



موسسه حمیده برمکی برای حاکمیت قانون

HAMIDA BARMAKI ORGANIZATION FOR THE RULE OF LAW

HBORL Working Paper No. 2015/04

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

Friederike Stahlmann

The Power of Experience: Civil War Effects on Seeking Justice
through Disputing

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If cited or quoted, reference should be made to the name(s) of the author(s), the title and the serial number.

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Abstract

Based on data gathered through anthropological research in the city of Bamyan in 2009, this paper discusses some of the effects of protracted civil war and violent regime changes on the possibility to seek justice through disputing. In comparison to other areas of Afghanistan, the city of Bamyan provides for an unusual setting in this regard, as all the main conditions for a positive environment for disputing seem to be fulfilled. Nevertheless, the author encountered the persistent opinion and found statistical evidence that relatively weaker parties hardly have a chance to successfully defend their rights-claims. The assessments that disputing parties conduct and the decisions they take as part of their dispute management reveal that much of the prevailing systemic injustice relates to the experiences that people have made during these civil wars. These experiences not only burden people with continuing guilt and victimhood, but also undermine their trust in any legal or political order to last. For weaker parties, this lack of long term reliability of legal security effectively turns disputing into an existential threat, rather than a chance to seek justice. Legal authorities and justice institutions are, under these conditions, not only deprived of the possibility to gain legitimacy based on professional conduct, but even face considerable challenges to administer justice at all.



Friederike Stahlmann*

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Introduction

The challenges posed by a post-war setting for access to justice through disputing and the acknowledgment of how central this access is for the legitimacy of the socio-political order at large shaped much of the debate on rule of law in the last decade of Afghan legal studies and policies.¹ I will seek to contribute to this debate by presenting a discussion of private disputants’ perspectives and practices. Based on anthropological fieldwork I conducted in the city of Bamyan in 2008 and 2009, I will analyze the difficulties of seeking justice through disputing in a post-war context.²

There is no doubt that a past of civil-war tends to have disastrous effects on the chance to seek justice through disputing. My findings confirm that the prerequisites for any kind of rule of law are basic safety in daily life, and public institutions that are equipped and willing to support right over power, where need be. As challenging as it is to ensure these basic

* Ms. Stahlmann is a PhD candidate at the Max Planck Institute for Social Anthropology, Halle (Saale) and a lecturer at the Department of Anthropology at Martin Luther University Halle-Wittenberg. She is member of the International Max Planck Research School on Retaliation, Mediation and Punishment and the Centre for the Anthropological Studies of Central Asia (CASCA).

¹ For an overview see for example Hatem Elliesie, ‘Rule of Law in Afghanistan’ (*Understandings of the Rule of Law in various Legal Orders of the World*, Freie Universität Berlin, 2011) <<http://wikis.fu-berlin.de/display/SBprojectrol/Afghanistan>>.

² I thank the Max Planck Institute for Social Anthropology, Halle (Saale), Germany and the International Max Planck Research School on Retaliation, Mediation and Punishment for intellectual and financial support of this research.

requirements, it comes as no surprise that in many parts of Afghanistan the rule of the mighty prevails and people judge the current circumstances as fundamentally unjust.³

Bamyan city is a curious setting in this regard, though. As I will show in this paper, the conditions I encountered there in 2009 fulfilled all the criteria that are usually listed for a positive environment for disputing to an extraordinary degree. Nevertheless, the accounts I gathered from the people in Bamyan show a nearly unanimous agreement that there was no chance to successfully confront through disputing those who hold more power, no matter how grave their trespass⁴ had been. Even for me as an outsider, it was easy to detect that this was a persistent problem: the high percentage of disputes that were not addressed, witnesses who did not dare to speak, village councils who would look aside, elders who would pressure the relatively weaker party into immense concessions for settlements, help- and hopelessness among victims, and perpetrators who openly paraded a sense of impunity. The risks of disputing, I was told, would outweigh the potential gains. Many of my interlocutors went as far as assessing this period in time as ‘not really different to the times of civil war’ because of its lacking chance to seek justice through disputing. Given that life in Bamyan was otherwise secure and peaceful to a degree that people elsewhere in Afghanistan could only dream about, these assessments confirm the importance of access to justice for an overall assessment of security, and they indicate that something is fundamentally wrong with the order of justice as it is.

In the following, I will analyze how these assessments of prevailing injustice come about. Focusing on evaluations and practices by private disputing parties will allow me to question whether complying with the criteria usually set up for establishing the rule of law is sufficient to create a positive environment for defending one’s rights through disputing. I suggest that problems of seeking justice through disputing does not necessarily indicate a (mal-)functioning of justice institutions or lacking normative endorsement. In the case of Bamyan, I will argue that much of the prevailing systemic injustice relates to the experiences that people have had during these wars, civil-wars, and recurrent, violent regime changes.

I. Methodological considerations of analyzing the effects of civil war on disputing practices

This analysis will be based on data I gathered by accompanying disputing parties in their dispute management. These are also data about the working of legally relevant institutions, but my primary research focus was on the question of how and why people dispute as they do, and how these practices shape the institutional order of disputing. From the perspective of

³ See *Afghanistan Human Development Report: Bridging Modernity and Tradition and the Search of Justice* (Center for Policy and Human Development, UNDP, Kabul/Islamabad 2007).

⁴ In line with the general approach of this article, the usage of the term trespass does not refer to any definition by a particular legal system or body of law, but follows the disputant’s perspective. It thus refers to any act or omission of act that is interpreted as a violation of a right or entitlement by the respective claimant.

socio-legal research, any attempt to analyze problems that private parties face in seeking justice through disputing necessarily has to take into account whatever factors prove to be relevant for their decision-taking processes. I therefore spent much of the year in Bamyan trying to understanding the social relationships that are under negotiation in disputing, the needs and wishes that shape the values they defend in disputing, and people's fears and hopes, which all constrain how they can and do deal with situations in which they see their rights and entitlements disrespected by others.⁵

Analyzing private perspectives also requires one to be open for the empirically found plurality in categorical terms, rather than limiting the account to the scope and understanding of any particular legal order.⁶ This starts with allowing for the possibly wide range of conceptualizations of disputes. I will, therefore, treat any scenario in which party A makes a claim to party B which party B refuses to comply with as a dispute - irrespective of how and where such a claim is phrased, or what legal norm it might appeal to.⁷ This allows me to consider the processes and practices that happen before any third party institution might get involved, starting with the fundamental question of whether a party whose claim has been refused decides to continue defending its right, leaves the claim dormant, or finally discards it. And it encompasses the likely option that a dispute might transform in its course and continue after some official proclamation of a sentence or settlement.⁸

In theory, this wide definition of disputes also includes those between public and private parties. But given that inter-personal trespass of rights was the more common concern of my informants, I will limit the following analysis to the latter. Shaped by its own interests and institutions, the practice of disputing then constitutes a specific social relationship, which is nevertheless embedded in and shaped by the underlying social relationship between the disputing parties. It makes a huge difference to the dynamics of a dispute if this underlying relationship is one between husband and wife, between neighbors, or between strangers who happened to meet by chance. Obviously, additional third party actors and institutions can

⁵ I owe this chance to my doctoral supervisors Prof. Dr. Keebet von Benda-Beckmann and Prof. Dr. Günther Schlee, as well as Dr. Bertram Turner who entrusted me with conducting my own security assessments and thus the chance to share daily life with the people I am concerned about. The opportunity, however, I owe to the people of Bamyan, who not merely protected me, but permitted me into the social vicinity where frustration and anger were voiced, guilt and victimhood admitted, and strategies discussed and planned.

⁶ For a discussion of legal pluralism as a sensitizing concept, see Franz von Benda-Beckmann, 'Who's Afraid of Legal Pluralism' (2002) 34(47) *Journal of Legal Pluralism and Unofficial Law* 37.

⁷ This is based on the definition provided in P.H. Gulliver, 'Case Studies of Law in non-Western Societies: Introduction', in Laura Nader (ed), *Law in Culture and Society* (University of California Press, Berkeley, Los Angeles and London 2002) 11-23, at 14, while omitting Gulliver's further qualification that such a disagreement must have entered into the public arena (*ibid.*), because my observations in Afghanistan rather support Miller and Sarat's statement that 'most of the dispute processing experiences in any society consist of disputes which have no public aspect to them', in Richard E. Miller and Austin Sarat, 'Grievances, Claims, and Disputes: Assessing the Adversary Culture' (1980) 15(3-4) *Law & Society Review* 525, at 528.

⁸ See Keebet von Benda-Beckmann, 'Streit ohne Ende', in John Eidson (ed), *Das Anthropologische Projekt* (Universitätsverlag, Leipzig 2008) 133-149, at 143; Lynn Mather and Barbara Yngvesson, 'Language, Audience, and the Transformation of Disputes' (1980) 15(3-4) *Law & Society Review* 775-822.

affect such a disputing relationship (often pursuing some interest of their own), just as they tend to affect the course a dispute takes.⁹

Within my concern about the chance to seek justice between private parties I further limit the discussion to accounts by parties who regard themselves to be relatively weaker in terms of power. The question whether weaker parties have a chance to seek justice through disputing is not only a reliable test for access to justice, but also takes up the prevailing argument of widespread injustice that I encountered in Bamyan, namely that there is no chance to gain justice through disputing in cases where the victim is less powerful than the trespasser.

