موسسه حمیده برمکی برای حاکمیت قانون

HAMIDA BARMAKI ORGANIZATION FOR THE RULE OF LAW

HBORL Working Paper No. 2015/03

Editors: Dr. Tilmann J. Röder & Sayed Hameed Zia

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Hybrid Forms of Dispute Resolution and Access to Justice in Afghanistan: Conceptual Challenges, Opportunities and Concerns

Abstract

While the growing interest in informal justice is an important step in understanding the various forms of access to justice in Afghanistan and elsewhere, the conceptual dichotomy between formal and informal justice misinterprets the actual hybrid nature of accessing justice that most Afghans experience currently. Hybridity in access to justice, as opposed to duality, appears on all levels of the justice system from the Constitution to the resolution of local land disputes. This hybridity helps many gain access to justice since it makes up for an underdeveloped formal system while offering a system that is both faster and more flexible than a purely state system. The flexible nature of the system, however, also raises important concerns about issues such as "forum shopping" – i.e. the phenomenon of parties of a dispute selecting differing conflict resolution mechanism thought most likely to produce a favorable result – and the protection of individual rights. Both academics and policy makers could help improve access to justice across the population by rethinking the frames that they use to think about how disputes are being resolved and justice issues are being addressed.

Noah Coburn*

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I. Rethinking Justice in Afghanistan

A decade of both research and programming on access to justice and dispute resolution in Afghanistan has had uneven results. Despite billions in aid for the state judicial system and supporting programs, Afghans consistently complain of corruption, long delays, and a lack of capacity within formal judicial institutions.[1] At the same time, a growing interest in dispute resolution taking place outside of the state suggests that there are alternative paths for justice, pathways which are often faster and more effective than reliance on the formal system. At the same time, however, these mechanisms face some similar challenges as the formal system, particularly when it comes to protecting

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[1] See Liana S. Wyler and Kenneth Katzman, *Afghanistan: U.S. Rule of Law and Justice Sector Assistance* (United States Congressional Research Service R41484, Washington DC 2010), stating that in 2010 the budget of the United States Department of State's Bureau of International Narcotics and Law Enforcement, only part of American funding for justice programs, was $328 million USD. For more on the Afghan perceptions of the judicial system, see *Afghanistan in 2011: A Survey of the Afghan People*, (The Asia Foundation, Kabul 2011), and *Afghan Perceptions and Experiences of Corruption: A National Survey*, (Integrity Watch Afghanistan, Kabul 2010).

individual rights. This shift in thinking, however, has yet to produce widespread improvements in how Afghans are accessing justice.

This paper suggests, however, that conceiving of these systems as dichotomous misses some of the key mechanisms that Afghans are actually using to access justice currently and actually reinforces some of the problems that many Afghans face in accessing justice. Instead, we need to rethink the ways that we are thinking about justice both from an academic and a policy standpoint. By emphasizing the hybridity of the current culture surrounding justice, a clearer picture arises of both the system's strengths and weaknesses, allowing for both better assessment and support going forward.

II. A Dual Justice System?

While much of the initial emphasis of international donors following the American-led invasion of Afghanistan was on restoring formal justice institutions, over the past several years, international donors, Afghan policy makers, and local advocacy groups have increasingly stressed the importance of the so-called "informal" justice system in Afghanistan.[2] Much of this rethinking of donor approaches was generated by a 2007 report by The Center for Policy and Human Development at Kabul University that suggested that 80% of all disputes were being addressed in the informal sector.[3] This report and several follow ups correctly pointed out that by gearing all international aid to the formal system, donors missed out on building on connections with non-state local actors, who had actually been doing much of the dispute resolution in Afghanistan. These connections had grown out of a history of local, autonomous decision making in

[2] For a more complete review of international approaches to the informal justice system in Afghanistan see Noah Coburn, *Informal Justice and the International Community in Afghanistan*, (USIP Peace Works, Washington 2013) (Coburn 2013a). For an assessment of early aid to the Afghan judicial system see Astrid Suhrke, *When Less is More: The International Project in Afghanistan*, (Columbia University Press, New York 2012), and *Rule of Law in Afghanistan: Conference Report*, (American Institute for Afghanistan Studies, 2011). This paper draws on many of the ideas from those papers as well as *The Politics of Dispute Resolution and Continued Instability in Afghanistan*, (USIP Special Report, Washington DC 2011) (Coburn August 2011).

[3] See *Afghanistan Human Development Report 2007: Bridging Modernity and Tradition – The Rule of Law and the Search for Justice*. (The Center for Policy and Human Development; Kabul University, Kabul 2007). This is coincident with, and coincided with, the publication of a series of studies that questioned the effectiveness of donor funds in supporting formal judicial mechanisms (see, for example, Stephen Carter and Kate Clark, *"Snakes and Scorpions": Justice and Stability in Afghanistan*, (Office of the High Commissioner for Human Rights, Kabul 2010)), as well as an increased interest in both academic and policy circles in the importance of informal actors in dispute resolution and rule of law. For a series of examples of projects from a broad range of geographic case studies, see Deborah Isser (ed), *Customary Justice and the Rule of Law in War-torn Societies*, (USIP, Washington DC 2011).

communities, but became increasingly important particularly during periods such as the Civil War when the Afghan state was at its weakest and communities were forced to rely on internal dispute resolution mechanisms.

