

# The informal justice paradigm and the appropriation of ‘local reality’

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## *Abstract*

*This article traces the emergence of a new paradigm within rule of law assistance and the forms of appropriation that operate through it. An informal justice paradigm promotes external support to non-state justice as more sensitive to local aspirations and as a more efficient form of intervention. I problematise this paradigm by unpacking both its discursive premises and the actual mechanisms through which aid to informal justice can take place. I argue that the celebrated sensitivity to local context, contrary to assertions, in the last instance empower outside experts, whose mandate it becomes to validate ‘local reality’ and render it amendable for intervention. In sum, the informal justice paradigm enables a parallel form of governance where national institutions are deemed optional at best and irrelevant at worst, where ultimate authority is exercised by international expertise and where accountability to the local population is, on the whole, eroded.*

## Introduction

This article explores forms of appropriation at work in international aid projects that are aimed at strengthening informal and customary justice processes. It traces the global proliferation of such projects, accompanied by assertions that working with and supporting non-state and ostensibly organic or traditional forms of governance, as opposed to formal and national institutions, is often more culturally appropriate, more effective and enabling less imposing forms of outside engagement. By detailing the processes and mechanisms through which informal justice programmes are promoted and implemented, the article unsettles the democratic and empowering claims of this informal justice paradigm. I find that the celebrated sensitivity to local context within the informal justice paradigm in the last instance serves to empower outside experts. These are mandated to validate local reality and render it amendable for intervention and improvement. In sum, the informal justice agenda constitutes a parallel form of governing where national institutions are deemed optional at best and irrelevant at worst, where ultimate authority is exercised by international expertise and where accountability to the local population is, on the whole, eroded. Moreover, despite its language of authenticity and disinterest, support for informal justice never occurs in a vacuum. It is as susceptible to capture by larger projects of rule as is any legal regime. In Afghanistan, as I show, the surging interest in informal justice was closely linked to military agendas, framing the rapid strengthening of local conflict resolution mechanisms as a military imperative. These dynamics, once unpacked, serve as a reminder of the importance of placing ‘the need’ to engage with the informal justice sector into its specific historical and political context.

### Towards a new orthodoxy? The 'need' to engage with informal justice

The 1990s saw the rise of a remarkable consensus in the field of development practice around the rule of law as a necessary condition for economic development and progress as a whole.<sup>1</sup> This 'widespread agreement, traversing all fault lines . . . that the rule of law is good for everyone'<sup>2</sup> led to a surge in funding for development assistance attempting in various ways to reform legal frameworks, to strengthen courts and the skills of legal professionals and to improve other aspects of the justice sector. However, desired change often proved elusive. This lack of tangible results formed one backdrop to a discernible emphasis over the last five to ten years in the *rule of law* field on support to informal justice mechanisms and actors. Institutions like the World Bank, the UK's Department of International Development (DFID), the United States Institute of Peace (USIP), the International Development Law Organization (IDLO) and the United Nations Development Programme (UNDP) have been at the forefront of the canonisation of a new orthodoxy that calls for going beyond a 'state-centric' view and incorporate customary or non-state actors and processes in justice sector reform. A report from DFID in 2004 was an early articulation of this view. It made the case for working with non-state justice and security actors based on their prevalence and their ability to reach poor people.<sup>3</sup> The Organization for Economic Co-operation and Development (OECD) followed up in 2006, arguing that, in fragile states (referring to a now established donor categorisation of countries with limited government reach, violent conflict or deviating economic and political policies), conditions might necessitate unusual solutions and a 'multi-layered methodology' targeting both state and non-state service providers simultaneously.<sup>4</sup> By 2009, an OECD discussion paper pronounced a consensus to have emerged within the development community 'that non-state/local justice security are, often, more effective, accountable, efficient, legitimate and accessible service providers [than the postcolonial state]' and therefore 'indispensable for the short-term and intermediate-term distribution and delivery of justice and security'.<sup>5</sup> The World Bank's 2011 World Development Report, focusing on countries transitioning from conflict, made some cautious propositions along similar lines. It suggested supplementing formal justice with traditional community systems, since the former could not deliver in the short term. It advocated that, in early stages of transitions from violent conflict, bridges between formal and informal justice systems should be built.<sup>6</sup> An article published a year later by three authors associated with the World Bank's justice programme was somewhat more forceful, urging donors to shift away from 'state institutions as the answer'; instead of privileging state-centrism, operations should be decentralised (including engagement with legal pluralism).<sup>7</sup> Finally, a joint report commissioned by UNDP, UN Women and UNICEF illustrated a widespread sense that support to informal justice was set to become mainstream policy. Noting a growing interest in informal justice, 'until recently relatively invisible in development partner assisted justice

1 M J Trebilcock and R J Daniels, *Rule of Law Reform and Development: Charting the Fragile Path of Progress* (Edward Elgar Publishing 2008); T Carothers, 'The Rule of Law Revival' (1988) 77(2) *Foreign Affairs* 95–106.

