. Several examples show how forum shopping benefits the powerful. Kelly describes for the Palestinian Territories: "In a context where law has no absolute moral value, but is attractive for the substantive claims that can be made through it, people are willing to use whatever resources are available to them in order to enforce the tangible benefits of legal claims."⁶³ Moore indicates a similar phenomenon for Tanzania when it was a British protectorate, where community leaders exerted power by controlling the fora their fellow community members would use to resolve conflict.⁶⁴ Tamanaha also points out that people will simply make use of the competition between the systems in order to fulfill their interests.⁶⁵ As women are usually not in power, they lose out. A UNDP report states: "The result is competing sets of laws and procedures that, while giving claim-holders some degree of choice, in many instances serve to obstruct claim-holders' access to justice and impede effective handling of grievances by duty-bearers."⁶⁶

⁶² See Leonardi et al, above n 27; Isser, Lubkemann and N'Tow, above n 32.

⁶³ T Kelly, *Access to Justice: The Palestinian Legal System*, LSE working paper no. 41, 2.

⁶⁴ Falk Moore, above n 44, 12.

⁶⁵ Tamanaha, above n 60, 24; and Isser, Lubkemann and N'Tow, above n 32.

⁶⁶ UNDP, *Access to Justice in Aceh report: Making the Transition to Sustainable Peace and Development in Aceh* (2006) 11.

3.2 Finding opportunity in fluidity

Forum shopping may, however, also present an important opportunity to contest prevailing social norms and to promote women's rights. Unraveling the dynamics of legal pluralism, and the power interests that influence them can help point to important entry points for change. Most legal orders are fluid, as they depend on the definition and interpretation of norms by members of society and can therefore readily adjust to social changes. This continuity of the process can be key in the positive change of orders. The same is true of the existence of multiple justice fora. The availability of multiple legal orders provides the opportunity to select the institution that is more likely to grant women's rights. While those in power use forum shopping for their own advantage, it can also be strategically employed by women or those supporting women's access to rights. Where multiple legal orders exist, they can be used to contest each other. By supporting good contests, international actors can support women to become more active in shaping and defining legal norms and processes to advance the implementation of their rights.

3.3 Formal law and international standards as tools of contestation

As argued earlier, there is usually a significant gap between law and society. Unless they are aligned, it is difficult to expect the formal justice system to function well to provide order and justice within the nation-state. One of the questions is, therefore, how far 'ahead' of society can the law be without losing its regulatory powers due to its distance from the people it serves. Conversely, to what extent can law that is 'ahead' of society have a positive impact in shaping society and instigating social change? The answers are clearly context-dependent.

Bearing this in mind, rather than expect that the aim is to put formal laws in place, formal law and international standards must be seen as a framework and set of tools that can help tackle discrimination and contest problematic practices. Such legal frameworks can: hold states accountable before international law (this is also important where communities want to contest the government's action); and be used by citizens as a tool to contest norms or practices that are not compliant with human rights or gender equity, such as through advocacy and strategic litigation.⁶⁷

A human rights-based legal framework can also influence justice processes at the local level. In Mozambique and Tanzania, for example, a study of mechanisms to promote women's access to land rights concludes that while a formal judgment does not necessarily impact behavior or lead to increased adherence to law, it can be a powerful tool for NGOs to increase awareness of women's rights and request support from official actors.⁶⁸ Descriptions from Afghanistan make a similar point: "even if the formal law is not resorted to in an explicit manner, the simple fact that it exists and that people whose interests concur with its prescriptions can threaten to use it, might create a situation in which its objectives are partly met".⁶⁹

⁶⁷ See, for example, S Pradhan Malla, *Upholding Women's Right through Litigation*, Paper submitted to Interactive Expert Panel, United Nations Commission on the Status of Women, Fifty-fourth session, New York, 1-12 March 2010, United Nations WomenWatch <http://www.un.org/womenwatch/daw/beijing15/interactive_panel_III/Sapana%20Pradhan%20Malla%20paper.pdf> at 15 March 2011.

⁶⁸ A Kapur, 'Two Faces of Change: The Need for a Bi-Directional Approach to Improve Women's Land Rights in Plural Legal Systems' in E Harper (ed), *Working with Customary Justice Systems: Post-Conflict and Fragile States* (2010) 21.

⁶⁹ G Aldashev, I Chaara, J-P Platteau and Z Wahhaj, *Custom in the Shadow of the Formal Law: An Economic Analysis* (2007), European Center for Advanced Research in Economics and Statistics (ECARES) <<http://www.ecares.org/ecaresdocuments/seminars0708/aldashev.pdf>> at 15 March 2011.

The training of community paralegals has also been a promising approach in injecting women's rights at the community level. Community paralegals can negotiate between different legal orders and foster contestation where systems discriminate against women. They can ease access to formal systems⁷⁰ and provide an alternative address for women to turn to, where their formal rights are not acknowledged by the prevalent local institutions.⁷¹ However, while there is plenty of evidence that community paralegals have helped women to navigate the systems, there is still a lack of empirical evidence of the impact paralegals may have on local power structures.

A case in Sierra Leone, where a woman was raped by a police officer illustrates a positive impact of the intervention of paralegals. After mediation efforts by a community paralegal, who informed the police officer about the punishments of the formal law, the police officer paid the victim compensation.⁷² The paralegal allowed the woman to circumvent local power structures, which would have prevented the case from proceeding, and helped to promote the formal rights of the woman without having to rely on a malfunctioning formal system. While the police officer was not punished by a court, the compensation payment to the victim is a first step towards acknowledging the 'wrongdoing', preventing further incidents, and shifting power relations between men and women, but also between village authorities and the community paralegal as an alternative source of power.

At the same time, seeing formal law and international standards as tools of contestation also implies that they should not always be directly implemented. Instead, taking into account the fact that women across society will have varied socio-economic status, degrees of power and define their interests differently, these tools are to help women make informed choices rather than force them into a particular legal approach.

3.4 Supporting processes of change

Given that the fundamental barriers to women's access to justice in formal and informal systems are underlying socio-cultural norms, values and power relations, efforts to promote women's rights must engage with these deeper dynamics. Rather than focus on legal reforms of the systems themselves, advocates and donors should seek to support constructive processes of social change that in turn will influence the emergence of more equitable justice systems.⁷³

Promising methods to achieve this include: empowering women through rights awareness and rights-consciousness through positive experiences with the justice system;⁷⁴ creating alternative sources of power (such as community paralegals); and supporting spaces for contestation. Successful initiatives have fostered dialogue between affected women and community justice providers.⁷⁵ The Kenyan National Human Rights Commission, for example, facilitated meetings between Luo women who were denied inheritance of the land from their dead

⁷⁰ L Teale, *An Evaluation of the Way that Paralegals at the Timap Programme in Magburaka, Sierra Leone, Deal with Family Cases* (2007) 4.

⁷¹ This is distinctly different from alternative dispute resolution (ADR) initiatives, which are usually led by formal justice institutions. Here, once a woman has actually addressed the formal system, she may not want to be subjected again to mediation. Community paralegals, on the other hand, can support women in navigating the plural legal systems and possibly, addressing the formal courts.

⁷² V Maru, *Working to break the chains of injustice*, OSI news (2006–2007) 19.

⁷³ Sage, Menzies and Woolcock, above n 7.

⁷⁴ Engle Merry, above n 59, 343–381, 344.

⁷⁵ See also A Brown and A Nolan, *Towards Effective and Legitimate Governance: States Emerging from Hybrid Political Orders: Vanuatu Report*, Australian Center for Peace and Conflict Studies (2008).

husbands and community authorities. The Commission created the framework, in which women were encouraged to articulate their plight, while the elders had to defend that Luo culture does protect women. Challenged this way, the elders started to help women to obtain land titles from families denying the women inheritance.⁷⁶ What is important in this example is that: women were able to contest local practices; women were enabled to interpret and shape their own culture in a way that produced a different outcome; and women's formal rights to inherit underwent a process of 'vernacularization'⁷⁷ and are now formulated in a locally understandable idiom.

These three elements together may produce more legitimate and sustainable change for women and society as a whole. Providing more space for women to define their own conceptions of justice (for example, the best outcome in a given case) may provide more protection than enforcement of formal norms and allow for change at a pace that meets social evolution. Vernacularization, in which rights awareness is increased through engagement with local concepts and institutions, helps foster the dynamic of contestation. Levitt and Merry describe the local adaptation and appropriation of international rights as 'vernacularization'. A woman's group in Lima, Peru, for example, interpreted women's rights within the framework of the Andean traditions that shape their lives, regarding them more as communal rights than individual rights.⁷⁸ Such processes are more likely to be aligned with available mechanisms to enforce rights, because they make sense for local communities. Vernacularization in this regard can be an important tool in closing the gap between formal law and society, and in making formal rights useful at the local level.

A promising element in fostering change has been to work with 'insider' agents such as community paralegals or local NGOs. These are community members who are not only legitimate contesters, but are also familiar with the socio-cultural and political contests in a specific community, and can therefore challenge systems in the right spot. However, context needs to be understood in order to select the right insider agents for change so as not to reproduce gender-biased power relations and values. Closer cooperation with local and national women's organizations, NGOs and government can help to identify such agents.

Legal empowerment initiatives over the last decade have partly included such activities, in opposition to top-down justice sector reform, and in recognition that justice must be demand-driven and should serve to achieve increased socio-economic equity. Recently, the High Level Commission for Legal Empowerment of the Poor (CLEP), which informed the United Nations Secretary-General Report on 'Legal Empowerment of the Poor and the Eradication of Poverty', specifically called for attention to legal empowerment of women.⁷⁹ While the focus of these reports has been on the socio-economic angle of justice, such as access to labor, property and business rights, they have excluded criminal issues.

3.5 Acknowledge context and promote empirical work

Another extremely important aspect of the alternative approach proposed here is the paramount importance of context. A report by the Organisation for Economic Co-operation and Development (OECD) calls upon practitioners to consider that

⁷⁶ T Chopra, *Promoting Women's Rights by Indigenous Means: An Innovative Project in Kenya*, Briefing Note 1.2, World Bank, Justice for the Poor (2007).

⁷⁷ P Levitt and S Engle Merry, 'Vernacularization on the ground: Local uses of global women's rights in Peru, China, India and the United States' (2009) 9(4) *Global Networks* 451.

⁷⁸ Ibid.

⁷⁹ United Nations, 'Legal empowerment of the poor and eradication of poverty,' Report of the Secretary-General, A/64/133, 13 July 2009.

“local context should determine what development activities occur when, how and in what order, as the provision of justice and security is based upon historical legacies, cultural value systems, political calculations and intricate balances of power”.⁸⁰ However, many interventions continue to replicate models used elsewhere, rather than develop localized solutions.

One of the biggest gaps in designing context-specific approaches is the lack of empirical data. Most empirical work has focused on the very substance of customary systems and how they operate in order to design ways to link them with formal systems. There needs to be a significant shift to more thorough evaluations and assessments of the impacts of justice initiatives on society at large, including their unintended consequences. Furthermore, in order to understand the real gaps and opportunities, empirical work should focus on documenting how women navigate between multiple legal orders, rather than assessing how customary law treats them. Research should be used not only to inform donor programming, but can also be a powerful tool of empowerment and contestation for NGOs and for women themselves.

4. Conclusion

Admittedly, this chapter does more to deconstruct dominant paradigms of donor support to women’s access to justice than it does to provide a new blueprint. In part, this is because of the lack of hard evidence of the impact of the proposed alternative way of approaching the issue. More documentation of reform strategies and an evaluation of their impact are clearly needed. But more fundamentally, it is because the very notion of a blueprint is anathema to the argument that legal fixes and systemic entry points fail to enact real change. Donors and advocates would do well to stop focusing on customary justice systems as such. They should try instead to understand and engage with the processes of contestation and social change through which power relations and rights are mediated.

⁸⁰ OECD, above n 52, 6.

Finding the Pulse of Peace Operations: The Case for Privileging 'Political' Rather than Technical Forces

Bryn Hughes¹

INTRODUCTION

The future of successful peace support operations does not depend on mustering the right level of resources or in honing the technical and managerial skills of interveners and recipients alike, but rather on engaging fully and adroitly with the 'political'. In this chapter, the 'political' does not refer to the formal workings of government or the power struggles within and between organizations but to "the socio-cultural value systems that determine which behaviour, arguments, and actions are [deemed] legitimate".² It is these elements that engender a society's notions of how to live together, which constitute its pulse. Equipped with a 'political consciousness',³ the international community could recognize that truly fruitful engagements entail working *with* existing sources of power and legitimacy, and the social orders they enable.

The tendency of international agencies has instead been to view recipient societies through a sanitized, reductionist conception bereft of the rich, multilayered, dynamic interaction that indeed makes up any social context. With the qualified exception of the peace-building field,⁴ international peace operation actors enter the fray with purportedly 'objective' approaches, maintaining that they can somehow divorce their own life's socialization and world view from the facts on the ground that they seek to uncover and rectify.⁵ But this is never the case. Seemingly without having realized it, the international community now finds itself embarking on staggeringly ambitious efforts to rebuild entire societies from the ground up. Yet, ironically, this is done with largely top-down approaches that

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² A Harrington and T Chopra, *Arguing Traditions: Denying Kenya's Women Access to Land Rights*, Research Report No. 2, World Bank Justice for the Poor (2010) v.

³ R Keane 'Peace Operations and Crisis Management: Not Benign Tasks but Political Acts' in S Meharg (ed), *Measuring What Matters in Peace Operations and Crisis Management* (2009) 153–58.

⁴ While much of the peace building literature and practice has been *de facto* liberal state building, a significant and burgeoning portion nevertheless strives to engage with the political in the kinds of culturally appropriate and effective manner advocated here. For examples that bear this claim out, see J P Lederach, *The Moral Imagination: The Art and Soul of Building Peace* (2005); T Donais 'Empowerment or Imposition? Dilemmas of Local Ownership in Post-Conflict Peacebuilding Processes' (2009) 43(1) *Peace & Change*, 3–26; and O Richmond (ed), *Palgrave Advances in Peacebuilding: Critical Developments and Approaches* (2010).

⁵ Richmond maintains the widespread lack of understanding of local politics to date by the international community. He claims that they believe that their approaches are "unbiased by cultural or historical proclivities", being "naively ill-equipped to reform the politics of post-conflict states" (O Richmond, 'Liberal Peace Transitions: a Rethink Is Urgent', *Open Democracy* (2009) 2 <<http://www.opendemocracy.net/oliver-p-richmond/liberal-peace-transitions-rethink-is-urgent>> at 28 June 2011).

in effect ignore 'the political'. This misconstrued starting point often leads to the type of debilitating, yet scarcely recognized, tension whereby local actors are made to enforce politico-legal orders "that conflict openly with their internal beliefs and external ... social obligations".⁶

Although financial and managerial wherewithal may be in grave need, the crucial missing element is a realization that the political must be adroitly engaged in order for any form of assistance to resonate and take root in productive and lasting ways. A political consciousness also leads us to realize that if the values and beliefs of the people are not compatible with the imported institutions being installed by peace and capacity development operations, then conventional efforts will continue to be fraught with danger and setback. This is an insight, I argue, which does enormous work towards explaining the dubious results to-date. It is, after all, problematic to attempt to strengthen Western, state-based institutions that are at odds with the societies in which they are meant to operate.⁷ Programs intent on 'teaching' local populations how to conduct themselves in Western forms of policing or governance, for example, face a steep uphill climb to overcome life-long socialization in the space of a few weeks, months or even years.

Similarly symptomatic of this lack of political awareness is the term 'failed' states. It is not only derogatory and unconstructive, but also inaccurate. Most indigenous orders, such as those across the Pacific, for example, have never approximated the political structure known as the Westphalian 'state' in the first place.⁸ Their notions of how to live together have usually been vastly different from the experiences of countries in the Organisation of Economic Co-operation and Development (OECD). In places such as the Pacific, so much exists beyond formal state institutions.⁹ More often than not the 'failure' relates to the same forces that accompany the international interventions themselves. This outcome is exemplified by Clive Moore's observations about the 21st century crisis in the Solomon Islands: "What had failed was the introduced modern centralized process of government and its services, the export-led economy, and the infrastructure of urban life, not the lives of the 84 percent of Solomon Islanders who still live in villages and remain dependent on subsistence agriculture and fishing."¹⁰ Indeed, the crux of the problem is not the indigenous processes themselves, but the interaction between the indigenous processes and the introduced ones.¹¹ At the same time, political consciousness should not ignore intervening actors, since they would not be expected to forsake their own beliefs or organizational imperatives.

How, then, do we navigate the precarious shoals among the political principles, aspirations and needs of intervening actors, on the one hand, and of recipient societies, on the other? It is one thing to acknowledge the need for engaging the political, but another altogether to succeed in (re)producing a productive mélange of introduced and indigenous ways. Today, in the nascent Pacific country of the

⁶ A McLeod, 'Police Reform in Papua New Guinea' in M A Brown (ed), *Security and Development in the Pacific Islands: Social Resilience in Emerging States* (2007) 80.

⁷ McLeod, above n 6, 79.

⁸ B Hughes, 'Moving Beyond Rethinking the State of the State: to the Challenge of Reshaping International Contributions to Peace operations' (2010) 10(3) *Conflict Security & Development*, 329; M Jacka, 'Security and Development: Conflict and Resilience in the Pacific Islands Region' in M A Brown (ed), *Security and Development in the Pacific Islands: Social Resilience in Emerging States* (2007) 33.

⁹ M A Brown 'Security and Development: Conflict and Resilience in the Pacific Islands Region' in M A Brown (ed), *Security and Development in the Pacific Islands: Social Resilience in Emerging States* (2007) 1.

¹⁰ C Moore, 'External Intervention: The Solomon Islands beyond RAMSI' in M A Brown (ed), *Security and Development in the Pacific Islands: Social Resilience in Emerging States* (2007) 169.

¹¹ Brown, above n 9.

Marshall Islands, for example, there are segments of society that would prefer a return to 'traditional' ways while others long passionately for the embrace of most that is 'modern'.¹² Often at odds with each other, whose interests are allowed to will prevail? The challenges are vexing. They are, however, challenges that we cannot afford to shirk because 'business as usual' promises more of the same failings. At worst, development and security assistance undermines the local sources of capacity needed for sustainable peace.¹³ The example of Somaliland suggests that societies may in fact be better off without current modalities of international assistance.¹⁴

The purpose of this chapter is to make a foray into this consequential space pertaining to how we address the politics of peace operations. Its core argument centers on the need to concentrate on the political rather than the technical. This political approach also requires that the political views of *intervening* actors be aired and added to the mix of indigenous voices, instead of ignoring their existence or enter into decision-making considerations. The difficult yet central challenge is to negotiate outcomes amenable to all. The chapter's first two sections are dedicated to developing the context by outlining current approaches and then highlighting a few of the many and largely unnoticed fissures between how Western and recipient societies conceive security and justice. This latter aspect is vital because the recognition of difference is a prerequisite for effective mission planning and implementation processes. The political, as with the rest of the social world, should not be viewed through a linear, mechanistic lens. Therefore, the third section of the chapter explores the notion of 'complex social systems'. It posits that peace operations must be conceptualized through a lens that emphasizes the fluid and interactive nature of what may emerge during programming. Finally, field research from the Pacific Islands is used in section four to help demonstrate these issues in a current case.

1. A critical overview of contemporary assistance

Good intentions fill many personnel within present-day endeavors, despite others who might consciously push ideological or economic agendas.¹⁵ The author's discussions with those responsible for developing and implementing the programs of organizations, such as the Australian Federal Police (AFP), the European Union (EU), OECD and the United Nations, usually reveal how concerned they are in assisting the world's vulnerable populations. Increasingly, the timelines for evidence of 'success' are rightly being discussed in terms of up to a hundred years. Accordingly, expectations for meaningful impact are viewed in inter-generational terms as opposed to the few years to which peace operations are traditionally committed. The intended reach and gravitas of contemporary programs stand in stark contrast to colonial models in which European states maintained only threadbare control, never seriously committed to reshaping the broad fashion in which the colonized behaved, much less thought.¹⁶

¹² This assertion is based on recent field research conducted by the author and Charles Hunt from the University of Queensland in conjunction with the Australian Federal Police.

¹³ Brown, above n 9, 27.

¹⁴ See L Wiuff-Moe Centre for International Governance and Justice, ANU, *Negotiating Political Legitimacy: The Case of State Formation in Post-Conflict Somaliland* (2009) Issues Paper.

¹⁵ For views that chronicle the contrary realities of deliberate abuses and imposition of the liberal peace, see, for example, J Chopra, 'The UN's Kingdom of East Timor' (2000) 42(3) *Survival*, 27; R MacGinty, 'Indigenous Peace-Making Versus the Liberal Peace' (2008) 43(2) *Cooperation and Conflict*, 39.

¹⁶ The *kiap* epitomized the perfunctory and minimalist colonial approach. The *kiap* served as the colonial agent in an all-in-one executive, judicial and enforcer role intended to pacify the local population – but only to the degree that the European states could extract what they wanted (See McLeod, above n 6, 76-79). This model however never came close to the intense level of resources and wide-ranging expectations contemplated in today's peace operation imagination. See also S

However, intervening actors tend to view recipient societies through a self-image lens. At the risk of straying perilously close to quotes from a former U.S. Secretary of Defense, it is a truism that “we know what we know”. There is no real concerted effort to learn about the ‘other’. The self-image lenses of intervening actors presume that the values and beliefs of local populations are compatible with, or even similar to, their own.

‘Development’, for instance, has generally connoted a progression from some inferior system to Western-style economic and political system.¹⁷ It is presumed that customary systems are the cause of failure, and yet it is uncritically accepted that modern Western replacements of customary systems are superior. Emblematic of this self-image misdiagnosis are the many descriptors beholden to the Western notion of state such as ‘failed states’; ‘weak” states’;¹⁸ ‘fragile states’, and ‘emerging states’.¹⁹ Beyond blanket recommendations to jettison the ‘old’ (non-Western) to make room for the ‘new’, more specific transplants relate to neoliberal economics.²⁰ This too has proven problematic since tensions between the state and its population have often stemmed from a shift to modern economic models. The case in Papua New Guinea (PNG) attests to this. From the 1980s, the Government allowed large-scale export of resources, which in turn led to environmental and community degradation at the local level.²¹ What is more, the link between democracy and economic growth is unproven.²²

A related point is that assistance needs to be demand- rather than supply-driven. It is a stated core idea of the World Bank approach that governance can be improved by monitoring what people actually care about: “If the issue is not of concern to a broad range of people, there is far less likelihood that the monitoring effort will be sustained over time or its findings fed back into the policymaking process.”²³ Yet, despite small numbers of forward thinkers such as those in the Justice for Peace area,²⁴ the World Bank exemplifies the international community in that it tends to lack the actual mechanisms capable of seeking out and incorporating the wishes of local stakeholders. The problematic default position for the international community has been that the most meaningful decisions end up being made by a comparatively small number of external experts, whose decisions are based on a worldview emanating from their socialization and hence their sense of politics.²⁵

The blind spots to local politics that invariably ensue are precisely what often leads to resistance, and in turn, significantly impede peace operations. As such, misdiagnoses of international actors have real world consequences. In particular, resistance to development from indigenous elements often occurs because the programs have ignored the cultural, ethical and social.²⁶ In other words, they have failed to engage the *political*, as defined in the introduction to this chapter.

Dinnen and J Braithwaite, ‘Reinventing policing through the prism of the colonial kiap’ (2009) 19(2) *Policing and Society*, 161.

¹⁷ Jacka, above n 8, 34.

¹⁸ S Dinnen, A McLeod, and G Peake. ‘Police-Building in Weak States: Australian Approaches in Papua New Guinea and Solomon Islands’ 8(2) (2006) *Civil Wars*, 87.

¹⁹ Brown, above n 9.

²⁰ Richmond, above n 5.

²¹ Jacka, above n 8, 47.

²² P Lamour cited in Jacka, above n 8, 41.

²³ P Bergling, L Bejstam, J Ederlöv, E Wennerström and R Zajac Sannerholm. *Rule of Law in Public Administration: Problems and Ways Ahead in Peace Building and Development*, Folke Bernadotte Academy Research Report (2008) 55.

²⁴ See, for example, T Chopra, ‘Promoting Women’s Rights by Indigenous Means: An Innovative Project in Kenya’, The World Bank Justice for the Poor, Briefing Note, Vol 1 Issue 2 (2007).

²⁵ Hughes, above n 8.

²⁶ Jacka, above n 8, 34.

By contrast, peace interventions require an appreciation of the broad spectrum of interests and preferences in each context. One key is avoiding the *faux pas* of creating an 'us' versus 'them' division. Another is to resist viewing the circumstances as only filled with problems, and instead concentrate on how current local capacities and strengths can be enlisted.²⁷ Following from this, there is no recipe for state building or model of statehood that can be applied universally.²⁸

This reality points to a need to appreciate the power and legitimacy that underpin politics, with the view that politics is 'power in action'.²⁹ Power derives from many sources, of course, including ideational (for example, civil rights movements), material (for example, military might), and institutional (for example, the United Nations' authority). Peace operations' programming should also be guided in terms of which stakeholders (including intervening actors) possess ideational, material, and/or institutional power.

Legitimacy has a mutually reinforcing relationship with power. Although a popular way to conceptualize legitimacy is in terms of its logics (i.e. 'legal-rational', 'traditional', 'charismatic', 'democratic' and 'international')³⁰ this view is incomplete without an appreciation of *how* something has come to be considered legitimate. Attention must therefore be paid to the interplay between the discursive and material forces that enable legitimacy.³¹ Problems arise, however, when exogenous actors fail to appreciate legitimacy's inter-subjective and thus context-specific quality, and instead substitute this perspective with a Western state self-image. As Eric Scheye points out: "If a significant percentage of the citizenry perceives that their formal state provided justice and security system is foreign, incomprehensible, and contrary to their beliefs, cultural values, and expectations, there is little likelihood that that system can be deemed legitimate, accessible or effective."³²

Hence, this critical evaluation of contemporary assistance foregrounds numerous areas for improvement in the political space. A useful starting point is mapping the political realities that underpin stakeholder interactions. Participatory approaches are highly effective for this task and can simultaneously enable politically adept program design and implementation. The next section points out a few of the many areas in which politics of recipient societies can differ from those of the OECD countries. Such differences make it difficult for intervening actors to engage adroitly with politics foreign to their imaginations.

2. Recognizing political diversity

Part of the reason politics is not front and center in mainstream peace operations thinking is a lack of awareness of other socio-cultural value systems, i.e. it may astonish many of the conscientious members of interceding forces from Western countries to learn the depth to which their own values and notions of the social world can differ from those to which they aim to transfer skills and institutions.

²⁷ Brown, above n 9, 27.

²⁸ S Bellina, D Darbon, S Sundstøl Eriksen and O J Sending. *The Legitimacy of the State in Fragile Situations*. Oslo: Norad. Norad Report 20/2009 Discussion (2009) 5.

²⁹ A Huczynski, *Influencing within Organisations* (2nd ed) (2004).

³⁰ L Anten, *Strengthening Governance in Post-Conflict Fragile States*, Issues Paper, Netherlands Institute of International Relations, The Hague (2009) 48-49.

³¹ The Copenhagen School's conception of 'securitization' provides a cogent framework by which to understand this interplay (See B Buzan, O Waever and J de Wilde, *Security: A New Framework for Analysis* (1998).

³² E Scheye, 'The Statebuilding Misconception in the Fragile and Post-conflict State' (2010) 14(3) *Journal of International Peacekeeping*, 270.

The cultural sensitivity training undertaken by many peacekeeping forces, for instance, seldom has time to do more than skim the surface. This section provides some examples of some of the major areas in which the stark differences between socio-cultural belief systems often exist. The challenge for orthodox mindsets is how to conceive societies whose notions of political community seldom resemble the modern, Weberian notion of a state.³³ Yet, such awareness is vital because what is politically palatable for each constituency can vary dramatically, and in the worst cases, begin from incompatible or even mutually exclusive stances. Identifying and acknowledging difference, rather than glossing over what may be integral pillars of recipient societies, is a crucial step towards negotiating mutually acceptable directions.

Violence is a germane area beset with often dramatically divergent viewpoints. Whereas Western conceptions of society hinge on a homeostatic view in which violence is considered a dysfunctional aberration to order, many traditional societies have considered violence as 'normal' part of life.³⁴ More specifically, violence in certain circumstances is viewed as legitimate, as a conflict resolution tool in response to a problem and not as the problem itself. By contrast, the Western idealized notion deems violence legitimate only when it is performed by formal state actors.³⁵ A lack of acknowledging this difference could prove disastrous to program managers.

Relatedly, there is a more nuanced but nevertheless equally significant divergence that pertains to the Western idea of 'impartial' justice. Westerners have been taught the primacy of the abstract concept of the state; allegiances and legitimacies are meant to flow from this concept. Crime, for example, is understood as a transgression against the abstract subject of the state. Thus in Western socio-cultural value systems one's position in, *inter alia*, society, ethnicity and gender is propagated as being irrelevant to this notion of impartial justice (despite the discrimination that commonly occurs in practice). However, many Melanesian societies, for instance, see wrongs as committed against *particular* people, property or the supernatural order. As such, the many layers of identity that the 'impartial' perspective seeks to ignore are at the very heart of how traditional justice is designed and carried out.

Similarly, traditional societies, such as those across the Pacific Islands, have lacked the specialized systems of courts, police and prisons.³⁶ Since the times of the colonial *kiaps* in Melanesia, for instance, these functions have commonly been performed by single entities. Social, economic, religious, political and justice aspects are not understood as the ostensibly independent silos that characterize the OECD states of the 21st century; rather, these aspects regularly intermingle, overlap, or function seamlessly. How can these differences be reconciled, or conversely, on which model should developments rely?

On the matter of justice processes, Western approaches insist on a 'winner/loser' approach, which, *inter alia*, permits only a narrow discussion of the conflict, insofar as evidence not directly related to the case at hand is generally impermissible.³⁷ By contrast, Melanesian traditional approaches focus on restoring social relations, and interestingly, include a practice known as 'airing the talk',

³³ S Dinnen and J Braithwaite, 'Reinventing policing through the prism of the colonial kiap' (2009) 19(2) *Policing and Society*, 161. Hughes, above n 8.

³⁴ McLeod, above n 6, 77.

³⁵ S Dinnen, 'State Society and Governance in Melanesia: Law, Order and State in Papua New Guinea' Discussion Paper 97/1, The Australian National University (1997) 6, Research School of Pacific and Asian Studies <http://rspas.anu.edu.au/papers/melanesia/discussion_papers/ssgmdinnen.pdf> at 28 June 2011.

³⁶ McLeod, above n 6.

³⁷ Ibid 78.

which vitally allows for all parties to make their grievances public. This practice affords a significantly greater chance of identifying and then addressing root causes.³⁸ Emblematic of this divide, the practice of incarceration was introduced and largely imposed on peoples for whom the Western concept of a jail was previously unfamiliar.

The above exploration, albeit brief, illustrates the often wide gaps between the socio-political imaginations of many recipient societies and those offering to provide 'solutions'. The recognition of diverse worldviews opens space to consider unfamiliar forms of politics and then how they may be best engaged. This is not to suggest that the politics of Western donor sources are invalid but rather, to argue that attempts to bring in Western practices and institutions can clash against the values and beliefs that have been instilled in local populations since birth. It is much to ask, for instance, to have someone's lifelong teachings suddenly supplanted by several months of training on the Western approach of separation of law and order functions, presumed to be *the* correct model.

3. The political within complex social systems

The discussion so far has explored numerous facets of the political, ranging from its central importance to successful peace and development transitions to highlighting how starkly different Western and non-Western societies can conceive the political itself. In order to grasp these aspects, however, it is also significant to understand the overarching context in which the political takes place. An analogy might be attempting to understand the behavior of fish without knowledge of the ocean. The aim of this section is to account for the context in which politics plays out, in straightforward and practical terms. It is based on the notion of 'complex social systems'.

Mainstream views have unwittingly treated peace operation environments as though problems, such as corrupt practices or lack of law and order, can be identified and then isolated on their way to being 'solved'. Time and again we witness program planning and implementation according to this static conceptualization. Indeed, it is difficult to find any major European Union or United Nations mission articulation that does not take this approach. Training indigenous police forces, for example, is a common tactic thought to 'solve the problem' that law and order is precarious due to a dearth of competent state police forces. It is assumed that once the police have been trained to a sufficient degree, the problem of law and order should be remedied if not mitigated substantially. According to this reductionist thinking, the social world is viewed implicitly as if focusing resources on police training could have no unforeseen or negative spillover effects.

This approach embodies technical solutions, which pay little attention to the politics surrounding who may be perceived as winners or losers, or even what forms of policing might be preferred by particular stakeholders.³⁹ The approach also assumes that different elements of the context can be treated in isolation. This is basically the peace operations' version of *ceteris paribus*, a term used widely in discussions about economics to mean 'all else remaining the same'. In stark contrast to this viewpoint, an increasing number of thinkers instead view programming through a lens informed by 'complex social systems'. This alternative perspective places *relationships* as the central organizing concept, and

³⁸ Ibid.

³⁹ B Baker, 'Multi-Choice Policing in Uganda' (2005) 15(1) *Policing and Society*, 19-41, identifies myriad forms of policing from state as well as non-state sources, underscoring the potential for many winners or losers.

informs fields as diverse as nuclear physics, biology and organizational development.⁴⁰ As Margret Wheatley puts it, “nothing in the universe exists as an isolated or independent entity. Everything takes the form of relationships, be it subatomic particles sharing energy or ecosystems sharing food. In the web of life, nothing living lives alone”.⁴¹

The centrality of relationships accrues special meaning when examining peace support operations. Contrary to how mainstream Western social science has informed our views of conflict-affected environments, complexity thinking introduces heterogeneity of actors, interaction, dynamism, and the notion that behavior *will adapt*.⁴² Individuals and communities live within ‘a web of relationships’ with their enemies.⁴³ Peter Coleman identifies five paradigms used to understand and address intractable conflicts, which includes Systems Theory.⁴⁴ The main contribution of this theory is that it shifts our understanding away from static, simplified views of conflict into an appreciation of what Coleman describes as “the complex, multilevel, dynamic, and cyclical nature of these phenomena”.⁴⁵ Whereas Coleman treats each paradigm as rough equivalents and credible in its own way, the author maintains that conflict-affected societies should be understood as existing within complex social systems. According to this understanding, insights from ‘the others’ are seen as potentially enriching our acumen at various sites.

Similarly instructive, Kenneth Menkhaus argues that we should think of the circumstances of ‘state fragility’ into which peace support operations are deployed as ‘wicked’ rather than ‘tame’ problems.⁴⁶ Chief among the characteristics that distinguish these problems are that they morph continually due to societal interactions. Moreover, the solutions to ‘wicked problems’ are neither true nor false “because they are judged in a social context in which different stakeholders have different values and goals”.⁴⁷ This attribute of multiple perspectives reinforces that the political – as does its close companion, legitimacy – precludes singular interpretations of social conditions. Indeed, there is no ‘god-eye from nowhere’.⁴⁸ To the contrary, the political fits the description of perennially contested, fluid and inter-subjective concepts flowing from the processes of social interactions. The international community, however, continues to plan, implement and evaluate peace operations as though they were tame problems. In this sense, problems are somehow afforded with well-defined stopping points, and with solutions that can be ‘objectively’ arrived at and evaluated from stable and thus predictable environments.⁴⁹

When the above characteristics are amalgamated into an accessible form, the context in which the ongoing production of the political occurs can be understood as follows. First, interactions are the key to what exists in the social world. What ultimately emerges is a product of the interdependent exchange between each of the myriad levels. A vital dynamic of this interaction is that agents “adapt to the

⁴⁰ Lederach, above n 4, 29.

⁴¹ M J Wheatley, *Turning to One Another* (2002) 29.

⁴² M Brigg, *The New Politics of Conflict Resolution: Responding to Difference* (2008) 143-8.

⁴³ Lederach, above n 4, 31.

⁴⁴ P Coleman, ‘Paradigmatic Framing of Protracted, Intractable Conflict: Toward the Development of a Meta-framework –II’ (2004) 10(3) *Peace and Conflict: Journal of Peace Psychology*, 226.

⁴⁵ Ibid 226.

⁴⁶ K Menkhaus, ‘Arrangements sécuritaires locaux dans les régions somaliennes de la Corne de l’Afrique’ [Local security arrangements in the Somali regions of the Horn of Africa] *Politique Africaine*, 11. For a general discussion on wicked versus tame problems, see also H Rittel and M Webber, ‘Dilemmas in General Theory of Planning’ (1973) 4 *Policy Sciences*, 155. Furthermore, the distinction between tame and wicked problems parallels the distinction between ‘complicated’ and ‘complex’.

⁴⁷ Menkhaus, above n 46, 86.

⁴⁸ Brigg, above n 42, 147.

⁴⁹ Menkhaus, above n 46, 86.

behaviour of other agents, who in turn adapt".⁵⁰ As a result, particular relationships or patterns of behaviour cannot be reduced and quarantined as if they occur in a vacuum or closed system. Second, multiple perspectives will continue to comprise those engaged in these relationships. Among other implications, this denies the possibility of a single viewpoint while lending itself to a 'de-centred universalism' approach in which difference is always welcome.⁵¹ "Success for whom and how so?" are questions that do not lend themselves to one-dimensional responses. Third, 'the whole' is what matters, because complex systems are ever-emerging syntheses in the space between chaos and order. The characteristics exhibited by such systems are not therefore merely the sum of isolated, disconnected parts. The fourth characteristic follows directly from this: unforeseeable consequences are virtually assured in this constantly emerging world. Rigid programming, set in long timeframes, is thus highly problematic because of its incapacity to adapt to changing circumstances.

The work of Bruce Baker and Eric Scheye on the justice and security sector in post-colonial environments reinforces the need to focus on interactions by drawing attention to the "parallel authorities and regimes" that pervade the vast majority of places where peace operations tread.⁵² This awareness, moreover, points to the complex inter-relations that exist in each programming space. Of the pragmatic issues raised by this awareness is the following key consideration: if external actors grant resources to one actor/group but not to another, the potential for negative unintended consequences looms large since the excluded might consider international intervention as a threat to the continuance of their identity and livelihood. In any case, programmers must remain cognizant that relationships across the broadest spectrum of actors are affected from interactions in complex social systems.

Equipped with a complex systems perspective, we keep sight of the multiple perspectives that inexorably comprise any social system. Peace operation environments are commonly characterized by non-state and hybrid institutions, practices and actors,⁵³ making this awareness highly relevant. In practical planning and implementation terms, we must be continually aware how the various local actors and mechanisms relate to and interact with each other. In the sphere of policing, this may entail the state police, traditional chiefs and customary justice, crime prevention citizens groups, and others. No longer can we afford to assume that activities in one place will have no effect on other parts of the system. Similarly important is repudiating Western social science's myth that we can accurately know or predict what will eventuate from programming within a complex web of relations.⁵⁴ Unlike 'complicated' systems (for example, wiring in an aircraft), which are ultimately knowable, the interaction between many agents in complex systems, by contrast, results in unpredictable and surprising outcomes.⁵⁵ Such an admission may help to imbue a humbler attitude among external experts.⁵⁶

⁵⁰ D Hendrick, *Complexity Theory and Conflict Transformation: An Exploration of Potential and Implications*, Centre for Conflict Resolution, Department of Peace Studies, Working Paper 17 (2009), 5.

⁵¹ Brigg, above n 42, 163.

⁵² B Baker and E Scheye, 'Access to Justice in a Post-conflict State: Donor-supported Multidimensional Peacekeeping in Southern Sudan' (2009) 16(2) *International Peacekeeping*, 173.

⁵³ See B Baker and E Scheye 'Multi-layered justice and security delivery in post-conflict and fragile states' (2007) 7(4) *Conflict, Security & Development*, 503-528.

⁵⁴ Brigg, above n 42.

⁵⁵ Hendrick, above 50, 5.

⁵⁶ Brigg, above n 42.

4. The case of the Marshall Islands

This section brings together the above discussions to interrogate a current case of international assistance. How might the conceptual arguments made thus far in this chapter translate into the real world to help the international community improve its part? What can a political consciousness offer to programming by highlighting the multiplicity of crucial perspectives, state as well as non-state, with their potentially vastly different world views? And how might we grapple with all of this, recognizing that it takes place within a fluid, complex social system in which the interactions between the stakeholders are both the key to success and impossible either to isolate or predict far in advance?

The author's recent field work in the Republic of the Marshall Islands (RMI) aimed to show how a conventional, state-centric and technical approach, devoid of political consciousness, can miss the mark entirely. What is needed instead is a sound grasp of the politics that comprise RMI, i.e. not just the intentions of state actors or according to what Westerners may deem their interests to be. First and foremost, the sources related to power, legitimacy and interests of the groups that comprise an environment should begin to be identified as fully as practicable. This endeavor entails recognizing the different values and beliefs of intervening and local actors alike. Furthermore, the fluid relationships and emerging interaction between stakeholders that comprise the social system must remain at the forefront of any thinking about where and how to allocate resources during interventions. Such awareness does not presume to be able to guess the future, but instead recognizes the central importance of stakeholder interaction so that the inevitable reactions can continue to be a chief consideration for program planning and adaptation. As such, identifying the emergence of unforeseen consequences should remain a prominent aim for all concerned. The underlying point is that an appreciation of the above ideas means that avenues for sustainable and context-appropriate assistance can start to come into focus. It is the kind of involvement that avoids instilling local resistance due to political disinterest.

The following analysis is based on viewpoints elicited from a wide spectrum of stakeholders in RMI. Consistent with the chapter's recommendation to gain as comprehensive as possible an awareness of the politics, the net was cast deliberately wide to gather the diversity of perspectives across community and government alike. At the same time, it was appreciated that the nature of the environment was a complex social systems, and this in turn warranted special focus on how each stakeholder might interact with and perceive the others. The information was gathered through semi-structured interviews conducted in May and June 2010, by four members of the Australian Federal Police's (AFP) Pacific Policing Development Program and two researchers from the Institute for Social Science Research, The University of Queensland (ISSR). The express purpose of the enquiry was to draw a picture of the situation from which planning and monitoring and evaluation for sustainable peace and development could be produced. More than 50 persons from over 30 organizations or government units were asked about issues pertaining to public safety, in general, as well as specific information related to police performance and coverage. Church groups, women's organizations, traditional leaders, local NGOs, educational institutions, and the chamber of commerce were met together with members of the police (RMIP), attorneys general and ministers of government departments.

The broad categories developed to prompt story-telling responses included: identifying current practices and viewpoints together with any concerns; the

causality underpinning the current circumstances (a focal point for political considerations); perceptions of the police; and accompanying recommendations linked to what local resources might be brought to bear. Headline findings included: the top public safety concern was alcohol-related, anti-social behavior; and perceptions of the police were divided, perhaps predictably, between community stakeholders and public safety personnel (for example, the police). Recommended solutions varied from creating 'safe houses' for women and limiting alcohol access, to specific ways to improve RMIP's responsiveness. From a methodological point of view, variances to these generalizations stood out clearly, demonstrating the moderating value of triangulation. Concurrently, there were many original additions to the common views which, when put together, offered a robust picture of the multiplicity of Marshallese perspectives on these issues. The varied views also provided myriad options concerning solutions to be pursued or where to allocate resources, irrespective of any contradictions among the perspectives.

Seen through a conventional, state-centric, technical lens, the interpretation would tend to suggest that more and better police training and more government resources (including the right kinds of legislation or formal enhancements to policing or judicial powers) would be advisable in order to redress RMI public safety problems. But more nuanced points came from the interviews, which help to appreciate the politics of RMI public safety (i.e. the way various perspectives converge to influence how Marshallese society functions). These points included:

- Patriarchal cultural norms have contributed to many abuses of women (for example, sexual and domestic violence) yet, these mores are a departure from centuries-old traditions whereby women had authority and respect, and were protected; hence there is precedence for returning to these less problematic cultural norms.
- There is societal stigma associated with abused women, which in turn makes it difficult to prosecute and convict male offenders because it means asking women to be publicly shamed by coming forward.
- Traditional leaders (mainly *Iroij* but also the *Alaps*, who are the 'caretakers' of the land) continue to hold significant albeit informal sway in the community. (*Alaps*, for example, can heavily influence voting by threatening to evict persons from their land and more generally, *Iroij* are able to command significant compliance to their edicts.)
- Numerous forces in recent decades (for example, the increasing influence of Western culture, the availability of alcohol, and movements of persons from one island to another) have seen an erosion of the cultural mechanisms that previously helped to maintain order, with one result being that the younger generation in particular appears to resist traditional power and norms.
- The ethnic Chinese are an important political consideration, since their actions as profit-driven business owners have appeared to contribute significantly to the widespread youth drinking problem.
- Regarding resources to improve the situation, it was consistently pointed out how NGOs and community groups (for example, church groups such as Salvation Army and the Police Wives' Group) could be productive local sources to begin sustainable progress. A variety of vehicles through which to communicate effectively to the community were identified. In addition to conventional sources such as the radio and newspapers, they also included traditional mechanisms such as village meetings (*Weto*) to spread the word in effective and culturally appropriate fashions, i.e. Western institutions and socio-technologies are not necessarily the best way to convey what peace and development programs are doing.

4.1 Unequal administration of the law

In order to illustrate how a political consciousness could inform assistance to the RMI, the author selected a key issue elicited from the interviews, concerning the near-unanimous view, among non-police-related interviewees, that the RMIP were not enforcing the law equally or effectively. This is a common criticism in peace and capacity development sites. Correspondences to impunity, corruption and simply inadequate training have frequently become superficial diagnoses. Explanations of and cures for endemic corruption would normally suggest that endemic corruption is part of the 'flawed' condition of local culture and therefore the solution would be increased training and education on how to be 'good' police, that is according to Western models of what a good police is. The 'solutions' across the globe to date have therefore included more oversight of various departments and tighter accountability policies and structures, as well as more and better training to provide the members of the police force with a clearer sense of professional ethics and conduct. Based on such apolitical assessments, the international community derives its assistance mandates. But such an interpretation fails to consider the politics, and therefore falters in its advice to development assistance.

By contrast, political lenses draw attention to what is occurring below the surface, where the pulse of peace operations beats. In short, the inequitable enforcement of the law stems from social constraints on the members of the RMIP. A broad section of stakeholders interviewed told of how traditional sources of authority outside the formal state were still highly powerful in terms of how the police conducted themselves. Specifically, interviewees chronicled how the police were severely hampered from enforcing the law equally across society because powerful members of society were able to leverage traditional power sources and forms of socialization to remain above the formal law; The police were unable to arrest or pursue someone if the *Iroj* did not want the persons to be held to account for fear of reprisal. Examples were given in which the police were contacted shortly after detaining 'well-connected' persons and pressured to release them. This included the use of physical threats. The conventional view of the international community fails to recognize that Western institutions can often be at odds with non-state forms of power and legitimacy. It skims over questions of why some persons and not others seem to enjoy immunity by failing to account for informal sources of power and legitimacy. Particularly, in close-knit communities like those living in most of the Pacific Islands, the police officers, like other people, find it hard to ignore the socio-political conditions in which they live their daily lives. RMIP officers have grown up being taught both to respect the authority of the traditional leaders and to be suspicious of Western impositions (for example, the vexatious post-World War II relationship with the United States). Hence, introduced Western ways have led an uncomfortable co-existence with more indigenous pulls. With a political lens, we can appreciate that it is unrealistic to expect the police to go 'outside themselves' and somehow ignore their socialization.

These insights can have practical and concrete consequences if international assistance fails to take seriously the power of traditional elites, such as the *Iroj* and *Alaps* in the Marshall Islands, i.e. without a political awareness, members of the RMIP could continue to be caught in a political cross-fire. A likely result is that not only will their morale and public perception continue to suffer, but so too their conduct in general. Indeed, tacit frustration was apparent along these lines among RMIP interviewees. But these political dynamics must be known in order to effectively address the sources of the problems rather than their manifestations. We cannot expect them to follow Western models of best practice

policing if they operate in a political landscape that impedes much of what the training exhorts.

Given these realities, the key question for international assistance should revolve around: How can we help mitigate interconnected public safety problems? The question should not be narrowly cast as: How can we better 'educate' the state police so that their conduct clearly adheres to Western practices? Irrespective of what we as Westerners endeavor to instill in police officers in terms of procedure and principles, the political context in which they live has more powerful influence, which leads to tension between the often opposing forces of Western versus indigenous politics. Rather than directing resources for training, policing solutions should concentrate foremost on making the political terrain more conducive to equitable and effective public safety. To work in the political space, intervening actors such as the AFP will clearly need to consider different strategies and personnel skill sets than previously practiced.⁵⁷ With respect to RMI, this means working with traditional leaders so that they can play their part. Concrete strategies might entail establishing a community-wide forum, which would include government representatives to periodically gather together the myriad actors that influence public safety so that the political issues could be raised and negotiated.⁵⁸

This ongoing engagement to build relationships and cooperation need cost no more than other approaches. It explicitly embraces the World Bank's aim of being demand-driven. In concrete terms, the approach promises to generate a grounded accountability, which could help to remove a crippling impediment to RMIP's capacity to enforce the law equally. At the same time, it embraces an awareness of complex social systems, meaning that the RMIP is not seen as existing in a vacuum. Therefore, aid programming must take into consideration the emerging relationships and their changing environment rather than believe that more training will lead to equitable enforcement. Yet another benefit is that the resources that the *Iroj* and other community members could bring to bear for improved peace and security are vital. This is particularly so because, as with the vast majority of recipient societies, available state resources in the RMI conspicuously lack the capacity to provide daily law and order services to the bulk of the population.

5. Conclusion

The underlying argument of this chapter has been that the international community must shift away from its tendency for technical solutions and instead begin to engage with a political consciousness. In order for external assistance to bear sustainable results, it must be guided first and foremost by the determinant fluid interests, power and legitimate forces on the ground. These forces swirl around in a complex social system whose interactions determine what emerges. This reality does not lend itself to prediction by even the most sophisticated Western social science technologies.

A big part of the challenge for the international community is to accept that what results may not approximate the Western liberal democratic model.⁵⁹ This is not to say that international actors should be forced to abandon or violate their own forms of politics. It is to say, however, that what emerges cannot be stifled by the discipline of the state sovereign and by liberal universalism.⁶⁰ The pursuit of a

⁵⁷ Hughes, above n 8.

⁵⁸ This suggestion comes directly from the unpublished work of Jodie Curth.

⁵⁹ Richmond, above n 5.

⁶⁰ Brigg, above n 42.

political order that seeks to “combine the comparative advantages of both the classic Weberian system and traditional or customary institutions” may provide a compelling alternative.⁶¹ But, as Abby McLeod maintains, external attempts to promote peace and development will only succeed when local notions of order are at least accommodated, if not accepted.⁶²

Given this lofty set of demands on the international community, how to go forward? A starting point is to become familiar with local politics. This requires addressing the widespread lack of awareness of the often deep and pervasive differences between non-Western and Western imaginations. The Marshall Island case presented in this chapter illuminated how to redress this awareness gap by eliciting views from the broadest spectrum possible of stakeholders. Key to mapping the political realities that constitute a society is to learn how and with whom different stakeholders interact, and to understand the role of the state and the cultural information related to taboo, power structures and sources of legitimacy. More adroit engagement can stem from this increased knowledge.