Partially as a result of decades of turbulence in national politics, on a local level, Afghanistan has a rich history of dispute resolution that either happens independent of or in conjunction with state actors.[4] These take several forms, but most common are gathering or councils of elders called *shura*s or the more ad hoc gatherings typically in Pashto areas referred to as *jirga*s where disputants, often times represented by or including members of their extended families, enter in either binding or quasi-binding consultation.[5] This is a simplified definition that does not take into account the vast variety of local nuances and ways in which this political negotiation takes place. While several useful studies have attempted to classify and define the various types of dispute resolution mechanisms,[6] such attempts at classification ignore the extremely similar nature of these mechanisms, such as their focus on community harmony rather than retribution.[7] This flexibility, which makes definitions so difficult, also makes these methods effective as they adapt to changing local political conditions.[8] The irony, however, was that while this adaptive nature made the mechanisms increasingly appealing to international donors, donors also had the overwhelming tendency to attempt to bureaucratize and define these mechanisms to better build programs to support them.

The debate over how best to support access to justice in Afghanistan coincided with the shift by ISAF and American military forces towards a counterinsurgency approach and a de-emphasis of some of the state-building projects that had been part of the early years of the intervention. This shift saw the provision of justice locally as an important means for 'winning hearts and minds'. It was increasingly believed by international officials that the failure of the Afghan government to provide services or transparent, non-corrupt

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[4] For a historical overview of these relations, see Amin Tarzi, *The Judicial State: Evolution and Centralization of the Courts in Afghanistan*, (Doctoral Thesis, New York University 2003), and Amin Tarzi, *Historical Relations between State and Non-State Judicial Sectors in Afghanistan* (USIP, Washington DC 2006).

[5] For more on the term *jirga* see Ali Wardak, 'Jirga: Power and Traditional Conflict Resolution in Afghanistan', in John Strason (ed), *Law After Ground Zero* (Routledge-Cavendish, New York 2002). A useful introduction to local political mechanisms can also be found in Louis Dupree, *Afghanistan*, (Princeton University Press, Princeton 1980).

[6] See for example *The Customary Laws of Afghanistan* (The International Legal Foundation, 2004), < http://theilf.org/wp-content/uploads/2011/08/reports-ilfa-customary-laws.pdf> (ILF 2004).

[7] Ali Wardak, 'Structures of Authority and Local Dispute Settlement in Afghanistan', in *Conflicts and Conflict Resolution in Middle Eastern Societies: Between Tradition and Modernity* (Duncker and Humblot, Berlin 2006).

[8] For a more thorough discussion of these concepts see Coburn 2013a (n 2).

governance structures outside of urban areas was driving many communities into the arms of the insurgents. The counterinsurgency paradigm suggested that it was often more effective to engage local elders who were a part of the informal system in order encourage dispute resolution, as opposed to supporting formal judicial institutions as a more state-building oriented approach would demand.

This helped spur a debate over the legal status of the informal system, resulting in a policy-making process facilitated by the Ministry of Justice, involving numerous Afghan government bodies, international organizations, such as the UN, Afghan civil society groups, and international donors.[9] The draft policy recognized the importance of the informal justice system while raising serious questions about the lack of state oversight and the dangers of human rights abuses in such an extra-judicial system.[10] While this policy ultimately did not produce any new legislation, it reflected several key points in how both international donors and the Afghan government have increasingly come to view dispute resolution and access to justice for ordinary Afghans as a question of working within this dually conceived system.[11]

This shift in thinking about justice in Afghanistan tended to conceptualize justice generally, and dispute resolutions more specifically as divided conceptually into two pieces. The Ministry of Justice policy on informal justice, for example, stated that: "informal dispute resolution *outside* of the formal, state justice system is time-honored in local communities" and that "linking the formal and informal systems in constructive, systematic ways" could help improve access to justice. [12] This paradigm conceived of two separate systems, at times engaging each other, but fundamentally separate. The terms used, such as "informal" as opposed to "formal" justice or "non-state" as opposed to

[9] The debate over the relationship between the state and communities within the Afghan legal system has numerous historical precedents. In particular, see Vartan Gregorian, *The Emergence of Modern Afghanistan: Politics of Reform and Modernization, 1880-1946* (Stanford University Press, Palo Alto 1969), and Mohammad Hashim Kamali, *Law in Afghanistan: A Study of the Constitution, Matrimonial Law and the Judiciary* (Brill, Leiden 1985).

[10] See *Draft National Policy on Relations between the Formal Justice System and Dispute Resolution Councils* (The Ministry of Justice, Kabul 2009) (Ministry of Justice 2009).