2 B Z Tamanaha, *On the Rule of Law: History, Politics, Theory* (CUP 2004) 1.

3 DFID, 'Non-state Justice and Security Systems: A Guidance Note' (DFID 2004).

4 E Scheye and A McLean, 'Enhancing the Delivery of Justice and Security in Fragile States' (OECD 2006) 11.

5 E Scheye, 'State-provided Service, Contracting Out and Non-state Networks: Justice and Security as Public and Private Goods and Services' (INCAF/Partnership for Democratic Governance, OECD 2009) 7.

6 World Bank, *World Development Report 2011: Conflict, Security, and Development* (World Bank 2011).

7 D Desai, D Isser and M Woolcock, 'Rethinking Justice Reform in Fragile and Conflict-Affected States: Lessons for Enhancing the Capacity of Development Agencies' (2012) 4(1) *Hague Journal on the Rule of Law* 64.

interventions', the report sought to identify how engagement with informal justice could build respect for and protection of human rights.<sup>8</sup>

There are many dimensions to the increasing traction of the idea that aid donors must make 'informal justice' an integral component of their strategies, and it is beyond the scope of this article to examine them all to exhaustion. However, a few central elements are as follows.

The very first assumption serving as a premise for the whole paradigm is that the justice sectors in certain countries are in need of externally driven improvement. This is, of course, the underlying principle of the entire rule of law field, of which the call for support to informal justice constitutes but the latest revision. Within the general parameter that the justice sector is in need of 'improvement', one central trope underpinning the informal turn is centred on the shift to a more *user-orientated* strategy. The case for the user-orientated approach is built on both normative and efficiency grounds. Firstly, to take the 'users' as the starting point is presented as a moral question. As the World Bank states:

Justice for the Poor reflects an understanding of the need for demand oriented, community driven approaches to justice and governance reform, which values the perspectives of the users, particularly the poor and marginalized as women, youth, and ethnic minorities.<sup>9</sup>

However, more practical reasons for the user-oriented perspective are also articulated, justified on grounds of efficiency: A percentage ranging from 80 to 95 is often cited as reflective of the amount of total legal cases that informal justice actors 'solve' or adjudicate. From this figure, it is inferred that, in order to be more effective, in particular to expand *access* to justice to the poor or to users more generally, it is more sensible to engage informal mechanisms since they have a broader reach. But, as Balchin points out, there is a paradox here. Most research – and often donor statements as well – acknowledges that informal justice mechanisms tend to either exclude or disadvantage marginalised groups such as impoverished people and women. Yet the same informal justice mechanisms are held to be a solution to the increased access of marginalised people to justice.<sup>10</sup>

At a closer look, this seeming paradox is made possible through a formalistic definition of justice to the exclusion of a substantive one. In turn, this formalistic definition of justice is achieved through a marketised language in which justice is presented as a 'service' to be delivered, a commodity or a product.<sup>11</sup> The framing of justice as a matter of supply and demand, of delivering a service to a customer or user, is at the heart of a move that forecloses discussion of the *content* of justice or at least makes the content of secondary importance. In other words – justice is no longer about a certain outcome being ensured – but about a service having been delivered. Whether disputes are being solved – not *how* they are being solved – is the paramount issue.

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8 Danish Institute of Human Rights, *Informal Justice Systems. Charting a Course for Human Rights-based Engagement* (Report commissioned by UNWomen, UNDP and UNICEF 2012).

9 World Bank, 'Justice for the Poor Program Presentation' (World Bank 2006).

10 Cassandra Balchin, 'Strengthening International Programming on Access to Justice for the Poor and for Women: Lessons Learnt from Pakistan's Musalihat Anjumans and other Programs' in Peter Albrecht et al (eds), *Perspectives on Involving Non-state and Customary Actors in Justice and Security Reform* (IDLO in conjunction with Danish Institute for International Studies 2011). There might be a calculation of a trade-off here, Balchin hypothesises, that involves an assessment that, on balance, informal justice is the lesser of two evils in the context of an inadequate formal system, but as she points out, if such an assessment is being made, it is rarely made transparent or explicit: *ibid* 88.

11 Jonathan Padwe, 'Customary Law, Traditional Authority and the Ethnicization of Rights in Highland Cambodia' in Frederic Bourdier (ed), *Development and Dominion: Indigenous Peoples of Cambodia, Vietnam and Laos* (White Lotus Books 2010).

This privileging of formalistic over substantive justice is also bolstered by another normative theme within the informal justice paradigm: earlier approaches to justice sector reform that focused on the state justice sector only are denounced as *Western-centric*.<sup>12</sup> By way of contrast, policy makers are called upon to be more open-minded and less prescriptive: They should recognise empirical reality and avoid ethnocentric prescriptions. Extending support to informal justice is thus described as the hallmark of a more tolerant and less imposing attitude, whereas insisting that only the state justice system should prevail is tantamount to imposing a Western model and refusing to recognise the non-Western world. On this point the informal justice discourse takes its cue from a burgeoning broader academic debate on postcolonial or non-Western statehood and political authority which points to the multiplicity of governance in such settings,<sup>13</sup> but somewhat misrepresents or misunderstands much of this work. For instance, while authors like Christian Lund have made the analytical point that postcolonial societies typically have more dispersed political power and public authority, with various ‘institutions’ vying for influence, they have also cautioned that ‘the state’ is everywhere socially constructed and its self-presentation as a unitary, autonomous body is misleading, also in the West.<sup>14</sup> However, in the informal justice discourse, this ‘hybrid order’ literature often becomes the basis of an ‘inverted essentialism’,<sup>15</sup> a radical difference between Western and non-Western polities; the former is where Westphalian or Weberian statehood properly belongs, whereas in the latter, aspirations to Western categories of governance are at odds with ‘reality’ or contrary to local culture.<sup>16</sup>