The international community, more generally, should aim to help generate the space in which politics can evolve in productive ways. One invaluable contribution may be simply to initiate conversations under a peacekeepers’ security umbrella between local enemies who have previously been unable or unwilling to work together.⁶³ More ambitiously, the aim could be to work with stakeholders to instill John Paul Lederach’s “practice of paradoxical curiosity”, whereby the pernicious dichotomies that enable violence can be eroded, and in their place, community members can (re)learn to navigate constructively through the paradoxes of their politics.⁶⁴ Ultimately, it is through these politically focused approaches that we can begin to find a society’s heartbeat and thus, how peace support operations should be undertaken.

⁶¹ V Boege, M A Brown, K P Clements, and A Nolan, ‘States Emerging from Hybrid Political Orders – Pacific Experiences’ (2008) 11 *The Australian Centre for Peace and Conflict Studies, Occasional Paper Series* 46.

⁶² McLeod, above n 6, 73.

⁶³ J Braithwaite, H Charlesworth, P Reddy and L Dunn, *Reconciliation and Architectures of Commitment Sequencing peace in Bougainville* (2010) 1.

⁶⁴ Lederach, above n 4.

The International Community and the 'Shura Strategy' in Afghanistan¹

Noah Coburn

The international community in Afghanistan has increasingly come to realize that the failure of the Afghan state to provide citizens with predictable access to justice has contributed significantly to the insurgency in much of the country. As a result, funders, policy makers and the international military have increasingly looked to alternative approaches to justice that rely on informal, non-state actors. While this acknowledgement of legal pluralism in Afghanistan has been an important step in attempting to understand the local context for both rule of law and governance challenges, whether international programs aimed at engaging the informal justice sector are actually effective remains an open question.²

The aim of this chapter is to look at how the presence of the international community has begun to reshape the relationship between the formal and informal justice sectors in Afghanistan. There have been several thorough studies of the informal and formal sectors in Afghanistan, most of which focus on the resilience of the informal system and the corruption of the formal system.³ Several of these reports have looked at the diversity of forms of traditional dispute resolution mechanism, particularly the contrast between the Pashtun south and east, and other parts of the country. Some have summed up these systems – at times competing, and at others harmonized – as the 'clash of two goods'.⁴ The complex, often symbiotic relationship between these systems, has evolved often times in response to dynamics between the state, based largely in Kabul, and communities in the provinces. In the decade of the current international intervention, the situation has become increasingly complicated,

¹ Some of the ideas presented in this chapter have grown out of previous publications by the United States Institute of Peace (USIP). In particular, N Coburn and S Miakhel, *Many Shuras do not a Government Make: International Community Engagement with Local Councils in Afghanistan*, USIP Peace Brief (2010); and N Coburn and J Dempsey, *Informal Dispute Resolution in Afghanistan*, Special Report, USIP (2010) <www.usip.org> at 28 June 2011. The phrase 'shura strategy' has been borrowed from Anne Marlowe of *The New Republic*.

² Throughout this chapter, the phrase 'informal sector' is used to refer to the range of actors responsible for the vast majority of dispute resolutions across Afghanistan that are conducted outside of formal court structures. Also, referred to as 'traditional justice', community-based dispute resolution and non-state justice, all of these phrases are problematic in one way or another. Most notably we find that 'traditional' mechanisms are often very modern reformations of historical practices, non-state dispute resolution involves state actors such as district governors and community based dispute resolution relies on religious figures from other communities. For simplicity's sake, 'informal justice' will primarily be used, which the author finds the least problematic of the common terms, although this is not meant to imply a strict dichotomy between formal and informal justice. Most of the significant disputes actually end up relying on actors from both sectors.

³ See for example A Wardak, 'Jirga: Power and Traditional Conflict Resolution in Afghanistan' in J Strawson (ed), *Law After Ground Zero* (2002); The Liaison Office (TLO), *Linkages between State and Non-State Justice Systems in Eastern Afghanistan: Evidence from Jalalabad, Nangarhar and Ahmad Aba, Paktia* (2009); D Smith and S Manalan, *A Case Study of Community Based Dispute Resolution Processes in Bamiyan Province* (2009) Kabul: AREU; D Smith, *A Case Study of Community Based Dispute Resolution Processes in Nangarhar Province*, Kabul: AREU.

⁴ See T Barfield, N Nojumi and J A Their, *The Clash of Two Goods: State and Non-State Resolution in Afghanistan*, USIP.

particularly as a result of the recent military and civilian surge. As a result, in many districts it is no longer two systems working together and occasionally clashing, but three, with internationally sponsored councils competing with both the state and informal systems for legitimacy.⁵

This chapter will focus on this nexus between the international community, Afghan state actors and informal actors. While many internationally sponsored programs have not been running long enough to have created lasting results, this chapter will argue three points based on some initial observations on the short lives of these projects:

1. Informal dispute mechanisms are highly politicized and adapt to changing political conditions;
2. International efforts to engage the informal system have been too reliant on Western, state-oriented paradigms of ordering society (often emphasizing large formal programs with formidable budgets) to be effective at increasing access to predictable justice in Afghanistan; and
3. Local actors have taken advantage of these shortcomings to increase their own political capital often at the expense of local stability. This is not to argue that internationally sponsored programs cannot be successful in Afghanistan at improving access to justice through engaging the informal system. However, these efforts need to be localized and politically aware, and must ensure that they do not create perverse political or economic incentives, which actually undermine access to justice in the long term. Under the current conditions, with the sometimes contradicting goals of counterinsurgency and state-building, and lack of coordination between international and Afghan government actors, many programs have thus far failed to have their intended consequences.

1. The 'Shura Strategy'

On a warm spring day in 2010, inside a hastily constructed Afghan National Army training center on the plains west of Kabul, the International Security Assistance Forces (ISAF) in Afghanistan hosted a gathering of local elders, government officials and international observers. A stage with plush sofas had been set up in the front of the room, on it. On these sofas sat a handful of ISAF officers, the Minister of Justice, four members of Parliament, a State Department representative and a few other Afghan Government dignitaries. A handful of ISAF reporters and other Westerners sat at the back of the room. Between us, around long tables, just low enough below the stage that their heads were at the levels of the feet of the speaker, sat approximately 140 local elders and recently released detainees.

The program was a part of an ISAF strategy to deal with the large number of detainees being held by NATO forces in Afghanistan. Detainees, most of whom were being held at a US constructed facility at the Bagram Airfield, were having their cases reviewed. Those who had a sufficient amount of evidence against

⁵ It is obviously an oversimplification to argue that these three groups of actors are independent and often there is a good deal of overlap of their roles. For example, formal actors, such as judges, may also sit on informal bodies like district *shuras*. For such an analysis, however, considering the three as distinct is a useful oversimplification. In particularly unstable areas, Taliban justice is also a viable option, but will only be briefly touched upon in this chapter. For more on this see S Ladbury in association with Co-operation for Peace and Unity and D Smith, *Helmand Mapping Study*, Coffey International Development (2010).

them were being handed over to the Ministry of Justice. Those on whom they had no evidence or who were accused of lesser crimes were being released at 'Prison Release Shuras'. The use of the term 'shura', from the Arabic for consultation and often translated as council, is intriguing. *Shuras* are found across Afghanistan in a series of different guises, but generally composed of the influential men from a certain community, ranging from neighborhoods to councils that include members of tribes from across the country.

These bodies can be highly formalized or case-specific and many have the tendency to break down and reform quickly. The phrase is often contrasted with *jirgas*, which are generally more ad hoc gatherings of similar elders aimed at resolving a specific dispute or case. In some instances, however, they can be used interchangeably, and the lower house of the Afghan Parliament is called the *Wolesi Jirga*, despite the fact that it is a permanent council. As the international community has come to increasingly recognize the importance of these local mechanisms in rule of law, governance and security, numerous efforts have been made to engage such bodies in a 'traditional' manner.⁶

This Prisoner Release Shura was part of a series of loosely related efforts by different international groups to use local justice and governance mechanisms to strengthen rule of law in Afghanistan. While occasionally at odds with each other and rarely coordinated, all of these efforts were a part of the counter-insurgency shift that included a large surge in troops, but more importantly, also included increased efforts to engage local communities in a more culturally sensitive manner. These programs frequently had rather unpredictable results. This *shura* was no exception and as Afghan and international speakers each made their presentations, one was left with the feeling that a series of very different conversations were taking place simultaneously. There was certainly room for participants to interpret the event in many different ways.

The meeting was opened by the Minister of Justice who called on those who had been released to join the side of the Afghan Government and accept the Constitution. He argued that prayer and respect for religion were the only real reasons that any of them were alive and that the current instability made prayer impossible. At the same time, however, he called on ISAF to provide evidence for those detained or to release them. The Parliamentarians who followed the Minister were more bombastic, calling on ISAF and the Ministry of Justice to immediately release all those who were innocent (the way the criticism was phrased suggested that it was the Ministry's fault when international forces kept innocent Afghans detained). One parliamentarian who was a former Taliban described his own detention and said that reconciliation should have started in 2001, not nine years later. Several participants appeared to be using the gathering as an opportunity to campaign for the parliamentary elections, which were only a couple of months away at the time of the meeting.

The speeches made by ISAF representatives were slightly more formulaic. They focused on the number of detainees who had already been released and laid out the process of gathering testimony and evidence, such as fingerprints and residue from explosives. An ISAF general, the highest ranking member of the international military speaking, talked about their desire to hand over the system to the Afghan government as soon as possible, so that ISAF could become primarily advisors in the process.

⁶ 'Traditional' is a problematic word, particularly in the Afghan context, where tradition is often cast and recast in order to justify very modern political agendas. Dispute the use of the term, none of the mechanisms discussed in this chapter should be considered static.

The elders and detainees spoke towards the end of the day. They were briefer and a number of them were subdued. Many spoke of their innocence and described how they had been arrested after local enemies had given the international military false information about them. Some were more animated. One elder repeatedly emphasized the fact that we were in the Islamic Republic of Afghanistan and then led the room in three chants of *allahu akbar*, during which the international attendees seemed to shuffle their feet uncomfortably. However, the blame for long detentions was spread fairly evenly. Several speakers pointed out that the international military should not be detaining people, and some emphasized that the Afghan Government did not have the capacity to deal with such cases. A number also pointed out how well they had been treated while detained.

The meeting was not always smooth. As the speeches were being delivered, participants came in and out of the building and attention wandered. Translation was also slow and sloppy. During one more animated speech from a Member of Parliament, the translator commented to the English-speaking listeners that the man was simply repeating himself and that "he looked drunk".

At a lull in the meeting, a series of elders gathered around some of the ISAF officials towards the front of the room. They swamped the overly taxed translators with questions about other neighbors and relatives who had been detained during military operations and not heard from again. The officials dutifully took down names and phone numbers, but did not seem optimistic that they would be able to assist. They tried to convince the elders that even though this meeting was only for those who had already been released, they should stay for lunch. One elder told the official that any information he could give him about those who were still detained would be vital. At the end of the meeting, all of those released received a certificate in a picture frame. It was hard to imagine those who were still living in insurgent-filled areas returning home to hang the certificate proudly on their walls.

The most remarkable aspect of the meeting, however, was the sense that the three main groups in the room, the Afghan Government officials, the members of the international community, and the local elders and detainees, were all talking past each other. In fact, when one takes a wider look at the international community's engagement with the informal justice system in Afghanistan, it becomes increasingly clear how conversations about access to justice, security and formal and informal structures are mired in a series of contradicting goals, visions and rhetoric.

2. Informal dispute resolution and the international intervention

Over the past few years, the international community has come increasingly to recognize the importance of informal dispute mechanisms in Afghanistan. This has resulted in an increased number of programs engaging with the informal sector. The United State Agency for International Development (USAID) awarded US\$10 million to a large private contractor. A concerted effort has been made by the United Kingdom Department for International Development (DFID) to create district-level justice sub-committees in districts where British forces have been fighting against insurgents. A series of ISAF programs aimed particularly at dealing with detainees have been implemented. A nation-wide effort has been made to set up development councils, which sometimes lead to a direct impact on

local governance, and there are a handful of similar, smaller programs run by various NGOs interested in the rule of law.⁷

Additionally, at the encouragement of a number of international donors, including USAID and DFID, the Ministry of Justice has worked to formalize the relationship between the formal and informal justice sectors. This has entailed a rather lengthy and ongoing series of negotiations and working group meetings to draft a policy and later a law, involving Afghan government institutions, such as the Afghan Independent Human Rights Commission, the Ministry of Women's Affairs, the Supreme Court and the Attorney General's office, as well as international donors, such as the American Embassy, the United Nations Assistance Mission to Afghanistan and several smaller non-governmental organizations (NGOs).

The United States Institute of Peace (USIP) has been closely involved in this drafting process as well as in running a series of pilot projects in 13 districts across eight provinces of the country. These pilot projects are meant to both investigate how informal dispute resolution is working in the targeted districts and to improve access to justice by better linking informal bodies with the formal justice system. The data considered in this chapter come from these pilot districts as well as interviews and conversations with Afghan government officials, local leaders and members of the international community working on rule of law and informal dispute resolution. The analysis looks at programs dealing both with the informal justice sector and local governance mechanisms, which have all been reshaped by the recent shift in strategies that attempt to target local political actors in order to stabilize Afghanistan.⁸ Ultimately, the analysis suggests that in order to be successful, the international community must ensure that programs are small, flexible and grounded in local political realities, which – these programs have thus far struggled to achieve.

2.1 Local dispute resolution as an adaptive mechanism

It is often assumed that informal justice mechanisms have survived in Afghanistan solely due to the weakness of the central state. This explanation, however, diverts attention from the actual strengths of the informal system. Informal forms of dispute resolution are adaptive mechanisms that have in turn contributed to a balanced relationship between the state and non-state leaders in many parts of the country. Informal mechanisms have not survived because the state has failed to co-opt them, but because local leaders have adapted them to fit changing local political and economic conditions in order to maintain stability and local autonomy.

In a political setting that values independence, informal dispute resolution has served as a method for maintaining community stability by resolving cases in a way that emphasizes collective rights. The ideal format of both *shuras* (ideally composed of representatives of each group within the community) and *jirgas* (generally composed of an equal number of the kin or close allies of both

⁷ While the international community often makes the distinction between local governance and rule of law projects, in communities in Afghanistan such a distinction is rarely meaningful. The elders, religious figures and commanders in an area who are involved in dispute resolution are the same figures involved in local governance. Similarly, while the District Governor should technically focus only on governance, in practice this figure is often deeply involved in dispute resolution as well. As a result, this chapter will consider both local governance and rule of law initiatives sponsored by the international community that have impacted dispute resolution.

⁸ 'Strategies' are used here since the international community is not as homogenous as many would like to assume. Different organizations in Afghanistan often have very different goals and methods of operation. The most obvious example are the contrasting goals of state-building, often pressed by the US State Department, and counter-insurgency, which defines ISAF's current mission.

disputants) creates social pressure on the disputants to compromise and resolve their dispute in a way that will not further destabilize social relations. In the case of the *jirga*, by relying on patrilineal relatives, who in Afghan society share both honor and legal responsibility, pressure is increased since the honor of those deliberating is also at stake. A failed negotiation would further destabilize the community and lessen the prestige of all those involved in the process. As a result, those involved in informal dispute resolution are often also responsible for the enforcement of their decisions. For example, in one recent case in Nangarhar, the resolution of a case involving multiple murders called on all representatives present to burn down the house of anyone who violated the truce by attempting to extract further revenge.

Informal mechanisms vary across the country. Many assessments of the justice system conclude that these variations are simply the result of cultural differences between Pashtuns (who favor *jirgas*) and non-Pashtun groups (who are more likely to have formalized *shuras*). However, there is also a socio-political logic to these variations. In areas of ethnic diversity, it is more effective to have a recognized body that negotiates relationships between elders from each group. Without direct kin ties between groups, a formal *shura* has political legitimacy that more ad hoc groups lack. On the other hand, in Pashtun areas of the south and east, tribes are still the fundamental method for organizing socially and politically. Therefore, there is less of a need for such a body of oversight that transcends ethnic difference, and disputants use kin-based relations to identify those who can sit on the *jirga*. Such ad hoc bodies have the additional benefit of being difficult to regulate and control. It is much easier for the state or individuals to monitor and regulate a council with a fixed list of members who often meet at specific times than it is to control a group that comes together only for the express reason of resolving a specific dispute.

As a result of these trends, in areas where USIP has conducted research, it is often the most heterogeneous ones where district *shuras* are the most necessary and, as a result, the strongest. For example, the primarily Tajik district of Istalif has a very small and rather informal district *shura*, since kinship ties often ensure that disputes are resolved relatively quickly. In contrast, the neighboring district of Qara Bagh, composed of Pashtun and Tajik communities, in which there are regular tensions over land and water, has a much stronger district *shura* that meets regularly to negotiate relationship and disputes between communities.

Informal bodies also do not directly resist the state as much as they use it when it is to their advantage and many dispute resolution bodies already have formal or informal links with the state. In some cases, once a civil dispute is resolved it will be taken to the Haqooq Office, which deals with civil cases, to have the resolution recorded there. Many groups acknowledge that the stamp of the Government – while not as legitimizing as community consensus – does provide more legitimacy than a document without such a stamp would. Under current Afghan law, the Haqooq has the right to claim a 10 percent fee on any case that the office registers, although in several areas, such as Ahmadaba in Paktya, the Haqooq has come to realize that such a fee makes individuals less likely to register cases with them, and in practice rarely charge more than a consistent two dollar rate.

Other links are less predictable, and many bodies have close relations with their district governors who occasionally certify decisions. Some district *shuras* also meet in the district governor's compound (for example in Qara Bagh or Istalif), further blurring the line between state and non-state actors. The relationships

between local officials and informal leaders vary in the districts where USIP works. However, in the districts where the informal and formal systems work together, respondents generally tend to be more satisfied with dispute resolution, than in areas where district governors have distanced themselves from local elders. Such relationships clearly vary over time, and in Ahmadaba in Paktya, a district that became less stable in 2010, elders, perhaps threatened by insurgents, began to pull away from the district governor, who in turn has become less willing to negotiate with local leaders.

It should not be assumed, however, that these mechanisms only work in one direction. The district governors described above also have an incentive for maintaining relationships with informal leaders who provide them with insight and political reach into the community that they would otherwise lack. This is particularly useful since following historical governance patterns in Afghanistan, most district governors are assigned to areas other than their own. Such patterns, however, do not only reflect the weakness of the state, and even in areas with a relatively strong formal judiciary, the state often relies on informal actors. After extensive tracking of cases in both the primary criminal and civil courts of Kabul city in the summer of 2010, USIP observed that almost 50 percent of all cases before the court had some form of informal dispute resolution aspect to them. Most often the judge would refer the compensatory aspect of the case to a group of kin of the parties to determine how much should be paid.

As these cases suggest, informal bodies are far from static, but respond to shifting political and economic conditions. Some have even argued that the presence of *shuras* in Afghanistan has expanded significantly over the past decades, mostly due to the preference of international groups to engage with such 'representative bodies'.⁹ These changes, however, are minor compared to the other ways that the international presence in Afghanistan has deliberately attempted to reshape informal governance and dispute resolution bodies across the country.

3. Adapting to post 9-11 conditions

Since the collapse of the Taliban Government following the international invasion of Afghanistan in 2001, there have been significant political and social changes. On a local level, these changes have become increasingly significant during the recent 'surge' of both international troops and civilians as the United States has increasingly embraced a counterinsurgency model aimed at 'winning hearts and minds' at the local level. The increased emphasis on local development, governance and rule of law projects has reshaped the political landscape in many areas and has particularly increased the access to resources for local leaders. In turn, on a national and local level, individuals have shifted their approaches to both formal and informal mechanisms in order to adapt to these changing conditions. The following sections focus specifically on places where we see the formal and informal systems interacting with international programs and actors.

3.1 Informal justice on the local level

The international community has sponsored several programs, large and small, aimed at interacting with informal political leaders in order to strengthen rule of law and local governance. These programs have had varying degrees of

⁹ See C Johnson and J Leslie, *Afghanistan: The Mirage of Peace* (2008) 41-2.

success. USIP has used a series of approaches in 13 different districts in eight different provinces and has tested certain approaches primarily aimed at linking formal and informal mechanisms. For example, in districts with some government presence, USIP has found that creating forums in which the elders and government officials can discuss ways in which to facilitate cooperation has helped improve dispute resolution and cut down on tension between the two groups. At the same time, programs that encourage recording and storage of dispute resolutions have helped to formalize this process and to promote predictable and effective linkages between the formal and informal systems. In Paktya, for example, even in communities with high illiteracy rates, there are written records being kept of a majority of significant disputes that have been resolved. There are, however, several steps can be taken to make such recording and storage more effective, such as standardizing the ways in which informal decisions are recorded. In other areas, however, USIP has focused on more formalized training of elders in order to approach the formal system. With countless community leaders across the country, this approach yielded some positive results, but ultimately does not appear to be a cost-effective way of creating real change at the local level. The approach does not address the central political issue of why the elders sometimes choose to approach the formal system and at others, keep cases strictly within the informal sphere. Ultimately, it appears that for many community leaders, choosing whether to access the formal system is based more on whether they feel that such a venue would or would not be in their best interest, than whether they have the necessary knowledge to access the formal system.

In other cases, programs that utilize such 'traditional' mechanisms have been successful at promoting both rule of law and accountable governance mechanisms. For example, the National Solidarity Program (NSP) set up over 20,000 Community Development Councils (CDCs) across the country, with the goal of increasing community involvement in the development process.¹⁰ While some of these CDCs have met with mixed results, in other places, such as some communities in Nangarhar, other CDCs have become liaisons between the community and international actors, and have expanded their roles into governance and dispute resolution issues. These bodies have actually replaced some other local *shuras* as forums for dispute resolution. This program has been effective in part because of how it adapts to local conditions and relies on local implementing partners who have a history of working in Afghanistan. For example, based on cultural norms, in some areas, CDCs are composed of both men and women; in others there is a council for men and a separate council for women, and in more conservative parts of the country the councils are male-only. Such acknowledgements that the current political and social context in Afghanistan may not allow programs to instantly install Western ideals make this program more flexible and successful than numerous other programs that tend to disregard local norms.

In some cases, however, attempts to engage informal actors have had more problematic results. Internationally sponsored *shuras* in other areas complicate the justice landscape. Since resolving disputes creates political capital for those involved in the process, in some areas there is significant tension over who should be involved in dispute resolution. In some quasi-urban areas where USIP has conducted research, mosque-level *shuras*, neighborhood *shuras*, CDCs,

¹⁰ See National Solidarity Programme <<http://www.nspafghanistan.org>> at 28 June 2011. While CDCs were not designed to be involved directly in rule of law issues, due to the size of the program and their reach into communities, it can be argued that the NSP has reshaped rule of law on a local level more than smaller programs that are meant to deal with the issue more directly.

unions, police chiefs and the courts are all in open competition to resolve as many disputes as possible. Two sides in a dispute will often choose two different venues to resolve their dispute based on their personal connections, which brings other political actors from those bodies into conflict and increases tension. This minimizes cooperation between these bodies, encourages forum shopping among justice consumers, and ultimately undermines the resolutions being made.

More worrying is the fact that in response to recent concerns about the legitimacy of the Afghan Government, multiple, occasionally conflicting, internationally sponsored programs have been established, which threaten to further complicate local politics and undermine the informal structures that are effective. For example, a large USAID program is setting up district-level *shuras* in 80 key districts, while an Independent Directorate for Local Governance (IDLG) program is attempting to increase local government presence in many of the same districts. These goals, if not in direct conflict, are at least sure to increase local tensions. At the same time, it is unclear what the relationship between these projects and previous projects such as the NSP will be or, more importantly, what will happen with these programs if district-level elections are ever held, as mandated by the Constitution. In some cases, these conflicts of interest may be resolvable on paper, but in reality, each new program generates new sources of political and economic capital at a local level, often with destabilizing results.

In some cases, the consequences of international involvement with local justice mechanisms have been more immediate and dire. Assassinations of government officials in the south of the country have become commonplace, but the Taliban has also targeted informal leaders who have been associated with internationally sponsored programs. In the months following the set-up of an internationally sponsored district council in Helmand, the head and deputy head of the council, together with two other members and the family of a third member were assassinated by the Taliban for what most described as their affiliation with the *shura*.¹¹ In another case, a suicide attack killed 40 people at a wedding party in the pivotal district of Arghandab, targeting members of a local defensive initiative who were part of an ISAF program that attempts to incorporate local militias into the security structures.¹² These attacks undermine the long-term stability of the entire country by potentially eliminating an entire generation of leadership and weakening informal dispute resolution structures that have been effective.

Informal mechanisms have also been undermined in more subtle ways. For example, it is now increasingly common for *shuras* associated or working with international groups to receive a stipend for their time, travel or both. Community leaders in areas where USIP has conducted research who are not associated with these programs receive no payment for their services. In fact, simply being a member of an influential council should generate enough political capital to make it worthwhile to attend. Furthermore, since class is an important social marker in much of Afghanistan, a rural elder too poor to pay for transport to the district center is probably not influential enough to sit on that district *shura*. However, in much of the country the precedent that international groups will pay elders to attend community meetings, training and other events has been established. Indeed, representatives from both large government-sponsored projects and small NGOs now complain that it is extremely difficult to convene such a meeting of elders without some sort of financial compensation.

¹¹ Information from informants in Helmand.

¹² See Anon, 'Afghan Wedding Attacks Aimed at Anti-Taliban Guests', *The Hindustan Times*, (Delhi) 11 June 2010, *The Hindustan Times* <<http://www.hindustantimes.com/Afghan-wedding-attacks-aimed-at-anti-Taliban-guests/Article1-556140.aspx>> at 28 June 2011.

Furthermore, in many cases, local actors have taken advantage of the lack of political knowledge of international groups to manipulate programs. Perhaps the most notorious example of this was the attempt in the spring of 2010 by ISAF to co-opt the Shinwari tribe in southern Nangarhar. The military gathered together 130 elders at a *shura* where a deal was announced that would supply the tribe with US\$1 million in aid, whose ultimate destination would be determined by the elders in exchange for their united opposition to the Taliban. Other leaders, however, not invited to the *shura* meeting took offence, as did neighboring tribes. A series of local land disputes turned violent, and the entire deal collapsed as the area further destabilized.¹³ While the scale of this case is significant, there are numerous other accounts of military funding going to local supporters destabilizing areas. Taliban insurgents often take advantage of local rifts over land, which are exacerbated by the allocation of funds to one group, but not the other.¹⁴ This is particularly true of Commander Emergency Relief Program (CERP) funds, which are earmarked for providing American commanders with quick access to development funds in order to generate community support. Complaints that this money has led to further insecurity are increasingly common, particularly as these loosely regulated funds have grown to US\$1.2 billion in 2010. Due to security in the areas where many of these projects are taking place as well as the political nature of the projects, it is extremely difficult to access their overall impact. USIP researchers have been forced to rely on accounts by ISAF, which tend to be overly positive, and accounts by local communities, which are much more negative.

Ultimately, at the local level, international attempts at interacting with leaders and informal councils have met with several problems. The most severe are the fundamental differences in goals between international and local actors. The primary goal of local dispute resolution mechanisms in the ideal case is to ensure long-term community stability. Programs, particularly those supported by the international military, despite their ability to create short-term stability, threaten to destabilize local politics in the long term. The influx of funds at a local level can generate tensions between local government officials and community leaders, driving these two groups further apart. These tensions are even more serious at the national level.

3.2 The politics of informal justice at the national level

On a national level, international attempt have also met with mixed results when attempting to more systematically and effectively engage the informal system. The most notable is a Ministry of Justice-led effort to create a national stance on informal justice that has been supported by the international community. This policy, and now draft law, was meant to create links between the formal and informal systems that would improve access to justice, but the drafting process has become mired in a political morass.

At the time of writing, for over two years, work has been done, at first on a draft of a national policy and more recently, on a national law. The slow speed has less to do with the substance of the policy or law and more with the variety of conflicting goals that those involved in the drafting have. With respect to the international community, many are frustrated with the amount of money spent

¹³ J Partlow and G Jaffe, 'U.S. Military Runs into Afghan Tribal Politics after Deal with Pashtuns', *The Washington Post*, (Washington) 10 May 2010 (among other accounts).

¹⁴ Based on conversations with tribal leaders in Paktya and Kabul, and NGO employees in Paktika and Paktya.

on a formal system that is slow, corrupt and perceived by local communities as illegitimate. Linking the informal justice system to the formal system is seen as a cheap and effective alternative to help state-building in Afghanistan. Furthermore, international concerns have grown that local perceptions of the Afghan Government as corrupt and inefficient are fueling the insurgency.

The argument is that the Taliban, by providing justice that is often brutal, but also swift and effective, has increased their appeal in insurgent areas of the country. Thus, counterinsurgency theory argues, if the informal system linked with the formal system is seen as a viable alternative to Taliban justice, fewer communities will turn towards the Taliban to resolve their disputes.¹⁵ There are other reasons that many in the international community support the policy, however. Certain programs, for example, involving the international military rely on internationally sponsored *shuras* to deal with prisoners brought into military bases, currently do not have a legal basis. In such cases, with no formal system in the area to hand prisoners over to, these *shuras* have been the only way for the military to deal with detainees despite their questionable existence under Afghan law. Attempts to regulate and streamline detention have been made, but process has been slow.

With respect to the Afghan Government, motives in creating this law are very different. While bodies such as the Ministry of Justice and Attorney General's Office have promoted engaging the informal system in order to decrease the backlog of cases and to provide justice faster, other government institutions have different priorities. The Afghan Independent Human Rights Commission, for example, sees the purpose of the law as regulating the power of informal actors. At the same time, however, perhaps aware that the Afghan State lacks the capacity to efficiently oversee these informal mechanisms, it has, at other stages in the drafting process, refused to acknowledge the existence of justice mechanisms outside the formalized state system, in some cases publicly claiming that informal justice simply does not exist.

The Supreme Court has also opposed the law at several stages, but almost always in a way that avoids direct confrontation over the substance of the law. While Supreme Court officials will acknowledge the importance and strength of the informal system in private conversations, any public declaration would admit to the shortcomings of the formal court system and, from their viewpoint, could lead to a decrease in international funding for their programs. As a result, the Supreme Court has repeatedly refused to send representatives to the working group meeting, or has sent lower-level officials who do not necessarily speak for the court. These tactics have greatly stalled the drafting process, without forcing the Supreme Court to ever directly admit to the strength of the informal sector or directly angering those international donors eager to work with the informal system.

There are other cases where motives are less clear. For example, certain human rights groups have been active in opposing any law that would address the informal justice sector. However, these groups have done little to provide input to improve the drafting process. Part of this is the economic incentives that dictate the ways that international NGOs attempt to secure funds. For example, while there is currently a vibrant human rights community in Kabul, these organizations

¹⁵ Very little research has been conducted on public perceptions of the Taliban justice systems in areas where it is actually an effective and viable option. Most anecdotal evidence, however, does seem to support these points, although caution should be taken in unquestioningly accepting all of these assumptions.

tend to be small and rarely cooperate, particularly in comparison with NGOs in other sectors, such as public health. One of the reasons for this appears to be that funding for human rights NGOs often comes from private sources, which results in a serious competition for limited funds. The result in the case of informal justice is that human rights groups often protest the treatment of women and children by the informal system in the media, because this is a topic that appeal to international donors. However, no human rights group has yet implemented a program that would attempt to limit these violations before they occur.¹⁶

This is not to argue that Afghan government institutions and international groups are intentionally derailing programs that could improve access to justice. Rather, the chapter aims to show how the numerous economic and political incentives surrounding the national-level approach to informal justice has led both Afghan and international groups to act in conflicting ways that have complicated the politics of access to justice.

4. Informal justice, the international community and stabilization in Afghanistan

While international efforts to improve access to justice and engage with local leaders have thus far met with fairly mixed results, some initial conclusions can be made that suggest how and when such programs may actually increase access to justice. First, many of the programs that are set up to promote the agendas of the international community fail to take into account local realities and motives for actually participating in such programs. Thus, a donor such as USAID who oversees billions of dollars in aid has an incentive to award all of their funds for informal justice to one private contractor, making it significantly easier for officials to administer and oversee. In fact, smaller programs that are more flexible and deal with local realities are more effective, but under the current USAID funding structures, which currently favor large scale contracting, are unlikely to be funded.

Furthermore, due to the complexity of the current political landscape in Afghanistan, donors are simultaneously interacting with government officials and local leaders who have very different agendas. Government officials have considerable reason to deny the strength of the informal system. Any legitimatization of the informal system is a tacit admission that the formal system is currently failing to supply all Afghans with access to justice and could potentially divert international funds from the formal system. Frustrated with the poor performance of the state judiciary, the international community has become more careful with unrestricted funding going to the formal system. Simultaneously, officials at the Supreme Court and the Ministry of Justice complain about independent contractors who have been brought in to support the judicial system.

The programs that have been most successful are those that motivate all actors to participate using incentives that are sustainable and not potentially disruptive, such as cash payments. For example, the NSP has been effective because the international community benefits from the way that it distributes funds at a local

¹⁶ It is also indicative that human rights groups often protest the treatment of women and children who are often protected within the informal systems by their families, but rarely mention the treatment of ethnic or sub-tribe minorities who are far more disadvantaged in a system that focuses on community consensus.

level. In turn, local actors benefit from the political capital that they acquire by having access to such funds and a voice in the direction of local development. It is unsurprising, however, that those who have been most critical of the NSP are those in the ministries that are being bypassed through such funding mechanisms.

For internationally sponsored programs to be effective at promoting access to justice, they must move beyond Western paradigms of ordering society and deal with local political realities. Furthermore, while taking advantage of informal mechanisms, they need to consider how they could be destabilizing in the long term. Most importantly, the ways in which these programs are creating political and economic resources that increase tensions and actually limit access to justice must be considered. While the current approaches often favor large-scale projects with sizable budgets aimed at creating short-term stability, such programs can be manipulated by local political leaders and government officials to solidify their own power in ways that prevent many poorer Afghans from effective access to justice. Less money and more local political knowledge could go a long way in improving the situation, but currently, during this period of military and civilian surge in Afghanistan, many programs threaten to do more harm than good.

Pragmatism, Proximity and Pashthunwali: Informal Justice at the District Level in Helmand Province

Kate Fearon¹

INTRODUCTION

In Helmand Province in Afghanistan there are numerous actors who dispense justice. These can be divided into the following five main groupings (in approximate order of influence): Afghan officials, who usually include the District Governor (DG) and the District Chief of Police (DCOP); the elders, the Taliban, the mullahs; and the Afghan Government's formal judicial system, which includes judges, prosecutors and other Ministry of Justice staff. This chapter describes the order and interaction between these providers and the environment in which they operate. A key argument here is that although these five groupings of justice providers regularly engage in dispute resolution individually, it is more common to find that a *combination* of these five groups of providers are involved in resolving a given dispute. For the most part, the involvement of different providers is driven by 'whatever works' for both the disputants and the providers. This suggests a kind of *a la carte* approach to justice. Dispute resolution draws on different source doctrines, such as Islam and Pashthunwali,² but they are also determined simply by whoever is around at the time of the dispute. This *a la carte* approach to justice was described to the author as follows:

It is like a giant set of scales. Each side is heavy. But right now GIROA [Government of the Islamic Republic of Afghanistan] is very active and so people see this and say 'let's work with them right now. The Governor is coming and there is wheat seed distribution programme. But if the Taliban is in control, the people – who are not TB – will follow them.'³

In this chapter, it is suggested that the *a la carte approach* to justice implies at least three insights on dispute resolution in Helmand Province:

1. For these Afghans in Helmand, an essential survival tool is that of being on the winning side. In a very pragmatic sense whoever is the provider of security or justice is of less relevance than the fact that security or justice is provided, that people enjoy protection and relative safety. As will be detailed further below, security is prized over ideology, religion or custom;
2. Justice provision is inextricably linked with local power structures; and
3. Pragmatism is a key driver in dispensing justice.

This chapter first sets out the methodology deployed and terminology used. Then, each of the five providers in turn is discussed, with examples of the type of cases each solves, as well as the context in which they are deliberated on. Each sub-

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² Pashtunwali is, broadly speaking, the basic lifestyle code of the Pashtun people.

³ Interview with members of Community Council (Garmsir, 15 October 2009).

section outlines some of the advantages and disadvantages, opportunities and limitations each group experiences before moving on to discuss in greater detail the process by which each provider takes decisions. The chapter then examines the linkages within and between the informal providers as well as the linkages between the formal and informal justice sector. The gender dimension of justice provision is also considered before presenting conclusions about the mix-and-match nature of informal justice provision in Helmand Province.

1. Methodology and terminology

This chapter is based on data collected over one year between March 2009 and March 2010. All interviews were conducted in the Pashto language and its consecutive translation transcribed. The focus was more on services providers than service users. Data sources include formal focus groups, one-on-one in-depth interviews, and repeated in-depth group discussions. Initial research was conducted in Lashkar Gah only,⁴ but extended to the five districts of Nad e Ali, Garmsir, Gereshk, Nawa and Marjeh.

In this chapter, the concept of 'traditional' is not applied to refer to disputes being resolved by village or tribal elders. Rather, the concept of the 'informal justice sector' (IJS) is applied, because it better reflects the range of actors engaged in the provision of justice outside of the formal court sector. Moreover, the IJS and the formal sector are approached as integral components of the same justice providing system. The word *shura* is used in this chapter to describe both a group or council of elders, and the meetings held by these elders to discuss dispute resolution matters.

2. Justice providers in Helmand Province

In the following, five providers of justice will be outlined, with a focus on the type of cases that they issue determinations on and their contexts.

2.1 The Elders

In each district within the remit of this study, the elders' system was to in operation. Before the establishment of the Afghan Social Outreach Programme's (ASOP) Community Council (CC) program, the elders were mostly operating at the village, not the district, level. Although its capacity varied from place to place, the elders' system was found to be well established where the Taliban was absent or weak. The presence of the elders' system did not, however, depend on the presence of Government of the Islamic Republic of Afghanistan (GIROA) institutions. In general, the elders' system is much better rooted in the districts than in the provincial capital of Lashkar Gah (LKG). LKG city dwellers expressed this as follows: "The elders are able to provide for some but not all cases. For example, if two families are in dispute over a smaller problem, the elders would solve it"⁵; and "The elders are dealing with smaller problems, they can't deal with big issues."⁶ While there were some questions of the enforceability and fallibility of some of the elders' decisions, it was maintained that "[t]he elders can provide

⁴ K Fearon, *The Cow that Ate the Turban*, Internal Report to the Helmand Provincial Reconstruction Team (PRT), (2009).

⁵ Focus group interview with female dressmaking students (8 February 2009).

⁶ Ibid.

a fair judgment, but this is not implemented”⁷ and “[e]veryone makes mistakes. The elders make mistakes.”⁸

The resolution mechanisms used by the elders were valued by respondents, which above all were pragmatic and aimed at promoting community harmony through deliberative and discursive means. As one respondent asserted, “There’s no way a small dispute over land should be resolved with guns. It needs to be resolved by discussion.”⁹ Another interviewee asserted the following about the reconciliatory resolution mechanisms of the elders:

OK, let’s say a person was an engineer. He’s been educated, there’s been an investment in him, and he’s in a position to put that investment back into the community. If he is accused of something, the Taliban would just kill him straight away. But the elders would consider the case much more carefully, consider what the impact would be on the community, before taking the decision.¹⁰

This support for the resolution process provided by the elders is derived both from its Islamic¹¹ and cultural antecedence, as well as from the strong perception that the formal justice sector is fundamentally fragmented; either it takes too long to undergo a formal court process, or the court is simply seen as corrupt. Moreover, respondents found that the officials of the formal court are often too uneducated or unqualified to provide proper resolutions. The comparison between the elders and the formal courts was described in the following way by a former Chief Justice of the Provincial Court:

In Paktia Province, the elders’ system does work well. In Paktia the tribal leaders decide the cases as a judge would decide – taking into consideration all aspects of the case. They make good decisions. ... Even if there was a court, the people didn’t want the case to go there because it would have taken too long to get resolved. So they would take guarantees from both parties. If both parties were happy to use the elders, they’d decide the case on the spot. If, after the decision any party rejected it, or sought further revenge, that would constitute an insult for our decision and then the whole tribe would hurt the man who had rejected the decision.¹²

Based on these observations, it is therefore not surprising that members of local communities seek providers other than the formal courts for resolving their disputes. This is particularly the case at the district level. Here, people are much more likely to be respectful of the views and authority of the elders, and of non-state actors in general. The elders in the districts are in turn more likely to assume responsibility for more serious disputes, even murder. However, it is difficult to draw solid conclusions because the situation is very complex.

The research found that justice is provided in a very localized and context-specific manner. It is affected by a number of factors, and combinations of them, including, for example, whether an area:

⁷ Focus group interview with male farmers (31 January 2009).

⁸ Focus group interview with female students (1 February 2009). This was more likely to be noted by female respondents.

⁹ Ibid.

¹⁰ Focus group interview with a youth group (28 January 2009).

¹¹ For example, General Whadat Regional Commander of the Afghan National Police noted at a *shura* on 2 November 2009 that “As Allah has said, ‘have *shuras* between the Elders and have suggestions proposed’.”

¹² Interview with Judge Juma, Chief Provincial Judge (13 August 2009).

- is a rural or urban setting;
- is a GIROA- or non-GIROA-controlled area;
- is a Taliban or non-Taliban controlled area;
- has a strong or weak sense of security and the rule of law;
- has a strong or weak local leadership and self-sufficiency;
- has a long-standing local tradition of dispute resolution;
- has a high or low level of poverty, commercial activity and agricultural production.

Moreover, justice provision is partly governed by the history of Afghan social organization, which is characterized by fragmented tribes that are isolated from the state and each other, and which act in highly autonomous ways. Justice provision is also influenced by the sense of normality, stability or security felt by the members of a particular community. For example, in relatively prosperous Gereshk, where the Afghan National Police (ANP) has been able to provide some semblance of security, the elders residing in the town are more likely than not to transfer serious cases to the formal sector. Thus, when asked about the handling of murder cases, they responded that the matter did not concern them, but concerned the government court. By contrast, in rural areas such as Nad e Ali, where the ANP has not been able to provide security, the elders have no qualms about intervening in a murder case. However, such linear conclusions do not reveal the full complexity of justice provision. The research found that, in general, the closer the elders are to GIROA, both physically and politically, the more confidence they have in dealing with minor cases and the more likely they are to refer serious cases to the formal judicial sector, even with all its faults. Moreover, where neither GIROA nor the Taliban are present, the elders are more than capable of dealing with any kind of dispute that comes before them. Another key insight is that community members use the justice providers that are physically available to them, which suggests that *proximity* is also a strong determinant of justice provision: “[...] very small crimes can also be dealt with by the elders. If it is a big dispute, it depends on who is closest, the Taliban or GIROA. Whoever is closest, that’s where we go. We prefer the Taliban to solve problems.”¹³

The following examples from the elders on the Community Councils in Nawa and Nad e Ali illustrate the type of cases and the degree of power the elders have or used to have in resolving them.

Ah, but before the government we sat together and discussed many cases, even murder. If we can’t solve it, it goes to LKG. ... For a murder we go to both families and ask them for permission to make a deal. We might have to go to them 3-4 times. Then, if they give us permission to make a deal, they say to us, ‘you can make a deal’, we charge the killer with money to give to the family of the man who got killed. ... The typical amount is about \$30,000 to 40,000.¹⁴

Also there was another case where two families were fighting and someone was killed. It was a fight amongst the young people, not the elders. ...We got the elders together and solved the problem here, bringing the two tribes closer again.

Yes, my family and theirs got together and gave full authority to the elders to solve the problem. Only after they got full authorization from us did they discuss the detail of the case. They levied a fine of 1 million Afghanis as compensation for the person who was murdered. After that everyone came

¹³ Group interview with elders (Marjeh, 12 April 2010).

¹⁴ Group interview with Security Sub-Committee (Nawa, 27 October 2009).

together and had lunch in each of the houses and all the bad feeling is gone.¹⁵

The above cases also illustrate how much money changes hands, and how consistent the compensation levy is (1 million Afghanis is approximately US\$20,000) in dispute resolution processes across districts. When it was put to the elders of NDA that 1 million Afghanis was a great deal of money in the local economy, and that the chances of one family not being able to pay was high, they stated that the money was often collected among the tribe and given to the other tribe: "Maybe someone gives 10,000 (\$200) Afghanis, maybe 50,000 (\$500) Afghanis. That way a million is made up."¹⁶ The two examples above additionally highlight the collective and consensual nature of dispute resolution and the significance of offering compensation. Fundamentally, this points to how a crime committed in a community is conceptualized as a rupturing of relationships. Therefore, the resolution process as well as the outcome can be seen to contribute to reducing enmity between the social units of individuals, families and tribes.

It is also common for a group of elders to act as guarantor for a person who has been accused of a minor offence or of Taliban membership. The elders will sign a letter, which is held by the District Governor or the Chief of Police, or by the senior elder in the village or district. The letter essentially provides the elders' guarantee of the 'good character' or 'reformed character' of the person arrested or accused. For the most part, this system is used to positive effect. However, at least one GIROA official lamented that the elders could also make unwelcome interventions in some cases. In one instance, for example, an elder phoned the local National Security Directorate (NDS) police commander to lobby him before he knew that a particular person had been arrested. The elders can therefore be a very powerful force, but this depends on the circumstances of each district.

Although, as stated above, the elders can in some instances deal with serious offences, the vast majority of the cases they deal with are minor, involving land, water and dowry arrangements.

In terms of decision-making, the elders draw on a number of sources or doctrines, primarily Islam, Pashtunwali and local tradition. In general, they follow a collective and inclusive process, which may also differ from Islamic law. For example, in one particular murder case, the elders recommended a cooling-off period of almost a year before the case was formally resolved:

So this murder case that we inherited. We try to moderate. Sharia and Islamic law say that if someone kills another man, the killer should be killed. But, if both parties agree to discuss the matter, if both agree, then they give authority to the tribal leaders to find a solution that will be acceptable to all. When someone kills someone else, you visit with women and the older men and go to the victim's family. You say to them, 'yes, we know he's done this really bad thing. We want to persuade you not to commit a similar offence. We want to persuade you not to continue the enmity. Please, for 8 months, don't kill, or hurt the man who committed the murder. You should not have to see him in that time. So then we send requests to both parties. To one we will ask that they forgive, of the other we will ask that he compensate – with land, property, a house, maybe women, and eventually they agree.¹⁷

¹⁵ Interview with member of Nad e Ali Justice Sub-Committee (7 January 2010).

¹⁶ Ibid.

¹⁷ Interview with Justice Sub-Committee members (Garmsir, 15 October 2009).

It is noteworthy that, although the elders reference what kind of punishment they believe Islamic law would prescribe, they may also seek to moderate it on the ground. As in the above case, moderation is applied by using the principle of forgiveness and by promoting positive relationships in the tribe. The decision on serious crimes is taken in an open forum and draws on Islam, the tribal code (Pashthunwali) and any local traditions that are of relevance:

We draw on the customary laws in the area. The people want the old traditions, so it is mainly not from Islam that we decide. But the decisions match Islamic teaching. ... For example, if the issue is about not fighting between two tribes, we will draw on Islam. Islam says we should not fight amongst each other.¹⁸

Although there is much respect for Islamic law, it does not have the final word. *Primus inter pares* in the above murder case appears to be Pashthunwali, but this can vary from case to case, and from district to district. For this reason, it is more useful to view decision-making through a prism of Pashthunwali, Islam, local tradition and formal state law. The elders are more likely to utilize state law or regulations in deciding on civil matters such as land or water disputes, and less likely to do so for serious criminal offenses. A reason for this could be that crimes such as those against a person, in effect blood crimes, are more likely to violate Pashthunwali values of honor, hospitality, respect and revenge. The formal state sector is unable to honor such values, and state regulations do not necessarily recognize them. For example, the Afghan Constitution, with its fundamental concepts of crime as a personal action, liberty as the natural human state and its granting of equal gender rights before the law, cannot countenance dispute resolution that may involve the exchange of women and children, or the banishment of a family for the crime of one of its members as part of a communal agreement.¹⁹ In the resolution of blood crimes, the elders are driven by pragmatism and proximity. They will rely on their own capacity and explore what other providers are available in the vicinity. Further, they will filter such cases through a mesh of Pashthunwali, Islamic law and local tradition to ascertain what is the most common-sense outcome. However, they also have competition from the Taliban.

2.2 The Taliban

The relationship between the Helmandi communities and the Taliban is complex and mainly governed by ambiguity. On the one hand, interviewees frequently gave the impression that there is some satisfaction with Taliban decisions, because they are taken swiftly and in accordance with Islamic law:²⁰

Yes, the Taliban are solving problems, small disputes, in the right way, the Islamic way. ... We are happy with how the Taliban do things. ... The punishment is all included in Islam: if you steal, your hand should be cut off; if you commit murder, you will be executed, so the Taliban will hang them.²¹

¹⁸ Interview with Nad e Ali elders (face-to-face interview), 7 October 2009

¹⁹ See for example, Constitution of Afghanistan, Art 22 (The citizens of Afghanistan – whether man or woman – have equal rights and duties before the law); Art 24 (Liberty is the natural right of human beings); Art 25 (An accused is considered innocent until convicted by a final decision of an authorized court); Art 26 (Crime is a personal action) Afghanistan Online <http://www.afghan-web.com/politics/current_constitution.html#chaptertwo> at 28 June 2011.

²⁰ Group interview Marjeh elders (12 April 2010). For more examples of this, see Fearon, above n 4.

²¹ Group interview with Marjeh elders (4 February 2010).

As expressed in the quote above, Taliban justice is accepted to some degree, and not just in Taliban controlled areas. For example, one resident of Lashkar Gah related how he had been to the courts on a land dispute but had not gained a satisfactory settlement. He then went to the police where he was not satisfied either. His third attempt to obtain justice was rewarded with the Taliban as provider, even when the other party to the case was a Taliban fighter.