[11] While there was unanimous support for an acknowledgment of the informal system, there were wide divides on whether this acknowledgment was intended as a means of regulating the informal system or empowering it to resolve more dispute more openly. This Ministry of Justice initiative, of which the author was a part of, is described further in Coburn 2013a (n 2).

[12] See Ministry of Justice 2009 (n 10).

"state" justice, further emphasized this divide. This was further highlighted in analysis pieces with titles such as 'The Clash of Two Goods'.[13]

This conceptual divide was not just a question of language and had genuine policy implications. For instance, USAID responded to this paradigm by dividing their justice support initiatives into two pieces. Before the drastic raise in American troops in 2010, there had been one primary contract from the US government awarded for justice support. After 2010, this contract was divided into two, and separate contracts were then signed for international contractors working to support formal judicial institutions, and a contract supporting informal mechanisms went to a different contractor.[14] While USAID attempted to coordinate these projects, there was minimal communication or real coordination between them.

Similarly, NATO, American, and British troops embraced this new "informal" approach.[15] For example, they began to use militarily sponsored *shura*s to determine, for example, whether detainees should be released.[16] Such practices occurred before 2010 as well, but were usually not discussed at senior levels. Once the shift in strategy occurred, however, a presenter from a small forward base in the south was brought to a NATO conference to brief other groups on how such approaches could be better integrated into current programs.[17] In each of these cases, the new focus on the "informal" justice system changed the ways in which the international community was interacting with the Afghan state and with local communities through both financial support for these mechanisms, as well as simply increased engagement. While there are questions about how deeply this impacted ways in which ordinary Afghans thought about justice in Afghanistan, it significantly reshaped how justice mechanisms were being supported by the Afghan government and international donors.

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[13] Thomas Barfield, Neamat Nojumi and J. Alexander Thier, 'The Clash of Two Goods: State and Non-State Dispute Resolution in Afghanistan', in Deborah Isser (ed), *Customary Justice and Rule of Law in War-torn Societies* (USIP, Washington DC 2011).

[14] For more on this shift in funding, see Dion Nissenbaum, 'Program to Modernize Afghan Justice System Yields Little So Far' *McClatchy DC* (Washington DC, 12 January 2011), < http://www.mcclatchydc.com/2011/01/12/106695/program-to-modernize-afghan-justice.html>.

[15] While some other NATO countries were hesitant to work closely with non-state actors, the British military in the highly unstable province of Helmand, was one of the first to actively work with these mechanisms. See for example Fraser Hirst, *Justice Sector Support in Helmand*, (PRT Assessment, Integrity Watch Afghanistan, Helmand 2008).

[16] See for example Ann Marlowe, 'Shura to Fail?' *The New Republic* (13 May 2010), < http://www.newrepublic.com/article/politics/shura-fail>, and Noah Coburn and Shamahmood Miakhel, .and Coburn and Miakhel September 2010. Coburn, Noah and Shamahmood Miakhel, 'Many Shuras Do Not a Government Make: International Community Engagement with Local Councils in Afghanistan', *Peace Brief 50* (USIP, Washington DC 2010).

[17] Based on an interview with the author.

Despite this new interest, on the ground research on dispute resolution in Afghanistan raises some questions about the accuracy of conceptualizing access to justice in this manner.[18] First of all, there are issues with the terms being employed. What is often times referred to as "informal" justice, is, in many instances, actually highly formalized. Tribal laws, particularly among the Pashtuns, often times referred to as Pashtunwali, have strict rules about compensation and punishments based upon the context of the dispute.[19] Similarly, many of the decisions made in *shura* and *jirga* meetings, even in rural areas with low literacy rates, are recorded on written contracts that share many elements and, occasionally, seem to mimic court documents. Furthermore, the implications attached to terms such as "tribal codes" and "informal mechanisms" implies that these processes are static, centuries old traditions, when in fact they are dynamic relationships that have continued to be reshaped based upon Afghanistan's changing political and economic conditions.

Another issue with the term "informal" is the implication that the state judiciary is in fact "formal". Interviews of Afghans using the government court system, particularly the primary courts, often mention corruption and the importance of individual connections and networks.[20] This raises questions about whether most Afghans actually experience the judicial system as "formalized". Instead, most described winning a case in the court system as a question of personal connections and the ability to bribe key figures in a timely manner. Who the winner of the case was, it was said, had less to do with the facts of the case than who the two sides were and what political connections they had.