I have argued that the informal justice paradigm makes its case on the twin notions of efficiency and local legitimacy, both anchored in a user-orientated approach. To this it should be added that even if the legitimising trope of the informal justice paradigm is its purport to proceed from user needs and local values, the paradigm also shares premises with neoliberal agendas of austerity and withdrawal of state services. As has often been pointed out, making self-reliance a virtue has served to discipline populations, and particularly the poor, into making fewer demands on the state and into accepting the dismantling of welfare provision.<sup>17</sup> Similar dynamics are observable in the international development industry, but here an additional twist has been the use of cultural difference or local reality as a platform on which differentiated rights to state services and access to material goods are asserted. As Sorensen argues: ‘in the global periphery, liberalism has re-discovered multiethnic-post conflict societies as tribal, communal and sectarian’.<sup>18</sup> This rediscovery of local reality is clad in a progressive language of recognition. But in actuality the privileging of local reality or culture over local aspirations might serve to produce the exclusion of large amounts of people from ‘our’ standards of legality, asking them instead to find virtue in their customary

12 Albrecht et al (n 10).

13 B E Bertelsen, ‘Multiple Sovereignties and Summary Justice in Mozambique: A Critique of Some Legal Anthropological Terms’ (2009) 53(3) *Social Analysis* 123–47; V Boege et al, *On Hybrid Politic Orders and Fragile States: State Formation in the Context of Fragility* (Berghof Research Center for Constructive Conflict Management 2008); V Boege et al, ‘Building Peace and Political Community in Hybrid Political Orders’ (2009) 16(5) *International Peacekeeping* 599–615; C Lund, ‘Twilight Institutions: Public Authority and Local Politics in Africa’ (2006) 37(4) *Development and Change* 685–705; C Lund, ‘Twilight Institutions: An Introduction’ (2006) 37(4) *Development and Change* 673–74; K Meagher, ‘The Strength of Weak States? Non-state Security Forces and Hybrid Governance in Africa’ (2012) 43(5) *Development and Change* 1073–101.

14 Lund, ‘Twilight Institutions: An Introduction’ (n 13).

15 Padwe (n 11).

16 Ibid.

17 M Duffield, *Development, Security and Unending War: Governing the World of Peoples* (Polity Press 2008); J Reid, ‘The Disastrous and Politically Debased Subject of Resilience’ (April 2012) *Development Dialogue* 67–80.

18 J S Sorensen, ‘The Failure of State-building: Changing Biopolitics and the Splintering of Societies’ (April 2012) *Development Dialogue* 49–65, 56.

legal systems, a solution heralded as both more efficient and legitimate. This is not to say that all demands for support to informal justice are parts of a neoliberal agenda, but to point to how easily the former can be co-opted by the latter.

### Support to informal justice in practice

If the informal justice paradigm might assign segments of the population to other legal zones, it does not simply leave them there to their own devices. The informal justice paradigm constitutes non-state justice processes as a *policy field*, to be delineated, mapped and subject to interventions intended to improve their functioning, fill any missing gaps and remove aspects deemed problematic. It is when we examine the details of the actual practices through which such interventions are to take place that the notion of support to informal justice as somehow more bottom-up or user-driven becomes unsustainable. Before turning to the story of informal justice support in Afghanistan, this article looks at some common themes that are emerging in the informal justice policy literature.

While, as many within the paradigm themselves point out, the development of concrete strategies is still in its infancy,<sup>19</sup> there are some widely agreed upon points. First of all, there is general agreement across the board that support must be context-driven and flexible:

A key finding . . . is the messy, nuanced and context-specific nature of engaging with customary justice systems. There are few guiding principles that can be applied across the board and no model solutions that are guaranteed to advance empowerment in every environment. What works in a given country context is situation-specific and contingent on a variety of factors, including social norms, the presence and strength of a rule of law culture, socio-economic realities, and national and geo-politics, among others.<sup>20</sup>

Moreover, in order to devise the support appropriate for the context at hand, it is emphasised that donors must acquire an extremely detailed knowledge prior to intervening. The need for 'deep contextual knowledge'<sup>21</sup> is often linked to the importance of avoiding support to 'the wrong' actors, those who are human rights violators, criminals or just without local legitimacy. As one paper states:

Donors need to develop a knowledge management strategy that will help them acquire a detailed level of knowledge (including the identification of reliable local informants) in order to minimize the chance of supporting actors who prove unreliable or unaccountable.<sup>22</sup>

What this research-driven form of intervention effectively represents is a kind of *ethnographic governmentality*,<sup>23</sup> in the sense that knowledge about the population, framed in anthropological terms such as culture, custom or community, is a paramount tool to develop policy. Moreover, while the community or customs are the formal reference point from which policy is designed, in the particular intervening practices that the informal justice paradigm enables, the authority to validate exactly what these are lies with the external intervener. Whatever the knowledge produced by interveners affirms as 'empirical facts' or the 'reality on the ground' is to be the basis of policy.