On the other hand, however, it is recognized that the Taliban do not have the monopoly on the interpretation and application of Islamic law. Although some believe that the Qur'an literally preaches an 'eye for an eye' and a 'life for a life', others hold that there is another interpretation and application of the Qur'an and the Hadith:

So they [the Taliban] have their justice commission. If you have a problem you just tell them and they sort it out very quickly. They have 4-6 mullahs down there [MJH] who decide the cases for them ... they think that everyone who comes before them should be killed. But in the Holy Qur'an we are not allowed to kill even our brother Muslim.²²

There are also those who view the Taliban through a political, rather than a theological, prism, characterizing their actions as related more with social control than religion:

They only have one kind of system. If it's a murder case, they kill. They have no prison. For minor crimes, amputation used to happen lots, but not so much around here any more ... because the TB don't have enough people, they are getting weak. In the past they used to announce it publicly. They'd get everyone together at the bazaar and they'd cut hands, feet, or hang people, with everyone watching. Now there is no audience, no show.²³

Taliban provision of justice relies on more than simple doctrine; it requires a certain degree of social acquiescence, which is readily given in some places, tolerated in others and spurned in others still. This aspect refers to the point above concerning justice as being driven by a survivalist strategy of being on the winning side. Taliban justice could not occur, and indeed does not, without consent, i.e. it is not an unassailable or impregnable fortress. It exists in a social and political environment and needs to be alive to this in order to prevail. The public recognizes that, just as the elders are not infallible, neither are the Taliban. This recognition is particularly the case where there is some GIROA presence. The Taliban do have limits: they may not be educated enough nor able to deal with matters that are beyond the scope of their service delivery, such as land disputes, which require official documentation:

There is a TB court in some areas, but it is run by TB who are not so well educated. They can't really decide on cases – they can only make IEDs [Improvised Explosive Devices]. Even when people go to them for justice they can't make any decisions, so people get disappointed and come back to the elders.²⁴

The TB solve crimes, like stabbing or stealing things. Small issues were getting resolved by them right away. But big issues, like land, issues

²² Interview with Justice Sub-Committee elders (Garmsir, 15 October 2009).

²³ Interview with District Chief of Garmsir National Security Directorate (15 October 2009).

²⁴ Workshop discussion with Nad e Ali elders at District Development Plan Workshop (10 January 2010).

involving official documents that are lodged with the provincial governor's office, the TB don't have the authority to solve those kinds of issues. They are not able to.²⁵

The process of acquiring justice is fluid. Even when the Taliban are those chosen initially as providers, they may not always continue to be so. According to public opinion, it is the performance that counts, i.e. who provides the service in a satisfactory manner:

For example, two people in my village had a dispute over land, so they went to the TB two or three times. But the TB couldn't reach a decision on the land, so the parties were still in dispute. Then they came to me, both parties and I collected all the elders from different areas and also the mullahs, so there would be a balance both ways, and we got an agreement.²⁶

Thus, parties to a dispute appear to be willing to approach not only several providers, but several combinations of providers. In the above dispute, for example, the participation of the mullahs and the Government was coordinated by the elders in the final resolution. This illustrates the point that justice delivery involves a mix and match of providers.

The strengths of the Taliban are that they are speedy, effective and decisive. Their weaknesses – from a human rights perspective – are that they frequently dispense disproportionately cruel, harsh and corporal punishment. However, this is not always a weakness for the local population. For many Helmandis, the Taliban are aligned 'closely enough' with the elders' so as to be accepted by the population. Both the process they use and the doctrine they refer to in decision-making approximate tradition the elders' methodology. However, ultimately, the Taliban undermine tradition, because they reject the collectivism and participatory nature that underscores the elders' decision-making such as the concern for restoring community harmony. However, the corporal punishments handed down are within the range of tolerance on both religious and social axes so as to be acceptable, at least in contexts where they are the prime providers of security in a locality.

The two key community priorities are security and justice; it is possible that local Taliban groups can meet one of these two key community priorities, namely the desire for justice. However, in Helmand, security is so highly prized that it overrides other fundamental rights and freedoms. Therefore, if the Taliban guarantee security in a community, the community members are prepared to pay a high price in terms of the types of punishments that are inherent in dispute resolution; i.e. for their security, they are prepared to tolerate even corporal punishments.

2.3 The Mullahs

The mullahs are another justice provider group with a strong influence. However, this strength is difficult to comprehend, not least because formally they do not exist as a group, due to the fact that Islam as a religion has a very loose structure with little hierarchy. Mullahs tend to act very much as individuals taking care of pastoral duties within a limited geographical range. This complication is further compounded by the questionable education of many of the mullahs. One estimate, provided by a mullah is that out of approximately 800 mullahs in

²⁵ Group interview with Marjeh elders (12 April 2010).

²⁶ Meeting Note, District Development Plan Workshop, Nad e Ali (NDA), 10 January 2010.

Lashkar Gah, only 10 percent, are properly have a formal theological education.²⁷ Since mullahs are generally revered individuals in a society saturated by religion, the public is willing to ignore whether they are *madresa*-trained or not.²⁸ Most mullahs are poor, not politically engaged and are perceived to be pious and learned. Their power seems to be based on all or some of these attributes. The mullahs may not always have the final word on a decision. However, their views are sought by virtually all of the other four groups of justice providers whenever the latter are unable to resolve a case in the first instance or when a theological imprimatur is deemed necessary to allow a case to be resolved. The following quotes from two different elders illustrate this point:

Yes, one and a half months ago we had a case where two people were arguing over the division of land [a boundary dispute]. One was poor and the other was powerful. The powerful guy beat up the poor guy. They came to the Community Council and we contacted the mullahs and the dispute was resolved – both have their own land. The punishment was that one had to prepare a meal for the other.²⁹

There was another incident ... where a person killed two others in a car accident. The mullahs went and begged on the perpetrator's behalf for forgiveness. And he was forgiven³⁰

When asked why should mullahs be involved in a land dispute case, an elder from Nad e Ali replied:

The group [of decision-makers] included elders and mullahs so that we would know the Shar'ia law – who would be right or wrong according to it. We think about that, and we think about the government when we decide about the piece of land – that's all in the background. We took a decision after we got authorization in writing from the two disputants.³¹

The Taliban can also retain their own mullahs as a way to make their decisions appear more legitimate. Whether this is due merely by virtue of the mullahs' presence, i.e. to simply rubber stamp the Taliban decision in theological terms, or whether they actually consider the case from a Shari'a perspective is unclear. The issue is that having the mullah present, if not directly engaged, in decision-making is something that even the Taliban feel necessary at times to boost their position. This is an indicator of just how influential the mullahs are.

2.4 The Local State Officials: the District Governor and the Chief of Police

The true power brokers in terms of justice delivery are the local district officials. Usually, these are the District Governor (DG) and the District Chief of Police (DCOP), although at times the local commanding officer of the National Security Directorate (NDS) or even the Afghan National Army (ANA) might play a role. In general, the DG and the COP are the first port of call for the resolution of disputes. But when community members come to them, it is not with the expectation that they will invoke the formal GIROA instruments of the court system, but rather that the DG and/or COP will make a quick decision either

²⁷ Interview with Mullah Kaar E Saab, a leading liberal mullah (Lashkar Gah, 26 January 2010).

²⁸ That is, has attended a medresa, or religious school, and has therefore been trained in the core tenets of Islam.

²⁹ Group interview with elders in Nad e Ali (7 January 2010).

³⁰ Interview with Mullah Kaar e Saab (26 January 2010).

³¹ Interview with Nad e Ali elders at District Development Plan Workshop (10 January 2010).

unilaterally or by referring the case to the local elders. The key point is that the case will be decided by formal officials by using informal, not formal, means. This should be seen as more than a localized response to the absence of a functioning formal justice sector in the districts as the way that the state officials operate is also a manifestation of the cultural norm of local power-brokers making decisions about the populations they represent or rule over. In this case, the local power-brokers are not warlords, or the Taliban, but members of the Government. The people respect them as the current figures of authority and conflate their powers and duties not only with those of the judges, but also with those of the elders. This partly concerns the role of the COP and the DG in delivering security for the population. Security is the overriding concern for all, and they are prepared to pay a high price for it, such as police corruption: "The most important thing in the district is the security situation. Unless we have security we can't do anything else. It's because of it that the DG and the COP can act in the way that they do."³²

There is a broad range of issues that the DG and/or the COP are called on to mediate or resolve cases such as: dowry disputes at weddings; land or water disputes; whether or not a drug user should be sent to a rehabilitation facility; and murder.

Where there is some formal judicial presence, the inclination and ability of the ANP in particular to arbitrarily determine a case can cause their fellow formal authorities frustration of: "For example, 15 days ago a thief stole 4 or 5 sheep at the Juma Market. He admitted it, so it was a good case. I thought that we should send the case to [the court at] LKG. But the next day he was released [by DCOP]."³³ The former DCOP in Gereshk stated openly that "everyone [here] has a different law than the main one in Kabul. ... Everyone has their own law and they will run it how they did before."³⁴ Here, he is strongly suggesting that during his tenure as DCOP he was a law unto himself and therefore national laws did not reach – or did not apply to – Gereshk. This view was echoed by others in the formal sector. In discussing the situation in Nad e Ali, the Director of the local Juvenile and Human Rights Directorate of the Court stated:

When the formal government, the CID, arrest someone, they have the right to hold them for 72 hours. Then they have to hand them over to the prosecutor who also has a specified time before they must refer them to the court. But nowadays the COP does it all.³⁵

Complaints about these formal actors resolving disputes informally tend to come from members of the formal justice sector. When complaints do come from citizens, they tend to be overwhelmingly about the ANP. One explanation could be that, while citizens refer to the DG, i.e. their interaction with him is voluntary (he *responds* to their needs), it is not always the case that citizens refer to the COP. However, the role of the COP in providing security means that people, to a certain degree, tolerate that he engages with cases on his own initiative, rather than in *response* to people's demands.

³² Interview with Provincial Prosecutor at the District Development Plan Workshop (10 January 2010). Although his role is part of the formal justice architecture, his comments reflect the fact that the DGs and COPs have more power than he does in many respects.

³³ Interview with Garmsir elders (9 February 2010).

³⁴ Interview with District Prosecutor, Gereshk (10 October 2010).

³⁵ Huquq Director Meeting Note, District Development Plan Workshop (10 January 2010).

2.5 The Community Council Justice Sub-Committees

The Afghan Social Outreach Programme (ASOP) was rolled out in Helmand in February 2009. Over the course of 2009, four Community Councils (CCs) were established, in Nad e Ali (February), Garmsir (March), Gereshk (April) and Nawa (October). Each CC is elected from a locally established electoral college, the composition of which is overseen by the Provincial Governor's office. Three sub-committees are drawn from the full body of elected members for Development, Justice and Security. The three sub-committees have contributed to the drafting of an overall District Plan by writing a folio-specific plan, crafted at a four-day inaugural workshop. The initial justice plans established that the Justice Sub-Committees (JSCs) should perform the following activities: act to resolve disputes; become informed and inform the local community about human rights; reach out to all sections of the community; monitor prisoner conditions; and assist the District Governor when he was called on to resolve disputes. The JSCs in effect imitate the elders' way of informally resolving disputes. The difference is that the JSCs have been elected, are district-wide, i.e. not just village-specific, and they have a more formal link with the District Governor. Cases get referred to them from the village level, the prosecutor and the DG, as indicated by the following statement by an elder from Nad e Ali:

Most people around here don't go to the government [for dispute resolution]. Most people go down the traditional route for justice. Because we have representatives of each tribe and village in NDA on our *shura*, when people have a justice issue, their elders bring it to the JSC or the people bring it directly to the JSC.³⁶

The Gereshk Prosecutor also stated that he refers cases to both the CC and the District Governor: "So many cases come before me. The cases that are not too heavy, I send to the CC or DG, because otherwise I am too busy."³⁷ As with the elders as a whole, the cases received by the JSCs are mainly minor civil disputes, such as those related to water access, land boundaries, inter-tribal fighting and dowry arrangements. As discussed earlier, elders do, however, tend to discuss serious criminal cases in places where there is little GIROA presence. However, only one JSC — in NDA — had discussed a serious crime during the timeframe of the research. This was a legacy case relating to a murder that occurred before the JSC had been constituted. It is cited in more detail below, as an example of the decision-making process. The other JSCs tended to want to shift responsibility to the formal sector quickly when serious cases were involved. This was either because a case was beyond their capacity and their authority, or because they lacked the confidence to deal with it.

This section has highlighted the great variety among justice providers operating in Helmand Province including the numerous referral routes and ways in which justice providers come together to resolve disputes. Likewise, there are manifold linkages between the formal and informal sectors, some of which have already appeared in the sub-sections above, and will be discussed in detail below.

3. Linkages between the formal and informal sectors

It seems that the public expect that no effort will be spared to bring them justice, and no avenue is left unexplored. In seeking justice, the public seems to perceive informal and formal providers as being part of the same continuum. As the

³⁶ Group interview with Nad e Ali JSC members (7 January 2010).

³⁷ Interview with District Prosecutor (Gereshk, 21 December 2009).

examples in this section illustrate, the providers also live up to this view in practice. Informal providers refer cases to the formal providers and the source doctrines they consider, and formal providers refer cases to the informal providers and the source doctrines they consider. This underscores the mix and match approach to justice provision.

The JSC in Gereshk have used lawyers to arrive at a determination in a commercial property case. Although this case was treated as a formal process, the JSC was approached for assistance in resolving the case. However, instead of resolving it by deliberation alone, the JSC used a different component of the formal sector, namely attorneys, and combined this with the use of the informal sector, namely Islamic law, to facilitate a resolution. This process is described as follows:

Two men had an equal claim to a shop. This was a 10 year-old case that was getting nowhere in the courts. We made a decision that was supported by all concerned. We took a record and fingerprints. ... The decision was made because of Islamic rules. We selected two lawyers, and they estimated a price for the shop. We then asked who was happy to purchase. One was, one wasn't. So one got the money, and the other got the shop.³⁸

The JSC in Garmsir assisted in resolving a case by ensuring that the correct GIROA forms were filled out by a claimant. The claimant came to them directly, but the JSC recognized the limits of its capacity to render a decision and thus it played the role of connecting the claimant with the appropriate official authority. The JSC also helped fill out the required forms.

As noted earlier, there is no formal legal authority for the elders' system or for the JSCs. However, their legitimacy is grounded in the fact that they represent a pragmatic response to the situation on the ground in a volatile and hostile security environment. While both the village elders and the JSCs are accepted by the community due to the quality of their decisions, the JSCs derive further legitimacy from having undergone an electoral process.

There are also several examples of formal judicial actors resolving disputes either using, or being influenced by, informal means. Judge Juma, a former Chief Justice of Helmand Province, participated in resolving the following case while he was the Chief Justice of Paktia Province. As indicated in the words of Judge Juma, this case was to a large extent, resolved by informal means:

For example there was a case I was involved in, not just as a judge, but as an elder. A murder had been committed. I went with the family with 20-30 tribal elders, some women and some sheep to the victim's family. We made a request to the offender that he not repeat the crime. The tribal elders informed the whole gathering that they were making a decision collectively. They said 'you should pay him something if you have killed him.' So they did punish the guy who committed the crime. They took his land, which sent a message to others not to commit similar crimes. The decision was also about creating a positive feeling in the community.³⁹

Not only does this example illustrate the judge's willingness to take off his GIROA hat temporarily, but it also reinforces some of the common components of resolving disputes, including financial compensation, forgiveness and not revenge, collectivism, promotion of community harmony, and honor and respect

³⁸ Interview with Chair of Justice Sub-Committee (Gereshk, 9 October).

³⁹ Interview with Judge Juma, Chief Justice of Helmand Province (Lashkar Gah, 13 August 2009).

for the resolution process. Similarly, the prosecutor in Marjeh describes the role of the elders as one of a range of legitimate justice providers and as another linkage between the formal and informal sectors. In the following statement, he highlights the inclusion of the elders' opinion in the consideration of formal sentencing:

Well, we have a rule. If the elders give an opinion on the case and get an agreement we will decrease the punishment in the court case. So, for example, if the sentence was ten years, an elder's intervention could make it 5 years. There are two types of punishment: punishment if you harm another human being and punishment if you go against religion. It is up to them [the victims], if they go to the prosecutor or to the elders.⁴⁰

These different examples show that the linkages between the formal and the informal system are not only multiple and varied, but also take place in an informal manner, where the views of victims are also central. However, as addressed below, the extent to which victims and disputants in general can influence the process is highly gendered.

4. The gendered dimensions of justice provision

No discussion of informal justice in Helmand would be complete without some consideration of the role of women, in particular, the impact that the informal justice sector has on them and their participation in justice provision. With one notable exception, the IJS does not work for women, as Helmandi society's traditions do not support the interests of women. On an individual level, some men and women may enjoy positive relationships, and legal equality is recognized in the constitution; however, in society in general, women and children are considered the property of men, first of their fathers or brothers, and later of their husbands.

Informal justice arrangements are made on the basis of consent and collectivism within a village, but 'consent' in this context is not understood in terms of personal agency. Consent in Helmand simply means the consent of the men in the village, district, or province. Informal justice relies on notions of collective agency and consent, which, however, are unavailable to women. If anything, they are but objects in the process, used to recompense the crimes and misdemeanors committed by men. An exception to this rule appeared in Gereshk.

Gereshk Community Council is the only council to which women (five) have been elected. These were mainly professionals, including teachers and lawyers. Two of these five women sit on the JSC, and they are very active. For example, they advertise their services in smaller *shuras* that they organize for women around the district. They will spare no effort in making themselves available in the resolution of cases, particularly when it involves domestic violence or other cases related to marriage.

The following case demonstrates the pragmatic 'whatever works' approach, which ensures that the women get their foot in the door and engage the man implicated in the case. Here, one of the women on the JSC – a former lawyer in pre-Taliban times – describes the approach used in one particular case that draws on the Afghan value of hosting:

⁴⁰ Interview with District Prosecutor (Marjeh, 2 April 2010).

A young girl of 18 years came to me. She said 'my parents want me to marry an addict, who is also a smuggler.' But how can I stay with him? He doesn't care about anyone. I need your help or I will kill myself!' I went to her house, to speak with her father. At first he didn't allow us in, and told me to go away. But, we are Afghan: you must host someone even if they are your enemy. So we got a cup of tea. The first time we talked, the father took an extreme view. But we continued to talk, and he came around. He was worried, though, about the marriage contract that he had already entered into. He said 'I can't do anything about that. His [the addict's] family will take the girl.' So I took her husband and brother and father to the *shura*. I said to them, 'if you want to give a girl to an addict, he is a half-man, she will kill herself and this will be your responsibility. The girl repeated in front of them that she would kill herself if they made her marry the addict. That decision was really hard. The session lasted 2-3 hours. But eventually they allowed her to go by herself. Now, she goes to school.⁴¹

When the woman was asked if the decision in the above case might have been different if there had not been the two women on the JSC, the answer was yes. If there had only been men on the JSC, the case could have had a very different outcome. The women on the JSC were able to satisfy the claimant because they advocated for the young woman and lobbied the father before it was heard at the *shura*. Importantly, the presence of women on the JSC made a difference, while the resolution process also continued to respect the social, cultural and religious tramlines.

The experience from Gereshk is a very small aperture, but it demonstrates that women's participation in informal justice mechanisms is possible and that when women advocate for women's interests in informal justice spaces, the sector can produce favorable outcomes for them. It also demonstrates that when women see other women in positions of leadership in informal justice mechanisms, they will bring forward their cases. If there are no women on the JSC or village elder council, then women are highly unlikely to bring forward cases. It seems reasonable to conclude, therefore, that if the situation in Gereshk was replicated in other places, the same outcomes might be expected. However, this is not something that can be imposed. First, it would be extremely difficult to identify women who would agree to being so imposed, and second, even if they were, the likelihood that they would simply be ignored by the men is very high. In Gereshk, as in other places, the CC members enjoy legitimacy because they are elected.

Non-Afghan actors, such as those involved in the CC program from the United Kingdom, can play a supportive role in furthering women's participation in the provision of justice.⁴² However, because the role of women is so sensitive in Afghan society, it is imperative that the leadership from within Afghanistan is engaged, including leaders from the Afghan Government or from the tribal elders' system. Concretely, this implies the support from influential Afghan men. The Gereshk experience provides an exemplar for an Afghan-led movement towards advancing women's participation in, and their ability to benefit from, the informal justice sector. In fact, since women fare little better under the formal justice sector, the added-value principle underlying the above example — that women's participation in decision-making makes the system work better for both women and men — may also have importance for the participation of women (as jurists and lawyers) in the formal sector.

⁴¹ Interview with member of JSC (Gereshk, 9 October 2009).

⁴² UK intervention was required to ensure that the women kept their places on the Council post-election.

5. Conclusion

The vast majority of social disputes in Helmand are dealt with informally, at the village and district level. Informal mechanisms generally work in providing access to justice, with the notable exception of women. Informal justice often complements and frequently acts in the absence of the formal sector. However, it is problematic to view informal justice simply as a temporary tool with which to dispense justice until the formal sector is reformed to a sufficient degree. A strong informal sector benefits the formal sector, and consequently Helmand Province. Therefore, international and government support to strengthening the informal sector should be a short, medium as well as a long-term goal.

This chapter described the five main justice providers that operate in Helmand (the Afghan Government judicial sector, other Afghan government officials such as the DG or DCOP, the elders, the Taliban and the mullahs; the DG and DCOP are probably the most used and the most powerful. In addition to these five providers, there are four source doctrines that are drawn on in making decisions about justice outcomes (state law, Islamic law, local tradition, and the Pashthunwali code). A key insight from this chapter is that it is more common than not to find combinations of these five providers involved in resolving any given dispute at the district level. This mix-and-match approach is also reflected in the fact that the providers tend to make decisions by drawing on a combination of the four source doctrines. How justice is provided and by whom is influenced by at least seven contextual factors (for example, degree of affluence or poverty, presence or absence of GIROA, the Taliban, or a functional elder's *shura*). Informal justice provision can therefore best be conceptualized as an amalgam of different possible source doctrines, available providers and contextual factors. Moreover, proximity, pragmatism and Pashthunwali are key drivers behind justice provision. The result is that the same type of case, such as a land dispute, may be determined by many different routes, leading to the same, a similar, or an entirely different outcome, all depending on the circumstances, the availability of providers and the source doctrine that they draw on.

For example, in a land dispute case, the context might be a rural, impoverished environment, with a strong elders' *shura*. Accordingly, it would be more likely that the source doctrine would be a combination of local tradition and Pashthunwali, and possibly also Islamic law. Given that the elders' *shura* is strong here, it is most likely that the elders would be the single provider, although they may seek assistance from the mullahs, especially if the case demanded some use of Islamic law. If they were using only local tradition and Pashthunwali, then they may not seek assistance from the mullahs. The same kind of land dispute would likely be resolved differently in a more affluent urban, context, where there is a strong DG and a weak elders' *shura*. Here, the DG would likely resolve the dispute as a single provider and he may draw on either state law or local tradition as the source doctrine. The same type of case could also occur in an impoverished rural context with a weak elder's *shura* and a strong Taliban *shura*. Here, the case would likely be determined by the Taliban as the single provider, using their interpretation of Islamic law as the source doctrine.

Justice provision is inextricably linked with local power structures and there is no notion of the separation of powers between the Executive and the Judiciary.

The provision of justice is further influenced by how local communities conceptualize crime. With the exception of the Taliban, crime is seen as a rupturing of relationships. For the elders, the resolution process and the outcome both contribute to the key goal of reducing enmity in the family, tribe or village.

Given the Pashtunwali principle of *badal* (revenge and the capacity for engagement in revenge cycles that can last generations), this conceptualization of crime may seem counter-intuitive. However, revenge, although recognized as a right of the people, it did not emerge in this study as a right that was routinely exercised. The elders, the DGs and the mullahs all endeavored to reconcile relationships.

Taliban justice, although cruel, harsh and disproportionate, is accepted by a significant portion of Helmandis. Although this acceptance is related to proximity, it is also welcomed as being in harmony with tribal life, although seen as more extreme version. The Taliban are, in doctrinal terms at least, pushing an open door. But Taliban justice does have its limits, and requires some level of social acquiescence to thrive. While they appropriate the elders' methods, ultimately they undermine them. The Taliban do not apply the collectivism and participative methods that underscore the elders' decision-making process towards repairing community harmony.

Although there is much respect for Islam in decision-making, it does not have the final word. *Primus inter pares* among the doctrinal sources appears to be Pashtunwali, but this can vary from case to case, district to district. Consequently, it is better to view the decision-making process as through a prism of Pashtunwali, Islam, local tradition and the formal justice sector.

While the informal sector is not normally beneficial to women, the presence of women on the JSC in Gereshk has made a difference in their lives. Further, this was achieved while still respecting the social, cultural and religious tramlines. However, unless there is support from the Afghan male leadership at all levels, i.e. leaders who champion women's rights, there will not be more progress for women. This commitment from men needs to occur and be maintained at national, provincial and district level.

Finally, there is a disagreement between the national and the provincial level in Helmand Province. The national level has no relevance to those engaged in resolving disputes on the ground. While there are solid horizontal linkages between the actors at provincial and district level, as demonstrated in this chapter, there are no vertical linkages to national actors. This reflects more than a disconnect between national policy and local justice provision. Not only has over eight years of justice reform at the national level had no effect on the ground, but failure to materially support the elders at the district and village level has only played into Taliban hands.

The national policy currently being drafted, on the relationship between the formal and informal sectors, recognizes the contribution of the informal sector, which will continue. This policy also aims to craft a diagonal linkage. However, efforts to overly prescribe a top-down approach only risks adding bureaucracy to the mix and match character of justice that exists on the ground. This could jeopardize the advantages that characterize the informal justice sector — that it is local, speedy, and its decisions are seen to be both in line with Islam and local culture, and proportionate to the crime committed or dispute. Irrespective of national policy, it is likely to have little traction on the ground. The elders will continue to mediate disputes because the communities' demand for dispute resolution will not diminish.

Strengthening International Programming on Access to Justice for the Poor and for Women: Lessons learned from Pakistan's *Musalihat Anjumans* and other programs

Cassandra Balchin¹

INTRODUCTION

It is to be welcomed that multilateral and bilateral development agencies are moving beyond a state-centric approach to justice and have begun to recognize the vital role non-state legal orders (NSLOs)² play in people's lives and the potential contribution to improving access to justice offered by alternative dispute resolution (ADR).

This direction is partly a response to calls for a contextual approach to justice sector reform as a solution to the weaknesses of past reform efforts.³ Also, the right to culture forms part of international human rights standards and when the state fails or refuses to pay due regard to cultural diversity and contextual specificity through refusing to recognize (or even suppressing) a plurality of legal orders, this can amount to structural discrimination.⁴ Meanwhile, given estimates that "even in societies with the most developed legal systems, only about five percent of legal disputes end up in court,"⁵ greater attention to ADR mechanisms may be more in tune with the realities of people's lives and potentially increase their legal choices.

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² It is recognized that the term 'non-state' is in many instances inaccurate since the line between state and its 'other' is blurred and replete with presumptions that do not always hold. However, other options such as 'alternative', 'informal', 'traditional' or 'local' are equally unsatisfactory.

³ V Maru, 'Between Law and Society: Paralegals and the Provision of Justice Services in Sierra Leone and Worldwide' (2006) 31 *Yale Journal of International Law* 427, 429.

⁴ A 2004 Expert Seminar on Indigenous Peoples and the Administration of Justice expressed concern that indigenous peoples were the victims of discrimination and racism in the administration of justice, and identified 14 causes for this situation, including the failure to recognize the special relationship with ancestral lands, the criminalization of indigenous cultural and legal practices, and the non-recognition of indigenous legal traditions E/CN.4/2004/80/Add.4

⁵ L Chirayath, C Sage and M Woolcock, *Customary Law and Policy Reform: Engaging with the Plurality of Justice Systems* (July 2005) 2

<http://siteresources.worldbank.org/INTWDR2006/Resources/477383-1118673432908/Customary_Law_and_Policy_Reform.pdf> at 27 May 2011.

However, if reform towards greater plurality is often necessary or justified this does not guarantee it is human rights compliant. A review of research, analysis, reports and policy documents relating to access to justice programming by such agencies over the past decade raises a number of concerns that appear common across regions as regards their impact on access to justice for marginalized groups, especially women.

This chapter will detail these concerns, synthesizing from a range of secondary source materials. These materials relate largely to plural legal orders which have been a focus of the author's work in recent research and publications.⁶ This chapter will further illustrate these concerns through a case study of ADR-style *Musalahat Anjumans* in Pakistan.

The field of access to justice analysis and programming is rapidly evolving and there are increasing indications of a focus on ensuring access to justice for the poor and especially for women. This chapter therefore hopes to be a timely critique that will also contribute to reflection on how to strengthen international programming on access to justice. Towards this end, for each issue raised the chapter will offer international policy-makers and practitioners suggestions for ensuring programming is rights-based and thus in the long-term more effective.

It is not within the scope of this chapter to assess the human rights impacts of justice sector reforms that strengthen or introduce plural legal orders. Such an analysis synthesising across different regions and legal systems is offered elsewhere.⁷ The focus of this chapter will instead be on how to ensure that the *programming* of justice sector reform (particularly in the area of plural legal orders) strengthens access to justice in ways that advance human rights, especially of the poor and marginalized groups such as women. 'Programming' is understood to include:

- the conceptual foundations and political aims that underlie justice sector reform relating to plural legal orders;
- the research and empirical base informing reform programmes;
- the analysis behind reform programme design;
- the consultation process that helps shape and implement reform programmes;
- project planning, implementation, monitoring and evaluation.

This chapter focuses on justice sector reform programming regarding plural legal orders implemented by or supported by multilateral and bilateral development agencies and policy-makers. Local women's rights and human rights activists have been engaged in this process for decades and despite their limited resources often have been very successful (some examples are discussed below). But in comparison, the international financial institutions, multilateral agencies and bilateral agencies that support justice sector programming have far greater resources, have greater influence over governments, and can promote the reform

⁶ Plural legal orders arise when diverse legal orders co-exist or overlap within a particular jurisdiction or country, with the result that a dispute or subject is governed by multiple norms, laws and/or forums. See International Council on Human Rights Policy (ICHRP), *When Legal Worlds Overlap: Human Rights, State and Non-State Law* (2009) available at <<http://www.ichrp.org/en/zoom-in/when-legal-worlds-overlap>> at 1 June 2011; C Balchin, *Background paper on women's access to justice in plural legal orders: reframing debates in the light of women's experiences* (2010) UN Women. While parallel state-recognized religion-based family laws are among the most common forms of plural legal orders and can have serious human rights impacts (as the two cited publications reveal), they are rarely the focus of justice sector reform and are therefore not discussed in depth in this chapter.

⁷ ICHR, above n 6.

of entire justice systems through supporting large-scale national governance programmes such as decentralisation. It is therefore vital to ensure that such powerful justice sector programming takes into account the needs and rights of marginalized groups.

1. Musalihat Anjumans: a justice sector reform case study

Musalihat Anjumans (literally 'Reconciliation Forums') alternative dispute resolution forums were introduced by the Pakistan Government under a United Nations Development Programme (UNDP) assisted decentralisation programme which has been operating since 1999.

The 2001 Local Government Ordinance, which is part of this programme, included provisions for setting up *Musalihat Anjumans* throughout the country at the lowest administrative level, the Union Councils. However, the Ordinance lacked any procedural detail. Under the law, the members of the *Musalihat Anjumans* "shall use their good offices to achieve the amicable settlement of disputes amongst the people in the Union through mediation, conciliation and arbitration."⁸ There was no further elaboration of procedures until 2006 when Rules accompanying the 2001 Ordinance were eventually developed in each province. But even these are partial at best. For instance, *Insaaf* (Justice) Committees appoint the *Musalihat Anjuman* members, yet the 2001 law and subsequent Rules provide no details as to how these Committees are to be formed and who are to be the constituents.

In 2004, UNDP started a programme called Gender Justice Through *Musalihat Anjumans* (GJTMAP). The Project's objectives include: "Partnerships with Judiciary, Police, District Judiciary, CSOs (civil society organizations) for accountable, fair and equitable dispensation of justice."⁹ A pilot phase was launched in two districts for each of Pakistan's four provinces, and a further total 12 districts are to be added during a 2007-2011 up-scaling phase; it now covers roughly 20 of Pakistan's 100 districts. GJTMAP states that "The *Musalihat Anjumans* can cover various different disputes related to gender justice," and lists "numerous benefits", including "Equity and easy access to justice for disputants at community level; Means towards curbing gender based violence and its repetition due to a controlled community setting."¹⁰

The case study of *Musalihat Anjumans* is based on the work of and interview with Sohail Akbar Warraich, a Pakistani rights activist who for many years headed the legal services section of Shirkat Gah Women's Resource Centre (SG);¹¹ several of his observations are based on discussions with SG paralegals. For over 15 years, SG has run a paralegal training and legal empowerment programme, working with community-based organisations across the country, in addition to providing legal aid services, engaging in public interest litigation, and conducting national advocacy and lobbying for constitutional and legal reform. Warraich continues to conduct SG's paralegal courses and has researched the roles of local

⁸ *The Punjab Local Government Ordinance 2001* (Ordinance XIII of 2001) s 103, The Punjab Local Government Ordinance <<http://www.pap.gov.pk/uploads/acts/426.html>> at 11 July 2011.

⁹ H R Afridi, 'Gender Justice Through Musalihat Anjuman Project (GJTMAP) Making Justice Accessible for All through ADR' (presentation delivered at UNDP Symposium 'Non-State & State Justice Systems: Principles & Practices of Engagement', Bangkok, October 2010). This PowerPoint presentation was given to the author by a participant at the symposium and is available on file with the author.

¹⁰ GJTMAP <http://www.gitmap.gov.pk/about_project/index_about_project.php> at 11 July 2011.

¹¹ Shirkat Gah has been one of Pakistan's leading women's rights organizations since the mid-1980s. Shirkat Gah – Women's Resource Centre <<http://www.shirkatgah.org/>> at 11 July 2011.

administrative and judicial authorities.¹² He has published on Muslim family laws and been closely involved in numerous national legal reform initiatives. The case study also draws upon materials on the GJTMAP website,¹³ and a 2010 presentation by the UNDP GJTMAP National Manager for Pakistan at an international symposium.¹⁴

2. Strengthening approaches to access to justice reform

2.1 Learning from local practice

As justice sector reform becomes increasingly transnationalized, reform programmes often sideline skilled and experienced local legal professionals in favour of those able to communicate in international languages, especially English.¹⁵ The learnings from effective projects may be being overlooked simply because they are in the vernacular, or are not framed as 'justice sector' programmes but rather as general social empowerment initiatives, or local activists do not have the time and the writing skills needed for documenting their experiences. Even where local staff are hired for reform programmes, the skill-set required to work for an international donor means that such staff are unlikely to be those with extensive community-level experience. This was true of the designers of Pakistan's Devolution Plan which culminated in the 2001 Local Government Ordinance. Most were desk researchers or foreigners, and few had even voted in council elections or interacted with local councils.¹⁶

The *Musalihat Anjuman* case study also illustrates how local legal experts may at times be consulted, but that this may not always be a meaningful process. During the 1999-2000 process towards Pakistan's Devolution Plan, there was quite extensive consultation by the Pakistan Government and international agencies, but "the issue was that to what extent the recommendations and critiques of the civil society groups were being incorporated into the ambitious and ambiguous Plan."¹⁷ When the 2001 Local Government Ordinance was promulgated, the provisions for *Musalihat Anjumans* were retained in full despite heavy criticism from local rights activists. In 2004 after the UNDP's GJTMAP was established, local groups highlighted the loopholes in the 2001 law to GJTMAP staff. "In private they agreed, but were not willing to ask the Government to amend it. They were more concerned that the project take off and they be able to make some presentation," notes Warraich.

In mid-2005 civil society organisations were invited to bid for a study on the workings of the *Musalihat Anjumans*. According to Warraich, "Instead of any rights-based group involved in the issues locally, it was given to some consultancy firm. Some months later the project staff privately told me that the report was not worth sharing." The same year, when Rules governing the *Musalihat Anjumans* were being drafted, consultations were again held but, "primarily with groups who were partners in other UNDP projects."¹⁸

¹² S A Warraich, *Muslim Aili Qawaneen: dushwarian aur mumkina hal* (Muslim Family Laws: Obstacles and Solutions, Urdu language) (2007). This book is currently being translated into English by Shirkat Gah Women's Resource Centre, Lahore.

¹³ Gender Justice Through Musalihat Anjuman Project (GJTMAP) <<http://www.gitmap.org/>> at 1 June 2011.

¹⁴ Afridi, above n 9.

¹⁵ U Mattei, 'A Theory of Imperial Law: A Study on U.S. Hegemony and the Latin Resistance' (2003) 3(2) *Global Jurist Frontiers* 58.

¹⁶ Interview with Sohail Akbar Warraich, Pakistani human rights expert (London, 21 October 2010).

¹⁷ Ibid.

¹⁸ Ibid.

In 2005 implementation of the GJTMAP project was handed over to Local Government Departments in each province. Provincial committees were formed to provide support for the work, and rights organisations were invited to be on the committees. In Warraich's opinion, the intent "was to have people who were not opposed the project, not those who wanted a very cautious approach or who knew how the system works on the ground. All Shirkat Gah's resources on women's rights were highly appreciated, but they needed rights activists just to pick our brains and show they had consulted."¹⁹

It is possible to engage in access to justice work in ways that advance the rights of poor and marginalized groups such as women while also acknowledging and supporting local cultures, traditions and practices. Worldwide, there are several examples of paralegal and legal empowerment programmes run by local women's and human rights groups that illustrate these possibilities. Among many, these include Ain-o-Shalish Kendra in Bangladesh, Timap for Justice in Sierra Leone, the Integrated Centre for Women's Aid (Centro de Atencion Integral de la Mujer) in Ecuador, and the Women and Law in Southern Africa initiative. Examples of research that is similarly rights-based but also rooted in local experiences include research by the Centre for Applied Legal Studies in South Africa on rural Black women's actual experience of customary marriage, and large-scale quantitative and qualitative research by Sisters in Islam in Malaysia into experiences of polygamy for husbands, wives and their children.²⁰ According to UN Women: "Local women's organizations and human rights non-governmental organizations (NGOs) that work on the ground are aware of the benefits and drawbacks of the various legal systems, and their successful interventions are based on the lived realities of the people with whom they work."²¹

In order to draw upon the wealth of local experience and expertise that has been built around justice sector reform, especially in the area of legal plurality and the rights of marginalized groups, it is vital for international policy-makers to examine how consistently and more effectively to integrate learning from local practice into programming. One possibility is to facilitate knowledge-building processes that provide local experts with the means and support – largely in the shape of an editor or co-author and translator where necessary – to ensure the former's analysis reaches the international stage.

2.2 Ensuring a consistent political commitment to a rights-based approach

If culture is acknowledged as a contested field, and by extension the normative orders that are the basis of legal systems and their reforms are also contested, it is clear that justice sector reform entails political choices and moral preferences. There have been calls for policy-makers, including international donors, to be open about these choices.²² Some multilateral and bilateral development agencies acknowledge that reform projects involve political choices and impacts.²³

¹⁹ Ibid.

²⁰ <<http://www.askbd.org/>>; Maru, above n 2; Ain o Salish Kendra <<http://www.askbd.org/>> at 1 June 2011; Balchin, above n 6; K L Robinson, 'The Minority and Subordinate Status of African Women under Customary Law: Arguments for Repeal' (1995) 11 *South African Journal on Human Rights*, 457.

²¹ UN Women, *Progress of the World's Women 2011-2012 – In Pursuit of Justice*, (2011) 75.

²² F von Benda-Beckmann, K von Benda-Beckmann and A Griffiths (eds), *The Power of Law in a Transnational World* (2009) 127.

²³ Justice sector reform "is not a neutral, technical activity, but one that raises broader governance issues," and "Intervention may ... have an impact on existing power relations at both local and national levels" (UK Department for International Development (DFID), *Non-state Justice and Security Systems* (2004) 3). Meanwhile, "questions of constructing a single, coherent justice system in Somalia involve technical considerations and inputs, but are essentially political ones" (A Le Sage, *Stateless Justice in Somalia Formal and Informal Rule of Law Initiatives* (2005) 8).

Whether or not a particular plural legal order advances human rights depends upon a variety of contextual factors.²⁴ This contingency makes it essential that justice sector reforms that claim a basis in advancing human rights, development or access to justice be judged against such a claim. In this process, it is important to retain the principle of the indivisibility of human rights since the use of rights language, including emphasizing the right to equality and the right to difference, can be used to hide, reproduce, or deepen marginalisation and exclusion.²⁵

The names of prominent current legal reform policies and programmes – Justice for the Poor (World Bank), Access to Justice for All (UNDP), the Commission on Legal Empowerment of the Poor (CLEP) – raise the hope that legal reform policy will henceforth pay greater attention to the human rights of the marginalized.²⁶

However, policy interventions in practice currently seem to lack an urgency in their commitment to human rights and social equality. For instance, a UNDP study promoting the recognition of NSLOs says projects “should *work towards gradually enhancing* [emphasis added] the quality of dispute resolution and getting the informal justice systems to adhere to human rights based principles.”²⁷ While an incremental approach to remedying the shortcomings of NSLOs may be realistic, such latitude is rarely granted to inadequate state justice institutions. Moreover, in the experience of women’s rights and development activists, at times attitudes and practices can shift remarkably rapidly: both towards and away from human rights standards. In other words, an incrementalist approach can simply be out of tune with local possibilities. This is another area where greater interaction between justice sector policy-makers and those working more broadly on rights, empowerment and development could strengthen analysis and programming.

Similarly, for some programmes one can question the depth of commitment to a rights-based approach because there is little discussion of what to do about the inevitable rights violations until NSLOs evolve to meet human rights standards. For example, the law governing the *Musaliht Anjumans* appears to contradict the UNDP’s own policy. The UNDP rightly recommends that, “Any oversight mechanisms need to forward to the formal system those [NSLO] cases which are against natural justice, corrupt, politically motivated or breach international standards of human rights.”²⁸ Yet neither the 2001 Ordinance nor subsequent Rules regarding the *Musaliht Anjumans* provide the option of appeal. Judicial oversight is only available when a *Musaliht Anjuman* considers a civil dispute that has been referred to it by a Civil Court.²⁹ This raises serious questions as to how users are to protect themselves against decisions that violate their rights. In

²⁴ ICHRP provides a detailed framework for assessing the likely human rights outcomes of an intervention (ICHRP, above n 6).

²⁵ R A Hernández Castillo, ‘National Law and Indigenous Customary Law: The struggle for justice of indigenous women in Chiapas, Mexico’ in M Molyneux and S Razavi (eds), *Gender Justice, Development, and Rights* (2002) 14.

²⁶ “The poor are not the objects of legal empowerment, but its co-designers and facilitators. They must participate and provide feedback in all phases of the reform, including the close monitoring of the results” (Commission on Legal Empowerment of the Poor (CLEP), *Making the Law Work for Everyone* (2008) 9, UNDP

<http://www.undp.org/legalempowerment/report/Making_the_Law_Work_for_Everyone.pdf> at 27 May 2011). See also H J Gruss, ‘The World Bank and Legal and Judicial Reform’ (presentation at the International Symposium on Legal Assistance Projects, Nagoya University, Aichi, Japan, 13-14 September 2000).

²⁷ E Wojkowska, *Doing Justice: How Informal Justice Systems Can Contribute* (2006) 16.

²⁸ Ibid 42.

²⁹ Under s 106(2) lawyers are explicitly prohibited from representing parties and under s 104(3) court approval is envisaged only where a civil dispute was referred by a court under s 89A of the Civil Procedure Code. See, *The Punjab Local Government Ordinance 2001*, above n 8.

the name of "safeguarding and promoting the rights and lawful entitlements of women and other vulnerable sections of society",³⁰ the project potentially threatens to undermine fundamental rights. This contrasts with the pre-existing 1961 Conciliation Courts Ordinance which provided for judicial review, and spelled out procedural details including pecuniary limitations to jurisdiction. Additionally, from 2001 until 2006 when the relevant Rules were introduced, there was no minimum educational qualification for a member of the *Musalihat Anjumans*.³¹ Pakistan's Criminal Procedure Code (CrPC) has highly complex provisions relating to the types of case where parties can compromise, including cases relating to violence against women. The 2001 Ordinance required *Musalihat Anjumans* to "have regard to" these CrPC provisions when hearing cases.³² "When members are supposedly not even required to be literate, how will this work for justice?" asked Warraich.³³

Improving access to justice is often framed as something particularly needed for the poor and dispossessed. Yet writings which promote plural legal orders and ADR as a way of improving access to justice often also note that such systems exclude or work to the disadvantage of women and other marginalized groups. "Informal justice systems generally do not work in the resolution of disputes between parties who possess very different levels of power or authority."³⁴ On the World Bank's online Access to Justice Topic Brief, the only time a gendered comment is made is in relation to ADR: "... it is argued that ADR based on traditional social relationships may reduce women's access to justice when prevailing norms discriminate against women."³⁵ Other studies question a linear relationship between decentralisation and poverty reduction "particularly where the most vulnerable are concerned".³⁶

This raises questions about the coherence of analysis underlying current programming: if NSLOs are acknowledged as deeply flawed, especially vis a vis the marginalized, then why are they promoted as an access to justice solution for the poor? Is it merely that *on balance* NSLOs are seen as the lesser of two evils (in the context of an inadequate or rights-violating state system)? If so, the factors that inform this assessment of the 'balance' are rarely made transparent. The pragmatic argument that 'donors cannot do it all' is insufficient in that it does not lay bare the political choices that have been made in implementing more limited programming.

³⁰ GJTMAP Project Goal, <http://www.gjtmap.gov.pk/about_project/index_about_project.php> at 1 June 2011.

³¹ The Punjab *Musaalihat Anjuman (Constitution & Function) Rules 2006* made a marginal improvement upon this in Rule 3(2) which states "Provided that the persons having legal experience or retired civil servants may be included in such a list." In other words, any significant educational level remains optional.

³² Section 103: Provided further that in bringing parties to a dispute to an amicable settlement, *Musalihat Anjuman* shall have regard to the provisions of section 345 of the Code of Criminal Procedure, 1898 (Act V of 1898), Hadood laws and all other laws for the time being in force where under certain offences are not compoundable."

³³ Warraich, above n 16.

³⁴ Wojkowska, above n 26, 20. Similar examples include T Barfield, N Nojumi and J A Their, *The Clash of Two Goods: State and Non-State Dispute Resolution in Afghanistan* (2006); and BAPPENAS/PSPK-UGM/UNDP, *Justice for All? An Assessment of Access to Justice in Five Indonesian Provinces* (2006), available at <http://www.undp.or.id/pubs/docs/Justice%20for%20All_.pdf> at 27 May 2011.

³⁵ World Bank <<http://web.worldbank.org/WBSITE/EXTERNAL/TOPICS/EXTLAWJUSTINST/0,,contentMDK:20756347~isCURL:Y~menuPK:1990386~pagePK:210058~piPK:210062~theSitePK:1974062,00.html>> at 1 June 2011.

³⁶ S Byrne, G Mirescu and S Müller, *Decentralisation and Access to Justice* (2007) International Research and Consulting Centre Series, 8.

This makes it important to understand the motives underlying programming. International actors may have quite varied rationale for supporting NSLOs. For instance as regards land titling in Uganda: "The World Bank, for example, sees the reliance on customary arrangements as a simpler and less conflictual route to the eventual titling, registration, and privatisation of land ownership, whereas Oxfam sees the reliance on customary systems as a way to strengthen and democratize local communities, and promote bottom-up grassroots initiatives."³⁷ However, it is essential not to homogenize the motivations of international actors, who may also be diverse *internally*. These internal contestations may partly explain some of the analytical inconsistencies in programming mentioned throughout this chapter.

Despite the diversities, there are certain motivations that frequently surface as dominant. Numerous donor-sponsored legal reform projects promote ADR and the incorporation of NSLOs into the state system in the name of efficiency – primarily as a means of freeing state courts for more 'serious' cases such as business disputes. This is not new: one of the earlier examples was the *Barangay* Justice System introduced in the Philippines in 1978 partly to reduce the volume of litigation in court.³⁸ More currently, a UNDP policy briefing on the *Musalihat Anjumans* also highlights the efficiency argument that "MAs can significantly reduce the case-load of formal courts."³⁹ This is efficiency understood in economic terms rather than expanding access to justice in the substantive sense.⁴⁰ Several studies covering Africa, Asia, Latin America and global policy have critiqued the market-driven language of some justice sector reform programmes.⁴¹ It is interesting to consider how far the current fashion for supporting plural legal orders and ADR is a development of this market vision of justice sector reform, one that espouses a preference for deregulation and privatisation. Rather than acting to strengthen the existing system to meet the demands on the formal system, according to Warraich the aim of the 2001 reforms was "privatising all these matters and [expecting] people to take responsibility for their own disputes. State costs and energies should be saved from that. [It's about] the state not taking responsibility for basic guarantees like the right to life and property, people's access to justice and due process of law."⁴²

Elsewhere, notably devolution and decentralisation projects in Africa, reform programmes involving the recognition of NSLOs may actually be motivated by an effort to increase state control over the periphery and reproduce communities that can be administered.⁴³ In other words, the pattern whereby many plural

³⁷ A M Tripp, 'Women's movements, customary law, and land rights in Africa: the case of Uganda' (2004) 7(4) *African Studies Quarterly* 1.

³⁸ M M Tachibana, 'Tensions and Compromises of Legal Pluralism: Case Study from a Philippine Migrant Community' (paper presented at the Commission on Folk Law and Legal Pluralism, 15th International Congress, 'Law, Power and Culture: Transnational, National and Local Processes in the Context of Legal Pluralism' 2006, 8).

³⁹ United Nations Development Group <http://mdgnet.undg.org/ext/MDG-Good-Practices/mdg3/MDG3_Pakistan_Gender_Justice_through_Musalihat_Anjuman.pdf> at 1 June 2011.

⁴⁰ Comments made by Sara Hossain (Bangladesh human rights lawyer) at an ICHRP meeting on Legal Pluralism and Human Rights, Geneva, 22-23 February 2008.

⁴¹ M Davidheiser, *Governance and Legal Reform in the Gambia and Beyond: An Anthropological Critique of Current Development Strategies* (2007) Working Paper no. 93, Max Planck Institute for Social Anthropology; M Galanter and J Krishnan, 'Bread for the Poor: Access to Justice and the Rights of the Needy in India' (2004) 55(4) *Hastings Law Journal* 789; R Sieder, 'Legal Globalization and Human Rights: Constructing the 'Rule of Law' in Post-Conflict Guatemala' in P Pitarch, S Speed and X Leyva (eds), *Human Rights in the Maya Region: Global Politics, Moral Engagements, and Cultural Contentions* (2008); Y Ghai and G Cottrell, *Marginalized Communities and Access to Justice (Law Development and Globalizat)* (2010); F von Benda-Beckmann, K von Benda-Beckmann and Griffiths, above n 21.

⁴² Warraich, above n 16.

⁴³ Davidheiser, above n 40, 4-7; L Buur and H M Kyed (eds.), *State Recognition and Democratization in Sub-Saharan Africa: A New Dawn for Traditional Authorities?* (2007) 19.

legal orders came into being under colonial rule as a means of co-opting local elites is being replicated today through justice sector reform programmes. As discussed later in this chapter, *Musalihat Anjumans* are also reinforcing the power of existing elites.

2.3 Ensuring programming is backed by high quality analysis and research

Given the high stakes involved in terms of human rights outcomes, impact on local power dynamics and financial outlays, it is surprising how easy it is to find examples of research and analysis regarding plural legal orders that is somewhat lacking. This can be partly explained by the fact that project cycles tend to be short and resources limited for researching the policy context.⁴⁴ However, even acknowledging these constraints, it is clear there needs to be an effort to strengthen the quality of related research and analysis.