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[18] Research for this paper was conducted from 2009-2014 with support from the United States Institute of Peace and Bennington College. Much of the data here comes from a set of pilot projects set up by USIP and a series of implementing partners to test means of linking the formal and informal forms of dispute resolution in thirteen provinces across Afghanistan. It also draws on studies conducted by the Afghanistan Research and Evaluation Unit (AREU) found in Rebecca Gang, *Community Based Dispute Resolution Processes in Balkh Province* (AREU, Kabul 2010); Rebecca Gang, *Community Based Dispute Resolution Processes in Kabul City* (AREU, Kabul 2011); Deborah Smith, *Community Based Dispute Resolution Processes in Nangarhar Province* (AREU, Kabul 2009); and Deborah Smith and Shelly Manalan, *Community Based Dispute Resolution Processes in Bamiyan Province* (AREU, Kabul 2009). Other useful on-the-ground studies include *Linkages between State and Non-State Justice Systems in Eastern Afghanistan: Evidence from Jalalabad, Nangarhar and Ahmad Aba, Paktia* (The Liaison Office (TLO), Kabul 2009) (TLO 2009); *Formal and Informal Justice in Helmand and Uruzgan*; *Formal and Informal Justice in Helmand and Uruzgan* (TLO Working Paper, Kabul 2011) (TLO 2011); Sarah Ladbury, 'Helmand Justice Mapping Study', in *Final Report for the Department of International Development Afghanistan* (Coffey International Development Ltd., 2010).

[19] See for example Lutz Rzehak, *Doing Pashto: Pashtunwali as the Ideal of Honorable Behavior and Tribal Life among the Pashtuns* (Afghanistan Analysts Network, Kabul 2011); or ILF 2004 (n 6), which overly states the stasis of these codes, but provides some useful examples.

[20] See for example Zuhal Nesari and Karima Tawfik, 'The Kabul Courts and Conciliators: Mediating Cases in Urban Afghanistan', in *Peace Brief 101* (USIP, Washington DC 2011).

There are similar issues with calling these actors and the dispute resolution process, the "non-state justice system". This is related to broader questions about defining state and non-state actors in Afghanistan. In reality, most governmental officials in Afghanistan have significant political capital that comes from personality as opposed to position. This includes the reputations of these leaders, their patronage networks, tribal ties, history of connections with various militias, or other sources of power that are independent of the positions that they actually hold. The strongest governors, such as Mohammad Atta Noor in Balkh and Gul Agha Sherzai in Nangarhar, are not simply provincial governors, but are former commanders, tribal elders, or men of similar repute.[21] Moreover, often times these men will hold government positions, but will also sit in on tribal council meetings where in those moments they would appear to be simultaneously considered "state" and "non-state" actors.

On the other end of the spectrum, there are very few "non-state" actors who do not have some connections with the state. Instead, the state is constantly a potential source of resources or, conversely, a potential threat to their authority. This means leaders in all parts of the country cultivate careful relations with the state and officials to help maintain their own influence locally.[22] In many cases these men are referred to as *pul*s or bridges between the people and the government, defined not by either category, but by their ability to move between the two. The result of these complex relationships is that local leaders are constantly positioning and re-positioning themselves vis-à-vis the state; they are never independent of it. What this means locally is that when a district *shura* meeting includes the district governor, the chief of police, and a series of local elders, it is neither a "state," nor a "non-state" institution, and instead analysis of these bodies should focus on their hybridity and how Afghans in these communities then come to conceive of their options when accessing justice.

Despite these clear issues, however, policy towards how Afghans gain access to justice by both the Afghan government and international donors ignores many of these nuances. The concern, however, is not simply with terminology, but also about the implications of this simplification. This dichotomous approach to conceptualizing and programming around justice in Afghanistan imagines a clear divide between the Afghan state on one

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[21] For a recent ethnographic examples of these complex relations, see Antonio Giustozzi, *Empires of Mud: Wars and Warlords in Afghanistan* (Columbia University Press, New York 2009); and Dipali Mukhopadhyay, *Warlords, Strongmen Governors, and the State in Afghanistan* (Columbia University Press, New York 2014).

[22] This has long been true even in some of the most remote corners of Afghanistan. For an account of the role of the government in creating authority for the Kyrgyz *khan* living in the Wakhan Corridor see M. Nazif Shahrani, 'The Kirghiz Khans: Styles and Substance of Traditional Local Leadership in Central Asia' (1986) 5 Central Asian Survey Issue 3-4, 255.

side and society on the other, and clearly reflects the Western assumptions about bureaucratization and the state that many of these international donors bring into their analysis.[23] Such an idealized approach ignores the important ways in which politics on a local level in most of Afghanistan is a near continuous dialogue and debate between a series of power brokers and elders, none of whom are purely "state actors", and none of whom exist completely independently of the state.

To respond to this issue methodologically, it is important when measuring and assessing access to justice that researchers not simply sit at courthouses and count the number of cases that come in, or even sit on local councils in an attempt to quantify the "informal" system. Instead, a more conceptually sound approach would track the disputes themselves. Such an approach reveals the way that many cases move through a series of venues and include a multitude of actors. This complex movement actually tells us much more about justice in Afghanistan than approaches that attempt to reify either the so-called formal or informal systems. This complex local political landscape suggests that Afghans are actually accessing justice and resolving disputes using a variety of forums, which are more notable for their hybridity than anything else.