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19 M Derks, *Improving Security and Justice through Local/Non-state Actors* (Netherlands Institute of International Relations 'Clingendael' 2012).

20 E Harper, E Wojkowska and J Cunningham, 'Conclusion: Enhancing Legal Empowerment through Engagement with Customary Justice Systems,' in *Working with Customary Justice Systems: Post-Conflict and Fragile States* (IDLO 2012) 173.

21 Desai et al (n 7) 62.

22 Derks (n 19).

23 Padwe (n 11).

At the same time, according to the logic of improvement (without which external intervention would, of course, be superfluous), informal justice mechanisms are nonetheless found to be in possession of deficits in need of improvement. These deficits are similarly defined by interveners who are held to retain the ultimate standard against which such shortcomings are identified. A constant theme is the need for informal justice mechanisms to be subject to outside monitoring to 'maximize the system's benefits and address its weaknesses' as one report formulates it.<sup>24</sup> Customary justice mechanisms are presented as working imperfectly if simply left to their own devices or the victim of ill-informed interventions; outside expertise is constantly needed in order to ensure their optimal operation and to curb their excesses. Various programmatic prescriptions to set up monitoring mechanisms that can ensure compliance to human rights principles or otherwise warrant that informal justice processes do not lead to 'harmful' outcomes are a key feature of most practical guidance. Some have observed that this resembles the so-called *repugnancy clauses* of colonial times whereby customary law and practices were allowed in so far that they were not '*repugnant to natural justice equity and good conscience*'.<sup>25</sup> As in colonial times, customary justice processes are measured against standards of civilisation that are ultimately defined by interveners.

It is clear then that in this interplay between proceeding from the 'facts on the ground' and, at the same time, subjecting them to the necessary improvements, it is the authority and judgment of the interveners that are paramount. The opinions of national officials, on the other hand, are regarded as less important or even an obstacle to be overcome. For instance, Derks warns that 'host governments' might perceive non-state or local actors as competitors or threats to stability and peace and oppose outside support to these actors as interference into domestic affairs.<sup>26</sup> Donors are therefore advised to apply their diplomatic skills to persuade host governments to permit international intervention support to non-state actors, or to avoid a discussion with host governments altogether by providing support indirectly to non-governmental organisations (NGOs) or trade unions.<sup>27</sup> Scheye goes even further in questioning the importance of national government opinion, suggesting that, while the political elite (i.e. the government) might cast the question of support to non-state actors as a matter of legitimacy, the real reason for their scepticism is to do with power struggles and with national government's desire to consolidate its own power.<sup>28</sup> Said differently, in opposing international support to non-state governance, national governments are often acting out of mere self-interest and their opposition is therefore not to be taken too seriously.

In sum, the relations of governance that the informal justice paradigm seems to draw up, is one in which local reality and community are to be deciphered and modified by careful calibration of donor expertise, with national institutions in a more marginal position. Its claim to be a form of locally driven, less intrusive approach is therefore problematic, at least from the point of view of national governments. Moreover, as with all forms of interventions, attempts to 'improve' informal justice do not operate in a vacuum. As a tool of governing, it tends to become entangled in other projects of rule. As I show below, this was certainly the case in Afghanistan, where external interest in informal justice attained new dynamics as local justice mechanisms were framed as a crucial part of the US-led counter-insurgency.

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24 Harper et al (n 20) 171.

25 Merry cited in Padwe (n 11) 332 (emphasis added).

26 Derks (n 19) 2.

27 Ibid.

28 Scheye (n 5).

### The promotion of informal justice mechanisms in Afghanistan

Afghanistan has a formal legal system built on a combination of secular jurisprudence and Sharia law, dating back to the 1880s. In addition, informal justice processes often referred to as *shuras* or *jirgas* are commonplace, although these do not have any official legal status in the country. They are typically presided over by male elders, often nominated by parties to a conflict or dispute. It was these latter mechanisms that increasingly become an object of international focus post-2001, in particular, since international aid to the formal justice system seemed to yield disappointing results.<sup>29</sup> The USIP, a research and policy institute funded by US Congress, was something of a pioneer. USIP, which had a large office in Kabul, started working on informal justice as early as 2002, commissioning several research publications on the informal justice system and organising a series of workshops and conferences. In 2007, the UNDP entered the field with its biyearly Human Development Report for Afghanistan focusing on justice reform. The report suggested that 80 per cent of all cases were solved by the informal justice system and called for the establishment of 'a hybrid model of Afghan justice that articulates, in detail, a collaborative relationship between formal and informal institutions of justice'.<sup>30</sup> In early 2009, USIP proceeded to set up what it termed *pilot projects* in 13 districts across eight provinces of the country.<sup>31</sup> These projects were to 'test ways of designing or strengthening links between the state and informal systems to increase access to justice'<sup>32</sup> and were implemented either by USIP itself or by partner NGOs.<sup>33</sup>

At the same time, other experiments were taking place in Helmand province, where the UK government had also been working with informal justice processes for some time. In 2008, justice committees consisting of 'representative groups of senior tribal elders representing all the major tribes and sub-districts of a district'<sup>34</sup> were established through UK initiatives in two districts in the province. A year later, they were followed by additional committees in other districts and incorporated into the Afghanistan Social Outreach Programme (ASOP) to increase the visibility and presence of the Afghan government at the local level.