First, programming can at times appear full of decontextualized platitudes. A popular UNDP diagram offering a 6-step process towards 'appropriate remedies' rightly sees a logical progression from legal awareness to accessing appropriate forums.⁴⁵ Yet the requirement that project documents produce simple statements means they rarely explain how the immense gap between these steps – between being familiar with the content of law and procedure, and cases actually being heard by an appropriate forum – is to be bridged for the marginalized on the ground. The complexity of justice sector reform can be frustrating for all involved and is sometimes used by states to mask their failure to meet their responsibilities. But in the rush to find quick fixes, digestible models and manageable programmes, there is a danger of over-simplification. As Kenyan researcher Celestine Nyamu-Musembi asks, are donor approaches to plural legal orders "a solution in search of a problem? (that is to say what donors feel they are able to do is what frames the problem)."⁴⁶ A 'modelling' tendency within justice sector reform circles may also be unhelpful since it is based on the hope or assumption that what worked in one context can be either scaled up nationally or transposed elsewhere with little regard for the contextual factors that contributed to the model's success. The 'modelling' tendency continues despite a healthy critique of the challenges of scaling up across development practice and including in justice sector reform.⁴⁷ This point is not to be misunderstood as a call for a cultural relativist approach but simply the need for greater attention to contextual realities beyond platitudes.

Second, analysis and programming is sometimes logically inconsistent. Recommendations often include calls for judicial confirmation of mediated agreements or NSLO decisions, and training and education of justice providers. Yet proper implementation would reduce expected savings in expenditure and alleviation of the state system's burdens. More affordable oversight that relies on the disadvantaged raising the alarm about violations of their rights only protects against the most extreme cases. A UNDP briefing argues the case for the *Musalihat Anjumans* as a means of increasing women's access to justice

⁴⁴ J Faundez, 'Non-State Justice Systems in Latin America: Case Studies: Peru and Colombia' (paper prepared for DFID workshop Working with Non-State Justice Systems, 2003) 61; C Biebesheimer and M J Payne, *IDB Experience in Justice Reform: Lessons Learned and Elements for Policy Formulation* (2001) 25; DFID, above n 22, 7; N Menzies, *Legal Pluralism and the Post-Conflict Transition in the Solomon Islands: Kastom, Human Rights and International Interventions* (2007) 15.

⁴⁵ Wojkowska, above n 26, 30.

⁴⁶ Presentation at ICHRP workshop, Geneva, October 2008.

⁴⁷ World Bank Justice for the Poor Programme, *Forging the Middle Ground: Engaging Non-State Justice in Indonesia* (2008); T Chopra, *Building Informal Justice in Northern Kenya*, Legal Resources Foundation Trust (LRF) Justice for the Poor, Research Report (December 2008).

especially in the area of gender-based violence and also states that they can “significantly reduce the case-load of formal courts”. Yet the same briefing elsewhere notes that only two percent of violence against women cases ever go to the formal courts.⁴⁸ Meanwhile, valorizing tradition as a solution to the illegitimacy of the formal justice sector faces the paradox that in practice ‘traditional’ NSLOs also tend to violate rights. Sometimes, the recommended solution is for ‘hybrid systems’ that combine state and non-state orders, often without any discussion as to how to achieve a fusion of systems that have been posited as totally contrasting systems. Somewhere the analysis does not add up.

My review of the literature found numerous examples of policy research on plural legal orders that appears to lack a certain internal consistency. Two representative examples of the trend include one paper which states that its findings indicate “the complex set of changing realities” which makes it difficult to assess “exactly what role traditional leadership can play in governance as a whole” but in the next paragraph asserts “traditional leaders have an important role to play in narrowing the gap between policy and its practice”.⁴⁹ Another representative example points out that earlier community court initiatives were not successful and that “local interest was lost” and yet goes on to say a new community courts proposal “constitutes a valuable document which could be used in the near future in the formulation of state policy.”⁵⁰ Plural legal contexts are so complex that it is in fact possible that these seemingly contradictory statements may be coherent. But the papers in this instance do not help the reader understand how this works. A potential outcome is that policy programmers with very different perspectives on justice sector reform could pick and choose from such research the analysis which appears to support their possibly diametrically opposed positions.

Third, by failing to understand and address existing plural legal orders, justice sector programming can further complicate an already complex system. There can be no doubt that Pakistan’s entire governance system was in need of large-scale reform in 1999-2000 when the Devolution Plan, which included a provision for the *Musalihat Anjumans*, was being developed. Ultimately, however, the kind of comprehensive reform needed was abandoned in favour of a piecemeal approach which then not only lacked coherence but also introduced an inexplicable duplication of provisions governing minor legal matters. There were already the Small Causes Courts established under an 1887 law, the Arbitration Act 1940, and the Conciliation Courts Ordinance, 1961. Human rights groups suggested to international donors that an effective approach would be to strengthen these systems, especially since they “had developed jurisprudence and clarity due to a continuity of law since 1961, and people were familiar with them.”⁵¹ Yet the 1961 law has not been repealed, creating further confusion.

Fourth, reform planning needs to take into account the formal legal system’s attitudes to date towards NSLOs, or risk being unsustainable in the long-term. In Pakistan, there is a precedent for the striking down of ADR-style mechanisms. In the late 1990s *Khidmat* (Assistance) Committees were set up designed to perform similar functions to the *Musalihat Anjumans*. They were challenged before the

⁴⁸ United Nations Development Group <http://mdgnet.undg.org/ext/MDG-Good-Practices/mdg3/MDG3_Pakistan_Gender_Justice_through_Musalihat_Anjuman.pdf> at 27 May 2011.

⁴⁹ D Malzbender, J Goldin, A Turton and A Earle, ‘Traditional Water Governance and South Africa’s ‘National Water Act’ – Tension or Cooperation?’ (paper presented at international workshop on African Water Laws: Plural Legislative Frameworks for Rural Water Management in Africa, Gauteng, South Africa, 26-28 January 2005, 11).

⁵⁰ D Nina and P J Schwikkard, ‘The ‘Soft Vengeance’ of the People: Popular Justice, Community Justice and Legal Pluralism in South Africa’ (1996) 36 *Journal of Legal Pluralism and Unofficial Law* 69, 81.

⁵¹ Warraich, above n 16

High Courts and in each case their decisions and even formation were struck down. Warraich believes the *Musalihat Anjumans* are open to judicial challenge. "Take sexual assault which is constructed as a crime against the state: if someone complains of rape and there is an attempt to hush up the matter through conciliation and the person was deprived of her right to pursue the case, she could go in constitutional writ and the *Musalihat Anjumans* will be struck down, or at least that particular function. At the moment there is a contradiction: the Supreme Court has issued very strict orders in an interim order against *swara* [giving women in appeasement]. If a *Musalihat Anjuman* was found to be using *swara*..."⁵²

Finally, to be coherent reform needs to account for a country's overall governance system. In Pakistan's case, the effectiveness of the new local government system depended on a number of reforms in policing and district administration, which ultimately have not taken place. In other words, the *Musalihat Anjumans* are the de-contextualized remnants of a grandly-conceived overhaul of Pakistan's local administration.

2.4 Keeping power dynamics and gendered perspectives centre-stage

All systems favour the powerful. But this observation does not justify dispensing with a power lens, and although international development policy analysis has learnt the language of gender equality, 'empowerment of the poor' and the need to protect minorities, this does not appear to extend to a clear recognition of the need to address structural inequalities.

Failing to use a power lens means programming is failing to see how promoting plural legal orders can reinforce existing power imbalances within and between communities. The most striking example of the failure of justice sector reform to commit to addressing structural inequalities is the approach to gender commonly found in international programming.

The gender discrimination prevalent in the content and procedures of non-state legal orders, alternate dispute resolution and plural legal orders are widely reported.⁵³ When pluralities are supposedly designed to advance choice, a gender lens questions the actual scope of this choice for socially weaker parties to disputes such as women.⁵⁴ In practice, 'choice' can simply mean being buffeted by competing social pressures.⁵⁵ In the case of ADR and quasi-formal plural legal

⁵² Ibid.

⁵³ Balchin, above n 6 focuses on the impact of plural legal orders on women's rights. Examples of this critique come from diverse contexts and indicate a global problem. They include ADR-style Mediation Boards in Sri Lanka (A Hussein, *Sometimes there is No Blood: Domestic Violence and Rape in Rural Sri Lanka* (2000)); customary Local Courts in Zambia (International Commission of Jurists (ICJ), *Zambia – Attacks on Justice* (2002) <http://www.icj.org/default.asp?nodeID=349&sessID=&langage=1&myPage=Legal_Documentation&iid=21145> at 27 May 2011); conciliation promoted by *casas de justicia* (USAID-funded legal services centres) in Colombia and state-recognized *rondas campesinas* (Night Watch Committees) in Peru (Faundez, above n 43); ADR-style Special Criminal Courts designed to fast-track domestic violence cases in Brazil (F Macaulay, 'Judicialising and (de) Criminalising Domestic Violence in Latin America' (2005) 5(1) *Social Policy and Society* 103) which have since been dismantled in recognition of the problems they raised; opposition to state-recognized religious arbitration for family matters in Canada and Britain (Rights and Democracy, *Behind Closed Doors: How Faith-Based Arbitration Shuts Out Women's Rights in Canada and Abroad* (2005); S A Warraich and C Balchin, *Recognizing the Un-Recognized: Inter-Country Cases and Muslim Marriages and Divorces in Britain* (2006)).

⁵⁴ Women Living Under Muslim Laws, *Knowing Our Rights: women, family, laws and customs in the Muslim world* (2nd edition 2006).

⁵⁵ For instance on the one hand, propriety in Botswana dictates that a woman should respect 'tradition' and not approach the state courts, and on the other hand tradition dictates her case is

orders, women are usually unaware that the procedure is voluntary. While women may lack the social and financial means to approach the formal courts, these disadvantages are just as significant in any ADR or quasi-formal forum. In other words, the provision of 'choice' has done nothing to rectify the structural disadvantages that were used as a justification for the introduction of plurality.

The absence of a power lens and specifically gendered perspectives on plural legal orders also means that justice sector form programmes continue to support the assigning of family matters and domestic violence to NSLOs or ADR mechanisms, often arguing that these are 'minor' matters which do not need to be brought to the state system.⁵⁶ But for women, matters such as the denial of adequate maintenance or low-level but repeated domestic violence may lead to poverty and incapacity for work, both of which must be accepted as 'serious' indeed.

There are several concerns about how the *Musalihat Anjumans* actually play out in terms of women's access to justice and advancing gender equality. First, the inclusion of women as members on the *Musalihat Anjumans* is merely optional and was only introduced under the Rules in 2006.⁵⁷ This represents a reversal of trends in women's representation in Pakistan because since 2001 there has been a *compulsory* one-third quota for women representatives in elected local government institutions which has largely been welcomed and applied in practice.⁵⁸

Second, the Rules contain a schedule of suggested matters that can be heard by the *Musalihat Anjumans*.⁵⁹ For example, the Khyber-Pukhtunkhwa Province Rules state that cases of sexual assault, the issue of *swara* (giving women in appeasement), and forced marriage can be heard by them. This is hardly a question of 'minor matters' and Warraich is concerned that the new system undermines constitutional rights guarantees: "Imagine a case of sexual assault or kidnapping or coercive marriage: if the families come to an agreement through the *Musalihat Anjuman* rather than getting the matter prosecuted through the normal system and they agree on something that is a total violation of the rights of these individuals, like the rapist marrying the victim. These are people who are not aware of the law and who tend to apply discriminatory customary practices."⁶⁰

When Warraich researched the workings of the *Musalihat Anjumans* through Shirkat Gah paralegals, they found that while violence against women cases were being referred to the *Musalihat Anjumans*, it was not by the women themselves. Instead they found examples of senior police officials sending alleged rape cases for local arbitration. This trend towards removing dispute resolution from the formal system contradicts decisions by the superior courts calling for greater

unlikely to get a very sympathetic hearing (A Griffiths, 'Legal Pluralism in Botswana: Women's Access to Law' (1998) 42 *Journal of Legal Pluralism and Unofficial Law* 123, 131).

⁵⁶ As proposed for example in Byrne, Mirescu and Müller, above n 35, 17; Wojkowska, above n 26, 17; Barfield, Nojumi and Their, above n 33.

⁵⁷ In Punjab for instance, s 3(2) now states that "at least one woman may be included in such a list [of members]." See *The Punjab Local Government Ordinance 2001*, above n 8.

⁵⁸ S L Reyes, 'Quotas for Women for Legislative Seats at the Local Level in Pakistan' (2002) International Institute for Democracy and Electoral Assistance (IDEA) <http://www.idea.int/publications/wip/upload/CS_Pakistan_Reynes.pdf> at 27 May 2011; Shirkat Gah updated SG Women & Politics Special Bulletin [am awaiting confirmation of citation]. While Afridi, above n 9, claims 93 percent of *Musalihat Anjumans* now include a woman member, this is still a backtracking on the accepted notion of compulsory one-third quotas.

⁵⁹ Jurisdiction is not limited to the matters listed in the schedule but the highlighting of matters involving women and violence against women in the schedules indicate an apparent assumption that the *Musalihat Anjumans* are particularly suitable for adjudicating such matters.

⁶⁰ Warraich, above n 16.

restrictions on parallel systems, especially in criminal matters relating to women's rights.⁶¹

Third, in addition to criminal law matters the *Musalihat Anjumans* have the potential to obstruct access to justice for women in family matters. Pakistan's 1961 Muslim Family Laws Ordinance (MFLO) is reasonably advanced in terms of rights protection, but there are now concerns that the jurisdictional and procedural confusion created by the *Musalihat Anjuman* system will obstruct legal empowerment initiatives to clarify women's family law rights. Under the MFLO, the Chair of the local Union Council (known as a *Nazim*) has certain mandatory functions for administering family law including aspects of maintenance, divorce and polygamy. Research by Shirkat Gah in a Punjab district found instances where divorce proceedings were instead being transferred to *Musalihat Anjumans* although this is not the recognized legal forum for these proceedings.⁶² Possibly *Nazims* see the new mechanism as a way of saving themselves work.

Fourth, the Rules prohibit coercion in mediation, but in practice it is questionable to what extent women give informed consent, if at all, to their disputes being heard by the *Musalihat Anjumans*. Warraich has found that written records are unclear as to whether a woman first applied to a *Musalihat Anjuman*, or filed an application with the Chair of the UC (under the MFLO) who just chose to forward her case to the *Musalihat Anjuman*. This may require some nuancing of the UNDP's claim that 45 percent of disputes referred to *Musalihat Anjumans* were by women.⁶³

It is often argued that *because* most disputes are resolved outside the state framework, recognition of this can better ensure that institutional reforms reflect the demands of communities.⁶⁴ There are two problems with this approach: first, high levels of use do not necessarily mean NSLOs provide rights-based justice outcomes especially for the marginalized; and second, a pragmatic approach to accessing whatever justice is available should not be conflated with normative preference. This is particularly important to understanding power dynamics and gendered perspectives regarding reforms that introduce plural legal systems.

Surveys suggest that in many cases women prefer local justice over the formal system. However, given the weakness of the formal system in many places and the social pressure that women are often under to keep disputes within the family or community, this may reflect necessity rather than genuine preference.⁶⁵ Since the marginalized usually have more to lose from disturbing the social peace than the powerful, they may continue to uphold NSLOs out of social necessity, which may not be the same as their normative or ethical preferences. Indeed, there is

⁶¹ In a 2004 case about a choice marriage and the death threats issued to the couple, the Sindh High Court had ruled that *jirgas* (a type of informal forum) were to be abolished (A Cowasjee, 'First Step in Getting Jirga System Abolished' (2004) Asian Human Rights Commission - Religious Groups for Human Rights <<http://www.rghr.net/mainfile.php/0622/721/>> at 27 May 2011).

⁶² Z Chaudary, 'Women accessing rights: Constraints and benefits of non formal legal systems', Shirkat Gah Women's Resource Centre/Women's Empowerment in Muslim Contexts (2010) 12.

⁶³ Afridi, above n 9.

⁶⁴ For example, see World Bank, *A Framework for Strengthening Access to Justice in Indonesia* (undated) 3, The World Bank <<http://siteresources.worldbank.org/INTJUSFORPOOR/Resources/A2JFrameworkEnglish.pdf>> at 27 May 2011. See also A Wardak, 'Building a post-war justice system in Afghanistan' (2004) 41 *Crime, Law & Social Change* 319, 337; CLEP, above n 25, 63; Wojkowska, above n 26, 31.

⁶⁵ Eckert notes how people's use of 'courts' run by the Hindu fundamentalist Shiv Sena in Mumbai were not because they were necessarily legitimate but for pragmatic reasons (J Eckert, *Governing laws – on the appropriation and adaptation of control in Mumbai*, Working Paper No. 33, Max Plank Institute for Social Anthropology (2002) 10).

evidence that at times the disadvantaged want more, not less of the state.⁶⁶ This includes examples from Canada where Muslim women successfully campaigned against state recognition of arbitration by religious leaders in family matters; from Ghana where there is a strong demand for authoritative state intervention in legal disputes; from South Africa where younger and more educated South Africans want the state and not traditional leaders to manage water supply systems; and from women in Afghanistan regarding family disputes.⁶⁷ In reality, those on the margins of society are also on the margins of legal orders, state or non-state. Research by Shirkat Gah has found that “the formal court system is viewed positively: women feel that they can only receive justice from the judiciary because that is the only forum where their voices are heard.”⁶⁸

The above clearly indicates the need to take the perspectives of users, especially marginalized users, into account when designing interventions relating to plural legal orders if these interventions are to address their problems. This requires a nuanced view of both pragmatic factors shaping people’s choices as well as accounting for their normative preferences. It also requires a power analysis and gendered perspectives which reveal how women and other marginalized groups navigate legal pluralism on the ground.

2.5 Taking into account the impact of justice sector reform on political dynamics and legal contestation

Taking power dynamics into account also relates to contestations at the national level. It is vital not to overlook the impact of reforms introducing or strengthening plural legal orders on the systemic inter-relationships between state and non-state orders, between multiple state-recognized orders, and between multiple non-state orders. More simply put, how does the recognition of a non-state order or introduction of ADR mechanisms such as *Musalihat Anjumans* affect local political contestation around law?

There is evidence that the introduction of ADR or the creation or recognition of non-state legal orders with the aim of removing cases from the main court system can undermine the latter rather than make it more effective. A detailed study of India’s ADR-style *Lok Adalat* (People’s Courts) notes that the *Lok Adalats* “consume scarce resources of money, personnel, attention, and energy” and may diminish the supply of precedents and impede the development of tort doctrine and expertise responsive to India’s new industrialized economy.⁶⁹ Wherever the state delegates judicial powers to non-state actors, the latter’s understandings of law in effect become part of state practice leading to a capture of the state by non-state actors.⁷⁰ When analysing the impact of such a capture, it is important to take into account the local power dynamics it may reflect, such as a tussle between different classes or economic interests, ethnic groups, or groups

⁶⁶ Faundez, above n 43, 47 citing CANSEL, *Justicia y Conflicto Urbano en Colombia – Formas Comunitarias de Tratamiento y Resolución* (1999) 161-175; and B de Sousa Santos, ‘The Law of the Oppressed: The Construction and Reproduction of Legality in Pasargada’ (1977) 12 *Law & Society Review* 5; J Beyer, *Imagining the State in Rural Kyrgyzstan: How Perceptions of the State Create Customary Law in the Kyrgyz Aksakal Courts*, Working Paper no. 95, Max Planck Institute for Social Anthropology (2007).

⁶⁷ Rights and Democracy, above n 52; R C Crook, *State courts and the regulation of land disputes in Ghana: the litigants’ perspective*, Working Paper 241, Institute of Development Studies (2005) 17; Malzbender et al, above n 48, 2; USAID, *Field Study of Informal and Customary Justice in Afghanistan and Recommendations on Improving Access to Justice and Relations between Formal Courts and Informal Bodies* (2005) 13.

⁶⁸ Chaudary, above n 61, 13.

⁶⁹ Galanter and Krishnan above n 40, 807 and 829-830.

⁷⁰ Eckert, above n 64.

contesting religious interpretations. Interest capture by local elites has also been a feature of African decentralization.⁷¹

Local critics of the *Musalihat Anjuman* mechanism claim that the reform has contributed to the further weakening of the formal system and exacerbated power tussles.

First, the new arrangement undermines previous constitutional provisions regarding provincial autonomy. Under Pakistan's federal arrangement, laws on local government are a provincial subject, yet the planning for the 2001 reforms was done at the federal level. Although each province ultimately promulgated separate provincial Ordinances, "the matter has also been placed in the Sixth Schedule of the Constitution which means that any amendment by a province requires the prior approval of the President of Pakistan."⁷²

Second, the absence of procedural clarity in the operation of the *Musalihat Anjumans* arguably undermines the constitution by creating a quasi-formal system that operates beyond constitutional guarantees of equality before the law and due process. There are concerns that the new mechanisms undermine decades of (partially successful) effort to elaborate rights guarantees such as equality before the law and equal protection of law and to improve the decisions of the subordinate judiciary in Pakistan.

Third, the *Musalihat Anjumans* have also created jurisdictional confusion (not resolved through the 2006 Rules) regarding Muslim family law and criminal matters such as sexual assault. This raises interesting questions about the reach and sovereignty of the state of Pakistan vis à vis legal mechanisms that ostensibly operate as part of the devolved state.

Fourth, according to Warraich the push towards ADR, common among all donors in Pakistan, has introduced a negative trend towards a multiplicity of forums that will bring confusion in terms of procedure and accountability. Historically Pakistan's police have tended to act more as mediators than law enforcers, with all the implicit power biases involved. "These schemes are providing a cover to those acts of the Police. That is the danger."⁷³ Rather than provide streamlined justice in the community, this confusion will exacerbate local power tussles and reinforce the power of local feudal and tribal power-holders whose authority and impunity the formal courts have had some success in challenging. For instance, in Khyber-Pukhtunkhwa Province in the past four years all police stations have set up *Musalati jirgas*.⁷⁴ Separate to the *Musalihat Anjumans*, they too lack a clear framework and during field visits in Nowshera, Mardan, and Swabi Districts, Warraich found "There is complete confusion. The people who are nominated to these *jirgas* are nominated by the district Police, sometimes by the district mayors. There is sometimes tension over who is the actual *jirga*."⁷⁵ When a senior Police officer in Punjab issued a notification in May 2008 ordering all

⁷¹ L K Nkonya, 'Customary Laws for Access to and Management of Drinking Water in Tanzania' (2006) 2(1) *Law Environment and Development Journal* 50-55.

⁷² Warraich, above n 16.

⁷³ Ibid.

⁷⁴ While the term '*Musalihat Anjumans*' is used at the national level, in provincial legislation and in local usage the terms committee, *jirga* and *panchayat* (the latter two being terms for customary non-state legal orders) are also used. Warraich has a copy of a letter dated 12 January 2009 from the office of the Inspector General of Police NWFP, instructing his police subordinates to set up *Musalati* committees in all police stations and referring to a memorandum of understanding signed between NWFP Police and Asia Foundation and the NGO Just Peace. These 'spin-off' forums are not part of the GJTMAP *Musalihat Anjuman* project but they are an undoubted consequence of the 2011 Ordinance and the promotion of *Musalihat Anjumans*.

⁷⁵ Warraich, above n 16.

district Police chiefs to constitute *Musalihat* committees in their areas, the Chair of the local council challenged this in a constitutional petition in the High Court claiming it amounts to the setting up of a parallel legal system. While the Chair may not have been acting out of a selfless dedication to the preservation of the separation of powers and may simply have resented a local police official's encroachment onto 'his territory', the example does illustrate potential problems as regards the democratic principle of the separation of powers.

The legal system is deeply valued in Pakistan and has historically therefore been a major site of political contestation.⁷⁶ A swing towards a legal system that reinforces the power of local, unaccountable justice mechanisms, has thus to be understood not just as a matter of legal sector reform but potentially a major new political direction.

2.6 Recognising culture as internally contested and questioning presumptions about non-state legal orders

How culture is understood greatly affects justice sector reform related to plural legal orders. Unfortunately a tendency to essentialize suffuses much of the literature. Some international policy studies talk about distinguishing between 'true' and 'untrue' traditional authorities. For instance in Mozambique or comparing informal justice sector rules in Afghanistan with "correctly interpreted Sharia".⁷⁷ This ignores evident diversities and internal contestation, and portrays custom and religion in a reified and timeless way.⁷⁸

There is also a tendency in the literature to presume that ethnic, religious, community identities – that is to say, 'cultural differences' – are necessarily experienced as normative differences, and thus require the recognition of multiple customary or religion-based NSLOs. Yet legal-anthropological research from places as diverse as eastern Tibet and among Quechua-speaking communities in southern Peru has found that people of a shared community do not always use their shared religion or ethnicity as a normative reference in dispute resolution.⁷⁹ In the case of Peru, the decisions were based "on equitable principles that could have been equally effective had they been invoked before a state court". The sociological theory of intersectionality also makes clear that various people of a particular ethnicity or religion may have more in common with those of the same sex or class from other communities than with each other. Thus recognition of non-state legal orders on the basis of recognizing 'cultural difference' often overlooks internal contestation.

⁷⁶ This has been experienced as attempts to secure legal cover for repeated bouts of martial law and the hanging of the country's first democratically elected Prime Minister; as many as 18 amendments to the 1973 Constitution; and clashes between progressives and Islamists over both family and criminal laws. In 2007, the sacking of the Chief Justice of Pakistan by General Pervez Musharraf's Government led to mass mobilisation led by lawyers and joined by ordinary citizens. Bar elections that would pass by unnoticed in other countries are major political events in Pakistan.

⁷⁷ L Buur and H M Kyed, *State Recognition of Traditional Authority in Mozambique: The Legible Space between State and Community* (2006) DIIS Working Paper 36, 1, 5; USAID, above n 66, 15.

⁷⁸ For a discussion of diversity and political contestation regarding interpretations of Shariah, see M K Masud, 'Ikhtilaf al-Fuqaha: Diversity in Fiqh as a Social Construction' in Z Anwar (ed), *Wanted: Equality and Justice in the Muslim Family* (2009) Musawah

<<http://www.musawah.org/docs/pubs/wanted/Wanted-MKM-EN.pdf>> at 11 July 2011; Z Mir-Hosseini, 'Towards Gender Equality: Muslim Family Laws and the Shari'ah' in Z Anwar (ed), *Wanted: Equality and Justice in the Muslim Family* (2009) Musawah

<<http://www.musawah.org/docs/pubs/wanted/Wanted-ZMH-EN.pdf>> at 11 July 2011.

⁷⁹ F Pirie, *Feuding, Mediation and the Negotiation of Authority among the Nomads of Eastern Tibet*, Working Paper no. 72, Max Planck Institute for Social Anthropology (2005) 17; Faundez, above n 43, 33.

Approaches that essentialize culture also produce numerous unhelpful binaries in justice sector reform: between state and non-state legal orders; 'secular' and 'religious'; 'civil' and 'criminal'; universality and cultural relativism; rights and culture; the individual and the collective. When combined with the programming demand for easily replicable models, 'clear policy messaging' and succinct project documents, binary approaches tend to lead to the privileging of one essentialized concept over another. Like many other areas of development policy, justice sector reform appears subject to swings of fashion⁸⁰ between one extreme (unqualified support for the formal system) and another (unqualified support for NSLOs).

Recognizing culture as contested across and within social groupings is a more effective, if more complex, approach. It allows policy to rise above such binaries, which are unhelpful because they do not match the nuanced realities on the ground. Overcoming essentialisation requires not just a political commitment to understanding diversity but also a commitment to strengthening the empirical basis for policy regarding non-state systems.

In addition to research that fails to understand the differences between pragmatism and moral or political preferences (see above discussion about women's choices), there is an absence of baselines of local justice systems. This makes it "hard to recommend that something be supported without knowing exactly what it is".⁸¹ As a result of the lack of proper information about NSLOs, the intellectual and political debate about them tends to be conceptual rather than empirical and, thus, dominated more by ideology than by a real understanding of the way remote and marginal communities deal with governance and resolve their disputes.⁸² On the other hand, it could be argued that there is indeed sufficient empirical research on non-state and plural legal orders which, if synthesized globally, could serve as a useful starting point for policy. Possibly, then, policy support for the strengthening of plural legal orders is due to political choices rather than a lack of information. In other words, whether there is or is not a sound empirical base for policy, political dynamics inform policy matters.

A review of the literature also reveals two contrasting approaches: one which consistently highlights positive presumptions about non-state legal orders vis à vis the state order (quicker, cheaper, fairer, more effective, more legitimate, and so on); and the other which raises empirical examples that question these presumptions. The former tends to be more common in donor and donor-sponsored literature, which again raises the political question as to why international justice sector policy prefers positive presumptions rather than taking account of nuances that challenge such essentialisation.

Gains in efficiency through Pakistan's *Musalihat Anjumans* are questionable. UNDP claims that, "since October 2006, 11,648 (79 percent) disputes have been settled out of a total of 14,824 received."⁸³ While the crude numbers may appear impressive, they need to be contextualized. The presentation notes that 1,063 *Musalihat Anjumans* have been established. Thus on average each *Musalihat Anjuman* has received 14-15 disputes over the four-year period, and roughly two to three disputes have been settled a year. Even if it is acknowledged that not all have been in operation for the full four years and may therefore have solved

⁸⁰ F von Benda-Beckmann, K von Benda-Beckmann, J Eckert, F Pirie and B Turner, *Vitality and Revitalisation of Tradition in Law: Going Back into the Past or Future-Oriented Development?*, Max Planck Institute for Social Anthropology Report (2002-2003) 296-306, 301.

⁸¹ Menzies, above n 43, 15. See also DFID, above n 22, 7.

⁸² Faundez, above n 43, 61.

⁸³ Afridi, above n 9.

more in a shorter period, this is hardly an impressive efficiency record. Warraich adds, "Show us the quality of the decisions. If the mere criteria is that the parties reconcile and that a decision was effected, then fine. But does that mean the parties were made to reconcile in ways that were as per the rights guarantees in the constitution and laws is a question to be asked."⁸⁴

A discussion of examples that challenge essentialised assumptions about NSLOs has appeared elsewhere.⁸⁵ Some of this analysis challenges the way 'cost' or 'fairness' are understood. The former must also be measured in social terms, thus taking into account the 'cost' to a woman of being told she must not ignore her 'domestic duties' if she is to avoid further domestic violence. Police intervention on behalf of powerful respondents in India's *Lok Adalat* ADR mechanism⁸⁶ raises concern about corruption, one of the characteristics of the state courts that the reform was supposed to address. Where customary punishments are commonly collective, the notion that NSLOs produce consensual outcomes must take into account the fact that the powerless within that community may have had no part in deciding to commit the offence but will share in the punishment. Moreover, evidence regarding the devolved *Aksakal* (Elders') courts in Kyrgyzstan indicates that far from choosing to have their cases heard by these devolved mechanisms, people are being pushed into this by local police,⁸⁷ while in Fiji police encourage the use of *bulubulu* (ritual apology and recompense) in rape cases so they don't need to go through to court".⁸⁸ All these examples question the presumption about the superiority of NSLOs and ADR mechanisms vis à vis the formal state courts.

In the case of *Musalihat Anjumans*, Warraich's research finds that they are quicker than formal courts, but are not necessarily cheaper since the expenses incurred by witnesses and conciliators still have to be borne by the parties. Moreover, Shirkat Gah paralegals who have supported women during *Musalihat Anjuman* proceedings report that the *Anjuman* members are reluctant to record

⁸⁴ Warraich, above n 12.

⁸⁵ ICHRP, above n 6, 49-54; Balchin, above n 5. This includes a diversity of examples such as Bangladesh *shalishes*: S Golub, *Non-state justice systems in Bangladesh and the Philippines*, Institute of Development Studies (2002); Maoist 'people's courts' in Nepal: International Commission of Jurists (ICJ), *Nepal: Justice in Transition* (2008) 23; ADR introduced in Latin America to deal with domestic violence cases: Macaulay, above n 52, 111; Indigenous community justice mechanisms in Peru: Faundez, above n 43, 19; Dispute resolution among nomads in Eastern Tibet: Pirie, above n 78, 15 and 23; Feuding clans in the Mindanao region of the Philippines: A B Ragsag, 'Customary Justice System in Mindanao: Challenges and Opportunities for Philippine nation-making. Non-State Ordering: Rido, Clans and the State – Secessionist Dynamics in Southern Philippines' (paper presented at the Commission on Folk Law and Legal Pluralism, 15th International Congress 'Law, Power and Culture: Transnational, National and Local Processes in the Context of Legal Pluralism' 2006, 5); Finnish Roma: M Gronfors, 'Social Control and Law in the Finnish Gypsy Community: Blood Feuding as a System of Justice' (1986) 24 *Journal of Legal Pluralism and Unofficial Law* 101; Inter-tribal disputes before *jirgas* in Afghanistan: T Barfield, *Informal Dispute Resolution and the Formal Legal System in Contemporary Northern Afghanistan*, The Rule of Law Program, The United States Institute of Peace (2006) 7, and Pakistan: B Sarwar, 'Personal Political: *Jirga* injustice' (2004) *The News*; and Amnesty International, *The Tribal Justice System*, ASA 33/024/2002 (2002) 13 and 32); Customary *xeer* decision-making in Somalia: Le Sage, above n 22, 34 and 36; Vigilante style neighbourhood security networks in Africa: L W Kimathi, 'Non-State Institutions as a Basis of State Reconstruction: The Case of Justice Systems in Africa' (paper presented at Codesria's 11th General Assembly, 2005, 9, 15); and 'citizen justice' in Guatemala: Sieder, above n 40, 20; as well as examples of customary and non-state legal orders in Aceh: B Siahaan, 'The Establishment of Islamic Law in Aceh vs National Law of Indonesia' (paper presented at the Commission on Folk Law and Legal Pluralism, 15th International Congress, Law, Power and Culture: Transnational, National and Local Processes in the Context of Legal Pluralism, 2006, 2); Canada: Rights and Democracy, above n 52, 6; Sierra Leone: Maru, above n 3, 437; and the Solomon Islands: Menzies, above n 43, 2 and 11.

⁸⁶ Galanter and Krishnan, above n 40, 813.

⁸⁷ Beyer, above n 65, 9.

⁸⁸ S Engle Merry, *Human Rights & Gender Justice: Translating International Law into Local Justice* (2006) 126.

in writing promises that would enable fair implementation of an agreement. "The *Musalihat Anjuman* insist that if someone has verbally promised and so and-so has guaranteed it, this is enough. This means forcing a woman, just through different tactics."⁸⁹ Evidently, the rule providing for agreements to be recorded in writing appears to be observed in the breach when the opposing party is more powerful. SG paralegals also report that the requirement for both parties to consent to the intervention of the *Musalihat Anjumans* is hardly observed; often one party is pressurized by local officials or police. "Ordinary people who do not know the intricacies are very vulnerable to such exploitation. They cannot sometimes determine whether the forum to which they applied is the same forum hearing their application. The police and local council push you around and through their delaying tactics they actually make you go to the forum they want you to go to rather than the forum of your choice."⁹⁰

There are numerous examples of stereotyping of the characteristics of NSLOs. First, the term 'non-state legal orders' is itself largely a misnomer since the line between state and non-state is usually blurred in practice.⁹¹ So it can be a mistake to regard non-state systems as a solution to the problems of the formal legal system just because of their presumed distance from the state system. Indeed, the above discussion of how Pakistani police and local officials force or trick parties into using the *Musalihat Anjumans* is an example of how close the systems can be.

Second, justice sector reform today often justifies the recognition of or devolution of justice matters to NSLOs by highlighting their 'traditional' or 'popular' nature in contrast with the state system's apparently imported or imposed nature. However, the presumption of 'tradition' has been widely questioned.⁹² Many practices labelled 'traditional' are in fact colonial inventions, or relatively recent developments created both by donors and local institutions for their own ends.⁹³ Custom can be thoroughly modern and in Vanuatu in 2005 the *Malvatumauri* House of Chiefs attempted to pass a new 'custom law', which prohibited ni-Vanuatu women from wearing trousers, shorts, pants or jeans; the dress code was challenged by women as unconstitutional and is now enforced intermittently and informally.⁹⁴ Among some indigenous minorities, the 'people' and their

⁸⁹ Warraich, above n 16.

⁹⁰ Ibid.

⁹¹ For instance, in the Gambia and Afghanistan, police and state courts often refer cases to non-state forums (Davidheiser, above n 42; Barfield, above n 84), and in the Philippines state authorities sometimes help pay compensation to a feuding party in order to bring a customary dispute to a close (Ragsag, above n 84). Non-state orders also use the state order. So for example in Botswana, chiefs sometimes use the common law (Griffiths, above n 54), while Kyrgyzstan *Aksakal* elders use threats to transfer cases to the formal system to pressurize parties to compromise (Beyer, above n 65). At times it can be impossible to tell the two systems apart: in eastern Tibet (Pirie, above n 78, 2) and Pakistan (N Shah, 'Faislo: The Informal Settlement System and Crimes Against Women' in F Shaheed, S A Warraich, C Balchin and A Gazdar (eds), *Shaping Women's Lives: Laws, Practices and Strategies in Pakistan* (1998)) members of the 'non-state' mechanism are often also local government authorities or elected officials.

⁹² Buur and Kyed, above n 76; Faundez, above n 43, 23; Eckert, above n 64; National Centre for Women Development, *A compilation of the constitution, national and state statutes and regulations, local government bye-laws, customary laws and religious laws, policies and practices, and court decisions relating to the statuses of women and children, applicable in Nigeria* (2005); Beyer, above n 65; Kimathi, above n 84, 9; M V Höhne, 'From Pastoral to State Politics: Traditional Authorities in Northern Somalia' in L Buur and H M Kyed (eds), *State Recognition and Democratization in Sub-Saharan Africa: A New Dawn for Traditional Authorities?* (2007) 167; Galanter and Krishnan, above n 40, 813.

⁹³ Von Benda-Beckmann et al, above n 79, 301.

⁹⁴ Vanuatu Women's Centre, 2005 cited in I Jalal, *Harmful Practices Against Women in Pacific Island Countries: custom and conventional laws* (2009), expert paper prepared for United Nations Division for the Advancement of women EGM/GPLHP/2009/EP.15.

'traditions' have barely survived which means some have had to be reinvented,⁹⁵ while conflict has similarly disrupted 'tradition' in Burundi and Mozambique.⁹⁶

In Pakistan, Shirkat Gah paralegals and community-based organizations from rural areas report that "When we speak to people they say if it had been a matter of going to *jirgas* and *panchayats* [traditional forums], those were already existing so why should we go to a new *jirga* or *panchayat* [*Musalihat Anjuman*] based at the local Union Council?" It is also evident that not all locals want 'more tradition'. SG paralegals also report people saying "Have we not seen enough of these *jirgas* and *panchayats*!" Warraich adds, "If people were that interested in traditional forms of dispute resolution why they did not of their own initiative form *Musalihat Anjumans* in their Union Councils once the statutory basis was provided in the 2001 law. Why did it require large-scale projects by UNDP and other agencies to activate these forums?"⁹⁷

Third, any process of 'recognizing' NSLOs or creating new justice mechanisms that are designed to respond to 'peoples' needs' inevitably involves political questions of representation and legitimacy. While NSLOs may well be popular in the sense that they are ubiquitous, this does not mean they are necessarily 'of the people' or representative of all sectors of a community. Young men and women are commonly excluded from representation in NSLOs, for instance in Kyrgyzstan's *Aksakal* courts, Afghan *jirgas*, Nigerian customary courts and water management councils in Tanzania (even though users are mostly women). In dealing with 'community-based' systems, it is important to assess even the extent to which 'community' can be said to exist.⁹⁸ Who speaks for or who constitutes 'the community'? In 2005–2006, Warraich surveyed roughly one in five districts of Pakistan including three of the four districts in which the UNDP was piloting the *Musalihat Anjumans*. "We found there were hardly any *Insaaf* (Justice) Committees formed, and if formed, they had been nominated, not elected. They were made up of all sorts of locally influential people or friends of the Chair of the Union Council or relatives of the Member of the Provincial Assembly or a friend of the head of the local Police station. The typical power holders." This is worrying because the members of a *Musalihat Anjuman* are appointed by an *Insaaf* Committee. Warraich also points out that although the law states that a *Nazim* (head of the local council) cannot sit on a *Musalihat Anjuman*, he has come across numerous reports of *Nazims* taking part in the *Anjumans*.⁹⁹ This substantiated by research into *Musalihat Anjumans* in one of the UNDP's pilot districts in Punjab, which found that "One member of the committee explained, 'All these selections are political. The Union Council *Nazim* always brings in his people. Whichever party enjoys majority will form its committees and appoint its own people. None of this is done on merit.' [...] Respondents were of the view that appointments were political and unqualified."¹⁰⁰

In the name of 'the people' and a democratic recognition of their specific needs, programming can be highly undemocratic and non-consultative. Consultation should not only be with local experts but also with the communities directly affected. Lack of consultation was a major criticism of earlier state sector reforms, yet international policy pressure to introduce 'accessible justice' can

⁹⁵ D A Iturralde G, *Management of Multiculturalism and Multiethnicity in Latin America* (1995) 4.

⁹⁶ Action Aid, *Traditional peace building in Burundi* (2008) Action Aid <http://www.actionaid.org.uk/index.asp?page_id=1338> at 27 May 2011; Buur and Kyed, above n 76.

⁹⁷ Warraich, above n 16.

⁹⁸ R Mungoven, *Beyond the Courts: Developing Amnesty International's position on non-judicial mechanisms for accountability and redress*, AI Index POL 30/003/2001 (2001) 36.

⁹⁹ Ibid; and Warraich, above n 15.

¹⁰⁰ Chaudary, above n 61, 11.

ironically curtail or ignore community participation mechanisms. The literature is replete with examples of justice sector and governance reforms that claim to provide localized justice but which have been perceived by users as inherently top-down. These include Water Users Associations in South Africa, local self-governance reforms in Kyrgyzstan, and the example of one *Casa de Justicia* legal service centre in a Colombian shantytown, whose two most prominent officers were the Police Inspector and the Public Prosecutor.¹⁰¹ In some instances, more local justice mechanisms does not translate into improved access to justice if there is no mechanism for challenging the decentralized decision-makers who fail to follow the rules about how the public should be consulted.¹⁰² The scope for accountability appears to have been deliberately narrowed in the case of the *Musalihat Anjumans*. In addition to the absence of provision for judicial review, under s 13 of the Punjab Rules for instance, "A *Musleh* [conciliator] shall not be liable for anything done in good faith in the course of proceedings for amicable settlement." Since they are neither elected nor answerable to any professional body, how are the members of the *Musalihat Anjumans* to be held accountable? Claims by UNDP that there is "a mechanism for monitoring the functioning of such platforms to avoid their misuse"¹⁰³ need to be unpicked. There are indeed provincial monitoring boards involving NGOs and the local *Insaaf* Committee can theoretically dismiss a *Musleh* (arbitrator). However, the provincial boards have no powers of dismissal, meet infrequently in distant provincial capitals, and there is no mechanism for reporting abuses. One can imagine that only the most egregious abuses might ever reach them. Moreover, as already discussed, there are no rules governing how the *Insaaf* Committee is appointed, and anecdotal evidence suggests they are simply a replication of existing local power structure. This too raises questions as to the actual likelihood of any effective monitoring. Elsewhere, concerns have been raised about the accountability of 'community' systems once they are formalized.¹⁰⁴

The above highlights the kinds of research and evidence needed to strengthen the analysis which underpins justice sector programmes relating to plural legal orders: it needs to take local power balances into account, especially gender dimensions and the rights of other marginalized groups. And it needs to take wider national power tussles into account. It needs to see culture as diverse and internally contested, leading to an end to essentialised assumptions about the characteristics of state and non-state legal orders.

2.7 Strengthening project planning, implementation, monitoring and evaluation

Undoubtedly international policy-makers and donor programming staff face numerous constraints in designing and implementing justice sector reform. But most programming challenges – arising both from the donor's own political and economic context as well as from the context of the recipient country – are a known quantity. These include the lack of secure long-term resourcing and policy shifts following changes in donor country governments; potential means for offsetting the project design impact of the former are discussed below. However, funding constraints could offer a golden opportunity: they should spur justice sector reform programmers to ensure significant improvements in project design,

¹⁰¹ Malzbender et al, above n 48, 6; Beyer, above n 65, 9; Faundez, above n 43, 46.

¹⁰² J Oloka-Onyango, *Decentralisation without Human Rights? Local Governance and Access to Justice in Post-Movement Uganda*, HURIPPEC Working Paper no.12 (2007) 4.

¹⁰³ United Nations Development Group <http://mdqnet.undg.org/ext/MDG-Good-Practices/mdg3/MDG3_Pakistan_Gender_Justice_through_Musalihat_Anjuman.pdf> at 27 May 2011.

¹⁰⁴ Burr and Kyed, above n 76, 20; Kimathi, above n 84, 14; Report of the United Nations Special Rapporteur on the Situation of Human Rights and Fundamental Freedoms of Indigenous People, Mr Rodolfo Stavenhagen, A/61/490 (2006) 25.

implementation and monitoring. This is especially where current weaknesses cannot be explained as arising from financial constraints.

Although one of the five principles of the 2005 Paris Declaration on aid efficacy was a commitment to donor harmonization to avoid duplication, there are indications from later studies -- including by donors themselves -- that problems in terms of poor planning and coordination in justice sector reform remain, particularly in post-conflict situations.¹⁰⁵

A report sponsored by the Swiss Development Cooperation (SDC) suggests that "methodological difficulties alone do not explain why few lessons so far seem to have been learned. It is also a matter of political priority and willingness of each donor agency. It seems to us that this political will has been weak, and that far too few efforts have been made at all to promote evaluation-based better practices".¹⁰⁶ Moreover, the nature of donor bureaucracies and internal contestations mean that sound analysis and best practice do not always inform all programming. That the ICHRP 2009 report needed to reiterate recommendations from a 2001 ICHRP study on the failings of foreign aid to the justice sector suggests lessons are too often not being absorbed. In Pakistan, a basic project design flaw meant that a full five years elapsed between the introduction of the *Musalihat Anjumans* and the development of the Rules regarding their practical functioning.¹⁰⁷

In contrast to the wealth of literature supporting the introduction or strengthening of plural legal orders, there is relatively little information regarding the monitoring and evaluation of such reform projects, which suggests that often it is simply not happening. Shortcomings in this area have been noted across the world.¹⁰⁸

In the case of the *Musalihat Anjumans*, the quality of project design is questioned by experienced training organisations. Shirkat Gah was approached to contribute to UNDP trainings for government officials and local government representatives but decided not to input since the 'training' appeared to involve a one-day event with 500 participants. Subsequently, GJTMAP reported that "Since Oct. 2006, 18,500 stakeholders trained 313 Judges."¹⁰⁹ There is no indication of the content of this training, nor of any follow-up to assess its impact and the need for further interventions. The GJTMAP project lists as its achievement "Rated best practice model by 3rd Party Evaluators (ADB/EAD, UNDP, etc.)."¹¹⁰ The extent to which these organizations can be regarded as truly 'third party' is questionable. Evaluation also has implications for accountability, and here too the project is somewhat lacking. On the GJTMAP website, the latest publicly available report (a draft) covers April-June 2008.¹¹¹ Since 2008, the project has added additional districts per province but without in-depth qualitative analysis of the impact of the smaller pilot phase, it is difficult to understand the basis for this significant

¹⁰⁵ Office of the High Commissioner for Human Rights (OHCHR), *Rule-of-Law Tools for Post-conflict states: mapping the justice sector* (2006) 39; Byrne, Mirescu and Müller, above n 35, 24. See also T Carothers, *Aiding Democracy Abroad: The Learning Curve*, Carnegie Endowment for International Peace (1999).

¹⁰⁶ E Skaar, I Samset and S Gloppen, 'Aid to Judicial Reform: Norwegian and International Experiences' in Byrne, Mirescu and Müller, above n 35, 25.

¹⁰⁷ This appears to repeat problems in Uganda's decentralization policy which, despite backing from several major international and bilateral donors, for over a decade failed to have a single coherent document outlining the policy framework (Oloka-Onyango, above n 101, 30).

¹⁰⁸ For Kyrgyzstan: Beyer, above n 65, 9; the Solomon Islands: Menzies, above n 43; Latin America: Faundez, above n 43, 45; and India: Galanter and Krishnan, above n 40, 825.

¹⁰⁹ Afridi, above n 9.

¹¹⁰ Ibid.

¹¹¹ Gender Justice Through Musalihat Anjuman Project

<http://www.gjtmap.gov.pk/reports_documents/sb_index_reports_documents.php> at 11 June 2011.

scaling up of the project. Anecdotal evidence from Shirkat Gah paralegals does not seem to justify this scaling up. According to Warraich, "Via the paralegals and community-based groups we work with, I have never heard of any substantive, positive development, and that these bodies are making any difference or facilitating women in access to justice. I have only heard jokes ridiculing their work or people not abiding by what they try to decide."¹¹²

A detailed critique of project monitoring and evaluation regarding plural legal orders appeared in a 2009 ICHRP report, and covers a range of issues. These include the tendency to focus on quantitative indicators rather than qualitative outcomes,¹¹³ which is of particular concern given the weak empirical research base regarding plural legal orders. It also means activities that can be easily measured may be favoured over potentially more meaningful interventions.¹¹⁴ This tendency is despite recognition at least in theory by donors that sophisticated quantitative and qualitative indicators are needed.¹¹⁵ The question is therefore why there is still a gap between the theory and practice of programming regarding monitoring and evaluation. It is clear that international and bilateral access to justice programmers face at times unreasonable pressure from national legislatures and their own bureaucracies to produce demonstrable results, in a sector that needs long time spans for reform to achieve fruition.¹¹⁶ However, there is as yet no sign of a collectively articulated response to this pressure, which strongly argues a defence of qualitative analysis of reform impacts, especially from the perspectives of marginalized users. Meanwhile, the very qualities that make NSLOs attractive – fluidity, informality, operating in isolated communities – can make them difficult to monitor and evaluate effectively. Here too it is yet to be seen whether justice sector programming is able to gain from other development sectors which have learnt to build into their project planning manageable but effective feedback mechanisms.

2.8 Recognizing the limits of law so projects are in tandem with broader social change projects

For many of the most intractable social problems, including gender discrimination, there are limits to what law – uniform or plural, state or non-state – can achieve. For instance, neither state bans on the practice and accusation of witchcraft nor their adjudication through non-state legal orders have ended rights violations associated with witchcraft. Similarly, while non-state systems may appear better able to address cyclical feuding,¹¹⁷ this does not end the custom of violence and accompanying rights violations. Particularly given that law often acts a source of power which dismisses the knowledge and experiences of the marginalized, more law – even if in the shape of access to justice programmes – may not be the whole solution.¹¹⁸

¹¹² Warraich, above n 15.

¹¹³ See also DFID, above n 22.

¹¹⁴ Biebesheimer and Payne, above n 43, 33.