III. Layers of Hybridity

Research that tracks how disputes are addressed locally and nationally in Afghanistan reveals some important lessons about the issues with how Afghans access justice today. In contrast with approaches to dispute resolution and justice that emphasize the binary opposition between the government and an idealized version of society, there is a multiplicity of forms of justice in Afghanistan that exist on various layers simultaneously. The Afghan state's formal legal code actually acknowledges this hybridity on several levels and, in some cases, attempts to codify and regulate the diverse venues where disputes are resolved. For example, both the constitutions of 1964 and 2004 attempted on a certain level to codify informal practices such as *loya jirga*s, or grand councils, that have been used regularly through Afghanistan's history to ratify national changes to government structures. Despite their unclear legal status, since 2004, *loya jirga*s have continued to be used on a primarily ad hoc basis, such as the 2010 *jirga* called by President Karzai to discuss peace negotiations with the Taliban and the 2013 *jirga*

[23] It is also worth noting that Afghan government officials have a clear incentive when describing this system to also misrepresent it as dichotomous, since this makes it more likely that donor funds will continue to move through government officials, as opposed to being used on community level projects that would not give officials the same opportunity to take advantage of these funds either legitimately or through corruption.

addressing the status of international forces in the country.[24] These meetings, of questionable constitutional status, have a formal legal veneer to them, but are largely informally constructed.

In reality, these competing systems have often led to problematic legal contradictions. Similarly, the Constitution of 2004 simultaneously acknowledges sharia, or Islamic law, international human rights standards, and 'customary' law. There is no clarifying clauses of what to do in cases when these systems contradict each other.[25] In reality, it is left for judges, local officials, and local leaders to interpret some of these ambiguities in the manner that they feel best suits the case. In interviews, officials discussed the very different ways in which they chose personally to navigate some of the challenges presented by these multiple systems. As will be discussed further below, this can lead both to certain opportunities, but also challenges for how Afghans access justice.[26]

Research in several provinces suggests this legal ambiguity, combined with the weak presence of the state outside of urban centers has resulted in Afghan communities attempting to resolve disputes in the quickest way possible, using a variety of sources, that demonstrate the hybrid way that most Afghans currently think about justice. In many cases, a dispute can also move from venue to venue, sometimes involving new actors and, at other times, using the same actors in a different setting.

For example, in one case analyzed in depth elsewhere,[27] two brothers with a dispute over land that they had inherited from their father brought the case to their district's primary court. The court investigated initially, but felt that they did not have enough knowledge about land in the area, so it referred the case to the district council, a quasi-formal council of local elders, the district governor, and a few other officials.[28] Instead of reviewing the case, in part because they were busy with other issues, the district council actually referred the case to another, smaller, village council composed entirely of local elders,

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[24] Thomas Barfield argues that *jirga*s throughout Afghan history were largely performances that legitimized government decisions that had been previously negotiated between elite actors. See Thomas Barfield, *Afghanistan: A Cultural and Political History* (Princeton University Press, Princeton 2010), ch 5.

[25] For more on some of these contradictions and ambiguities see 'Reforming Afghanistan's Broken Judiciary', in *Asia Report 195* (International Crisis Group (ICG), Brussels 2010).

[26] For example, there are several areas where Pashtunwali and sharia law directly contradict each other, as in the case of females' share of a family inheritance. In cases where Pashtunwali and sharia agree, decisions are something publicly declared by religious locals to be according to sharia law. In more than one case recorded during this research, however, when the resolution of the dispute did not adhere to sharia law, this conflict was simply ignored.

[27] See Coburn August 2011 (n 2). This dispute took place in a large town in a rural area in the center of the country.

[28] Further complicating the matter, the Constitution of Afghanistan establishes district level councils, but there have not been elections for these bodies yet, making the status of those that exist questionable.

some of whom were also on the district council. This village council eventually resolved the issue, but then referred their decision back to the primary court which formally registered the ruling.

While the decision was ultimately made by local elders in a village council, to say that this case was resolved in the "informal system" misses the importance of the court's ratification of the decision, as well as the fact that the case was discussed on multiple occasions in different venues by various overlapping actors. More importantly, to think of either the court or the village council as actually resolving the case and the resolution happening at some precise moment is a mistake. This case demonstrates that the resolution happened in a large part because of the process itself. If the court had not looked at the case first, the councils might not have felt able to deal with it; similarly, by referring the case to the village council, the district council was simultaneously giving authority to the smaller council and allowing it to make its decision. Had the young men begun by bringing the case just to the village council or, on the other hand, demanded that it be resolved within the primary court alone, it is unlikely that this would have been successful.

In other cases it is not just state officials bringing in informal actors, but local leaders will also bring in state officials at strategic moments during dispute resolution. In one case, studied in Paktya, two young men got into a physical altercation over water usage from a shared irrigation channel.[29] Concerned that this feud would escalate, local elders brought in the district governor and asked him to arrest all those involved. The elders then met to discuss the case. With most of the young men involved detained, they were assured that violence was not imminent, which gave them an opportunity to make progress in the mediation between the two families involved, which they did. Once both families agreed to a resolution, the elders were assured that family pressure would prevent either of the young men from renewing the feud. The elders then had the governor release the men from prison. In cases like this one, accessing justice is not about bringing a dispute to a discrete forum to have it resolved, but is instead a hybridized process drawing on multiple actors and sources of authority simultaneously.