Partly due to the lobbying of international donors, the idea of a formalised relationship between formal and informal justice was repeatedly reiterated in various benchmark documents formulated as part of the donor-led reconstruction process. Most importantly, in 2009, USIP successfully lobbied for the inclusion of a reference to the informal system in the Afghan National Justice Sector Strategy. According to USIP, this reference then *obligated* 'the State to develop an official policy toward its relations with customary dispute resolution systems and to conduct activities that will strengthen these systems so that fair and effective access to justice for all Afghans is achieved'.<sup>35</sup> Other donors threw their

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29 The material in this section draws upon on the author's interviews and observations in Kabul between 2010 and 2011 in connection with her PhD fieldwork in the country.

30 UNDP, *Afghanistan Development Report 2007: Bridging Modernity and Tradition: Rule of Law and the Search for Justice* (UNDP 2007) 20.

31 N Coburn, 'The International Community and the "Shura Strategy" in Afghanistan' in Albrecht et al (n 10).

32 USIP, 'Informal Dispute Resolution in Afghanistan' in *USIP Special Report* (USIP 2010) 1.

33 For a more detailed account of attempts to promote informal justice in Afghanistan, see T Wimpelmann, 'Nexus of Knowledge and Power in Afghanistan: The Rise and Fall of the Informal Justice Assemblage' Central Asian Survey (forthcoming).

34 DFID, 'Support to the Informal Justice Sector in Helmand' (Internal DFID note on file with author April 2009).

35 USIP <[www.usip.org/programs/projects/reasons-between-state-and-non-state-justice-systems-afghanistan](http://www.usip.org/programs/projects/reasons-between-state-and-non-state-justice-systems-afghanistan)> accessed 29 March 2011.

support behind such a policy, which would allow them to anchor their work in the provinces to some kind of national framework, or at least secure the formal sanctioning of the Afghan government for their activities.

This was the backdrop to the April 2009 establishment of a joint national–international 13-member working group in the Afghan Ministry of Justice, tasked with developing an Afghan government policy that would bestow official recognition on informal justice processes and create a system of co-ordination and referral between them and the formal system. The working group was established largely through the efforts of USIP and the UK government, which subsequently became prominent actors in steering the process. However, many of the Afghan representatives in the group – justice officials, women activists and human rights workers – strongly opposed the very idea of a national policy which recognised informal justice mechanisms. They protested that the *shuras* and *jirgas* were conservative, unaccountable mechanisms which effectively reinforced the power of local elites and sanctioned abuses against the poor and women. They insisted that women in particular were better off in formal courts than in *jirgas* and *shuras* where they could even find themselves given away in marriage as a compensation for a crime or offence, so-called *baad*. The Afghan Supreme Court had also long objected to what it regarded as a potential negation of the formal system's universal jurisdiction. It had voiced its opposition repeatedly, in particular, in 2007 when it had gone to the drastic step of banning the UNDP report and deemed any quoting from it illegal.<sup>36</sup>

Eventually, after a year of protracted and often heated negotiations, a short policy document was agreed upon, consisting of four pages and providing recognition to traditional justice mechanisms. The policy argued that the positive functions of the informal system should be strengthened and, at the same time, practices and decisions that violated the human rights of women, men and children, including *baad*, should be eliminated. Disputes resolved through informal justice processes 'not in contravention of Sharia, the Constitution, other Afghan laws and international human rights standards' would be recognised as valid decisions by the formal justice system, after registration with relevant government institutions. But what the internationals considered something of a victory proved short-lived. When a new Minister of Justice was sworn in, he decided to change the policy for a law which he considered to be more appropriate. Despite intense lobbying efforts from Western embassies to keep the painfully crafted policy, the entire process restarted. Furthermore, the law that eventually was drafted under the supervision of the Ministry essentially ended up criminalising the very system that the internationals had attempted to promote.<sup>37</sup> In effect, the overall impression in Kabul was one of failed appropriation by the international actors.

But while the internationals might have been outmanoeuvred in the capital, international engagement with informal justice had in fact gained pace dramatically. The chief reason for this was that support to informal justice had meanwhile come to be framed as a military imperative. It followed that there was simply no choice to await the approval of national authorities – strengthening the *shuras* and *jirgas* had to go ahead regardless, lest the war against the Taliban be lost. In what follows, I take a closer look at the assumptions and infrastructure through which these efforts could take place.