¹¹⁵ For example, Wojkowska, above n 26, 45-46, (adapting DFID, above n 22; Penal Reform International, *Access to justice in sub-Saharan Africa: the role of traditional and informal justice systems* (2000); and Vera Institute of Justice, *Measuring Progress towards Safety and Justice: A Global Guide to the Design of Performance Indicators across the Justice Sector* (2003)) proposes several quantitative and qualitative indicators, including increased safety, security and access to justice in the area covered by the informal justice system; increasing the transparency of informal justice systems; increase in the number of people who understand how to access services; increase in number of women who express confidence in informal institutions; improving the protection of rights; and enhancing cooperation between state and informal institutions.

¹¹⁶ Biebesheimer and Payne, above n 43, 1.

¹¹⁷ Barfield, Nojumi and Their, above n 33.

¹¹⁸ This question is discussed in detail in D Danardono, 'Imagining a Fair Trial: Feminist Legal Spaces as a Strategy In Deconstructing the Dominant Legal System in Semarang' (paper presented at the Commission on Folk Law and Legal Pluralism, 15th International Congress, 'Law, Power and Culture:

Thus, effective approaches to improving access to justice in plural legal contexts require them to be in tandem with wider social change projects. For instance, one legal aid centre in Colombia took a broad and highly localized approach to the high levels of domestic violence in the area, which were partly associated with high male unemployment. It negotiated with local businesses to set up an informal affirmative action programme for employing local men.¹¹⁹ In Australia, indigenous title is now more frequently settled by political negotiation than by judicial pronouncement, recognizing that law is generated by wider cultural and political processes.¹²⁰ Besides, is the failure to date of state and non-state legal orders to provide non-discriminatory justice due just to the failure of national legal projects, or is it also linked with wider national development policy, and transnational and global processes such as the arms race and global trade inequalities that drain development resources?

In some quarters, "a consensus is emerging in development cooperation that pushes for a more 'holistic' view of co-operation in the field of justice".¹²¹ But underfunding and a cost-cutting approach to reform projects¹²² mean that the holistic approach in practice is often sidelined. Thus in Somalia, international interventions address isolated aspects of the access to justice complex and "few of these projects are being implemented together with a single group of Somalis in a single location".¹²³ In Uganda, the revision of the National Gender Policy was claimed by the UNCDF as a "main result" of the decentralization programme – but the Policy was not adequately disseminated for lack of funds.¹²⁴ Moreover, local concern about the possibility that funding for non-state legal orders and quasi-formal ADR may be at the expense of the formal legal system can lead to heightened political contestation within national policy-making.¹²⁵

Inadequate funding can lead to a piecemeal approach to reform, and thus renew concerns regarding the political prioritisations that underlie policy choices made by access to justice programmers. However, the achievements of many small-scale, broad social empowerment programmes run by local rights organizations, which often include access to justice elements, indicate that international and bilateral access to justice programmers need to further strengthen their engagement with and support for local rights groups as equal partners. As large, often less agile bureaucracies, international and bilateral donors usually resist working with small, individual local organizations as this is supposedly not cost-effective. However, as this chapter hopes to have illustrated, the results of the current ways of working in access to justice reform are themselves not always impressive.

Transnational, National and Local Processes in the Context of Legal Pluralism' 2006, 2-3), based upon but also critiquing C Smart, *Feminism and the Power of Law* (1989).

¹¹⁹ Faundez, above n 43, 46.

¹²⁰ K Gover, *Legal Pluralism and State-Indigenous Relations in Western Settler Societies* (2009) 12, International Council on Human Rights Policy <http://www.ichrp.org/files/papers/168/135_gover.pdf> at 27 May 2011.

¹²¹ Byrne, Mirescu and Müller, above n 35, 10. See also Le Sage, above n 22, 9-11; Wojkowska, above n 26.

¹²² Menzies, above n 43; Le Sage, above n 22.

¹²³ Le Sage, above n 22, 11-12.

¹²⁴ United Nations Capital Development Fund (UNCDF), *Investing in Least Developed Countries: Uganda Country Brief* (2006).

¹²⁵ DFID, above n 22, 6. See also Wojkowska, above n 26, 39.

3. Conclusion

Aside from the context of indigenous peoples where non-state justice is mandated under international law, there is also clearly a place for plural legal orders that include some form of recognition for existing non-state legal systems or the establishment of quasi-formal alternative dispute resolution. From Warraich's experience in the rural and deprived urban areas of Pakistan, "They can resolve issues like fights between neighbours over a dog barking, the duration of farmers' canal water turns, or should the parking be here or there. These are the issues that can be better resolved without litigation." In other contexts, they may offer a rights-based alternative to the formal system in an even broader range of disputes.¹²⁶

Thus, plural legal orders are not intrinsically harmful to rights or counter to access to justice. This chapter argues simply that how they are currently being introduced or strengthened through international reform programmes needs urgent attention. Whereas past critiques of justice sector reform have focused on their state-centric and 'west-centric' approaches, it is time to raise similar concerns about the weaknesses of programming in the area of plural legal orders.

Pakistan's *Musalihat Anjuman* ADR-project is to date a relatively small programme in one particular context. However, the concerns being raised about the analysis that underpins it and its impact on access to justice for the marginalized especially women, as well as questions about the design and implementation of the project, mirror critiques of other access to justice projects related to plural legal orders across the world.

This chapter proposes a number of constructive approaches that may help strengthen programming in this area. They include:

- Learning from local practice;
- Recognising culture as internally contested and understanding intersectionality;
- Ensuring a consistent political commitment to a rights-based approach;
- Keeping power dynamics and gendered perspectives centre-stage;
- Taking into account the impact of justice sector reform on political dynamics and legal contestation;
- Ensuring a solid empirical base to justice sector programming and questioning presumptions about non-state legal orders;
- Distinguishing between users' normative preferences and pragmatism;
- Ensuring programming is backed by high quality research and analysis;
- Strengthening project planning, implementation, monitoring and evaluation;
- Recognizing the limits of law so projects are in tandem with broader social change projects.

Several of these recommendations do not require additional resourcing but rather changed approaches and a changed imagination of justice sector reform. Ultimately, this is a question of political will.

¹²⁶ As discussed in Balchin, critical to ensuring this is possible, especially in terms of gender equality, is supporting the inclusion of women in defining culture and the implementation of state and non-state legal systems (Balchin, above n 6).

Village Justice in Indonesia: Defining the 'State' and 'Non-state' in Dispute Resolution Processes

Matthew Zurstrassen¹

INTRODUCTION

This chapter examines the distinction between 'state' and 'non-state' actors in dispute resolution processes in Maluku and Aceh Provinces of Indonesia. The chapter is based on research during 2009 and 2010 on how communities access and make use of justice institutions in those provinces. The research shows that village-level actors play a very important role in providing justice solutions to communities. First, the chapter examines the types of disputes experienced by communities and dispute resolution processes. Despite variations between provinces, at the core of the majority of disputes are issues directly affecting community livelihoods. Village-level government authorities, local customary elders and/or local religious actors play the dominant role in dispute resolution processes. The chapter examines how these actors operate and engage with communities as well as with state actors beyond the village level. Given the importance of actors at the local level, the chapter then examines how they are defined and obtain their legitimacy. Finally, the chapter presents the argument that distinguishing between 'state' and 'non-state' when defining actors involved in dispute resolution processes has its limitations. These actors are better defined as being on a spectrum where legitimacy is derived from various sources, such as the law, local government recognition and community legitimacy. Defining dispute resolution actors in this way better represents the complexities of dispute resolution processes, where multiple actors and their sources of legitimacy overlap and interact.

This chapter draws on the information obtained through research conducted by the World Bank's Justice for the Poor program.² The research included a comprehensive quantitative baseline survey. The survey was conducted among 2,400 households and community leaders across the Province of Maluku and in four districts in Aceh and was representative of these geographic areas.³ The baseline survey was followed up with four months of qualitative research across those geographic areas.

¹ The author is a consultant with expertise on access to justice and village governance programming. Between 2008 and 2010, he was Team Leader of the World Bank's Justice for the Poor program in Indonesia. The research findings presented below draw significantly on data collected as part of a World Bank, Justice for the Poor program with support from AusAID and the Royal Embassy of the Netherlands in Indonesia.

² From 2008 to 2009, the World Bank's Justice for the Poor program conducted qualitative and quantitative research in Maluku and Aceh to support implementation and evaluation of a Government of Indonesia access to justice program titled the Mediation and Community Legal Empowerment program (MCLE). MCLE is a component of the Government of Indonesia's Support for Poor and Disadvantaged Areas (SPADA) Project.

³ The districts were Aceh Utara, Pidie, Aceh Besar and Aceh Barat. Pidie has subsequently divided into two districts, Pidie and Pidie Jaya.

1. Maluku and Aceh: Case study areas

The recent histories of both Maluku and Aceh have been significantly shaped by conflict. Maluku, in the far east of the archipelago, consists of many small islands scattered over a large geographical area. The population of about one million is roughly half Christian and half Muslim. There are still vibrant local *adat* (customary) practices and beliefs. Infrastructure is poor, and transport between islands is frequently difficult and dangerous. Twenty-eight percent of the population (380,000 people) lives below the poverty line.⁴ Maluku was divided by sectarian conflict beginning in 1999 and claiming several thousand lives. The conflict saw the emergence of a culture of vigilantism, with communities often taking sides along ethnic or religious lines.⁵ The government-sponsored Malino II peace talks in 2002 marked the beginning of a gradual reduction in violence.

Aceh is located on the western extreme of the Indonesian archipelago and is home to approximately four million people. A number of ethnic groups coexist, but much of the population identifies itself as Acehnese; the vast majority of the population is Muslim. As part of provisions providing Aceh with greater autonomy, *shari'a* (Islamic) law governs certain aspects of societal relations. Aceh has an economy that spans from subsistence farming to the mining of oil deposits. Around 893,000 people live in poverty (22 percent).⁶ The Province was wracked by violent conflict prior to the devastation of the Asian tsunami in December 2004, a humanitarian disaster of massive scale in which around 226,000 people were killed. The separatist conflict, which lasted for 30-years with varying intensity, took the lives of approximately 15,000 people. The conflict ended only in 2005 with the signing of the Helsinki Memorandum of Understanding, a peace agreement between the Free Aceh Movement (GAM) and the Indonesian Government.

2. Disputes and dispute resolution processes

This section outlines the predominant dispute resolution processes in Aceh and Maluku. This includes a description of the types of disputes identified by communities and village leaders as the most prevalent. Following this, the dispute resolution process is discussed, emphasizing the preference for resolutions to be negotiated at the local level. There are referral mechanisms where disputes enter the formal system, and in many of these cases, village-level actors are involved in facilitating the interface between communities and the formal institutions.

2.1 Types of disputes

The types of disputes emerging from the survey reflect a society concerned primarily with its livelihoods and inter-personal struggles; most disputes are localized and concern daily activities of community members. The number of disputes reported is higher than figures that have been reported previously. More than 10 percent of families in Maluku and Aceh have directly experienced a

⁴ Badan Pusat Statistik (BPS, National Statistics Agency), *Jumlah dan Persentase Penduduk Miskin dan Garis Kemiskinan Menurut Provinsi, Maret 2009* (Number and Percentage of Poor Citizens and Level of Poverty per Province, March 2009), Badan Pusat Statistik <http://www.bps.go.id/tab_sub/view.php?tabel=1&daftar=1&id_subyek=23¬ab=3> at 5 June 2011.

⁵ G Brown, C Wilson and H Suprayoga, *Overcoming Violent Conflict: Volume 4, Peace and Development Analysis in Maluku and North Maluku* Jakarta, UNDP, Lembaga Ilmu Pengetahuan Indonesia (LIPI) and Badan Perencanaan Pembangunan Nasional (BAPPENAS) (2005).

⁶ BPS, above n 4.

dispute over the last two years, most of which relate either to economic livelihood issues or crime.

Information on the prevalence of disputes in communities is presented in two ways. First, data is reported on the percentage of villages that had reported different types of disputes over the last two years.⁷ In Aceh, almost half the villages (48 percent) reported at least one land ownership/use dispute. This was followed by theft (45 percent of villages) and domestic violence (40 percent). In Maluku, land ownership and use was also the most prevalent type of dispute reported at the village level, with over 60 per cent of villages reporting the occurrence of this type of dispute. Theft was the second most common type of dispute (31 percent) reported, followed by fighting (30 percent) and domestic violence (23 percent).

Second, information was collected at the household level.⁸ In Aceh, 3.2 percent of households reported experiencing a dispute relating to 'distribution of aid'.⁹ Land disputes were also experienced by approximately 3 percent of the households. This was followed by theft (2.0 percent) and disputes involving identity cards (1.7 percent). Consistent with the village-level reporting, land disputes were the most common type of dispute reported at the household level in Maluku (4.5 percent). Households in Maluku also report similar levels of disputes relating to distribution of aid (4.3 percent). These two types of disputes were followed by domestic violence (2.5 percent) and theft (2.1 percent).

The findings from the quantitative survey are broadly consistent with prior research in this area.¹⁰ Several key variations do arise, however. First, the percentage of disputes reported by community leaders is higher than previous surveys suggests. The most recent Governance and Decentralization Survey (GDS), an Indonesia-wide survey conducted in 2006, asked household respondents a similar question. In this survey, criminality was reported as the most common type of dispute, with approximately 16 percent of respondents reporting knowledge of an incident in their village in the previous two years. This was followed by land conflict (13 percent) and family disputes (11 percent).¹¹ The GDS and other prior surveys asked randomly selected community members about disputes in their community. This may have resulted in lower levels of awareness about disputes reported in previous surveys as community members are less likely than community leaders to be aware of the breadth and severity of actual disputes occurring in a village. The village-level findings from the research in Maluku and Aceh draws on community leaders as respondents, thereby possibly

⁷ Focus Group Discussions (FGDs) were held with community leaders in each village surveyed. These percentages represent types of disputes having been identified as having occurred in a village in the last two years according to participants in the FGDs. Figures shown for villages are the percentage of villages that have experienced each dispute type, rather than the number of actual disputes that occurred

⁸ Household respondents were asked to identify actual disputes to which a household member had been a party in the previous two years.

⁹ The term 'distribution of aid' used in the quantitative survey covers both government and donor development programs. The term was defined as "(a)ny disputes over the distribution of aid or assistance. This could include disputes over who receives aid, how much is received, the late delivery of aid, the quality of the aid provided, etc." It does not include complaints relating to corruption. See S Clark, *MCLE Baseline Survey Manual*, Manual commissioned by the World Bank (2008) 43.

¹⁰ K McLaughlin and A Perdana, *Conflict & Dispute Resolution in Indonesia: Information from the 2006 Governance & Decentralization Survey*, World Bank – Indonesia Social Development Paper No.16 (2010). See also The Asia Foundation & A C Nielsen, *Survey Report on Citizens' Perceptions of the Indonesian Justice Sector*, The Asia Foundation <<http://asiafoundation.org/pdf/IndoLaw.pdf>> at 5 June 2011.

¹¹ McLaughlin, above n 10, 7.

explaining why village dispute levels are higher in this survey than previously reported.¹²

Second, disputes relating to distribution of aid are more prominent for households. Distribution of aid is the most common type of dispute experienced by households in Aceh and the second most common type of dispute in Maluku; yet, this only ranks number five in terms of types of disputes recorded by community leaders. A significant number of overall disputes (15 percent in Aceh and 13 percent in Maluku) involve complaints against village government officials. This number rose dramatically for disputes involving the distribution of aid. Over 73 percent of these types of disputes in Aceh and almost 60 percent of them in Maluku involved complaints against the village government. One possible explanation is that disputes related to the distribution of aid are underreported by community leaders in surveys because they are frequently involved as a party to these disputes.

Third, the quantitative survey was not able to differentiate between disputes involving individuals and communal disputes. Qualitative research indicates that communal disputes are common, particularly those over land boundaries. Ongoing disputes over land boundaries were recorded in three of the 22 villages where field research was conducted. In addition, three other villages in Maluku had previously been subject to a common land dispute, which had been brought to the Supreme Court. However, at the time of the research, the verdict had yet to be truly accepted by all parties.

2.2 Resolving grievances

It is well acknowledged that the vast majority of disputes in Indonesia never enter the formal legal system,¹³ but rather, are settled through community-level dispute resolution processes. In both Maluku and Aceh, village government officials play a determining role in the resolution process for the majority of disputes.¹⁴ First, most community members will attempt to seek a resolution to their dispute through direct negotiation with the other party.¹⁵ The success rate for this process varies between Maluku (59 percent) and Aceh (44 percent).

Village government officials handle a majority of disputes that are referred to third parties if direct negotiation fails. In Aceh, 53 percent of disputes were referred to the village head, with another 10 percent referred to hamlet heads.¹⁶ Family or friends (8 percent) and the police (7 percent) were the next most popular options. As in Aceh, village heads were also the most popular actors involved in dispute resolution in Maluku (43 percent). This was followed by the police (16 percent), sub-district heads (13 percent), hamlet heads (12 percent) and then family or friends (12 percent). The research further shows that village leaders do not lack confidence in their perceived ability to resolve disputes satisfactorily.

¹² The GDS survey also included interviews with community leaders. The results from those interviews re-enforce that community leaders are more likely to be aware of the breadth of village disputes than randomly selected household representatives. See McLaughlin, above n 10, Annex A.

¹³ The World Bank, *Forging the Middle Ground: Engaging Non-State Justice in Indonesia*, World Bank (2008) 3.

¹⁴ Through the quantitative survey, over 10 percent of households in Maluku and Aceh directly experienced disputes over the last two years. These households were then asked a series of questions relating to the dispute and the dispute resolution process. A more detailed analysis of those findings is contained in I O'Neill, B Dasgupta and M Zurstrassen, *Community Access to Justice and Conflict Resolution in Aceh and Maluku*, baseline quantitative report commissioned by the World Bank (2008).

¹⁵ This is the case in both Aceh (68 percent of disputes) and Maluku (70 percent).

¹⁶ Hamlet is the translation of *dusun*, a spatial unit below the village. Each village in Indonesia is divided into a series of between four and ten hamlets.

It is of particular interest to note the more limited reference by respondents in the quantitative research to the role of *adat* or religious leaders in the dispute resolution process.¹⁷ Previous research indicated that these actors played a prominent role in the dispute resolution process. For example, the GDS for 2006 found that 'informal leaders' were second only to village officials in terms of actors involved in dispute resolution processes.¹⁸ Qualitative research also emphasized the importance of *adat* and religious leaders. It was considered a rare occurrence, in particular in Maluku, that a land dispute would involve an *adat* leader. Similarly, religious leaders were routinely involved in family or inheritance disputes in both Maluku and Aceh.

Resolving a dispute at the village level is a complex process. As McLaughlin highlights, in approximately half the number of cases reported in the GDS survey, more than one actor was reported as being involved in the case. This was most likely to involve village officials and informal leaders "working together to attempt to craft an acceptable solution".¹⁹ This information is not surprising because essentially, this is what characterizes the *musyawarah* (literally 'common deliberation') process of dispute resolution, which is popular throughout Indonesia. It is also backed up by responses of village leaders themselves. Over half the village leaders in Aceh and Maluku noted that they would usually refer disputes to a third party to find a solution.

What the quantitative survey results indicate, however, is that where communities are required to nominate to the actor who plays the most influential role, they are likely to identify the village head. While the village heads may not have an absolute monopoly on decision-making at the local level, their voice carries greater weight than other actors. Having a dominant actor in the dispute resolution process is not inherently negative. Many formal legal systems provide the judiciary with monopoly power in decision-making. However, these systems also put in place sufficient checks and balances to ensure neutrality in the process and remove the potential for conflicts of interest. The same cannot be said for village-level dispute resolution mechanisms.

The research showed that 15 percent of disputes in Aceh and 13 percent in Maluku involve village government officials as parties to the dispute. With the exception of family members and other individuals from the same village, this was the third most prevalent party to a dispute in both provinces. This indicates that this type of village governance institution is not necessarily a benevolent, independent intermediary. Both quantitative and qualitative research identified practices of village government officials presiding over disputes to which they were either themselves parties to or closely aligned to the parties of the dispute.

The role of village government officials is of particular concern in disputes involving the distribution of development aid. As mentioned above, such disputes were just as common as land disputes, according to the experiences of households in both Aceh and Maluku. In these cases, the vast majority involved the village government as the other party to the dispute.²⁰ In cases where these types of disputes could not be resolved through direct negotiation, the parties were much more likely to leave them unresolved compared to other types of disputes. Of the 38 disputes relating to distribution of aid recorded in Aceh, 23 (or

¹⁷ In Aceh, *adat* leaders were involved in resolving 5.7 percent of disputes, similar in number to religious leaders (6 percent). In Maluku, no respondents claimed to have referred disputes to either *adat* or religious leaders in the first instance.

¹⁸ McLaughlin, above n 10, at 13. See also The World Bank, above n 13.

¹⁹ McLaughlin, above n 10, at 14.

²⁰ These forms of disputes involved village officials in 73 percent of cases in Aceh and 60 percent of cases in Maluku.

61 percent) were left unresolved. This varies significantly from the other prominent forms of dispute.²¹ Of the aid disputes reported to other parties, almost half in both provinces were reported to either the village or hamlet heads despite the likelihood that they were involved in the dispute.

2.3 Referral mechanisms and institutional co-existence

International discourse on legal pluralism often presumes competition between formal legal systems and what is often defined as 'non-state' actors.²² This research indicates that different normative systems can be defined as co-existing. In Indonesia, it is at the interface of the village and sub-district where local governance actors meet formal justice institutions. There are cases where these institutions 'talk across each other' and continue to operate in different realms. There are also instances where they collaborate to provide outcomes that are deemed just and fair by the parties involved. The case of Agus in Aceh provides an example of how different actors work together to resolve disputes:²³

Agus was beaten and hospitalized by Bambang, a friend and work colleague. Bambang believed Agus had divulged a secret to Bambang's wife. The case was reported to the village head, who immediately took the case to the police given the degree of violence involved. After interviewing both parties, the police returned the case to the village head on the grounds that the men were mostly interested in identifying a peaceful resolution to the dispute. The village head facilitated a meeting between community leaders including the village secretary, representatives from the *tuha peut* (or Acehnese form of Village Council) and the *Imam* (Islamic religious leader). At the meeting, it was decided to fine Bambang 16 grams of gold for failure in religious duties, and Rp 2,500,000 (\$US275) for medical expenses. Both parties signed a document to this extent, including a commitment from Bambang to uphold the *adat* of the village. Following this a ceremony was held on sacred ground involving the parties and their families and the village leaders. The police were informed of the resolution and as a result did not file a case, thereby allowing Bambang to avoid formal prosecution and a criminal record.

As in this case of Agus and Bambang, community members in general engage with formal government institutions beyond the village level primarily through intermediaries, who in most cases are the village heads. The quantitative data showed only 16 percent of cases in Maluku where disputes were taken directly to the police and 6.8 percent in Aceh. The referral of disputes to formal actors other than the police was negligible, with the exception of the sub-district head in Maluku. There are limited incentives and numerous disincentives for villagers to seek intervention from actors beyond the village. The most frequently cited disincentives included the practical costs (time, transport costs and actual institutional costs) involved in accessing institutions beyond the village level and the limited trust in state institutions, resulting in a reluctance to engage with the bureaucracy.²⁴ In addition, decades of authoritarianism have resulted in an

²¹ The figures are similar for Maluku. Of the 14 distribution of aid disputes recorded, but not resolved directly between the parties involved, exactly half were not reported elsewhere. In comparison, almost 18 percent of land disputes and 47 percent of thefts were not reported onwards in Aceh. In Maluku, the figures were 18 percent for land disputes and 22 percent for thefts.

²² B Tamanaha, 'Understanding Legal Pluralism: Past to Present, Local to Global', (2008) 30 *Sydney Law Review*, 375; G Woodman, 'Ideological Combat and Social Observation: Recent Debate about Legal Pluralism' (1998) 42 *Journal of Legal Pluralism*, 21.

²³ In order to protect respondents, all identities, including names of locations below the district level, have been changed in this report.

²⁴ On costs involved in accessing justice sector institutions, see, for example, C Sumner, *Access to Justice: Empowering Female Heads of Households in Indonesia*, PEKKA & AusAID (2010) PEKKA

interesting juxtaposition. Village cohesion was strengthened because communities were reluctant to take their problems beyond the village level in order to protect the reputation of the village. It was also due to uncertainty of the outcomes of escalation. In some cases, the power of the village government also created a sense of fear in the communities. Taking issues to external authorities would expose village leaders as being incapable of handling their own problems. The village leaders, in turn, had the capacity to make life more difficult for those who reported the disputes. These dynamics remain, making local level resolution the most socially acceptable path.

Due to the co-existence of normative systems, in many instances, a dispute will only be referred to the formal system upon the acquiescence of the village head. In these instances, village leaders play the role of gatekeepers, who facilitate the interface between villagers and actors beyond the village level. These leaders have significant power in determining which matters of community concern can be best dealt with at the village level and which should be referred upwards. There is a lack of detailed empirical evidence on how this power is used. In Maluku, for example, the criteria for whether or not the police should be involved in resolving gender-based violence varied, with many village leaders interviewed stating that the presence of blood was the tipping point. One hamlet leader in Maluku Tenggara noted: "In *adat* it is forbidden to harass or beat women. If they do need to be beaten then it should be done indoors, not in the street or outside."²⁵

As has been noted elsewhere,²⁶ where there is an imbalance of power between disputing parties, the more powerful have few problems in taking their disputes to a variety of forums in search for the best result. The case of Dewi in Maluku provides an example of this:

Dewi was beaten by her male neighbor, Eko. Dewi's family felt the attacks violated an *adat* tenant requiring women to be protected and respected. They therefore reported the case. The hamlet head called a meeting between the two families to resolve the issue and invited the police to attend as a security precaution. Dewi suggested that Eko paid an *adat* fine to resolve the complaint. However, her family was dissatisfied with this solution as they were of a *mel* (noble) class and the perpetrator of *iri* (lower) class in a social hierarchy where caste still has some influence. Ultimately Dewi's family lodged a case with the police. Eko paid both the *adat* fine and spent one year in jail for the offence.

3. Re-thinking the concept of 'non-state'

The concept of 'non-state' is often used to define a range of actors including representatives of village governance institutions. The use of the term differentiates these actors from government and formal justice sector institutions. However, defining actors as either purely 'state' or 'non-state' is an oversimplification when examining the sources of legitimacy that the actors draw on. This section shows that the primary local-level actors, identified earlier, obtain influence and respect by combining different sources of legitimacy, which includes recognition from the state. By identifying the limitations of trying to strictly distinguish between 'state' and 'non-state', the section will alternatively

<www.pekka.or.id/8/index.php?option=com_content&view=article&id=144%3Aaccess-to-justice-empowering-female-heads-of-household-in-indonesia&lang=en> at 5 July 2011.

²⁵ Interview with survey participant (Maluku Tenggara, August 2009).

²⁶ The World Bank, above n 13.

view institutions as existing along a spectrum from the purely informal state at one end, to the formal state at the other end.

3.1 Defining local-level actors

A number of potential actors are likely to assist in resolving disputes at the village level in the Indonesian context. These include the purely informal institutions, namely family, friends and neighbors. They also include actors who represent village-level institutions. Among village governance institutions, there are three primary actors: village government (both legislative and executive) authorities; traditional or *adat* leaders; and religious leaders. This is not to say that other actors do not exist or, in certain cases, yield significant power. Business entities, for example, are an obvious source of power in communities. However, their authority comes from their economic standing rather than the legitimacy conferred upon them by society or government.

Defining village government officials as 'non-state' in Indonesia ignores the fact that the institutions they represent obtain their authority and legitimacy, at least in part, through government regulations that provide for their existence. Village heads, as the pre-eminent village government position in the village, are ostensibly representatives of the government at the lowest level. They are mandated by the state to carry out government functions in villages. State law also defines the manner in which they are elected and the duration of their appointment. Similarly, by state law, village heads are authorized to represent the village in judicial proceedings. As such, their legitimacy in communities often draws on this possession of executive power.²⁷ In addition to being elected and being acknowledged as authoritative representatives of the village by government institutions beyond the village level, village heads invariably also draw their authority from experience, connections, and in some cases, customary or spiritual power.²⁸

In addition to the executive branches of government at the village level, each village has a legislative body, the *Badan Permusyawaratan Desa* (BPD, Village Consultative Body). Although provided for by law, BPD's powers have diminished significantly in recent years. However, qualitative research indicates that in some instances, individuals are able to play a more active role in dispute resolution processes when they are appointed as representatives in the BPD.

Customary or *adat* law remains influential in regulating social and cultural behavior. *Adat* leaders maintain a high degree of social legitimacy. They are perceived as the most trusted form of institution in Aceh and the second most trusted institution in Maluku, following the religious courts. In Aceh, 86 percent of respondents and in Maluku, 81 percent of respondents had a positive view of trust in *adat* leaders. The Constitution recognizes *adat*;²⁹ in theory, the judiciary is required to take *adat* into account in making decisions.³⁰

²⁷ *Law 32 on Local Governance 2004*, and *Government Regulation 72 on the Village 2005* defines the village and explains the role of the village head. In this context, the village head acts as a representative of the 'Executive' branch of the government at the village level.

²⁸ Hamlet heads and village secretaries can also be defined as representatives of the executive at the village level in that their roles are defined by legislation, and authority is bestowed upon them through both the village head and government officials at the sub-district and district level.

²⁹ *Constitution of the Republic of Indonesia 1945*, art 18(B) provides: "The State recognizes and respects the individual communities of traditional law and their traditional rights as long as they survive, and in accordance with the development of the community and the principle of the Unitary State of the Republic of Indonesia, as regulated by law." Article 28(I)(3) states: "Cultural identity and the rights of traditional communities are respected in accordance with the continuing development of civilization over time."

³⁰ *Law 4 on the Authority of Judges*, (2004), Art 28(1).

Decentralization has also provided districts and provinces with the authority to revitalize *adat* institutions. For example, in Aceh, the provincial government has released a number of regulations recognizing the role of *adat*.³¹ In a number of ways, this has resulted in the symbols of *adat* being superimposed onto the structures of the government at the village level. For example, *Qanun* (Provincial Government Regulation) 9 on the Re-emergence of Adat and Adat Traditions (2008) defines five types of *adat* leaders with authority to resolve disputes.³² The village head (or *Geuchik* as they are referred to in Aceh) is the first leader defined. In Aceh, as in other provinces in Indonesia, this is gradually leading to *adat* leaders being granted legitimacy and recognition by the state. Some researchers have argued that this process considerably strengthens the hand of *adat* leaders.³³

Religious law is another normative framework with influence. Religious heads are generally well respected and can exert considerable authority. In particular, their experience and social position is called on to address issues relating to family law, inheritance disputes and sexual and domestic violence. As with *adat* institutions, religious institutions do not rely solely on social or cultural norms for their legitimacy; the state also formally recognizes their importance.³⁴

3.2 Defining actors by their sources of legitimacy

Defining actors as either purely 'state' or 'non-state', gives the impression that the actors either obtain their legitimacy from the state or from somewhere else. In addition, much of the international discourse on 'non-state' actors centers on debates over what degree of recognition such institutions should receive from the state.³⁵ These debates often overlook the fact that many of these institutions commonly referred to as 'non-state' already obtain some degree of legitimacy through state recognition.

Actors engaged in village-level governance and dispute resolution in Indonesia obtain their influence and respect by combining different sources of legitimacy. As noted in the previous sub-section, the legitimacy of a village head will, in part, be based on state recognition and regulation of his role as a representative of the state in the village.³⁶ His position is also influenced by the fact that he is elected by villagers, although the degree to which this generates legitimacy will depend on the perceived legitimacy of the election. Other factors that may come into consideration in determining the legitimacy of a village head include: the strength of networks of the individual beyond the community, the economic and social standing and integrity of the individual, and the perceived capacity of the individual to resolve disputes. The degree to which factors bestow legitimacy upon actors will vary significantly depending on the socio-political context of a village. It is possible that a village head in the most conflict-affected parts of Aceh

³¹ See for example *Provincial Regulation 9 on the Emergence of Adat and Adat Traditions 2008* and *Provincial Regulation 10 on Adat Institutions 2008*.

³² See art 14(2).

³³ See F Benda-Beckmann and K Benda-Beckmann, *Recreating the Nagari: Decentralization in West Sumatra*, Max Planck Institute for Social Anthropology Working Papers No. 31 (2001).

³⁴ *Presidential Institution 1 on Kompilasi Hukum Islam (Compilation of Islamic Law) 1991*, for example, provides local Muslim religious leaders with certain powers in relation to marriage and inheritance.

³⁵ See, for example, UK Department for International Development (DFID), *Non-state Justice and Security Systems*, DFID Briefing, (May 2004); Organization for Economic Co-operation and Development/Development Assistance Committee (OECD/DAC), *Enhancing the Delivery of Justice and Security*, OECD (2007); E Wojkowska and J Cunningham, 'Justice Reform's New Frontier: Engaging with Customary Systems to Legally Empower the Poor', in Sd Golub (ed), *Legal Empowerment: Practitioner's Perspectives*, (2010) 93; B Baker and E Scheye, 'Multi-layered Justice and Security Delivery in Post-conflict and Fragile States' (2007) 7(4) *Conflict, Security and Development*, 503-528.

³⁶ Village heads are, invariably, male.

may have limited legitimacy due to his position, perceived as a state representative in a context where, until recently, the state had more limited respect. Elsewhere, state recognition gives status to the village head.

Despite contextual variations, it is still possible to use the 'state' and 'non-state' terms, as long as they are seen as two extreme points of a spectrum. In this way, it is possible to generalize and situate different categories of actors along the spectrum. However, their exact location on the spectrum will depend on local factors. Neighbors, friends and family would fall into the category of non-state at one extreme. This is because their authority is based on their kinship ties and accessibility, rather than any power conferred upon them by the state. At the other end of the spectrum, in the state category, are the law enforcement agencies, which primarily include the courts and the prosecutors.

Situated in between these categories is a range of other actors. They may be actors who represent institutions of the state, but who either utilize power beyond the powers conferred upon them by the state, or use power in a manner that is less determinative or enforceable than a court decision. Alternatively, they may be actors from non-state institutions who have had some degree of power or legitimacy conferred upon them by the state. Examples of the former include police officers who may be requested to mediate disputes outside their formal jurisdiction, such as land disputes. As noted above, sub-district level government officials (the *camat*, or sub-district head) are also called on to resolve disputes, in part, due to the authority conferred upon them by the state. Accordingly, they would lie in the middle of the spectrum.

Actors representing village-level institutions will invariably be situated closer towards the non-state end of the spectrum. The village heads would fall somewhere in the middle of the spectrum, with their exact location depending on the local context. On most issues, *adat* and religious leaders have less authority to act on behalf of the state than village heads. They would therefore lie closer towards the non-state end of the spectrum. The section above identified some cases in which the role of these leaders received state recognition, such as that of religious leaders in dealing with family law issues and that of *adat* leaders' in specific dispute resolution processes. Where local governments have regulated to provide the *adat* leaders with dispute resolution powers, such leaders would be placed closer to the state end of the spectrum.

4. Conclusion

This chapter uses research on dispute resolution processes in Maluku and Aceh provinces, Indonesia, to present an alternative framework for viewing local-level dispute resolution actors. The research from these two provinces highlights that local level institutions, in particular village government officials, play an important role not only in resolving disputes, but also in facilitating the interface with more formal state institutions. This interface is not always characteristic of the competition between actors who represent the state and actors who do not represent the state. Dispute resolution actors frequently facilitate access to other kinds of actors. Community members may also seek assistance from a range of actors. Exploring the source of legitimacy of local-level actors identifies some weaknesses in perceiving them as either purely 'state' or purely 'non-state'. A more accurate description would be to view the range of actors as lying along a spectrum between the state and the purely informal. Since the legitimacy of any given actor is determined by a range of factors, including but not limited to the degree of recognition or authority they are granted by the state, the exact location of that actor on the spectrum will vary dependent on context.

The perception of actors as lying along a spectrum has at least three distinct advantages over defining them as either 'state' or 'non-state'. First, it helps to better acknowledge the complex interactions that occur between dispute resolution actors. Defining dispute resolution actors as either 'state' or 'non-state' gives the impression that these actors act primarily in competition with one another. Community members will either use or prefer one form of actor over another. The relationship, however, is much more complex. Dispute processes often involve a multitude of interacting actors. In the Indonesian context, this interaction is most common between local-level actors, as exemplified through the *musyawarah* dispute resolution process. Depending on the type and seriousness of the dispute, actors beyond the village level may be called upon to strengthen the legitimacy of local level actors. This chapter has, for example, pointed out how local level actors use the police to add authority to their mediation.

Village leaders acknowledge the interaction between dispute resolution actors. The majority of village leaders surveyed identified that they would usually refer a dispute to another actor when approached by a community member. Village-level officials play an important role as an intermediary between community members and other dispute resolution actors, facilitating the interface between the state and the community. The networks of a village leader and their capacity to refer disputes to other actors, including facilitating the interface with more formal actors, can be considered one factor that community members take into consideration in entrusting these actors to resolve their disputes. Village-level actors often play an active role in referring the dispute upwards to more formal actors. In this way, each tier of institution mediates dealings with the next tier. A person making a complaint to the police would usually not go directly to the district police station. Most commonly, she or he would approach village officials, and through them, the sub-district police. This does not imply that there is no competition. Community members routinely identify the different options available to them and may seek assistance from a range of different actors with the purpose of obtaining the most favorable outcome. However, in Indonesia, the co-existence of a range of actors is not, in itself, seen as negative. It provides options for community members to seek alternatives. In addition, it has the potential to place a greater degree of accountability on actors since they are aware that their decisions may be subject to scrutiny by other actors or appealed to different forums.

Second, context is important. Categorizing actors as either 'state' or 'non-state' fails to adequately take into consideration the context within which those actors operate. The extent to which specific actors represent the state or operate beyond state oversight varies not only from country to country, but also within countries and from locality to locality. In the Indonesian context, district and provincial governments are progressively playing a more active role in formalizing the role of *adat* leaders. Adopting an approach that places these actors along a spectrum between the purely non-state and the purely state provides greater flexibility to take local context into account. Furthermore, it also provides for a more accurate depiction of the sources of legitimacy of particular actors. This understanding is a necessary prerequisite for any efforts to increase engagement with, or oversight of, dispute resolution actors at the local level.

Third, it is important to acknowledge that state recognition and the accountability of village level actors are two separate issues. Although village-level dispute resolution actors may receive recognition from the state they operate, predominantly, beyond the purview of the state. As discussed in this chapter, village-level actors, in particular village government officials, obtain some power

because their position is recognized by the state. In theory, such recognition should be accompanied by greater accountability. The village governance regulatory framework, for example, sets out checks and balances for different village government officials.³⁷ However, there are concerns with respect to how village government officials, as the primary dispute resolution actors, utilize their power.

This chapter identified two areas where potential for misuse of power by village government officials exists. First, a significant number of cases at the local level involve village government officials as parties to the case. This is particularly the case where the disputes involve the distribution of development aid. Compared to other cases, these cases also face more challenges in being resolved efficiently and equitably. They are more likely to remain unreported or unresolved. Second, village government officials also play an important role in referring disputes to the state courts or the police, in effect acting as a key interface between community members and officials beyond the village level. Given that these officials are both involved as the primary dispute resolution actors and on occasion are also parties to the dispute themselves, this additional role is open to abuse. The grounds on which village government officials make decisions to refer cases beyond the village level may have less to do with the merits of particular cases and more to do with the particular interests of the village authority. These findings emphasize the need for a more detailed understanding of the manner in which power is used at the local level. Policy-makers are increasingly recognizing the important role played by dispute resolution actors at this level. Efforts to better engage these actors should focus not only on providing increased state recognition, but also on ensuring adequate checks and balances.

³⁷ See, for example, *Law 34 on Local Governance 2004*, art 205–210. The village head is accountable to villagers (through six-yearly elections), to district government officials and, at least in theory, to the BPD.

Popular Concepts of Justice and Fairness in Ghana: Testing the Legitimacy of New or Hybrid Forms of State Justice

Richard C Crook, Kojo Asante and Victor Brobbey¹

INTRODUCTION

The provision of effective, legitimate and accessible justice through judicial institutions and more generally through the rule of law is probably one of the most fundamental of all public goods expected from a well-governed state. Here, 'rule of law' does not merely refer to the current neo-liberal conception of a legal system, which protects private property and facilitates the market economy, but also to the provision of a justice system which sustains the security of all citizens, particularly the most vulnerable. It also protects against the exercise of arbitrary power by the state or the powerful, and provides for the public regulation of civil disputes in ways which are trusted by citizens. The idea that public officials are subject to legal and moral norms is particularly important in ex-colonial states where the state is often perceived as a tyrannical and arbitrary monster.² In addition, state law is present in everyday life insofar as it uses the authority of the state to enforce, regulate or define social and economic relationships, from marriage and sexual behaviour to economic exchange, the disposal of property and the power to command the services of others.³ In short, the degree of public trust in, and the legitimacy of, public judicial institutions directly underpins the legitimacy and trustworthiness of the state itself.

The 'local justice' research stream of the Africa Power and Politics Programme (APPP) was developed to undertake empirical investigation into what kinds of state or state-supported justice institutions in African states might provide such legitimate, effective and accessible dispute resolution.

Currently, the legal systems and courts of most African countries are widely denounced as inaccessible to ordinary citizens because of their formality, alien procedures and concepts derived from their colonial origins, corruption and inefficiency. In English-speaking common law countries in particular, there is a deep crisis that is caused by overload and backlog of cases, which results in a denial of justice by the state. In recent years, however, many African states have

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² C Young, *The African Colonial State in Comparative Perspective* (1994).

³ G Poggi, *The Development of the Modern State* (1978) 101-102; G O'Donnell, 'Polyarchies and the (un)rule of law in Latin America' in J Mendez, G O'Donnell and P Pinheiro, *The (Un)rule of Law and the Underprivileged in Latin America* (1999).

attempted to address these crises of the public legal system through reform of judicial institutions, particularly at the local level. The search for alternatives has included 'popular justice', the revival of traditional forms of dispute settlement and chiefs' tribunals applying customary law. Other alternatives include various forms of alternative dispute resolution (ADR) ranging from court-attached ADR provided by lawyers to state support for paralegals, non-governmental organizations (NGOs) and other state agencies providing dispute settlement services.

The first phase of the research therefore looked at three different kinds of local justice institutions in Ghana, comparing a conventional state court with a new state-sponsored ADR service and a land disputes resolution system based on the traditional chieftaincy authorities.⁴

The District or Magistrates Courts are the lowest-level courts of first instance applying formal state law, which in Ghana includes customary law. They have been in existence for over 150 years, since the time of the Gold Coast colony. Until 2002, they were called Community Tribunals and incorporated a lay panel of community assessors sitting with a legally qualified magistrate. They have now reverted to operating with a single, legally qualified or trained judge. Recent studies have suggested, however, that these courts have become more informalized and flexible in their procedures.⁵ Since 2005, they have also become venues for the Judicial Service's national 'Court-connected ADR' programme, using paid paralegal mediators. Following pilots in the Accra Region, the programme has been rolled out to 25 courts across all ten Regions, although all Magistrates are encouraged to experiment with it where they can. Its official purpose is to tackle the enormous backlog of pending cases in the state system and improve accessibility for the poor and vulnerable.

The Commission on Human Rights and Administrative Justice (CHRAJ) is a constitutional body under the 1992 Constitution, and its autonomy and independence are constitutionally guaranteed. Its principal mandate is to investigate abuses of power and maladministration, whether by the Government or other agencies, which infringe on citizens' human rights as guaranteed by the Constitution. This includes unfair treatment of citizens by public agencies, corruption of public officials, and unequal recruitment practices. It is unusual, however, compared to other national human rights commissions in that it has a network of District Offices in most of Ghana's 170 districts. These District Offices offer a free mediation or ADR service to complainants. The service has attracted increasing numbers of individual citizens seeking resolution of disputes, ranging from family disputes (custody of children, maintenance of spouses and divorcees) inheritance, land and property cases, to landlord-tenant relations and employer-employee cases.

The Customary Land Secretariats (CLSs) are new 'hybrid' institutions that were set up in 2003 by the Ministry of Lands. They are still at a pilot stage—ten were established by 2005, and there are only 39 operating at the time of writing. They are administered by chiefs and staff employed by the Traditional Councils, but

⁴ The research was carried out in collaboration with CDD-Ghana researchers under the leadership of Professor Gyimah-Boadi, Kojo Asante and Victor Brobbey. The authors gratefully acknowledge the contributions of other CDD staff including Daniel Armah-Attoh and Sewor Aikins, who worked on the questionnaires and data entry, and Kwabena Aborampah-Mensah (Programme Manager and mass survey supervisor).

⁵ R Crook, S Affou, D Hammond, A Vanga and M Owusu-Yeboah, *The law, legal institutions and the protection of land rights in Ghana and Cote d'Ivoire: developing a more effective and equitable system*, IDS Research Report No. 58, Institute of Development Studies (2007).

their function is a modern one: to record and demarcate the full range of local lands held under customary tenures and to record and formalize the allocation procedures (sale, leasing and other tenures), which are under the control and 'allodial ownership' of customary authorities—chiefs, family heads or 'land priests'.⁶ The aim is to improve the transparency and accountability of customary land administration, and to develop land use planning and new revenue sources. The CLSs are mandated to deal with disputes which arise over their land administration — particularly demarcation and definition of rights — by setting up land dispute resolution committees called Land Management Committees, which bring together representatives of the customary authority with local government and community members. The Committees are led by the chiefs and basically follow customary procedures and conventions relating to land, although officially they have been enjoined to offer ADR.

The main focus of the research was to assess and explain the extent to which these dispute settlement institutions (DSIs) were providing public dispute settlement that was 'legitimate, accessible and effective'. Their performance with respect to these dimensions was judged using three main sets of criteria:

- *Legitimacy*: the extent to which the codes of justice, principles, procedures and remedies offered by the three DSIs were congruent with the beliefs, expectations and demands of both the general public and of litigants;
- *Accessibility*: the extent to which ordinary citizens, particularly the poorest and most vulnerable, were able to access and use their services, and not disproportionately excluded or disadvantaged by their procedures;
- *Effectiveness*: the efficiency of their services in terms of speed of settlement, affordability and enforcement of settlements.

This chapter focuses primarily on the authors' findings with respect to the legitimacy dimension, which depends fundamentally on discovering what local beliefs and expectations of justice really are, and how people experience or perceive the institutions in question.

1. Popular ideas: evidence of the mass survey

The survey of popular opinion on justice and dispute settlement interviewed 800 respondents selected randomly from the two case study districts (400 in each), using a multistage, stratified area sample with a random selection of households and of individuals within households.⁷ The questionnaires focused primarily on people's experiences of and opinions on dispute settlement, whether in court or elsewhere, paying particular attention to how people think about fairness, what they value in any dispute settlement process and who or what they find trustworthy. As far as possible, an attempt was made to avoid abstract opinions

⁶ About 80 percent of all land in Ghana is held under customary tenures. In Ghanaian land law, the allodial title is the ultimate title to the whole territory of the political community, which in Akan societies is vested in the office of the chief (not the chief personally), known as the 'Stool' (similar to the concept of the 'Crown' in English law). The Stool is conceived of as a 'trustee' or custodian of the land and must manage it on behalf of the community, both now and in the future. Therefore, all dispositions or uses of Stool land are subject to the approval of the chief (see *Constitution of Ghana 1992* arts 36(8) and 267(1)).

⁷ The survey was administered by CDD-Ghana with the collaboration of recent graduates from the University of Ghana and Kwame Nkrumah University of Science and Technology, Kumasi, trained by CDD and APP researchers. Interviews were conducted in the local languages (Twi or Ga) or English, depending on what the respondents were most comfortable with.

and to elicit responses within an action context. A large number of the questions were open-ended and then post-coded. It is worth noting that as the respondents were generally willing to engage in substantial and serious discussion of the issues, the authors have a high level of confidence in the robustness of the findings. Although the primary interest was in respondents' experiences of, and opinions on, dispute settlement and justice, it was nevertheless anticipated that only a minority of such a popular sample would actually have been parties to a formal case or dispute.

The structure of the questionnaire therefore divided the respondents into three main subsets: a) those who had actually experienced, i.e. been parties to, a case; b) those who had witnessed a dispute settlement in their community; and c) those who said they had neither been involved in, nor witnessed, a dispute settlement. The actual sample produced the following percentage in each subset of total respondents:

- Subset 1 (parties to a case): 20.1 percent
- Subset 2 (those who had witnessed a case): 38.4 percent
- Subset 3 (those who had neither witnessed nor been parties): 41.5 percent

1.1 Concepts of fairness and justice

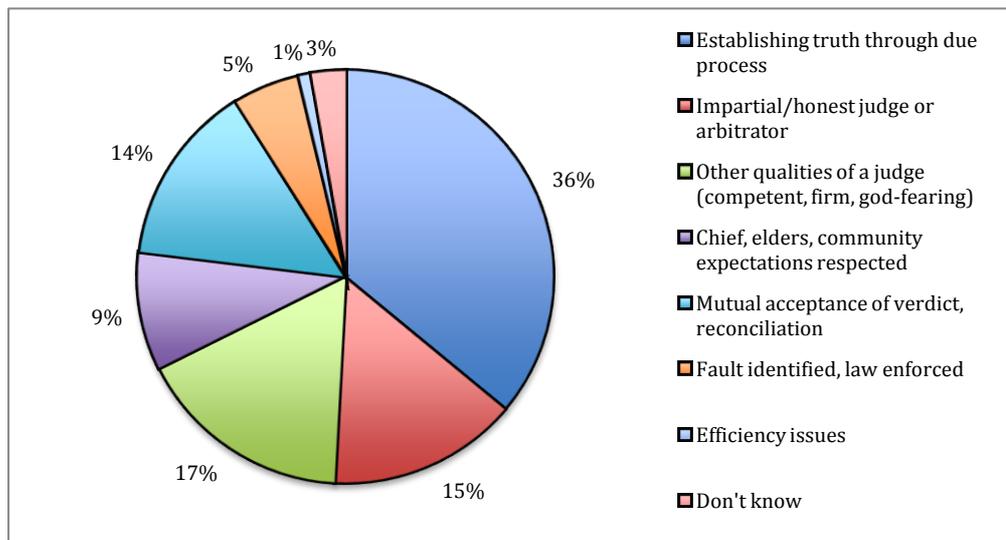
The most significant findings of the survey relate to how Ghanaians define fairness and justice in the settlement of disputes. Respondents in subsets 1 and 2 were asked to explain *why* they thought a case they had been party to or had witnessed was handled fairly or unfairly.⁸ Respondents in subset 3 were asked a more hypothetical question: 'If you ever got involved in a case, what are the most important things about a dispute settlement institution which would make you trust them to give a fair settlement of your case?' The answers of the largest single group of respondents across all subsets (36.1 percent) emphasized the importance of the truth ('the true facts') being established through 'due process', specified as both parties being allowed to speak freely and make their case to the judge (Table 1 and Figure 1).