Even in areas where the state judiciary is most developed, there are multiple instances of the ways in which the court system draws on legitimacy from sources outside of the narrow legal definitions that created the institutions. For example, in one study of the Kabul primary courts, over the course of a four month period almost half of all civil cases and one third of all criminal cases involved the participation of some sort of informal reconciler or a *jirga* meeting between various family members involved in the case.[30] In

[29] This account is based upon interviews conducted by the author in Paktya.
[30] Nesari and Tawfik 2011 (n 20).

many of these cases, informal mediators were used by the court to resolve aspects of whatever the issue under discussion was. Once resolved to the satisfaction of both parties, the decision would be ratified by the court, which had little to do with the actual details of the settlement. This was common in cases related to family law, but was also employed to resolve the civil aspect of criminal cases before the trial. Thus, reconcilers would determine the restitution that parties were required to pay before the criminal charges were even discussed. Following this, the judge would then take this resolution into account when considering the criminal aspect of the case, even while the legality of these types of processes is unclear. In a separate study, 150 out of 377 civil disputes registered in the Jalalabad court system were ultimately resolved by informal gatherings of elders, suggesting the widespread nature of this practice.[31]

In other areas of access to justice, particularly during the international community's reorientation towards counterinsurgency tactics, the question of Taliban justice was framed in opposition to more legitimate state justice or even local variations of informal justice in more stable parts of the country.[32] The concept of Taliban justice, however, also relies on false dichotomies. In less secure parts of the country there are reports of the Taliban providing dispute resolution in some cases by relying on 'motorcycle *mullah*s' who ride around dispensing justice using the Taliban's conservative interpretation of Islamic law. Such cases, however, are also not clearly divided conceptually with the Taliban on one side and local, informal councils on the other. In fact, there are reports in several instances that the Taliban did not actually resolve disputes themselves, but empowered certain local elders to make decisions, which Taliban militia then enforced. In a case like this "Taliban" justice looks more like "informal" justice in more stable areas, simply with the backing of the Taliban, as opposed to the Afghan state. In some of the most extreme cases, there have even been incidents of Taliban members assisting in the resolution of a dispute and then encouraging the parties in the dispute to take their resolution to the local land office to have the resolution registered.[33] In cases like these, it is not a simple question of competing systems, but systems that are intertwined and interactive, not discrete.

What all these cases have in common is the fact that for Afghans, living in such a complex political landscape, there is no simple divide between formal and informal (or even Taliban) justice. Instead, attempts to access justice rely on an understanding of the local political landscape and the position of the various leaders in the area. Those

[31] TLO 2009 (n 18), 9. The fact that this study was done of the court registry suggests that if anything the number was actually higher since judges and clerks tend to underplay the role of local leaders.
[32] The impact of "Taliban justice" is under-researched, but for some useful discussions of the concept, see Ladbury 2010 (n 18), AIAS 2011 (n 2), and TLO 2011 (n 18).
[33] Ladbury 2010 (n 18), 9.

involved in the dispute will then attempt to use this variety of approaches to actually seek justice. This presents those attempting to reform the system and improve access to justice with several opportunities and challenges.

IV. How Hybridity Helps

As several of the cases above suggest, the current hybrid approaches to justice that most Afghans rely upon has several benefits that make up for some of the challenges of trying to access justice while confronted with a weak state. The Afghan state's low capacity in terms of judges and courts, but perhaps also more importantly, the lack of capacity in land registry offices and other places that deal directly with local concerns, leaves a significant void in resolving many of the low level disputes that are most disruptive to local economic and social life. Often the state has neither the capacity, nor the position to deal with these issues. Instead, local elders often have a deep and much more complete understanding of who owns land in the area and, as seen above, it is often easiest for the state to simply refer cases to these elders who are sometimes far more qualified to resolve the issue. At the same time, if there is an office of the Ministry of Justice ("*hoqooq*") in the area, disputants may try and take advantage of the formality of the registration process.

By taking advantage of these various venues that are available, actors can also adjust to local political conditions more quickly. In several districts visited during research, local leaders made it clear that they were happy that there was no courthouse in the district itself, but felt that it was important that one existed within a few hours' drive in the provincial capital. This enabled them to resolve small level land issues and other disputes locally, while still having the option of bringing more serious matters to the provincial court. As one elder explained, it was good that they did not have a prison in the district, because this meant that for serious cases that required detention, they would involve the state, whereas for other cases, they were generally able to rely on local leaders.

Perhaps most importantly, conceptualizing access to justice through a more hybrid system builds on the cultural and political aspects of local Afghan life that already regulate life in Afghan provinces. Concepts such as *islah* or reconciliation, the fear of *fitna* or social disorder, and the practice of holding *shuras* or councils are embedded in both sharia law, local cultural value systems, and in various places in the Afghan legal code. These values were referred to in interviews by both local disputants and government officials far more frequently than actual state laws. While resolving disputes or discussing justice issues, these concepts are often referenced and provide significant pressure on those involved to resolve their disputes in a peaceful manner.