Analyzing how inter-personal differences of power might relate to assessments of injustice requires a methodological approach that allows the unravelling of features that would cause such a perception of systemic injustice beyond the individual frustrations with the many particular problems specific rights-claims can be shaped by.¹⁰ To allow for this, I will take the unusual route of analyzing post-war conditions of disputing by focusing on less troublesome case scenarios.¹¹ In the following discussion of core areas that affect access to justice through disputing, I will thus single out and follow the scenario which my interlocutors as well as institutional actors agreed upon to be least problematic to answer to in terms of justice.

The least problematic case-scenario I found in this regard were disputes about private claims to ownership of land between adult men of different families. Transmitted through either inheritance or contract,¹² entitlements of land were in principle agreed upon by everybody just as it was agreed upon that men ought to have full and personal control over them. Potential disputes over them were thus little affected by a lack of rights-awareness or the acknowledgment of entitlements by a mere minority.¹³ Customary regulations are not only detailed and complex in phrasing respective entitlements, they also hardly differ from state

⁹ The state's recourse to criminal law and its sanctions might be the most extreme case with regard to the effects for the initial inter-personal disputing relationship.

¹⁰ An example for such a problematic case would be the competing definitions of the crime of rape, the various procedural difficulties in seeking justice for it and the conflictive social values it is governed by. For a detailed discussion, see *Silence is Violence: End the Abuse of Women in Afghanistan* (UNAMA/UNHCR, 2009) <www.ohchr.org/documents/press/vaw_report_7july09.pdf>.

¹¹ Legal anthropologists have long warned that looking for the 'troublesome cases' might provide a fractured picture of our understanding of an order (as in Keebet von Benda-Beckmann, 'The Environment of Disputes', in W.M.J. van Binsbergen (ed), *The Dynamics of Power and the Rule of Law: Essays on Africa and Beyond* (LIT, Münster 2003) 235-245, at 236, tracing this back to the 1920s). I have the impression though, that in dealing with times that are declared 'extraordinary' and troublesome per se, such as post-war times, the 'ordinary' tends to take a backseat in the attention.

¹² For a detailed discussion of various legal kinds of transfer of land and respective legal provisions, see Conor Foley, *A Guide to Property Law in Afghanistan* (Norwegian Refugee Council, Oslo 2005), at 69.

¹³ The daughter's share in inheritance would be an example for rights that are only known to and acknowledged by minorities and, therefore, enjoy far less social protection. For a general discussion of the importance of rights-awareness in disputing processes see William Felstiner, Richard Abel, and Austin Sarat, 'The Emergence and Transformation of Disputes: Naming, Blaming, Claiming...' (1980) 15(3-4) *Law & Society Review* 631. The current efforts in legal training and awareness campaigns might be exceptional in their outreach, but the Afghan history of legal politics is a good example how regime changes tend to go along with such educational campaigns. The modernization campaigns by King Amanullah can serve as an early example, in Asta Olesen, *Islam and Politics in Afghanistan* (Curzon Press, Richmond 1995), at 111.

law or classical *fiqh* both in substantive regards. Potentially problematic forms of legal pluralism,¹⁴ such as a lack of practical agreement over the hierarchy of norms or war-related normative diversity within social fields,¹⁵ thus played a negligible role. The fact that I found hardly one family without grievances about such land rights underlines that this case scenario is an ordinary and widespread concern and allows me to introduce dominant patterns in quantitative regards.

Such an approach will exclude many of the more complex crimes and extraordinary grievances that happened during the wars. If so, then how is it possible to analytically distinguish lasting effects of the wars from patterns of justice and injustice that are either much older than the wars or are caused by the current regime?

Apart from obvious structural consequences of war, such as the existence of refugee-returnee- and IDP¹⁶-communities, or the internationally administered ‘reconstruction’ regime, to name two out of many, I suggest that the most reliable answer can be found by analyzing people’s considerations that lead to practices of disputing . The following discussion shows that past experiences not only shape the expectations for the future, which are critical for the necessary anticipation of potential long-term effects and side-effects of disputing strategies and practices. It will also show that at times people explicitly refer to experiences they had during the wars to evaluate the present in all that might be relevant for the course a dispute could take.¹⁷

II. Values of rights, interests in disputing

People do not dispute because of a violation of a right, but because of the values that are attached to that right and the other party’s refusal to acknowledge it. These values set the interests in disputing and serve as references for successful settlements. Such values and subsequent interests in disputing tend to be multilayered. Land is not only a matter of physical, but also of social survival. It not only serves to grow food, feed animals, pay for health care, or invest into whatever might seem important. Also, marriages, fulfilling social obligations, and investing into social relationships cost money, and it is revenue from land

¹⁴ See Franz von Benda-Beckmann 2002 (n 6) for general discussion of legal pluralism, which is neither unusual as an empirical observation, nor need it cause assessments of injustice.

¹⁵ That specific social fields establish and enforce norms of their own making is a worldwide and usual phenomenon (see for example Sally Engel Merry, ‘Legal Pluralism’ (1988) 22(5) *Law & Society Review* 869, at 878). What made negotiations about rights in Bamyán problematic at times were huge differences of legal socialization and normative expectations among those sharing the same social field like villages or even families. I found this to be a consequence of the large variety of survival-strategies during the wars, and the huge differences in biographical trajectories that followed from that. In effect, these often defy reliable expectation in terms of normative outlook based on markers such as ethnic, sect or local belonging, kind of education or wealth.

¹⁶ Internally displaced person.

¹⁷ For an in-depth discussion of the temporal quality of both agency and structure see Mustafa Emirbayer and Ann Mische, ‘What is Agency?’ (1998) 103(4) *The American Journal of Sociology* 962.

that most reliably covers any such costs and investments. Because it is the most limited, but also the most stable resource, it serves as a reliable indicator of relative power within a community.¹⁸ More importantly, however, ownership of land was also treated as a condition for fully belonging to a place and a community. For instance, I found no written rule that someone has to own land in order to be elected to a Community Development Council (CDC). However, I was told repeatedly, ‘Look, it’s a village council. One can’t be elected without owning land. Only people from the village can be elected.’

I assume all these values of land to be long-term traits in evaluating it. But I encountered also references to the more recent experience of civil war, when land has proven to be the most reliable resource for survival in times of turmoil. Land was the easiest resource to translate into social capital, into manpower, and into access to power-holders higher up in the military hierarchy. It thus provided for access to weapons, protection by warring parties, or could be used to buy sons out of military service and likely death.

However, the refusal of a trespasser to acknowledge rights-claims to land not only means a threat to these many kinds of security. It is also an open refusal to acknowledge the victim as a bearer of that right, which tends to constitute an insult in itself. Since in Afghanistan it is the men who are considered responsible for protecting their family’s property, it is also they who are most affected by this kind of offense.¹⁹ By defending rights-claims, victims thus not only want to signal that trespass will be in vain, in order to deter others from following the trespasser’s example. They also need to prove that one earns the respect of his specific social status and role which demands that one should be willing to defend one’s rights by all means available.²⁰ Efforts to defend entitlements are thus not only a material and inter-personal matter, but also have a public dimension.

Depending on the underlying relationship between victim and trespasser, the weight of such an offense on a person’s social belonging and status as a rights-bearing subject easily gains a political dimension. Not only is the distribution of land a matter of politics and always has been,²¹ but the past of Afghanistan and Bamyan is full of episodes in which discrimination on

¹⁸ For a discussion of the direct correlation between being landless and poor, see for example Liz Alden Wily, *Land Relations in Bamyan Province* (Afghan Research and Evaluation Unit (AREU), Kabul 2004) <www.areu.org.af/UpdateDownloadHits.aspx?EditionId=179&Pdf=401E-Land%20Relations%20in%20Bamiyan-CS-print.pdf>, at 66.

¹⁹ In Bamyan, I could not find major differences in this gender perception along ethnic or religious lines. For an early, but detailed discussion in the context of the Pashtunwali see for example Willi Steul, *Paschtunwali. Ein Ehrenkodex und seine rechtliche Relevanz* (Franz Steiner, Wiesbaden 1981), at 137.

²⁰ The most extreme version of that attitude towards entitlement of rights that I encountered was that if a man was not willing and able to defend his rights, he would not earn them. This was, however, a minority view, and if it ever had been a majority attitude, I assume the fact that everybody has had the experience of not being able to defend one’s land at some point during the civil war, which must have weakened the social relevance of that expectation.

²¹ The importance, which different policies of land distribution have for the evaluation of regimes, becomes apparent in the way that history at large was often explained to me along changes in land policies. In a similar way, ethnic groups were often characterized by the ways through which they got access to land in Bamyan, rather than the more official markers like language, descent, or sect affiliation.

ideological, ethnic, or religious grounds led to a systematic challenge of the right to land. Having been Hazara during the reign of Abdur Rahman, communist during the rule of the Shura-ye Engelab, or Tajik while the Hezb-e Wahdat controlled the area, to name just a few adversarial relationships, meant the experience that the right to live was at jeopardy for belonging to a certain group. The most recurring symbol for such group persecution that I encountered was to have been driven away from one's father's land and thus denied belonging to that place.²² Given the multitude of identity markers disputing parties might differ in, and the many past frontlines these markers are associated with, interpersonal disputes might easily be understood as yet another episode in a long story of guilt and victimhood, even if the actual piece of land had previously not been part of that story.²³ War experiences thus not only shape the subjective value of land but also reverberate in the evaluation of disrespect for land rights.