<sup>36</sup> A Suhrke, *When More is Less: The International Project in Afghanistan* (Hurst/Columbia 2011).

<sup>37</sup> The draft law stated that *jirga* members should have 'complete knowledge of Afghan laws' and be local residents, effectively disqualifying a large number, if not the majority, of current *jirga* participants. Moreover, the draft law declared that those members of *jirgas* and parties to disputes who did not observe its provisions should be prosecuted.

### Expert authority and Afghan reality

As in other settings, the case for recognising and supporting informal justice mechanisms was grounded in a local reality discovered through scientific enquiry. The '80 per cent' claim published in the 2007 UNDP report came to be widely circulated and formed part of a broader literature in which it was asserted that the formal justice system was not only ineffective in most of the country, but that it was indeed alien to Afghan culture. Most Afghans, it was argued, preferred the restorative justice of their customary ways, and often resented the retributive justice practised by the formal courts.<sup>38</sup> In turn, such statements drew upon a long-established template in Western scholarly and government discourse in which Afghanistan (and the region) is presented as possessing enduring features of tribalism and non-stateness that makes it particularly unsuited to 'Western' forms of governance. As more historically grounded scholarship points out, this template of non-stateness has in fact developed in close relationship with Western conquests and expeditions into the country. There were strategic reasons for why Western scholarship has tended to privilege a tribal, stateless, independent and Pashtun imagery of the region, such as attempts during the nineteenth century to wrest certain areas away from the Afghan monarch<sup>39</sup> or discredit the Soviet-backed communist government in Kabul during the last phase of the Cold War. As we shall see, the latest resurrection of these images was also closely entwined in geopolitical dynamics and far from representing a neutral statement of 'facts'. Nevertheless, the disinterested air of academic expertise was fundamental both to establishing the *need* for engagement with informal justice and in the actual organisation of such engagements.

For instance, a publication from USIP illustrates how such scholarly authority was at play in discourses about informal justice.<sup>40</sup> The USIP report presents findings from its aforementioned pilot projects, which are to form the basis of future policy. Noting that the formal justice system remains in a 'severely dilapidated state', something that could 'take generations' to redress,<sup>41</sup> the two authors state that most Afghans anyhow resort to informal mechanisms: 'Many experts believe that as many as 80 per cent of all disputes in the country are resolved in the informal system.'<sup>42</sup> They conclude that 'given the many problems with the state justice sector', 'informal mechanisms provide the best prospect of providing sound dispute resolution services to most Afghans today and in the future'.<sup>43</sup>

But expert knowledge was not only important in establishing the need to support informal justice, it was also integral to the actual practice of such support. Having laid out the case for the *need* to engage with the informal system, the report also offers practical recommendations for how such engagement can take place. Many of the points centre around the importance of context, political sensitivity and research. The document states that organisations working with the informal system need to have an 'intimate knowledge of the local political landscape'. Project implementers should thus be familiar with the history of the area, the key power-holders, ethnic and tribal divisions, the reputation and loyalties of the formal justice system and local government officials, major sources of income, and who controls them, and the influence of the insurgency. Ignorance of the local context and failure to appreciate the 'inherently political nature of dispute resolution' might

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38 S Haroon, *Frontier of Faith: Islam in the Indo-Afghan Borderland* (Columbia University Press 2007); M Marsden and B D Hopkins, *Fragments of the Afghan Frontier* (Columbia University Press 2011).

39 Haroon (n 38).

40 USIP (n 32).

41 Ibid 2.

42 Ibid 3.

43 Ibid.

undermine efforts altogether: attempts to engage might be rejected by the local community as illegitimate, or might fuel tension and, indeed, political destabilisation, for instance, by favouring one group over another.

In fact, infrastructure was already in place to provide such intimate knowledge called for by the USIP report. In the wake of the 2001 invasion, a handful of Afghan NGOs and institutes had emerged which specialised in catering to Western information needs – often known as ‘mapping’ exercises. Perhaps at one point the most successful and prominent of these, was The Liaison Office (TLO, formerly the Tribal Liaison Office), which was founded as an Afghan NGO in 2003. In 2011, TLO had 150 staff, and 10 field offices, concentrated in the war-ridden southern and eastern provinces of Afghanistan. The language that TLO used to advertise its services clearly illustrates how institutionalised knowledge production about Afghan local reality for Western donors had become. The organisation’s website describes its activities as:

thorough research of the ground context in given areas in order to understand community structures, decision-making and conflict resolution mechanisms, stakeholders and their sources of power (actor mapping), conflict-generating factors between individuals and groups (conflict mapping), local capacities for peace, existing service provision, economic realities, and the impact of Afghan government and international development and stability initiatives.<sup>44</sup>

TLO was one of the implementers of the USIP pilot projects on informal justice and one of a handful of organisations which had established themselves through a portfolio of various mapping and project activities. Often, these organisations were carrying out activities that involved a combination of both. In this vein, what research identified as local reality fed into programme activity, to be immediately acted upon. The researchers performed a vital role as necessary intermediaries, whose authority was constantly at work in deciding action.