In addition to this, leadership in Afghanistan has historically been far more accountable to communities than in some other Middle Eastern countries. Locally, positions such as *malik*s, *khan* and other local titles are generally inherited patrilineally. However, in most instances, if a son does not live up to his father's reputation and is not considered by the community to be wise or just enough, he can be replaced. While clearly not an ideal quasi-democratic system, there are still elements deeply engrained in Afghan culture that could be used to help promote justice more locally.[34] By focusing instead on simply the formal system, or even by focusing on the informal system and separating these leaders conceptually from the state, a key opportunity to help Afghanistan's local justice mechanisms develop has been lost.

For many local communities hybridity provided the flexibility needed during several decades of turmoil to adapt to shifting political and economic conditions, and general instability. Instead of institutionalizing a certain method of implementing justice, the flexible nature of these systems has become a part of the local political culture. This flexibility, while providing useful opportunities, also raises some important concerns.

V. Forum Shopping and other Concerns

This hybrid system should not be overly idealized. The current failings of the formal judicial system means that dispute resolution processes are often corrupted regardless of whether these are happening inside or outside the state system, rights are not protected rigorously enough, and justice is unevenly applied. All of these concerns are also applicable to the state court system as well, however, there are several key concerns that hybridity raises in and of itself.

Such a hybrid system presents certain structural concerns in part because of the inherent flexibility of the system. The existence of multiple systems and pathways to justice creates a double edged sword. On one hand, in areas where there are multiple venues for dispute resolution, competition between local actors can actually improve accountability. Local elders, hoping to enhance their reputations, will be more likely to attempt to address disputes in a way that reflects the values of the community and in a timely manner. This competition, however, can also inhibit dispute resolution.

On the other hand, flexibility means that disputants may bring their cases to the forum that they feel will be most likely to resolve the case in their favor. If the two sides in the case feel that they are likely to benefit from different personal connections, this can lead

[34] For more on this see Noah Coburn and Anna Larson, *Derailing Democracy in Afghanistan: Elections in an Unstable Political Landscape* (Columbia University Press, New York 2014), ch 5.

to forum shopping, which can escalate tension instead of resolving it. Imagine for example a case of a dispute where one side has connections to the district governor and another side has connections to a local elder, and each tries to use their respective relationship to their advantage. This can then lead to a competition of authority between the district governor and the elder, not just between the disputants. Of the districts where research was conducted, this tendency was particularly pronounced in Nangarhar, where police and local elders had an adversarial relationship, and disputants would attempt to take advantage of this tension.[35] This could lead to essentially competing resolutions to a dispute and involve an increasing number of people in the process. Perhaps unsurprisingly, Sarah Ladbury reported a similar tendency to forum shop in Helmand where the Taliban, Afghan national government officials, and local elders were all vying for authority simultaneously.[36]

In addition to this potential competition, flexible, hybrid systems are also more difficult to observe and monitor. This can mean, in the case of the Taliban justice system, that there are real concerns about the protection of human rights in such a hybrid system. Other local mechanisms can also be difficult to monitor for human rights abuses. It is notable, for instance, that many human rights groups are concerned with *baad* or the exchange of women in marriage to resolve a dispute, and yet none of these groups has been able to systematically gather data on how often these exchanges occur. Such practices, which local leaders are aware are technically prohibited by the Afghan state, are particularly likely to be difficult to monitor.

In other cases, local elders may actually have concerns about whether the authority of their own rulings will be respected. As a result, in a surprising number of cases, disputes resolved outside of the state system will still be brought to either a court or a district office to be informally registered. While these are often outside the strict letter of the legal code, many feel that processes like this, once registered, are more legitimate and more likely to be enforced.

Similarly, if relying on local elders to make decisions about issues such as land disputes, local biases against certain groups, particularly against minorities, can greatly undermine the ability to access justice. In dispute resolution venues that are deeply intertwined with local political structures, the biases of those structures will shape the outcome of the cases, with the strongest often benefiting the most. In many situations where local elders are more concerned about local stability than the protection of individual rights, this may mean making decisions that emphasize group rights over individual rights. Of course it is also clear that the current state system is not doing enough to protect the rights of local

[35] Coburn 2013a (n 2), 28-29.
[36] Ladbury 2010 (n 18), 13.

minorities, particularly in lower level primary cases, so this is another place where a hybrid system is not necessarily displaying any limitations to the access of justice that we do not observe in the state system as well.

The current state-centric approach to justice by the Afghan government and international donors does not address these issues as much as they simply ignore them. Ignoring the hybridity of the system actually exacerbates many of these issues instead of addressing them. Policy and programming that takes the realities of this hybrid system are necessary if one wishes to actually improve access to justice across the country.