Table 1: Popular understanding of justice, by type of respondent

	Subset 1 (%)	Subset 2 (%)	Subset 3 (%)	ALL I (%)
Establishing truth through due process	44.7	31.6	33.5	36.1
Impartial/honest judge or arbitrator	15.5	12.7	15.4	14.8
Subtotal 1 +2	60.2	44.3	48.9	50.9
Other qualities of a judge (competent, firm, God-fearing)	5.6	1.3	35.3	16.8
Chief, elders involved, community expectations respected	0.0	13.4	9.4	9.3
Mutual acceptance of verdict, reconciliation	14.9	28.0	0.0	14.2
Fault identified, law enforced	5.6	10.1	0.0	5.2
Efficiency issues (delay, cost, etc.)	3.7	0.7	0.0	1.0
Don't know	0.0	0.0	6.3	2.7

⁸ The precise question was, 'Do you think the dispute settlement procedure was fair?'

Figure 1: Mass survey: popular understanding of fairness and justice (all respondents) (percentage)



The second most important set of ideas related to the qualities required of a judge, particularly impartiality (expressed variously as 'not biased', 'honest', 'respects the truth', 'listens to both sides' – 14.8 percent) and 'other qualities' such as 'competence', 'reputation', 'experience', or being 'God-fearing' (16.8 percent). It may be argued that the idea of an 'impartial judge' is very similar to the principle of allowing both sides to make their cases in order to establish the truth; both emphasize the need for balance in how a dispute is dealt with, in order for the truth to emerge. If the two views are combined to reflect this common underlying concept, then the combined percentages are very striking: 60.2 percent of those who had been parties to a case and 44.4 percent of those who had witnessed a case saw fairness in dispute settlement as associated with a balanced process for establishing the true facts, dependent on either the procedures themselves and/or an impartial judge. To what extent were these views the product of particular experiences, or a more generally shared mindset in the population at large? This can be gauged initially by comparing the results for subsets 1 and 2 with those for subset 3 – those who said they had no personal experience of a case.

Although a much larger proportion of subset 3 saw the quality of the judge as being the most important factor for a fair settlement (50.7 percent), the answers of the second largest group (33.6 percent) fell into the 'justice as due process' category – hearing both sides, obtaining a balanced judgement. If these are added to the 'impartial judge' answers, a very similar percentage of this group (49 percent) shared the views of subsets 1 and 2 on 'justice as due process'.

Overall, therefore, over half of all respondents (50.9 percent) defined justice and fairness as 'due process' combined with an impartial judge. If adding the respondents who emphasized other qualities of the judge related to impartiality, such as competence and honesty, then the proportion rises to 67.7 percent. It may therefore be argued that the notion that justice requires a 'balanced process for establishing the true facts' was very widespread in the general population of the districts surveyed, regardless of people's personal experiences, although it was clearly much more important to those who had actually been party to a case.

A substantial minority of respondents expressed other views but they were more fragmented and therefore formed a number of minority positions that could not collectively be seen as a coherent alternative to the 'due process' concept.

Thus, overall, the third most important group of respondents saw fairness as requiring mutual acceptance of the result by both parties, expressed either as coming to an 'understanding' of each other or as some kind of reconciliation or peaceful resolution of conflict. This is an undeniably important idea, which resonated in many ways with the experiences of actual litigants; that is, disputants seem to show a general desire to attribute a moral quality to any settlement — perhaps motivated by the belief that subsequent hostility can be mitigated if there is mutual acceptance.⁹ Nevertheless, only 14.9 percent of those who had been parties to a case put forward this view, compared to 0 percent of those who had no experience of a case. A substantial number of those who had witnessed a case (subset 2) held this view (28 percent) — in fact, the second largest group after the combined 'balanced process' group. One explanation could be due to the different kinds of dispute settlements that they had experienced compared to those in subset 1; a much higher percentage of subset 2 had witnessed informal, family and traditional forms of dispute settlements.

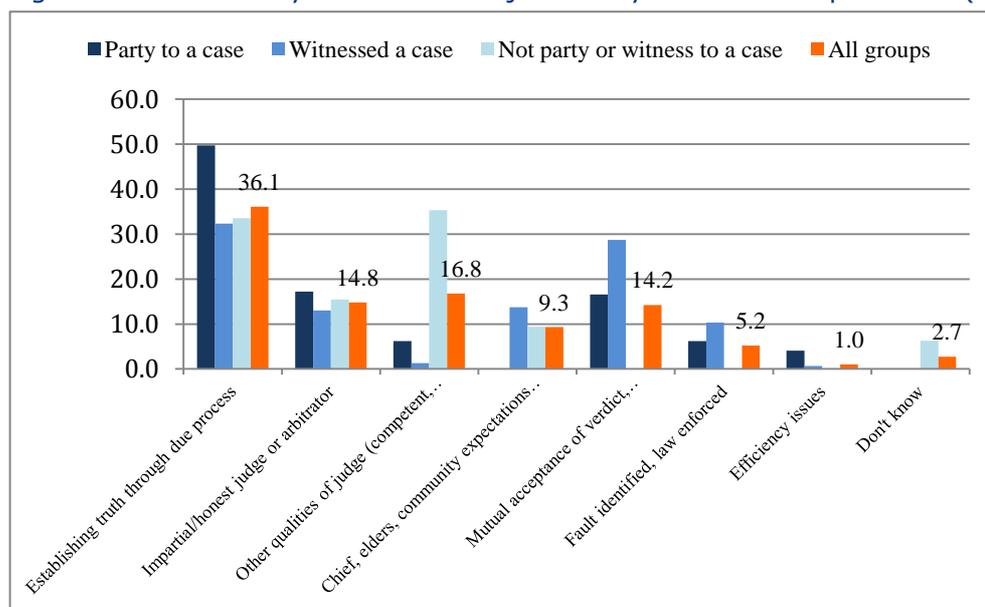
A fourth category of views emerged from subsets 2 and 3 alone: the idea that the 'fairness' of a dispute settlement corresponded to what people in the community 'expected the result to be' (13.4 percent of subset 2) or that it was necessary for chiefs or elders to be involved (9.4 percent of subset 3). These views were combined into a category that was labelled 'traditionalists' or communitarians — those strongly influenced by community norms and traditional hierarchies. This provides some limited evidence for the view of justice popularized by anthropological studies of African societies, according to which justice is not a product of abstract impartiality or formal law, but rather an outcome linked to community expectations, the premium on social peace, and local knowledge of the protagonists. This view was, however, limited to a small number of those who had witnessed a local dispute settlement, and for subset 3, the answer could well be explained by the formulation of the question, since they were not being asked to assess a particular case, but only to give a general opinion on the kind of dispute settlement procedure they might trust in a hypothetical situation. The assertion that a fair settlement requires the involvement of chiefs or elders of the community should also be treated with caution. One cannot assume that DSIs run by chiefs or community elders are necessarily associated in peoples' minds with the provision of community-based or restorative justice; they might well be admired for providing the kind of balanced or truth-seeking justice seen as ideal by the largest groups of respondents. This kind of ambiguity in survey results can only truly be resolved with the kind of detailed and action-based data that comes from observing the courts in action and from surveys of actual litigants.

A fifth very small minority of respondents (5.2 percent) stressed a completely opposite viewpoint, i.e. the belief that justice means the identification of 'wrongdoing' or the wrongdoer, and the enforcement of the law.

⁹ Cf. Diehl's observation that in a village community, people are reluctant to go to court because they do not want to jeopardize social relationships, a fear which recalls the coercive elements that can underpin the pressure to accept 'reconciliation' (E Diehl, 'Can paralegals enhance access to justice? The example of Morogoro Paralegal Centre in Tanzania' (2009) 42 *Verfassung und Recht in Übersee*, 187–211).

Finally, it may be significant that only very small numbers of respondents in any of the three subsets mentioned 'efficiency' issues such as cost and delay as crucial to the provision of a fair or just dispute settlement: 1 percent of respondents (3.7 percent of subset 1 respondents, and 0.7 percent of subset 2) spontaneously mentioned these kinds of issues; none of the respondents in subset 3 raised them. This is not to say that people in Ghana are not concerned with these issues, particularly those who have to deal with judicial or other dispute settlement institutions, as shown in the litigants' surveys. However, they are clearly not concerns that spring to people's minds when asked what they mean when they say that a dispute has been dealt with or settled fairly.

Figure 2: Mass survey: 'fairness and justice' by subset of respondents (%)

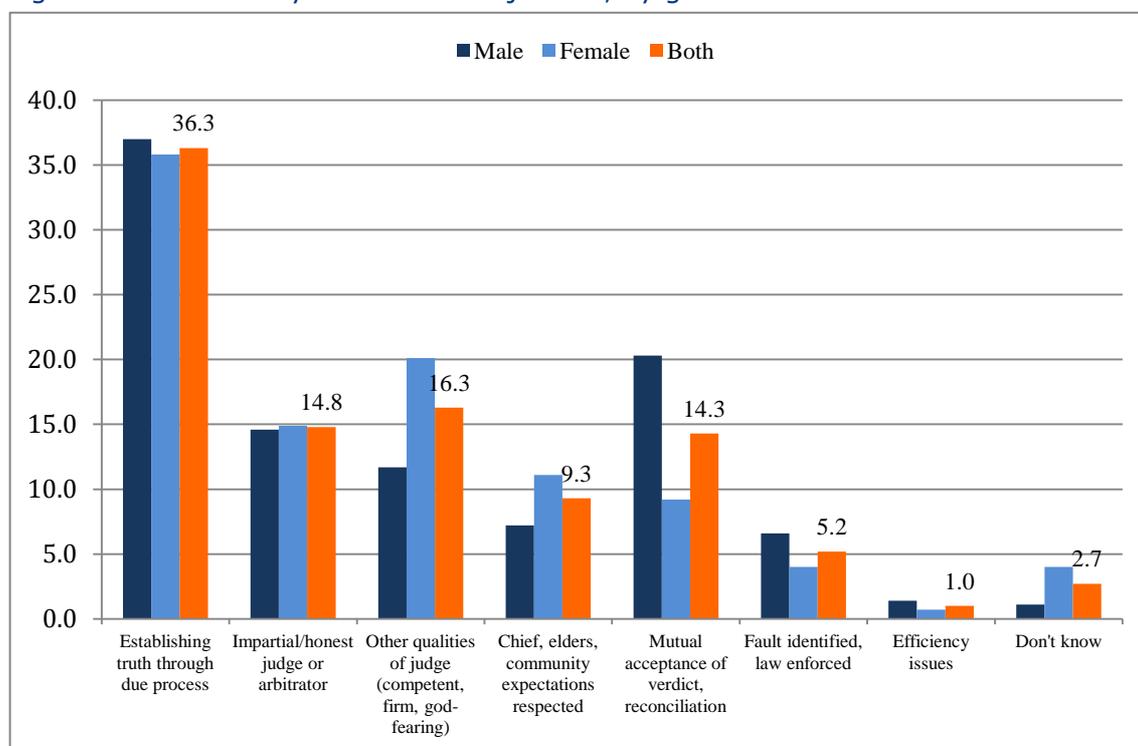


How can one explain differences in the conceptualization of justice and fairness among the three types of respondents (see Figure 2)? It is clear that respondents who had experienced a case (subset 1) were most likely to espouse the view of justice as a balanced process to establish the true facts with an impartial judge (over 60 percent of the subset). Those who had only witnessed a case being heard were much more likely to mention the need for mutual acceptance and reconciliation, and the idea of conforming with community expectations (although these were still views held by a small minority, even within this group). The group who said that they had neither witnessed nor been party to a case were even more strongly disposed to favour due process factors and the good qualities required by a judge — 84 percent, with 51 percent focusing on qualities of the judge. Of this latter group, only a small minority thought that fairness required chiefs to be involved (2.1 percent) or elders (7.3 percent).

The differences between subsets 1 and 2 may have been a function of the kinds of DSIs which they had actually experienced. For subset 1, those who had experienced their case in a state court formed the largest single group (32.9 percent) followed by a traditional chief's court (24.8 percent), with the others fragmented among a wide variety of DSIs — family elders, the police, local government or elected officials, paralegals and religious leaders. The experiences of subset 2 were predominantly associated with more traditional and informal kinds of justice offered by village chiefs (48.2 percent) or family and community

elders (13.7 percent); state courts formed the other main group, at 25.8 percent. It is possible, therefore, that the opinions of subset 2 respondents were influenced by the tendency of informal dispute settlement – whether by a village chief or by family elders – to focus on finding an amicable or agreed settlement. This is by no means a full explanation, given that nearly two-thirds of subset 1 had also experienced various forms of informal justice, including that offered by village chiefs. It may be argued that having been involved in an actual conflict or dispute which ended up requiring a settlement in a DSI was a more powerful influence in predisposing this group to recognize the importance of due process, rather than the type of DSI they had used. Indeed, the contrast with subset 3 is perhaps the most powerful and telling element in the survey; the opinion of those who claimed not to have any direct experience of any DSI presumably drew upon a general set of values or attitudes prevalent in local society. This opinion very strongly resonated with – indeed was an exaggerated version of – the predominant views of the other two groups in its emphasis on the need for due process and competent, balanced judges.

Figure 3: Mass survey: 'fairness and justice', by gender



To what extent did social differences such as gender, age, educational level and occupation influence people's views on justice and fairness? The results show an extraordinary consistency across most of these differences, with only minor variations attributable to gender (see Figure 3). The respondents' age had almost no impact on the kind of view that they were likely to hold – there was particularly strong consistency on the 'due process' value. Further, levels of education seemed to make little difference either, except that respondents with a post-secondary education (a very small proportion of the sample) were less likely to suggest that an impartial judge was needed, but much more likely to suggest that other qualities were important such as competence and reputation. Also, with respect to occupation, there were few differences of any significance.

Some minor differences attributable to gender did emerge (Figure 2): women were much less likely to emphasize the importance of reconciliation or mutual acceptance than men. This may be an indication of the extent to which getting involved in a public dispute is a last resort for women, which makes them more determined to pursue a remedy to the bitter end. Also, women were slightly more likely to argue that a judge should be competent and 'God-fearing', and that community expectations were important. However, these were not major differences that could give rise to any strong sociological or policy finding on the significance of gender in local cultures of justice and dispute settlement.

1.2 Trust in dispute settlement institutions

The kinds of answers which respondents gave to these contextualized questions about fairness and justice should be compared with their responses to the hypothetical question about trust, which was asked at the beginning of the interview — 'if you had a dispute, who would you trust to settle it?' Respondents were given a closed list of possible choices and asked to rank each one from 'trust a lot' to 'would not trust at all'. The most popular choice of the kind of authority that people said they would 'trust a lot' was 'village chief' (77 percent), followed by a 'paramount chief' (76.5 percent), and a 'family head' (73.6 percent) (Table 2). But these 'traditional' choices were followed very closely by religious leaders (72 percent), court judges (69.4 percent) and lawyers (65.5 percent). The relationship between these 'trust' rankings and the way in which the majority of respondents defined what they saw as important in achieving a fair and just settlement of disputes raises some difficult interpretation issues and some very interesting possibilities. If most respondents with any experience of a dispute value impartial and balanced court processes which establish 'the truth', does this mean that they place more trust in chiefs or family heads to deliver this kind of justice? Or was there a disjunction between the kinds of people whom respondents say they trust, at least hypothetically, and what they actually see as important for fairness and justice?

Table 2: Mass survey: trust rankings – 'trust a lot'

Rank (out of 17)	Type of dispute settlement institution	Percentage of responses 'trust a lot'
1	Village chief	77.0
2	Paramount chief	76.5
3	Family head	73.6
4	Religious leader	72.0
6	Court judge	69.4
13	The Commission on Human Rights and Administrative Justice (CHRAJ)	45.0
16	Customary Land Secretariat (CLS)	42.6

A simpler explanation might be that respondents answered this trust question on the basis of reputation rather than as a specific request to consider the content or context of any dispute settlement procedure. Hence, what is surprising is that religious leaders were given trust ratings almost indistinguishable from those of chiefs or family heads — a sign, perhaps, of significant recent changes in Ghanaian society. The high ratings given to chiefs could be a reflection of the

general respect for the institution and were a conventional response prompted by people's knowledge of, or familiarity with, particular institutions or authority figures. This was supported by the outcome for this question at the other end of the scale.

Table 3: Mass survey: trust rankings – 'would not trust at all'

Rank (out of 17)	Type of dispute settlement institution	Percentages of responses 'would not trust at all'
1	Fetish priest	87.8
2	School head teacher	26.7
3	Agriculture Department Officer	20.9
4	Police	18.7
15	Human Rights and Administrative Justice (CHRAJ)	8.4
16	Customary Land Secretariat (CLS)	8.3

The ratings were low for whether people trusted the new CLSs (chiefly institutions) or the CHRAJ — 42.6 percent and 45 percent respectively, ranking 16 and 13 out of 17 possibilities. However, very large numbers of respondents gave 'don't know' answers in relation to these two institutions – 35.4 percent for the CLS, and 31.1 percent for the CHRAJ. This suggests that many respondents had simply not heard of them and therefore felt they could not 'trust' them (a very rational response). This is further confirmed by looking at the 'don't trust at all' ratings — a response which can be interpreted as a strongly held negative attitude (Table 3). Here, the authority not trusted by the largest number of respondents was a 'spiritual leader' such as fetish priest¹⁰ (87.8 percent of respondents), followed a long way down the scale by the 'school head teacher' (26.7 percent) and the 'Agricultural Department Officer' (20.9 percent). Yet, the CLS and the CHRAJ were at the bottom of the list, with only 8.4 percent and 8.3 percent, respectively, responding that they did not trust them at all — fewer even than for the 'village chief'. Indeed, respondents were not willing to say that they trusted a chiefly institution such as the CLS 'a lot' because they had not really heard of it; hence they did not feel strongly enough about it to respond that they did not trust it "at all". Their entirely reasonable response was a neutral one.

For these reasons, the high trust rankings for village and paramount chiefs, family heads and religious leaders may be interpreted as responses to a hypothetical reputational question. It was only when asked to consider questions on fairness and justice in a more specific context that they gave answers which revealed what they truly valued or understood about the fair settlement of disputes. Whether respondents actually saw particular DSIs as likely to offer the kind of justice that they preferred cannot be deduced from the general trust question; this only emerged from the more detailed contextual questioning about particular cases, and obviously, from the survey of litigants' behaviour, relating to why their case ended up in a particular DSI. In this respect, the idea of 'choice' itself must always be understood in the context of other determining factors, such as the behaviour of the different parties (willingness to compromise, the issues at

¹⁰ A practitioner of traditional religious spells and herbal cures, with powers derived from a particular god or spirit (the 'fetish').

stake), the remedies sought, and purely practical issues of availability and proximity.

2. The litigants' experiences of dispute settlement

2.1 The Magistrates Courts

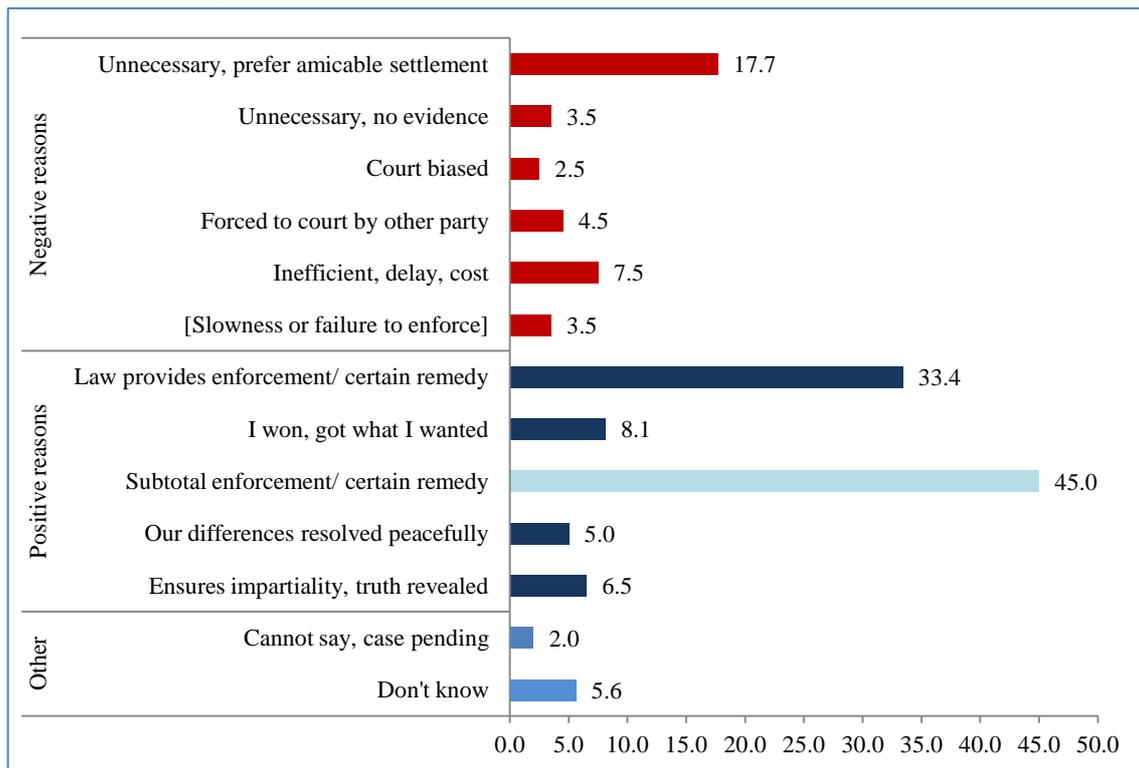
One hundred and ninety-nine respondents were interviewed in this purposive survey, all litigants with current cases in the Magistrate's Courts of the two case-study districts. Respondents were chosen over a five- to six-month period focusing on covering all those with land or inheritance, property and breach of contract cases, with a small selection of others involved in matrimonial, theft and defamation cases. Of the respondents, 58.7 percent were men and 41.3 percent were women. Compared to the general population of the two districts, the litigants were an older group (48.3 percent aged over 40) and much more highly educated than the average population (36.2 percent had a secondary or post-secondary education — the latter being 17.1 percent of the total), while only 9.5 percent were illiterate.¹¹

In assessing the litigants' expectations regarding the kind of justice they might receive at the Magistrate's Court, the authors first tried to establish why they had chosen to use the Court rather than any of the other possible DSIs available in the legally plural context of Ghana. Since 53.3 percent of the respondents went directly to the Magistrate's Court without trying any other form of dispute settlement, it is clear that the kinds of legal remedies offered by these Courts had a powerful attraction. Of those who had tried another DSI first (44.2 percent), 56.8 percent had used family elders or community elders, and only 9.1 percent a chief's traditional court — far fewer than the number who had used Unit Committee or District Assembly officials or other bodies (12.5 percent). This is another contrast with the conventional view that most people prefer to go to their village chief first. When asked why they thought the Magistrate's Court was a better option than the initial DSI they had used, the largest group — 41 percent — said that it offered an 'applicable law' and/or enforceable judgment, whereas the next largest group focused on the appeal of an impartial judge and a procedure which would consider all the facts in order to reach the truth (10.2 percent).

How people wanted their dispute to be settled was also strongly revealed by their responses to the question of whether, and for what reason, they considered that it had been 'worthwhile' taking their case to the Magistrates Court: 53.3 percent gave an unequivocal 'yes', while another 10.6 percent said 'to some extent' — making a majority of 63.9 percent with a positive view; however, 12.1 percent said they could not say, while 24.1 percent responded 'no'.

¹¹ According to the 2000 Ghana Census, 20 percent of the population over 15 years of age in the Accra Region District were illiterate and 39 percent in the Brong-Ahafo Region District. The figures for those with a secondary or post-secondary educational level were 25.6 percent and 11.5 percent, respectively, although this calculation included all those over the age of 6, thus to some extent overstating the educational level for the adult population.

Figure 4: Litigants survey (Magistrate’s Court): Reasons for saying it was or was not worthwhile going to court (%)



In explaining their reasons for it being worthwhile going to court (see Figure 4), the most important perspective was, again, the concern with a certain remedy — 33.4 percent said that what made it worthwhile was the prospect of ‘changing the behaviour’ of the other party through an enforceable judgment based on law. Some linked this to the failure of amicable settlement to produce a result. If adding the respondents who made a negative point of this, i.e. they were dissatisfied because of the slowness or even failure of the court to enforce the judgement, then the total explaining their answer in terms of enforcement was 36.9 percent. In addition there was a smaller group who insisted that all they wanted was to ‘win’, which is a cruder way of saying much the same thing—making a total of 45 percent who felt that enforcement or getting a certain remedy were what they most valued from the court process.

Another much smaller group emphasized that, in their opinion, the most important consideration was that the court had acted impartially and enabled the truth to be established (6.5 percent).

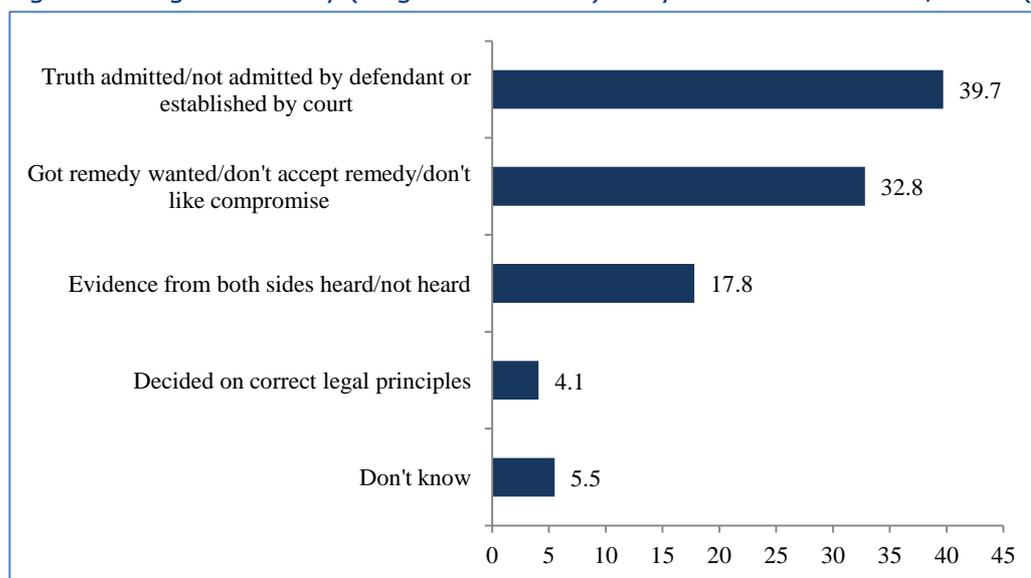
Opinion was clearly divided, however, on whether it had been worthwhile going to court; a large minority (17.7 percent) felt that going to court had been unnecessary, and argued that it could all have been resolved through negotiation (i.e. an amicable settlement), although in many cases they blamed the other party for stubbornness (a small group – 4.5 percent – complained that they had not chosen to come to court, but had been forced by a summons). A further 3.5 percent said that it had been unnecessary because there had not been sufficient evidence, making a total of 25.5 percent who felt it had been unnecessary for some reason.

On the positive side, some also praised the court process for facilitating a 'peaceful' settlement, or enabling the parties to resolve their differences and to 'understand each other' (5 percent). It is clear that there was a desire among even formal court litigants for amicable or negotiated settlements, although still very much a minority.

Finally, it should be noted that only a few focused on cost or delay issues — 4 percent said that the process was too slow, and 3.5 percent that it was too expensive or a waste of money.

How did the litigants relate their experience of the Magistrate's Court to their idea of what makes a fair or just dispute settlement? The cases that had been settled were examined first, and the respondents were asked how they viewed the verdict. Given that most respondents were currently involved in cases, the number whose cases had actually been concluded was inevitably quite limited, only 36.7 percent of the total, so their opinions cannot be taken as representative of the entire group. Nonetheless, when asked to rate the verdict on a four-point scale from 'not at all fair' to 'very fair', 68.5 percent rated it 'very fair' and 20.5 percent, 'somewhat fair', making a total of 89 percent of those who had obtained a verdict.

Figure 5: Litigants' survey (Magistrate's Court): why was the verdict fair/unfair (%)?



Respondents were then asked to explain *why* they rated the verdict fair or unfair, and the answers provide an interesting contrast with the popular survey (Figure 5). The litigants in the Magistrate's Court were clearly interested in seeking legal remedies or a clear resolution of the case. It is not surprising, therefore, that the most cited reason for stating that the verdict was fair or unfair focused on the allocation and acceptance of fault or liability: 40 percent argued that what really mattered was that the 'truth had come out' and that the defendant (in some cases, themselves) had — or had not — accepted the truth of the accusations or problems raised. Here, there was some similarity with popular opinion, particularly those who had experienced a case, in that there was a concern to establish the 'truth' about the facts, but with respect to the allocation of liability. Relatedly, 17.8 percent said that the fairness or unfairness of the verdict was based on whether both sides had properly been heard. Thus, nearly 60 percent

saw fairness as either the truth being established and being accepted by both parties, or that both sides had been properly heard.

The second largest group (32.8 percent) focused on the remedy — either they had got the ruling they wanted or they disagreed with it (for example, did not agree with the amount of compensation). Most significantly, however, none stated that the verdict was good because a compromise had been reached; nonetheless, it is interesting that many litigants wanted the ‘guilty’ party to *accept* and understand their fault, and were not satisfied with just winning. They wanted to give the judicial process a moral dimension.

Overall, the litigants also had a generally positive view of the trial process; when asked to comment (in an open-ended question) on how they thought the judge had conducted the hearings, the overwhelming majority (72.2 percent) made positive comments. Echoing views expressed in the popular survey, they tended to focus on the extent to which the judge seemed to behave in a balanced, honest or helpful manner. The largest single group (37 percent) used terms such as ‘helpful’, ‘patient’, ‘polite’ or ‘friendly’, while the next largest group (18 percent) emphasized qualities such as ‘professional competence’, ‘firmness’ and ‘correctness’ (obeying the law). A similar proportion (17.4 percent) felt that the proceedings were fair and impartial — often using the same phrase as respondents in the mass survey, ‘seeking the truth’. On the negative side, there were complaints that judges did not listen to the parties, and some worried that they were sometimes too angry or ‘strict’. But only a remarkably small number made accusations of bias or lack of impartiality (3.6 percent). Another small group made mixed comments, noting both good and bad points in the conduct of the trial (5.1 percent).

To what extent did litigants in the Magistrate’s Courts share any of the understanding and concerns about justice revealed in the popular survey? Clearly, these litigants were involved in a very specific experience, and perhaps the most important point to note is that when people go to a state court, even at the first instance level, they are definitely seeking a clear legal remedy that will indeed be enforced. This was the motivation of the largest single group of respondents (45 percent). Nevertheless, there is some evidence that, among those who resort to a Magistrate’s Court, there is an acknowledgement that fairness requires the ‘truth’ to be established and recognized by all parties, or that due process (hearing both sides) is required (58 percent of those who had received a verdict). The perspective of these litigants on the trial process also echoed the popular view in that what they saw as most significant in the conduct of the judge were qualities of balance, helpfulness, patience and impartiality.

A substantial minority (17.7 percent), however, would have preferred an ‘alternative’ form of settlement based on negotiation or compromise, and some (5.5 percent) even saw the court as a method of providing a peaceful way of resolving differences. In fact, 17.1 percent of the sample had tried the Court-annexed ADR. There is some echo here of the views expressed in the popular survey, particularly those in subset 2 (respondents who had witnessed a case), 28 percent of whom spoke of the importance of mutual acceptance of a verdict and reconciliation.¹²

¹² It is important to distinguish this view from the idea of acceptance of the truth by both parties, in which the objective is that the party found to be at fault accepts the truthfulness of the verdict. This is somewhat different from the idea of reconciliation through compromise.

2.2 The Commission on Human Rights and Administrative Justice (CHRAJ)

Forty-eight respondents who had disputes heard by the CHRAJ were interviewed in the two districts over a six-month period. The sample deliberately included equal numbers of men and women, and revealed a much younger profile than the respondents in the Magistrate’s Courts and the CLSs: over 60 percent were under 40 years of age. Their modal level of education was also lower than the other two DSIs — 52 percent Junior Secondary or the old Middle School Leaving Certificate. However, the District’s case statistics show that the majority of complainants at CHRAJ were women suing men for child maintenance, child custody (in some cases, accusations of abduction of children), breach of promise to marry, and for maintenance after separation or divorce. A history of domestic violence and abuse was often associated with these complaints. Many of the child maintenance cases involved very young women — schoolgirls and students — who had been abandoned immediately after getting pregnant, and sought support for their education as well as child maintenance. Others involved failed relationships after some years of cohabitation, usually because the man had found a new partner.

The choice of CHRAJ seemed to have been mainly determined by practical considerations relating to its location, and the fact that its services were free, while a fifth of respondents mentioned its ‘good reputation’. However, half of the respondents — mainly the men — had been summoned, so they had not actually exercised any ‘choice’. Of those whose case had been settled, 61 percent felt that it had been fair and were satisfied with the result; one interesting aspect was that a small group was dissatisfied even though they acknowledged that the process was fair. Closer analysis revealed that defendants were in fact more likely to be satisfied that the verdict was fair, and plaintiffs were more likely to say it was fair but they were dissatisfied. This very clearly shows the impact of a process which emphasizes compromise — some complainants felt that they did not really obtain all that they wanted nor what they felt entitled to, whereas defendants often felt that they had received more than they expected from the negotiation (Figure 6).

Figure 6: Litigants’ survey (CHRAJ): overall satisfaction with the decision by plaintiffs and defendants (%)

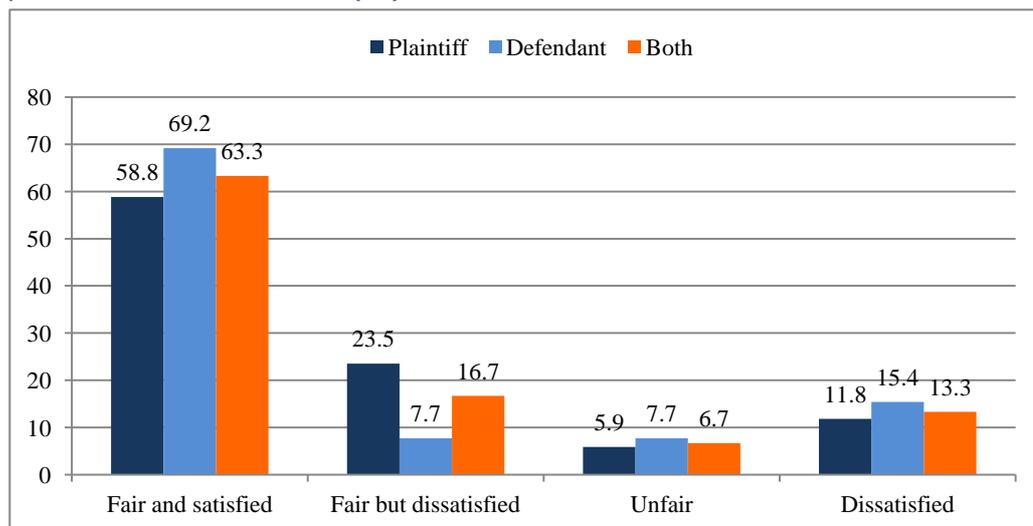


Table 4: CHRAJ: reasons for decision

Reason	Percent (%)
Moral duty to provide or care for children	34.5
Determination of facts	27.6
Compromise	17.2
Used applicable law	17.2
One party gave up/admitted liability	3.5
Total	100.0

Indeed, when discussing their cases, CHRAJ respondents did not emphasize compromise as the core value; the largest group (42 percent) saw the verdict as a determination of facts (bringing out the truth) or even an application of 'the law'. Another significant group, however, saw the process as having a moral dimension — namely, that it was about confirming duties to care for or provide for children (see Table 4), particularly in maintenance cases. Yet, the mediators, when questioned, saw this as a matter of law as specified, for instance, in the *Children's Act 1998*. These findings show how people who sought an ADR-type settlement through the CHRAJ were primarily concerned to have the person they felt had wronged them acknowledge the truth and 'do the right thing' — even if they had to accept a compromise which they did not necessarily feel was adequate. Out of all the respondents, 71 percent felt that the CHRAJ was the 'best way of settling disputes'.

2.3 The Customary Land Secretariats (CLSs)

Forty respondents who had ongoing or previous disputes heard by a CLS were interviewed. It should be noted, however, that in the Accra Region, the CLS in the district was a relatively restricted Ga 'family land' institution,¹³ and most of the cases reviewed had been heard by a hybrid committee funded and administered by the District Assembly (DA): the Land and Chieftaincy Disputes Resolution Committee. This body was chaired by the local chief together with three representatives of the Traditional Council as well as the Queen Mother and two other traditional chiefs.¹⁴ It also included the District Police Superintendent, the Director of the CHRAJ, the Presiding Member of the DA, the Chair of the DA Development Committee and two other DA members. The presence of the police was justified on the grounds that in this District, land or chieftaincy disputes frequently present security issues and a danger to peace and order, which may require police involvement. In fact, the Committee was in many respects an aspect of the District security apparatus. The CLS in the Brong-Ahafo Region was situated in the palace of the Paramount Chief and chaired by the chief's Krontihene (the second-in-command in the Akan traditional hierarchy). It also included a representative of the District Assembly (for example, the Town Planning Officer or District Surveyor) and a representative of one of the state land sector agencies, such as the Office of the Administrator of Stool Lands. This CLS heard more cases than the Accra committee, but still only a handful (12) over a six- month period compared to the 350 cases per year in the local CHRAJ office.

¹³ The Ga people are the indigenous inhabitants of Accra, and unlike the dominant Akan societies of Ghana, their land is owned and managed by extended families or lineages, rather than by the chiefs or political authorities who have jurisdiction over the whole territorial community and manage the land as 'trustees' for that political community.

¹⁴ The Queen Mother is the head of the royal matrilineage and has an important political function as 'kingmaker' when a new chief has to be selected from among the eligible candidates.

The majority of the litigants in the CLS were older men (70 percent) with generally quite high levels of education (47 percent with secondary or post-secondary levels). When asked why they had chosen to go to the CLS, the majority (60 percent) said that they saw it as the most appropriate in terms of its jurisdiction (customary land) and its reputation or competence. However, only 52 percent were both satisfied with the verdict and felt it was 'fair' and only 47.5 percent felt it was the 'best way of settling disputes'. When asked what would be a better alternative, most respondents mentioned the need for special land courts, which would be more competent to deal with all the matters and enforce judgments — similar to the attitudes of those who used the Magistrate's Courts.

When discussing the reasons for the verdict, the most interesting theme to emerge was the strong emphasis which the litigants put on 'bringing out the true facts' (74 percent overall); nearly half of those interviewed said that the verdict was based primarily on formal documentary evidence. The committee panels tended to emphasize a 'fact-finding' approach rather than applications of customary law or traditional norms. There was little or no interest in 'compromise' or reconciliation. Indeed, in many cases, the 'winners' were observed being doused in white powder by their entourage, a traditional way of celebrating victory. They were clearly very interested in establishing fault. The idea that there was a winner and loser was encouraged by the practice of making only the losing party forfeit his or her 'advance against costs' to the CLS panel — in spite of the official rhetoric which portrays the CLS as a form of classic ADR.

3. Congruence between popular concepts of justice, and the procedures of the three DSIs

3.1 Summary of local values

The evidence from the mass survey, interviews with litigants, and observation of cases show that when Ghanaians find themselves involved in — or are asked to think about — a conflict or dispute, they have particular sets of ideas about what they want and value from a dispute settlement process. These ideas may be described as 'popular concepts of fairness and justice', and they apply to a variety of cases, whether they concern disputes over property or land, business, landlord-tenant relations, or matrimonial and sexual relations.

Respondents seemed to most strongly value a judge or arbitrator whom they perceived to be impartial and competent, who could ensure that the true facts would be established, and that the disputing parties would be given a fair chance to present their stories: in short, the local concept of 'fairness' is identified with the idea of a 'balanced process'. This does not mean that people necessarily accept the 'adversarial' view of due process embedded in the state courts applying Anglo-Ghanaian common law. Ghanaians want to see both parties to a case given an equal hearing, but do not necessarily see justice as emerging from a debate or contest between the parties. Most respondents emphasized that the 'truth' should be established, and that the parties involved must acknowledge or accept it. If one of the parties was at fault, respondents thought that this should be publicly accepted by that party. This view emerged most strongly from those who had had personal experience of a case, and litigants in the Magistrate's Courts.

The evidence also shows that a substantial number of people saw justice as best served through reconciliation and peaceful or amicable settlement. In some respects, 'mutual acceptance' of the truth of the findings can be seen as elements

of a process, which may ultimately make reconciliation possible. But this is not the same as compromise, where the parties simply agree to 'split the difference' for the sake of a settlement, or restoration of harmonious social relations. In this sense, amicable settlement may be seen as a kind of remedy, a way of avoiding going to court.

The remedy which people sought or expected was indeed an important determinant of how the justice process was perceived, and was clearly linked to the subject matter and the history of the case. Thus, many disputants initially used informal, non-state DSIs (family, respected community leaders, village chiefs, religious or political leaders), possibly believing that they offered the kind of balanced and impartial justice they respected, but hoping for an amicable private settlement in which the matter could be resolved. However, with land cases as well as intra-family property disputes or contract and debt cases, the level of hostility and even violence often leads to the failure of this kind of dispute resolution. Approaching a state-supported and free dispute resolution service, such as that offered by the CHRAJ, may be considered the next alternative when informal or private settlement fails or is simply seen as inappropriate. Yet, as the experiences of those who used the CHRAJ show, compromise is not always what people necessarily want, nor is it even in their best interests. It is highly significant that 53 percent of litigants in the Magistrate's Courts had come straight to the Court without first using an informal DSI. Thus, by the time disputants arrive in court, the plaintiffs are resolutely seeking a clear and enforceable remedy which will give a declaration of title, enforce specific actions on the defendants, pay what is owed, or award damages.

The strong interest in establishing fault and certainty of enforcement is vividly confirmed by the extraordinarily low rates of out-of-court settlement in Ghana.¹⁵ The numbers of respondents expressing a belief in amicable settlement may in fact be a result of current policies emphasizing ADR and the availability of court-connected ADR, although the extent of their impact should not be exaggerated.

3.2 The legitimacy of the Magistrate's Courts

The codes or concepts of justice underlying the work of the judges in the Magistrates Courts seemed to derive strongly from their professional self-identity, based on their common law training and socialization into the traditions of the Ghanaian judiciary. The judges proclaimed their belief that they must be impartial and that the purpose of the judicial process was to 'establish the truth' in relation to the facts of a case, and to apply the principles of law including customary law where appropriate. This classic common law view, embodied in the adversarial court system, sees justice primarily in terms of 'due process'.¹⁶ Hence, one magistrate felt that fairness derives from an assessment of the arguments put forward by the parties in court and therefore the truth emerges from letting the parties make their cases.¹⁷ In Court, they routinely reminded litigants that they must tell the truth. Further, they also used the language of rights — ironically,

¹⁵ R C Crook, S Affou, D N A Hammond, A F Vanga and M O Yeboah, *The law, legal institutions and the protection of land rights in Ghana and Cote d'Ivoire: developing a more effective and equitable system*, IDS Research Report 58 (2007).

¹⁶ F E Dowrick, *Justice According to the Common Lawyers* (1961).

¹⁷ The behaviour of members of the public in court suggests that the role of lawyers in defending their clients is not well understood or appreciated; most people blame them for what they see as prolonging cases and making life difficult. The judges themselves blame lawyers for many of the difficulties experienced by the state courts, although for more cogent reasons, predominantly their incompetence and disorganization.

more so than the CHRAJ officials — stating that compromise cannot be allowed to prevent people from enjoying their legal rights.

In terms of the codes used in practice, these courts used a variety of laws and principles, not just common law and statute. They applied established customary laws where the judge thought they were appropriate, for example, Akan matrilineal inheritance or marriage custom,¹⁸ and in some observed cases, used Ghanaian 'cultural principles' such as respect for the elderly. In some of the court-connected ADR mediations, mediators were even observed invoking evangelical Christian ideas, which are now widespread among the general population.

Although the Magistrates Courts retain the formal atmosphere of a state court in which strict order is kept, witnesses swear an oath, and the judge is an authoritative figure sitting on a raised platform, hybridity is clearly emerging in the use of various kinds of informal, non-legal procedures. Local languages are used in the vast majority of cases, with English only used by the judge to record their notes. Judges frequently adopt inquisitorial or even conversational strategies in order to facilitate the disclosure of facts by parties and witnesses, especially in the absence of lawyers — or even *because* of the frequent incompetence of counsel. They give advice and suggest ways of settling. This is particularly true when they are sitting as a Family Tribunal, and currently they routinely encourage resorting to ADR, either to the official ADR service in Accra or to informally commissioned arbitrators elsewhere. Official ADR settlements benefit from the fact that they have to be recorded as 'consent judgments' by the Court, and thus have enforceability.

The values of justice and the procedures used in the Magistrate's Courts seem therefore, to correspond closely to the dominant view of justice and fairness put forward by the respondents in the popular survey and in the surveys of litigants. The only difference is that ordinary people put less of a premium on the adversarial process, seeing justice not as a competition to see who puts forward the best arguments, but as a genuine search for the truth, which comes from allowing both parties to fully bring out the facts. Further, more than the judges, perhaps, ordinary people want the truth to be confirmed by acknowledgement of fault and its acceptance by both parties. The courts also offered the kinds of enforceable remedies sought by litigants.

3.3 The legitimacy of the CHRAJ mediation service

The CHRAJ district-level mediation service offered something rather unique which was very different from both the CLSs/chiefs and more informal, community or family-based arbitration. In many ways, the CHRAJ mediations corresponded most closely to the ideal model of ADR, dealing primarily with disputes between private individuals, settled in private in a completely relaxed and informal atmosphere by an impartial mediator who is not from local society. Of greatest interest is that the CHRAJ mediators rarely made use of either customary or legal principles, particularly in relation to marriage or sexual relations, but focused intensively on reaching agreed compromises often based on monetary compensation. The emphasis on compromise was sometimes so strong that it was allowed to override the strictly legal or customary rights of parties; this can

¹⁸ The Akan societies of Ghana, located in southern Ghana, account for over half the population; being matrilineal, land and property are inherited through the female line. Thus, upon a man's death, it is his sister's children (the matrilineal nephews and nieces) who inherit his property, not his widow or his children by her.

be problematic in many matrimonial or sexual violence cases, which tend to form a large number, if not the majority, of their cases. The reliance on 'common sense' ideas in the Ghanaian context also led to the adoption of a variety of codes of justice, ranging from human rights principles to the Christian principles of the mediator, or cultural beliefs about respect for the elderly.

The congruence of the CHRAJ mediations with popular understanding of justice is very strong: its District officers, trained in ADR and personally committed to a 'human rights' code of ethics, do provide an impartial arbitration which gives all parties a real and unrushed opportunity to state their case in a friendly, non-coercive atmosphere. They have the authority that comes from being a state, constitutionally protected and independent institution. Moreover, unlike the more informal, non-state DSIs, they have some capacity to enforce judgements. Although they cannot enforce them directly like a court of law, they facilitate compensation payments by ordering them to be paid and collected via their offices. If the agreements are not respected, it becomes immediately obvious, and disgruntled parties can ask for further action, or they may subsequently be referred to court.

One challenge with the CHRAJ procedures is that the emphasis on compromise and agreement can result in pressure on weaker parties — particularly the many vulnerable women who seek their help — to accept settlements that do not truly serve their best interests or that may prevent them from obtaining their full legal rights. This must be balanced against the fact that they are successfully getting some kind of recompense for vulnerable or poor people who probably would not have dared to go to a court at all.

3.4 The legitimacy of the CLSs and Land and Chieftaincy Disputes Resolution Committee

Although the CLSs were intended to be based on the existing, formally defined Traditional Authorities, they are still new institutions which are little known to the public, partly because only small numbers of pilot CLSs have been set up and even fewer are fully operational. The mixed DA/Chieftaincy Committees are even less well known and are the product of special initiatives in particular districts on a rather random basis.

When asked about their principles of adjudication, the chiefs and CLS officials routinely invoked the language of ADR and said that they promoted 'win-win' settlements based on compromise and restorative justice. But these commitments seemed more reflective of the official language of government policy than what occurred in practice. While in some cases there was reference to the importance of restoring social harmony or peace, other aspects of the procedures differed considerably from ADR — for example, the resorting to documentation of local histories and formal land claims, the concern with the rights of Stools, and consultation with local opinion leaders and other chiefs on the broader aspects and merits of the case. These procedures all imported factors extraneous to the narrow question of the dispute between the parties. The dominant characteristic of the CLS procedures was in fact a concern to establish the 'facts of the case'; rules of judicially established customary law and other land laws were rarely applied. In addition, many panels were clearly trying to establish who the winning party was, arguing 'there is only one truth'.

Although conducted in local languages, the procedures combined formal elements of the state court system (for example, written summons in English, taking of

evidence and cross-examination of parties) with the formal rituals and protocols of the traditional system. Many of these protocols were relatively intimidating to ordinary citizens and do not conform to the basic principle of ADR, i.e. that the mediator should be a neutral figure who can engage informally with the parties to facilitate agreement. In Brong-Ahafo, the hearings took place in the Paramount Chief's Palace, and witnesses had to swear oaths by stepping on the money which had been deposited. Traditional hierarchies were strongly reproduced in the court format: litigants who were family heads, elders or chiefs were given chairs and allowed to wear their sandals. Ordinary 'subjects' had to stand, and were reminded sternly to remove their sandals if they approached the chiefs while still wearing them.¹⁹ As a result of such a format, the panel was relatively unfriendly to women and to strangers or migrant farmers; there was evidence that migrant farmers felt at a distinct disadvantage and were reluctant to use it, while the predominantly 'male elders and chiefs' membership and the traditional atmosphere of a Paramount Chief's court frightened off female litigants.

The DA Land and Chieftaincy Disputes Resolution Committee in peri-urban Accra had more flexible procedures which seemed to depend on the importance and type of case: with some cases, a 'modern' ADR approach was adopted; in others, formal traditional protocols and language were used ('high' or idiomatic Ga comprehensible only to indigenous citizens of high status),²⁰ while in important inter-community cases, the hearing resembled more a traditional chief's court with large numbers of people in attendance.

It would seem evident, therefore, that the procedures and codes used in chiefs' traditional courts diverged in many ways from popular concerns with balanced and impartial due process. This is not to say that individual chiefs may not be respected individually as capable of adjudicating wisely and impartially, but the logic of traditional procedures and codes can make this difficult to achieve if they are allowed to override the rights of individual parties and at the same time reinforce social and economic hierarchies.