One example of a programme with a built-in mapping component was the ASOP. It was conceived as a programme to extend governance to the countryside of Afghanistan. Set up first in co-operation with the British in Helmand, it was subsequently to be replicated – although in a slightly modified form – in co-operation with the US, which funded its anticipated establishment in more than 100 districts. The main activity of ASOP was to set up councils at the district level.<sup>45</sup> The rationale for the councils was a concern amongst Western governments that a distant, overly centralised and unresponsive Afghan administration caused the population to support the insurgency. The councils were tasked with bringing the concerns of local residents to the attention of government officials, especially regarding the quality and conduct of reconstruction activities, and with providing a forum for solving conflicts. They also proved useful for intelligence purposes. The mechanisms for selecting members for the councils varied somewhat, but the first step was based on a ‘mapping exercise’, carried out by one of the research organisations mentioned above, which produced a short list of power-holders in the area.

TLO and similar organisations typically hired a few expat researchers and interns based in the capital. Afghan staff mainly collected data in the field, although the organisation would normally be formally led by a well-connected national who could ensure that the organisation stayed on good footing with the government. The Afghan data-collectors, usually respectfully referred to as researchers, were the providers of raw data. Their ability

44 TLO, ‘Research and Analysis’ <[www.tlo-afghanistan.org/research-and-analysis](http://www.tlo-afghanistan.org/research-and-analysis)> accessed 27 March 2011.

45 Matt Waldman, ‘Community Peacebuilding in Afghanistan: A Case for a National Strategy’ in *Oxfam Research Reports* (Oxfam International 2008).

to move around undetected in insurgent-ridden areas, speak in local languages and access local networks made them crucial to the overall enterprise. But the notes and transcripts they produced were subsequently to be validated, refined and put into useful form by senior, mostly Western, staff in the capital.

Institutionally, the 'mapping industry' formed part of an emerging governance constellation that rendered national debate about the content of justice superfluous. Instead, bureaucratic power was channelled through NGOs, whose authority to decide was founded on special knowledge of Afghan culture and local context. While this knowledge gave the appearance of being *Afghan-led*, the fact that the entire endeavour was structured by larger fields of power was largely rendered invisible. The local reality (that the mapping exercises claim to be able to access) was, of course, fundamentally shaped by the war between coalition forces and insurgents, but not recorded as such. For instance, widespread use of local conflict resolutions over formal courts could, rather than reflecting an enduring cultural preference, be linked to safety and security, since government justice officials were explicitly targeted as government collaborators by insurgents and often remained holed up in fortified compounds in fear for their lives. As such, they were not particularly accessible to the local population and many districts were completely out of reach for any government official in any case. Moreover, the organisations carrying out such research, as long as they stood to prosper from continuing funding flows, had a vested interest in the reality that they set out to map. For instance, claims of local demand for informal justice might ensure a continuation of funding to these types of activities. One project evaluation even found that one of the organisations involved in the USIP pilot projects paid formal justice staff substantial amounts to refer cases to the *jirgas* set up by the organisation, doubtless inflating the number of cases that the latter 'solved' and thereby the appearance of a successful project.<sup>46</sup> More generally, the proliferation of interest in the informal and the traditional had taken place in the context of the growing difficulties facing Western attempts to stabilise Afghanistan. The procurers of mapping services were, after all, members of the NATO coalition and, despite claims of being *Afghan-led*, the direction of accountability in these activities went from the NGOs to Western capitals, via foreign embassies and military bases. As I show below, the very premise was to consolidate a certain political order.

### Working locally by necessity

The tendency to circumvent national institutions became even more pronounced once the military expressed a direct interest in informal justice. This happened as US military forces began to articulate their strategy as counter-insurgency (COIN for short), as part of a reinvigorated effort to 'win the war' following the start of the Obama presidency. Explicitly modelled on colonial counter-insurgency wars, COIN framed the local population as rational actors whose support could be won over through the provision of desirable services such as protection and good governance. But, in Afghanistan, the COINistas, as they were sometimes called, soon determined that the national government was simply not up to the job. The Karzai administration was dismissed as too corrupt and incapacitated to deliver services on a scale anywhere close to what was needed. This led many military strategists to conclude that alternatives had to be found. Like many in the informal justice paradigm, COINistas came to view the national government and its institutions as having a dubious right to exercise monopoly over violence or adjudication. With a military victory at stake, support to informal justice was even a security imperative:

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46 Arne Strand, personal communication June 2012.