VI. Looking at Access to Justice Moving Forward in Afghanistan

As all of the above suggests, access to justice in Afghanistan is already occurring in a hybrid manner. Conceptualizing justice, however, as single (state only), dual (formal v informal), or even triadic (formal v informal v Taliban), misses a key opportunity to both build on aspects of the system that are currently working well, while attempting to regulate those aspects of the system that are problematic. There is a need among both international donors and Afghan officials to take a more nuanced look at how justice is currently being accessed in the country and ask if there are ways in which to accentuate the beneficial aspects of the current system while limiting the harm that is being done.

As Stromseth, Wippmann, and Brooks point out in their volume on rule of law after military interventions, "The rule of law is as much a culture as a set of institutions, as much a matter of the habits, commitments, and beliefs of ordinary people as of legal codes (2006, 310)". A more useful approach would look at the culture that surrounds justice and rule of law issues in Afghanistan and the way that religious beliefs, social structures, economic conditions, and local politics all come together to define how justice is being understood at a local level.

International donor projects to Afghanistan have progressed since their original state-centric approach in the years following the American invasion, and their acknowledgment of the "informal" system has allowed for more nuance in conversations about justice. Despite this, by conceptualizing this simply as a dual system, as opposed to a more integrative model, many of the inherent premises surrounding how justice is being accessed are misunderstood. These approaches still often conceptualize issues with the judicial system as technical concerns, instead of as issues of how this is embedded in local political systems, which is the main issue.

The concerns of international donors focusing on technical aspects of the legal system, while ignoring how those systems actually fit into the wider Afghan political context, are not simply connected to issues of dispute resolution. In the recent 2014 Presidential

Elections, the actual technical and legal issues of counting the votes were eventually considered largely secondary to the informal political negotiations going on between the two candidates.[37] This example demonstrates again, however, how the international community, by primarily focusing its electoral support projects on technical support for elections, largely missed the key issues that were actually determining the outcome of the election.

A shift in how we think about justice would, for example, have implications for how international donors design justice education programs as well. Such concerns are pressing, since local dispute resolution mechanisms have adapted in the past to fit changing political and economic needs,[38] and it is likely that they will change again as the Afghan political-economy shifts in response to a decrease in international attention.[39] Going forward, programs only emphasizing the formal aspect of the judiciary are not speaking to the reality of how dispute resolution and justice is actually happening on the ground today. Simultaneously, however, programs just aimed at "informal" actors ignore the ways in which these actors are constantly interacting with the state. A more integrative approach that emphasizes the variety and hybridity of access to justice is essential and would look at justice from a series of different angles simultaneously – the same way that most local communities are currently thinking about justice in Afghanistan.

It is perhaps unsurprising that we see such high levels of flexibility in a country that has been plagued now by three decades of instability and political uncertainty. With concerns about the political future on both national and local levels, in order to govern themselves, Afghan communities have had to creatively draw on a series of mechanisms based upon the shifting conditions that they were dealing with. At the same time, while it seems likely that this flexibility in the ways that justice is accessed in Afghanistan will diminish in the short run, it is also important to consider the ways in which this flexibility fits the great social and political diversity of the country. Pashtun society, which is much more tribally organized than the political cultures of other major groups in Afghanistan, is much more open to the use of customary tribal regulations. Applying such codes to minority communities in other parts of the country, however, would make no sense

[37] This was perhaps seen most clearly when the candidates announced the power-sharing agreement that they had come to several hours before the Independent Election Commission actually announced the winner of the contest

[38] For example, Johnson and Leslie noted an increase in the presence as NGOs looked to work with community councils on development projects. Chris Johnson and Jolyon Leslie, *Afghanistan: The Mirage of Peace* (Zed: 2008), 41-42.

[39] See Noah Coburn, 'The Political-Economy of Withdrawal and Transition in an Afghan Market Town' (2013) Afghanistan Regional Forum Series Paper, Washington DC: The Elliot School.

because of their different forms of social organization. Embracing this hybridity would allow for more local nuance and respect for the cultural norms of multiple groups simultaneously.

Approaches that encourage hybrid access to justice potentially have much far reaching benefits than suggested by many of the current approaches to supporting dispute resolution in the country. For example, the counterinsurgency approach which favors informal actors resolving disputes in order to encourage stability has certain benefits. It also has the danger of doing long term damage by supporting corrupt local actors who are not accountable to the government or civil society. However, by reframing support to these actors and attempting to tie them into other dispute resolution mechanisms and the state itself, one can encourage a culture of accountability with local elders and state officials in more regular communications with each other.

Relationships like these could help better integrate the state, civil society, and local communities, and would reshape the way in which many political conversations are currently occurring. It would also create new venues for political conversations and, ultimately, make it easier to access justice. In order to make real advancements, however, we need to begin looking at justice as an issue of political culture and not simply as a technical process. Such a nuanced view should not be difficult to achieve since it is, in fact, how most Afghans are currently experiencing access to justice. A shift in approach, however, could have far reaching consequences for improving both how we think about justice and how we actually encourage it in the Afghan context.