The values at stake in trespass upon land rights thus tend to bear both the emotional value of a long-term past of injustice and the ability to affect one's long-term future of survival in economic and social terms. This goes to show how grand hindrances must be for victims of trespass to abstain from trying to defend their rights and demanding justice. By discussing their evaluations of basic conditions for the chance to seek justice through disputing in the following sections of this paper, I will try to show why many abstain from pursuing their rights-claims nevertheless.

III. Pre-conditions for access to justice

No matter how important land rights might be, and how much would be at stake in defending them, disputing first of all requires a certain amount of security.²⁴ There is no scope for arguing or defending rights where a claimant, a witness, a judge, an elder, or a *mullah* risks being shot if they confront those in power with a blame and a claim.²⁵ From the way in which the people talked about the past, it was evident how this minimal security had been far from guaranteed. The situation I encountered in Bamyan in 2009 was radically different in comparison to other parts of Afghanistan; the city seemed like a safe island.²⁶ However,

²² This does not suggest that it was the most painful experience of persecution. I assume, that having lost loved ones, or fallen victim to a mass rape would be more traumatic, but for that reason also less easy to disclose and refer to.

²³ The illicit appropriation of land is one of the few crimes committed during these wars which can actually be proven and to some degree rectified. I had the impression that for this reason it has not only turned into a symbol, but indeed a substitute for seeking justice for other crimes committed during the civil wars.

²⁴ For a general discussion of problems with basic conditions for rule of law in Afghanistan, see Whit Mason, 'Introduction', in Whit Mason (ed), *The Rule of Law in Afghanistan: Missing in Inaction* (Cambridge University Press, 2011) 1-12; Michael Hartmann, 'Casualties of Myopia', in Whit Mason (ed), *The Rule of Law in Afghanistan: Missing in Inaction* (Cambridge University Press, 2011) 172-204.

²⁵ In the anthropological definition a dispute needs both: blame and claim.

²⁶ That I, as a foreign woman on my own, could live in a private house with no barbed wire, guards, or extra walls, move freely, meet with alleged Taliban envoys, and not have to seek the protection of any civil war party but could meet and host people of all walks of life, ethnic, and religious groups was exceptional. But as a

power and fear of violent reprisals can take a quiet form and may be hard to judge. On the one hand, people would hardly admit to a stranger that, for instance, their neighbors had the power to scare them. Similarly, the fact that criminal statistics show a low crime rate might just mean that people did not report crimes. Indeed, I know of many incidences that went unreported. Officials, on the other hand, would not want to risk their authority and professional reputation by admitting that they were too afraid to do their jobs. I would regard it as convincing arguments for a sense of safety in daily life though, that husbands let their wives and children walk around without male company to visit relatives even after sundown; that victims complained about alleged trespassers without apparent hesitation; and that no one ever claimed that any military faction would threaten public safety at any moment.

There were several features that supported this safe environment in comparison to other provinces and cities. One of these was that Bamyan has no significant opium production industry and that other resources are so scarce that no potential trouble-maker seemed to care enough to challenge the state in control over the province. But I assume that even more conducive for sustaining safety in the public order and in daily life was the agreement between former local enemy groups of all kinds on a local truce. This is an impressive achievement, because it requires them to ignore in daily life the dense webs of guilt and victimhood that everyone who lived through the times of civil war is necessarily part of. It was made possible by a consensus about a shared past of victimhood, which allowed the creation of a shared bond across all past lines of division and hatred that, indeed, every single person could sincerely identify with. In order to account for the responsibility for the suffering, the public story was that those who were ‘really guilty’ were either dead or had left Bamyan. Different considerations led to this agreement of dealing with the past. For one, it would be extremely difficult to dissect all the harmful consequences of these wars and allocate responsibility for past actions in a manner that could be agreed upon. It would be not only difficult, but also risky, because any attempt to try and sort out the past might provoke an actualization of former frontlines and concerned collectives as groups,²⁷ and thus pose a security risk to everybody alike.

The responsibility for protecting this truce lies in theory with everybody, but in practice with those who would be able to end an escalation. These tend to be the most influential and powerful members of any extended family, who are also typically those who are elected into the CDC independent of their actual age. They are referred to as *rish-e safed* locally and as elders in English literature. Exactly who gets involved in tasks of de-escalation is, just as with their legal role as facilitators of customary law and dispute settlement, very much dependent

foreigner I necessarily had a different position and all kinds of reasons could have allowed for my personal safety.

²⁷ On the difference between collectives and groups, and dynamics of group-formation see Rogers Brubaker, ‘Ethnicity Without Groups’ (2002) 43(2) *European Journal of Sociology* 163.

on the concrete case of concern and the respective elder's relationship with the involved parties.

This truce went along with a toleration of state institutions and the presence and power of foreigners. The then-governor Habiba Sarabi was at least taken seriously as the representative of the ruling elite. I was told that former war parties and their officials still held power, but no one claimed that they would or could jeopardize daily security. 'They can't do anything at the moment, the government is too strong.' The troops of the New Zealand-led Provincial Reconstruction Team (PRT) tended to be ridiculed for 'guarding themselves and still being scared', but the state's security apparatus was taken seriously for the power to keep basic control. That I heard people in daily arguments threaten each other with 'I will go to the police' or 'take you to court' need not be an acknowledgment of the quality of work done by the police or judiciary, but it serves to describe their high rank in the hierarchy of power. I also found people to be highly outspoken in their critique about politics, but also on alleged nepotism and corruption.

This leads to the question of institutional capacity to fulfill mandates, as the second crucial precondition for access to justice. With regard to the actual capacity of justice institutions to fulfill their function, corruption was the most often recurring theme of complaint. Corruption, indeed, has the power to jeopardize any official mandate and any kind of legitimacy. Justice tends to be its first victim, because the question is not of how much officials charge for services that ought to be for free, but of who is able to pay more, and thus it is not absolute but relative access to resources that tends to matter.

There are two mechanisms that may help to counter corruption and other imbalances of power between parties within an order of justice.²⁸ Social solidarity formations are one mechanism that may outbalance personal resources, while institutional checks and balances through oversight bodies and institutions of support are another mechanism that can override individual differences of power. I discuss the failure of solidarity formations later on, but as these would eliminate differences in power and my basic concern relates to such differences in power, the question here is if institutionalized control of state justice institutions and support in claiming rights was effective to a degree that would ensure state institutions as options of recourse in cases where disputes cannot be solved satisfactorily by the parties themselves or with the help of non-state²⁹ institutions such as elders.

Positive indicators in this regard include the fact that everybody I spoke to had several alternatives in mind of who could and would provide help for free, and I could gather that

²⁸ Within socio-legal studies it is widely acknowledged to be nearly impossible to completely undo differences of power within processes of disputing, even under the most stable and peaceful circumstances. See for example Marc Galanter, 'Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law' (1981) 19 *Journal of Legal Pluralism and Unofficial Law* 1.

²⁹ By 'non-state' I merely allude to the characteristic that institutions are not part of official state structures. This does not imply that they would not be acknowledged or even supported by the state.

even though the institutional paths to courts were sometimes lengthy and winding, people ultimately got access to them. They also tended to find the support they needed in order to translate their grievances into complaints that fit the demands of the respective institution in language and form. I suppose that these are highly exceptional conditions that can be attributed to Bamyan's small size and the good coverage by support institutions, which it enjoys as a safe environment and due to its status as provincial capital. The more significant indicators, however, were the kind of complaints about corruption in justice matters, for these tended to concern the length of the procedure, not the outcome, at least not as far as state institutions were concerned. Willful protraction of proceedings is an accusation that is very hard to prove, since there are many formally correct reasons that can lengthen procedures of which some might, in practice, not be caused by bad faith. However, it is interesting that the courts' practice to refer land cases to village councils and elders for mediation was often regarded as proof of corruption on the part of the courts. While it confirms that especially weaker parties would benefit from quick proceedings, this questions the often portrayed opinion that non-state forums are better qualified and equipped to deal with land disputes in terms of justice. It, too, questions the assumption that courts tend to be more corrupt than elders, who are presumably subject to social control which could forestall or at least minimize corruption.³⁰ All this casts doubt on assumptions of better chances to seeking justice in non-state institutions in the setting of Bamyan,³¹ but it does not explain why state institutions could not fill this void.