For the purposes of COIN there is not a 'longer term' in which to work. The longer it takes, the better for Taliban war aims. They are keen to portray the government as ineffectual and chronically corrupt. They are of course right. COIN operators, working locally by necessity, are not going to be able to correct the faults of a disastrously compromised elite, and a largely unco-ordinated international effort that might take decades to bring positive effect. The solution lies, as with so much in the world of COIN, in local solutions. Local solutions, however, often collide with national aspirations. The awakenings movement in Iraq, which extracted much of the sting from the Sunni resistance cells, was hardly compatible with aspirations for state monopoly on force. Similarly, local justice initiatives may not strictly be compatible with traditional ideas of the judiciary holding the monopoly on final adjudicative authority.<sup>47</sup>

By 2010, despite the vocal opposition in the Ministry of Justice working group, support to informal justice was becoming a mainstream policy amongst larger donors. The US Agency for International Development (USAID) was sufficiently convinced to change its justice strategy. No longer solely focused on the formal system, it divided its support into two components, one of which was support to informal justice conceptualised as a pilot programme to be implemented as a support function to military operations. According to the 'clear hold and build' doctrine of COIN, once an area was 'cleared' of insurgents through military operations, the next step was to establish a military 'hold' of the area, followed by the rapid provisions of the services it was assumed that the population wanted, hereunder justice ('build'). Thus, the tender document for USAID support to informal justice instructed:

Upon arrival in a cleared district, the Contractor's Field Team will assess the status of the informal and state justice systems, as well as the specific needs of the community, through close consultations with tribal/informal justice actors (tribal elders, religious leaders, local government officials, and other community leaders). Within one week, the team will develop an action plan based upon the specific circumstances found.<sup>48</sup>

In fact, the NATO military saw themselves as being in direct competition with the Taliban, which was reported to have set up Sharia-based courts that by virtue of their 'speedy' nature held a 'comparative advantage' which 'is significant enough to persuade or coerce some members of the community that the Taliban can provide at least one service to the community more effectively than the Afghan government or their tribe'. The analogy of competition in a justice market resonated with the overall approach to justice as a service which has characterised much of the informal justice paradigm. But in Afghanistan around 2010 – at the apex of the NATO military campaign in the country – delivering this service became associated with higher stakes than ever since it was made into a matter of life and death. It removed even further the possibility of prioritising the content of justice over its mere delivery in any form.

## Conclusions

In the end, the COIN doctrine that framed much of the Western military operations in Afghanistan eventually lost steam. Some of its key strategists exited the battlefield through a whirlwind of scandals, culminating in the resignation of Central Intelligence Agency Chief David Petraeus in late 2012. More seriously, the NATO coalition, whose commanders

47 F Ledwidge, 'Justice and Counterinsurgency in Afghanistan: A Missing link' (2009) 154(1) *Rusi Journal* 27.

48 USAID Statement of Work, Rule of Law Stabilization Program (RLS) Informal Component, United States Mission to Afghanistan, Attachment I (2010), USAID tender document on file with author, 6.

argued that they neither had the troop levels nor the political support to conduct COIN properly, gradually adopted a somewhat different strategy. They shifted to a combination of targeted assassinations and raids and the offloading of much of the fighting to local forces. Meanwhile, the interventions into informal justice themselves had changed rather noticeably, from the fine-tuned, subtle actions advocated by USIP into the much more standardised, rapid forms of intervention developed by USAID. With the gradual withdrawal of troops and funds from Afghanistan, it is difficult to predict the future shape of external involvement with the country's informal justice. At the moment, there appears to be a momentum, with USAID renewing its informal justice project until at least 2014<sup>49</sup> and others like the World Bank reportedly considering to enter the field as well.<sup>50</sup> There was, however, no apparent success in getting Kabul's sanction of the project's efforts 'to create accessible, efficient, holistic, equitable, and sustainable systems that can not only bring or improve justice and dispute resolution in these particular districts, but that can serve as tested models for adaptation and replication throughout Afghanistan'.<sup>51</sup> Even if the final version had been more to their liking, women activists had decided to lobby the President to take the law proposal on *jirgas* and *shuras* off the government's agenda, an objective they reported to have succeeded with in the spring of 2011.

The formulation of a new consensus pronouncing that external support to justice sector reform must include engagement with non-state justice 'providers' hinges on the claim that such forms of intervention are typically more in tune with local realities and demands. In other words, they are more legitimate. In this article, I have sought to problematise such assertions by exploring the actual practices through which these interventions might take place. I have pointed to how the discretion afforded to foreign experts in defining local reality leaves national actors with few avenues of reviewing or questioning decisions, let alone possibilities to realise a more transformative agenda. The events unfolding in Afghanistan also hint at other forms of intervention for which the focus on non-state actors might pave the way. In their quest for pushing through a policy that would bestow formal recognition to customary justice processes, external actors even took little notice of the protestations of the country's Supreme Court. As the question of national sanction was rendered increasingly irrelevant, external actors took to circumventing Kabul completely. Instead, they sought legitimacy in the 'need' to restore the *shuras* and *jirgas*, which they maintained, had solved the majority of disputes in Afghanistan for centuries.<sup>52</sup> What this amounted to was an institutionalised erosion of Afghanistan as a sovereign nation state, a reverting back to an imperial cartography of permeable borders. It was a form of appropriation where Western powers were free to choose what forms of political authority to validate, and under whose jurisdiction people in other countries should live.

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49 USAID, *Afghanistan Rule of Law Stabilization Program: Informal Component (Phase 3)* (USAID 2012–2014).

50 Desai et al (n 7).

51 USAID (n 49).

52 John Dempsey and Noah Coburn, *Traditional Dispute Resolution and Stability in Afghanistan* (Peacebrief, United States Institute of Peace, 16 February 2010).