4. Conclusions

The data from our surveys and other observations have provided some evidence on the relationship between what ordinary people and the users of these DSIs actually think about justice and dispute settlement, on the one hand, and what these institutions offer in practice on the other hand. The comparison of the three kinds of local dispute settlement institution revealed that the Magistrate's Courts were highly congruent with popular values and expectations, and offered the majority of litigants what they were seeking. The CHRAJ ADR mediations were also clearly attuned to important sets of beliefs and needs, especially for vulnerable people such as the poor and young women who could not afford or were afraid to use formal courts and wanted impartial, amicable settlement. However, they did not necessarily deliver enforceable remedies or fully protect

¹⁹ It should be recalled that in Ghana, the superior chiefs continue to wield a political authority that, until recently, was a formal part of the governmental system of the Native Authorities (NAs) and the Native Courts (NCs) created by the British colonial administration. The NAs gave an institutional, legal and economic basis to the chieftaincy, and produced a powerful 'neo-traditional' elite of wealthy and western-educated chiefs who were a major bulwark of colonial society. Since independence, in spite of the loss of many formal powers, they have remained an institutionalized and important part of the national political elite, as well as the recognized custodians ('allodial owners') and administrators of lands held under customary tenure (see R Crook, 'Customary justice institutions and local ADR: what kind of protection can they offer to customary landholders?' in J Ubink and K Amanor (eds), *Contesting Land and Custom in Ghana: State Chief and the Citizen* (2008) Chapter 6).

²⁰ Ga is the language of the Ga people of Accra (see above n 13).

rights. The customary-based CLS land dispute committees seemed the least attuned to popular ideas and expectations about how to settle land disputes, catering to a relatively narrow and elite set of clients using very formal traditional procedures.

Two particularly interesting aspects of the findings may be highlighted. First, is the challenge they present to the conventional, indeed stereotypical, picture of popular ideas about justice, long presented in much of the literature, which assumes that:

- Most Ghanaians prefer the 'informal' customary justice or dispute settlement institutions as offered by chiefs;
- Customary or traditional justice refers to restorative justice and the privileging of social harmony over individual legal rights; and an acceptance that the judge need not be neutral or detached but rather has intimate knowledge of the parties and their families.²¹

This is not in fact what Ghanaians appear to seek from justice institutions, and these stereotypes of traditional justice are in themselves misleading.²² Any brief acquaintance with the history and culture of the Akan and other kingdoms of Ghana would suffice to counteract the notion that 'the customary' is necessarily informal.²³ Insofar as the CLSs offer some contemporary version of a customary court procedure they will not necessarily privilege reconciliation; nor can they plausibly offer an ADR-type mediation in which an impartial stranger focuses on balancing the claims of two individuals without use of unequal power resources. The CLS panels are too embedded in the power relations of local land ownership and social hierarchies to offer this kind of settlement.²⁴ Their concern is more to establish *rightful claims* according to customary rules of historical legitimacy, which involve constant renegotiation in the light of changing social group relations.²⁵ This means that decisions in practice reflect political relations and inequalities of power.²⁶ Ordinary citizens still respect chieftaincy and tradition in Ghana, but they are only likely to resort to a chiefly institution if they are already involved in a set of relationships over land which suggests that the chief will look on their claim favourably. It is only at the family or very local level that informal modes of traditional dispute settlement may be resorted to when there is still the hope of a fair and amicable settlement.

Also, it is worth emphasizing the significance of the positive findings on the Magistrate's Courts and the CHRAJ. A strong case can be made that the first instance state courts in Ghana provide a form of justice that corresponds with popular understanding of justice and fairness (due process and impartiality) and also offer the certainty and enforceability of remedies that people want should

²¹ A N Allott, 'African law' in J P Derrett, *An Introduction to Legal Systems* (1968) 131-156, cited in Penal Reform International, *Access to Justice in Sub-Saharan Africa; the role of traditional and informal justice systems* (2000) 24-25; for a full review of this literature see, Penal Reform International (2000) 24-34.

²² See Rattray's 1929 account of the procedures in the court of a superior Asante chief for a more authentic picture of customary justice (R S Rattray, *Ashanti Law and Constitution* (1969) 388).

²³ See, I Wilks, *Asante in the Nineteenth Century: the Structure and Evolution of a Political Order* (1975); T McCaskie, *State and Society in Pre-Colonial Asante* (1995).

²⁴ Crook, above n 19, 137-9.

²⁵ S Berry, 'Tomatoes, land and hearsay: property and history in Asante in the time of structural adjustment' (1997) 25(8) *World Development* 1225-41; S Berry, *Chiefs Know Their Boundaries: Essays on Property, Power and the Past in Asante, 1896-1996* (2001); K Juul and C Lund (eds), *Negotiating Property in Africa* (2002).

²⁶ P E Peters, 'The limits of negotiability: security, equity and class formation in African legal systems', in Juul and Lund (eds), *Negotiating Property in Africa* (2002) 45-66.

attempts to find amicable settlement fail. State courts and agencies have been too readily dismissed in favour of 'informal' solutions to the need for better and more legitimate forms of public dispute settlement. It is true, of course, that the state courts face a crisis of effectiveness, unable to cope with the huge and increasing numbers of suits lodged.²⁷ In this sense, the Magistrate's Courts are the victims of their own popularity, but this does not mean they should be abandoned; rather, they need reform, resources and new ways of operating. Various measures could focus on developing and encouraging the informalities and judicial activism already being practised by Magistrates, and weaknesses in court administration are undoubtedly responsible for much of the backlog caused by constant adjournments. Above all, the popular reluctance to consider out-of-court settlement must be tackled — this may be a matter of 'culture', to which ADR is seen as the solution. ADR, however, will not address this rooted behaviour unless it is implemented in very specific ways.

As argued, it is difficult to see ADR solutions as emerging directly from customary institutions unless they change in such a way that would probably lose their cultural uniqueness and importance. Nevertheless, informal ADR is resorted to by large numbers of ordinary citizens from a variety of other social institutions and individuals. For ADR to be offered in its most professional form, respectful of both human rights requirements and popular ideas of justice, the state needs to guarantee training in and maintenance of appropriate standards. Institutions such as the CHRAJ or the Court-attached ADR offer these kinds of positive possibilities; they are truly congruent with popular values about procedure and impartiality, and offer enforcement of remedies. If their reach could be extended and the legal profession brought on board, they might begin to make an impact. However, without clear guidelines on what codes or principles are being implemented, caution must be taken with overemphasis on compromise. Above all, these institutions must satisfy the most basic popular value which seems to emerge from this research, i.e. they must ensure that the 'truth comes out'.

²⁷ In 2007–2008, at the national level, the Magistrate's Courts handled 43,100 civil cases and 49,272 criminal cases, representing clear-up rates of only 40 percent and 30 percent, respectively; in the Accra case study court in the same period, 264 civil cases were cleared up (21 percent of the total pending), and in the Brong-Ahafo court, 240 civil cases out of a much lower total, representing a clear-up rate of 47 percent (see Republic of Ghana Judicial Service, *Judicial Service Annual Report 2007–2008* (2008)).

Experiences of Informal Justice and Security Provision in a Fragile Environment: The Case of the Terai Region in Nepal

Competition for power and order

Lars Peter Lopez Christensen and René Taus Hansen¹

INTRODUCTION

Relations between the state and non-state 'spoilers' of security and justice, and non-state 'providers' of security and justice in Nepal are complex. This chapter analyzes structural imbalances and discrimination in security and justice, current dynamics of security and justice provisions in the Terai region of Nepal, exploring how they relate to the armed conflict in Nepal that took place between 1996-2006, and recent emerged dynamics, such as the emergence of armed groups and an influx of new informal dispute resolution actors.

The chapter is structured in four parts. Section 1 presents the background to the situation in Nepal and the particular kind of fragility that exists in Nepal. In section 2, the dynamics of security and justice in the Terai region are analyzed, including linkages between non-state actors themselves and their relationship to state institutions. Section 3 outlines generic lessons from the Nepal context on the motivations and dynamics of non-state actor involvement in security and justice provision. Finally, recommendations and conclusions will be presented in section 4.

For more than two decades, Denmark has supported democratic development in Nepal and the promotion of peace, human rights and better governance both at the national and local level. Initially, Danida² programs supported both state and non-state actors, but following the King's suspension of the government and introduction of direct rule in 2005 most support was directed towards civil society. The human rights crisis became the explicit focus of programming, and support was given to help transform violent conflict into a non-violent change process. A Peace Support Programme was launched in 2007 to support the implementation of the Comprehensive Peace Agreement (CPA), while the "Human Rights and Good Governance Programme (2009-2013)" began implementation to

¹ The views expressed in this chapter are those of the authors and do not necessarily reflect the official policy, position or views of the Danish Ministry of Foreign Affairs, Danida or any other agencies, organizations or individuals mentioned. Special thanks to Mukunda Kattel, Tula Narayan Shah, Dr. Yubraj Sangroula, Geeta Pathak for valuable input and suggestions, to Anju Shresta for data analysis and Murari Shivakoti for review & editorial support.

² Danida is the label for Danish International Development Assistance. It is not an agency in itself, as development assistance is administered by the Danish Ministry of Foreign Affairs. The main priorities for Danish assistance is; 1) Freedom, democracy and human rights; 2) Growth and employment; 3) Gender equality; 4) Stability and fragility; and 5) Environment and climate.

address structural issues such as social exclusion, accountability, conflict transformation and the ineffectiveness of the political system³

1. Background

1.1 Definition of Terai and Madhes

The Terai and the Madhes are often used interchangeably to describe the southern part of Nepal bordering India. However, the terms differ in origin. Terai describes the 20-30 kilometer wide fertile strip of land between the Indian border and the hill districts further north. Approximately 17 percent of Nepal's land mass is occupied by the 20 districts that make up the Terai and host almost 50 percent of the population (Nepal consists of 75 districts). The term Madhes has been subject to considerable political interpretation, especially in recent history and is used to describe the non-tribal, caste Hindus of Indian origin inhabiting the Terai.⁴ As ethnically based identity politics have taken root these differences in meaning have become important. Madhes political parties refer to the Madhes as their area, thereby labeling it as belonging to one segment of the population. This has had an alienating effect on those who are not considered Madhesis, including the Tharus, who constitute the original population living in the western part of the Terai.

1.2 Non-state actors

Non-state actors in the context of the Terai cover a multitude of stakeholders. They include a large number of civil society organizations, but also armed groups, motivated by criminal activity as well as political affiliation. The distinction between armed groups and political parties is at times blurred, but most armed groups are criminal in nature, some claiming a less than convincing political agenda. In terms of justice provisions the term 'non-state actor' in this chapter covers traditional authorities, private sector companies, paralegal services and community mediation initiatives, primarily managed by non-governmental organizations (NGOs).

Recent political history of Nepal

1980 Constitutional referendum – direct (non party based) elections to National Assembly
1985 Nepal Congress Party begin campaign to establish multi-party system
1990 Protest leads to new democratic multi-party democratic constitution (Jana Andolan I)
1991 Nepali Congress Party wins first elections
1996 Maoist begin insurgency aiming to abolish monarchy and establish a peoples republic
2001 June, Crown Prince kills King and close relatives in a palace shooting spree. Prince Gyanendra crowned King
2001 November, Maoist intensify insurgency and attack army and police posts, state of emergency declared
2002 May, Parliament dissolved. Interim government formed
2002 October, elections postponed indefinitely
2003 January, ceasefire declared. Ceasefire ending in August.
2004 May, Street protests by students and activists
2005 February, King assumes direct power and dismisses government.
2005 April, state of emergency lifted
2005 November, Maoist and opposition parties agree on programme to restore democracy
2006 April, King agrees to restore parliament after violent protest, (Jana Andolan II) ceasefire declared.
2006 May, Parliament limit powers of King, peace talks begin.
2006 November, Comprehensive Peace Agreement signed.
2007 January, Violent protest in eastern Terai in attempt to gain autonomy (Madhesi Andolan)
2007 December, Monarchy abolished.
2008 April, Maoist win largest number of seats of any party in Constituent Assembly/Parliament, assumes leadership of government in August.
2009 May, Maoist resign from government after dispute over army chief. New government formed under UML (Communist Party) leadership
2010 May, deadline for promulgating new constitution extended one year. June, UML government resigns.

³ In the 15-year period 1998-2013 a total of DKK533 million (~USD\$100m) has been programmed for good governance, human rights promotion and peace support.

⁴ J Miklian, *Nepal's Terai: Constructing an Ethnic Conflict*, International Peace Research Institute (2009).

1.3 Context

Conflict and fragility have become 'household words' among Nepal scholars, following the Maoist insurgency from 1996-2006. Nepal has routinely been listed as a fragile state, years after the Comprehensive Peace Agreement was signed. Nepal is finding itself in a troublesome transition, dominated by intense political power struggles, the challenges of writing a new constitution and restructuring the state to become federal, with very little socio-economic progress. Progress may be slow, non-transparent and determined by other factors than public demand for democratic change, but the state is functioning, albeit at limited capacity, and the nation is not challenged on its very existence as it was during the height of the armed conflict.

Empirical studies⁵ have pointed to poverty as one of the main explanatory factors in the outbreak of the conflict with issues of discrimination and exclusion being correlated with poverty rather than a direct factor in itself. Other empirically based studies⁶ point to the insurgency by the Maoist to be a politically, and not ideologically, motivated attempt to gain power and did not directly relate to social exclusion, caste and grievances of the population. The now commonly accepted root causes of the conflict were identified in an earlier analysis listing the interdependent causes of the conflict, including factors such as poverty, social exclusion, and political agenda.⁷ This narrative is guiding overall interventions in Kathmandu by the national and international stakeholders.

While Nepal may be moving in the right direction overall, albeit at a slower than desired pace, the southern region of Terai is continuing to suffer from a crisis of security and justice. The region is diverse and the situation differs from district to district, with the mid and eastern Terai generally assumed to be the least secure. Public perception is showing an attitude that Nepal is moving in the wrong direction, with more pessimistic voices from the Terai districts.

Public perception on developments in Nepal 2010			
Generally speaking, do you think the country is moving in the right direction, or do you think it is moving in the wrong direction?			
	Total	Non Terai	Terai
	Percent		
Right direction	13.6	14.6	12.6
Wrong Direction	62.1	57.4	67.2
Little of both	12.4	14.5	10.1
Refuse to answer	0.2	0.2	0.2
Don't Know	11.7	13.4	9.8
Total	100.0	100.0	100.0

Source; Public perception survey on security and justice in Nepal 2010, Not yet published (SaferWorld, 2010)

The security situation across the country has improved after the cessation of hostilities in 2006, however in Terai, a high level of violence has continued. It is noteworthy that the sources of post conflict insecurity are non-state actors other than the Maoist.

In 2000 radical Maoist cadres began operating in the Terai and gradually began assuming the role of security and justice providers in areas under their control. State installations and institutions were targeted, especially police posts⁸ in the

⁵ Q T Do and L Iyer, *Poverty, Social Divisions, and Conflict in Nepal*, World Bank Policy Research Working Paper 4228 (2007).

⁶ A Acharya, *The Maoist Insurgency in Nepal and the Political Economy of Violence*. In *"The Maoist insurgency in Nepal: Revolution in the 21st Century"* (2009).

⁷ D Thapa, *A Kingdom Under Siege, Nepal's Maoist Insurgency 1996-2004* (2004).

⁸ The insurgency started with an attack on a police post in the district of Rolpa, 13 February 1996 (S Rishikesh, *History of Nepal*, (2009)).

rural areas and Village Development Committee⁹ (VDC) secretariats and offices. Other representatives of the state were also targeted, which led to a swift removal of state representation in the districts. The specific targeting of police and VDC structures removed basic infrastructure for state-provided security and justice.¹⁰ The motivation behind this was twofold. On the one hand, the police were targeted for tactical reasons,¹¹ and other state institutions for ideological and political reasons. On the other hand Maoists sought to take over state functions as an attempt to establish a 'people's republic'. As a consequence of their tactical and political motivation, a 'People's Courts' was established. The actions of the Maoist were therefore a deliberate destruction of the established security and justice systems, both state and traditional, in order to replace them with their own and, according to the Maoists, non-discriminatory mechanisms. For years large areas of the country were deprived of many of the usual mechanisms for security and justice provisions. As a consequence of the conflict, severe human rights violations took place. The Maoist agenda was politically motivated, and they had imposed their systems of security and justice on communities based on ideology. They were championing gender and social justice, also within economic and social field, redistributing wealth and property accordingly. The Maoists had a clear strategy to create a new order in society that was implemented with violence and persistence.¹²

From 2004 a growing sense of identity and political mobilization by Madhesi parties and new armed groups in the Terai meant that the Maoists were challenged. From 2004-2006, because the Maoist influence was actively challenged, it decreased gradually. With the CPA in 2006 and the rise of the Madhes movement in early 2007 the influence of the Maoist was severely reduced. The Madhes Andolan¹³ early 2007 was therefore a turning point. Suddenly, different political factions and parties were able to speak with one voice and demanded greater autonomy and influence in state structures.

The absence of locally elected bodies in Nepal had a negative impact on the security and justice situation in the Terai. The power and security vacuum was gradually filled by competing political parties and criminal elements. It is estimated that more than 100 armed groups are currently operating in the Terai.

The state was sluggish to respond in regard to security and justice after the CPA in 2006, partly due to lack of resources allocated to reconstruct destroyed infrastructure, and partly because the new political dynamics gave the Madhes parties a large say over state interventions in the Terai. Only when the Madhes parties gave their permission to implement a 'special security plan' could the state begin to reassert its influence on the law and order situation. The special security plan was endorsed by the government in July 2009 and had national coverage. It has a specific focus on the eastern and mid-western Terai, aiming to

⁹ VDCs are the lower administrative level of the Ministry of Local Development, there are 3913 VDCs in Nepal, each are further divided into wards, typically 9. The VDC is served by a VDC secretary, who represents the state in the area.

¹⁰ VDC secretaries are involved in solving disputes on land and family related matters, and have some legal mandate to undertake mediation.

¹¹ In the first years of the conflict the Government of Nepal saw the insurgency as a criminal issue and did not deploy the army until 2002.

¹² An example of the impact on justice provision of the Maoist campaign; the district court of Rolpa, registered 28 cases in the 9 month period July 1998 – April 1999, the normal case flow was 30-35 cases per month (K Hatchhethu, *The Nepali State and the Maoist Insurgency 1996-2001*, (2004)).

¹³ The Madhesi Andolan in early 2007 can be seen as a turning point in the situation in the Terai. Built on three inter-related problems facing the Madhesi people, namely, crisis of identity (Madhesi feel that they are treated like Indians and not as Nepalis in Nepal), systematic exclusion (they are not properly represented in the police, army and bureaucracy) and lack of proper representation (their representation in parliament is disproportional), the Andolan entrenched a strong anti-Pahadi (hill people) sentiment in the psyche of the Madhesi people.

improve public security by curbing the activities of armed groups and organized crime. The plan brings the three main security agencies, Police, Armed Police and Intelligence under unified command and allocates resources to especially problematic areas.

Critics of the plan state that it has merely shifted limited resources from one place to another and used draconian means, including extra judicial killings, as a way to combat crime. Whereas the Maoist had a structured political and social agenda, the new powerbrokers did not. The prevailing motivation seemed to be to gain political power and yield associated economic benefits. Security provisions were patchy at best and justice provided by the Maoist People's Courts diminished and was not replaced by a new system. Communities had to rely on a fairly small number of traditional justice providers and on community mediation for settling local disputes.

With the elections in 2008, multiple parties were wooing the voters and the system suddenly became more open to competition. While the system was heavily influenced by politics and money, the communities now had several powerful groups to go to, either armed groups or political parties. In other words, the population of the Terai had a larger pool of actors to go to that would take up their cause. The security system was confusing and justice provision by non-state actors was fragmented.

The battle for control over the Terai left the region in a dire state. Some armed groups, inspired by the Maoist mode of operation, had stated political agendas to legitimize their actions. Some political parties established their own armed groups to compete over determining the order of the Terai. NGOs and other civil society organizations did not intervene in any significant way in favor of securing 'law and order', but remained focused on implementing their own programs. Some journalists tried to report on the deteriorating situation, but many stopped after the first killings of reporters.

1.4 The development of a regime of Political Patronage

The state is gradually reasserting its role as security and justice provider in the Terai. However, within the foreseeable future the system is likely to be restored to a level of state presence capable of addressing only the most severe security threats; it is unlikely that state security and justice provisions will meet actual community demand. The police posts are slowly being reestablished, which has had a marked positive impact on community safety, and the armed groups have been under pressure from the special security plan implemented by the government. The plan has succeeded in capturing or killing a number of leaders of the armed groups and as a consequence many of the groups have splintered into smaller localized criminal syndicates. The number of armed groups currently operating in the Terai has been estimated by the government of Nepal to be at least 109. Most political parties maintain some degree of physical strength, typically in the form of youth wings and affiliated groups, accused of violating human rights through killings, abductions and extortion of businesses.

There is widespread political interference in investigations of the police and judicial processes across Nepal, perhaps more prominently in the Terai.¹⁴ Some armed groups not affiliated with political parties are using corruption or brute force to achieve impunity.

The Maoist Peoples Courts are no longer present in the region; traditional structures have regained some importance as have the local government and

¹⁴ INSEC, *Human Rights Yearbook 2010* (2010).

police. Surprisingly, a 2009 survey¹⁵ shows a steady decline in the role of community groups as justice providers since 2007.

Political interference in security and justice provisions has become a concern for police and communities in general.¹⁶ The increased assertiveness of the Madhesi political parties, which led to unprecedented democratic representation in the Constituent Assembly and Parliament in 2008, has resulted in political parties injecting themselves into areas related to security and justice. This is also made possible because of the absence of locally elected leaders.¹⁷ As outlined above, local government has traditionally had a role in conflict resolution and justice provisions in the communities. A survey showed that only 42 percent of the VDC secretaries¹⁸ were at their duty station in 2009.¹⁹ The situation improved during 2010, but even with a full deployment of VDC secretaries the administrative capacity remains low.

Saferworld²⁰ shows that the various institutions used by the population to resolve problems are VDCs, political groups, community mediation structures, and traditional authorities. Politicians are now closely linked to the police and to VDC secretaries and are exerting growing influence over informal justice along the same lines as politics are influencing formal justice and security.

The general picture emerging is of a state slowly reasserting itself and non-state actors engaging in constructive justice provisions in the shape of mediation and paralegal activity. At the same time the state is losing out in terms of ability to provide vis-à-vis local government, and traditional authorities. Both of these sets of institutions are being infiltrated by political parties. Non-state actors are predominantly engaged as spoilers in the security sector. Severe problems exist because of a very large number of armed groups looking for economic benefit. In the case of politically affiliated armed groups the motivation is mainly to use intimidation to compete for order and political power.

The emerging system is a modern form of Panchayat.²¹ Political parties are taking up the role as non-elected community representatives and are gradually assuming some degree of authority as informal justice providers. Security forces are strongly influenced by political parties as well. As the dust from the Maoist insurgency and the Madhesi Andolan slowly settles, a regime of continued weak state institutions,²² politically influenced and corruption begin to emerge. One exception has been the growing focus on mediation and paralegal programs, which by all accounts are generally not as influenced by politics as traditional authorities and VDCs.²³

¹⁵ Saferworld, *Treading Water, Security and Justice in Nepal in 2009* (2010)..

¹⁶ International Crisis Group (ICG), *Nepal: Peace and Justice*, Asia Report No. 184 (2010); ICG, *Nepal's political rites of passage*, Asia Report 194, 29 September 2010; INSEC, above n 14.

¹⁷ The elections in 2008 did not include local government elections. An All Party Mechanism and Local Peace Committees (LPCs) have been established in many VDC and District Development Committees, but their effectiveness varies considerably.

¹⁸ VDC secretaries are civil servants at the village level with responsibility for administering the VDC budget and recording of births, marriages and deaths. They also play a role in settling local disputes.

¹⁹ UN Officer for the Coordination of Humanitarian Affairs (OCHA), *Map of Nepal: Village Development Committee (VDC) Secretaries displacement- as of July 2006*, (2009) UNHCR Refworld, <<http://www.unhcr.org/refworld/docid/4821c9860.html>> at 11 August 2011.

²⁰ SaferWorld, *Public perception survey on security and justice* (not yet published); Saferworld, *Treading Water, Security and Justice in Nepal in 2009*, (2010).

²¹ The word 'Panchayat' is used to mean a traditional informal gathering of elders coming together to settle an issue reported to them, and not to mean the authoritarian system known as the "Panchayat System" that preceded the 1990 political change in Nepal.

²² But growing in capacity; having been nearly completely absent during the insurgency.

²³ R T Hansen, interview with Y Sangroula (4 October 2010).

The masters in the patronage system may have changed compared to those in power under Pahadi²⁴ domination during the traditional-authoritarian regime or the Maoist regime during the insurgency, but the general system remains the same and is dominated by the struggle for power and economic benefits. There are clear indications that the increase in representation and recognition of the Madhesi cause has influenced the system to be less discriminatory.²⁵ However, the true inclusion may not only be related to what segment of the population you belong to, but also whether you are inside or outside the patronage system. The risk is that marginalized communities in the Terai, even with a high degree of self-determination and democratic representation, continue to be marginalized if they are not inside the new patronage systems, which are currently being created and forming new elites in the Terai.

2. Dynamics of security and justice

Nexus²⁶ between the various stakeholders define the order of security and justice in the Terai, and include criminals, security, justice, politicians and armed groups. Two types of nexuses will be examined: The security nexus and the justice nexus.

2.1 Security Nexus

The stakeholders of the security nexus are the police, armed groups, whether political or purely criminal, politicians, the private sector and smugglers. The army has deliberately been left out of the analysis. After the CPA, the army was confined to their barracks and the police regained the sole responsibility for civilian security.

Smugglers do not represent a security problem as such and have no real influence over the security situation in the Terai. In fact many would refer to them as mere cross border traders. The distinction between what is India and what is Nepal is blurred in the border areas. Communities live on both sides of the border, and cultural and economic links are strong. In short, the border does not exist in practical terms in most places. Therefore smuggling has always been an integrated part of economic activity in the Terai. However, due to their activity formally being illegal, it provides the police with an opportunity to generate income from them. The connection between police and smugglers is very strong and among the oldest in the Terai, but it does not harm society as such. In fact the 'business' is crucial to many communities. It does, however, severely affect state income generation from customs. In some cases the police are encouraging smugglers to keep the community peaceful.²⁷ In other cases it has been reported that the police have enlisted the support of smugglers to monitor the border with respect to criminal activities and activity of armed groups.²⁸ The connection between armed groups and smugglers is relatively weak as they have not captured the cross border 'business' yet.

²⁴ 'Pahadi' refers both to the people from the hill origin (especially Brahmin and Chhetries) and the culture they practice; including the language they speak (Nepali).

²⁵ Madhesi representation in the Constituent Assembly is substantial. Madhes issues are being debated at the highest levels, but the inclusion of Madhesi in state institutions is still lacking.

²⁶ Nexus is defined as a connection, or series of connections, linking two or more things, and is used in the analysis to describe the linkages in the networks determining security and justice.

²⁷ There are examples of fertilizer smuggling being accepted by police to ensure continued livelihood for communities (B Giri, 'Smuggling thrives at Belauri customs', *Republica* (Nepal) 12 June 2010, MyRepublica

<http://archives.myrepublica.com/portal/index.php?action=news_details&news_id=19806> at 11 August 2011).

²⁸ R T Hansen interview with youth groups (Janakpor, 28 September 2010,).

The connection between the police and armed groups/criminals used to be very strong in the Terai. The police, in the fight against the Maoists, indirectly supported activities of some armed groups. Following public pressure for increased security, subsequently endorsed by the Madhesi politicians, and the resulting special security plan, the link between police and armed groups has weakened considerably. In particular the transfer or suspension of senior police officials with connections to organized crime and armed groups has significantly shifted the balance of power back towards the police. However, the links between armed groups and police does, however, still exist especially when there are large public tenders,²⁹ but it is likely to be on an individual³⁰ rather than an institutional basis.³¹ The strong partisan connection to crime and armed groups can be understood as indirect protection of criminals by the politicians, it is through this partisan linkage that enable criminal groups to exercise influence over the police. When the link between police and armed groups was the strongest, crime levels were the most severe in several of the east and central Terai districts.³²

The private sector usually portrays itself as a victim of armed groups and criminal activity. Large scale 'donation drives', extorting millions of rupees from private business, are seriously hampering the business environment in the Terai. Businesses also suffer from political campaigning and bandhs (strikes). However, the private sector is also contributing to insecurity by taking advantage of the lack of law and order and paying criminal groups to act against competition and for protection, thereby sustaining armed groups. In some cases private sector businesses reportedly paid the police to carry out killings of criminal leaders who had been blackmailing businesses, abducted members of wealthy families, and so forth.³³ Traditionally, the private sector is well connected to the political elites and contributes to parties and election campaigns.

The nexus between armed groups, criminals and politicians is very strong.³⁴ Some politicians have even established their own armed groups that have linkages to non-political criminal groups. They are motivated by the continuous inflow of state funding to the districts and income from criminal activities, but most importantly the groups are involved in mobilizing communities for elections. The political-criminal nexus enables both sides to gain from the income. The nexus greatly impacts the communities through lack of service provisions and non-transparent decision-making impedes development as does continued insecurity and absence of the rule of law. Across all districts where interviews have been conducted, both police and non-state actors openly state partisan interference as the main problem in security and justice provisions.

The strong role of parties and armed groups is fuelled by dynamics such as youth unemployment, a culture of violence from the conflict years and weak law enforcement by the state. Male youth join the various groups out of frustration and stay involved because of fear of reprisals if they leave. Once they become members of these groups they often become addicted to alcohol and drugs, violate their own communities through criminal activities and as a consequence become alienated. A challenge in dealing with these non-state spoilers of justice and security is that the members join mostly out of their own free will. The socio-economic factors that brought them to the groups are unlikely to change in the

²⁹ R T Hansen interviews with T N Shah, (Kathmandu, 1/10/15 September 2010)..

³⁰ R T Hansen interview with Y Sangroula (4 October 2010).

³¹ This does not imply that the nexus is now at an acceptable level. The nexus has been weakened but is still negatively affecting security to a large extent and is partly responsible for the continued impunity and lack of law and order.

³² R T Hansen interview with T N Shah (Kathmandu, 1/10/15 September 2010).

³³ R T Hansen interviews with T N Shah (Kathmandu, 1/10/15 September 2010).

³⁴ ICG, *Nepal: Peace and Justice*, Asia Report No. 184 (2010).

near future. Some join to escape social discrimination and quickly become part of an elite by violent means. They become relatively affluent and gain a new social identity. It is important to note that the root causes of the violent groups are not found in lack of law enforcement, but are socio-economic. Weak law and security enforcement allows criminal activity to continue, but is not the cause. Better policing alone cannot solve the problem. It requires fundamental socio-economic change, a new value-based political culture and better opportunities for the young, unemployed and often disillusioned young men.

The nexus between politicians and the police stems from the politicians influencing the police to provide protection to party cadres, including armed youth wings and criminals. It has been recognized as a common occurrence that the police are under substantial political pressure even in very minor cases. The system of promotion in the security forces is politically directed even for junior posts, enabling parties to provide considerable leverage on officials.³⁵ The nexus between crime, police and political parties is mutually reinforcing. Where police officers have links to armed groups in order to benefit financially, they have often paid substantial amounts to get that posting. This increases political party influence, as transfer threats would have severe economic consequences.³⁶

While interference in the security and justice institutions is broadly assigned to political parties in general, there seems to be dynamics at play internally in the parties as well. It is suggested that not all political leaders are aware of the extent to which local party cadres are influencing the system and that many party leaders use the party name to increase the opportunity for private gain. Interviews in eastern Terai revealed that in up to 50 percent of all cases where parties influenced police investigations, two local leaders in two major parties were involved. Evidence from interviews also suggests that the police use partisan pressure as an excuse for not meeting expectations. Partisan involvement may not be as prevalent as the police claim, and in some cases it is being used as an explanation when in reality it is in the interest of the police to release criminals.³⁷

The political agenda in the Terai is influenced by the demand for more inclusion of ethnic groups in the security forces. While it is generally recognized that this needs to take place, the danger is that the security forces with a federal structure and a high degree of ethnic representation will be subject to elite capture in the federal states, thereby strengthening the nexus between politicians and police, further compromising the professionalism of the police.

2.2 Justice Nexus

The main stakeholders in the justice nexus are the politicians, formal justice sector, traditional justice providers, local government, community mediation groups and paralegal services. Additionally, the police play a substantial role in the justice nexus as the majority of communities approach them as a source of justice.

The framing of concepts and issues has importance not only in theoretical terms, but also in the way interventions are designed. The western concepts of justice are being interpreted as litigation.³⁸ Areas of justice not included in this strict interpretation are labeled Alternative Dispute Resolution. The mere framing of the concept as alternative defines what is perceived to be the norm (formal

³⁵ R T Hansen interview with Y Sangroula (4 October 2010).

³⁶ ICG, *Peace and Justice*, Asia Report No. 194 (29 September 2010).

³⁷ R T Hansen interview with youth groups (Janakpor, 28 September 2010).

³⁸ Y Sangroula, *Community Mediation: A Pedagogic reflection in Context of Nepal* (2010).

mechanisms, litigation) and what is perceived to be outside the normal range of justice. However, for a typical rural community, alternative dispute resolution is the normal, most frequently used mechanism and as such the 'real' justice system. The formal system is not attractive to poor women and men. It is often far away, costly to use and subject to corrupt practices and undue pressure from powerful elites.

Therefore, the definitions and framing of issues related to security and justice are determined from the outset by a predetermined set of values that divide mechanisms into informal/alternative on the one side and formal /normal on the other side. To a community the so-called 'informal' mechanisms are often being administered by an 'authority' such as traditional leaders or the growing number of paralegal services and mediation initiatives³⁹ with more credibility and enforcement potential⁴⁰ than the 'formal' state institutions.

The police play a pivotal role in many parts of the Terai. They are in many instances the first point of contact when a dispute emerges. Either the police engage in mediation, at times arbitration, or they ask the complainant to go to traditional or mediation services provided by non state actors. The role of the police as the first port of call and likened to a 'case distribution center' gives them an important function in the provision of justice. Their link to mediation and paralegal services is helpful to communities. In fact, the police assist communities in accessing services they would not have been able to access on their own.

Relations between politicians and police is almost replicated in the politician-formal justice nexus. Parties prefer to interfere in the criminal process at the police level before it becomes a judicial matter. The political leverage may be weaker at the court level as the careers of judges are not as dependent on political acceptance as the careers of police inspectors.

But political interference in the formal justice sector is rampant and acknowledged by all stakeholders. Interference manifests itself in a complex network of favors that are exchanged in combination with direct or indirect financial incentives (bribing) to get a ruling which suits the purposes of local politicians. In turn, local politicians exchange favors with higher level political actors within their party structures or with local businessmen and criminal groups. Only in rare cases is physical violence, or the threat of physical violence, necessary.

Traditional authorities and local government continue to be the most important source of justice in the Terai. Parties occasionally interfere in litigation, mostly in cases of local government conflict resolution. Mediation and paralegal services provided by NGOs have made a significant impact in some areas. While mediation and paralegal services are generally spread thin on the ground, some districts have good penetration of services and they also have a positive impact on the traditional structures. Many traditional leaders have been trained by the mediation/paralegal service providers and the skills are spilling into the traditional justice systems.⁴¹ Traditional justice is under pressure from the small but increasing role of mediation and paralegal services, the increasing role of political parties and a general change in the social fabric of the communities. Following the armed conflict and the rise of violent groups, traditional structures no longer

³⁹ Such as Centre for Legal Research and Resource Development

⁴⁰ One weakness of mediation services as stated by traditional leaders is the focus on enforcement. They state that traditional authorities have the advantage over mediation as they can deliver punishment (Focus group discussion with traditional leaders (Dhanusha, 28 September 2010)).

⁴¹ Focus group discussion with traditional leaders (Dhanusha, 28 September 2010).

command the same respect that they previously had. Migration has also affected the cultural homogeneity of the communities, introducing new judicial practices in otherwise well entrenched systems.⁴²

2.3 Combining the nexus

It is clear from the description above that two main actors defining the order of both security and justice in the Terai are the politicians and the police, with substantial influence from armed groups and criminals. Politicians are crucial in understanding the order and motivations that determine the current security and justice regime in the Terai. The current regime is dominated by a clear political patronage system and fuelled by income from state funding and criminal activity. It uses violence in the pursuit of electoral dominance. The nexus between politicians, police and criminal groups is cementing itself as the new prevailing order and the design of the emerging federal system risks reinforcing non democratic political control of justice and police institutions even further in informal alliances with criminal and armed groups.

As the nexus between police, politicians and criminals grows stronger, the patronage system becomes dominant, and the power dynamics become difficult to change in favor of enhancing accountability and voices of the poor.

As the political patronage system evolves and solidifies, it becomes difficult to break. The interests in maintaining the system become stronger and any attempt to disrupt them will be met with great resistance. The backbone of the nexus is the armed groups/criminals, politicians and the police on the security side, and the politicians and the justice system on the justice side.

There is however room for optimism. Just as the strong links described above between actors in the Terai are currently determining the system, the current weak nexus between mediation and paralegal initiatives, police and justice institutions has the potential to change the situation if they continue to gain importance in the communities. The growing, albeit small, role of mediation and reformed traditional systems has the potential to influence the justice practices for the better. With a weakening nexus between police and armed groups the security situation is likely to improve, supported by deeper involvement by key private sector players, who have the potential to influence politicians.

The effect of this complex system of order and power relations in justice and security provisions in the Terai is that the poor communities continue to live outside the patronage systems and suffer greatly as a consequence. There is little hope for those outside the systems to influence them, especially in the absence of elections for local bodies. The continued weak representation by the state combined with an imperfect institutional, juridical and legislative framework tend to cement local level patronage systems. In fact, the dynamics in the nexus described may point to a continued interest by major stakeholders in maintaining a weak state as it enables the patronage systems to continue its domination of the security and justice systems in the Terai. Politics have been criminalized and crime politicized.

⁴² R T Hansen interview with T N Shah (Kathmandu, 1/10/15 September 2010).

3. Defining a framework for security and justice in fragile environments

The picture emerging from the analysis of the situation in the Terai region of Nepal is that the balance between security and justice is heavily affected by patronage relations and power structures in society. The analysis leads to a description of a framework for security and justice in the Terai, affected by the fragile context and the changing power dynamics in society. The conclusion is that the level of security and justice that one can hope to achieve depends on one's position within the prevailing patronage systems. There are, however, important social class/caste and gender differences that impact on the level of security and justice women and men can achieve in the Terai.

3.1 Security

An individual or community will have various degrees of power in society depending on their status in relation to the patronage system. Power in this respect can be in terms of money, caste/class position, political connections etc. Level of power will influence the degree to which the individual or community experiences justice and security. A generic framework would state that the less power you have the less security you will have. In contrast, the powerful will have a high degree of security to the extent that they become 'untouchables' in society because of their positions and the prevailing culture of impunity. One example could be the leader of a powerful armed group with political connections and ample financial resources. It will be next to impossible to detain or limit the freedom of movement of such a person, whereas the community outside the patronage network will experience great insecurity, violence, abuse and extortion by the powerful.

3.2 Justice

The powerful will be able to influence formal and informal mechanisms to such a degree that impunity prevails. Contrary to this, the weak, will be subject, at times, to very harsh justice or injustice in the worst case. Examples are discriminatory practices by traditional authorities towards lower castes and women, and detention in remand prison for a period longer than the suspected crime may carry as maximum sentence. The powerful in society rarely find themselves in such situations.

What we have seen over the last decades is a considerable change in the definitions of who is powerful. The role of the traditional elites (landlords, big business people and leading representatives of state structures) has come under pressure, first by the 'people's war' led by the Maoists, and now increasingly by armed groups supported by a few politicians and corrupt police officers. The scene itself has not changed much, but the actors and to some extent the rules of the game have. In this regard, two important elements should be pointed out here: The rigidity of the system and level of inequality.

3.3 Rigidity and fragility

A system exists that excludes large parts of the population in terms of patronage. The current system benefits the elite, both new and old, and it is further developed and consolidated by weak state presence, weak institutions, and lack of democratic maturity. Changes will be hard to achieve as they will act against a powerful combination of vested interests. Two propositions therefore have to be made.

1. It is not possible to enhance the power of one group without affecting the power of other groups.
2. Changing the level of access to justice and security will automatically change the degree of power of certain groups.

Therefore:

- If marginalized communities are empowered, the powerful will be less dominant;
- If the possibility of impunity and sense of security is removed from the powerful, they will lose power; and
- If the security and justice of marginalized communities is enhanced they will be empowered.

These propositions entail that the security and justice is a zero-sum game, i.e. discrimination against one group is always a positive discrimination of another. Zats⁴³ found indications that justice cannot be done in a discriminatory environment dominated by a zero-sum mentality.⁴⁴ While this is not always the case, the situation in the Terai does imply a high degree of zero-sum game mentality. The reason is that the security vacuum is filled by opportunistic agents. The mechanisms being employed are to benefit and protect a small group of stakeholders. Security and justice provisions have therefore become dominated by competition between those inside and those outside the old as well as new and emerging patronage networks, even if those inside and outside the networks are from the same ethnic group.⁴⁵

The zero-sum nature of the Terai situation is linked to the strength of the nexus between criminal groups, police and politicians. The stronger the nexus, the stronger the zero-sum properties, and as the nexus weakens, so will the motivation to maintain the system. Fragility of the state allowed for security and justice provisions to be captured by the elite. The conflict accentuated this tendency to the extent that some geographical areas are under the control of small armed groups, closely controlling security and justice provision to their advantage.

In general, the human rights discourse is designed around a non-zero-sum game, i.e. my rights can improve without yours being violated. However, the zero-sum characteristics could be seen to become more rigid, the more a system is designed to protect small ruling elites. Unfortunately in these situations the zero-sum-game mentality is also the most destructive and makes reforms extremely difficult. The conclusions are therefore: *It is not possible to increase levels of security for the less powerful without reducing the security for the powerful. In justice terms, if you try to achieve a fair and equal treatment for the less powerful, you will automatically decrease the level of impunity for the powerful.*

These dynamics are often not informing interventions by the international community in its efforts to improve access to security and justice. The focus of most donor initiatives has been on enhancing the access to justice and security for the poor and marginalized, especially women and children. There is nothing wrong with this ambition. The issue is that it only addresses one side of the dynamics in play. Any change in empowerment and access to security and justice by the less powerful will have a direct impact on the power and impunity of the elite. This is rarely appreciated by external actors and the resistance of local elites to change is often overlooked. Enhancing women's rights to own land,

⁴³ N D Zats, 'Beyond the Zero-Sum Game: Toward Title' (2002) 77(63) *Indiana Law Journal*, 63-140.

⁴⁴ He was researching discrimination in the US employment system.

⁴⁵ S Brown, 'Theorising Kenya's Protracted Transition' (2004) *Journal of Contemporary African Studies*.

inheritance or control economically productive sectors may generate a defensive response even if the objectives to do so are universally appreciated as just and fair. Reluctance to work on the dynamics related to the powerful may be understandable. Not many governments or international stakeholders have the desire or ability to openly challenge the powerful in a community and actively work on actually decreasing the security they enjoy, or bring them to justice, especially if they belong to political elites responsible for implementing a fragile peace.

The particular dynamics within a fragile state environment such as Nepal in general and the Terai in particular make it possible for rapid shifts to occur regarding who is considered powerful. Also the degree of entrenchment of the powerful groups is an important factor in determining how the situation can be changed. In the case of the Terai, the most important stakeholders in the system described above have been the non-state actors, the Maoist, political parties and armed groups.

4. Recommendations and conclusions

The situation in the Terai region of Nepal demonstrates localized fragile state characteristics. A post-conflict break down of law and order is slowly being brought under control by the state. In the interim, the security vacuum is being filled by criminal armed groups and political actors competing to define the order of the future Terai. The prospects of a federal state add further complexity to the situation.

While the law and order situation as well as the human rights situation is better than during the recent armed conflict, levels of security and justice are still unsatisfactory. The state is currently unable to fully deliver on its core mandate to provide basic security and justice to the population. Following from this, the prevailing patronage systems in the Terai may not change. The old, and emerging elites are resilient and utilize influence to maintain the status quo. The nature of the patronage systems is such that marginalized communities will find it close to impossible to change the system, partly because of the inherent inequality in the system, and partly due to the rigid nature of the mechanisms at play.

An informal alliance between police, politicians and criminal elements are determining the order of justice and security. Communities are forced to utilize the structures of the patronage systems to access security and justice, even when it entails using criminal groups or political mechanisms to seek justice.

The opportunities for change lie with the stakeholders in the security and justice nexus that are countering the patronage systems, notably the mediation and paralegal services, which are yet to be penetrated by political and criminal elements. Their credibility and influence on communities are potentially high as the mediators have been known to also influence the main justice providers, traditional authorities, in a positive way.

However, a number of recommendations for practitioners can be made on the basis of the dynamics described in the Terai. It is important that the focus is not only on the 'easy' empowerment of the less powerful, but also active countering of the impunity and security of the local elites.

4.1 Recommendations to civil society

Monitoring mechanisms should be established with respect to service delivery by local government, police and formal justice system,⁴⁶ to enable evidence based recommendations on where problems are the greatest and provide information on the nature and strength of existing patronage systems.

Programs in support of informal justice should be designed to collaborate rather than to compete with traditional structures. If possible, local government and police roles in conflict resolution should be considered as linked to other informal mechanisms and referral mechanisms.

The outreach of paralegal and mediation services should be substantially enhanced, both by rolling out to more districts but also by better coordinating service providers and by achieving synergies and economics of scale in service provisions. Indications are that services are spread very thinly on the ground. A comprehensive mapping and understanding of traditional structures for justice provisions needs to be established in order to guide new initiatives.

Civil society needs to recognize the link between fundamental issues of corruption and the provisions of security and justice. They need to establish better linkages in their work between local level interventions and policy advocacy at the national level.

Private sector organizations need to recognize costs of the current order of security and justice and actively contribute to breaking the perception among national and local policymakers that the competition for power and order is a zero-sum game. The communities at large, including the elites, will gain from an understanding that everybody will be better off if the current patronage systems are replaced by fair, equal treatment of all citizens within reformed justice and security structures.

4.2 Recommendations to donors

Donors need to recognize the role that continued support has in maintaining the patronage systems. Local government funding is reported to be a source of corruption and fuel for the political-criminal nexus in the Terai. The local government systems should be closely monitored and their role in the broader security and justice crisis analyzed.

The international community is too focused on the conflict that was, and too little on the conflict that is. Proper analysis of the dynamics of the security and justice crisis in the Terai must be undertaken. A closer look is required regarding who is serving what functions in the criminal-political nexus. Analysis should include a proper investigation of the role of corruption in the erosion of the state and its functions. Much of the analysis already made fails to properly take into account the security and justice nexus as outlined in this chapter.⁴⁷

The culture of political violence must be broken by high-level commitment and international pressure. The international community must bring pressure to bear

⁴⁶ Many models exist for this, citizens report cards is one proven model to replicate. Various mechanisms have recently been established to enhance accountability, including the Local Governance Accountability Facility (LGAF) a semi-autonomous body, linked to the Local Governance and Community Development Program (LGCDP), and Programme for Accountability in Nepal (PRAN), a project financed by the World Bank in Nepal.

⁴⁷ Structured political economy analysis will be important to fully appreciate the dynamics. Denmark is currently initiating a comprehensive security and justice review in Nepal together with other international stakeholders.

on the very people that the struggling peace process is depending on and make sure political parties denounce their violent youth wings and actively discipline their own cadres, de-linking them from criminal and armed groups.

4.3 Recommendations to political parties

Political parties need to become more democratically accountable internally, thereby ensuring proper representation by communities affected by the lack of law and order. It will be necessary to strengthen internal party structures and democratic processes and procedures.

Political parties should be made aware of the extent to which their name is being used to promote impunity, injustice and lack of security.

National and local political structures must be made aware of the actual cost of the continued political influence over security and justice in informal alliance with criminal groups. Private sector actors can assist in making this a tangible reality for them.

4.4 Recommendations to the state

Political interference in justice provisions should be countered, for example, by ensuring that sentencing is coherent across districts and across the country, and by ensuring that inconsistencies due to corruption are avoided in sentencing. Centrally promoted monitoring systems can assist in this regard.

The police in particular must be made accountable, which will include making sure the force is democratic, in the sense that it responds to legitimate orders from the center and are composed of individuals that largely mirror the population they work with. Currently, the police are seen as an enforcer of security, not as a provider of services to the communities.

The composition (ethnic and gender), recruitment and promotions of police should be de-linked from the political process, possibly by establishing an independent Police Service Commission.

The security forces should be accountable to the communities they serve by introducing community policing models. Accountability and transparency in security operations must be enhanced by proper reporting back to communities on cases received and results achieved at both the local and national level.

Proper complaint handling mechanisms should be in place, preferably independent from the security forces. Professionalism should be enhanced at all levels to ensure that the police provide professional services. Nepal has a large police force in numbers, but coverage and professionalism should be enhanced.

4.5 Addressing the root causes of the crisis in the Terai

The lack of security forces and proper justice mechanisms does not adequately explain the security and justice crisis, which is currently affecting the daily lives of millions of women and men living in the Terai region of Nepal. The root causes are lack of gainful economic activity for young men, social and caste based discrimination, a culture of violence and impunity and severe strains on natural resources, including land. Initiatives to empower women and engage them further in gainful activities have been established, but the young men, fuelling the criminal groups, have few alternatives to crime. There is a need to fully appreciate the gravity and the dynamics in the current security and justice crisis in the Terai by national and international policy makers in Nepal. A profound

social transformation, and not only a modified version of the 'status quo', appears to be required.

While the security situation is improving, the patronage networks controlling security and justice are cementing in ways that will be seen as highly negative from the point of the citizens in the Terai seeking equal access to security and justice.

Finally, planning for security and justice in the Terai is needed for long term – generational intervention. However, national plans are of very short duration and international planning is at best medium term and based on inadequate analysis of the local dynamics. The wider democratization effort in Nepal will directly impact on the security and justice in the Terai. The more democratic and accountable the political system is, the greater the opportunity will be for breaking the patronage networks.

From Practice to Policy and Back: Emerging Lessons from Working with Community-Based Justice Mechanisms in Helmand, Afghanistan

Mette Lindorf Nielsen¹

INTRODUCTION

The international community is generally slow at learning lessons and even worse at integrating them into future approaches. This is no less challenging in a stabilisation environment with a particularly volatile security situation and often highly contested political settlements. To remedy this, the UK Government has created a dedicated capacity in the Stabilisation Unit (SU) to guide and lead the cross-government process of learning lessons about what works and what does not work in conflict-affected and stabilisation environments. This reflects the increasingly practical, pragmatic and flexible approaches that the UK has been taking on the ground in places like Helmand. It is hoped that, through the effective identification, analysis and dissemination of lessons, this capacity will enable a better feedback loop from practice to policy, as well as from practice to future practice.² The SU's approach to lessons is intensely practical. Lessons are based on the experience of people working in the field, discussions with experts across the UK government, including the military, and the wider international community, and by keeping abreast of the latest literature. Lessons are shared with a broad range of stakeholders and fed into pre-deployment training and preparation. Recognising that lesson-learning is an ongoing process should help to increase the impact of lessons on policy and institutionalise improvements at both the strategic and operational levels.