IV. Establishing evidence and proof of entitlements and trespass

Any chance to seek justice through disputing depends on the reliability of procedural means to establish evidence, proof of rights-claims, and trespass upon them. Since it is the criterion of a dispute that the alleged trespasser does not acknowledge these voluntarily, justice would require institutionalized and reliable procedural assistance. As crucial as matters of land have always been in Bamyan, they enjoy immense procedural attention and regulation both by state laws, but also through customary proceedings. More important for matters of procedural justice might be that these procedural means for establishing evidence and proof of rights and trespass enjoy widespread knowledge and endorsement. A supportive and noteworthy feature is that the crimes of large-scale land-grabbing notorious during civil war times are to a large extent considered to be rectified. Even the Pashtuns, who could in socio-political regards be

³⁰ Such views were commonly presented to me by elders and at times also judges, but are, too, reflected in legal reports and articles. Cf. e.g. Thomas Barfield et al., *The Clash of Two Goods: State and Non-State Dispute Resolution in Afghanistan* (USIP, 2006) <www.usip.org/sites/default/files/file/clash_two_goods.pdf>; UNDP 2007 (n 3); Noah Coburn and John Dempsey, *Informal Dispute Resolution in Afghanistan* (USIP, 2010) <www.usip.org/publications/informal-dispute-resolution-in-afghanistan>; Colin Deschamps and Alan Roe, 'Land Conflict in Afghanistan: Building Capacity to Address Vulnerability' (2009) Issues Paper Series AREU <www.areu.org.af/UpdateDownloadHits.aspx?EditionId=212&Pdf=918E-Land%20Conflict-IP-web.pdf>.

³¹ In critically discussing these assumptions in the following I do not mean to question, that they may be valid without reservations under the different conditions of other settings in Afghanistan.

considered the main losers of the wars in Bamyan, told me that they did not face major problems to find their claims to individually held land acknowledged after the war.³²

The wars nevertheless cast their shadows on the assessments of institutional capacity. The frustrations I encountered show how vulnerable such institutions are under the destructive circumstances of civil-war.

Just as in other places, problems with documentation of claims were reported to me. Not only was paperwork lost in the turmoil of fighting and fleeing, registries were also partly destroyed and stayed incomplete, because owners sold their land while being abroad or could not afford the arbitrary and extravagant fees for registering contracts with regimes that were often enough considered enemy-like. Much more widespread were frustrations with tracing the misuse of power and trespass where documentation existed, but where transactions were not considered just because of the circumstances under which they came about. I heard several accounts of people selling their land at gunpoint, and often such direct form of duress was not even necessary. It had been enough to have one's seeding material stolen by hungry soldiers, or to have one's harvest destroyed in order to be forced to sell one's land far below its long-term value in order to gather at least the means to flee. While it is often difficult enough and sometimes impossible to prove the validity of a single transaction that happened under such extraordinary circumstances, disputes tend to develop their own history of harm, claims, counter-harm, and counterclaims, and create along with these many relevant facts,³³ which easily escape any form of procedural justice built on formal correctness.

Part of this problem lies in the allocation of responsibility. War party formations create collectives in which individual responsibility is very hard to demarcate. Even those who knew the parties and the history of the dispute often considered it unpredictable if a previous owner would blame a former regime's leadership, the current user, possibly his family at large, or some kind of collective defined along markers of identity such as ethnic, sect, or military affiliation. Doing justice to such blurred, but no less real webs of guilt and victimhood is hardly possible through any kind of fact-finding procedure, but might still shape a dispute's dynamics and assessments of justice.

Where the more rigid and formalistic rules of state procedures fail to acknowledge these different layers of responsibility and the difficulties of producing evidence, elders as well as judges tended to claim that additional customary means of fact-finding are far more reliable. A main argument in support of customary procedures was that the social proximity in which people live would provide for sufficient publicity of relevant knowledge in order to establish such facts. However, I got the impression that the wars have considerably questioned this

³² The long-lasting conflict about nomads' claims to pastures and rights to passage through the province is a very different issue and was far from settled. But as this was locally considered a political rather than a legal problem, I leave it aside here.

³³ See Keebet von Benda-Beckmann 2008 (n 8), at 142, for a general discussion. For examples from the realm of land rights in Afghanistan and the challenges this poses for matters of restitution: Foley 2005 (n 12), at 55.

reliance on public knowledge to establish the veracity of accusations of trespassing or individuals' claims to rights and entitlements.

The following example illustrates a customary method for evaluating entitlements to a piece of land in addition to paperwork. As I was taught, a means to fact-finding is to ask the immediate neighbors, who are not only expected to know the borders of their land ownership, but should also be informed about transactions concerning slots adjacent to theirs. This method of forestalling undue rights-claims or the temptation to forge contracts now faced several major problems though. One was that those who were neighbors now and should serve as neutral witnesses were often considered part of the problem by sharing the alleged trespasser's past in the wars. The destruction of the old, Tajik-dominated bazaar of Bamyan during the war and the building of a new Hazara-dominated bazaar is an example of that kind of constellation. A Tajik who has a dispute with his Hazara neighbor over the border between their shops will be hard pressed to accept neighboring Hazara shop-owners as trustworthy witnesses, because most Tajiks consider the new bazaar and the distribution of slots to be a symbol of illegitimate winners' justice by the Hazara at large.

But even with witnesses whose reputations are not called into question and whose testimonies are beyond reproach, there are practical problems that stem from the past: the many regime changes and civil war periods have forced virtually everyone to flee from Bamyan at some time or another. This means that with regard to local affairs, there are gaps in every person's memory, no matter how trustworthy and detailed it might be otherwise. Disputes are, however, often precisely about these times of forced leaving, as these were both times of large-scale illicit appropriation, and times in which people much more readily chose to sell land than one usually would. Migration also caused the additional problem that land transactions are often made far away from the land in question and without the knowledge of those who have remained behind.

I had the impression that the shortcomings of possible fact-finding due to the extraordinary circumstances of the civil-wars, and the experience that the legal order at large is not equipped to even name injustice in an appropriate manner has cast doubts on the legal systems' reliability, even for cases arising now. But I did not find it to be a reason for victims not to attempt disputing.

Comparing the capability of state and non-state institutions, customary proceedings have better chances of producing reliable evidence, including in better assessment of witnesses' reliability and in accounting for degrees of uncertainty, more complex histories of disputes, and disputing relationships that sometimes defy absolute, one-sided declarations of guilt. A further advantage of customary proceedings is the ability to acknowledge the emotional and social value of the harm caused by a trespass and the refusal to acknowledge a rights-claim. People widely agreed that elders usually had no problems in finding the truth and that local authorities often already knew who had done what and if it was right or wrong.

However, the large amount of disputes that start their institutional path in courts rather than village-forums suggests that for some reason the option of partial acknowledgment of a dispute's value at a court was preferable to the chance of a more encompassing acknowledgment by a community forum. The most widespread argument for that was, that even though elders knew the facts best they would not act upon, and according to, this knowledge. The individual assessments even suggest that the more trust was granted to a third party, the less it was part of and related to the social field of the disputing parties. This indicates that there are problems with settling disputes rather than the production of facts, and it suggests that in Bamyan this is a particular problem of elders and within local communities. That the reliable production of facts is overall a problem of relative concern in seeking justice is further confirmed by the pattern that it were not the especially complex cases that victims did not pursue, but those in which the other party was considered stronger.

V. Dispute settlements

Dispute settlements, if they are to serve justice, not only need to acknowledge all injurious aspects. In order to consolidate the approval of a rights-claim in the parties' relationship, settlements also need to end the disputing episode between the parties on a relational level. On an emotional level, this is easier the less the dispute has escalated, and on a social level, the less the public becomes involved in its course. Both of these features would again seem to privilege non-state institutions as the preferred arena for dispute resolution.

As in many socio-cultural fields, norms of discretion are a considerable concern in Afghanistan where disputes happen in the context of intimate relationships and a public procedure would necessarily lead to a public disclosure of private affairs.³⁴ In the case-scenario I have been tracing so far, in which adult men of different families disagree about entitlements to land, this aspect matters little though, since I found hardly a land-case in which the whole village did not know about anyway. A court procedure might express an escalation by the mere formality of the court as a forum, but in terms of publicity there is hardly any difference as compared to a non-state proceeding. According to both judges and elders, however, courts are said to sort out the formal and material aspects of injuries, but are ill-equipped to deal with the social and emotional aspects necessary for a dispute settlement. Where a dispute between husband and wife is ended by a divorce, it might matter less if they get back on good terms with each other. But a neighbor tends to stay a neighbor, and the experience is that in such continuing relationships emotionally unsettled disputes are easily a

³⁴ To threaten a perpetrator with the shame entailed in such a breach of norms of discretion by 'going public' may become a powerful leverage for the victim in negotiating to get his or her rights acknowledged. In Bamyan, women sometimes used that threat as a last resort to negotiate, for instance, an end to extreme forms of domestic violence. But these were exceptional cases, because by actually taking that step women had to expect that the social sanctions enacted in response would deprive her of all forms of social protection and security. Most regarded this risk far more threatening for life than regularly broken bones.

long-term source of trouble, and even pose the threat of escalation beyond the scope of social control or restraint. The ready availability of weapons and the possibility to enlist support by fellow war party members during the wars caused several such cases of unrestrainable escalation, which tended to be quoted as examples for the continuing threats of failed peacemaking as part of dispute settlement.³⁵

According to their mandate, judges would be little concerned about parties holding unsatisfied grudges as long as their sentences distinguishes right from wrong, and acknowledges formal claims. On the basis of what I witnessed in court, and from what both lawyers and witnesses have confirmed, judges nevertheless seemed to make a considerable effort to de-escalate and mediate interests and emotions. In legal terms this showed in their attempt to rephrase land disputes as civil disputes, even where the victim's accusation entailed criminal matters. But it, too, was a regular pattern that they tried to sort out the issue through mediation rather than adjudication. In doing so, they appealed to religious duties of seeking peace and being ready to forgive, lobbied for the future benefits of mutual agreements, and urged parties to consider norms of reputation and the responsibility they carried for their families and the community at large by showing respect for both the law and making peace.