This chapter offers some reflections on how the SU has drawn lessons and sought to derive best practice from one particular engagement – the pilot approach of the UK-led Provincial Reconstruction Team (PRT) in Helmand to working with community-based justice mechanisms since 2008. Of course, caution should always be exercised when seeking to transfer lessons across different contexts, but as will become apparent there are clear parallels between these emerging lessons and already widely acknowledged first principles of working in fragile states such as 'do no harm' and 'take context as the starting point'.³ As the Helmand example illustrates, taking context as the starting point means coming to terms with the messy realities on the ground, understanding the complicated and multi-layered governance relationships in which international engagement is embedded, and specifically situating the effort in this context and its impact on it. Lesson-learning is not necessarily made difficult by the quality or quantity of the information but by the preconceptions of the people consuming it. There are clear conceptual challenges to working with community-based justice mechanisms that

¹ This chapter is a discussion paper, not a statement of UK policy.

² The Stabilisation Unit's *Stabilisation and Conflict Lessons Resource* can be accessed at <http://www.stabilisationunit.gov.uk/stabilisation-and-conflict-resources.html>

³ OECD DAC *Principles for Good International Engagement in Fragile States*, 2007.

are embedded in highly localised forms of governance. The realities on the ground in Helmand question some widely held assumptions about how the justice system in Afghanistan works and consequently how international actors should engage with it. Understanding how justice processes actually work can only be based on experiences in the field and engagement with the affected communities. Effective community engagement is necessary to understand the interests of groups across a broad range of cultural, ethnic and religious backgrounds, as well as across genders. Without this understanding, efforts will at best be ineffective and at worst do harm.

Unfortunately, all too often international actors do not have the resources or aptitude for effective community engagement. This is even more the case in volatile security environments such as Afghanistan, where issues concerning access and the neutrality of international actors have to be considered. Community engagement approaches inevitably need to be adapted to the specific needs, culture and context of the operating environment. Ultimately, it is our ability to understand and explain lessons, as well as our ability to have a positive impact on the governance relationships our interventions are embedded in, that will determine whether a lesson identified becomes a lesson learned. This chapter begins with some reflections on conceptual challenges of starting from practice before offering a brief introduction to the UK's engagement in community-based justice in Helmand. It then sets out seven emerging lessons and describes how they were translated into UK advice to a policy process led by the Government of Afghanistan to define the role of community-based justice mechanisms and their relationship with the state. The chapter is based on the experiences of those working on the ground in Helmand and draws on research as well as personal conversations with Afghan stakeholders and other international actors working on these issues in Afghanistan. The emerging lessons are offered with thanks to all involved for their valuable insights and experiences on the ground.

1. Conceptual Challenges of Starting from Practice

The justice sector in Afghanistan has proved to be one of the most challenging and difficult areas for international engagement. One reason is that the provision of security and justice is at the nexus of political power struggles. Consequently, stimulating the political will needed to address security and justice reform can be extremely difficult, particularly in places where the political settlement is weak or absent. Another reason is that the international community has not shown unity of effort with respect to the justice sector, resulting in the Government of Afghanistan being pulled in different directions by different international stakeholders with different priorities. Many international actors in Afghanistan have simply found it difficult to understand the local context, and in the absence of this understanding they have struggled to move beyond the urge to export models from their home countries. This has led to a confused and sometimes conflicting legal framework, uncoordinated approaches to capacity-building and a lack of strategic direction.

If international actors want to improve access to justice for Afghans, they need to have a thorough understanding of Afghanistan's legal pluralism and the various more or less formal approaches to resolving disputes – not because they are right or wrong, but simply because they exist and are widely used. The legal systems of Afghanistan include codified national law, Shari'a law,⁴ tribal codes and customary practices. Some argue that the 2004 Constitution of Afghanistan gives

⁴ Islamic law, interpreted as giving people their rights under Islam. In Afghanistan, Shari'a is based on the Hanafi school, one of the four Sunni Islamic schools, which is considered the most liberal and rights-focused.

Shari'a primacy, but this is not unequivocally clear. The Constitution does, however, recognise the role of Islam in determining social relations and national law and of Hanafi jurisprudence for matters that no national law regulates.⁵ The Constitution is equally ambivalent about the role of tribal codes and customary practices apart from stating that, where they are 'contrary to the principles of the sacred religion of Islam', the state should adopt measures to eliminate them.⁶ This ambivalence likely reflects the fact that there is no popular consensus on the role and value of tribal codes and customary practices, even among the elite. Furthermore, the limited knowledge on the part of the international actors involved in drafting the Constitution is likely to have played a part. In any case, we need not just to acknowledge the various legal systems operating in Afghanistan, but also actually to understand how they operate in practice.

It is clear that the state-society dichotomy is not a helpful analytical framework through which to understand how justice processes work. In Afghanistan, this is even more the case for three reasons. First, dispute resolution happens through a myriad of relationships and processes that cut across the state-society dichotomy. In formal legal proceedings, judges will often call upon local mullahs or elders ('white beards') for advice, and national law is not always applied, even when a judge is involved. Whether or not and how Shari'a principles are applied depends on how educated the mullahs involved are in Shari'a and the extent to which they are able to influence decisions. Dispute resolution outside the formal sector will generally apply a mixture of Shari'a and Pashtunwali principles,⁷ as well as using customary practice and settle disputes by applying what we might simply term common sense. This 'mix'n'match' approach⁸ sits uncomfortably with the notion of predictability that is central to the concept of the rule of law. A narrow conception of the rule of law requires simply that the laws of the land are upheld. A broader one would describe a situation where the process for deciding those laws has certain qualitative attributes.⁹ Such broader definitions seek to capture the fact that, in countries where there are mechanisms for the people to influence the law-making process, laws are more likely to reflect the cultural beliefs and practices of the population. In such cases, the tension between laws and actual behaviour is usually less pronounced than in countries where formal laws are devised by the few for the many. In Afghanistan, the situation is complicated by the plurality of legal codes and value systems, with Islam as the only system of thought that permeates most of Afghan society. Whereas codified national law does incorporate many Islamic principles, national law also reflects many principles that are not well-understood or appreciated by many Afghans. It is not at all straightforward to establish where the application of a particular principle of adjudication ends and where customary or cultural interpretation of the said principle starts. In countries where there is a greater

⁵ Note that article 3 of the Constitution of Afghanistan reads: 'No law shall contravene the tenets and provisions of the holy religion of Islam in Afghanistan.' Some interpret this as asserting the primacy of Islamic law over national law where their convergence is disputed. This is in tension with Article 130, which suggests that Islamic law (Hanafi) is only to be applied in the absence of other laws.

⁶ Article 54 of the Constitution of Afghanistan.

⁷ Pashtunwali is the pre-Islamic code of the Pashtun people and the dominant tribal code in Afghanistan. Pashtuns make up about 40% of the total Afghan population. There has not been a census in Afghanistan since 1973, so this is an estimate.

⁸ K Fearon, 'Now she goes to school': *The Work of the Gereshk Community Council Justice Sub-Committee May-September 2009*, Provincial Reconstruction Team Lashkar Gah.

⁹ A broad and widely accepted definition of the rule of law is that used by the UN, although it has been criticised as too value-laden: 'The rule of law is... a principle of governance in which all persons, institutions and entities, public and private, including the State itself, are accountable to laws that are publicly promulgated, equally enforced and independently adjudicated, and which are consistent with international human rights norms and standards. It requires, as well, measures to ensure adherence to the principles of supremacy of law, equality before the law, accountability to the law, fairness in the application of the law, separation of powers, participation in decision-making, legal certainty, avoidance of arbitrariness and procedural and legal transparency.' Report of the Secretary-General on the Rule of Law and Transitional Justice in Conflict and Post-Conflict Societies, 2004.

match between the national legal framework and the population's values, such boundaries are much less obscured.

Secondly, the concepts of judicial independence and the separation of powers are not well-developed in Afghanistan. Not only is actual judicial independence weak, the need for it is also not widely appreciated. UK-funded research has confirmed that in Helmand people tend to conflate the judiciary with the executive branch of government.¹⁰ This is perhaps not so surprising in a society where, historically, whoever has the power to govern in a community also has the authority to settle disputes. To the extent that the Afghan government is seen as the power-holder – which in many places it is not – people expect it to *deliver* justice, as opposed to facilitating the framework for an independent judiciary to do so.¹¹

Thirdly, when the state is involved in resolving disputes, it often does so through non-judicial actors. Research has confirmed that the role of the Woliswal (district governor) is extensive in local dispute resolution.¹² The Woliswal is an elected state official but is usually also a prominent community leader. Further, the unique institution of Huquqs – civil rights mediators employed by the Ministry of Justice – have a mandate to mediate civil cases using the principles of dispute resolution, but they cannot mediate a case without a petition signed by the Woliswal. There is nothing unusual about non-judicial actors having dispute resolution functions – in the UK, the police have powers of mediation, and council authorities, for example, can mediate neighbourhood disputes relating to noise pollution – but the extensive function of, in particular the Woliswals, adds to the popular perception that the executive branch of government, not an independent judiciary, is the main state deliverer of justice.

Finally, some reflections are in order concerning identity and legitimacy. When we talk about what is and what is not the state, we assume that people are identified by this one denominator, whether or not they are part of the state. In reality, people's identities are multi-faceted and fluctuating. A Woliswal may be approached to resolve a dispute because he is a government representative, but he is just as likely to be approached because he is a community leader. Whether a Woliswal *acts* in his formal capacity when he does act is a different matter altogether, but again in the Afghan context it is perhaps not all that important. And if it is important, who is it likely to be most important to: the international community, who sees improving the legitimacy and capability of the Afghan government as central to its exit strategy, the Woliswal who lives in a particular community and has to reconcile his formal role with his community identity, or the community members who have their dispute resolved, whether successfully or unsuccessfully? This is not to say that justice is in the eye of the beholder, but to point out that the *way* in which justice is delivered is likely to matter more to communities than *who* delivers it. The principal requirement, as will be discussed below, is that those who deliver justice are legitimate in the eyes of those receiving it.

Clearly we need descriptive categories, but we must apply these contextually. Compartmentalising justice actors in Afghanistan into the neat little boxes of 'formal' and 'informal' sectors or 'state' and 'non-state' actors will not advance a contextual understanding of the delivery of justice in Afghanistan. Failing to appreciate this can lead to flawed approaches. Rather, it is critical to understand

¹⁰ S Ladbury (2009), *Drivers of Radicalisation*, Department for International Development.

¹¹ Chapter 7 of the Afghan Constitution asserts the independence of the judiciary. Supreme Court judges are appointed by the President and endorsed by the National Assembly.

¹² D Smith and J Lamey, *Community-Based Dispute Resolution in Bamiyan Province*, Afghanistan Research and Evaluation Unit, 2009; D Smith and J Lamey, *Community-Based Dispute Resolution in Nangarhar Province*, Afghanistan Research and Evaluation Unit, 2009.

the linkages between different justice actors and how they can work together better to improve access to justice for the Afghan population.

2. The UK Approach: One System, Two Sectors

In both national and Helmand-specific surveys, insecurity dominates as the top issue of concern to Afghan citizens.¹³ Afghans clearly want security and justice to be provided, and some see the state as having a key role to play, but few have confidence in the state's ability to deliver.¹⁴ This has led to an international preoccupation with enabling the state to deliver security and justice because this particular kind of service provision is seen, rightly or wrongly, as central to the aim of enhancing the legitimacy of the Government of Afghanistan. This is becoming an ever more clearly stated part of the international exit strategy. The UK's response to the complex Afghan justice landscape and its pronounced legal pluralism was to start from practice – the realities on the ground. This led the UK to regard the whole as greater than the sum of its parts and to develop an aspiration to move towards a single integrated accountable, accepted and accessible justice system through a 'one system, two sectors' approach to justice.¹⁵ This approach is premised on two principles: first, that the state justice sector¹⁶ and community-based justice mechanisms are two sectors within one justice system; and secondly, that providing ways for the community to engage constructively with the Afghan state on justice issues can help build trust and enhance the legitimacy of the government. It is clear that neither the state sector nor the community-based justice sector on their own is capable of fulfilling the justice needs of the people of Afghanistan, but working together they have a better chance. In reality, most international actors will have a range of reasons for engaging – or not engaging – with community-based justice mechanisms, but irrespective of why they choose to engage, it is clear that it will be a long time before the state sector alone can meet the justice needs of the Afghan people.

The UK estimates that in Helmand about 95% of dispute resolution still takes place in communities without the involvement of judicial or government officials.¹⁷ Efforts to increase the capacity of the state sector have always been an essential element of the approach, but judicial capacity remains very limited. It has proved difficult to attract state justice actors to remote and insecure areas, as well as retain them. In September 2010, there were prosecutors in six of Helmand's thirteen districts, judges in three and a civil rights mediator or Huquq from the Ministry of Justice in four, but ten months later in July 2011, only one

¹³ The Asia Foundation (TAF) *Afghanistan in 2010: A Survey of the Afghan People*, 2010. See also TAF surveys from previous years. For Helmand survey data, see S Ladbury, *Helmand Justice Mapping Study*, in Association with Co-operation for Peace and Unity, 2010.

¹⁴ The Asia Foundation (TAF), as above n 13. Whereas 62% of those surveyed are cited as having a positive assessment of the government's performance in providing security, the data are not conclusive and contrast with the fact that 30% of those surveyed think that insecurity is the government's most important failure. There are also clear variations between urban and rural respondents. Confidence is a measure of public trust in the government. Confidence in the state justice system is stagnating, but confidence in the Afghan National Police fell from 86% in 2006 to 79% in 2010, mainly due to concerns over corruption. Note that the UK deems the TAF surveys to have a margin of error of (-/+) 4%, so this decline is only just statistically significant.

¹⁵ This is reflected in the work of the UK-led Provincial Reconstruction Team in Helmand and the 2009 Country Plan of the Department for International Development.

¹⁶ The *state* justice sector includes elected or appointed government officials as well as statutory justice actors such as judicial and prosecutorial officials. This is not to entrench the limited independence of the judiciary, but to use a contextually relevant vocabulary. Because of the role played by government actors, it makes little sense to distinguish the two in descriptive terms, although qualitatively there is clearly a difference. When reference is made to *statutory* justice actors or sector, it is to describe the role of judicial and prosecutorial actors in dispensing justice.

¹⁷ The PRT has made this estimate based on anecdotal evidence, but there is no scientific way of accurately establishing i) how many disputes exist, or ii) how many are resolved, and by whom.

more district had a prosecutor and two more a judge. These state justice actors have proved to be of varying quality – e.g. many of the judges have no formal legal education – and performance differs from district to district.¹⁸ Only 5% of people in Helmand¹⁹ trust the state sector in Helmand compared to a country-wide average of 48%.²⁰ More people trust the community-based justice mechanisms, but communities also recognise that these are not without their problems.²¹

UK policy has been implemented in Helmand through two programmes aimed at encouraging stronger cooperation between state and community-based justice mechanisms in Helmand since 2008: the Afghan Social Outreach Programme (ASOP), and the Prisoner Review Shuras (PRS). ASOP is a government-led programme implemented through the Independent Directorate for Local Governance (IDLG). Its aim was to establish Community Councils (CCs) in all districts by identifying local leaders in recently ‘cleared’²² areas through elections.²³ CCs operate at district level and comprise elected leaders from the various communities. Their function is primarily to ensure that communities have a channel for influencing decision-making at the district level through leaders they have chosen as their representatives. CCs have developed district community plans and usually have three sub-committees, for security, social and economic development, and justice respectively. In Helmand, the Justice Sub-Committees (JSCs) were set up in part as district-level dispute resolution forums for cases that elders had been unable to resolve at the community level. JSCs have helped resolve civil as well as criminal cases, and whereas the PRT encourages JSCs to refer serious criminal cases to the judicial officials, there are examples where they have resolved disputes involving serious crimes such as murder. The exact role of JSCs differs from district to district and has evolved over time in response to changing circumstances, notably the growing presence of state actors. In districts where the state’s presence has become stronger than previously, JSCs do less dispute resolution and act more as information-sharing forums.²⁴ In some cases, competition between the two sectors has developed, with one refusing to acknowledge the judgements of the other, or only reluctantly doing so, thus compromising disputants’ access to justice. This is a key risk requiring mitigation, as it can, as discussed later, reduce access to justice.

The PRT has also encouraged the development of Prisoner Review Shuras (PRSs). The composition of the PRS has varied from district to district, but generally they comprise the chief of police, the local army commander, the local head of the intelligence services, the district governor and a community representative, who is usually also the chair of the JSC. Their purpose is to ensure that arrests and detentions are based on actual evidence and to reduce pre-trial detentions so that they do not extend beyond the legal limit of 72 hours. If there is evidence but the offence is minor, the case is referred to local elders or the JSC for resolution. More serious cases are referred to the police or a prosecutor. The role of the PRS is not to weigh evidence but only to ascertain whether any evidence exists

¹⁸ Monthly PRT reporting; Ladbury, as above n 10; 2010; D Smith, Coffey for the Department for International Development, 2010.

¹⁹ Whereas these figures are not from the same study, researchers have concluded that they are comparable and reliable; see Ladbury above n 10.

²⁰ *Afghanistan in 2010: A Survey of the Afghan People*, TAF, 2010, p. 71.

²¹ S Ladbury, above n 10.

²² The concept of ‘cleared’ refers to the US Army’s counter-insurgency doctrine set out in its 2007 Field Manual which uses ‘clear, hold, build’ terminology to describe the sequential progression towards sustainable peace. Under Obama, the word ‘transfer’ became the fourth stage of this mantra denoting the exit of international military forces and transfer of security provision to national authorities.

²³ Community Councils are transitional and precursors of the establishment of District Councils under the new Sub-National Governance Act.

²⁴ PRT reporting, October 2010.

against the accused that warrants further referral. If the PRS ascertains that there is no evidence, the detainee will be released, showing that PRSs also help prevent unlawful detention. In part, PRSs were set up to compensate for the absence of district prosecutors, but in some districts they have continued to meet even if a prosecutor is now present. Whereas the role and operations of PRSs also vary from district to district, they have helped establish certain important principles. One principle which now seems more widely acknowledged is that the 72-hour detention rule should be respected, even if the principle is not always observed. Another is that relatives should be able to access information about detainees. Finally, there seems to be greater appreciation of the fact that the security forces should operate within the law, leading hopefully to improved accountability over time. This demonstrates that practice helps establish principles, although it is too early to say how well-established these principles are or to what extent they have permanently changed the behaviour of, for example, the security forces. Such inter-agency coordination is a key challenge to justice reform in most countries, so it is encouraging that, even in the most difficult environment, actors who seemingly have few incentives to work together are continuing to do so.

3. Emerging Lessons and Implications for Best Practice

Turning to emerging lessons, what follows is a discussion of what UK experience in Helmand and studies of other parts of Afghanistan tell us about how to work best with community-based actors on justice issues. Clearly there is no blueprint, but based on the UK experience, these emerging lessons are the sort of issues that international actors and others should be thinking about when considering engagement with community-based justice mechanisms.

3.1 Understand, adapt and be realistic

Working with community-based mechanisms is complex and difficult. They are not uniform and fluctuate in their operation, as well as in their sources and application of adjudication principles. In Afghanistan, the justice system comprises a set of actors who are linked in a myriad of ways. In Helmand, these actors include elders, mullahs and other prominent community leaders, the Taliban and government officials – both elected and appointed – as well as judicial officials. The relationships between these actors are complex and vary from location to location, as well as, crucially, from case to case. As already discussed, a variety of sources for principles of adjudication are used in Afghanistan. How principles are applied depends on a range of factors. These include the nature of the issue at hand, the experiences and knowledge of those involved in the dispute resolution and the geographical location and degree of security in the area. It is all part of an impressively adaptive and pragmatic approach to resolving disputes, usually peacefully.²⁵

Sources and principles of adjudication do share features. All have restorative and retributive attributes, but usually one will be more important than the other. For example, Pashthunwali is based on restorative principles, with the overriding aim of reconciling the conflicting parties. The much debated Pashthunwali practice of *baad* – the exchanging of girls between families as compensation for murder – is in essence a practice that seeks to restore the relationship between the two parties by creating strong bonds between them. This is done by exchanging

²⁵ K Fearon, *Proximity, Pragmatism and Pashthunwali: Informal Justice at District Level in Helmand*, 2010 Stabilisation Unit (draft).

assets between their families – in the case of *baad* often very young girls. There are examples of Pashthunwali applying retributive principles too, but it is never straightforward to assess to what extent practices are influenced by other codes, such as Shari'a. Shari'a itself, of course, is not a monolith, and many different schools with different interpretations and practices exist. Generally, Shari'a is more concerned with realising individuals' rights under Islam. Contrary to Western perceptions, local women often cite Shari'a as a preferred alternative to customary practices. Few know what it means to have a functioning statutory justice system based on the rule of law. This is the case in Afghanistan,²⁶ as well as in places like northern Nigeria²⁷. Most Afghans are Sunni Muslims and subscribe to the Hanafi school. Hanafi is usually considered one of the more liberal schools of law within Sunni Islam. This makes it more flexible and more accommodating of community values and, for example, tribal codes such as Pashthunwali than other Islamic schools, such as Wahabi as practised in Saudi Arabia. The Taliban, too, base their practice of Islam on a combination of the old tribal code of Pashthunwali and the Islamic movement of the Deobandis, which in fact usually apply Hanafi jurisprudence. In Afghanistan both Islamic principles and Pashthunwali are codified, and where Islamic principles sometimes lay down specific punishments for specific crimes, *hududs*, Pashthunwali also has a strict tribal code of behaviour and restorative methods for settling disputes. The difference between them is that, whereas Islamic principles often apply retributive principles, Pashthunwali often applies restorative ones. Essentially, the principles applied in Helmand by community-based justice mechanisms are a combination of a variety of social influences, and disentangling them is almost impossible. Furthermore, as with all social processes, they respond to changing social and power realities and change over time. Even in Helmand, where Pashtun culture is very strong, the Pashthunwali principle of *badal* – 'revenge' or 'cycles of revenge' that can span generations – no longer seems to be widely applied.²⁸ It is also said that Taliban practices have changed over time.

A fundamental aspect of the rule of law is the predictable application of publicly promulgated principles. Rather, justice processes in Afghanistan can be said to involve negotiation between different, and sometimes competing, principles to arrive at a decision. The complexities of these processes and their changing nature pose real challenges for how international donors interact with them. International engagement inevitably contributes to shaping power structures that determine justice outcomes, and when this impact is not well-understood, engagement can have negative, unintended effects. The *implication for best practice* is that, at a minimum, international actors need to understand how community-based justice mechanisms work and build flexibility into their approaches. Flexibility is key. If you get it wrong, adapt. If local circumstances require you to change your approach, do so. Sometimes it might be better not to become involved, and if engagement is pursued, the rationale for the engagement needs to be based on the realities on the ground, not a predetermined ideal about how things should work – 'if it ain't broke, don't fix it'. Unfortunately, understanding how these processes actually work requires a skills set that is not often readily available to international actors in Afghanistan. Here, the majority of international justice actors are legal professionals with limited background in community engagement and approaches to mapping local dynamics and power structures. Achieving a balance of skills that suits both the local context and the desire to improve the performance of the statutory justice sector is important.

²⁶ Ladbury, above n 10.

²⁷ For an interesting discussion of sources in *Shari'a* for protecting women's rights see *Promoting Women's Rights through Sharia in Northern Nigeria* by the Centre for Legal Studies, Ahmadu Bello University, Zaria, British Council 2005.

²⁸ Ladbury, above n 10.

3.2 Acknowledge that justice is local

By definition, community-based justice mechanisms only work when they work for the community – that is, when they reflect community values. In dispute resolution, the parameters for what constitutes justice are necessarily set by the community itself. Of course, not all community members are equally powerful during the negotiation of community values. In these processes, restorative principles usually but not always take precedence over retributive principles.²⁹

Whereas statutory law distinguishes between civil and criminal ‘wrongs’, communities generally do not. In Helmand, a ‘wrong’ is conceptualised as a rupturing of relationships, and ‘justice’ is about restoring those relationships.³⁰ Restoring relationships might involve a process by which the two parties deliberate on their experiences and agree to remain amicable. Combining restorative and retributive principles may involve repentance, compensation and being ostracised from a community, even if only temporarily. An interesting example from Afghanistan involves a case of murder where the perpetrator and the victim’s family agreed not to have any contact for eight months to stop the violence. After that period, the accused would be asked to provide compensation in land, property and/or women.³¹ Even if communities were to make a distinction between civil and criminal ‘wrongs’, cases will often involve aspects of both. For example, a land dispute case might have criminal elements associated with it, such as violent conduct. If the state is involved, prosecutors will usually deal with the criminal elements and the Huquq with the civil ones. In community-based processes, such distinctions are rarely made. This means that over-regulating and over-defining jurisdictions can have adverse effects on access to justice. Outlawing community processes that deal with criminal ‘wrongs’ could mean that no justice at all is achieved.

The *implication for best practice* is that international actors need to appreciate local conceptions of justice and investigate the priorities, needs and aspirations of local communities. These are likely to be diverse, and there will be a number of ways in which they can be better met. Our aim should be to identify what works, what doesn’t work and why. We can help strengthen the accountability and fairness of the various options people have for resolving disputes. For example, in many countries, international actors have sought to introduce legal aid mechanisms to ensure that, once in contact with the statutory authorities, defendants as well as suspects understand their rights and obligations, as well as the system they are interacting with. Such legal aid would clearly take different forms with respect to community-based processes, and whereas outsiders should not seek to transpose cultural values, engagement with community leaders on basic legal principles such as presumption of innocence and the right to have one’s case heard can help improve the quality of processes and access to them, for example for women.

3.3 Understand that community-based justice mechanisms are here to stay

Some see community-based justice mechanisms as only necessary in the absence of a stronger statutory sector, and that essentially community-based mechanisms operate in poor societies because they cannot *afford real justice*. This is a

²⁹ Elspeth Huxley’s *Red Strangers* provides a fascinating account of the tensions between restorative and retributive principles in the context of the Europeans’ arrival in Kikuyu tribal areas in Kenya in the early twentieth century. As Richard Dawkins notes in his foreword, Huxley so immerses the reader in Kikuyu culture and ways of thinking in the first half of the book that, by the time European principles of justice are introduced half-way through the book, they seem almost absurd to the reader.

³⁰ Fearon, above n 25.

³¹ Fearon, above n 25.

misconception. In all societies there is a role for issues to be discussed and disputes settled within the community and through non-judicial means. In many societies, including those with a strong, independent judiciary, principles of mediation and dispute resolution are used by state and non-state actors alike, usually because they have attributes that are more conducive to social outcomes. For many communities the value of retributive methods such as imprisonment is difficult to comprehend. Imprisonment, for example, has economic and social costs not only for the offender, but also for his or her family and the wider community. Some societies have found ways to compensate for this, for example in welfare states, with an extensive state-sponsored social safety net. Community-based justice actors rarely have detention facilities at their disposal, and in addition the process is often premised on what is good for the community collectively, rather than what is good for the victims. Their application of retributive justice may involve economic punishments such as compensation through material goods which have an immediate impact on offenders' financial situations but do not remove their ability to participate in economic life and provide for their families. These discussions are extensive and will probably always be inconclusive in legal philosophy. Here, they are worth reiterating to try and improve our understanding of why communities prioritise the way they do. In Helmand, community-based justice mechanisms apply features of restorative and retributive principles to settle both civil and criminal disputes, as well as sometimes serious ones. People in Helmand generally do not regard the retributive principles of state justice as resolving their problems.³² Perhaps more important than the economic aspects, for people who have lived through decades of conflict, punishments do not always settle the matter or compensate the 'wronged' party, thus leading to more conflict. The *implication for best practice* is that considering community-based justice mechanisms as temporary measures limits our scope. Rather, they should be acknowledged for their contribution to social cohesion, and international actors should recognise their intrinsic value in settling disputes peacefully, rather than as temporary alternatives.

3.4 Build accountability into engagements from the outset

The integrity of justice processes is inextricably linked with local power structures. In a sense, justice outcomes can be said to be a reflection of these power structures. If a community does not trust community-based justice actors, their legitimacy will be eroded and they will be unlikely to be able to resolve the dispute. Justice processes have two, sometimes competing sources of legitimacy: accountability to the people and the enforceability of decisions. If a process is considered accountable, it is likely to have legitimacy. Even if this accountability is primarily to local power-holders, provided that communities accept these power-holders as the legitimate ones, the process has legitimacy. Conversely, if its power-holders are not considered legitimate – for example, if they are seen to represent partisan interests external to the community – the legitimacy of the process declines. If the decisions of a justice process are enforced, this also adds to its legitimacy. Conversely, if they are not, the process – and the decision – will lose legitimacy. Whereas Taliban mechanisms are generally able to enforce their decisions, their accountability to the people is weak and there is often weak convergence between their values and community values. Community-based justice mechanisms usually have high levels of legitimacy because they are accountable directly to the people – *wolesi*, or 'the People's System', as people in Helmand call it. For this reason, elders are reliant on parties voluntarily submitting to their authority and will generally not become involved if there is no consent.³³ Accountability to the people is a key strength of community-based

³² Ladbury, above n 10.

³³ Fearon, above n 25, 27-8.

justice processes and one which the state sector cannot yet offer. On the other hand, the erosion of the power of the elders in the last thirty years has weakened their ability to enforce their decisions.

What does this mean for donors? A community-based approach necessarily builds on existing local power structures, but all community approaches to some extent 'meddle' with these. It is important to understand the interests, intentions and capabilities of those we are working with. Working with a particular set of power-holders will likely confer powers on them that they would otherwise not have (access to resources, decision-making powers). Whereas there is no such thing as ungoverned space, local power structures may have been disrupted or be weakly defined, for example, as a result of conflict. A community-based approach can help facilitate the emergence of accountable power structures that match community needs and aspirations, but international actors should avoid stimulating emerging power-holders whom the community does not support. A lack of integrity and corruption also affect legitimacy. No Afghanistan-wide study exists of the level of involvement of community-based justice actors in corrupt practices, but communities in the provinces of Herat, Nangarhar and Helmand have voiced allegations.³⁴ In Helmand, community concerns relate to the transparency of the election process of Community Council (CC) members and financial misconduct. Interestingly, many people also see CC members as government employees rather than community representatives, in part because they are paid a stipend for their public service.³⁵ Well-founded or not, these concerns limit the legitimacy of JSCs and in turn, their ability to successfully resolve disputes. The *implication for best practice* is that international actors should build accountability mechanisms into the process from the outset and, if based on a government-led process, should integrate mitigation measures to ensure that the infusion of cash and conferring of power on particular individuals does not jeopardise their support within the community. First, the process used to identify the partners of international actors must be anchored in community processes so that they are recognised by the community to have the necessary authority and legitimacy to take forward the engagement on the community's behalf. Secondly, if international actors support a process that involves giving particular community members control over material or financial resources, it is critical as part of standard monitoring and evaluation mechanisms to be able to detect and take action if these resources are misappropriated.

3.5 Encourage effective cooperation between the state and communities

The debate about linkages between the state and community-based justice mechanisms often focuses on the dangers of co-opting well-functioning community-based mechanisms into state structures that are seen as corrupt and are not highly trusted. This argument suggests that such linkages would 'contaminate' something that is 'pure'. In Afghanistan, this has little bearing on reality because extensive linkages already exist and it is rather the case that more effective cooperation could strengthen both sectors. Community-based justice mechanisms do not operate in isolation from the state. A variety of well-established linkages between community-based justice actors and the state

³⁴ D Smith and J Lamey, Jay, *A Holistic Justice System for Afghanistan*, Afghanistan Research and Evaluation Unit, 2009; D Smith J Lamey, *Community-Based Dispute Resolution in Nangarhar Province*, Afghanistan Research and Evaluation Unit, 2009; Ladbury, above n 10.

³⁵ Ladbury, above n 10. The Government decision to pay elected Community Council members a stipend mirrors the practice for Provincial Councils.

already exist across Afghanistan, including in Helmand.³⁶ Examples of linkages include:

- *Mixed forums*: dispute resolution forums often include both community-based actors and state representatives;
- *Case referrals*: cases are referred from community-based mechanisms to the state, or vice versa. Sometimes weak enforcement stimulates seemingly endless referral loops, where cases travel between the community-based sector and the state for long periods of time;
- *Registration*: community-based actors may register their decisions with the state, for example, with the *amlak* (records office) for land disputes;
- *Huquqs*: these civil rights mediators are part of the Civil Law Offices of the Ministry of Justice but are mandated to mediate in civil rights cases, usually using dispute resolution principles rather than statutory law. They can also refer cases to the court.

Linkages can help increase the ability of community-based justice actors to enforce their decisions. Whereas the role of elders in dispute resolution does not seem to have diminished, the erosion of their standing has had negative implications in this regard. If decisions are not enforced harmony will not be restored, and the legitimacy of the actors making the decision will decline. Exacerbating this challenge is that this is one area where the Taliban seem to out-perform all other service-providers. When community members express support for Taliban justice mechanisms, they overwhelmingly do so because, although harsh, Taliban justice is nearly always effectively enforced.³⁷ Linkages with the state, such as official recognition of decisions in particularly complex or serious cases, can help boost the authority of the elders. We know examples from Helmand where the district governor's backing of a decision by the elders helped ensure it was enforced.³⁸ For the state sector, engagement can be a source of legitimacy and a platform for engaging with communities to build trust. This in turn can help increase confidence in the state and lay the foundations for a functioning state, an essential aim of stabilisation. State actors might also see linkages as a way of reducing caseload. Of course, linkages also offer governments the potential to control and co-opt powerful community leaders. This risks undermining the integrity of community-based processes and is a risk that should be actively mitigated. Some level of state oversight can, however, help safeguard human rights. The *implication for best practice* is that effective cooperation between community-based and state sectors can help increase the legitimacy of both and can have stabilising effects. Understanding why linkages already exist is likely to be central to identifying how they might be enhanced. Reasons might include capacity limitations or political objectives. They might also relate to the pragmatism of disputants. Given a choice, disputants are likely to choose an adjudicator based on how effective they think they will be rather than on their identity, whether a government or judicial official, a community representative or a mixture of both.

³⁶ D Smith and J Lamey, Jay, *A Holistic Justice System for Afghanistan*, Afghanistan Research and Evaluation Unit, 2009; Fearon, above n 25.

³⁷ Ladbury, above n 10.

³⁸ Ladbury above n 10.

3.6 Take local attitudes as the starting point for improving human rights protection

The fact that community-based justice practices do not always respect human rights is sometimes cited as a reason why engaging with them is too risky for international actors. It is easier for international actors to address the excesses of the state because usually governments will have signed up to a human rights protection framework that such engagement can be based on. Conversely, human rights violations are also a reason for precisely why international actors should work with community processes. Whatever the engagement, it can be a platform from which to engage with communities and their leaders alike to improve respect for human rights in community practices. This, however, is a process of cultural change and should be founded on the moral codes and cultural practices of the community in question. It is interesting that community criticism of Taliban practices does not focus on the harsh punishments or the quality of decisions made. Rather, communities are interested in whether the punishment has succeeded in restoring harmony. This does not necessarily mean that they condone *hudud* punishments or other harsh practices, but it does mean that 'restoring harmony' ranks higher in their hierarchy of values.³⁹

Box 1. Afghan attitudes towards the practice of *baad*

The practice of *baad* is where women or girls are given to a victim's family by the perpetrator's family as a means of compensation, usually for serious crimes such as murder. The intention is that, by forming a blood bond between the two families concerned, harmony is restored and reconciliation achieved. *Baad* is primarily a Pashtunwali practice, and Pashtunwali clearly specifies in what cases *baad* should be applied. Many see its use as a violation of Shari'a principles, as well as, of course, human rights.

Despite the clear Pashtunwali guidance on its use, research conducted in Helmand and Nangarhar have found some evidence that the use of *baad* is in decline.⁴⁰ The underlying reasons for this decline are not well-understood and are likely to be complex. It could be linked to Islamic principles gaining ground over tribal codes such as Pashtunwali. It also seems that, where effective alternative solutions can be found, *baad* is less likely to be used, for example, if a family can afford to compensate for "wrongs" with land or livestock instead of women. This suggests a link between increased prosperity and a decline in the use of *baad*.

Research in Helmand also suggests that the decline in *baad* is connected with the predominantly pragmatic approach people take to justice. People criticised *baad* for not being effective in restoring harmony and saw this – rather than women and girl's rights – as the primary reason for why it should be abandoned. Interestingly, not all women took issue with *baad* as an act in itself, and some acknowledged its restorative potential. Rather, they took issue with the negative effects of *baad*. For example, they complained that *baad* girls were often treated badly by other wives, which in turn had an impact on whether *baad* was effective in restoring harmony or not. In other words, it is *when baad does not work (in the sense of restoring harmony) that the community does not support it*.

A multi-pronged and long-term approach is needed to achieve progress on human rights. Changing attitudes and behaviour takes time, and pushing human rights

³⁹ Ladbury, above n 10.

⁴⁰ D Smith and J Lamey, *Community-Based Dispute Resolution in Bamiyan Province, Afghanistan Research and Evaluation Unit, 2009*; D Smith and J Lamey, Jay, *Community-Based Dispute Resolution in Nangarhar Province, Afghanistan Research and Evaluation Unit, 2009*.

too hard can stimulate rather than reduce conflict. Discussing rights with communities and community leaders requires a language that resonates with the community and an approach that situates these rights in the local context, for example, in Islamic or customary practices. To illustrate, the Taliban's application of Shari'a law is not normally rejected because it breaches human rights but because it is seen as *un-Islamic*.⁴¹ Evidence is scarce, but another way to advance human rights protection might be to offer alternative means of settling disputes that are as or more effective in restoring harmony. As already discussed, the ability to enforce decisions has a key role to play and is something donor programmes can help address. There are a number of *implications for best practice*. International actors should seek to improve human rights protection by taking local attitudes and practices as the point of departure. Instead of referring to Western norms or indeed international human rights instruments that are likely to have little resonance with communities, reference should be made to the principles of Shari'a and tribal codes. A nuanced approach should:

- *Show communities how human rights principles can help them solve their problems.* As PRT engagement with PRSs has shown, practice can be a powerful tool in establishing principles. The more cases that are successfully resolved without violating human rights, the more likely it is that such application of principles will be used in future disputes.
- *Engage with religious leaders on human rights.* Although local mullahs often have quite a basic religious education, they do have considerable legitimacy. People have said that their involvement is sometimes more to add legitimacy to the process than to offer advice on Shari'a principles.
- *Use existing community structures as a platform for raising awareness about human rights.* Large gatherings have security risks and might also limit the constituency, for example, in the case of women. Other entry points might include existing *shuras*, health clinics and schools.

3.7 Whilst recognising constraints, harness the potential of women

Access to justice for women is limited in Afghanistan, reflecting their position in Afghan society in general. Both the state and the community-based justice sector apply practices that discriminate against women, but the latter's access to community-based justice mechanisms is better than to the state justice sector, as it is for all citizens. Access to the state justice sector is even more restricted for women due to their movement restrictions, but some also argue that their access to community-based mechanisms is highly compromised by the fact that these are dominated by men. However, UK experience in Helmand shows that, contrary to what many believe, community-based justice mechanisms *can* work for women, while experience from elsewhere suggests that their access to them is better than some believe. There are clear differences in how women and men experience and access justice mechanisms. Women are often involved in community justice as *objects* rather than *participants* and will also have different justice needs to men. Listening to women in Helmand, the lack of access to justice for children is an important issue, with many girls facing forced marriages,

⁴¹ Another illustrative example is the reaction to the proposed Shia family law in 2009, which effectively legalised rape within marriage. Whereas the international community reacted against this law by using one of the various foundations of our moral codes, namely human rights, Afghans claimed it was un-Islamic. Women and men alike demonstrated in front of the National Assembly, and the law was eventually withdrawn and revised. In hindsight, civil society groups suggested that what made the difference were not the public demonstrations or international outrage, but a letter from the Organization of the Islamic Conference (OIC) denouncing the law as un-Islamic. Fearing isolation within the international Islamic community, President Karzai initiated a redrafting of the law.

some through *baad* but many not, and older men having sexual relations with young boys.⁴²

The UK's experience in Helmand has shown that women do sometimes participate in and influence community-based justice mechanisms. In some cases their influence has actually helped produce better justice outcomes for women and children.⁴³ In the less conservative provinces of Bamiyan and Nangarhar, 'white-hairs' (female elders) have been found to participate in community-based justice mechanisms as parties to a dispute and decision-makers.⁴⁴ Even in Helmand, the work of one Community Council has demonstrated that, where women are involved as participants in dispute resolution, access to justice for women and children can increase as a result (see Box 2). Where women do not directly participate in these mechanisms, they can still be influential, through either their husbands or other male family members.

Box 2. Women on the Gereshk Community Council⁴⁵

In Gereshk, five women, mainly professionals such as teachers and lawyers, were elected to the Community Council. Two of these women sit on the Justice Sub-Committee and have proactively sought to address justice issues that affect women. They have successfully acted as intermediaries for women to take their issues into the public domain. Several women said that the ability to speak to other women increases the likelihood of them approaching the JSC with their issues. They helped:

- Persuade a father to stop the marriage of his eighteen-year-old daughter to a drug addict – 'now, she goes to school'⁴⁶
- Negotiate an agreement with a husband to divorce his first wife at her request (not usually socially permissible in Pashtun culture)
- Visit and provide support to female detainees in prison
- Organise women *shuras* to raise awareness of the work of JSC

A combination of different factors made this engagement possible. First, Gereshk is a district capital on the trade route between Iran and Pakistan. The population has therefore long been exposed to external influences and is quite heterogeneous. Secondly, being professionals, these women were educated and had already broken with social patterns. This is likely to have impacted on how they assessed the risks of becoming involved. Thirdly, Gereshk is less conservative and, despite initial resistance, men were more open to accepting women's involvement.⁴⁷

The experience in Gereshk reminds us that increased participation by women depends on two critical factors: the extent to which the women decide to accept the risks of involvement, and the extent to which men are ready to acquiesce in such involvement. The *implication for best practice* is that, whereas international actors need to work with men, it is also possible to work directly with women to

⁴² Interestingly, although homosexuality is an offence in Afghanistan, forcible sexual relations between young boys and older men is not uncommon and is, at least to some degree, a socially accepted practice.

⁴³ D Smith and J Lamey, *Community-Based Dispute Resolution in Bamiyan Province*, Afghanistan Research and Evaluation Unit, 2009.

⁴⁴ D Smith and J Lamey, *Community-Based Dispute Resolution in Bamiyan Province*, Afghanistan Research and Evaluation Unit, 2009; D Smith and J Lamey, *Jay, Community-Based Dispute Resolution in Nangarhar Province*, Afghanistan Research and Evaluation Unit, 2009.

⁴⁵ Fearon, above n 25; Ladbury, above n 10; Fearon, above n 8.

⁴⁶ Fearon, above n 8.

⁴⁷ S Ladbury, *Helmand Justice Mapping Study*, in Association with Co-operation for Peace and Unity and Deborah Smith, Coffey International for the Department for International Development, 2010.

increase access to justice for women and children, but it must be done at their own pace. If the agenda is forced, the risk of retribution is higher, such as being ostracised or even physically punished. International actors must be careful to not encourage participation in public forums that might increase the risk of harm to women, violent or otherwise. Only the women themselves can decide on the risks they are willing to take. Any engagement with men on women's and children's rights should be based on the same risk assessment.

The UK continues to test and discuss these emerging lessons and adapt its approach to both policy and programming. As the Stabilisation Unit's lessons methodology suggests, lesson-learning never ends and lessons should be continuously honed. A discussion follows of how some of these lessons and the realities of people's experience of justice in Helmand were fed into policy.

4. Reflections on Using Practice to Inform Policy

After years of discussion, the Afghan minister of justice set up a working group to develop a policy on the relations between the state and the community-based justice sector in early 2009. Since then, elections have been held and a new minister of justice has been appointed. The new minister has continued the work of his predecessor, but has taken the view that a law based on the draft policy is needed to regulate these relations. Although a draft law now exists, it has yet to be tabled in the National Assembly, possibly reflecting the fact that various stakeholders have recognised the limitations of regulating these issues and relationships by law.

Initially, the working group consisted of many Afghan stakeholders and a few select international representatives in an advisory role. Throughout the process, the importance of consultations with a broad spectrum of Afghan society was highlighted, mainly by the international representatives. Following encouragement from the latter, a few Afghan civil society representatives were also brought on board, but unfortunately consultations with community actors were not extensive. Each of the actors involved came to the working group with their preconceptions about what community-based justice actors were up to, why and whether we should care about them, and – not least – why the government needed a policy about them. Some approached it from an *access to justice angle* – community-based justice actors dispense the vast majority of justice delivery in Afghanistan. In other words, if you have a problem or a dispute with your neighbour, the 'white beards' are the ones you go to. The government needs to have a view on these practices simply because they exist and are widely used, not because they are good or bad. This camp was mistakenly seen by some as somehow *favouring* the community-based justice sector and being soft on human rights abuses. Some – mainly groups representing women – approached it from a *human rights angle*. The 'white beards' way of settling disputes is often cruel to women and girls, and the government must stop this' was a not uncommon intervention. Grounded in well-documented reality, this viewpoint is clearly a credible one. Unfortunately, it also became a reason for refusing to engage with the policy process, and this regrettably somewhat limited the influence women had over it. Then there was what might be termed the legalistic camp, consisting of Afghans and internationals alike, who argued that the constitution gave the statutory justice sector a legal primacy over all cases and a clear exclusivity over criminal cases. Therefore, this group argued that recognising the 'white beards' authority to deal with civil cases and petty crimes required a constitutional amendment. The final camp was not part of the working group but deserves a mention. This is the group that decided that the community-based justice sector was simply *irrelevant to their work with justice* in Afghanistan. With the

increasing focus on community-based justice, this group has declined in size over the past couple of years and another one emerged. Instead, a multitude of actors are now keen to be involved with community-based justice processes, including the international military, but have varying degrees of appetite for and capacity to understand the reality on the ground. In this working group – and beyond – among both national and international representatives a bizarre, almost ideological dichotomy emerged. One was labelled either ‘for’ or ‘against’ the community-based justice sector. What was lost in the conversation was the extent to which people living *real* lives and having *real* problems have access to means of resolving these *peacefully*.

In the 2008 country plan of the Department for International Development, the UK Government made a conscious decision that working with non-state justice actors had value both in terms of access to justice and as a means of helping a struggling government establish itself. The UK’s experiences in Helmand informed its engagement on the working group throughout. Many contentious issues were discussed at length. In some cases the UK’s advice derived directly from its own experiences in Helmand.

- *Regulation versus recognition.* Some members of the working group felt that the objective of the policy was to regulate community-based actors either by criminalising certain aspects of their practice or by making state involvement mandatory in certain processes. The *UK advice* was that over-regulation would not only be unfeasible but also reduce a key strength of community-based processes – their high levels of accountability to the people themselves (Wolesi). As we have seen, in Afghanistan community-based justice mechanisms and the state justice sector operate not in parallel but as part of the same system, and extensive linkages exist. They complement each other, and the contributions of both are needed to meet the justice needs of the Afghan people.
- *Addressing gender injustice.* The justice experiences and needs of men and women, boys and girls, differ enormously in Afghanistan, regardless of whether they seek justice in the state or the community-based justice sector. Therefore, the need to ensure respect for women’s and children’s rights in the policy was rightly a central discussion. This discussion clearly highlighted various prejudices about what these experiences and needs are. Many believed that women simply have no other role than as victims in community-based justice processes. Some felt that these discriminatory practices were a reason to dismiss, exercise extensive state control over community-based justice actors, or even criminalise them. The *UK advice* was that a better approach would be for the policy to enshrine respect for the rights of women, children and other vulnerable groups and promote the increased participation of women in community-based justice mechanisms and the state sector alike.
- *Dealing with petty crimes.* A heated discussion among the policy community in Kabul was about whether or not community-based justice mechanisms should have a mandate to deal with petty criminal offences. Defining what is and what is not a petty crime is not straightforward. In the Afghan penal code, crimes are not defined by the nature of the offence but by the type and duration of potential sanctions and punishments. Of course, communities will rarely know any of these definitions. The *UK advice* was that, subject to safeguards (consent required, right of appeal, no right to impose imprisonment, fines, physical punishments etc.), it is appropriate for communities to deal with petty criminal offences, excluding those where the state is a party to the dispute. Criminalising such dispute

resolution would undermine the legitimacy of the law but also be impractical and unenforceable, as well as limiting communities' access to justice.

- *Dealing with serious criminal offences.* A consensus quickly developed that community-based actors should be encouraged not to deal with serious criminal offences. Sometimes, however, serious criminal offences have civil aspects that can be dealt with through community-based mechanisms – for example, with respect to land disputes. The *UK advice* was that the policy should discourage murder cases from being resolved outside the statutory sector, but that legally criminalising such practices might cause rather than resolve conflict.
- *State sanction of decision and registration.* Particularly with respect to criminal cases, it was argued that the Afghan Constitution bound courts to sanction all such cases, even if they were eventually resolved by community-based actors, and that failure to do so would render any decisions made by such processes void.⁴⁸ The *UK advice* was that this would be impracticable and inundate the state sector with administrative functions that it would not have the capacity to assume, with potentially destabilising consequences. The UK interpreted the constitutional provision as binding the courts but not barring the actions of community members, meaning that the onus is on the state to reach out, not vice versa. To reverse the obligation would impact negatively on central attributes of community-led processes, their timeliness and effectiveness. If community-based decisions were to be registered with a state authority, the adopted process would need take into account the practical limitations and, when undertaken, i) take place once a resolution has been negotiated, ii) be the voluntary decision of the parties, and iii) be a speedy and a bribe-free process.⁴⁹
- *Right of appeal.* The problem of referrals going back and forth between the two sectors means that cases remain unresolved, compromising access to justice. Some members of the working group argued for the primacy of the state sector in all cases. Instead, the *UK advice* was that for petty offences or civil disputes such primacy was impracticable, apart from in cases where the state is a party to the case. In all other cases, the parties should retain a right to refuse participation in community-based justice processes, as well as a right to seek justice through statutory means. With respect to civil cases, the UK argued that the state should uphold decisions made on civil cases by the community-based actors unless there was evidence of duress, coercion or fraud.

To conclude, it is not clear where the Afghan government is now taking the law-drafting process and indeed its eventual implementation. In the latter part of 2010, the working group started to meet again to take forward the first draft, but as already mentioned no law has as yet been tabled in the National Assembly. The UK will continue to learn more about how, as an international actor, it can best support improved access to justice in Afghanistan and will continue to ensure that experiences on the ground feed into UK policy and then back into practice. One thing is clear, however: international actors are not and never will be best placed to judge the appropriateness of their approaches to community-based

⁴⁸ Article 122 of the 2004 Afghan Constitution states that 'No Law shall, under any circumstances, exclude any case from the jurisdiction of the judicial organ as defined in this chapter and submit it to another authority'. Other constitutional provisions, such as articles 120 and 134, are also relevant to this discussion.

⁴⁹ Ladbury, above n 10.

justice mechanisms. These approaches should always be grounded in an understanding of how these mechanisms work and how international engagement with them might affect communities and local power dynamics. Grounding solutions in local realities is the key to success.