All this was very similar to the rhetoric strategies I encountered from elders or religious authorities. It is hard to tell whether judges choose to 'switch heads' and take the role of mediating elders rather than adjudicators because it tends to be less work, or whether they act out of concern not only to facilitate justice, but also peace. Effectively this does not matter and shrinks the difference in procedure that disputing parties are offered in state- and non-state forums.

It is important to note in this context that as part of their strategy judges frequently refer parties back to their communities in case their own mediation attempts fail.³⁶ This is very much in accordance with the concerns of international advisors not to repeat past mistakes to support a potentially over-indulging state that loses legitimacy by interfering in the self-regulatory capacity of social communities and imposes potentially alien perceptions of

³⁵ The most prominent of these concerned a village not far from the centre of Bamyan city, which was inhabited mainly by two families sharing a common ancestor. During the wars, these two families had been caught up in an uncontrolled escalation of violence, leaving between 40 and 160 people dead (the number differed depending on whom I asked). The death toll, I was told, was so high because the families had allied themselves with opposing civil war parties. Whether these war parties had an interest in causing this escalation or the disputants were using the war parties' power to turn the dynamic to their own advantage I do not know, but here it does not matter much. What matters is that the experience continues to serve as a reference for the risk of an escalation and its dreadful consequences. 'And now', they said, 'look, all these people killed, the young ones, the educated ones, even women! Many women lost their husbands, lost their sons and even babies.'

³⁶ For a discussion of how not only disputing parties conduct 'forum shopping', but also forums and third party actors 'shop' for disputes, see Keebet von Benda-Beckmann, 'Forum Shopping and Shopping Forums: Dispute Processing in a Minangkabau Village in West Sumatra' (1981) 19 *Journal of Legal Pluralism and Unofficial Law* 117.

justice.³⁷ Local mechanisms of dispute resolution are, too, suggested as a means for protecting parties from the possibly corrupt and badly equipped state court system. And it is phrased as a means of respect for the traditionally distant relationship between state and citizens.³⁸

This is very much in line with the demands phrased by local state and non-state authorities.³⁹ Apart from a wish for unconditional state recognition of privately or customarily cast agreements, I found that such opinions often did not represent the disputing parties' wishes and practices. There are several conclusions in this reasoning that demand a scrutiny. In my observation, parties as well as communities tend to be fairly skilled to keep affairs outside the control of the state if they want to. I know of several severe criminal offenses, including murder, which happened in post-war times, which were successfully kept away from state interference. In civil proceedings the state is even less of a concern, since no state interests are involved per se. Victims can hardly be forced to take a dispute to court if they do not want to, yet if they choose to it has to be assumed that they have reasons to do so. If non-state institutions from within socio-legal fields were considered legitimate and successful in settling disputes by the concerned parties, the question is why victims of trespass, and especially those being relatively weaker, would turn to state institutions in the first place.

Judges or police officers might be suspected to be more concerned about their workload or the public order than in land rights as such. The many complaints by judges that nowadays people come to them with every petty problem point in that direction. The role that elders played was regarded as ideal, especially by older judges, and often resembled the former function of the *arbab*, with its double role to protect people in their daily life from interference by the state, and the state from coming into contact with the daily life of people. Being in charge of dispute resolution locally as a function of power might be one explanation as to why elders are interested in and fight hard to get control over disputes. Such fighting is not necessarily a metaphorical expression, as I had to learn one day while walking up a path on the hill where the courts were located then. Seeing a group of men wrestling with each other I walked slower, both curiously and cautiously trying to find out what this was about. When the men noticed me, the fight changed into a shouting match and soon one of them left, which gave me the chance to talk to the others, whom I had met before and knew to be elders of a village not far away. To my astonishment, I learned that these elders did not have a personal dispute with the third man, but that they wanted to stop him from going to court in order to 'protect him from himself'. They then painted a horrifying picture of what happened to people as soon as

³⁷ For a general discussion of the limits of past and present modernization agendas in Afghanistan, see Astri Suhrke, 'Reconstruction as Modernization: The "Post-Conflict" Project in Afghanistan' (2007) 28(7) *Third World Quarterly* 1291.

³⁸ Cf. Masood Karokhail and Susanne Schmeidl, 'Integration of Traditional Structures into the state-building Process: Lessons from the Tribal Liaison Office in Loya Paktia', in *Publication Series on Promoting Democracy under Conditions of State Fragility – Issue 1: Afghanistan* (Heinrich Böll Foundation, Berlin 2006) 59; Barfield et al. 2006 (n 29).

³⁹ See for example Thomas Barfield, *Informal Dispute Resolution and the Formal Legal System in Contemporary Northern Afghanistan* (USIP, 2006) <www.usip.org/programs/projects/relations-between-state-and-non-state-justice-systems-in-afghanistan>, which suggest that this is not limited to Bamyan.

they enter the courts and the happy comparison of easy access to peace and justice through village mediation, i.e. themselves. Seeing that they had to resort to physical force in order to stop the man, this had apparently not been convincing for that litigant.

However, it need not be a rejection of mediatory proceedings if people go to state courts first. It might also be that people have a local mediation procedure already in mind when they go to court and, indeed, only go to court in order to improve their chances in such a procedure. Having procured the confirmation to one's rights and the maximum damages set officially makes it easier for victims to step back from this maximum gain for the sake of re-establishing friendly relationships. Often this partial waiving of rights is considered a legitimate price for gaining the acknowledgment of trespass and a public plea for forgiveness by the perpetrator, before granting forgiveness and by doing so formally closing the dispute.⁴⁰ Given everyone's experience that actual forgiving is harder than merely uttering the words, those who try to resolve disputes strive for settlement agreements that deter both parties from future aggression even if they are not truly emotionally satisfied. In order to make sure that parties honor their agreements, and in appreciation of the long-term relationships at stake, customary law in Bamyān provides for settlement arrangements that are designed to bind parties to keeping peace on a long-term basis. Paying damages in instalments is one of these. Another of these mechanisms that was often quoted to me was the practice of protracted *baad*, i.e. to promise a new-born girl for marriage as soon as she has grown up as a kind of compensation, since this means that the victim has to refrain from hostilities for at least 14 years in order not to endanger the deal.⁴¹

Weaker parties often accused elders for forcing them into undue compromise, and judges for assisting the elders by referring cases back to the communities before issuing a sentence. The recurrent weaker parties' allegation was that elders by doing so did not aim at peace through justice but at peace through keeping things quiet at the cost of justice.

Partly, this seems a problem of a collision of functions. The elders' socio-political task as members of the local elite is to keep the past at rest. This means that the fewer claims raised, the smaller the risk that these relate to past facts, reawaken past emotions and trigger a violent escalation. This, however, goes against their mandate as legal functionaries to name and support unsatisfied rights-claims. Substance matters like land, which necessarily relate to the

⁴⁰ This serves to show the importance of social satisfaction for reaching settlements.

⁴¹ Deborah J. Smith and Shelly Manalan, *Community-based Dispute Processes in Bamiyan Province* (AREU, Kabul 2009) <www.areu.org.af/UpdateDownloadHits.aspx?EditionId=292&Pdf=940E-Community-Based%20Dispute%20Resolution%20in%20Bamiyan%20CS%202009.pdf> at 45, note that this is a rare and unusual practice in Bamiyan. I came across several cases from the past, but as reference for the underlying logic is was still prominent. Both structural supportive arguments and the critique of its unintended consequences seem to be rather widespread (for African examples see for example Günther Schlee and Bertram Turner, 'Rache, Wiedergutmachung und Strafe: Ein Überblick', in Günther Schlee and Bertram Turner (eds), *Vergeltung, eine interdisziplinäre Betrachtung der Rechtfertigung und Regulation von Gewalt* (Campus, Frankfurt/Main 2008) 49-67, at 52).

past one way or the other, thus have to be kept under even closer control than other conflicting issues. In addition to the potential threat to daily security, naming and acknowledging trespass in the present while refusing to name that of the past easily seems insincere. Since the routes to addressing the past are widely blocked, this in turn undermines the social protection of norms and rules in the present. This problem was vividly demonstrated to me during a dinner with a family that was the victim of trespass to its land. The talk turned to the lack of public concern for problems like that. The day before I had witnessed a meeting of the CDC, comprised of a range of socially respected and relatively powerful men. When I asked why those could not execute or initiate social sanctions against the trespasser, I was laughed at: ‘You were sitting with murderers yesterday. And you are sitting with a murderer now. We suffer from injustice, we can judge it, but applying sanctions to all bad behaviour? How should that work?’

The shared guilt and, I would suggest, the immense crimes people have witnessed and suffered from, seem to put injustice into a perspective that renders the enactment of social sanctions by which stronger parties could be pressured to stick to norms, acknowledge guilt, and agree to appropriate compensation, somehow hypocritical. This does not mean that the grievance caused by an acute case of trespass is any less than it was ever before,⁴² but that past experiences seem to have caused a public relativization of immorality and even outright trespass. Statements like this show very practically how wide this referential frame of experience with both guilt and injustice is and it shows how much people are trapped in past webs of guilt and victimhood. This deprives any socio-legal field of the means to enact and protect whatever norm might be at stake, and fundamentally undermines any sincere attempt to address present injustice.

With the mandate to acknowledge victims’ claims, elders face this problem in a particular way. Even if such claims only concern problems of the present, supporting them might provoke the perpetrator to personally accuse and question an elder for his own unacknowledged responsibilities of the past. The considerable continuity of power throughout the wars is responsible for elders being particular vulnerable to such accusations, and thus have particular reasons to downplay or even ignore claims.⁴³ The bigger one’s resources were, the higher one’s military or political positions tended to be, and hence the higher the chance to be an elder. Even though people distinguish between commanders and elders, elders still have a higher potential responsibility for having enacted injustice during the wars than ordinary people. The higher the relative responsibility for past injustice, the higher the interest to forestall chances to be questioned about one’s own responsibility.

⁴² This is a question that is hard to answer by means like participant observation and it is likely that the ways people emotionally deal with trespass have changed through the immense experiences of injustice in the past. From what I experienced, the suffering from injustice in the present was, however, real enough and reflects the continued values and interests at stake in rights-claims.

⁴³ The exception to this is the local Pashtu community and their elites of power, who have left Bamyan at the beginning of the war and, with the exception of a few families, did not return.

Being part of the complex social fabric therefore seems a hindrance rather than a chance for administering justice through local mechanisms of dispute resolution. But even when elders chose not to keep silent but to acknowledge trespass, people often found it hard to believe in or even consider the option of neutrality. The amount and weight of unsatisfied grievances people themselves carry from the past make many expect that everybody is likely to act upon such grievances rather than in the interest of justice.⁴⁴ Therefore, the less someone is part of a tight social fabric and its past, and the more one appears only in the role of the third party, as judges and mediators from afar do, the more scope third parties seem to have in addressing past and present wrongs. The unusually good reputation of lawyers working for the Norwegian Refugee Council, who mainly and successfully acted as mediators, but were in the majority not from Bamyan, confirms that it matters less which kind of settlement procedure one represents, but rather how one is socially embedded.

These patterns of assessments explain much of the allegations and complaints about elders discouraging parties from disputing, downplaying grievances and claims, and pressuring parties into unfair settlements in which victims have to forgive their trespassers in order to enjoy a small portion of their right. It also shows why people tend to go to court and are frustrated with being referred back to elders, and even regard it as a sign of corruption, as mentioned above. This gets worse when judges take a failed mediation attempt as an indication that victims did not want to settle but are more interested in ‘causing trouble’ than actually seeking justice, which is an assumption I regularly encountered among judges.⁴⁵

These assessments do not explain, however, why people most often complained about a lack of neutrality in cases with pronounced power differences rather than in cases that – such as the man’s evaluation of the judge above – were structured along past frontlines. The difficulties with administering justice within a community also do not explain why weaker parties would not insist on getting their rights confirmed in court with the help of the support institutions in place and go on from there. I closely witnessed a woman without any family support and against immense social pressure managing to get a divorce and even custody rights for all her children, including those nearly of age. If that was possible, it should be

⁴⁴ The following incidence can illustrate how this can undermine the chance to gain legitimacy through good practice: An old man told me in considerable fury that a judge had found him guilty of cutting his neighbor’s trees and that this had not been fair. I asked him if it had not been he who had cut the trees. ‘No, no, it was me’, he replied. I then suggested that perhaps the trees had actually belonged to him. ‘No, they were his, and I cut them’, he acknowledged. He also told me that the compensation sum the judge had ordered him to pay was appropriate. Seeing that I was puzzled, obviously unable to understand the injustice in the decision, he explained: ‘You see, it was not the decision itself, but his [the judge’s] motivation. He wanted to make a Hazara pay for the destruction of the old Tajik bazaar. He has *kina* and he would have made me pay even if I had not cut the trees. He is Tajik.’ This was an extreme case, especially since it the judge was not even from Bamyan and thus had not been part of the many local fights between Tajiks and Hazara. But the manner in which the old man apparently afforded the judge no chance of gaining legitimacy by delivering a substantially fair judgment shows how important the perception and delegitimizing effect of *kina*, the unsatisfied urge for satisfaction for an injustice one suffered, may become.

⁴⁵ The frustration by parties about this attitude underlines the importance of the voluntary character of non-state institutions. See e.g. Barfield et al. 2006 (n 29), at 25.

possible to ignore pressure by elders in order to get one's land rights confirmed. Even if that social pressure as enacted by elders was taken seriously, it could not explain why people would entirely abstain from disputing. Forgoing one's rights partially against one's free will might affect how one assesses the justness of the outcome, but one might assume that a partial forgoing of rights might be better than enjoying none of it.

The recurrent answer to my quest for an explanation was that, when facing a stronger party as an opponent, one might get the sentence that confirms one's rights, but this was not only not enacted but even posed a risk. Judges tended to claim that such statements would cover only part of the story, and that the real reason for not pursuing claims in court was not to run the risk to have one's own wrongdoings exposed as well. This might be true in some cases. However, the pattern of this complaint was not only extremely prevalent, but often I managed to collect additional opinions by unrelated neighbors and witnesses who confirmed the victim's story and shared their assessment. This leads to the critical area of enforcement and protection of settlements.

VI. Enforcement and Protection

There might be huge differences between policy interests in law enforcement and private party interests in making use of their rights.⁴⁶ What both have in common is that a court verdict or a settlement agreement alone cannot make interests in justice work. Such resolutions need to be backed by the authority of some kind in order to gain relevance. The question in the context of Bamyan is, however, why apparently strong state institutions are not sufficient to ensure respect for a court sentence. This might be partly due to the fact that the police forces were considered far less effective and reliable than the judiciary. It may also reflect the fact that it is a much more challenging task to enforce and protect sentences in comparison to making them. The shortcomings of the police forces were often negatively compared to the experiences of the powerful control exercised by war party regimes. With justice concerns in mind such reference might seem surprisingly dubious, given the many accounts I gathered of how everybody at some point had fallen victim to the cruelty of the ruling discrimination⁴⁷ executed by one or another of the many regimes in power over the

⁴⁶ Wherever the interest in law is some kind of social, economic or religious engineering, the degree of law enforcement and the enactment of sentences is a fundamental concern. If settlement agreements or judgments are adhered to practically may also serve as measurement for the authority of legal institutions and third parties and their capacity of law enforcement. However, with a concern about assessments of justice in the private realm, incidences or even statistics proving a lack of enforcement are not necessarily a worrying sign. I found it not unusual that, for instance, a court sentence was only regarded as an intermediary step in a much more encompassing long-term negotiation. Often the enjoyment of a right that was publically acknowledged was then traded by the victim for the fulfillment of another interest that was beyond the realm of legal protection. Sometimes victims preferred to keep the threat of a sentence's enforcement as a leverage to gain better control over the terms of the relationship.

⁴⁷ This discrimination was usually not limited to declared enemies, but often too ranked internal party hierarchy higher than rights-protection.

course of the civil war. The common discrimination and the crimes committed by these parties were openly acknowledged and widely condemned. It was rather the war parties' will and ability to exercise control that was used to set the standard of commitment that people wished for when they asked for the protection of their rights. Together with an often limited knowledge of the current legal scope of police mandate and powers this led to expectations that could hardly have been fulfilled. From what I witnessed of communications between police officers and citizens in need, it was indeed often difficult to detect much commitment or find an attitude to serve, even in cases when I was present.⁴⁸ I can also confirm by personal experience that both internal qualification and external oversight of executive forces could be much better. I argue though, that if the police could be called and would indeed arrive on time, e.g. as soon as someone started to steal his neighbor's harvest, if it was more responsive to complaints about continued practices of trespass and more interested in backing the judiciary's authority, it would still be taken little more seriously as a relevant institution of law enforcement and protection in matters like land rights than it is now, and it would help little to convince all those to seek justice through disputing who do not dare to do so far.

The argument for this leads back to the temporal quality of the values and interests that are at stake in disputes in general and land disputes in particular. Basic security might be guaranteed, lawyers, judges, and elders might support the victim's right, draft a perfectly just settlement, and make the trespasser agree to it. Justice, however, would not only require the efficacy of current institutions to protect such settlement, no matter if through state or non-state institutions, but also the reliable anticipation of its future protection as long as there is an interest in the entitlement under dispute and as long as the relationship with one's current opponent lasts. If the task is to defend one's right to have control over a piece of land and defend it in the long run against the greed of a rich and powerful neighbor, all these conditions for protecting this right might be needed on a life-long basis.

People kept telling me that it was only now that things work as they do. Trying to understand what the label 'post-war' might mean, I had automatically assumed that this 'now' was different in comparison to the past. I only started to learn how wrong I was when I witnessed an evening-discussion by a farmer's family. It was late winter and the talk turned to the soon to come task of preparing the fields for sowing. Then, in passing, the question came up if it would make sense to do so, which left me completely puzzled. I first thought that the family might not be able to afford the seeds and cautiously inquired if prices had risen again. What I learned was that the question had been one about the political situation, the overall security situation in the nearby future, and thus the likelihood of the chance to harvest what one's sows. What I started to learn that evening was how deeply engrained the expectation is that no regime is going to last, that regime changes tend to be highly violent, and more likely than not

⁴⁸ I had the impression that, even though I had no power through any institutional affiliation and was without official mandate of oversight, state officials often tried to prove their qualification and professional attitude to me when I was present.

come along with an episode of civil war. The family agreed to prepare their fields, and it did not take them long to make up their minds. But given that they had nothing else to do for a living, the fact that the question was asked at all was astounding. It was so taken for granted that the regime would break down that no one even bothered to state it before I started to inquire. The only question was when it would do so. The related anticipation that a regime change would likely endanger the harvest shows how volatile and endangered life in its most basic form is perceived to be.⁴⁹ Seven years of sowing and harvesting in relative peace had done little to change that. Being alert to the relevance of temporality in such assessments of relevant environments and the effects experiences have on such temporal assessments and anticipations helps to answer many of the open questions.

Even if a regime change might not lead to civil war and some partisan rule of an unforeseeable kind, the experience is that along with new regimes, new sets of norms come into power. The following example will demonstrate that this not only undermines any legal certainty in a substantial sense, but even concerns settlements themselves.

One day, an elderly man approached me in the market, seeking my opinion and advice.⁵⁰ Many years earlier, he explained, an unfriendly relationship between two neighboring families had escalated over a border issue between their fields, leaving several people on both sides injured and one man dead. The Taliban controlled the area at that time, but involving them was regarded as risky because the outcome was unpredictable. The parties agreed that my informant would give his newborn daughter as a wife (when she became older) to the brother of the victim. In this way, the dispute was kept rather quiet and small-scale, and the involvement of the Taliban had been avoided. When the current regime set out to end this settlement tradition and punish forced marriages, the man who had made the initial agreement was suddenly dependent on his daughter's voluntary acquiescence to the marriage. However, the girl refused, and her father found himself on the horns of a dilemma. The would-be husband threatened him with death if the agreement was not honored and made it clear that he was not willing to accept any other terms of settlement, while the state threatened the man with imprisonment if the agreement was honored.

This case underlines how such legal changes of the past are often inscribed into the disputes' histories and remain relevant into the present. Even if a code or norm enjoys endorsement in normative regards at a certain moment, its potential short-term relevance will necessarily undermine the possible respect it enjoys in practical regards. When even the agreed-upon

⁴⁹ Notably, the expectation of recurrent fundamental change is primarily held by those who stayed in Afghanistan throughout the wars. I found that people who had come back after a long-term experience of a difficult, but comparatively stable life in refugee-communities abroad tended to have a much longer-term perspective within this order.

⁵⁰ I tried to avoid influencing the courses disputes took by providing only institutional advice. When people sought my advice anyway, I insisted that I did not have the right to take sides nor the power to do any kind of advocacy, but that I had come to listen and to learn. However, this was one case out of very many, when I truly shared people's sense of helplessness with the many dilemmas they faced.

settlement of one day may turn into a crime in the next day, it would be almost foolish to rely on the lasting relevance of any code or settlement. The experiences of the many different policies and politics in regards to land, starting from changing nomad-settler policies via land reforms, to outright land grabbing by warlords, to current development plans, and the war-related experiences of having to flee and leave land behind on a regular basis together obviously add immensely to the lack of trust in normative protection as well as practical enforcement by the state institutions.⁵¹ The crucial question is thus how this anticipation of a soon-to-come regime change and civil war affects protection within the social field.

The discussion in the last section has already revealed a marginal concern by the general public for trespass which necessarily also applies to the protection of settlements. But the lack of social control of power and norms is not only a trade-off between justice and the fear of a reactivation of the past.

The experience people have had with the twisted and unpredictable developments and changes that war party formations and alliances took during the civil war has taught them the lesson that relevant power structures are fully aligned with and geared towards outside forces and interests, which makes it impossible to predict arrangements of power even for the near future.⁵² Survival under such unpredictable and existentially threatening conditions depends on two things, I was told: one's own resources and one's relationship to those with more resources. Both criteria are not new as such, because in a harsh natural environment like the one in the Central Highlands, where one bad harvest might endanger the life of many, survival always depended to some degree on the chance to seek help from someone more resourceful. What changed through the wars is the kind of power this refers to, the way it is produced and the consequences this has for the socio-political order. I suggest that this change can be described as a shift from *khan*-model of power to a warlord-model.⁵³

⁵¹ I found one notable exception to this pattern that is of relevance for land disputes, namely a seemingly shared respect for paperwork by all regimes. The underlying logic of bureaucracy, which all kinds of state orders rely on, seems to command a mutual respect for official paperwork across the temporal, spatial or normative limits of regimes' orders.

⁵² Among Hazara, a standard reference of such unpredictability was that during the civil wars the Iranian government, despite its proclaimed solidarity with the Shia Hazara, had started to support Tajik war parties, even though Tajik commanders had by then turned into the fiercest enemies of Hazara.

⁵³ Elwert summarized the differences between these, with African settings in mind, as the difference between warlords and 'big men'. Warlords, he wrote, 'create power with money for weapons and mercenaries, and win prestige from power, which gives them credit for the acquisition of new wealth. Big men [...] transform prestige into power. Power may create wealth, but wealth and labour power has to be "devoted" to the people in order to create prestige.' See Georg Elwert, 'Switching Identity Discourses: Primordial emotions and the social Constructions of We-Groups', in Günther Schlee (ed), *Imagined Differences: Hatred and the Construction of Identity* (LIT, Hamburg 2002) 33-54, at 42. To trace when exactly that shift happened is difficult, because it is even difficult to judge inasmuch the *khan*-model was ever fully valid in practice. The historical accounts I gathered all suggest however that with the beginning of the civil war, the foreign military interference and the ever increasing dependency on foreign money and weapons not only changed the conditions of leadership in terms of necessary skills but also sealed off the dominance of the warlord-model of power. See for example Bernt Glatzer, 'Schwert und Verantwortung: Paschtunische Männlichkeitsideale', in Erwin Orywal, Aparna Rao, and Michael Bollig (eds), *Krieg und Kampf: Die Gewalt in Unseren Köpfen* (Reimer, Berlin 1996) 107-120, at 117; D.B. Edwards, *Before Taliban: Genealogies of the Afghan Jihad* (University of California Press,

The descriptions I got of what legitimate authority would be like still refer to the *khan* model of power, entailing the norm that power ought to be used in order to support those who are in need and depend on it. Partially, elders argue along this old *khan* model, when they claim to use their authority for the sake of others and the community at large.⁵⁴ I do not doubt that there are elders who go out of their way to serve their communities, but contrary to the older notion of authority, the decisive criterion with which to gain the prestige for being elected into the CDC is the ability to gain access to outside resources, not the management of internal resources. Power thus depends on access to those with even more power. Personally, this means that one must not offend those with more power, because one might be cut off from access to outside resources. Currently, the risk to challenge someone more powerful by engaging in a dispute against him is a comparatively harmless one, because it may result in being taken off a list of recipients of gifts by an NGO or not being offered a job. In times of civil war, however, the experience people refer to is that such a challenge may easily result in being shot in revenge, or at the least being excluded from the protection a war party can offer. In such times, whatever one may possess one only keeps by toleration of those higher up in the ranks, and that obviously includes one's land. Respect for power is thus respect for current or future dependency, based on a hierarchy of resources. This logic applies to everybody, as there is always someone higher up in the rank.⁵⁵ The very idea that anyone would not follow this existential logic of survival of siding with or at least avoiding confronting those with more power was discarded as impossible, illogical, and stupid. It was even considered to be dangerously unpredictable, which confirms that the *khan*-model of power only remains valid as an ideological claim rather than a constitutive factor of socio-political ordering.⁵⁶ It was only theoretically possible that someone would be primarily committed to truth and support of weaker victims if that person will not anyhow be dependent on the local social fabric in the future, which is yet another reason for the higher respect third parties from elsewhere tend to enjoy.

Locally however, this not only deters witnesses from supporting the truth of the weaker, but also sets aside norms of solidarity and institutions of social protection, which seem to have lost any kind of reliability. Not even the support by one's own brothers against outside

Berkeley/Los Angeles/London 2002), at 148, for war related reasons for that shift; Jon W. Anderson, 'There Are No Khans Anymore: Economic Development and Social Change in Tribal Afghanistan' (1978) 32(2) *The Middle East Journal* 167, for pre-war developments that already supported this change.

⁵⁴ Similarly, the election procedure of the CDCs suggests that power ought to be legitimated by serving the community.

⁵⁵ I had the impression that this respect for power even questioned general norms of granting support for the weak, and had a share in causing emergencies and suffering that could easily be forestalled and remedied by basic solidarity. Help, I was told repeatedly, was stupid, because it would diminish one's own resources and pay no gain. That 'the state' or 'the NGOs' were held responsible for providing such help has many more reasons, but in effect it underlines a weakness of social consideration for those with less power.

⁵⁶ The many competing war-parties and the fact that in Bamyan frontlines ran through communities and even families might have additionally weakened the self-governing capacity of communities. It can be assumed, that communities that were less divided and enjoyed larger social cohesion and continuation throughout the different wars find it easier to combine both models and protect norms of power relating to solidarity and duties of support.

offense seemed to be taken for granted by victims, who tried to evaluate the power differences with an opponent.⁵⁷

With such a fear of future rule of unrestrained force, disputing parties with no or only little power differences between them have good reason to take settlements and reconciliation seriously and seem to be able to make good use of the support mechanisms they find in place at the moment. Some of these cases are also solved by non-state institutions to the satisfaction of both sides. Many, however, prefer to go to court in order not to endanger their relative equal power balance by activating local networks and relationships.

In cases where the power difference was large, relatively strong perpetrators tended to parade a sense of impunity. Even though there are many more disputes with little differences in power it is these that are quoted as sign for ‘a continuation of war’. Notably, the free reign those with power enjoy does not depend on their resort to force. The fear of unrestrained force in the future seems enough to stabilize a continuous pattern of rule of might over rule of law, which concerns in principle every one, because there are always those higher up.

The knowledge by local elders of this state of affairs might serve to mitigate the victims’ critical evaluation of elders’ administration of justice. Given these expectations for the future, one has to consider the option that they might actually act in the interest of the weaker parties by stopping them from going to court, downplaying emotions, arranging partial compensations, and assisting to protect them from the future risks of their present claims. The elders equally might just try to protect themselves, which they could hardly be blamed for, given that they depend on complying with this logic of survival as much as everybody else does. By expecting a further regime change and subsequent civil war to come soon, parties as well as mediators have no option but to adapt their disputing strategies to the temporality that is entailed in their assessment of the relevant political, legal and social environment.⁵⁸ The choices weaker parties can make underline this. Those who cannot wait to defend their rights-claims because survival is already at stake in the present have no choice other than to agree to an unfair settlement in order to see some portion of the land. This however has the disadvantage of officially sealing the permanent loss of a rightful claim. Many therefore choose to wait and hope for a future regime to give them some advantage over the other,

⁵⁷ This is partly a problem that was created by the relationships built through shared war-party membership, since the patterns of how such memberships came about, defy and contradict older taxonomies of social nearness that were based on kinship, locality, ethnic or sect affiliation. Bonds that build on reciprocal demands of support and solidarity stemming from the wars, in consequence, question older expectations of rules for practices of taking sides. Not only could such war-related bonds rarely be witnessed when they came about, but usually they neither can get to be known in social arenas that classically portray one’s social relations since they tend to lack social legitimation. The Hazara, who owes his survival to a Taliban from a time when Hazara fought alongside Taliban against other Hazara, will hardly invite the Taliban to a wedding party now and make that relationship public. He might still help him if he is in need though. Even the basic question of who would be on one’s own side and provide support is thus difficult to answer, let alone the question whose support the other party might get.

⁵⁸ For a detailed discussion of the temporal dependency between agency and structure see Emirbayer and Mische 1998 (n 17).

which is not foreseeable now.⁵⁹ One way or another, justice would look different, which goes to show how little justice can exist in a short-term form. These anticipations of the future and the disputing strategies that follow from them might be among the most devastating and lasting consequence these wars have for the present. The consequences these anticipations have for assessments of justice and disputing practices certainly serve to show the powerful impact past experiences have, as the anticipation of the future alone seems enough to defy most of the efforts made to create an order of justice, leading instead to a recreation and continuation of the experience of war that power cannot be constrained by law.

VII. Conclusion

As important as the chance to seek justice through disputing is, the continuing lack of a chance to confront those with more power with rights-claims is devastating. The pervasiveness and systematic character of this injustice is such that not even cases that ought to be the easiest to address qualify for access to justice. In effect, this prevailing injustice is devastating for a sense of security, which delegitimizes the political order at large, and creates a social environment that is marked by helplessness, fear, and impunity.⁶⁰ It not only undermines the chance to address past webs of guilt and victimhood, but it perpetuates and even adds new layers to them.

Such a lack of access to justice is not surprising, but indeed has to be expected in most Afghan settings at the moment. However, the high normative and practical endorsement of the current political order, including the powerful international presence, the assumed accessibility and efficacy of support systems for disputing, people's expectation that rights-claims and trespass would be acknowledged by institutional third party actors, and the overall safety in daily life mark Bamyan as a highly exceptional setting within the Afghan context.⁶¹ That assessments of injustice are persuasive even in a setting, which could stand as a successful example for post-war reconstruction, allowed me to show the lasting effects of civil war that might be less visible than rocket-shelled court buildings or obviously ill-equipped justice personnel, but are no less dramatic and devastating for an order of justice and daily life.

⁵⁹ While there are some kinds of resources that are regarded to have a reliable and stable value throughout regime-changes, of which land is the most prominent one, the present order is a good example that even power itself can be unpredictable, as a wealthy landowner remarked after a visit to an NGO: 'A few years ago, who would have thought, that I would one day be dependent on a young woman, who does not even have family in Bamyan, not to speak of land.' He was polite enough not to show too much of his indignation, that she had even dared to let him wait, but phrased it in a much more philosophical way: 'It is the power of the pen, which rules now. She has the pen.' He was certain though, that such temporal arrangements would not last, and that for the very same reason that the power of the pen had been unimaginable just a few years earlier, it will be gone soon: No regime is meant to stay.

⁶⁰ See e.g. Mason 2011 (n 24) for a critical overview of the effects of impunity to any rule of law.

⁶¹ These exceptional conditions might account for the fact, that the overall evaluation of state and non-state institutions contradicts overall findings in Afghanistan. Cf. e.g. UNDP 2007 (n 3), at 91.

What the evaluations by primary disputing parties underline is that questioning the political and legal order with regard to its present performance alone is insufficient for the chance to seek justice through disputing. Disputing as a practice of negotiating social relationships through right-claims vividly point to the fact that justice cannot exist on a short-term basis. Most social relationships are relevant in long-term regards, just as most rights-claims under dispute are of long-term relevance. The experience of life during war taught people that confronting those with power now might be a far greater risk for survival than losing the value of the right at stake. The fear of the power of others is so deeply engrained that it even applies to a resource like land, the value of which as a means of survival itself has increased with the experience of war.

The most earnest will to make the future work by letting the past rest cannot undo experiences, which not only cast doubts on the reliability of fact-finding and the legitimacy of legal authorities, but more importantly causes the expectation of only short-term reliability of the legal and political order at large. The way in which past experiences shape disputing practices have devastating consequences by undermining many of the efforts made to create an order of justice, and instead lead to a recreation and continuation of the experience of war that power cannot be constrained by law. There is no way of getting around the fact that, as formulated by Adam, ‘as living and evolved beings we *are* our own past’.⁶² Given that people have to maneuver in a highly complex, uncertain, and unpredictable world, they can hardly be blamed for taking the past’s lessons of survival seriously. The above account underlines that trust cannot just be ‘made’, but has to be earned. Even if the expectation of a new war to come had no foundation in the current national, regional, and geopolitical state of affairs, it would still be a valid lesson from the past until it has been de-valued and proven wrong by long-term experience of a reliable legal and political order.

This does not question the importance of safety in daily life and of well-equipped, trained, and committed legal authorities and institutions for any kind of rule of law. The fact that disputes between parties with similar power can be settled successfully is an immense achievement by all those involved and has great positive value for managing life and many social relationships.⁶³ The overall assessment of injustice and the traceable institutional shortcomings in allowing for the option of seeking justice through disputing are a response to factors far beyond the possible impact of these institutions, and is a call for caution of where to allocate responsibility for persuasive injustice. Especially in discussions with foreign observers or members of international organizations, I was often confronted with the assumption that assessments of injustice would have their cause either in a lack of professionalism on behalf of justice institutions, or that justice institutions could not become

⁶² Barbara Adam, *Time and Social Theory* (Polity Press, Cambridge 1994), at 142 (emphasis in the original).

⁶³ While this paper serves to support the critique of a belief in ‘political alchemy’ and the often highly mechanistic approach in attempts to foster rule of law, discussed in an overview by Mason 2011 (n 24), the good use that parties in Bamyan made of institutional structures underlines the relative value that lies in such efforts nevertheless.



effective because people rejected them on normative grounds. I do not doubt that both these issues may be valid concerns. But the conditions in Bamyan and people's assessments rather suggest that ultimately those who are responsible for having caused the experience and lessons of war are to blame, and that the chance for seeking justice in the future lies in the hands of those who have the power to secure a basic level of long-term stability and peace. Until that is achieved, I assume, one can only admire people's creativity and patience in managing survival, and acknowledge the continuing suffering caused by persuasive injustice.